

## FEDERAL TRADE COMMISSION DECISIONS

Complaint

95 F.T.C.

IN THE MATTER OF

AHC PHARMACAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3017. Complaint, April 28, 1980 — Decision, April 28, 1980*

This consent order requires, among other things, a Miami, Fla. firm and its corporate president, engaged in the marketing and advertising of health related products, to cease disseminating advertisements which represent that the use of AHC Gel or any similar preparation, alone or as part of an acne control regimen, cures acne and results in a blemish-free skin; or that any such preparation is superior to other over-the-counter acne products. Respondents are required to have a reasonable basis for advertising representations relating to product performance, efficacy and results and prohibited from misrepresenting the extent or results of product testing. Respondents are further prohibited from disseminating advertisements for acne products without first disseminating prescribed corrective advertising as specified in the order. Additionally, ad substantiation must be maintained for a period of three years.

*Appearances*For the Commission: *Steven Newborn.*For the respondents: *Pro se.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that AHC Pharmacal, Inc. (hereinafter "AHC Pharmacal"), a corporation, and James E. Fulton, M.D. (hereinafter "Fulton"), as an individual and corporate officer, hereinafter at times referred to as respondents, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. "AHC Pharmacal" is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 1609 N.W. 14th St., Miami, Florida.

PAR. 2. "Fulton" is an individual and corporate president of "AHC Pharmacal." He formulates, directs and controls the acts and practices "AHC Pharmacal," including the acts and practices described

herein, and he is the principal beneficiary of the corporation's business. "Fulton's" business address is 1609 N.W. 14th St., Miami, Florida.

PAR. 3. Respondent "AHC Pharmacal" is a privately held corporation which was organized and is maintained for the purpose of promoting and conducting the business interests of "Fulton." "AHC Pharmacal" and "Fulton" have been and now are marketing and advertising health related products, including but not limited to a product variously known as AHC Gel, AHC Pharmacal's benzoyl peroxide gel medication and b.p. gel medication (hereinafter "AHC Gel"), a product advertised for the treatment of acne. The respondents, in connection with the manufacture and marketing of said product, have disseminated, published and distributed, and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of "AHC Gel" for human use. "AHC Gel" is marketed by the respondents, both separately and as part of a program for the treatment of acne known as "Dr. Fulton's Acne Control Regimen" (hereinafter "the Acne Control Regimen"). This product, as advertised, is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements concerning "AHC Gel" and "the Acne Control Regimen" through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines with national circulations, and advertisements in the form of a booklet, entitled "Acne: A Treatable Disease" which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the product "AHC Gel," and have disseminated and caused the dissemination of advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said products in commerce.

PAR. 5. Typical of the statements and representations in said advertisements disseminated as previously described, but not necessarily inclusive thereof, are the following:

# Is the ACNE Problem Finally OVER?



Acne sufferer, now specialist, has developed a new treatment\* for acne control that offers young adults their first real hope for clear complexions.

"My acne started at sixteen. I tried everything from oral antibiotics to x-ray treatment, even ultraviolet light. Nothing worked. I became a Dermatologist and Ph.D. in Biochemistry in an attempt to find a cure for acne.

"After seven years of research, I discovered benzoyl peroxide (bp) gel\*, a topical medication that has revolutionized the treatment and control of acne.

"Since 1973, my Acne Health Care Centers throughout the United States have treated tens of thousands of acne sufferers using my benzoyl peroxide medications. The results: over 65% of our patients (even the cystic variety) are dramatically improved within eight weeks.

"Unfortunately, our clinics can only treat a very small percentage of those that really need help.

"In an effort to reach the many acne sufferers that are often given false hope about their problem and are continually disillusioned by over-the-counter acne remedies, we have developed a very exciting **ACNE CONTROL REGIMEN**."

"If we give you the opportunity to locate your acne sufferer early, we can bring the condition under control and eliminate the possibility of facial scarring that may result from continued acne breakouts."

"I consider this acne control program to be the finest available today for the control of acne — next to being treated at one of my Acne Health Care Centers."

*James E. Fulton, Jr.*  
James E. Fulton, Jr., M.D., Ph.D.  
Founder of Acne Health Care Centers  
Founder of Acne Research Institute  
Fellow, American Board of Dermatology  
Fellow, American Academy of Dermatology



"People don't realize how emotionally painful and frustrating acne can be. For seven years my days started and ended with depression. Dr. Fulton's Acne Control Regimen has given me new hope."

Before Treatment

## How Dr. Fulton's regimen\* works

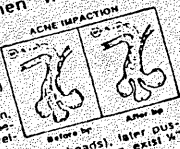
Acne is genetic. Normally, dead skin cells are flushed up the pores of oil glands by sebum (surface oil) and washed away.

In genetically defective skin, these cells stick — the pores become impacted — acne develops. These impactions (whiteheads, blackheads), later pustules, which could result in permanent scarring, exist beneath the surface of the skin.

Special soaps and most over-the-counter preparations attempt to dry up oil only at the surface level. This will never help the acne problem. Dr. Fulton's "Acne Control Regimen" actually penetrates into the pores and treats the genetic problem in two ways:

1. Kills the C-acnes bacteria which produce irritating acids in the pores and accelerates the shedding of dead skin cells, thus loosening and clearing up acne impactions.
2. Reduces the cohesiveness of dead skin cells, thus loosening and clearing up acne impactions.

**THE RESULT:** An opportunity now exists for the acne sufferer to find dramatic improvement.



**AHC PHARMACAL, INC.** 1351 N.W. 16th St.  
Miami, Florida 33125

Please rush — complete program(s) of Dr. Fulton's **ACNE CONTROL REGIMEN**

Which includes: (1) 4.5 oz. bottle of P.P. Gel Medication  
(2) Dr. Fulton's Marium  
— ACNE-A Treatable Disease

Enclosed is \$12.95 (which includes postage & handling for each program)

VISA  Check or Money Order  Master Charge Bank etc.

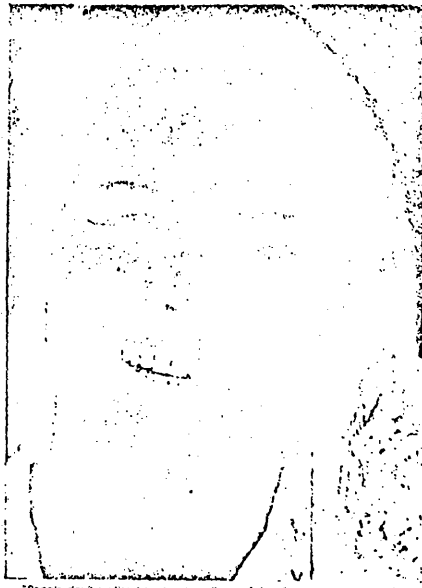
Card # \_\_\_\_\_ Exp. Date \_\_\_\_\_  
Name \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Signature \_\_\_\_\_  
Date \_\_\_\_\_

**MONEY BACK GUARANTEE:** If your program does not improve your skin, just return the empty containers for a full refund.

\*Dr. Fulton's unique gel of ultra-stabilized benzoyl peroxide — P.P. applied topically.  
Pat. Fulton, Jr., 3,342,000, method of action of benzoyl peroxide. J. Invest. Dermatol. 5:151, 1974.

# The ACNE Problem is Finally OVER



"People don't realize how emotionally painful and frustrating acne can be. For seven years my days started and ended with depression. Dr. Fulton's Acne Control Regimen has given me new hope."

Before Treatment

Acne sufferer, now specialist, has developed a new treatment\* for acne control that offers young adults their first real hope for clear complexions.

"My acne started at sixteen. I tried everything from oral antibiotics to x-ray treatment, even ultraviolet light. Nothing worked."

"I became a Dermatologist and Ph.D. in Biochemistry in an attempt to find a cure for acne."

"After seven years of research, I discovered benzoyl peroxide (bn) gel\*, a topical medication that has revolutionized the treatment and control of acne."

"Since 1973, my Acne Health Care Centers throughout the United States have treated tens of thousands of acne sufferers using my benzoyl peroxide medications. The results: over 85% of our patients (even the cystic variety) showed dramatic improvement within eight weeks."

"Unfortunately, our clinics can only treat a very small percentage of those that really need help."

"In an effort to reach the many acne sufferers that are often given false hope about their problem and are continually disillusioned by over-the-counter acne remedies, we have developed a very exacting 'ACNE CONTROL REGIMEN.'"

"If we are given the opportunity to reach you, the acne sufferer early, we can, in most cases, bring the condition under control and eliminate the possibility of facial scarring that may result from continued acne breakouts."

"I consider this acne control program to be the finest available today for the control of acne — next to being treated at one of my Acne Health Care Centers."



*James E. Fulton, Jr., M.D., Ph.D.*

James E. Fulton, Jr., M.D., Ph.D.  
Founder of Acne Health Care Centers  
Founder of Acne Research Institute  
Diplomat, American Board of Dermatology  
Fellow, American Academy of Dermatology

### How Dr. Fulton's regimen\* works

Acne is genetic.

Acne is clogged pores.

Normally, dead skin cells are flushed up the pores of oil glands by sebum (surface oil) and washed away.

In genetically defective skin, these cells stick — the pores become impacted — acne develops.

These impactions (whiteheads, blackheads), later pustules, which could result in permanent scarring, exist beneath the surface of the skin.

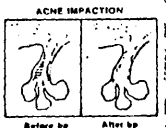
Special soaps and most over-the-counter preparations attempt to dry up oil only at the surface level. This will never help the acne problem.

Dr. Fulton's "Acne Control Regimen" actually penetrates into the pores and treats the genetic problem in two ways:

1. Kills the *C. acnes* bacteria which produce irritating acids in the pores and accelerate the clogging process.

2. Reduces the cohesiveness of dead skin cells, thus loosening and clearing up acne impactions.

**THE RESULT:** An opportunity now exists for the acne sufferer to find dramatic improvement.



AHC PHARMACAL, INC. 1351 N.W. 16th St.  
Miami, Florida 33125

Please rush — complete program(s) of Dr. Fulton's ACNE CONTROL REGIMEN

Which includes: (1) A 3 oz. bottle of b-o Medicated Soap  
(2) A 1 oz. bottle of b-o Gel Medication  
(3) Dr. Fulton's Manual  
ACNE: A Treatable Disease

Enclosed is \$12.95 (which includes postage & handling for each program).

VISA  Check or Money Order  Master Charge  Bank No. \_\_\_\_\_

Credit Card # \_\_\_\_\_ Exp. Date \_\_\_\_\_

Name \_\_\_\_\_

Address \_\_\_\_\_ Apt. # \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Signature \_\_\_\_\_ (M-478)

**MONEY BACK GUARANTEE:** If your improvement does not satisfy you, just return the empty containers for a full refund.

\*Dr. Fulton's unique gel of glycerin stabilized benzoyl peroxide — not applied for. Ref: Fulton, J. E., Studies on mechanism of action of benzoyl peroxide. *J. Cutaneous Med. Biol.* 9:191, 1975



PAR. 6. Through the use of said advertisements and others referred to in Paragraphs Four and Five, respondents represented, and now represent, directly or by implication that use of "AHC Gel," either alone or as part of "the Acne Control Regimen," will cure acne regardless of the severity of the condition.

PAR. 7. In truth and in fact, use of "AHC Gel," either alone or as part of "the Acne Control Regimen," will not cure acne. Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statement and representation set forth in Paragraph Five was, and is false, misleading and deceptive.

PAR. 8. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondents represented, and now represent that:

a. Use of "AHC Gel," either alone or as part of "the Acne Control Regimen," by persons with acne will result in skin free of pimples, blackheads, whiteheads, other acne blemishes, and scarring.

b. Use of "AHC Gel," either alone or as part of "the Acne Control Regimen," by persons with acne will help control pimples, blackheads, whiteheads, other acne blemishes, and scarring, regardless of the severity of the disease.

c. "AHC Gel," either alone or as part of "the Acne Control Regimen," is superior to all other over-the-counter acne preparations for the treatment of acne, including but not limited to other benzoyl peroxide products.

PAR. 9. In truth and in fact there existed at the time of the first dissemination of the representations referred to in Paragraph Eight no reasonable basis for the making of these representations, in that respondents lacked competent and reliable scientific evidence to support said representations. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 10. In the course and conduct its aforesaid business, and at all times mentioned herein, the respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

PAR. 11. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent AHC Pharmacal, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 1609 N.W. 14th St., Miami, Florida.
2. Respondent James E. Fulton, M.D. is an individual and corporate officer of AHC Pharmacal, Inc. and maintains an office at 1609 N.W. 14th St., Miami, Florida.
3. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

### ORDER

#### I

*It is ordered,* That respondents AHC Pharmacal, Inc., a corporation, and James E. Fulton, individually and as a corporate officer, their successors and assigns, either jointly or individually, and the corporate respondent's officers, agents, representatives, and employees, directly or through any corporation, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisements by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of a product variously known as AHC Gel, AHC Pharmacal's benzoyl peroxide gel medication and b.p. gel medication (hereinafter "AHC Gel") either alone or as part of "Dr. Fulton's Acne Control Regimen" (hereinafter "the Acne Control Regimen") or any other acne product or regimen will cure acne or any skin condition associated with acne.

2. Misrepresents the extent to which any product has been tested or the results of any such test(s).

B. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of "AHC Gel", either alone or as part of "the Acne Control Regimen", or use of any other acne product or regimen by persons with acne, will result in skin free of pimples, blackheads, whiteheads, other acne blemishes, or scarring;

2. Represents that "AHC Gel", either alone or as part of "the Acne Control Regimen", or any other acne product or regimen, is superior to other over-the-counter acne preparations for the treatment of acne, including but not limited to other benzoyl peroxide products,

unless, at the time of each dissemination of such representation(s) respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). "Competent and reliable scientific or medical evidence" shall be

defined as evidence in the form of at least two well-controlled double-blind clinical studies which are conducted by different persons, independently of each other. Such persons shall be dermatologists who are qualified by scientific training and experience to treat acne and conduct the aforementioned studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product or refers or relates to any characteristic, property or result of the use of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s).

## II

*It is further ordered,* That within sixty (60) days of the acceptance of this order, respondents shall cease and desist from disseminating or causing the dissemination of advertisements for "AHC Gel", "the Acne Control Regimen", and/or any other acne product or regimen, unless respondents first disseminate corrective advertisements for the Acne Control Regimen (including AHC Gel) in Sunday newspaper supplements and on radio.

A. All such Sunday newspaper supplement corrective advertisements shall clearly and conspicuously disclose, in the headline with boldface type no smaller than 48 points (one-half inch) in height, that "no product can cure acne." Nothing in the headline, or any part of the advertisement, shall in any way obscure or contradict the clear meaning of the disclosure. Furthermore, no language in said advertisement shall appear in a type size equal to or larger than the headline type size.

Said Sunday newspaper supplement corrective advertisements shall be disseminated in the following cities: Boston, MA; Atlanta, GA; Cleveland, OH; Philadelphia, PA; Pittsburgh, PA; and San Francisco, CA. Respondents may substitute cities of reasonable demographic and geographic similarity, provided that said cities are substituted on a one-for-one basis. Said corrective advertisements shall be run at least one full-page advertisement per month for a time period of three consecutive months, provided that said advertisements shall not be disseminated during the months of June, July, or August.

Respondents may elect to run two half-page corrective advertisements in the place of each and every full-page corrective advertise-

ment to satisfy their corrective advertising obligations under this part of the order. *Provided, however*, that all such corrective advertisements must be run in different weekly issues of the aforementioned newspaper supplements for any given locale, and other requirements of this order (*e.g.*, headline type size, dissemination schedule, etc.) are fully complied with.

B. All corrective advertisements which are required for dissemination by radio shall be at least thirty seconds in duration and shall begin with the unobscured announcement that "no product can cure acne." Nothing else in the advertisement shall in any way obscure or contradict the clear meaning of this statement. Said radio corrective advertisements shall be disseminated as non-consecutive spots over major radio stations (as defined below) in the following urban areas: Chicago, IL; Los Angeles, CA; Miami, FL. Said radio corrective advertisements shall be disseminated at least twice each month during the same three months as the Sunday newspaper supplement corrective advertisements, referred to in IIA, are disseminated.

For purposes of this order a "major radio station" shall be defined as a radio station which (a) has a broadcast power of at least 6,000 watts horizontal and 6,000 watts vertical, and (b) is described in its own promotional materials as being targeted at teenagers or young adult audiences and/or primarily playing rock, disco or contemporary hit music.

C. The obligation to run corrective advertisements shall not in any way alleviate other order obligations. Furthermore, such advertisements shall not represent, directly or indirectly, that the Federal Trade Commission approves, recommends or in any manner endorses the advertised product or product's advertising.

### III

*It is further ordered*, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

*It is further ordered*, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

*It is further ordered*, That such respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by

respondent, setting forth in detail the manner and form of its compliance with this order.

*It is further ordered,* That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

Complaint

95 F.T.C.

IN THE MATTER OF  
ELI LILLY AND COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF  
THE CLAYTON ACT

*Docket C-3021. Complaint, April 29, 1980 — Decision, April 29, 1980*

This consent order requires, among other things, an Indianapolis, Indiana manufacturer and seller of pharmaceuticals and other chemical substances, to cease engaging in several anticompetitive practices involving the United States finished insulin industry. Additionally the order requires Eli Lilly and Co. to grant certain licenses covering its existing and future insulin-related technology to existing and prospective competitors.

*Appearances*

For the Commission: *William C. Holmes.*

For the respondent: *Charles E. Buffon, Covington & Burling,*  
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Eli Lilly and Company, hereinafter referred to as "Lilly" or "respondent", has violated Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

I. RESPONDENT

PARAGRAPH 1. Lilly is a corporation organized and existing under and by virtue of the laws of the State of Indiana, with its principal executive offices located at 307 East McCarty St., Indianapolis, Indiana.

PAR. 2. Lilly's principal business is the manufacture and sale of chemical compounds and substances for use by or on living organisms — human, plant and animal. This business accounted for approximately 89% of the consolidated net sales of Lilly and its subsidiaries during the years 1972 through 1976.

PAR. 3. In 1976, Lilly's consolidated net sales were approximately \$1.34 billion, consolidated net income after taxes was approximately

\$200 million, and consolidated total assets were approximately \$1.58 billion. Sales of pharmaceuticals accounted for approximately \$761 million of Lilly's consolidated net sales in 1976.

## II. NATURE OF TRADE AND COMMERCE

### A. Relevant Market

PAR. 4. The relevant geographic market involved in this complaint is the United States as a whole.

PAR. 5. The relevant product market involved in this complaint is finished insulin.

PAR. 6. Finished insulin is a drug used by approximately 1,600,000 diabetics within the United States in the treatment of diabetes mellitus, commonly known as diabetes. For those diabetics who are insulin-dependent, finished insulin is the only method of treatment.

PAR. 7. The market for finished insulin has been and is expanding rapidly. In 1970, total industry sales of finished insulin within the United States were approximately \$26 million. By 1976, industry sales had expanded to approximately \$57 million, representing an increase of more than 119% between 1970 and 1976.

PAR. 8. The market for finished insulin within the United States is dominated by Lilly. Only two firms, including Lilly, account for 100% of total industry sales. Lilly alone accounted for more than 85% of total industry sales during the period from 1970 through 1976.

### B. Industry Information

PAR. 9. A vital raw material in the production of finished insulin is animal pancreas glands, derived as by-products from meat slaughterhouses. Unrefined insulin and other materials are extracted from these glands in a form called "insulin salt cake." Insulin salt cake is then purified into a precipitate referred to as "insulin crystals." Insulin crystals are combined with other substances to produce finished insulin.

PAR. 10. Lilly is the only firm in the United States finished insulin industry that is fully integrated. Lilly purchases animal pancreas glands, extracts raw insulin from the glands in the form of insulin salt cake, refines the salt cake into insulin crystals, produces finished insulin from the crystals, and markets the finished insulin to hospitals and pharmacies throughout the United States for use by diabetics.

PAR. 11. Lilly purchases its requirements of animal pancreas glands from United States meat slaughterhouses either directly or through "collectors" or "brokers." "Collectors" are firms that purchase glands



from the slaughterhouses for their own accounts, trim and freeze the glands, and then sell them to manufacturers, either directly or through brokers. "Brokers," in contrast, are firms that simply arrange for the purchase and/or sale of the glands at a commission.

### III. JURISDICTION

PAR. 12. At all times relevant to this complaint, Lilly has purchased and offered to purchase animal pancreas glands from meat slaughterhouses, collectors and brokers located throughout the United States, and has sold, shipped and promoted its finished insulin products to customers located throughout the United States. Lilly has thereby engaged in or affected commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Except to the extent that competition has been hindered, restrained or frustrated by the acts and practices alleged below in this complaint, Lilly has been and is in competition with other firms in the purchase of pancreas glands within the United States and in the sale and distribution of finished insulin within the United States.

#### A. Count I

PAR. 13. Lilly has monopoly power within the relevant market.

PAR. 14. Lilly has since at least 1952 directly and indirectly engaged in acts, practices and methods of competition that, individually or collectively, have willfully maintained its monopoly power within the relevant market and that have given it the power to inhibit, frustrate and restrain actual and potential competition within the relevant market.

Examples of such acts, practices and methods of competition include, but are not limited to, the following:

(a) Lilly has conspired with other domestic and foreign companies, including certain collectors, brokers, and other manufacturers of insulin, to:

(1) Allocate and control the meat slaughterhouses at which pancreas glands are collected within the United States;

(2) Allocate and control the distribution of pancreas glands collected within the United States;

(3) Suppress potential competition in the collection of pancreas glands within the United States through such acts, practices and methods of competition as:

(i) A concerted refusal to deal with collectors and brokers not privy to the conspiracy (hereinafter "disfavored collectors and brokers");

(ii) The inducement of refusals to deal with disfavored collectors and brokers by their customers and suppliers;

(b) Lilly has acquired exclusive licenses within the United States to certain key patents in the production of insulin products, including in particular a 1952 exclusive patent license from Novo Industri A/S, a Danish insulin producer ("Novo"), that expressly precluded other insulin manufacturers from entering the United States finished-insulin market with certain key insulin products.

PAR. 15. The aforesaid acts, practices and methods of competition by Lilly have had, among others, the following effects:

(a) The discouragement of potential entry into the United States finished insulin market, including, in particular, potential entry by:

(1) The insulin manufacturers privy to the aforementioned conspiracy affecting the collection and distribution of pancreas glands within the United States;

(2) The insulin manufacturers affected by the aforementioned exclusive patent licenses;

(3) Novo Industri A/S;

(b) The creation and maintenance of barriers to competition in the United States finished insulin market through:

(1) Control of the pancreas glands needed to produce finished insulin within the United States;

(2) Control of key patents significant to effective competition within the United States finished insulin market.

PAR. 16. The aforesaid acts, practices and methods of competition constituted and still constitute unfair methods of competition and unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## B. Count II

PAR. 17. Lilly has since at least 1952 acquired patent rights under exclusive patent licenses where the effect has been to tend to substantially lessen competition, or to tend to create a monopoly, within the relevant market.

An example of such acquisitions includes, but is not limited to, the 1952

exclusive patent license from Novo Industri A/S referred to in Paragraph Fourteen (b), above.

PAR. 18. The aforesaid acquisitions by Lilly have had, among others, the following effects:

(a) The discouragement of potential entry into the United States finished insulin market, including, in particular, entry by:

(1) The insulin manufacturers affected by the aforementioned exclusive patent licenses;

(2) Novo Industri A/S;

(b) The creation and maintenance of barriers to competition in the United States finished insulin market through control of key patents.

PAR. 19. The aforesaid acquisitions by Lilly constituted and still constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34, now in further conformity with the procedure prescribed in Section 2.34 of its

Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Eli Lilly and Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal executive offices located at 307 East McCarty St., Indianapolis, Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### I

#### DEFINITIONS

*It is ordered,* That the following definitions shall apply in this order:

1. "Lilly" means respondent Eli Lilly and Company, its subsidiaries, and its successors and assigns.

2. "Animal Insulin Products" means insulin extracted from animal pancreas glands, including any and all stages of production (insulin salt cake, insulin crystals and/or finished insulin).

3. "Other Insulin Products" means insulin produced by chemical synthesis, by microbes genetically manipulated using recombinant DNA techniques, or by any other methods other than extraction from animal pancreas glands.

4. "Existing Patents" means:

(a) United States and foreign patents owned by Lilly, or with respect to which Lilly has the power to grant licenses or sub-licenses, as of the date that the agreement containing this order is signed by Lilly, and

(b) Applications for United States and foreign patents, and any patents which may issue on any such applications, which applications are owned by Lilly, or with respect to which Lilly has the power to grant licenses or sub-licenses, as of the date that the agreement containing this order is signed by Lilly.

5. "Existing Know-How" means technical information, processes and procedures, whether patented or unpatented, which are used by Lilly in commercial production of Animal Insulin Products within the United States as of the date that the agreement containing this order is signed by Lilly. Lilly's obligation to make certain of such know-how available to licensees pursuant to this order may be met by (a) providing such licensees with a written description of the licensed

know-how sufficient to enable one reasonably skilled in the art to understand and reproduce such know-how, and (b) upon written request by a licensee, additionally providing written clarification respecting licensed know-how to such licensee where such clarification is reasonably necessary.

