IN THE MATTER OF

GENERAL MOTORS CORPORATION

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SECTION 2(d) OF THE CLAYTON ACT AND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9114. Complaint, July 19, 1978—Final Order, June 21, 1984

This order dismisses the Commission's complaint charging a Detroit, Mich. motor vehicle manufacturer with allegedly violating the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act by failing to make promotional allowances available on proportionally equal terms to all competing rental and leasing firms. In its opinion, the Commission noted that "in light of the Commission's public interest mandate" the Commission and the courts must be careful "not to expand the ambit of legislation beyond that set forth by Congress" and the Commission will therefore "eschew efforts to broaden application of the Robinson-Patman Act beyond that established by law."

Appearances

For the Commission: *Renee S. Henning.*

For the respondent: *Frederick Rowe, Kirkland & Ellis,* Washington, D.C.,

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, General Motors Corporation [hereinafter referred to as GM], has violated and is now violating the provisions of Section 2(d) of the Clayton Act, as amended (15 U.S.C. 13), and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. GM is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 3044 West Grand Boulevard, Detroit, Michigan.

PAR. 2. GM is the largest manufacturer of automobiles in the United States. In 1977, GM sold approximately 6.6 million automobiles, trucks and coaches in the United States. During 1977, GM's net sales exceeded $54,961,000,000. GM's net income during 1977 exceeded $3,337,000,000.

PAR. 3. In the course and conduct of its business, GM has been and

is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and GM's methods of competition are and have been in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended. [2]

The acts and practices herein described in connection with GM's offers and grants of advertising allowances and other expenses [hereinafter collectively referred to as agreements] are and have been in commerce, as "commerce" is defined in the Clayton Act, as amended, and are now and have been in or affecting commerce as the term "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. GM sells its automobiles and trucks [hereinafter referred to as vehicles] to dealers which, in turn, sell the vehicles to rental and leasing companies [hereinafter referred to as GM customers]. As more particularly described herein, GM deals directly with GM customers in administering its agreements in connection with the sale of its vehicles.

PAR. 5. In the course and conduct of its business, GM has paid or contracted for the payment of something of value to or for the benefit of some of its GM customers, as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such GM customers in connection with the distribution of vehicles sold by GM. GM has not made or offered to make such payments for services or facilities available on proportionally equal terms to all of its other GM customers competing with such favored GM customers.

For instance, GM has engaged in agreements with certain GM customers, including but not limited to, National Car Rental System, Inc., whereby payments have been made for advertisements linking vehicles sold by GM with the vehicles offered for rent or lease by GM customers to the value and benefit of said customers. Typical are advertisements placed by National Car Rental System, Inc., which include phrases such as: "We feature General Motor Cars." Payments for these agreements have been made by GM to GM's customers, or their agents. GM has not offered to pay, has not paid or otherwise made payments available on proportionally equal terms to all of its GM customers competing with the favored GM customers. [3]

COUNT I

Alleging violation of Section 2(d) of the Clayton Act, as amended.

PAR. 6. The allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. The acts and practices of respondent, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13).

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 8. The allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 9. The aforesaid acts and practices of respondent GM violate the policy of Section 2(d) of the Clayton Act, as amended; all to the prejudice of the public; have the tendency and effect of preventing and hindering competition and may tend to create a monopoly in the vehicle rental or leasing businesses; and constitute unfair methods of competition in commerce and unfair acts or practices in or affecting commerce, within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 29, 1983

PRELIMINARY STATEMENT

By Complaint issued on July 19, 1978, respondent General Motors ("GM") is charged with violation of Section 2(d) of the Robinson-Patman amendment to the Clayton Act, 15 U.S.C. 13(d), and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

The Complaint alleges that GM sells automobiles and trucks to dealers which, in turn, sell the vehicles to rental and leasing companies, and that GM deals directly with rental and leasing companies in administering its advertising agreements in connection with the sale of its vehicles. (Complaint, ¶ 4)