6. "Future Patents" means United States patents (exclusive of Existing Patents) issued within five (5) years after the date that the agreement containing this order is signed by Lilly, which patents are owned by Lilly, or with respect to which Lilly acquires the power to grant licenses or sub-licenses.

7. "Future Know-How" means technical information, processes and procedures (exclusive of Existing Know-How), whether patented or unpatented and including any United States patents which may issue thereon, which relate to the production of Animal or Other Insulin Products, and which Lilly acquires from persons, research groups or companies other than Lilly and Lilly employees within five (5) years after the date that the agreement containing this order is signed by Lilly, and which are in writing and are known by Lilly to have been reduced to practice by Lilly or by the persons, research groups or companies from which the know-how is acquired. Lilly's obligation to make certain of such know-how available to licensees pursuant to this order may be met by (a) providing such licensees with a written description of the licensed know-how sufficient to enable one reasonably skilled in the art to understand and reproduce such know-how, and (b) upon written request by a licensee, additionally providing written clarification respecting licensed know-how to such licensee where such clarification is reasonably necessary.

8. "Patents Issuing on Future Applications" means United States patents (exclusive of Existing or Future Patents) owned by Lilly which issue on applications filed within five (5) years after the date that agreement containing this order is signed by Lilly, which applications cover innovations developed by Lilly or Lilly employees.

9. "Reduced to practice" means demonstrated by actual use, by tests or by laboratory experiments as being workable for its intended purpose.

10. "Domestic Company" means any sole proprietorship, partnership, corporation or other business entity that is a United States citizen and that is not owned or controlled by a business entity that is not a United States citizen.

11. "Foreign Company" means any sole proprietorship, partnership, corporation or other business entity that is not a United States citizen, and any business entity that is a United States citizen but is

owned or controlled by a business entity that is not a United States citizen.

12. "United States" means the United States of America, its territories and possessions, and the Commonwealth of Puerto Rico.

13. "The date that the agreement containing this order is signed by Lilly" means and is: May 30, 1979.

## II

### PRACTICES PROHIBITED

*It is further ordered*, That Lilly, and its directors, officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device:

A. In connection with the purchase or sale of animal pancreas glands used in the manufacture of Animal Insulin Products:

(1) Shall not participate in any agreement or conspiracy with any manufacturer of any Animal Insulin Products or any buyer, broker or collector of animal pancreas glands to allocate or control the meat slaughterhouses within the United States from which animal pancreas glands are or will be obtained.

(2) Shall not participate in any agreement or conspiracy with any manufacturer of any Animal Insulin Products or any buyer, broker or collector of animal pancreas glands to allocate or divide animal pancreas glands obtained from meat slaughterhouses within the United States.

(3) Shall not participate in any agreement or conspiracy with any manufacturer of any Animal Insulin Products or any buyer, broker or collector of animal pancreas glands to suppress or limit actual or potential competition in the purchase or sale of animal pancreas glands obtained from meat slaughterhouses within the United States by (a) refusing to deal with any buyer, broker or collector of animal pancreas glands collected within the United States, or (b) inducing any manufacturer of any Animal Insulin Products, any buyer, broker or collector of animal pancreas glands or any meat slaughterhouses located within the United States, to refuse to deal with any buyer, broker or collector of animal pancreas glands collected within the United States.

(4) Provided that nothing contained in Subparagraphs (1), (2), and (3) above shall be construed to prevent Lilly (a) from making purchases of animal pancreas glands in the ordinary course of business from meat slaughterhouses, collectors, brokers and other sellers of such glands

located in the United States or elsewhere, (b) from entering into supply contracts with meat slaughterhouses, collectors, brokers and other sellers of glands located in the United States or elsewhere for reasonable periods of time not to exceed thirteen (13) months, or (c) from unilaterally refusing to purchase animal pancreas glands which do not meet Lilly's insulin yield or other quality standards, which Lilly does not need, or which are offered at a price unacceptable to Lilly.

B. Shall not for a period of ten (10) years after the date that the agreement containing this order is signed by Lilly enter into or enforce any provision in any license of any patent or know-how respecting the production of any Animal or Other Insulin Products, or any forms of Animal or Other Insulin Products, which provision by its terms restricts or prevents any other company from importing any Animal or Other Insulin Products into, or manufacturing any Animal or Other Insulin Products within, the United States.

### III

#### LICENSING OF EXISTING INSULIN PATENTS AND KNOW-HOW

*It is further ordered, That:*

A. Upon written application, made within five (5) years after the date that the agreement containing this order is signed by Lilly, Lilly shall grant to any Domestic Company that states in its application its bona fide intention to engage in:

(a) the production of any Animal Insulin Products within the United States for sale within the United States or export sale from the United States, or

(b) the production of any Animal Insulin Products outside the United States for sale exclusively within the United States,

a non-exclusive, royalty-free license to produce and sell Animal Insulin Products under any part or all, as the applicant may request, Existing Patents and Existing Know-How pertaining to the Animal Insulin Products that the applicant states that it intends to produce. Each such license granted pursuant to this Paragraph III. A shall contain no time limitation or other restriction or limitation whatsoever, except that such license:

(1) May limit the production and sale of Animal Insulin Products produced using such licensed patents and know-how to: production within the United States for sale within the United States and export

sale from the United States; and production outside the United States for sale exclusively within the United States.

(2) May be nontransferable.

(3) May require the licensee to pay reasonable expenses actually incurred by Lilly in administering the license and in making licensed know-how and written clarifications of licensed know-how available to the licensee (as provided in Paragraph I.5 above).

(4) May require the licensee to hold know-how received pursuant to the license confidential so long as such know-how is not otherwise in the public domain and not to communicate such know-how to anyone other than such governmental authorities as may be necessary to permit the licensee to produce and market Animal Insulin Products under the license.

(5) May make reasonable provision for cancellation of the license upon the licensee's failure to comply with the terms of the license.

(6) Provided that if Lilly disputes the "bona fide" nature of the applicant's stated intention to engage under the requested license in the production or sale of Animal Insulin Products within the United States, Lilly shall, within thirty (30) days from the date the written application was received by Lilly, submit to the Federal Trade Commission a written statement setting forth in detail its reasons for disputing the bona fide nature of such stated intention. The Commission may, at its election, request further information and itself determine the issue of whether such stated intention is bona fide, in which case the Commission's determination shall be final and binding upon both Lilly and the applicant. If the Commission instead declines to itself determine such issue, the applicant may, at its election, submit the issue for settlement by arbitration, which arbitration shall be conducted by and in accordance with the rules then effective of the American Arbitration Association.

B. Upon written application, made within five (5) years after the date that the agreement containing this order is signed by Lilly, Lilly shall grant to any Foreign Company that states in its application its bona fide intention to engage in the production of any Animal Insulin Products within the United States for sale exclusively within the United States, a non-exclusive, reasonable-royalty license to produce and sell Animal Insulin Products under any part or all, as the applicant may request, Existing Patents and Existing Know-How pertaining to the Animal Insulin Products that the applicant states that it intends to produce. Each such license granted pursuant to this Paragraph III.B shall contain no time limitation or other restriction or limitation whatsoever, except that such license:



## Decision and Order

(1) May limit the production and sale of Animal Insulin Products produced using such licensed patents and know-how to production within the United States for sale exclusively within the United States.

(2) May be nontransferable.

(3) May require the licensee to pay reasonable expenses actually incurred by Lilly in administering the license and in making licensed know-how and written clarifications of licensed know-how available to the licensee (as provided in Paragraph I.5 above).

(4) May require the licensee to pay a reasonable royalty for such licensed patents and know-how. Upon receipt of a written application for a license pursuant to this Paragraph III.B, Lilly shall advise the applicant, in writing within thirty (30) days, of the royalty it deems reasonable for the patents and know-how applied for. If the applicant and Lilly are unable to agree upon what constitutes a reasonable royalty within ninety (90) days from the date the written application for the license was received by Lilly, the applicant may, at its election, submit the issue of the royalty for settlement by arbitration, which arbitration shall be conducted by and in accordance with the rules then effective of the American Arbitration Association.

(5) May make reasonable provision for periodic inspection of the books and records of the licensee by an independent auditor, or other person acceptable to both Lilly and the licensee, who shall report to Lilly only the amount of the royalty due and payable and no other information.

(6) May require the licensee to hold know-how received pursuant to the license confidential so long as such know-how is not otherwise in the public domain and not to communicate such know-how to anyone other than such governmental authorities as may be necessary to permit the licensee to produce and market Animal Insulin Products under the license.

(7) May make reasonable provision for cancellation of the license upon the licensee's failure to comply with the terms of the license.

(8) Provided that if Lilly disputes the "bona fide" nature of the applicant's stated intention to engage under the requested license in the production of Animal Insulin Products for sale exclusively within the United States, Lilly shall follow the procedure for settling such disputes set forth in Subparagraph III.A.(6) above.

## IV

LICENSING OF FUTURE INSULIN PATENTS AND KNOW-HOW

It is further ordered, That:

A. For a period of five (5) years after the date that the agreement containing this order is signed by Lilly, and in all agreements or licenses with other persons, research groups or companies other than Lilly, under which Lilly acquires or contracts to acquire rights to patents, applications or know-how respecting any Animal or Other Insulin Products, Lilly shall use its best efforts to have reasonable language empowering Lilly to grant the licenses contemplated by Paragraph IV.B below included in such agreements or licenses.

B. Upon written application, made within five (5) years after the date that the agreement containing this order is signed by Lilly, Lilly shall grant to any Domestic Company that states in its application its bona fide intention to engage in the production of any Animal or Other Insulin Products within the United States for sale exclusively within the United States, a non-exclusive license to produce and sell Animal or Other Insulin Products under any part or all, as the applicant may request, of the following: Future Patents and Future Know-How acquired by Lilly from persons, research groups or companies other than Lilly and Lilly employees as of the date of such application for a license, that pertain to the Animal or Other Insulin Products that the applicant states that it intends to produce, and that Lilly has the legal capacity to license or sub-license as of the date of such application for a license. Each such license granted pursuant to this Paragraph IV.B shall contain no time limitation or other restriction or limitation whatsoever, except that such license:

(1) May limit the production and sale of Animal or Other Insulin Products produced using such licensed patents and know-how to production within the United States for sale exclusively within the United States.

(2) May be nontransferable.

(3) May require the licensee to pay reasonable expenses actually incurred by Lilly in administering the license and in making licensed know-how and written clarifications of licensed know-how available to the licensee (as provided in Paragraph I.7 above).

(4) May require the licensee to pay a reasonable pro rata share of the amounts actually spent by Lilly in acquiring, or financing the research and development by such other persons, research groups or companies of, such licensed patents and know-how.

(5) May require the licensee to pay a royalty not to exceed the royalty, if any, that Lilly shall become obligated to pay such other persons, research groups or companies respecting sales of licensed products by the licensee.

(6) May make reasonable provision for periodic inspection of the

books and records of the licensee by an independent auditor, or other person acceptable to both Lilly and the licensee, who shall report to Lilly only the amount of the royalty due and payable and no other information.

(7) May require the licensee to hold know-how received pursuant to the license confidential so long as such know-how is not otherwise in the public domain and not to communicate such know-how to anyone other than such governmental authorities as may be necessary to permit the licensee to produce and market Animal or Other Insulin Products under the license.

(8) May make reasonable provision for cancellation of the license upon the licensee's failure to comply with the terms of the license.

(9) May contain provisions that require the licensee to grant Lilly, at a reasonable royalty, a reciprocal cross-license on a non-exclusive basis with respect to any part or all, as Lilly may request, rights under United States patents issued and know-how reduced to practice (including any United States patents which may issue on such know-how), that pertain to Animal or Other Insulin Products, that are acquired by the licensee from persons, research groups or companies other than the licensee and the licensee's employees after the date that the agreement containing this order is signed by Lilly, and that the licensee has the legal capacity to license or sub-license as of the date of its application to Lilly for a license under this Paragraph IV.B.

(10) Provided that if Lilly disputes the "bona fide" nature of the applicant's stated intention to engage under the requested license in the production and sale of Animal or Other Insulin Products exclusively within the United States, Lilly shall follow the procedure for settling such disputes set forth in Subparagraph III.A.(6) above.

C. Upon written application, made within five (5) years after the date that the agreement containing this order is signed by Lilly, Lilly shall grant to any Domestic Company that states in its application its bona fide intention to engage in the production of any Animal or Other Insulin Products within the United States for sale exclusively within the United States, a non-exclusive license to produce and sell Animal or Other Insulin Products under any part or all, as the applicant may request, of the following: Future Patents, and Patents Issuing on Future Applications, covering innovations developed by Lilly or Lilly employees as of the date of such application for a license, that pertain to the Animal or Other Insulin Products that the applicant states that it intends to produce, and that Lilly has the legal capacity to license as of the date of such application for a license. Each such license granted

pursuant to this Paragraph IV.C shall contain no time limitation or other restriction or limitation whatsoever, except that such license:

(1) May limit the production and sale of Animal or Other Insulin Products produced using such licensed patents to production within the United States for sale exclusively within the United States.

(2) May be nontransferable.

(3) May require the licensee to pay reasonable expenses actually incurred by Lilly in administering the license.

(4) May require the licensee to pay a reasonable royalty for such licensed patents. Upon receipt of a written application for a license pursuant to this Paragraph IV.C, Lilly shall advise the applicant, in writing within thirty (30) days, of the royalty it deems reasonable for the patents applied for, and, with respect to patents not yet issued, Lilly shall so advise the applicant within thirty (30) days of issue. If the applicant and Lilly are unable to agree upon what constitutes a reasonable royalty within ninety (90) days thereafter, the applicant may, at its election, submit the issue of the royalty for settlement by arbitration, which arbitration shall be conducted by and in accordance with the rules then effective of the American Arbitration Association.

(5) May make reasonable provision for periodic inspection of the books and records of the licensee by an independent auditor, or other person acceptable to both Lilly and the licensee, who shall report to Lilly only the amount of the royalty due and payable and no other information.

(6) May make reasonable provision for cancellation of the license upon the licensee's failure to comply with the terms of the license.

(7) May contain provisions that require the licensee to grant Lilly, at a reasonable royalty, a reciprocal cross-license on a non-exclusive basis with respect to any part or all, as Lilly may request, rights under United States patents and United States patents which may issue on United States patent applications, that issue on patent applications filed after the date that the agreement containing this order is signed by Lilly, that pertain to Animal or Other Insulin Products, that cover innovations developed by the licensee or the licensee's employees, and that the licensee has the legal capacity to license as of the date of its application to Lilly for a license under this Paragraph IV.C.

(8) Provided that if Lilly disputes the "bona fide" nature of the applicant's stated intention to engage under the requested license in the production and sale of Animal or Other Insulin Products exclusively within the United States, Lilly shall follow the procedure for settling such disputes set forth in Subparagraph III.A.(6) above.

## V.

## REPORTING PROVISIONS

*It is further ordered, That:*

A. Within one hundred eighty (180) days of the effective date of this order, Lilly shall submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it has complied with this order.

B. For a period of five (5) years after the effective date of this order, Lilly shall submit in writing to the Federal Trade Commission a report concerning each instance in which a license is granted pursuant to this order, which report shall identify the licensee and set forth in detail all terms of the license. Such report shall be made within thirty (30) days after the granting of the license.

C. For a period of five (5) years after the effective date of this order, Lilly shall submit in writing to the Federal Trade Commission a report concerning each instance in which a license made pursuant to this order is cancelled, or in which a request for a license under this order is refused for reasons other than a dispute under Subparagraphs III.A.(6), III.B.(8), IV.B.(10) or IV.C.(8) concerning the applicant's "bona fide intention", which report shall set forth in detail the reasons for such cancellation or refusal. Such report shall be made within thirty (30) days after such cancellation or refusal.

D. Lilly shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Lilly which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other such change.

E. Lilly shall forthwith distribute a copy of this order to each of its operating divisions concerned with the purchase or sale of animal pancreas glands or with the licensing of patents or know-how.

## IN THE MATTER OF

## HERBERT R. GIBSON, SR., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION  
OF SEC. 2 OF THE CLAYTON ACT AND THE FEDERAL TRADE  
COMMISSION ACT

*Docket 9016. Complaint, Feb. 25, 1975\*—Final Order, April 30, 1980*

This order requires, among other things, a Dallas, Texas retailer of sundry items, to cease coercing, intimidating, boycotting or taking other action against suppliers because they do not appear in the Gibson Trade Shows; further, the order prohibits certain Gibson officials and corporations from receiving brokerage commissions from a supplier while acting as a buyer for Gibson retail stores.

*Appearances*

For the Commission: *Andre Trawick, Jr., Robert G. Boomer, J.B. Brookshire and Juliam V. Buenger.*

For the respondents: *Bardwell D. Odum, Dallas, Tex., John M. Gillis, Gillis, Rogers & Taylor, Dallas, Tex., Robert E. Rader, Jr., McCarty & Wilson, Ennis, Tex. and Robert W. Steele and J. Wallace Adair, Howrey & Simon, Washington, D.C.*

INITIAL DECISION BY THEODOR P. VON BRAND, ADMINISTRATIVE LAW  
JUDGE

FEBRUARY 26, 1979

## PRELIMINARY STATEMENT

[2]The complaint charges that the individual or "Gibson family" respondents, Herbert R. Gibson, Sr., Herbert R. Gibson, Jr., Gerald Gibson and Belva Gibson, and the "Gibson corporate respondents," Gibsons Inc., Gibson Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson Products Co., Inc., have violated Section 5 of the Federal Trade Commission Act and Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act.

The charges against Al Cohen Associates, Inc., Progressive Brokerage, Inc. and Barshell Inc.<sup>1</sup> are confined to allegations that these respondents violated Section 2(c) of the Robinson-Patman Act.

The complaint alleges that the Gibson family respondents have been

\* Reported in 87 F.T.C. 1389 as to all parties.

<sup>1</sup> The Commission, by order dated June 17, 1976, accepted a consent settlement negotiated with respondents Progressive Brokerage, Inc. and Barshell, Inc.

engaged in the operation and control of a number of retail stores referred to in the complaint as "Gibson family-owned stores." Such stores, it is alleged, resell sundry types of products to the consuming public, including, but not limited to, soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware. The complaint further alleges that individual respondent Herbert R. Gibson, Sr. doing business as "Gibson Products Company" and "The Gibson Trade Show," together with or acting through respondent Gibson Products Co., Inc., sells or grants license or franchise agreements permitting individuals or corporations to use various Gibson trademarks, service marks and trade names, such as "Gibsons," "Gibsons Products Company," or "Gibson Discount Centers," in the operation of retail stores ("Gibson franchised stores"). It is further alleged that respondent Herbert R. Gibson, Sr., together with or acting through respondent Gibson Products Co., Inc., conducts trade shows for or attended by the various Gibson family or franchised stores.

The Section 5 charges against the Gibson family and corporate respondents are in two counts.

Count I alleges that, acting individually or in concert, the Gibson family and corporate respondents, in connection with the operation of the trade shows, have knowingly induced and received or received payments from suppliers as compensation or in consideration for services or facilities furnished by or through said respondents in connection with said respondents offering for sale, selling, soliciting, handling or arranging for the sale of products to Gibson family-owned stores and the Gibson franchise stores or resale thereof. [3]

Count I charges that the Gibson family and corporate respondents induced from most of their suppliers one or more of the following payments or considerations:

1. Payment for booth rentals;
2. Payment for services in connection with booth rental, including, but not limited to, electrical contracts or services and furnishings;
3. Payment for advertising in a booklet or a tabloid which was circulated among persons attending the Gibson Trade Show;
4. Special trade show prices on one or more of the suppliers' products offered for sale at the Gibson Trade Show;
5. Provision of personnel to prepare and attend the booth throughout the time the Gibson Trade Show was open;
6. Special billing terms on sales made at the Gibson Trade Show; and,
7. Special allowances on all sales made at the Gibson Trade Show calculated from a predetermined percentage of all such sales.

The complaint also alleges that respondents, pursuant to the operation of the trade show, have knowingly induced and received or received from suppliers the furnishing of services or facilities in connection with the selling, offering for sale, soliciting, handling, or arranging for the sale of products sold to Gibson family-owned stores and Gibson franchised stores or the resale thereof.

Count I charges that many suppliers participating in the Gibson Trade Show did not offer or otherwise make available to all of their customers competing with respondents in the sale and distribution of their respective products such payments, allowances, services, facilities or other things of value on proportionally equal terms. According to Count I, the Gibson family and corporate respondents knew or should have known that such payments or services were not offered or otherwise made available on proportionally equal terms to all other customers of such suppliers who competed with respondents. [4]

Count I, in short, alleges that respondents have induced and received or received promotional payments or services contrary to the policy of Sections 2(d) and 2(e) of the Robinson-Patman Act.

Count II of the complaint alleges that the Gibson family and corporate respondents, pursuant to combination, agreement, understanding or conspiracy with all or some of the Gibson family-owned stores and Gibson franchise stores, pursued a course of conduct eliminating or boycotting suppliers who did not grant all or some of the special allowances during or incident to the Gibson Trade Show as set forth in Count I of the complaint.

Count III charges that the Gibson family and corporate respondents have utilized the services of various manufacturers' representatives and brokers, such as respondents Progressive Brokerage, Inc., Barshell Inc. and Al Cohen Associates, Inc., who performed services for Gibson family respondents and corporate respondents by:

1. Furnishing information concerning market conditions;
2. Maintaining contact with various sellers;
3. Inspecting and selecting specified qualities and quantities of sundry products; and,
4. Negotiating purchases of said products.

These services, the complaint alleges, were performed by such manufacturers' representatives or brokers as agents or representatives of the Gibson respondents and under their direct or indirect control. Count III charges the Gibson respondents with accepting or receiving, and the broker respondents with paying or granting, commissions, brokerage or other compensation, in lieu thereof, in violation of Section 2(c) of the Robinson-Patman Act.



After extensive hearings, the record closed on November 10, 1978. This matter is now before the undersigned for decision based on the allegations of the complaint, the answers, the evidence of record and the proposed findings of fact, conclusions and briefs filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having [5]considered the entire record and the contentions of the parties, makes the following findings of fact and conclusions, and issues the orders set out herein.

#### FINDINGS OF FACT

##### I. Respondents' Identity, Organization, Structure, and Business

###### A. Identity of Respondents and Their Related Businesses

1. Respondent H.R. Gibson, Sr. (Gibson, Sr.) is an individual who, in the period 1969 to November 1, 1972, operated and had a financial interest in retail stores operating under various trade names such as Gibson Discount Centers (Findings 5, 6).

The first Gibson Discount Center was founded by H.R. Gibson, Sr. and his wife Belva Gibson in Abilene, Texas in 1958 (CX 1329 Store Directory January-December 1973; Gibson, Sr. 5175).

2. The Gibson Discount Centers are retail discount stores selling to the general public (Moland 3543). Gibson Discount Centers, in the period 1969 to 1975, generally sold hard and soft goods, including beauty aids, health supplies, automotive supplies, housewares, toys and hardware (Gerald Gibson 4941-42).

3. Concurrently, in the period 1969 to November 1, 1972, Gibson, Sr. operated the Gibson Trade Show and licensed various franchisees to use Gibson trade names in their operation of retail stores (Gerald Gibson 4885; Findings 4, 25, 44).

4. Gibson, Sr., in the period 1969 to October 31, 1972, did business under the trade or "d/b/a" name of Gibson Products Company (Gerald Gibson 4784, 4856). He used the Gibson Products Company trade name while doing business in his individual capacity in conducting the trade show and licensing others to utilize Gibson trade names in their retail store operations (CX 1059, 1061, 1063, 1065, 1069, 1071, 1040A-C; Gerald Gibson 4784, 4856; Gibson, Sr. 7222).

5. Gibson, Sr. and his wife, respondent Belva Gibson, in the period 1969 to October 31, 1972, were majority stockholders in the following corporations owning and operating retail discount stores under the Gibson name (Gibson, Sr. 5299; Stipulation April 13, 1978):

Gibson Products Company, Inc.  
Gibson Products of Abilene  
Gibson Products Co., Inc.  
Gibson Products of Big Spring [6]  
Gibson Products Co., Inc. of Lubbock  
Gibson Products Co., Inc. (a Wyoming corporation)  
Gibson's Discount Centers, Inc.<sup>2</sup>

In the period 1969 through October 31, 1972, H.R. Gibson, Sr. and Belva Gibson also had a minority interest in certain other corporations operating retail stores under the Gibson name (Gibson, Sr. 5567-68). They had a minority interest in the stores at Shreveport, Louisiana, Bruton Terrace in Dallas, Texas, Hobbs, New Mexico and some other locations (Gibson, Sr. 5568).

6. Gibson, Sr. hired the store managers of those stores in which he had a majority interest. His overriding concern was with their overall profitability (Gibson, Sr. 5219-20, 5583), as is evident in the following statement: "My main thing that I watched for all the time is to see that the store was making money" (Tr. 5583). Although day to day operating decisions were left to the store managers, Gibson, Sr. was actively involved in the operation of these stores. As he stated:

The policy decisions that I made was pertaining to the financial affairs of the store. What I wanted was a store that would make money.

They would furnish me with the financial statements of the store. Anytime they didn't make money, I had to do something about it. Might get a new manager I would try to get the store to making money. That was my policy decisions (Tr. 5573).

7. Respondent Gerald Gibson is the son of H.R. Gibson, Sr. In the period 1969 to 1972, he owned Gibson Products Company of Paris, Inc., Gibson Products Company of Shreveport, Inc. and Gibson Products Company of Bruton Terrace, Inc., as well as a minority interest in Gibson Products Company of Garland, Inc., Gibson Products Company of Pueblo, Inc. and Gibson Products Company of Temple, Inc. These corporations operated retail stores at the locations indicated (Gerald Gibson 4844-45; Tr. 5050-51). [7]

Gerald Gibson, in the same period, also had an advertising business

<sup>2</sup> During the period 1969 to November 1, 1972, H.R. Gibson, Sr. and Belva Gibson (individually and/or collectively) owned in excess of 50% of the stock of the above corporations using the Gibson name. And, during the period 1971 to November 1, 1972, Gibson's Discount Centers, Inc. owned all of H.R. Gibson, Sr.'s and Belva Gibson's shares in the companies listed above.

which he operated as a proprietorship or "d/b/a operation" under the name G&G Advertising Agency<sup>3</sup> (Gerald Gibson 4846-48).

8. Respondent H.R. Gibson, Jr. is the son of Gibson, Sr. In the period 1969 to November 1, 1972, he was in the retail business and owned the majority of the stock in corporations operating retail stores under the trade name of Gibson's Discount Centers in Hutchinson, Kansas and San Antonio, Texas. In the same period, he owned some stock in corporations operating Gibson retail stores in Pueblo, Colorado, Richardson, Texas, Temple, Texas, Bruton Road in Dallas, Texas, as well as Plano and Fort Worth, Texas (H.R. Gibson, Jr. 5626, 5677, 5678-5679).

9. As a general rule, with some exceptions, the Gibson stores are separately incorporated (Gerald Gibson 5076). The corporate name of such corporations is frequently "Gibson Products Company" with the town where the store is located included in the corporate name, *e.g.*, "Gibson Products Co., Inc. of Lubbock" (Gerald Gibson 4799; JR 20 pp. 4-5; Stipulation April 13, 1978).

10. In 1971, the Gibson stores owned by Gibson, Sr., his sons and other Gibson franchisees collectively did approximately \$1.6 billion of business (Gibson, Sr. 5529).

11. The stock of the corporate respondents and certain other corporations engaged in retailing was closely held, in the period 1969 to October 31, 1972, by members of the Gibson family. Control over the respondent corporations and some of the retail corporations resided primarily in those members of the Gibson family who are individual respondents herein.

12. In the period 1969 to October 31, 1972, there was extensive overlap in the directors and officers of the corporate respondents, as well as certain other corporations which operated Gibson retail stores. The overlap resulted from the offices held by the individual respondents:<sup>4</sup> [8]

<sup>3</sup> Various Gibson stores, in the period 1969 to 1973, used the services of G&G Advertising. This was true of the majority of the Gibson stores in Texas (Gerald Gibson 4847-48). Gerald Gibson and his brother, H.R. Gibson, Jr., as one part of G&G's business, also prepared a tabloid (Gerald Gibson 4849). G&G Advertising stopped doing business about 1974 (Gerald Gibson 4848).

<sup>4</sup> The chart is prepared from Appendix A.

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GIBSON DISCOUNT CENTERS, INC.				
Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Incorporators	x		x	x
Directors	x x x x	x x x	x x x x x x	x x x x x x
Officers	x x	x x	x x x x x	x x x x x

GIBSON WAREHOUSE, INC.				
Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	x x x	x x x	x x x	
Officers	x x	x x	x x	

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IDEAL TRAVEL AGENCY, INC.					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1962 <sup>a/</sup>		x		
	1970	x	x		
	1971	x	x		
	1972	x	x	x	
Officers	1970	x	x		
	1971	x	x		
	1972	x	x	x	

<sup>a/</sup> In the year 1962, the exhibit listed H.R. Gibson as a director but did not state whether it was Sr. or Jr.

GIBSON PRODUCTS COMPANY					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Director	1970	x	x		
	1971	x	x	x	
	1972			x	x
	1973			x	x
Officers	1970	x	x		x
	1971	x	x	x	x
	1972			x	x

GIBSON PRODUCTS COMPANY OF SAN ANTONIO, INC.					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1970		x	x	
	1971		x	x	
	1972		x	x	x
Officers	1970		x	x	
	1971		x	x	
	1972		x	x	x

## Initial Decision

GIBSON PRODUCTS COMPANY INC. OF GARLAND					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1971	x		x	x
Officers	1971	x		x	x
	1972	x		x	x

GIBSON PRODUCTS COMPANY INC. OF RICHARDSON					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1970	x		x	
	1971	x		x	
	1972	x		x	
Officers	1970	x		x	
	1971	x		x	
	1972	x		x	

GIBSON PRODUCTS COMPANY OF SHREVEPORT, INC.					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1970	x			x
	1971	x			x
	1972			x	x
Officers	1970	x		x	x
	1971	x		x	x
	1972			x	x

GIBSON PRODUCTS COMPANY, INC. OF PLANO					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1971	x <sup>**/</sup>	x <sup>*/</sup>	x <sup>*/</sup>	x <sup>**/</sup>
Officers	1971	x <sup>**/</sup>	x <sup>*/</sup>	x <sup>*/</sup>	x <sup>**/</sup>

<sup>\*/</sup> Indicates that they were elected at meetings on April 28 and October 26, 1971.

<sup>\*\*/</sup> Herbert R. Gibson, Sr. was elected on April 28, 1971, and Gerald Gibson was elected at the October 26, 1971 meeting.

[11]13. Respondent Gibson Products Company, Inc. is a Texas corporation, formed on or about January 28, 1936 (CX 5). Its principal place of business since 1975 has been Ft. Worth, Texas, where it operates a retail discount center (Gerald Gibson 4695). Prior to 1975, its principal place of business was 1228 E. Ledbetter St., Dallas, Texas, where it also operated a retail discount center (JR 12, Gerald Gibson 4695-96.<sup>5</sup> See also Gibson, Sr. 5162, 5187, 5381).

14. Respondent Ideal Travel Agency, Inc., formerly Gibson Travel Service, Inc., is a Texas corporation, formed on or about April 23, 1962 (CX 3). Ideal's office was located at 519 Gibson St., Seagoville, Texas (Leverett 3790). In the period 1969 to November 1, 1972, Ideal operated as a travel agency and worked with the Gibson Trade Show, often collecting booth fees as the agent of H.R. Gibson, Sr. (H.R. Gibson, Jr. 5636-37, 5659-60; Gerald Gibson 4865-66). Ideal, in that period, also received some show fees from suppliers participating in the Gibson Trade Show (Gibson, Sr. 5193-94). It is now dissolved (H.R. Gibson, Jr. 5736-37; Gerald Gibson 4704).

15. Respondent Gibson Warehouse, Inc. is a Texas corporation, formed on or about May 28, 1962 (CX 4). Its function was to warehouse and resell merchandise. It is now dissolved (H.R. Gibson, Jr. 5637-38).

16. Respondent Gibson Discount Centers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas (CX 2). It was incorporated on or about October 6, 1969 (CX 2). The principal place of business of Gibson Discount Centers, Inc. is 519 Gibson St., Seagoville, Texas (CX 44). Gibson Discount Centers, Inc. originally functioned as a holding company to hold the assets of H.R. Gibson, Sr. and Belva Gibson (Gerald Gibson 5119; Gibson, Jr. 5632). It was formed by Gibson, Sr. to get out of the retail business (H.R. Gibson, Jr. 5626-28). It is currently a wholly-owned subsidiary of Gibsons, Inc. (Finding 28).

17. Respondent Gibsons, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas. It was formed on or about October 25, 1972 (CX 1). Its principal place of business is 519 Gibson St., Seagoville, Texas (Gerald Gibson 4690). Gerald and Herbert Gibson, Jr. formed Gibsons, Inc. in order to buy out their father's retail business and to put the corporations and interests owned by them together into one company (Gerald Gibson 5051-52; H.R. Gibson, Jr. 5680). [12]

18. Gibson Distributors, Inc. is a wholly-owned subsidiary of Gibsons, Inc. It opened for business in 1975, and buys, sells and warehouses merchandise (Findings 28, 35, 36, 55).

<sup>5</sup> The Dallas store on Ledbetter Street was closed in 1973 or 1974 (Gerald Gibson 4696).

19. Dixie Laboratories, Inc. conducts respondents' manufacturing business, which includes the manufacture of health and beauty aids (H.R. Gibson, Jr. 5692). Dixie Laboratories, which sold to Gibson and non-Gibson stores, also sold private label goods under the Gibson brand (Gerald Gibson 4871).

20. Rack Suppliers, Inc. is a Texas corporation engaged in the business of purchasing and reselling phonograph records, tapes and related products (Gibson, Sr. 5215). It is a wholly-owned subsidiary of Gibsons, Inc. (H.R. Gibson, Jr. 5667).

21. Gibson Data Processing Service, which has its principal office and business location at Seagoville, Texas (H.R. Gibson, Jr. 5724), is now, and for some time past has been, engaged in performing accounting functions for various Gibson retail stores (Gerald Gibson 4878).

22. Gibson Discount Printing was located in the warehouse at respondents' Seagoville complex (Gerald Gibson 4876). In the period 1969 to 1974, it printed show sheets for Gibson, Sr.'s trade show (Gerald Gibson 4877).

23. Gibson Development Corporation is now, and for some time past has been, engaged in the business of a holding corporation for various tracts of land (Gerald Gibson 4885; Gibson, Sr. 5215).

24. Respondent Al Cohen Associates, Inc. is a corporation engaged in the business of providing sales representation to manufacturers (Finding 425).

B. Divestiture of Retail Assets by H.R. Gibson, Sr. and Belva Gibson to H.R. Gibson, Jr. and Gerald Gibson

25. On November 1, 1972, H.R. Gibson, Jr. and Gerald Gibson purchased all or most of Gibson, Sr.'s retail store holdings (H.R. Gibson, Jr. 5644). The transfer of such assets to Gerald and H.R. Gibson, Jr. was accomplished by a sale of Gibson Discount Centers, Inc.'s stock to Gibsons, Inc. (H.R. Gibson, Jr. 5667; Gerald Gibson 5052, 5119). The effective date of this stock transfer was November 1, 1972 (H.R. Gibson, Jr. 5680-81).

H.R. Gibson, Jr. also purchased the assumed name, Gibson Products Company, from his father on November 1, 1972 (H.R. Gibson, Jr. 5702-A). H.R. Gibson, Sr. notified franchisees [13] licensed to use Gibson trade names in the operation of retail stores that, as of October 31, 1972, such franchise agreements were cancelled and further operation under the Gibson name would have to be arranged with the new owner of such trade names, Gibson Discount Centers, Inc., through its president, H.R. Gibson, Jr. (SR 156, McCrea 6816).

The sale of the retail assets by Belva Gibson and Gibson, Sr. to their



sons was publicized and announced at a banquet attended by manufacturers, manufacturers' representatives and Gibson franchisees (Gerald Gibson 5085; Levitt 1971-72; Hardiman 7872).

C. Respondents' Operations after October 31, 1972

26. H.R. Gibson, Sr., on November 1, 1972, registered the name The Gibson Trade Show as a "d/b/a." This name was not registered prior to November 1, 1972 (Gibson, Sr. 5216). He continued to operate the trade show after October 31, 1972 (Gerald Gibson 4885-86) under the name "The Gibson Trade Show."

27. The organization of Gibsons, Inc., beginning in November 1972, was completed in 1976 (Gibsons, Inc. Annual Report 1976; JR 20 p.2).

The voting stock in Gibsons, Inc. has always been in the hands of Herbert Gibson, Jr. and Gerald Gibson. Gibson, Sr. has never owned any voting stock in Gibsons, Inc., nor has he been an officer or director of that company (CX 1, 985-92, 1271-73; Gerald Gibson 5078). The record shows no management control by Gibson, Sr. over Gibsons, Inc. (Banks 7786; Cheek 7770).

In the period November 1, 1972 through 1975, 100% of the voting stock of Gibsons, Inc. was owned by H.R. Gibson, Jr. and Gerald P. Gibson. During that period, Gibsons, Inc., in turn, wholly-owned Ideal Travel Agency, Inc., Gibson Discount Centers, Inc., Gibson Warehouse, Inc. and Gibson Products Company, Inc. of 1228 E. Ledbetter St., Dallas, Texas (H.R. Gibson, Jr. 5736-37, 5739-40; JR 12 See Appendix B). Gibsons, Inc. owned Gibson Warehouse, Inc. and Ideal Travel Agency, Inc. until the two companies were dissolved (Gerald Gibson 5053; JR 12).

H.R. Gibson, Jr. and Gerald Gibson currently own 100% of the voting stock in Gibsons, Inc. (JR 12), with each owning 50% of such stock (Gerald Gibson 5078). And, Gibsons, Inc. continues to be a holding company for the stock of other corporations (H.R. Gibson, Jr. 5667). Gibsons, Inc. is in the retailing, manufacturing and real estate business (H.R. Gibson, Jr. 5667-68). Its principal business is the operation and licensing of retail department discount stores (JR 20 p. 3). [14]

28. At present, the subsidiaries of Gibson, Inc. are Gibson Distributors, Inc., Gibson Discount Centers, Inc., Dixie Laboratories, Inc., Gibson Print Shop Office Supply, Inc., Rack Supply, Inc. and Gibson Data Processing Service (Gerald Gibson 4972). Currently, the various stores in which Gerald and Herbert Gibson, Jr. have an ownership interest are held through Gibson's Discount Centers, Inc. (Gerald Gibson 4972-73).

As of December 31, 1976, the active divisions and corporations comprising Gibsons, Inc. were the following:

## Initial Decision

## GIBSONS INC. (The Parent Company)

Franchising Division

(Not incorporated—all franchise operations)

Dixie Laboratories

(Corporation Mfg. and Sales of Health and Beauty Aids)

Rack Suppliers, Inc.

(Distributor of Records and Tapes)

Gibson Printing and Office Supply Inc.

Equity Development Corporation

(Real Estate)

Gibson Development Corporation

(Real Estate)

Gibson Distributors Inc.

(Warehouse and Distribution)

Gibson's Discount Centers, Inc.

(Parent Company for retail store operations) (JR 20).

29. Gibson's Discount Centers operate in 29 states. As of December 31, 1976, Gibsons, Inc. operated 43 stores through its subsidiary, Gibson's Discount Centers, Inc. In addition, 614 licensed stores were operated under the Gibson trade name. Such licensees pay a monthly fee for use of the Gibson trade name (JR 20 p. 3, Gibsons Inc. Annual Report 1976).

30. In 1975, Gibsons, Inc. and its subsidiaries had assets of \$63,908,000; the corresponding figure for 1974 was \$54,588,000 (JR 20 p. 8). The consolidated net sales in 1975 and 1974 were, respectively, \$135,730,040 and \$127,831,833 (JR 18).

31. Gibson's Discount Centers, Inc., as a subsidiary of Gibsons, Inc., now has all the retailing business as well as the franchise business (H.R. Gibson, Sr. 5692). H.R. Gibson, Jr. and Gerald Gibson own all the stock in Gibson's Discount Centers, Inc. through the parent company (H.R. Gibson, Jr. 5691). All of the various corporation that own or operate stores are held, in turn, by Gibson's Discount Centers, Inc. (Gerald Gibson 4972). [15]

32. Gibson's Discount Centers, Inc. has licensed the use of the Gibson trade names since November 1, 1972. H.R. Gibson, Jr. signs all licensing agreements (H.R. Gibson, Jr. 5668).

33. In 1974 and 1975, the approximate sales volume of stores whose

stock was held wholly or in part by Gibson's Discount Centers, Inc. was approximately \$115 to \$120 million (Gerald Gibson 5022). The pertinent figure for 1976 was \$117 million and, for 1977, about \$110 million (Gerald Gibson 5023). In 1976, there were about 43 stores in this category, while in 1975 and 1974, the figure was 44 (Gerald Gibson 5023).

34. The retail operations controlled by Gibson's Discount Centers, Inc. consist of the following:

UNINCORPORATED DIVISIONS

Gibson's Discount Center — Plainview, Texas  
 Gibson's Discount Center — Ponca City, Oklahoma  
 Gibson's Discount Center — Amarillo, Texas  
 Gibson's Discount Center — Sulphur Springs, Texas  
 Gibson's Discount Center — Abilene, Texas  
 (841 Judge Ely Blvd.)

MULTI-STORE CORPORATIONS:

Gibson's Discount Centers, Inc. (A New Mexico Corporation)  
 Gibson's Discount Center — Portales, New Mexico  
 Gibson's Discount Center — Clovis, New Mexico

Gibson Products Co. of Hobbs, Inc.  
 Gibson's Discount Center — Hobbs, New Mexico  
 Gibson's Discount Center — Lovington, New Mexico

Gibson Products Co., Inc. of Lubbock  
 Gibson's Discount Center — 909 50th Street  
 Gibson's Discount Center — 5005 Slide Road  
 Gibson's Building Supply — 3117 Avenue H

Gibson Discount Centers of Roswell, Inc.  
 Gibson's Discount Center — 2800 North Main Street  
 Gibson's Discount Center — 110 West McGaffey

Gibson Products, of Shreveport, Inc.  
 Gibson's Discount Center — 3707 Greenwood Road  
 Gibson's Discount Center — 2600 Waggoner

Gibson Products, Inc. of Temple, Texas  
 Gibson Discount Center — Temple, Texas  
 Gibson's Discount Center — Terrell, Texas  
 Gibson's Discount Center — Waxahachie, Texas [16]

## Initial Decision

## Gibson Products Co., Inc. (a Wyoming Corporation)

Gibson's Discount Center —600 East Carlson,  
Cheyenne, Wy.

Gibson's Discount Center —2717 East Lincolnway,  
Cheyenne, Wy.

Gibson's Discount Center —Laramie, Wy.

## Greeley Gibson Products Co., Inc.

Gibson's Discount Center —Greeley, Colo.

Gibson's Discount Center —Longmont, Colo.

## Gibson Products of San Antonio, Inc.

Gibson's Discount Center —2627 S.W. Military Pkwy.

Gibson's Discount Center —1331 Bandera

## SINGLE STORE CORPORATIONS

Gibson Products Company of Abilene (2550 Barrow Street)

Gibson Products Company, Inc. of North Abilene (3202 N.  
First Street)

Gibson Products Co. of Albany, Inc.

Gibson Products of Batesville, Inc.

Gibson Products Co. Inc. of Big Springs

Gibson Products Company, Inc. of Bruton Terrace (Dallas)

Gibson's Fort Worth South, Inc. (5701 Crowley Rd.)

Gibson Products Inc. of Garland

Gibson Products Company, Inc. (Haltom City)

Gibson Products Company, Inc. of Hutchinson (Ks.)

Gibson Products Company of Newton, Inc. (Ks.)

Gibson Products Co., Inc. of Paris (Greenville, Tx.)

Gibson Products Company, Inc. of Plano, Tx.

Gibson Products Co. Inc. of Pueblo

Gibson Products Inc. of Richardson, Tx.

Gibson Products Company, Inc. of Western Hills (7901  
Highway 80 West, Ft. Worth, Tx.)

Gibson Products Company, Inc. of North San Antonio (JR 20  
pp. 4-5).

35. Gibson Distributors, Inc. is engaged in the buying and selling of merchandise. It opened for business in 1975, and since that time has been a subsidiary of Gibsons, Inc. (Gerald Gibson 5005-06). Gibson Distributors, Inc. resells merchandise mainly to Gibson's Discount Centers and some garden centers. There may have been a few sales to other companies (Gerald Gibson 5006).

36. Before November 1, 1972, the purchasing decisions of the stores currently controlled by Gibsons, Inc. or Gibson's Discount Centers, Inc. were made at the store level by the store manager (Gerald Gibson 5053-56; H.R. Gibson, Jr. 5680-81). After [17]that date, buying decisions for those stores were centralized in Gibson Distributors, Inc. (Gerald Gibson 5062-63; H.R. Gibson, Jr. 5761; Skelly 7932-33).

Gibson Distributors, Inc. has made purchases from the lines represented by the Gibson Trade Show for the forty-two stores under the ownership of H.R. Gibson, Jr. and Gerald Gibson as well as purchases from other lines (Skelly 7951). Gibson Distributors, Inc. is listed as a customer of the Gibson Trade Show in the Gibson Trade Show's Customer Information List, 1975 edition, published by Gibson, Sr. (CX 1330 p. 28).

#### D. Respondents' Store Directories

37. In the period 1969 to 1975, respondents prepared store directories containing a listing of the various stores operating under one of the Gibson trade names (H.R. Gibson, Jr. 5708). Prior to November 1, 1972, the directories were published by H.R. Gibson, Sr. in his capacity as franchisor of various persons and entities licensed to use the Gibson name. After that date, they were published by Gibson's Discount Centers, Inc. which, since that time, has taken over the licensing of such stores (H.R. Gibson, Jr. 5708, 5711).

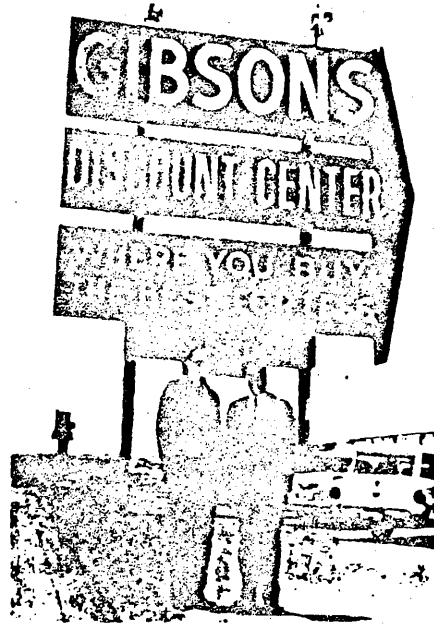
38. Respondents mailed store directories to manufacturers and to retailer customers of the Gibson Trade Show (Gibson, Sr. 5257-58; Gerald Gibson 5084). And, they were available in the Gibson Trade Show (Regeon 6664-66; B. Bradsby 6803). The purpose of such store directories was to enable manufacturers and/or other retailers to determine the proper person to contact in a particular store on matters such as bills (Gerald Gibson 4803-04).

39. The record contains CX 41, 1327 and 1328, which are store directories published in 1970 and 1971 by H.R. Gibson, Sr. while doing business under the Gibson Products Company trade name.<sup>6</sup> All three directories represented under the main heading, "Seagoville Executives," that H.R. Gibson, Sr. was Chairman of the Board, Mrs. H.R. Gibson, Sr. was Secretary, H.R. Gibson, Jr. was President and Gerald Gibson was Executive-Vice President of Gibson Products Company. A number of individuals were listed as home office personnel of the Gibson Products Company under the heading, "Home Office." And, trade show personnel were listed with the lines for which they were responsible under the heading, "Buyers."

<sup>6</sup> CX 41 is the Store Directory for July-December 1970; CX 1327 is the Store Directory for January-December 1971; and, CX 1328 is the Store Directory for July-December 1971 (See Appendix C and D).

The cover page on CX 1327, the store directory for January-December 1971, shows the following: [18]

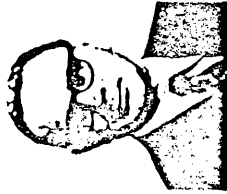
**STORE DIRECTORY**  
**JANUARY - DECEMBER**  
**1971**



**GIBSON PRODUCTS COMPANY**  
**519 GIBSON STREET**  
**SEAGOVILLE, TEXAS 75159**  
**A/C 214 287-2570**

[19]CX 1327 represents the following under the headings, "Seago-ville Executives," "Home Office" and "Buyers": [20]

SEACOVILLE EXECUTIVES



M.R. GIBSON, SR.  
CHAIRMAN OF THE BOARD



MRS. M.R. GIBSON, SR.  
SECRETARY



M.R. GIBSON, JR.  
PRESIDENT



GERALD GIBSON  
EXECUTIVE VICE-PRESIDENT

202- FEDERAL TRADE COMMISSION  
MARKET NO 9016 SEACOVILLE  
IN THE MATTER OF M. R. GIBSON, SR.  
MAYTEX

**MAYTEX**  
MERCHANDISE-TAILORED DISPLAY EQUIPMENT

ONE DISPLAY UNITS  
WALL UNITS  
PORTABLE UNITS

**MAYTEX PERSEAL PLASSIES** INVENTOR  
THESE ARE THE PERSEAL PLASSIES INVENTOR'S  
• These units are made of plastic  
• They are made by using a special  
• They are made of plastic and are  
• They are made of plastic and are

**MAYTEX MANUFACTURING COMPANY**  
P. O. BOX 174, Seacoville, Texas 75148  
Telephone 214-343-3714

**MAYTEX**  
Manufacturers of displays that sell

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Initial Decision

Buyers

Home Office



LEE H. BROWN  
LEE H. BROWN, JR.  
LEE H. BROWN, JR.



ROBERT J. BROWN  
ROBERT J. BROWN  
ROBERT J. BROWN



PAUL H. BROWN  
PAUL H. BROWN  
PAUL H. BROWN



JIM FERGUSON  
JIM FERGUSON  
JIM FERGUSON



HARRY LIBERMAN  
HARRY LIBERMAN  
HARRY LIBERMAN



BOB H. BROWN  
BOB H. BROWN  
BOB H. BROWN



ANDY FERGUSON  
ANDY FERGUSON  
ANDY FERGUSON



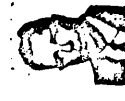
FRANK H. BROWN  
FRANK H. BROWN  
FRANK H. BROWN



BOB H. BROWN  
BOB H. BROWN  
BOB H. BROWN



PAUL H. BROWN  
PAUL H. BROWN  
PAUL H. BROWN



PAUL H. BROWN  
PAUL H. BROWN  
PAUL H. BROWN



PAUL H. BROWN  
PAUL H. BROWN  
PAUL H. BROWN



CHARLES H. BROWN  
CHARLES H. BROWN  
CHARLES H. BROWN



RAYMOND H. BROWN  
RAYMOND H. BROWN  
RAYMOND H. BROWN



PAUL H. BROWN  
PAUL H. BROWN  
PAUL H. BROWN



Initial Decision

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**BOB BROUGHTON**  
DIST. STORE SECURITIES



**BILL BARNES**  
WAREHOUSE MANAGER



**CHARLIE DAVIS**  
RACK SUPPLIERS



**TOM FERRELL**  
TRAFFIC MANAGER



**DAVIS FOSTER**  
ADVERTISING - DALLAS AREA



**MARGIE KAUTZ**  
IDEAL TRAVEL



**B. W. HUDSON**  
DIXIE LABORATORIES



**BILL REA**  
ADVERTISING - TABLOID



**LOYD REECE**  
GIBSON PRINTING CO.

[23]40. The listing together of the various individuals in the store

directories under the headings, "Seagoville Executives," "Home Office" and "Buyers," represented that the various individual and corporate respondents operated as one entity under the umbrella of "Gibson Products Company." Listing the trade show personnel as "Buyers" in the store directories, which contained a complete listing of Gibson stores, also created the net impression that the Gibson Trade Show and the retail stores constituted an integrated operation.<sup>7</sup>

41. Through the store directories in 1970 and 1971, the individual respondents, H.R. Gibson, Sr., Belva Gibson, Gerald Gibson and H.R. Gibson, Jr., represented that the individuals listed under "Home Office" and as "Buyers" of Gibson Products Company were under their control and acted in behalf of the individual respondents in their capacity as "Seagoville Executives."<sup>8</sup> The publications were disseminated to stores operating under the Gibson name and suppliers of the trade show alike (Finding 38). As a result, the trade show buyers in their dealings with suppliers and stores operating under the Gibson name acted under the apparent authority of the four individual respondents (see also Appendix C and D). [24]

42. The 1973 store directory published by Gibson's Discount Centers, Inc. (Finding 37) has the following legend on its first page:

<sup>7</sup> It is true that Gibson Products Co. was Gibson, Sr.'s trade name, under which he did business, and not a corporation. Nevertheless, the explanation that such representations were an error for which the respondents are not responsible is not persuasive (Gibson, Sr. 5254, 5376-78, 5599-5602, 5602-03. See also Gerald Gibson 4783-90). It is improbable that, with three store directories in the space of two years making essentially the same representations, respondents did not intend that such representations be made. There is no evidence in this record that any respondents made any statements to the trade retracting the representations which it is asserted were made in error. CX 1377 and 1406C, stationary used by Gibson, Sr. and Belva Gibson with the letterhead "Home Office Gibson Products Company, 519 Gibson Street, Seagoville, Texas 75159," further indicate that the representations in the store directories did not result from error. In this regard, see also CX 1329, showing that, in 1973, the store directory for that year contained the legend, "Store Directory . . . Gibson Products Company. . .," followed immediately with photographs of H.R. Gibson, Jr. and Gerald Gibson captioned "President" and "Executive Vice President," respectively (See Finding 42).

<sup>8</sup> The identical representations in three store directories in a two year period compels the inference that they were made with the knowledge and consent of the four individual respondents.



**STORE DIRECTORY  
JANUARY - DECEMBER  
1973**

**GIBSON PRODUCTS COMPANY  
519 GIBSON STREET  
SEAGOVILLE, TEXAS 75159  
A/C 214 287-2570**

The page containing this legend is immediately followed with the pictures of Gibson, Sr.'s sons and the following captions "H.R. GIBSON, JR. PRESIDENT" and "GERALD P. GIBSON EXECUTIVE VICE PRESIDENT" (CX 1329).

43. A 1975 store directory, published by Gibson's Discount Centers, Inc., represented that H.R. Gibson, Sr. and Belva Gibson were "Founders — Now Retired" of that corporation (CX 44).

**E. The Franchise Operation**

44. H.R. Gibson, Sr. licensed persons and firms to use various Gibson trade names in the operation of retail stores in his individual capacity while doing business under the name Gibson Products Company in the period 1969 to October 31, 1972 (Findings 3, 4, 25). The licensing or franchising operation was taken over by Gibson Discount Centers, Inc. ("GDCI") on November 1, 1972. GDCI is a wholly-owned subsidiary of Gibsons, Inc.; its voting stock is controlled 100% by H.R. Gibson, Jr. and Gerald Gibson, the sons of Gibson, Sr. (Findings 25, 27, 28, 31, 32). [25]

45. The registered trade names which Gibson's Discount Centers, Inc. licenses for use are Gibson Discount Centers and Gibson Products Company (H.R. Gibson, Jr. 5696-97).

46. There are in excess of 100 or 150 entities who own either a single Gibson store or a group of such stores (Gerald Gibson 5076-77). Certain store owners control more stores under the Gibson name than either Gerald Gibson or Herbert Gibson, Jr. (Gerald Gibson 5077). The biggest group is the Pamida group, which owns and operates in excess of 200 stores. West Brothers owns 20 to 25 stores, and several other groups own 10 to 15 stores (Gerald Gibson 5077).

47. The franchise fee is paid monthly and is based on the number of square feet in the store (Gibson, Sr. 5392-93). In 1965, the license fee ranged from \$150 to \$200 per month, depending on the area of the store (SR 155). At present, the licensing fee ranges from \$225 to \$275 per month per store (H.R. Gibson, Jr. 5696).

48. Currently, every Gibson store operates by virtue of a license from GDCI. Each store, including those owned by members of the Gibson family, pays a licensing or franchise fee (Gerald Gibson 5076; H.R. Gibson, Jr. 5690). This was the case before as well as after November 1, 1972 (H.R. Gibson, Jr. 5690).

49. Gibson, Sr. stressed that prospective franchisees needed adequate financing to run their stores (Gibson, Sr. 5390). Since November 1, 1972, the requirements to become a Gibson franchisee have basically been financial stability and some experience in retailing (H.R. Gibson, Jr. 5669). If a franchisee became bankrupt, the licensing agreement was cancelled (Gibson, Sr. 7278).

50. Both Gibson, Sr. and GDCI entered into franchise contracts with persons or entities licensed to use Gibson trade names in the operation of retail stores (SR 155, Munden Deposition Exhibit RX 1; SR 157, 159, 160, 161, 162A-C; CX 1447A-D). GDCI continues to enter into such contracts.<sup>9</sup>

51. Gibson, Sr.'s franchise agreements provided that the licensor would furnish the licensees of his trade names with the benefit of volume purchasing power and advice as to merchandising. Typically, such contracts provided: [26]

GIBSON shall give GRANTEE the benefit of volume purchasing power, advise as to merchandising, and render other assistance to GRANTEE as may be found appropriate by GIBSON in his sole discretion (Munden Deposition Exhibit RX 1. See also SR 155, 160, 161, 162A-C, 166; CX 1428-29).

52. Gibson, Sr. put "quality control" provisions into such contracts in the period 1966 to 1967 (Gibson, Sr. 7223). Typically, such a provision provided:

In consideration of the grant by GIBSON to GRANTEE of the right to use the

<sup>9</sup> Initially, Gibson, Sr. had oral or "hand shake" agreements with his franchisees. Eventually, however, he had written agreements with all of them (Gibson, Sr. 7223, 7258).

trademarks, service marks and trade names of GIBSON, namely "Gibson's", "Gibson" with design, "Gibson Products Company" and "Gibson Discount Center", GRANTEE conveys to GIBSON and GIBSON specifically retains the absolute, complete and final right of quality control over all products and items sold and all services rendered by GRANTEE to customers of GRANTEE's *Gibson Products Company of Brownfield, Texas*, and GRANTEE agrees to discontinue immediately the sale of any products or items or the rendering of any services under any one or more of the aforesaid marks and names if the quality thereof is disapproved by GIBSON (Munden Deposition Exhibit RX 1. See also SR 162A-C; CX 1429).

53. The cancellation provisions of such licensing agreements provided that they could be cancelled at any time within ninety days and that, upon notice of termination, the licensee was to immediately discontinue use of the Gibson trade names. A typical provision provided:

This agreement may be cancelled at any time within *Ninety (90) days* by written notice sent registered mail, by either party.

Upon termination of this agreement, GRANTEE agrees that he, or they, will immediately discontinue the use of "Gibson Products Company" and/or "Gibson Discount Center", and all other trademarks and/or service marks of GIBSON, [27]specifically including "Gibson's" and "Gibson" with design, and will not thereafter use same (Munden Deposition Exhibit RX 1. See also SR 155, 160, 161, 162A-C).

54. GDCI, in its contracts with licensees, also contracts to furnish them with merchandising advice and reserves to itself the right of quality control over the products sold and services rendered by the licensees (CX 1447). GDCI's standard licensing contract, in use since November 1, 1972, provides in pertinent part:

9. GIBSONS shall in connection with this Agreement render such assistance to LICENSEE in connection with the operation of his discount business as may be found appropriate by GIBSONS after request by LICENSEE, including advice as to merchandising and other business practices so as to enable the LICENSEE to benefit from the knowledge and experience of GIBSONS in the discount business.

10. LICENSEE agrees that GIBSONS retains the absolute, complete and final right of quality control over all products and items sold and over all services rendered by LICENSEE to customers of LICENSEE'S discount business and associated enterprises using the Service Marks and Trade Names licensed hereby to see that the high standards of GIBSONS DISCOUNT CENTERS throughout the United States of America are maintained and to protect the property rights of GIBSONS in the Service Marks and Trade Names set forth in Paragraph 1 hereof. The LICENSEE further agrees that if GIBSONS notifies LICENSEE that GIBSONS disapproves of the quality of products, items, or services sold or rendered in connection with sale of items or products in the discount business of LICENSEE, that LICENSEE will immediately discontinue the sale of such items, [28]products and/or services, or will immediately improve such services so that they meet the standards of excellence maintained by GIBSONS (CX 1447B; Tr. 8058).

55. Respondents expect that expansion of Gibsons, Inc. will be primarily through expansion of the licensing operations. Its subsidiary, Gibson Distributors, Inc., is expected to play an important role in such expansion. The 1976 annual report of Gibsons, Inc. states:<sup>10</sup>

*Expansion of Gibsons Inc. is to be primarily through expansion of the licensed stores. To this end, Gibson has established a subsidiary—Gibsons Distributors Inc. This is an experimental distribution center designed to provide dual services as a profit control center and as a source of inventory for Gibson Discount Stores. Over the next ten years the company anticipates at least eight such regional centers through which the licensed operations can be extended. Although the first center is a wholly owned subsidiary, the expanded regional centers are proposed to be co-operatives to afford the greatest benefit to the licensed stores. Profits from such expansion for Gibsons Inc. should be reflected in increases in license fees and additional charges for management services (emphasis added) (JR 20 p. 3). [29]*

56. Respondents, in licensing others to use the Gibson trade names, have a vital interest in the profitability of the licensees or franchisees on whom licensing fees depend (Findings 47, 49, 55).

#### F. The Trade Show

##### (1) In General

57. The Gibson Trade Show came into existence about 1964 to 1965 (Rogers 7358; Bradsby 6794; Thomas 6584-85). It is held approximately four times a year (CX 1040A-C, 1041A-D; Leverett 3733).

58. In May 1967, H.R. Gibson, Sr., doing business as the "Gibson Products Company" Seagoville, Texas, leased the premises at Market Hall, Dallas, Texas four times per year, in the period 1967 through 1973, pursuant to the following schedule:

1968	-	February 10-14
		May 20-24
		August 12-16
		* November 4-8
1969	-	February 8-12
		May 12-16
		August 18-22
		* November 3-7

<sup>10</sup> This document is inconsistent with the testimony of Gibsons, Inc.'s president, viz.:

JUDGE von BRAND: Well, let me ask you this: Do you have anything to offer [to franchisees] in addition to the [Gibson] name?

THE WITNESS: No, sir, none whatsoever. We've never got involved, we didn't want to get in with the management and the people and things like that to try to help them like McDonald's. We're not that type of organization. We don't charge for it (H.R. Gibson, Jr. 5695).

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- 1970 - February 9-13  
 May 4-8  
 August 17-21  
 \* November 2-6
- 1971 - February 8-12  
 May 10-14  
 August 16-20  
 \* November 1-5
- 1972 - February 12-16  
 May 15-19  
 August 14-18  
 November 6-10
- 1973 - February 10-14  
 May 14-18  
 August 13-17  
 November 5-9 (CX  
 1040C).

The lease stated that the leased premises should be used for the sole purpose of: [30]

Holding the Gibson Products private trade show, business meetings, and certain food functions (CX 1040A).

On November 30, 1972, H.R. Gibson, Sr., doing business as The Gibson Trade Show, contracted to rent the premises at Market Hall for the purpose of holding four shows a year in the period 1974 to 1979 (CX 1041A). Gibson, Sr. agreed that the premises were to be used for the sole purpose of "Holding a private trade show" (CX 1041A).

Market Hall in Dallas, Texas, where the Gibson Trade Show is held, is a 212,000 square foot exhibit fully designed for the display of merchandise (Cooper 4636).

59. The show was a closed show; it was necessary to have badges showing the name of the individual and company before gaining admittance (Moland 3596; CX 42, 43).

60. Gibson, Sr. and his employees invited the Gibson retailers to the Gibson Trade Show with letters announcing the date of the shows (Gibson, Sr. 5485).

61. In the period 1969 to 1972, only Gibson franchised or company owned stores attended the Gibson Trade Show (Munden Dep. CX 1435 pp. 24-25; Moland 3595). The jewelry buyer of the trade show recalled

that no one other than Gibson stores attended the show in 1972, 1973 and 1974 (Leverett 3796-97).<sup>11</sup>

62. Form letters used by the Gibson Trade Show in 1972 requested "All Manufacturers" to state their total dollar volume in the preceding year with all the Gibson stores (CX 307).

63. The Customer Information List 1975 Edition published by Gibson, Sr. is "A Comprehensive List of All Customers of the Gibson Trade Show" (CX 1330). The great majority of the stores listed therein were under the Gibson name. The Gibson Trade Show, as late as 1975, continued to be oriented to the Gibson stores.

64. The Gibson Trade Show affords participating manufacturers the opportunity to set up booths, to display their goods and to attempt to sell or place orders for their products with personnel of the Gibson stores attending the show (Moland 3595). Usually, retailer contacts with suppliers at the Gibson Trade Show are followed up at a later date (Gerald Gibson 5117). [31]

65. The booths at the Gibson Trade Show were staffed by employees of the suppliers or by manufacturers' representatives of the suppliers (Regeon 6687).

66. H.R. Gibson, Sr., in operating the trade show, published a Buyers Guide or Show Directory. This directory was distributed to manufacturers and retailers attending the show. It listed the names of manufacturers appearing at the show and the location of their booths (CX 42; Leverett 3904).

67. The amount of business generated by the Gibson Trade Show is substantial. The February 1974 show, for example, did a \$200 million business (Gibson, Sr. 5519-23). The Gibson Trade Show operated at a profit in 1973, 1974 and 1975 (Gibson, Sr. 5343-B).

68. If a supplier or his representative got a product into the Gibson Trade Show, this meant that he had authorization to sell to the Gibson retailers attending the show. This did not guarantee, however, that a Gibson franchisee would buy such merchandise (Moland 3650).

69. Manufacturers and their suppliers considered it an advantage to meet Gibson retail buyers at the show. Many of these retailers were in locations hard to reach, and it is difficult to call on all of them individually to make a sales presentation (Moland 3650-51).

70. Gibson, Sr. retained money derived from the Gibson Trade Show which he did not pass on to retailers operating under the Gibson name (Gibson, Sr. 5090; Munden Deposition 44-45; Thomas 6591; H. Underwood 7083; Skelly 7956).

71. Trade shows generally, including the Gibson Trade Show,

<sup>11</sup> In 1970 to 1971, this witness could only recall the owner of Wal-Mart stores attending as the guest of Gibson, Sr. (Leverett 3795-96).



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benefit attending retailers because the merchandise is laid out and it may be easier to shop than trying to look at catalogs or talk to sales personnel (Thomas 6588-89). [32]

72. In addition to providing facilities where the Gibson stores could select and purchase merchandise, the Gibson Trade Show also afforded them an opportunity to conduct meetings at the show. For example, the Buyers Guide for the Gibson Trade Show held November 5 through November 9, 1973, gave notice of the following meetings:

### **FRANCHISE OWNERS MEETING**

SUBJECT: GENERAL INSURANCE

MONDAY, NOVEMBER 5 - 2:30 P.M.

UPSTAIRS AT MARKET HALL

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### **FRANCHISE OWNERS MEETING**

SUBJECT: TRAINING FILM

TUESDAY, NOVEMBER 6 - 2:00 P. M.

UPSTAIRS AT MARKET HALL

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### **GDCI MANAGERS MEETING ON "INVENTORY PROCEDURES"**

TUESDAY, NOVEMBER 6 - 7:30 P.M.

SEVILLE ROOM

QUALITY INN - 2015 NO. INDUSTRIAL

(CX 42. See also CX 43, a Buyer's Guide for the December 1975 Trade Show listing a meeting of the Gibson Franchise Association). [33]

73. The Gibson Trade Show has not helped retailers to promote

merchandise at the retail level. Nor have retailers learned to promote the resale of products at the Gibson Trade Show (Thomas 6590-91; Gerald Gibson 5117). There is insufficient time to discuss such promotion at the shows (Leverett 3886Q; Gerald Gibson 5117). Generally, there is more time to discuss such subjects when a sales call is made on a buyer in the buyer's office (Leverett 3886Q).

## (2) Functions of Trade Show Buyers or Merchandise Managers

74. H.R. Gibson, Sr., in the period 1969 to 1975, employed buyers in his trade show organization (CX 41, 1327, 1328, 104).<sup>12</sup> These individuals were key employees in the operation of the Gibson Trade Show (See Findings 39, 78, 81, 84). The trade show buyers received instructions as to the functions which they were to perform from Gibson, Sr. (Leverett 3731). [34]

75. Manufacturers or their representatives contacted trade show buyers to have their products listed as authorized sources of supply for the Gibson Discount Centers as well as to obtain approval of such lines for the Gibson Trade Show (Moland 3541-43).

76. Individual Gibson Trade Show buyers were responsible for specific lines of merchandise such as soft goods, sporting goods, health and beauty products, toys, jewelry, stationery, school supplies, luggage, housewares, automotive supplies, hardware, etc. (CX 1327; Leverett 3708-09).

77. Trade show buyers, in contacting suppliers, referred to the "Gibson chain stores" in 1972, numbering "approximately 575 stores" (CX 307).

78. In most cases, it was the buyer's decision whether to put suppliers into the Gibson Trade Show. Sometimes, however, the decision was made by Gibson, Sr. (Leverett 3713). It was the trade show buyer's duty to examine the various product lines, to evaluate the lines and to discuss prices and products with suppliers or their representatives (Leverett 3712-13).

<sup>12</sup> Respondents, in the course of this proceeding, referred to these employees as "merchandise managers." The titles, buyer and merchandise manager, may on occasion be used synonymously in this decision. However, in view of contemporaneous documents such as CX 41, 1327, 1328 and 104 in the period 1969 to 1972, the title, "buyer," is the one which will be used most frequently. Moreover, one of respondents' "buyers" or "merchandise managers" conceded that others had referred to him as a buyer. And, significantly, this witness admitted that these employees in their correspondence referred to themselves as "buyers" in the period 1969 to 1972 (Regeon 6661-62. See also Munden Deposition CX 1435 p. 20). Consider also the spontaneous exclamation of Gary Leverett, "Well, I assumed other buyer's duties -- or, excuse -- not a buyer but a merchandise manager in the trade show" (Tr. 3785). This again throws some doubt on denials that buyer is the appropriate title, particularly when such denials are inconsistent with the contemporaneous documents. See also the testimony of Barney Bradsby, one of respondents' franchisee witnesses:

Q. Do you know what company they [Perkins and Regeon] worked for?

A. They were merchandise managers for Mr. Gibson.

Q. Is that the title that they held, merchandise manager?

A. I don't know what their titles were. I would say they were something, buyers or something (Tr. 6803).

79. Manufacturers' representatives did not try to sell the trade show buyers actual orders but tried to persuade them to have the lines listed (Moland 3548). Buyers (or merchandise managers) of the Gibson Trade Show could not put their name on an order and place merchandise in any Gibson store (Leverett 3873).

80. When suppliers contacted Gibson Trade Show buyers, normally they would want to exhibit their entire line of products (Leverett 3760). Suppliers, however, were not permitted to exhibit their entire line of merchandise at the Gibson Trade Show; "deadwood" in the line was culled out after discussion between the trade show buyer and the supplier's representative (Leverett 3760).

81. The trade show buyers were interested in the price of products because they were evaluating many lines and, in some cases, certain suppliers offered basically the same items (Leverett 3716).

Buyers for the trade show negotiated with suppliers on billing terms and prices (Leverett 3718, 3747-48). Buyers negotiated better terms and prices than originally offered; [35]this was part of their duties (Leverett 3719; Moland 3552, 3560).<sup>13</sup> Gibson, Sr. and Belva Gibson, on occasion, also sought to negotiate lower prices from manufacturers (Moland 3563, 3602, 3605).<sup>14</sup>

If buyers, in their dealings with suppliers, had a question about price, they would call Gibson, Sr. and get his feelings on it (Leverett 3720). Gibson, Sr. expressed his views as follows:

If a manufacturer presented us this item and he wanted \$3 and we knew—would look at it and we knew it could be had for \$2, we would say to Mr. Manufacturer, "Your price is all wet," or something of that nature, that "You're too high on that item. You ought to check on what your competitor is selling that for. We cannot do you a job, Mr. Manufacturer, we cannot sell this item at \$3" (Gibson, Sr. 5364).

[36]Such negotiations to assure them a competitive price benefited the Gibson stores participating in the trade show.<sup>15</sup>

82. Respondent Belva Gibson, in the period 1969 to the end of 1970,

<sup>13</sup> Q. Did you ever get better terms than a supplier initially offered you, as a result of these negotiations?

A. Than what I just discussed? Yes, sir. In some cases, I did.

Q. Was that one of your duties?

A. Yes, sir. I felt like it was.

Q. Did you ever negotiate better prices than those initially offered to you by a supplier?

A. Yes, sir.

Q. Was that one of your duties, also?

A. Yes, sir (Leverett 3719).

<sup>14</sup> Gibson, Sr., in the course of discussions with manufacturers' representatives, has asked, "Well, we know that is the price for the corner drug store; now what is our price [viz., the price of stores operating under the Gibson name]" (Moland 3563).

<sup>15</sup> Q. Did you regard this as a benefit to the stores to be able to buy these products at the prices like, for example, the \$2 price that you mentioned in your testimony just now?

A. If we bought that for \$3, it would certainly be a bad deal for anybody that bought it. But if he bought it at \$2, and that was the price that all the competitive manufacturers was selling for, well, it would certainly be a benefit to him. He wouldn't get—what is generally said in the trade, he wouldn't get stuck on it (Gibson, Sr. 5364).

assisted trade show personnel in their duties of persuading retailers to visit booths at the show and helping trade show buyers in selecting jewelry and doll items for the show (Leverett 3866-67).

83. During an interval in the period 1969 to 1972, Gerald Gibson advised his father with respect to cameras and electronic equipment, when the latter had no merchandise manager in that area. In this connection, Gerald Gibson advised Gibson, Sr. as to whether the equipment might be good or bad (Gerald Gibson 4886, 4888). He dealt with approximately 50 manufacturers (Gerald Gibson 4916). The manufacturers approached Gerald Gibson; he passed on information and show sheets prepared by them to his father (Gerald Gibson 4889, 4900). Before transmitting such show sheets to his father, Gerald Gibson discussed with some of the suppliers the listings on the show sheets. Such discussions included multiple packaging programs and delivery terms, as well as the suitability of some of the items listed (Gerald Gibson 4900-01). Gerald Gibson reported to his father, who had the final decision on such matters (Gerald Gibson 4913). Although Gerald Gibson was not paid for these services and did not consider himself a merchandise manager (Gerald Gibson 5105), the foregoing activities involved certain of the functions for which merchandise managers were responsible. [37]

84. Buyers sent out letters to family-owned and franchised stores concerning price and product recommendations (Leverett 3727). Such mailings were made to all of the stores (Leverett 3725). And, sometimes a trade show buyer might make phone calls if he "had a red hot price for the trade show" (Leverett 3723). Trade show buyers sent such letters "[t]o attract Gibson people into the trade show" (Leverett 3731).

Franchised stores also received letters from trade show buyers listing items or manufacturers' lines which were not to be purchased (CX 1435 pp. 17, 18, 20 Munden Deposition).

Trade show employees have written to Gibson stores suggesting that certain suppliers be discontinued because the buyers no longer authorized or recommended the line since such suppliers would not sell at a price which the buyers would recommend as profitable for the stores' operation (see, *e.g.*, CX 104).<sup>16</sup>

Documents such as CX 104 on their face constitute merchandising advice by trade show buyers to the Gibson stores (*cf.* Finding 51).

85. At the trade show itself, it was the function of the trade show buyers to patrol the aisles and booths, talking to manufacturers and the other people attending. In the course of their duties, the trade show

<sup>16</sup> Bobby Regeon, one of the "Seagoville Buyers" whose signature appears on the document, admitted his signature at Tr. 6638.

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buyers would bring buyers from retail stores attending the show to the booths of particular suppliers (Leverett 3834-35). The trade show buyers also visited the Gibson stores (Leverett 3839). The trade show

86. At the Gibson Trade Show, the trade show buyers were responsible for suppliers with lines of merchandise competing with each other (Regeon 6684-85; Leverett 3739, 3742-43, 3835-36; Gibson, Sr. 5357; Gerald Gibson 4953-54).

87. The Gibson Trade Show buyers were responsible for numerous booths at the trade show (Leverett 3735-37). They might be responsible for well over one hundred booths at such shows (Leverett 3736-37, 3762-63; Regeon 6682). It was a physical impossibility for the trade show buyers to see all the retailers at the show (Regeon 6687). A trade show buyer's average length of stay in one of the display booths "might not be but five minutes, just long enough to take the customer [retailer] in, introduce him to the factory, let the factory go to work on him, and I'd go get another customer for somebody else" (Regeon 6687-88). [38]

Essentially, manufacturers had to rely on their own personnel to make sales at the Gibson Trade Show.<sup>17</sup> [39]

88. The duties of such trade show buyers remained the same in the period 1969 to 1975 (Leverett 3724; Gibson, Sr. 5231).

## (3) Blanket Orders

89. A blanket order was an order placed by "the Seagoville Office," namely, H.R. Gibson, Sr. or his buyers, for all stores. The stores were classed as A, B and C stores, and the quantity of goods to be purchased depended on the size of the store (Munden Dep. CX 1435 pp. 25-26;<sup>18</sup> Leverett 3842). A blanket order could be increased, decreased or cancelled by the individual stores (Leverett 3842). They are orders

<sup>17</sup> Trade show employees made little or no effort to sell to Pamida, the largest franchisee group.

Q. Mr. Underwood, when you were attending the trade show, who would your buyers go to see to buy merchandise?

A. The manufacturer.

Q. And was the manufacturer always present, or did he have a representative?

A. Oh, he may have had a representative. I went to that manufacturer's booth, picked up the show sheets, discussed it with whomever was representing that manufacturer at that booth.

Q. Did you ever discuss goods which you were interested in with trade show personnel?

A. Not to my knowledge.

Q. Did they ever attempt to sell you those goods?

A. Not to my knowledge.

Q. Do you recall whether or not Mr. Gibson, Sr., has ever visited the Pamida offices to sell merchandise?

A. To my knowledge he never has.

Q. Have his employees attempted to sell merchandise at the Pamida headquarters?

A. To my knowledge they never have.

Q. Have you received phone calls from employees or from Mr. Gibson asking you to purchase a certain line of merchandise?

A. No, sir (Underwood 7109-10. See also McCrea 6820-21).

<sup>18</sup> Munden did not order merchandise under blanket orders in 1969 to 1970 (CX 1435 p. 47).

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recommended by the trade show buyers to the Gibson retail stores (Leverett 3844; Regeon 6619).<sup>19</sup> In most cases, the Gibson store thereto in order to cancel or modify such orders during that period (O'Kelley 6422).

In that period 1973 to 1974, blanket orders went to all stores operating under the Gibson name, including those stores in which H.R. Gibson, Jr. and Gerald Gibson had a financial interest (Leverett 3848-50).

Subsequent to the negotiation of a Bunte Candy blanket order, a manufacturer's representative doing business with the Gibson Trade Show received a plaque and membership in the "One Million Dollar of Gibson Discount Centers: H.R. Gibson, Sr., Chairman of the Board, Belva Gibson, Secretary-Treasurer and H.R. Gibson, Jr., President (Moland 3683-84, 3689-90). [40]

## (4) Show Sheets

90. Show sheets were essentially abbreviated price lists that manufacturers used to sell merchandise at the Gibson Trade Show (Gerald Gibson 4902). They were also used as order forms by retailers (Leverett 3758; Gibson, Sr. 5584).

Show sheets contained the prices and terms negotiated between trade show buyers and suppliers and approved by the former (Leverett 3754-55). For example, show sheets showed the freight terms under "show price" and the duration of such price (Leverett 3747).<sup>20</sup> And, the forms "Ship to," and, underneath that heading, the name, "Gibson Products Company" (CX 196A; Leverett 3756). Underneath the address of the particular store (Leverett 3757). This heading referred to the retailer customer in the Gibson Trade Show (Leverett 3757). No show sheets were printed with a name other than "Gibson Products Company" under the "Ship to" column (Leverett 3758).

92. After manufacturers had sent in a prepared show sheet and the trade show buyer had approved the prices and terms that had been

<sup>19</sup> For example, on a \$2 million blanket order for candy from the Bunte Candy Company, the shipments were \$300,000 (McLain 6773).

<sup>20</sup> Factors indicating that retailers were getting "a real extra special buy in the Gibson Trade Show" were noted in the remarks column (Leverett 3747; CX 196A).

<sup>21</sup> If there were an "extra special price for the duration of the trade show, then the buyer had to commit himself during the show to get the "special prices and terms" (Leverett 3749).

filled in, respondents printed the forms for use in conjunction with the trade show (Leverett 3754).

Once the show sheets had been printed,<sup>22</sup> they were taken to the Gibson Trade Show and handed out to the manufacturers and manufacturers' representatives (Leverett 3758). Retailers attending the Gibson Trade Show generally picked the show sheets up at the show (Gerald Gibson 4902). [41]

93. Show sheets contained the following notation:

Notice!!! Do not ship at prices higher than listed hereon or we will deduct. Price approval contact the Seagoville, Texas offices (Gibson, Sr. 5504; CX 854B).

The purpose of this notice was to notify Seagoville of any price increases. The language, "Do not ship at prices higher than listed hereon or we will deduct. *Price approval contact the Seagoville, Texas offices*" (emphasis added), is consistent with the Gibson Trade Show's role as an agent or representative of Gibson retailers and inconsistent with the claim that the trade show is a manufacturer's representative.

94. Show sheets were an integral part of the Gibson Trade Show's operations (Findings 90-93).

#### (5) Booth Fees

95. Booth fees are the amount of money that the manufacturers pay for renting space to display their merchandise at the Gibson Trade Show (Gibson, Sr. 5146-47; Gerald Gibson 4897). The booth fee is a set amount, and is the same for all trade show participants (Gibson, Sr. 5236).

96. In the period 1969 to November 1, 1972, Ideal Travel Agency received booth fees for rental of space at the Gibson Trade Show (Gibson, Sr. 5582). In that period, Ideal had its own bank account and paid no monies to corporations operating retail stores (Gibson, Sr. 5582).

#### (6) Show Fees

97. Suppliers seeking to participate in the Gibson Trade Show were asked for a show fee by the trade show buyers in the period 1969 to 1975 (Leverett 3785). Suppliers who refused to pay a show fee were not permitted to participate in the Gibson Trade Show (Leverett 3792, 3812). Suppliers were willing to pay the show fee because the Gibson Trade Show generated a lot of sales (Leverett 3834).

<sup>22</sup> Show sheets were printed in the respondents' print shop in Seagoville, Texas, under Lloyd Reece, as shown in CX 41 (Leverett 3758-59, 3779). The print shop was just around the corner from the buyers' offices in Seagoville (Leverett 3759).

98. The show fee was based on a percentage of sales made at the Gibson Trade Show to persons attending the show, namely, Gibson stores (Leverett 3791). And, the amount of the show fee was negotiable (Leverett 3790). The show fee, moreover, was to be paid on those sales made outside the Gibson Trade Show as well as those made at the show (Regeon 6689). [42]

Not all suppliers, however, paid a percentage of their sales as the show fee. Some, like Empire Pencil, paid a flat fee of \$15,000 in 1975 (Low 7719-20; CX 1255).

Show fee payments were payable on a quarterly, semi-annual or annual basis (Leverett 3791). The timing of the show fee payments was also negotiable (Leverett 3791-92).

There were no rules on setting show fees on the basis of whether the product was easier or more difficult to sell (Leverett 3886F-G). Setting the show fee with a particular supplier or manufacturer depended on the individual situation of that supplier (Leverett 3886H-I).

99. H.R. Gibson, Sr. instructed trade show buyers that one of their duties was to ask for the show fee (Leverett 3786). Occasionally, trade show buyers would report their show fee negotiations with suppliers to H.R. Gibson, Sr. (Leverett 3809).

Gibson, Sr. gave trade show buyers instructions concerning percentages to be asked in connection with show fees (Leverett 3800). Gibson, Sr. would issue instructions, such as, "Gary, talk to them and see what they can pay us" (Leverett 3802). In the majority of instances, Gibson, Sr. gave no specific instructions as to the percentage that was to be asked (Leverett 3802).

100. Prior to November 1, 1972, agreements concerning show fees were verbal. Subsequent thereto they were the subject of written agreement (Low 7461-62).

101. When Gibson, Sr. received the trade show fees in the period 1969 to November 1, 1972, they were deposited in his personal account and not put into the account of any corporation operating a retail store under the Gibson name (Gibson, Sr. 5581).

102. The Gibson Trade Show buyers (or merchandise managers) received a weekly salary and a small percentage of the show fee ranging from three to five percent (Gibson, Sr. 5238, 5242-43).

103. The show fee payment had nothing to do with suppliers' payment of booth fees for the rental of display space in the Gibson Trade Show (Leverett 3787).

104. The purpose of the show fee based on the percentage of a supplier's sales was to make money for the Gibson Trade Show (Leverett 3808). [43]



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## (7) Tabloids

105. A tabloid is an advertising section, usually about half the size of a normal newspaper page, about eight to 16 pages in size folded over and inserted in a newspaper or mailed out (Gerald Gibson 4849; Leverett 3823).

106. H.R. Gibson, Sr., in 1969 and 1970, in connection with the trade show, offered suppliers the opportunity to participate in Gibson tabloids (CX 1420A-B).<sup>23</sup> [44]

107. G&G Advertising, operated by Gerald Gibson as a proprietorship, prepared tabloids advertising products in the Gibson stores in the period 1969 to 1973 (Gerald Gibson 4849). Gerald Gibson put together the tabloid and, then, mailed a mock-up to the stores. The stores, if they so desired, could purchase the tabloid, buying as many pieces as they wanted for their market (Gerald Gibson 4851-53). Those stores buying a tabloid had their names placed on it (Gerald Gibson 4849-50). Sometimes, the tabloids were placed in the windows of the stores purchasing them (Gerald Gibson 4853).

108. Stores purchasing such tabloids did not pay Gerald Gibson's G&G Advertising for the privilege of being listed therein (Gerald Gibson 4851). The tabloids, prepared by G&G, were displayed by a printer, News Inc., at the Gibson Trade Show along with tabloids for other retailers. News Inc. was in the business of selling its publishing services in connection with such tabloids to retailers at the trade show (Gerald Gibson 4853).

<sup>23</sup> Q. *Mr. Gibson, in 1969 in connection with the Trade Show did you offer to serve suppliers the opportunity to advertise in the tabloid?*

A. Yes, sir.

Q. Mr. Gibson, did you inquire from these suppliers as to whether or not they had any standard advertising program?

A. I personally didn't. Den Woody who published the tabloid they had a booth in a show and the various exhibitors that wanted to advertise in a tabloid would contact Den Woody for an ad of half a page, quarter a page, or a whole page, or whatever they wanted.

And most all cases they paid Den Woody direct for the ad.

Q. All right, sir.

Mr. Gibson, did you, in conducting the Gibson Trade Show in the year 1970 conduct a tabloid advertising program?

A. Did I conduct one?

Q. Let me rephrase the question, sir.

*Did you, Mr. Gibson, in 1970 in your capacity as the individual sponsoring the Gibson Trade Show offer to the suppliers a tabloid program?*

A. We had tabloids from time to time; yes, sir.

Q. And, Mr. Gibson, did you have a tabloid program in 1971?

A. I do not recall any at the moment.

Q. All right, sir (emphasis added) (CX 1420A-B).

Gibson, Sr.'s testimony at the evidentiary hearings is inconsistent with his prior deposition testimony in CX 1420A-B. At the hearings, he testified:

A. The trade show never had any tabloid. This is not anything that belongs to the Gibson Trade Show.

Q. Thank you, Mr. Gibson (Gibson, Sr. 5322).

109. Suppliers contacting Gibson Trade Show buyers generally wanted to participate in the tabloid (Leverett 3823). They approached trade show buyers in order to get their products advertised in the tabloid, viz., the so-called "tab items." [45] The trade show buyers presented such tab items to H.R. Gibson, Jr., Gerald Gibson or Bill Rea,<sup>24</sup> who had discretion whether to put an item in the tabloid or not (Leverett 3863).

110. If a tab item was put in the tabloid, there was a sign at the booth in the Gibson Trade Show stating, "Recommended tab item." This procedure was in effect in the period 1969 to 1975 (Leverett 3863; Moland 3595). Trade show buyers, in discussing tab items with suppliers, wanted to make sure there was a competitive price on such items (Leverett 3865).

111. Suppliers did not pay for advertisements in the tabloids with trade show fees such as booth fees or show fees (Renninger 461; Gerald Gibson 5102). However, such payments were requested on the invoices of respondents such as Gibson Discount Centers, Inc. and paid to respondents such as Gibsons, Inc. (CX 491A, 491D).

112. Trade show buyers have signed "Gibson Tabloid" authorization forms under the heading, "Approved and Accepted (Gibson Products Co.);" (CX 491E; Leverett 3823-30; CX 1158D; Regeon 6675-76; CX 1326B; Perkins; CX 377B; Low 7642).<sup>25</sup> The name, "Gibson Products Company," on such authorization forms refers to the trade name used by H.R. Gibson, Sr. (Regeon 6676). This is also the trade name used by Gibson, Sr. in his trade show operation (see, e.g., CX 1040A-C Trade Show Lease signed by Gibson, Sr. for the period 1967 to 1973). [46]

113. On November 2, 1968, H.R. Gibson, Sr. sent a letter "To: ALL GIBSON SUPPLIERS" requesting their participation in a tabloid supplement in the *Dallas Morning News*. This tabloid was to run on March 2, 1969, and was to be entitled, "March Whirlwind of Savings" (CX 125). In pertinent part, this solicitation stated:

With such fantastic sales results in mind, I feel sure you will want to participate in the March "Whirlwind of Savings" with an appropriate ad in the March 2 tabloid which The Dallas Morning News will again publish exclusively. I firmly endorse it!

Please sign the attached space order and return to me, or take it to The Dallas Morning News representatives in Booth 3 at the show (CX 125).

<sup>24</sup> Bill Rea, in February 1975, when Leverett left the Gibson Trade Show, was working under Herbert Gibson, Jr. and Gerald Gibson for the Gibson stores (Leverett 3870).

<sup>25</sup> The explanation that the trade show and the trade show buyers had nothing to do with the tabloid is not convincing. One of the "Gibson Tabloid" authorization forms in the record indicates copies thereof are to go to "Bill Rea Ledbetter" and to "Seago Buyer" (CX 491E). Trade show buyers have signed their correspondence as "Seagoville Buyers" (See CX 104; Regeon 6638). In the case of CX 377B, 1158D and 1362B, the signatures of Messrs. Low, Perkins and Regeon appear over the title, "Buyer" (Compare with CX 1327). The forms on their face evidence such a relationship.

114. On February 21, 1969, H.R. Gibson, Sr. wrote a letter to "NAME BRAND GIBSON SUPPLIERS" requesting participation in cooperative advertising to be published in a "NAME BRAND" tabloid by the *Dallas Times Herald* on May 4, 1969. The letter stated, in pertinent part:

Work carefully with our buyers in the selection of items, to make certain this is an outstanding sales event, as well as an important public relations milestone.

Please give this your immediate attention and work with the Dallas Times Herald representative, who will be contacting you during the February Show. . .

I personally appreciate your cooperation and look forward to a truly important promotion for Gibson Discount Centers and you (CX 75).

115. On February 24, 1969, H.R. Gibson, Sr. sent a letter "TO: ALL GIBSON SUPPLIERS" requesting that they participate in promotional advertising to be published in the June 1, 1969, *Dallas Morning News*. This advertising supplement was to be sponsored by 30 Gibson Discount Centers, including nine stores in Dallas County (CX 74A, D). [47]

116. H.R. Gibson, Sr., in the period 1969 to 1972, at the same time that he was soliciting fees for participation in the Gibson Trade Show, solicited fees for cooperative advertising from "Gibson Suppliers" for the Gibson Discount Centers (Findings 106, 113-15).

117. Respondents' trade show operations and retail operations were interrelated in the solicitation and receipt of payments from suppliers participating in the trade show for tabloid or other advertising directed to the consumer (Findings 106, 107, 109, 110, 112-16). [48]

## II. Evidence under Count I of the Complaint

### A. L. M. Becker Co.

118. L. M. Becker Co. ("Becker"), of Appleton, Wisconsin, sells and ships vending machines and refills for vending machines throughout the United States (Hare 2527). Such sales include shipments to Gibson stores located outside of Wisconsin (CX 599A-Z-22). Becker is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

119. The vending machines involved in these transactions were manufactured by Becker; the refills were manufactured by other companies (Hare 2527, 2530).

120. From 1969 to 1973, Becker's sales organization consisted of 30 to 35 sales brokers who were employed on a commission basis and helped sell Becker products to retailers (Hare 2528, 2720-21).

Becker employed a broker who served as a manufacturer's representative in the Dallas-Fort Worth area and attended the Gibson Trade Show as Becker's sales representative (Hare 2552). Neither H.R. Gibson, Sr., the Gibson Trade Show, the Gibson Products Company nor anyone associated with respondents was considered by Becker as its manufacturer's representative or food broker in the Gibson Trade Show during the 1969 to 1972 period (Hare 2553, 2740).

121. Becker participated in the Gibson Trade Show in order to be able to make sales to Gibson stores (Hare 2539, 2606). This supplier's sales volume to all Gibson retail stores during the years 1969, 1970 and 1971 was three to five percent of its total sales (Hare 2640).

122. Becker participated in the Gibson Trade Show in 1969, 1970 and 1971 (Hare 2537). It attended two Gibson shows in 1969 and 1970, and one in 1971 (Hare 2603).

123. The services provided by the Gibson Trade Show to Becker included maintaining contact with the Gibson retail stores, preparing and distributing show sheets, bringing retailers over to Becker's booth at the trade show and, generally, helping Becker sell to the Gibson retail stores (Hare 2681, 2683-86, 2720).

124. The requirements for Becker's participation in the Gibson Trade Show were: a ten percent rebate on all sales to Gibson family owned and franchise stores and payment for rental of booth space (Hare 2538-40, 2545-46, 2605). [49]

125. Becker furnished product and price information for show sheets that would be utilized at the Gibson Trade Show. Prior approval from the Gibson Trade Show was necessary before goods could be offered for sale at the show (CX 594, 597; Hare 2607-08). The show sheets served as purchase order forms for use by Gibson retail store buyers both at the trade show and later on (Hare 2684-85). [50]

126. Becker made the following booth fee payments to the Gibson Trade Show:\*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
May 12-16, 1969	1	\$225.00	\$225.00	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	CX 580A-F
[Date of payment - April 16, 1970]			\$250.00	Check	Gibson Discount Center Toy Trade Show Market Hall - 2200 Stemmons Freeway Dallas, Texas	CX 592A-B

[51]127. When Becker contacted Gordon Fielden, a buyer for Gibson in Seagoville, about participating in the Gibson Trade Show,

\* Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

Fielden said that this supplier would have to pay the ten percent rebate in order to be "authorized" or "listed" to be in the show and authorized to sell to Gibson stores (Hare 2539-40, 2545-46; CX 579). Becker believed that if it were not "authorized" or "listed," it would be unable to sell to any of the Gibson stores (Hare 2541, 2543-44).

Becker agreed to make the ten percent rebate and signed a document so stating: [52]

HERBERT R. GIBSON, SR., ET AL.  
Initial Decision

Date 4/10/69  
To: GIBSON PRODUCTS CO.  
519 Gibson Street  
Seagoville, Texas 75159

From: J. M. Carter Co.  
Cop. Cont. 1122  
AW sec.

It is hereby agreed that we will pay you 16.7  
on all accumulative purchases from Gibson Products  
Company, Gibson Discount Centers and/or any of their  
subsidiaries, from above date, subject to exceptions  
listed below. This amount will be paid at the end of  
each calendar quarter in the form of a check payable  
to Gibson Products Company, Warehouse Account, Seago-  
ville, Texas for the purpose of promoting our products,  
the listing of our approved products to your stores and  
allowing us to display our approved products in your  
private trade show.

Exceptions: \_\_\_\_\_  
\_\_\_\_\_

Signed [Signature]  
For J. M. Carter Co.

MADE BY [Signature] 2-01  
11-74  
Richard W. Stiley  
691.6053

4579

## Initial Decision

[53] By "promoting our [Becker's] products" (CX 579), Gibson Products Co. was expected by Becker to send out bulletins prepared by Becker to the Gibson retail stores, promote Becker's products at the trade show, put Becker in the trade show directory and help Becker sell their products to Gibson stores (Hare 2549, 2678).

128. The ten percent show fee paid by Becker to the Gibson Products Company was paid for certain promotional services rendered, which consisted of being allowed to sell to Gibson stores and participate in the Gibson Trade Show (Hare 2650). The show fee was paid in connection with the original sale of Becker's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Becker's products to consumers<sup>26</sup> (Findings 68, 73, 97, 121, 124, 127).

129. Similarly, the booth fee was paid in order to enable Becker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Becker's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Becker's products to consumers (Hare 2650; Findings 64, 68, 73, 95, 121, 124).

130. Becker's show fee payments to H.R. Gibson, Sr. and Gibson Products Co. in 1969 and 1970 are summarized in the following chart:

[54]

<sup>26</sup> Richard Andrew Hare, former national sales manager of Becker (Hare 2526), testified as follows (Hare 2650):  
JUDGE VON BRAND: It is not the kind of promotion to sell your product to the consumer?  
THE WITNESS: No. It is a total promotion to sell the product to the individual store.

Initial Decision

Becker made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Becker Records	CX Number
\$145.50	7/23/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	June 1969	Rebate for month ending June 30, 1969 on shipments for which payment has been received	CX 579, 58 582A-C
\$364.00	8/20/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	July 1969	Rebate for month ending July 31, 1969 on shipments for which payment has been received	CX 579, 58 583A, C-D
\$318.45	9/23/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	August 1969	Rebate report - August	CX 579, 58 584A-C
\$529.30	10/16/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	September 1969	Rebate report - September	CX 579, 58 585A-C
\$332.50	11/18/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	October 1969	Rebate report - October	CX 579, 58 586A-C
\$452.80	12/12/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	November 1969	Rebate report - November	CX 579, 58 587A-C
\$148.80	1/22/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	December 1969	Rebate report - December	CX 579, 58 588A-C
\$ 95.00	2/24/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	January 1970	Rebate report - January	CX 579, 58 589A-C
\$300.50	3/23/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	February 1970	Rebate report - February	CX 579, 58 590A-C
\$153.00	4/16/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	March 1970	Rebate report - March	CX 579, 58 591A-C
\$148.00	5/19/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	April 1970	Rebate report - April	CX 579, 58 592A-B
\$420.05	7/8/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	May 1970	Gibson rebate - May	CX 579, 58 593A-D
\$329.55	7/21/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	June 1970	Gibson rebate - June	CX 579, 58 596A-C



[55]131. During the 1969 to 1971 period, Becker neither made nor offered to make payments based upon a percentage of total sales or alternate payments, except for the bulletin payments,<sup>27</sup> to any of its customers, other than the Gibson Products Company, for promotional services rendered (Hare 2645, 2652-60).

During the 1969 to 1971 period, Becker did not make any payments based upon a percentage of total sales in connection with any of the trade shows that it attended, other than the Gibson Trade Show (Hare 2661).

During the 1969 to 1971 period, Becker neither made any payments similar to the show fee payments nor made or offered to make an alternate payment to the booth fee to those of its customers that did not hold trade shows (Becker 2662).

132. After Becker ceased participating in the Gibson Trade Show, its sales volume with Gibson retail stores dropped in 1973 and 1974, due in part to competition from another vending company (Hare 2642, 2644, 2718-19).

133. During the 1969 to 1971 period, Becker operated a promotional program wherein it would make payments to wholesalers for bulletins sent by the wholesaler to Becker's retail customers in order to encourage purchases by the retailer from the wholesaler (Hare 2645-46). This same type of bulletin was made available to the Gibson Products Company (Hare 2649). The ten percent show fee paid to the Gibson Trade Show was in addition to the bulletin program (Hare 2649). Other than this bulletin program, Becker had no promotional or advertising program available for its customers (Hare 2648).

134. Becker paid the expenses of its employees who attended the Gibson Trade Show (Hare 2609).

135. The refills sold by Becker were not the type of product that lend themselves to advertising to the general public. Becker was unconcerned with promoting its products to consumers (Hare 2675-77).

136. Becker's vending machines were sold only to retail stores and not to consumers (Hare 2673). Thus, the vending machines were not, and could not be, subject to promotional advertising in connection with their resale.

137. In 1969 and 1970, Becker produced six product lines which included the following machines: a one penny toy and gumball, a one penny toy and hard candy, a nickel toy and gumball, [56]a nickel capsule with toys in it, a dime capsule with toys in it and a quarter capsule with toys in it (Hare 2529, 2535; CX 594).

<sup>27</sup> See Finding 133.

The refills, produced by other companies and purchased by Becker, were all standard lines of products that went out to every customer<sup>28</sup> (Hare 2530-31).

All of Becker's products cost Becker \$5.00 per box and were retailed at \$10.00 per box. Thus, a penny gumball box would have 1,000 gumballs, while a dime box would have 100 items in it (Hare 2532-33).

The nickel, dime and quarter capsules contained toys such as spiders, bugs, rings, et al. (Hare 2533).

138. The shelf life of the items that went into the capsules is indefinite. The shelf life of the items that went into the gum and candy is approximately one year (Hare 2533).

139. Some of Becker's invoices indicate that the company sold its merchandise to Affiliated Food Stores, Inc., a wholesaler who handled billing for Becker and warehoused merchandise for some of Becker's retail customers. However, individual retail stores were the indirect customers of Becker's products, at least in the majority of instances, when they were the direct recipients of shipments from Becker<sup>29</sup> (CX 599A-M, R, Y, Z-6, Z-9, Z-11-Z-22; Hare 2566-70, 2670-72, 2699-2703, 2707-08). Becker regarded as its customer the firm to which the shipments were noted on the invoice (Hare 2569-70).

140. The invoices in the record reveal several contemporaneous sales involving goods of like grade and quality sold to competing customers, including the following examples<sup>30</sup> (CX 587U, 589F, 599A, R, Y, Z-6, Z-9, Z-11-Z-15, Z-20, Z-22): [57]

Henderson, Texas: Toy N Joy Toy or Candy 1000/1¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins<sup>31</sup> - 6/2/70); Toy N Joy Toy or Gum 1000/1¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70); Toy N Joy Capsules 1000/10¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70); Toy N Joy Capsules 40/25¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70).

Dallas, Texas: Toy N Joy Toy or Candy 1000/1¢, Toy N Joy Toy or Gum 1000/1¢, Toy N Joy Capsules 200/5¢, Toy N Joy Toy and Gum 200/5¢, Toy N Joy Capsules 100/10¢, Toy N Joy Capsules 40/25¢ (Gibson - 10/7/69, 1/26/70, 3/16/70, 6/10/70, 8/10/70, 9/22/70; Sundown Food Store<sup>31</sup> - 8/31/70, 9/29/70, 10/26/70; M.E. Moses Company<sup>31</sup> - 11/30/70; D&J Supermarket<sup>31</sup> - 6/2/69). [58]

<sup>28</sup> Thus, the same penny box of gum or nickel box of capsules went out to every Becker customer (Hare 2531).

<sup>29</sup> Certain of the invoices in the record indicate that shipments were made to Affiliated (CX 599N-Q, S-W, Z-Z-5, Z-7, Z-8), or made to entities whose functional level is unknown. In these instances, it is not possible to determine whether the goods sold were sold to a nonfavored customer of Becker's competing at the same functional level as the Gibson stores.

<sup>30</sup> Commission counsel introduced numerous invoices of sales by Becker to Gibson retail stores located across the country (CX 582D-Y, 583F-S, U-X, 584D-R, 585D-W, 586D-T, 587D-T, V-W, 588D-J, 589D-E, G-H, 590D-O). However, there is no record evidence of any sales by Becker to any competing stores in these cities.

<sup>31</sup> Luther Jenkins, Sundown Food Store, M.E. Moses Company and D&J Supermarket function at the retail level of operations (Finding 369).

### B. The Parker Pen Company

141. The Parker Pen Company ("Parker"), of Janesville, Wisconsin, sells writing instruments, writing sets and desk sets (Renninger 264).

Its major manufacturing facility is in Janesville, and its products are sold and shipped from there throughout the United States (Renninger 264). Such sales include shipments to Gibson stores located outside of Wisconsin (CX 506A-F). Parker is engaged in interstate commerce and its transactions with the respondents, including the show fee payments based on such sales, are in the course of such commerce.

142. Parker ranks first in the worldwide sales of writing instruments and desk sets; domestically, it ranks third or fourth in such sales (Renninger 264-65).

143. Parker began selling to the Gibson Discount Centers in the early 1960's (Renninger 268). In the period 1971 to 1974, there were approximately 485 Gibson Discount Centers; Parker sold both of its product lines to approximately 210-220 of these stores during this period (Renninger 269, 274). It sold to both company owned and franchised stores (Renninger 272-73).

In the period 1971 to 1974, this supplier's sales to the Gibson retail stores constituted almost one percent of its total sales (Renninger 279). In 1971 to 1973, the Gibson stores as a group were considered Parker's largest account. In 1974, they were number one or number two (Renninger 281-82).

144. Parker shipped goods to the individual Gibson stores and billed the paying office indicated for the particular store (Renninger 270).

145. In the years 1971 to 1974, Parker attended or participated in at least one Gibson Trade Show per year (Renninger 283).

It participated in the Gibson Trade Show because, in its view:

The key to doing business with Gibson at that time was to attend the shows, and prior to attending the show was to get your product authorized and listed on the show sheets. [59]

The assumption on our part was that if you didn't go through that process, your likelihood of maintaining a rate of sale and volume to the Gibson stores would practically diminish to nothing (Renninger 318-19. See also Tr. 291).<sup>32</sup>

146. In the years 1971 through 1974, Parker did not employ H.R. Gibson, Sr. as a manufacturer's representative or broker to represent it at the Gibson Trade Show (Renninger 310-11); Parker considered H.R. Gibson, Sr. to be a customer in the period 1971 to 1974 (Renninger 335-36).

147. In the Gibson Trade Shows in which it participated in 1971,

<sup>32</sup> In 1975, a year when Parker did not participate in the Gibson Trade Show, its sales to the Gibson stores were 50 percent of sales in the preceding year (Renninger 282).

1972, 1973 and 1974, Parker made no sales to retailers other than Gibson Discount Centers (Renninger 300, 309). All of Parker's sales at the Gibson Trade Show were made through the use of show sheets (Renninger 308). Furthermore, at the beginning of each show, the trade show staff gave Parker a list of stores in order to verify that someone from each of those stores visited Parker's booth. The check list only contained the names of Gibson stores (Renninger 300-01).

148. Manufacturers' products had to be presented to a Gibson Trade Show buyer, accepted for sale and listed on show sheets before any manufacturer could display and sell its products to the Gibson retail stores (Renninger 291). In the case of Parker, the trade show buyer in question was Gary Leverett, the stationery and jewelry buyer (Renninger 291, 311-12).

Show sheets listed the products to be displayed or sold to Gibson stores. They gave the product description and price, listed whether the product had a special promotional price and stated whether the product was going to be advertised in a Gibson tabloid (Renninger 294).<sup>33</sup>

Generally, Parker's customers picked up the show sheets at the trade show and, subsequently, sent in the show sheets to Parker's representative as completed purchase orders (Renninger 298). 25% of Parker's sales to the Gibson stores were during the selling periods shown on the show sheets. The majority, or 75%, of Parker's sales to these stores, however, were made by Parker's sales personnel calling on the stores and writing their orders (Renninger 298). [60]

149. During the 1971 to 1974 period, Parker's employees and representatives staffed the booths at the Gibson Trade Shows (Renninger 283-84, 289-90). And, Parker paid the expenses for its employees attending the Gibson Trade Show, including transportation, lodging and meals (Renninger 316).

150. Parker representatives demonstrated products and discussed selling techniques with Gibson retail store buyers and owners at the Gibson Trade Show (Renninger 289-90). The more product knowledge a buyer has, the better he can sell that product (Renninger 293-94). However, in making sales calls on other customers, Parker's sales force would also explain the advantages of their product, demonstrate the product and help to develop selling methods (Renninger 400-01).

151. During the 1971 to 1974 period, the requirements which Parker had to meet to participate in the Gibson Trade Show were: securing the trade show buyer's approval for merchandise that was to be included on the show sheets; payment for the rental of booth space;

<sup>33</sup> CX 501A and CX 467 are show sheets (Renninger 294-95).

and, payment of a show fee based on a percentage of total sales to all Gibson stores (Renninger 311, 313-14, 317-18). [61]

152. Parker made the following booth fee payments pursuant to its participation in the Gibson Trade Show in the period 1971-1974:

Show	Number of Booths	Amount of Payment	Form of Payment	Payee		
1971	February '71	2	\$550	Check	Ideal Travel Agency	CX 466A-C
	May '71	1	\$275	Check	Ideal Travel Agency	CX 470A-E
	August '71	1	\$275	Check	Ideal Travel Agency	CX 473A-E
1972	May '72	1	\$300	Check	Ideal Travel Agency	CX 478A-C
	August '72	1	\$350	Check	Ideal Travel Agency	CX 482A-D
1973	May '73	1	\$350	Check	H. R. Gibson, Sr.	CX 488A-E
	August '73	1	\$350	Check	H. R. Gibson, Sr.	CX 492A-E
1974	February '74	1	\$350	Check	H. R. Gibson, Sr.	CX 497A-E
	August '74	2	\$700	Check	H. R. Gibson, Sr.	CX 500A-D

[62]153. The first request made to Parker for a show fee was in early 1971 (Renninger 322, 324). Initially, the supplier refused to pay the show fee (Renninger 324). Subsequently, in August 1971, the Gibson Trade Show buyer, Gary Leverett, told Parker's representative that it would have to pay the show fee (Renninger 324-25). When Parker's representative advised Leverett that he thought such payment would be illegal, Leverett stated it would have to be paid (Renninger 481-83). In this connection, Parker's representative had been informed that, unless the show fee were paid, its products would not be listed and it would not be permitted to participate in the show (Renninger 330).

Parker decided to make the show fee payments in order to participate in the Gibson Trade Show because, at this time, the Gibson stores were considered the largest discount chain that it had. The Gibson stores represented a sizable amount of business and Parker's officials did not feel that they could walk away from this kind of business (Renninger 318, 325-26).<sup>34</sup>

154. The amount of the show fee was to be based on five percent of total sales to all Gibson Discount Centers, including both company owned and franchised stores (Renninger 317-18, 326). Originally, Leverett had asked for three percent, but the request escalated to five percent by August 1971 (Renninger 326).

<sup>34</sup> Parker felt that it could not afford to lose the Gibson business which amounted to about \$100,000 at that time (Renninger 327).

155. Gibson requested that the show fee payment be made by check but Parker paid by credit memorandum (Renninger 328).<sup>35</sup>

156. Parker wanted an invoice for the show fee but never received one (Renninger 328-29). It wanted the invoice because its counsel felt the payment was illegal and part of the sales upon which the show fee was based were generated by franchised rather than Gibson owned stores (Renninger 329).

The five percent show fee to cover 1974 was paid in 1975 by a check sent to H.R. Gibson, Sr.'s attorney, Bardwell Odum (Renninger 333). Parker had previously advised Mr. Odum that, in its opinion, the fee was illegal. Mr. Odum claimed the fee was not illegal but due under a contract for invoices. Parker decided to pay, but never received any answer as to what services it was paying for in response to a request for that information (Renninger 333-35, 488. See also CX 505B, 505C, 1325; SR 55, 56A-B). [63]

157. Parker's show fee payments for the period 1971-1974 may be summarized as follows:

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<sup>35</sup> A credit memorandum is a negotiable instrument between a supplier and a customer where the customer may use the credit memorandum to offset part of his bill with the supplier (Renninger 331).

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Amount	Date of Payment	Form of Payment	Payee	Period For Which Payment Was Made	Description of Payment on Parker Records
\$5145.00	1972	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	4/1/71 through 12/31/71	Coop Advertising* X Mas
\$ 515.34	5/9/72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	1 <sup>st</sup> Quarter 1972	Spring 1972 Coop Advertising**
\$1562.84	8/30/72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2 <sup>nd</sup> Quarter 1972	Coop Advertising*** Spring
\$2020.24	Nov. '72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3 <sup>rd</sup> Quarter 1972	Coop Advertising****
\$ 873.54	Jan. '73	Credit Memorandum	Gibson Inc. 519 Gibson St. Seagoville, Texas	4 <sup>th</sup> Quarter 1972	Coop Advertising***** X Mas
\$6019.50	2/7/74	Credit Memorandum	Gibson Inc. 519 Gibson St. Seagoville, Texas	1973	5% allowance*****
\$5502.05	4/14/75	Check	H.R. Gibson, Sr.	1974*****	

\* CX 477A; Renninger 366-387, 396.

\*\* CX 477C; Renninger 387-388.

\*\*\* CX 477E; Renninger 388.

\*\*\*\* CX 477G-H; Renninger 388.

\*\*\*\*\* CX 477I; Renninger 388.

\*\*\*\*\* CX 466A; Renninger 395.

\*\*\*\*\* CX 505-A; Renninger 389-91.

[64]158. Parker regarded the five percent show fee as a discount or price reduction (Renninger 465). Parker did not regard the fee as cooperative advertising payments<sup>36</sup> (Renninger 463-64). The payment was made to enable Parker to display its merchandise to the Gibson Discount Center retailers attending (Renninger 497K-L; SR 51).

159. The Gibson Trade Show is not a service in connection with the resale of Parker's products to consumers. Parker's reason for attending the show was to get its products listed and into the hands of the buyers of the Gibson retail stores; it was concerned with making the original sale to the retailer rather than promoting the resale of its products to consumers (Renninger 497F).<sup>37</sup> The show fee was paid in connection with the original sale of Parker's products to Gibson retail stores; the

<sup>36</sup> References to the five percent payment in Parker's records as "coop advertising" are merely internal bookkeeping charges and do not reflect the actual purpose of the payments (Renninger 464).

<sup>37</sup> Q. You indicated on cross examination that you attended these I believe, four shows in order to build goodwill. Did you attend the Gibson Trade Show in order to build goodwill with the buyers there?

A. The reason we attended the Gibson Trade Show was to get our products listed in the hands of the buyers of the Gibson stores (Renninger 497F).

show fee was not a promotional allowance made in connection with the resale of Parker's products to consumers (Renninger 497K-L; SR 51; Findings 68, 73, 97, 145, 151).

160. Similarly, the booth fee was paid in order to enable Parker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Parker's goods to Gibson retail stores. The booth fee, accordingly, was not a promotional allowance made in connection with the resale of Parker's products to consumers (Findings 64, 68, 73, 95, 145, 151).

161. After Parker discontinued its participation in the Gibson Trade Show, it experienced a 50 percent drop in its sales volume to the Gibson Discount Centers (Renninger 282, 335). [65]

162. Customers of Parker, other than stores operating under the Gibson name, were not given payments of five percent or a percentage of their total sales (Renninger 338, 340B, 343).<sup>38</sup>

163. Parker had a standard cooperative advertising program available to all of its retail customers (Renninger 336-37). This was also available and communicated to each Gibson Discount Center or Gibson retail store (Renninger 337-38, 339).<sup>39</sup> The standard cooperative advertising program of Parker was discussed with the trade show buyer, Gary Leverett. The five percent show fee paid to Gibson Products Company was not a part of this regular cooperative advertising program (Renninger 338-39).

Parker's standard cooperative advertising program required proof of performance. None of the respondents in the period 1971 to 1974 furnished proof of performance in connection with the show fee payments (Renninger 343-44).

164. In 1971 or 1972, Parker participated in tabloid advertising in connection with the Gibson Trade Show (Renninger 317).

The supplier also participated in the August 1973 tabloid mailed and delivered to customers in the areas where Gibson stores were located (Renninger 379; CX 491A-E).<sup>40</sup> The items promoted in the Gibson tabloid advertisement were the Big Red Soft Tip Pen and Big Red Ball Point Pen (CX 491E). For such participation, Parker was billed \$250 by Gibson Discount Centers, Inc. (CX 491D). The agreement to participate in the tabloid, dated May 2, 1973, had been signed by Ray Bostrom for Parker and trade show buyer Gary Leverett for Gibson Products Co. This agreement was entitled, "Gibson Tabloid Authorization Form" (CX 491E). By credit memorandum of June 26, 1973, made out to

<sup>38</sup> In 1973, Gibsons Inc. received Parker's credit memorandum for the show fee; such payments were not made available to Parker's other customers (Renninger 340-41).

<sup>39</sup> Parker did not have such a program in 1973 (Renninger 339). The payment of the show fee in 1973 was probably charged against a nonexistent cooperative advertising budget (Renninger 339).

<sup>40</sup> Such tabloids may run prior or subsequent to the period of the trade show (Renninger 381).



Gibsons Inc., Parker made the \$250 remittance for such participation (CX 491A; Renninger 381-82). [66]

There is no record evidence concerning contemporaneous sales of the items promoted in the August 1973 tabloid to Gibson stores and other retailers competing with them in the resale of such merchandise.

165. Parker manufactures 252 to 300 different pens, combinations of colors and permutations thereof (Renninger 421). Parker's most expensive pen, the Presidential solid gold pen, costs \$400 (Renninger 421). The least expensive pen sold by Parker is the Jotter at \$2.50. Between those ranges, there are 50 to 100 different priced pens (Renninger 422). Parker's pens are sold in different types of packaging ranging from open stock boxes with twelve pens in a box to pens in individual gift boxes (Renninger 424). In addition, pens are also sold in combination with a pencil or individually (Renninger 424).

Parker's "midline products" are sold both by Parker's direct sales organization and by a network of wholesalers and distributors (Renninger 424-25). There are approximately 125 products in the "midline," which can be marketed in a number of different combinations (Renninger 425-26).<sup>41</sup>

The "prime line" products are primarily precious metal or stainless steel merchandise. These products fall within a higher price category and are considered Parker's jewelry or gift line (Renninger 426). Including all the combinations, there are about 125 products in this line (Renninger 427).

166. The tabulations in the record show contemporaneous transactions involving sales of goods by Parker to various Gibson stores and other Parker customers located in the same town or city (CX 506A-F). However, the record evidence does not disclose at what functional level many customers listed on CX 506A-F, other than the Gibson stores, operated at. For example, there is no way to determine on this record whether Abilene Prt. and Sty. Co. of Abilene, Texas, or Cook United, Inc. of Big Spring, Texas, were wholesalers or retailers (CX 506A). With respect to the majority of the alleged nonfavored customers listed on CX 506, complaint counsel have failed to sustain their burden of proof that Gibson retail stores and other Parker customers listed thereon operated and competed in the resale of Parker's merchandise at the same functional level. [67]

The tabulations also do not specify what products were purchased in a specific transaction. For instance, the products purchased are usually described as "midline products," "prime line products," "pens," "pencils," "sets," "refills," etc. Nor is it possible to determine from this

<sup>41</sup> "Pencil soft, soft tip, ball pen, pencil; ball pen, fountain pen; fountain pen, pencil. You go on and it will go on forever" (Renninger 426).

record the price of the products involved. Parker may have 50 to 100 different prices for pens. Given the wide array of Parker products, the information in the tabulations is insufficient to make the determination of whether the goods sold to Gibson retail stores and the goods sold to alleged competitors of Gibson stores were of like grade and quality.<sup>42</sup>

C. Tucker Manufacturing Corp.

167. Tucker Manufacturing Corp. ("Tucker"), of Leominster, Massachusetts, manufactures and offers for sale throughout the United States plastic housewares, which include trash cans, wastebaskets, laundry baskets, dish pans, pails and other products (Tocci 2141, 2142, 2153, 2162).

Tucker's products are shipped from Leominster, Massachusetts and Arlington, Texas. However, the invoices on all sales are issued by Tucker's Leominster, Mass. headquarters (Tocci 2143). The invoices in the record show sales to Gibson stores located outside Massachusetts and Texas (CX 320A-R). Tucker is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

168. Tucker employs manufacturer's representatives who are responsible for assigned geographic territories and are paid on a commission basis (Tocci 2150, 2153, 2184-85). For services provided to Tucker, the manufacturer's representative generally receives a five percent commission based on total sales in his or her territory (Tocci 2375-76). [68]

Neither H.R. Gibson, Sr., Tommy Perkins, an employee of Gibson, Sr., nor the Gibson Trade Show ever acted as a manufacturer's representative for Tucker (Tocci 2182-84, 2321, 2325; CX 312A-C).

169. Tucker attended the Gibson Trade Show approximately two times per year during the period 1969 to 1973 (Tocci 2187).

The basic service provided to Tucker by the Gibson Trade Show was the opportunity to sell its line of products to Gibson retail store buyers (Tocci 2339, 2371-72). This was the main reason Tucker participated (Tocci 2188). Services provided by the Gibson Trade Show to Tucker included bringing over prospective customers to the Tucker booth, listing the Tucker booth location in a directory and printing and distributing show sheets to Gibson retail store buyers (Tocci 2372-73).

<sup>42</sup> Parker sold Jotters and refills to K-Mart, Walgreens and Gibson stores in the period 1971-1974 (Renninger 497G). There is no indication in the record, either from invoices, tabulations, or testimony, as to the approximate dates when such sales were made to K-Mart or Walgreens. No witness from Walgreens or K-Mart testified. The evidence is too sketchy to permit a finding that such sales met the statutory criteria. Sales were also made to Target stores (Renninger 279).

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Such services also benefitted Gibson retail stores attending the Gibson Trade Show (Findings 71, 81; Tocci 2466, 2469-70).

170. Tucker's salaried employees staffed its booths at the Gibson Trade Show, and the expenses of the employees who attended the show were paid by the supplier (Tocci 2188, 2191).

171. In order to sell its products, Tucker's employees and representatives explained the advantages of Tucker's product line to Gibson store buyers at the trade shows; the manufacturer's representatives also made frequent calls on individual Gibson stores (Tocci 2192-93).

172. During the period 1969 to 1973, Tucker never sold its products at the Gibson Trade Show to customers other than Gibson stores. It was this supplier's understanding that other retailers were not allowed to attend (Tocci 2188-89).

173. During the 1969 to 1973 time period, the requirements imposed by the Gibson Trade Show for Tucker to participate in the shows were: reviewing its product line with Tommy Perkins and securing his approval; establishing competitive prices; making a two percent volume rebate payment per year; and, paying for rental of booth space at the trade shows (Tocci 2190-91, 2222-23).

174. Tucker prepared show sheets, which contained product and price information on merchandise presented to Gibson store buyers for their approval, for the February 1972 and February 1973 Gibson Trade Shows (Tocci 2223-24; CX 309A-M, 316A-Z-4). Tommy Perkins, the buyer at Seagoville, Texas, made the final decision with regard to pricing and other arrangements as well as Tucker's participation in the trade show (Tocci 2226). [69]

175. Tucker made the following booth fee payments to the Gibson Trade Show:\*

\* Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

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Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
February 14-18, 1970	2	\$250.00	\$500.00	Check	Ideal Travel Agency	CX 301A-B
February 12-16, 1972	2	\$275.00	\$550.00	Check	Ideal Travel Agency Seagoville, Texas	CX 308A-B
August 14-18, 1972	2	\$350.00	\$700.00	Check	Ideal Travel Agency Seagoville, Texas	CX 311A-B
February 10-14, 1973	2	\$350.00	\$700.00	Check	Joe W. Yeager	CX 315A-B Tocci 2201; SR 35A
August 13-17, 1973	2	\$350.00	\$700.00	Check		SR 35E, F: Tocci 2437-38

[70]176. In 1968 or 1969, Tucker agreed to a volume rebate after being told by Tommy Perkins that it was a requirement for participation in the Gibson Trade Show (Tocci 2185-86, 2208, 2325, 2411, 2415; CX 312A-C). "It was told to us [Tucker] that if we did not comply with his [Tommy Perkins'] request, we would not be allowed to participate in the Gibson Discount Center Trade Show" (Tocci 2209). Tucker accordingly agreed to pay a two percent volume rebate based on total sales to all Gibson stores, family owned or franchise (Tocci 2186, 2208, 2320, 2322, 2324, 2411, 2415; CX 312A-C). [71]

177. Tucker made the following show fee payments to the Gibson Trade Show:<sup>9/</sup>

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payments on Tucker Records	
\$2,876.00	3/31/72	Credit Memo	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	1970	Advertising allowance for the year 1970 <sup>9/</sup>	CX 306A; Tocci 2246, 2252-53, 2409-10
\$1,818.30	12/31/71	Credit Memo	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	7/1/72 - 10/31/72	Advertising allowance from April 1, 1972 to Oct. 31, 1972 <sup>9/</sup>	CX 306B; Tocci 2251-53, 2269
\$ 426.80	2/1/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	November and December 1972	November and December 1972 ad agreement rebate <sup>9/</sup>	CX 314 A-C
\$3,309.25	8/31/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas <sup>9/</sup>	2%	First half of 1973	Advertising allowance <sup>9/</sup>	CX 318 A-C; Tocci 2290, 2410-11
\$1,405.49	4/4/74	Check	The Gibson Trade Show 517 Gibson St. Seagoville, Texas	2%	Last half of 1973	2% trade show fee for the last half of 1973	CX 317 A-C; Tocci 2290, 2440

<sup>9/</sup> Tucker viewed the two percent trade show fee as going to H.R. Gibson, Sr.

By Mr. Steele (Counsel for Respondents):

Q. Was it your understanding that the two percent payment was going to go to Mr. Herbert R. Gibson, Sr., rather than to any retail stores?

A. It was our understanding that the payment was going to H.R. Gibson, Sr.

Q. And not to the retail stores?

A. That is correct.

(Tocci 2265. See also Tocci 2320). However, the witness immediately followed by acknowledging the interrelationship between H.R. Gibson, Sr. and the retail stores, at least prior to November 1, 1972:

By Mr. Boomer (Complaint Counsel):

Q. It was your understanding at this time, Mr. Tocci, that Mr. H.R. Gibson, Sr., in 1970, owned the retail stores?

A. Yes, it was.

(Tocci 2265)

<sup>9/</sup> Tucker's vice-president and director of marketing, Leonard J. Tocci, testified as follows:

JUDGE von BRAND: All right.

Mr. Tocci, at the beginning of your testimony, you spoke about volume rebates in connection with certain discussions you had with Mr. Perkins; is that correct?

THE WITNESS: Yes, that is.

JUDGE von BRAND: All right.

Now, what is the difference between those volume rebates and the reference to advertising allowance which I see on the credit memorandum, CX-306-B?

THE WITNESS: It is just the mechanics of processing the paperwork within our company, as far as the volume rebate. Although, it was just terminology used as advertising....

JUDGE von BRAND: All right.

Are you telling us that, as far as this transaction was concerned, it is your testimony, the terms, "volume rebate" and "advertising allowance" is synonymous?

THE WITNESS: Yes.

(Tocci 2252-53).

Based on this testimony, it may be fairly inferred that all of the payments made by Tucker to Gibson Products Co. and recorded by Tucker as advertising allowances were, in fact, show fee payments predicated upon a volume rebate based on total sales (See Tocci 2270, 2409-11).

<sup>9/</sup> Although the payee on this check was Gibson Products Company, the check was endorsed: "Gibson Products Company, For Deposit Only, H.R. Gibson, Sr., D.B.A. the Gibson Trade Show" (CX 318C; Tocci 2299).

[72]178. The two percent trade show fee paid by Tucker to respondents for sales made to the Gibson retail stores in the years 1970, 1972 and 1973 was not a promotional allowance made in connection with the resale of merchandise at the retail level; rather, it was paid

for the opportunity to make a sales pitch to the Gibson stores at the trade show and is, therefore, an allowance or discount in connection with Tucker's original sale to those stores (Findings 68, 73, 97, 169, 173; SR 35Y; Tocci 2407-08).

179. Similarly, the booth fee was paid in order to enable Tucker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Tucker's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Tucker's products to consumers (Findings 64, 68, 73, 95, 169, 173).

180. Tucker ceased attending the Gibson Trade Show after 1973 because it wanted to discontinue the two percent volume rebate payments due to its low profit margin (Tocci 2326-27).

During the period following the termination of Tucker's participation in the Gibson Trade Show, Tucker experienced minimal sales volume with regard to Gibson family owned stores. The sales to such stores were: in 1974, \$22,000; in 1975, \$4,000; no sales in 1976 or 1977 (Tocci 2334).

181. In 1970, 1972 and 1973, Tucker neither made nor offered to make payments based on a percentage of sales to any of its customers, other than Gibson Products Co. (Tocci 2246, 2254-57, 2282-83, 2292-94). In these same years, Tucker neither made nor offered to make alternative payments for services rendered to any of its customers, other than Gibson Products Co. (Tocci 2267, 2286-87, 2294-95).

During the period 1969 to 1973, customers of Tucker, other than Gibson, that had a trade show that Tucker attended were Ace Hardware, Cotter and Company and Merchants' Buying Syndicate ("MBS") (Tocci 2212). These customers all operate at the retail level of business (Finding 369). The trade shows operated by each of these organizations were open only to member retail stores (Tocci 2213-15). Tucker attended the MBS trade show from 1964 to 1973 (Tocci 2213); it attended the Ace Hardware show from 1968 to 1972 (Tocci 2214); it attended the Cotter show from 1972 to 1977 (Tocci 2215). While Tucker paid fees for rental of booth space at each of these shows, Tucker neither offered to pay nor did pay to these customers any percentage based on sales made to the stores that attended the show (Tocci 2213-16). Furthermore, Tucker neither offered to make nor did make an alternative payment to these customers for services rendered (Tocci 2267, 2294). [73]

182. During the period 1969 to 1973, Tucker did not offer to its customers either a standard advertising allowance, a standard program of volume rebates or a cooperative advertising program (Tocci 2143, 2150).

183. During the 1969 to 1973 period, Tucker sold its merchandise to

West and Company, Howard Brothers, Wal-Mart, W.E. Walker, Perry Brothers, OTASCO, Abbey Sales, Surplus City, Sterling Storage, H.E. Butt and family owned and franchised Gibson stores (Tocci 2158-59, 2161-62). These customers all sell merchandise at the retail level (Tocci 2159-60, 2168-70, 2175-81; Finding 369).

In that period, Tucker sold trash cans, waste baskets, laundry baskets, pails and dish pans to these retailers (Tocci 2162-63).

184. Tucker manufactures approximately 100 to 120 different products (Tocci 2396; Finding 167). For example, it makes eight to ten different sized trash cans ranging from a size that could be used in restaurants to a size suitable for the home (Tocci 2397). Tucker's waste baskets and dog dishes are also of different sizes and shapes (Tocci 2397).

185. Howard Brothers and West and Company are both licensed to use and do use the Gibson name on some of their stores and their own name on other of their stores (Tocci 2390-91, 2463-64). Both have attended Gibson Trade Shows in which Tucker has participated (Tocci 2391-92). The record accordingly is unclear as to whether, in their case, sales to Howard or West and Company could properly be construed as a sale to a nonfavored customer in a transaction involving a discrimination favoring the Gibson stores. The evidence (CX 320A) does not reveal in which instances Howard Brothers and West and Company were competing with Gibson retail stores; sales to these two customers might be sales to them in their roles as Gibson licensees.

186. There is considerable variation in Tucker's products (Finding 184). There is no evidence in the record pertaining to the specific merchandise purchased by competitors of Gibson. The invoices in the record (CX 320A-R) relate only to purchases by Gibson stores. There is insufficient evidence to support a finding that Gibson stores and other customers of Tucker compete in the resale of Tucker products of like grade and quality. [74]

#### D. Revell, Inc.

187. Revell, Inc. ("Revell"), of Venice, California, manufactures plastic model kits, including models of airplanes, ships, cars and animals, home racing sets, train sets and craft items, which it markets throughout the United States and the world (Wells 612; Blaustein 780-81).

Revell makes sales to national accounts (whose stores are located throughout the United States), regional accounts and wholesale accounts (Blaustein 785, 789). Revell has made sales to both Gibson franchised stores and Gibson company-owned stores (Blaustein 840-41).

Revell sells and ships its products from its Venice, California manufacturing plant to customers throughout the United States. Such sales include shipments to Gibson stores located outside of California (CX 752A-Z-103; Blaustein 780-81; Wells 613). Revell is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

188. Revell entered into contracts to participate, and did participate, in the Gibson Trade Show in the years 1968 through 1976 (Wells 614-15; Blaustein 813-21; SR 25A-F, H-P). Revell terminated its participation in the Gibson Trade Show in 1977 (Blaustein 802).

189. Defining a customer as an entity for whom Revell would write up an invoice on a shipment, Revell had 500 to 600 customers in 1973, including Gibson stores (Blaustein 782). Among the retail customers to whom Revell sold its products in the period 1973-1976 were J.C. Penney, Sears, Zayre, K-Mart, the Gibson stores and W.T. Grant (Blaustein 850-52).<sup>43</sup> Revell, in the relevant period, also made sales to the Target stores, a chain of 59 discount retail stores located in Minnesota, Wisconsin, Illinois, Iowa, Missouri, Colorado, Oklahoma and Texas (Doyle 4288-89, 4291, 4370; CX 1335A-B).

190. In the period 1969 to 1972, Revell representatives called on Gibson stores in addition to attending the Gibson Trade Show (Wells 762). And, Revell set up a program whereby its regional sales managers would contact those individuals having buying jurisdiction for Gibson stores (Wells 720-24). Revell has neither sent invoices nor sold merchandise to Herbert R. Gibson, Sr. or to the Gibson Trade Show (Blaustein 812). [75]

191. Revell's contacts with the respondents in connection with the Gibson Trade Show were with Gary Leverett and Lynn Low. The topic of discussion at meetings in Seagoville, Texas with Leverett and Low in 1973 and 1975, respectively, was Revell's participation in the trade show (Blaustein 790-91). Beginning in March 1975, Revell was advised that the Gibson Trade Show was a selling organization which would represent Revell to sell merchandise (Blaustein 793, 798, 847-48).

Revell, however, did not regard the Gibson Trade Show as its sales representative (Blaustein 807). And, trade show personnel did not write orders for Revell after 1975. Revell's own sales staff wrote the orders (Blaustein 807). Revell regarded the Gibson Trade Show as a customer (Blaustein 807).

192. Revell and Gibson Trade Show employees coordinated blanket and makeup orders. Some of the sales by Revell were made through a

<sup>43</sup> Revell's products were listed in the catalogs of Sears, J.C. Penney and Montgomery Ward (Blaustein 836).



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blanket order (Finding 89; Blaustein 803-04). Beginning in 1975, sales were effected through makeup orders, whereby Revell and Gibson Products personnel set up specific orders that required Gibson stores to sign and return purchasing orders so as to receive the merchandise (Blaustein 804). In the case of the blanket orders, while the customer could modify the order, the store would receive the merchandise specified on the order if it did nothing (Blaustein 804). In 1973, 1974 and 1975, blanket orders covered all Gibson stores, franchised as well as company-owned (Blaustein 853-54).

193. In 1968, the requirements for Revell's participation in the Gibson Trade Show were payment of a booth fee and development of a selling program to be presented to all Gibson stores at the show (Wells 618). In the years 1969 through 1976, the additional requirement of payment to the Gibson Trade Show of a one percent allowance on total sales to all Gibson stores (franchised and company-owned) was imposed (Wells 619-20; Blaustein 859). [76]

194. Revell paid booth fees to the Gibson Trade Show as follows:

Date of Show	Number of Booths	Rate Per Booth	Amount Paid	Payee	Case No.
November 1969	3	\$250.00	\$ 750.00	Ideal Travel Agency at Seagoville, Texas	CT 731A-C; Wells 63B
May 4-8, 1970	4	250.00	1000.00	Ideal Travel Agency at Seagoville, Texas	CT 735A-C; Wells 65J
May 14-18, 1973	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25H
August 13-17, 1973	1	350.00	350.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25L
November 5-9, 1973	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25K
May 13-17, 1974	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25I
November 4-7, 1974	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25H
May 12-16, 1975	2	350.00	700.00	H.R. Gibson, Sr. at Dallas, Texas	SR 25E
November 8-12, 1975	2	350.00	700.00	H.R. Gibson, Sr. at Dallas, Texas	SR 25D
May 15-19, 1976	2	350.00	700.00	The Gibson Trade Show at Dallas, Texas	SR 25C
October 2-6, 1976	2	350.00	700.00	The Gibson Trade Show at Dallas, Texas	SR 25B

[77]195. Revell agreed to pay, and did pay, to the Gibson Trade Show the one percent rebate for 1969 and subsequent years (Wells 629-

30, 649-50, 660-62, 663-64; Blaustein 859). For instance, in exchange for participating in the 1975 trade show, Lynn Low suggested that Revell make a payment based on annual sales. As a result, Revell agreed to pay a one percent allowance at the end of the year on all the business which it did with the Gibson Products Company for the 1975 calendar year (Blaustein 799-800).

The one percent rebate payments were made by Revell in order to assure participation in the Gibson Trade Show and use of blanket orders (Wells 727; Blaustein 800). However, Revell had no specific understanding with any Gibson personnel as to what the one percent payment might be used for (Wells 743).

Revell had been advised that it would be the beneficiary of various services performed by the Gibson Trade Show, including marketing presentations, a directory of all Gibson stores, blanket orders, mailings and advertising. Revell was especially drawn to the trade show by a so-called Extensive Sales Program, which promised to generate orders for manufacturers (Wells 726-27; Blaustein 801-02). [78]

196. Revell made show fee payments to the Gibson Trade Show, based on one percent of total sales to all Gibson stores, as follows:

Year	Amount of Shipments	Amount Paid	Payee	Invoice Date	
1969	\$313,122.26	\$3,131.22	Gibson Products Co. of Seagoville, Texas	1/20/70	CX 733A, B, D
1970	372,718.00	3,727.18	Gibson Products Co. of Seagoville, Texas	2/02/71	CX 739A, C
1970	Balance due on 1970 purchases	391.76	Gibson Products Co. of Seagoville, Texas	3/19/71	CX 740B-C

[79]197. The one percent trade show fee paid by Revell to the respondents for sales made to Gibson stores in 1969 and 1970 was not a promotional allowance made in connection with the resale of Revell's products to consumers (Findings 68, 73, 97, 193).

198. Similarly, the booth fee was paid in order to enable Revell to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Revell's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Revell's products to consumers (Findings 64, 68, 73, 95, 193).

199. During the period 1969 to 1972, Revell did not make any payments to any of its customers, other than the Gibson Trade Show, based on a percentage of total sales (Wells 663-64, 750). Nor did Revell make any payments for its merchandise being listed in the catalogs of retailers such as Sears and J.C. Penney (Blaustein 855-56).

200. The Gibson Newspaper Mat Service, which prepared tabloids advertising products offered for sale in Gibson stores, prepared an

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advertising tabloid for Revell. Revell paid \$300.00, on November 24, 1969, to Gibson Products Co. of Seagoville, Texas for the newspaper mat service (Wells 641-42; CX 732F). Revell did not have ad mats prepared for any customers other than Gibson Discount Centers, Gibson franchised stores or Gibson family-owned stores (Wells 641). The record, however, does not show what products were promoted for resale in the tabloid.<sup>44</sup> Under the circumstances, there is insufficient evidence on the question of whether customers competing in the resale of products of like grade and quality were subjected to a discrimination cognizable under Section 2(d) of the Robinson-Patman Act.

201. In 1969, 1970, 1971 and 1972, some of the accounts to whom Revell sold plastic model kits included Gibson Discount Centers, Gibson Products Co., Sears, Roebuck and Company, W.T. Grant, S.S. Kresge, J.C. Penney and G.C. Murphy (Wells 666-68; CX 752). Revell products purchased by customers such as Sears, Grant, Penney and K-Mart were shipped to customer warehouse locations with subsequent redistribution by the customer to its retail or catalog outlets (Wells 706-08). [80]

202. During each of the years in the period 1969 through 1975, there were approximately 200 items in the plastic model kits line manufactured by Revell. Since a third of the items were changed from year to year, there were about 600 to 700 different items in the product line for the 1969 to 1975 time frame (Wells 703). The prices of the different items in the plastic model kits product line may range from \$1.50 to \$10.00 or \$20.00 (Wells 705).

203. The tabulations in the record, summarizing Revell sales in 1970 and 1971, show the following contemporaneous transactions which involve sales of goods of like grade and quality to competing customers (CX 752A-Z-103):<sup>45</sup>

Hattiesburg, Mississippi: Baja car<sup>46</sup> (Gibson - 10/1/70; Sears<sup>47</sup> - 8/3/70, 11/5/70).  
 Brownsville, Texas: Baja car (Gibson - 8/7/70; Sears - 10/2/70).  
 Dallas, Texas: Baja car (Gibson - 8/7/70, 11/6/70; Sears - 7/22/70, 7/23/70, 8/4/70, 8/14/70, 8/27/70, 9/18/70, 9/22/70, 9/24/70); Trano

<sup>44</sup> Generally, the tabloids promoted particular items for resale. Products to be advertised in Gibson tabloids were noted as such at the trade show (Finding 110). Also compare CX 491E.

<sup>45</sup> The tabulations show many other transactions, including contemporaneous sales involving the Gibson stores and other customers of Revell. In the majority of these sales, however, there is no record evidence establishing the functional level at which such customers operated. Nor, in most of the transactions recorded, is there sufficient evidence to determine whether the like grade and quality requirement has been met. Given the hundreds of types of models put out by Revell and their wide price variation (Finding 202), product descriptions such as "planes," "bikes," "cars," "ships," etc. do not meet the like grade and quality requirement.

<sup>46</sup> The so-called "Baja car" is noted in the tabulations as, variously, Baja car, Baja 500, Sears Baja, Baja. In these instances, the product description is sufficiently precise to permit a finding that the products involved are of like grade and quality.

<sup>47</sup> Sears and J.C. Penney function at the retail level of operations (Finding 369).

Base (Gibson - 6/12/70; J.C. Penney<sup>47</sup> - 2/13/70); Dune Buggy (Gibson - 9/11/70, 11/10/70, 11/16/70; Sears - 8/18/70, 9/24/70, 10/2/70, 11/10/70); Evil Iron (Gibson - 12/27/71; J.C. Penney - 9/15/71). [81]  
Irving, Texas: Baja car (Gibson - 8/11/70; Sears - 7/70).

Victoria, Texas: Baja car (Gibson - 8/7/70; Sears - 8/70, 10/2/70).

Wichita Falls, Texas: Baja car (Gibson - 5/7/70; Sears - 7/23/70, 11/4/70).

Sherman, Texas: 12 pc. Disney (Gibson - 6/23/71; J.C. Penney - 6/25/71, 7/9/71, 7/29/71, 9/15/71, 10/1/71, 11/1/71).

Revell's sales to Target (Finding 189) are not recorded in the tabulations. Nor is there other record evidence as to the specific model type, style, price or price range of the plastic model kits purchased by Target, or as to the exact dates of those purchases.

#### E. Regal Ware, Inc.

204. Regal Ware, Inc. ("Regal"), of Kewaskum, Wisconsin, manufactures cookware and electric appliances (Mehring 1350-51).

Regal manufactures its products at four locations in the U.S.; they are Kewaskum, Wisconsin; Wooster, Ohio; Flora, Mississippi; and Peoria, Illinois. From these points, Regal sells and ships its products throughout the United States (Mehring 1351), including shipments to Gibson stores located outside of the above four states (CX 696A-E). Regal is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

205. Regal sells to wholesalers, catalog houses, premium accounts, military exchanges, cooperatives who service retailers, hardware wholesale distributors and electrical distributors, among others (Mehring 1589). It also sells to major chain store accounts as well as non-chain store accounts. The chain store accounts, with multiple stores operating under the same name, encompass discount stores, drug stores and variety stores (Mehring 1352). The chain store accounts that were customers of Regal during the period 1971 to 1975 include Woolworth, K-Mart, Gibson, Wal-Mart, Sterling stores, Koons, Jefferson stores, Target, TG&Y and Zayre (Mehring 1352-53, 1712; CX 696A-E; Evans 3951-52; Pettit 4100). [82]

In 1975, Regal did \$888,359 in business with all Gibson retail stores (SR 18R). Regal's 1975 volume of business with Target was approximately one-tenth of this amount (Mehring 1710-11). Its volume with TG & Y in that year was approximately one-fourth to one-third of the business with the Gibson stores (Mehring 1712). Regal did approximately at least four times as much business with all of the Gibson stores taken together as with Woolworth (Mehring 1628). Only S.S.



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Kresge Company and the Zayre Corporation had larger purchase volumes with Regal in 1975 than the Gibson stores (Mehring 1712).  
 206. Regal sold and shipped goods directly to individual Gibson stores in 1971 and 1972, and continued to ship a majority of the goods in this manner in 1974 and 1975 (Mehring 1362, 1366-67).

In 1971, although shipments of merchandise were sent by Regal to individual stores, the Gibson Products Company, 519 Gibson Street, Seagoville, Texas, was the paying office with accounting responsibility for a number of individual Gibson stores (Mehring 1565-67). Regal viewed Gibson Products Company, at 519 Gibson Street, as a customer since it appeared on Regal's accounts receivable ledger (Mehring 1568).  
 207. Personnel who worked for Regal on a commission basis were regarded as manufacturer's representatives (Mehring 1576-77). H.R. Gibson, Sr. did not demonstrate Regal products in Gibson stores to consumers, did not put up Regal product displays in Gibson stores and did not write orders for Regal products to Gibson retail stores and did not staff the Regal booth at the Gibson Trade Show in 1971 (Mehring 1573-75). Regal did not regard H.R. Gibson, Sr., or personnel in his employ, as a manufacturer's representative (Mehring 1577). Rather, he was regarded as a special type of representative; other special representatives were involved in the areas of military sales and direct mail sales (Mehring 1578). In 1971 through 1975, Gibson was the only chain store account that fell into this category of special representation (Mehring 1581).

208. Regal participated in at least one Gibson Trade Show per year in the years 1971 to 1975, and often attended two shows per year, generally in February and August (Mehring 1382). It attended Gibson Trade Shows in 1977, and plans to participate in future shows (Mehring 1382). [83]

209. Regal participated in the Gibson Trade Show because of the opportunity to meet the greatest number of buyers within a limited period of time in one place (Mehring 1383, 1646-47).

210. Approximately four to six Regal employees attended the trade shows (Mehring 1384, 1482). Regal always paid the expenses of its sales personnel, all of whom were salaried employees of Regal (Mehring 1387, 1477; CX 660A-E, 664A-E, 670A-D, 676A-E, 690A-H, 695A-E).<sup>48</sup> At the trade shows, Regal verbally described how its products worked and discussed selling techniques with buyers (Mehring 1385, 1486).

211. Regal and the Gibson Trade Show utilized show sheets as actual order forms in connection with the price listings of Regal items

<sup>48</sup> Not all of the expenses in the listed documents necessarily relate to the Gibson Trade Show, since Regal personnel attending the show would also attempt to call on other customers (Mehring 1481, 1605-06).

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to be offered for sale at the trade show (CX 647C, 649A-C, 659A-B, 663A-N, 665, 669A-N, 671A-M, 675A-M, 689A-I; Mehring 1511-12). Blank forms were submitted to Regal, who filled them in with product information and price listings. The show sheets were then forwarded to the Gibson Trade Show for bulk printing and distribution (Mehring 1511). The show sheets were not final until initialed by someone at Regal (Mehring 1516-17).

The Gibson retailers were important in helping to sell Regal products to the Gibson stores. Regal considered this helpful (Mehring 1645). personnel might inform Regal that certain items were inappropriate for Gibson stores. Regal considered this helpful (Mehring 1645). 212. The requirements for participation at the Gibson Trade Show during the years 1971 to 1975 were: payment of a booth fee, and payment of a show fee which consisted of a percentage of total annual sales to all Gibson stores (Mehring 1385-88; CX 672B). [84]

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213. Regal made the following booth fee payments to the Gibson Trade Show during the period 1969 to 1977: <sup>w/</sup>

Date of Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
July 10, 1969	2		\$450.00	Check	Gibson Discount Center Market Hall, 2200 Stemmons Freeway Dallas, Texas	CX 642A-C
February 14-18, 1970	2		\$500.00	Check	Gibson Products Co. c/o Ideal Travel Agency 519 Gibson Street Seagoville, Texas	CX 643A-C
February 8-12, 1971	2		\$550.00	Check	Gibson Discount Center February Trade Show Market Hall, 2200 Stemmons Freeway Dallas, Texas	CX 645, 646A-C
August 16-20, 1971	2		\$550.00	Check	Ideal Travel Agency	CX 648A-F
February 12-16, 1972	2		\$550.00			CX 658
August 14-18, 1972	2		\$700.00	Check	Ideal Travel Agency	CX 662A-E
February 10-14, 1973	2		\$700.00	Check	H. R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 668A-G; SR 18E
August 13-17, 1973	2		\$700.00	Check	H. R. Gibson, Sr.	CX 674A-E; SR 18B
February 9-13, 1974	2		\$700.00	Check	The Gibson Trade Show	CX 681, 682A-C
August 12-16, 1974	2	\$350.00	\$700.00	Check	H. R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 687, 688A-C, SR 18F
February 8-12, 1975	2	\$350.00	\$700.00	Check	H. R. Gibson, Sr. The Gibson Trade Show Seagoville, Texas	CX 692, 693A-C
August 4-8, 1975	2	\$350.00	\$700.00			SR 18D <sup>**/</sup>
February 9-13, 1976	2	\$350.00	\$700.00			SR 18C <sup>**/</sup>
January 5-7, 1977	3	\$225.00	\$675.00			SR 18A <sup>**/</sup>

<sup>w/</sup> Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

<sup>\*\*/</sup> The record evidence is deficient as to further information about these payments; no copies of checks were introduced into the record, nor was testimony offered, such as would establish that these payments were actually made.

[85]214. Regal paid the Gibson Trade Show a show fee in order to meet what it viewed as its competition (Mehring 1673-77). For instance, Regal learned that a competitor, Oster, was going to participate in the trade show and would pay a four percent show fee (CX 672D; Mehring 1548, 1676). Regal took such facts into consideration in deciding the amount of the show fee that it would pay (Mehring 1548-49, 1675).

The show fee percentage paid to the Gibson Trade Show was two percent in 1971, 1972 and 1973 (Mehring 1387-88; CX 677B). In 1974, the percentage was increased to three percent and has remained at that level ever since (CX 677B; SR 18B, E, G; Mehring 1388, 1390, 1417, 1422, 1562-63, 1648). [86]

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215. Regal made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment or Regal Records	Case No.
\$15,000.83	2/14/70	Check	Gibson Products Co. Attn: Torny Perkins	2%	1969	Volume rebate	CX 620A-C
11,884.38	1/20/71	Check	Gibson Products of Seagoville	2%	11 months of 1970 sales	Rebate of 2% advertising allowance for 11 months of 1970 sales to Gibson stores.	CX 620A-C
9,725.20	12/28/71	Check	Gibson Products Co. 319 Gibson St. Seagoville, Texas	2%	1971	1971 Advertising - 2% of sales	CX 651A-C, 652A-C; Mehring 1543-46
12,046.30	12/19/72	Credit Memo		2%	1972	Advertising allowance for 1972	CX 653A-C, 655, 678
5,852.34	10/27/73	Credit Memo	The Gibson Trade Show 317 Gibson St. Seagoville, Texas	2%	Jan.-June 1973	Show fee for Jan. - June 1973	CX 677A-D, 678
4,799.50	1/15/74	Credit Memo		2%	July-Dec. 1973	Show fee for July-Dec. 1973	CX 685, 678E 680A-B; Mehring 1689-90
11,926.44	10/11/74	Credit Memo		2%	Jan.-June 1974	Show fee for Jan. - June 1974	CX 685, SR 184
8,313.18	7/31/75	Credit Memo		2%	July-Dec. 1974	Show fee for July-Dec. 1974	CX 691
9,205.89	9/30/75	Check	The Gibson Trade Show 1206 E. Lubbocker Dallas, Texas	2%	Jan.-June 1975	Show fee for Jan. - June 1975	CX 180
17,576.88	11/17/76	Check		2%	July-Dec. 1975	Show fee for July-Dec. 1975	SR 188, B, C
10,933.40	9/21/76	Check	The Gibson Trade Show 319 Gibson St. Seagoville, Texas	2%	Jan.-June 1976	Show fee for Jan. - June 1976	SR 18L, U, V
14,748.85	2/9/77	Check	The Gibson Trade Show 1206 E. Lubbocker Dallas, Texas	2%	July-Dec. 1976	Show fee for July-Dec. 1976	SR 18N

9/ While the documents introduced into evidence describe these payments as advertising allowances, there is reason to doubt that description. Unlike the other records of payments made for advertising by Gibson of Regal products (see the chart detailing advertising allowances made by Regal to the Gibson Trade Show infra), the two instant payments cover blanket periods of 11 months in one case and one year in the other, do not specify whether the advertising was in tabloid form, in print ads or in some other form and do not specify what product(s) or product line(s) were advertised. Further, the payments are for substantially large sums and are within the same monetary range as the remaining show fee payments during the 1969 to 1976 time period.

10/ While the documents introduced into evidence describe this payment as an advertising allowance, the Regal witness admitted that the payment was, in fact, a show fee (Mehring 1543-46). Such an admission casts further doubt on the descriptions of the two payments referred to in the footnote above and suggests that they, too, may well be show fees.

[87]216. The three percent show fee paid by Regal to the Gibson Trade Show was viewed by Regal as payment for the trade show's services in helping Regal make sales to retailers (Mehring 1648-49). Regal did not consider the three percent show fee, or the two percent show fee paid prior to 1973, as promotional payments (Mehring 1648-49).

217. The services received by Regal from the trade show in exchange for the percentage payments made from 1971 through the present basically consisted of the opportunity to sell to buyers for the Gibson organization (Mehring 1392). The show fee was paid in connection with the original sale of Regal's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Regal's products to consumers (Findings 68, 73, 97, 209, 212, 216).

218. Similarly, the booth fees were paid in order to enable Regal to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Regal's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Regal's products to consumers (Finding 64, 68, 73, 95, 209, 212).

219. In 1972, Regal sold its products to Woolworth and TG & Y, in addition to Gibson stores (Mehring 1400; Finding 205). It did not make payments to Woolworth or TG & Y or any other chain store accounts.



based on volume of sales in that year (Mehring 1398, 1400). Nor did Regal make such payments to Woolworth in 1973 (Mehring 1405-06).

Regal did not make the three percent payment based on volume of total sales available to Woolworth in 1975. It only made a one percent advertising allowance available to Woolworth (Mehring 1422; Finding 223).

220. In the period 1969 to 1975, Regal had a standard two percent advertising allowance available for all its customers. This was the only promotional allowance made available to the Gibson stores in that period (Mehring 1392, 1641). [88]

221. Regal made the following advertising allowances to the Gibson Trade Show from 1971 onward:

Amount	Payee	Date of Payment	Form of Payment	Description of Payment on Regal Records	
\$ 880.80	Gibson Products Co. Seagoville, Texas Attn.: Tommy Perkins	12/22/71	Credit Memo	Advertising allowance on #840AV and F Buckeye Decorated sets appearing in November tab	CX 654A-B
\$ 1,161.75	Gibson Products Co. 519 Gibson St. Seagoville, Texas	4/17/72	Credit Memo	Advertising allowance on W740 Set in the April tab	CX 661A, C; Mehring 1429, 1431
\$ 500.00	Gibson Products Co. 519 Gibson St. Seagoville, Texas	5/22/72	Credit Memo	Advertising allowance for Spring Specials	CX 661B
\$ 500.00				IL 6726 in pre-Christmas tab. */	CX 672C
\$ 500.00				W820 in Spring tab. */	CX 677D
\$ 500.00				IL 6727 in November tab. */	CX 677B, D

\*/ The record evidence does not provide any further information as to these payments; neither copies of invoices nor copies of checks or credit memos were introduced into evidence, so as to establish the exact details of these payments and whether they were, in fact, paid out.

[89]222. The tabloids utilized in 1972 were under Regal's standard advertising program. Regal did not specify whether an advertisement was to run in a tabloid, as a print ad or in some other format (Mehring 1432-33).

The Gibson Trade Show discontinued the procedure of running tabloids for Regal products in 1973 (Mehring 1431-32).

223. Regal made available to Woolworth its regular two percent promotional allowance for promotion of Regal products during the 1969 to 1975 time period (Mehring 1633-34). However, Woolworth demanded and obtained a special promotional package from Regal.

Woolworth received a one percent advertising allowance and a one percent price reduction based on invoice price<sup>49</sup> (Mehring 1635-36). Under that arrangement, in 1973, 1974 and 1975, Woolworth received approximately a one percent allowance on print advertising. The Gibson stores, in that period, received a two percent allowance for print or tabloid advertising (Mehring 1414, 1417-18, 1421-22, 1425-26). The Gibson stores, however, did not receive a price reduction as part of their promotional program from Regal (Mehring 1641).

224. Regal sold its products to TG & Y in 1973, 1974 and 1975 (Mehring 1423). Regal made available to TG & Y an advertising allowance based on TG & Y's sales in the 1973 to 1975 period. TG & Y availed itself of the advertising allowance offer by running a tabloid which included Regal products (Mehring 1423-24, 1433).

Regal made various promotional offers available to TG & Y during the 1971 to 1975 time period (Pettit 4162). Different Regal products could have had different percentage advertising allowances or, even, lump sum advertising allowances (Pettit 4237-38). Promotional offers made by Regal to TG & Y were a thousand dollars credit memo in exchange for which TG & Y had to buy Regal products and advertise them in their company-wide advertising program (Pettit 4169-70, 4232), as well as other lump sum dollar amounts (Pettit 4173; SR 111F-G).

225. Regal sold its products to Target in 1975 (Mehring 1442). It made its standard advertising program available to Target in that year (Mehring 1443-44). [90]

Other than an advertising allowance based on two percent of total sales under Regal's standard advertising program (Mehring 1443), Regal made no other percentage of total sales payments available to Target in 1975 (Mehring 1444).

226. The two percent advertising allowance paid by Regal to Gibson retail stores was separate and distinct from the three percent of total sales volume paid to the Gibson Trade Show in 1973 (Mehring 1417; CX 683A).

227. The record does not support a finding that the Regal tabloid payments to respondents were beyond the scope of its regular advertising programs available to Regal's other customers and, thus, discriminatory (Finding 220).

228. Regal offered various promotional services to its customers who did not have trade shows. These services included in-store demonstrations of Regal products by Regal personnel for consumers at

<sup>49</sup> Woolworth placed Regal products in a tabloid as part of its promotional arrangement with Regal. The one percent price reduction in Woolworth's net invoice price was Regal's payment for the tabloid advertising (Mehring 1644-45).

the retail level, store display stands and product knowledge sessions where Regal personnel discussed Regal products with retail store sales personnel (Mehring 1488-90, 1601). These services were an extension of Regal's sales activities and were expected by its customers; they were not part of a formal program (Mehring 1493).

229. Regal manufactures about eight different cookware lines under the Regal name (Mehring 1370).

230. Regal also manufactures so-called "traffic appliances," which are small, hand-held electrical appliances such as coffee makers, fry pans, corn poppers, fondues, hot pots, griddles, slow cookers and french friers (Mehring 1370, 1611). Regal lists all of the electrical appliances that it produces under the heading, "traffic appliances" (Mehring 1377). The traffic appliance category is comprised of entirely different products. Including color variations, Regal manufactures over 50 different types of traffic appliances (Mehring 1610-11). Regal's customers generally do not purchase all of the traffic appliances which it manufactures (Mehring 1612-13).

Regal manufactures approximately 10 different models of coffee-makers, with color variations within each model (Mehring 1613, 1617-19). For instance, during the 1969 to 1975 time period, one type of Regal coffeemaker, called Poly Perk, had four different sized models, with three different colors in each size, to serve different consumer needs and preferences (Mehring 1617-19). [91]

During the 1969 to 1975 time period, the electric fry pans manufactured by Regal were all Teflon coated, with various exterior color combinations; there were two sizes (Mehring 1619-20).

Regal manufactures only one basic model of a corn popper. There were only color variations in the fondue and slow cooker models. There were different models, aside from color variation, of the other electrical products in the traffic appliance category (Mehring 1620).

231. There are differences in quality, color, styling and metals used in the various cookware lines manufactured by Regal (Mehring 1372, 1621-22). During the 1969 to 1975 time period, Regal's cookware lines fell into two basic subcategories, Teflon coated and non-Teflon coated interior surfaces (Mehring 1619-20, 1622-24). The purpose of this differentiation was to meet consumer needs and preferences (Mehring 1623).

Regal sold as many as four cookware lines to Gibson stores in 1971. The names of these lines are Duncan Hines, Imperial, Buckeye and Mardi Gras (Mehring 1371-72). There are different individual products and sets within each of the four lines (Mehring 1620-24). Regal's customers, *i.e.*, wholesale houses, distributors, central buyers, could

purchase products within each of the four lines either individually or in sets (Mehring 1621-22).

The Duncan Hines and Imperial lines are made of stainless steel, but of different weights. The Buckeye and Mardi Gras lines are made of aluminum, and are also of different weights (Mehring 1373).

During the 1969 to 1975 time period, the Buckeye line consisted of the following six individual products: three different sized saucepans, a Dutch oven and two different sized fry pans. The purchase of these product differentiations was to meet consumer needs (Mehring 1621).

232. The record shows that Regal sold traffic appliances to the following customers in the years indicated:

Gibson Stores	1971 - 1975
K-Mart	1973 - 1975
T.G. & Y.	1974, 1975
Woolco	1975
Target	1975

(Mehring 1378-79, 1380, 1442).

[92] In 1969 to 1975, TG & Y purchased Regal products, including so-called "staple items" such as Poly Perk coffee makers, tea kettles, pots and pans (Pettit 4102).

In 1975, Regal sold its Duncan Hines cookware line to TG & Y and Gibson stores (Mehring 1374), its Imperial cookware line to K-Mart, TG & Y, Target and Gibson stores (Mehring 1374-75, 1442), and its Buckeye cookware line to TG & Y and Gibson stores (Mehring 1375).

233. The array of Regal products carried by retailers, including Gibson stores, varies widely (Mehring 1624).

234. The tabulations in the record, summarizing Regal sales between 1969 and 1975, show the following contemporaneous transactions which appear to involve sales of goods of like grade and quality to competing customers (CX 696A-E):<sup>50</sup>

<sup>50</sup> The tabulations and record testimony disclose other contemporaneous transactions. However, in many of these sales, there is no record evidence of the functional level that the customer was operating at. Thus, it is not possible to determine whether the customer was competing with Gibson retail stores in the resale of Regal's products. Moreover, there is no record evidence showing that these transactions involve goods of like grade and quality. For instance, the tabulations describe certain products as "Dutch oven," "fry pan," "Poly Perk" and "pan." Poly Perks come in four different sizes (Finding 230). Dutch ovens and fry pans also come in different sizes, are made of different metals, come in different weights and styles, and have Teflon or non-Teflon interior surfaces (Finding 231). The difference in interior surfaces may alone vitiate any showing of like grade and quality, although this difference in combination with the others just listed remove any possibility of like grade and quality having been established for these products. Fry pans may be electric or non-electric (Findings 230, 231).

The testimony discloses that, in 1975, Regal sold each of its four cookware lines as sets to Gibson retail stores and certain stores allegedly in competition with the Gibson stores (Finding 232). However, there is no record evidence, in the form of documentation or otherwise, stating the places and dates of these transactions. Moreover, each of the four cookware lines sold were either Teflon coated or non-Teflon coated (Finding 231). Thus, like grade and quality was not established for these products.

[93]Shreveport, Louisiana: Cups<sup>51</sup> (Gibson - 3/14/72, 3/27/72; TG & Y<sup>52</sup> - 4/10/72); Pot-o-Plenty<sup>51</sup> (Gibson - 10/10/73; TG & Y - 9/7/73); Poly Urn<sup>51</sup> Gibson - 9/20/73, 9/25/73; TG & Y - 11/19/73).

Lubbock, Texas: Poly Urn<sup>51</sup> (Gibson - 3/2/73, 9/14/73; TG & Y - 3/13/73, 11/19/73); Tea Kettle<sup>51</sup> (Gibson - 9/14/73, 9/10/74, 10/7/74, 12/12/74; TG & Y - 9/26/73, 2/18/74, 10/25/74); Bowls<sup>51</sup> (Gibson - 2/6/74; TG & Y - 2/19/74).

#### F. Waltham Watch Company

235. Waltham Watch Company ("Waltham"), of Chicago, Illinois, manufactures and sells watches, jewelry and clocks (Levitt 1764-65).

Waltham sells and ships its goods from Chicago to throughout the continental United States, including sales to Gibson stores located outside of Illinois (Levitt 1765; CX 216A-D). Waltham is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such interstate sales, are in the course of such commerce.

236. Waltham sold its products to wholesalers for resale to catalog houses and to premium houses in the 1969 to 1975 period (Levitt 1993-94). It also sold to retailers such as the Gibson stores (CX 205A-B).

237. Waltham had a total sales volume for watches of \$185,716.25 with all Gibson stores during 1973 (CX 205A-B). Most of Waltham's sales of watches to Gibson stores in 1973 were shipped to individual stores (Levitt 1838; CX 209B).

238. During the 1969 to 1975 period, Waltham merchandise could not be displayed at the Gibson Trade Show unless listed on show sheets (Levitt 1868). [94]

Waltham furnished the product and price information contained in the show sheets, which were prepared and distributed by the Gibson Trade Show for use at their various shows in connection with the placement of orders (CX 194A-F, 196A-K, 208A-C, 212A-N; Lehman 1257-58, 1261, 1264, 1266; Levitt 1874-75). The show sheets could serve as prospective orders, with the individual Gibson retail stores filling in the blanks regarding quantity (Levitt 1987).

During the 1969 to 1974 time period, Waltham presented merchandise to Gibson buyers; the buyers, then, preselected merchandise and authorized the merchandise to be listed on the show sheets (Levitt 1863-64, 1866-67, 1877-78). Waltham's sales representative considered this procedure to be a sales presentation (Levitt 1866, 1881).

The Gibson Trade Show buyers, such as Gary Leverett, preselected

<sup>51</sup> There is no record evidence indicating that there are variations in any of these products, such as materials used, range of sizes, weight or electric versus non-electric operation.

<sup>52</sup> TG & Y functions at the retail level of operations (Finding 369).

merchandise for the benefit of the Gibson stores attending the trade show throughout the 1969 to 1975 time period (Levitt 2007-08). As such, Leverett was acting on behalf of the Gibson stores (Levitt 2008). Distribution of the show sheets at the trade show was a benefit to the Gibson stores as well as an effective selling tool for Waltham (Levitt 1988, 2008, 2020-22).

239. Belva Gibson participated at various times in physically selecting the merchandise, usually jewelry, that she thought would sell in Gibson stores (Levitt 1826-27).

240. In 1971, Gary Leverett, the jewelry buyer for Gibson Products Company, selected four models of watches from Waltham's sales representative for purchase. The transaction took place in Seagoville (Levitt 1823-25).

Although Leverett assumed the title of merchandising manager in 1973 or 1974, he continued to perform the same functions he had performed in earlier years as far as Waltham was concerned (Levitt 1913-14). Waltham's sales representative regarded Gary Leverett, who held the title of merchandising manager in 1973 (CX 203A; Levitt 1978-79), as a buyer (Levitt 1976).

241. During the 1969 to 1974 time period, Waltham made no sales at the Gibson Trade Show to stores other than the Gibson Discount Centers (Levitt 1899-1900).

242. At the Gibson Trade Shows, trade show employees introduced new franchise owners to Waltham personnel and asked Waltham to assist in writing an opening order for such stores. Gibson, Sr. also brought new managers to the Waltham booth and assisted them in selecting goods for the new store (Levitt 1904). [95]

At the trade shows, new store managers, Leverett and the Waltham sales representative discussed merchandise. Leverett assisted the new store manager in making decisions about what to buy (Levitt 1907, 1910). For already existing stores, the store managers would be able to finalize orders (Levitt 1908-09).

243. Neither Gibson, Sr. nor his employees staffed the Waltham booths at the trade shows in the 1969 to 1974 period; those booths were run by Waltham personnel (Levitt 1911-12). Leverett did not perform a selling function on behalf of Waltham at the trade shows (Levitt 1911).

244. The requirements imposed upon Waltham by the Gibson Trade Show to participate in the shows were: payment for the rental of booth space; and, payment of a five percent allowance based on total watch sales to all Gibson stores (Levitt 1803-05, 1809-10, 1829-31, 1834-35, 1838). [96]

245. Waltham made the following booth fee payments to the Gibson Trade Show:

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
May 14-18, 1973	1	\$350.00	\$350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 193A-B
August 1973	6	\$350.00	\$2,100.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 197A-B
Nov. 5-9, 1973	1	\$350.00	\$350.00	Check	H.R. Gibson, Sr. 519 Gibson Seagoville, Texas	CX 198A-B
February 1974	6	\$350.00	\$2,100.00	Check	H.R. Gibson, Sr. 517 Gibson St. Seagoville, Texas	CX 206A-C
May 13-17, 1974	1	\$350.00	\$350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 210A-B
Aug. 12-16, 1974	6	\$350.00	\$2,100.00	Check	H.R. Gibson	CX 211A-E

[97]246. From 1969 to 1974, Waltham set up a warehousing allowance to Gibson Products Company, payable in merchandise. The allowance was five percent of total sales of watches to all Gibson retail stores, regardless of whether the watches were shipped directly to individual stores or to a warehouse (Levitt 1803-05, 1838; Lehman 1284, 1301-02). In the case of Waltham's Dallas area representative, 99.9% of the shipments were shipped directly to the Gibson stores (Levitt 1838. See also CX 209).

247. Belva Gibson participated in discussions with Waltham's sales representative in 1971 as to the amount, \$118,768, that was to be paid on warehousing (Levitt 1813-14, 1822-23, 1825-26; CX 201C).

248. Sales made at the Gibson Trade Show to individuals who leased jewelry departments in Gibson stores were not included as part of the total annual sales to Gibson stores from which the warehousing allowance was computed (Levitt 1997; Finding 257).<sup>53</sup>

249. Waltham did not refer to or make use of the term, "trade show fee." It used, instead, the term, "warehousing allowance" (Levitt 1829-31, 1834-35; CX 203A). The five percent warehousing allowance had nothing to do with advertising or otherwise promoting the resale of Waltham products (Levitt 1968-69; Lehman 1284). Warehousing allowances are, in fact, trade show fees in the case of Waltham's dealings with Gibson stores. Such show fees effectively operate as

<sup>53</sup> In 1975, 25% of the sales made at the Gibson Trade Show were made to such leased jewelry departments (Levitt 1997).

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price reductions to the Gibson stores, and were paid in connection with the original sale of Waltham's products to Gibson retail stores (Findings 68, 73, 97, 244).

250. Similarly, the booth fee was paid in order to enable Waltham to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Waltham's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Waltham's products to consumers (Findings 64, 68, 73, 95, 244). [98]

251. Waltham made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Waltham Records	
\$2,414.70	11/24/70	House Order	Gibson Products Co. Attn: Gary Leverett 519 Gibson St. Seagoville, Texas	5%	1969	Warehousing allowance for 1969 purchases	CX 204B-Levitt 1 31
\$5,937.75	5/20/71	House Order	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn: Gary Leverett	5%	1970	Warehousing allowance	CX 201A-Lehman 1 72; Levit 1813-15, 1822-23, 1829-31
\$6,776.00	3/13/72	House Order	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn: Gary Leverett	5%	1971	Warehousing allowance	CX 202A-Lehman 1 73; Levit 1829-31
\$7,290.00	4/16/73	Credit Auth.	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn: Gary Leverett	5%	1972	Warehousing allowance	CX 203A-Lehman 1 Levitt 1 31
\$8,387.00	3/11/74	House Order	Gibson Products Co. 519 Gibson St. Seagoville, Texas	5%	1973	Warehousing allowance	CX 209A-Levitt 1 31

[99]252. During the 1969 to 1974 time period, Waltham conducted a cooperative advertising program that offered 10 percent off the face of invoices. The program covered watches, though not clocks or jewelry, and was made available to all retail and discount stores, but not to catalog stores. Retail and discount stores did not have to meet any requirements in order to participate in the advertising program (Levitt 1797-1800, 1858; CX 214A-B, 215A-B).

Payments under Waltham's cooperative advertising program (see, e.g., CX 214A-B) were made by credits to the customer's account (Lehman 1284). [100]

253. Waltham made the following advertising allowance payments to the respondents:

Amount	Date of Payment	Form of Payment	Payee	Description of Payment	
\$300.00	7/25/73	Check	Gibsons 519 Gibson St. Seagoville, Texas	For advertising ladies' and men's rings and pendants in June tab	CX 195A-D
\$250.00	9/16/74	Credit Auth.	Gibson's Inc. 519 Gibson St. Seagoville, Texas	Christmas Tabloid, 1973	CX 213A-B



[101]254. The prerequisite showing of sales of goods of like grade and quality involved in such tabloid promotions with respect to Gibson stores and other Waltham customers competing in the resale of such goods has not been made (Finding 259).

255. Waltham's line of watches were distinguished by price, style, color and quality (Levitt 1778, 1958). There were differences in the number of jewels; some watches were larger than others; some had dials of varying colors; some were stainless steel; some were calendar, some day and date; some were automatic, some not (Levitt 1958-60). Waltham had approximately 500 watches, priced from \$10 to \$1,000 (Levitt 1776).

Waltham considered one group of watches to be those in the \$15 to \$50 category; other groups were in the \$50 to \$75 and \$75 to \$100 categories (Levitt 1780). The \$15 to \$50 group of watches, however, is comprised of a large number of individual types of watches (Levitt 1957-58). No customer of Waltham ever purchased all of the types of watches in the \$15 to \$50 group (Levitt 1959).

256. Waltham sold watches in the \$15 to \$50, \$50 to \$75 and \$75 to \$100 categories to Gibson stores during the 1969 to 1974 time period (Levitt 1775, 1780-81, 1794). The \$15 to \$50 group of watches purchased by Gibson stores might be entirely different from the group of watches in the same price range sold to another Waltham customer (Levitt 1957). Furthermore, individual Gibson stores did not necessarily purchase the same group of \$15 to \$50 watches as other Gibson stores (Levitt 1957, 1959).

257. There were leased jewelry departments in some of the Gibson family owned and franchise stores in various locations, including Dallas, Fort Worth, Lubbock and Amarillo, Texas (Levitt 1954-55). Waltham sold its merchandise to individuals who leased such space in Gibson stores (Levitt 1996-97). Resale of Waltham products by leased departments in Gibson stores is not a sale by the Gibson store (Levitt 1956, 1986-87).

258. Waltham made direct sales of its watches in the \$15 to \$50 group to the lease division of Zale Company, which operated leased departments in other stores<sup>54</sup> during the 1969 to 1974 time period (Levitt 1789-90, 1930-31). There is no record evidence as to the specific model, style or price of the watches purchased by Zale, nor is there any evidence of the exact dates of those purchases. [102]

Waltham watches were carried in all Target stores in 1974 and 1975 (Doyle 4367-70). There is no evidence in the record as to the model,

<sup>54</sup> For instance, Zale leased the jewelry department in Globe stores (Levitt 1946).