The Complaint also alleges that GM has paid some rental and leasing companies for advertising furnished by such companies in connection with the distribution of vehicles sold by GM, and that GM has not made such payments available on proportionally equal terms to all other competing rental and leasing companies. (*Id.*, ¶ 5) As an example, the Complaint alleges that GM has entered into advertising agreements with National Car Rental System, Inc., whereby GM pays for advertisements placed by that firm which include phrases such as: "We Feature General Motors cars." (*Id.*)

In Count I, the Complaint alleges that GM's acts and practices violate Section 2(d) of the Clayton Act. In Count II, the Complaint alleges that the same acts and practices violate Section 5 of the FTC

Act, in that they allegedly (a) violate the policy of Section 2(d) of the Clayton Act, to the prejudice of the public; (b) have the tendency and effect of preventing and hindering competition and may tend to create a monopoly in the vehicle rental or leasing businesses; and (c) constitute unfair methods of competition in commerce and unfair acts or practices in or affecting commerce. (*Id.*, Count II)

In its Answer filed on August 17, 1978, GM generally denies the various allegations of the Complaint. The Answer affirmatively alleges that: (a) to support the retail sales efforts of GM dealers in offering GM vehicles to the new car consuming public, GM purchases advertising from many sources and media, occasionally including rental and leasing companies or systems which promote and feature GM products in their advertising, (b) GM does not purchase, nor is it obligated to purchase, advertising from all media or other potential suppliers of advertising, (c) rental and leasing firms are engaged in the business of offering a service to their customers which includes the opportunity for potential new car customers to "test drive" GM products, (d) there is no connection between GM's purchases of advertising and the rental and leasing [2] companies' purchase of GM or other vehicles from independent franchised GM dealers, and (e) GM's purchases of advertising are a lawful, procompetitive activity. (Answer, ¶ 5)

The Answer affirmatively alleges that GM's purchases of advertising have benefited competition within the automobile industry and within the rental and leasing industry and have benefited consumers of both new cars sold by dealers and of services offered by rental and leasing companies. (*Id.*, ¶ 9) The Answer also affirmatively alleges that the Complaint fails to state a claim upon which relief can be granted because, *inter alia,* (a) rental and leasing companies are not customers of General Motors, (b) the advertising purchased by General Motors is not purchased in connection with the sale or resale of any product or commodity, and (c) rental and leasing companies do not resell any products or commodities, but rather provide a service to their customers. (*Id.*, ¶ 10)[1]

On April 28, 1980, the parties signed a consent agreement proposing to settle the proceedings. By order dated May 23, 1980, the consent agreement was certified to the Commission, which in turn withdrew the matter from adjudication pending its consideration of the proposed settlement. The consent agreement was ultimately not approved, and by Commission order dated March 12, 1982, the matter was returned to adjudication. By order dated March 17, 1982, the

[1] The Answer asserts additional two affirmative defenses: discriminatory enforcement and violation of the terms of a protective order entered in *In re Hertz Corp.*, Docket No. 9033. (Answer ¶ 11) GM elected to waive its protective order violation defense at hearing. (tr. 1519–21) The other affirmative defense will be dismissed as a matter of law. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Indus. v. FTC*, 355 U.S. 411, 413 (1958).

proceeding was assigned to me for hearing because of my predecessor's retirement.

On April 21, 1982, I adopted a stipulation by which, complaint counsel abandoned any claim that GM's acts and practices in issue caused any injury to competition. In the Stipulation, complaint counsel agreed that "they will not pursue the third of their general theories of violation of Section 5, *i.e.*, the Section 5 injury theory." (Stip., ¶ 7) Specifically, the abandoned theory was that the GM acts and practices covered by the Complaint allegedly "constitute a violation of Section 5 because of their effect on competition." (Stip., ¶ 1(c)) Based on complaint counsel's decision to drop their Section 5 injury theory, the parties agreed that "[n]either the effects on competition nor the lack of effects on competition of the GM acts and practices covered by the [3] complaint are in issue in this case" and that "[e]vidence regarding the competitive effects, as well as evidence regarding the lack of competitive effects, of these GM acts and practices is irrelevant and inadmissible and, therefore, will not be offered in this case by complaint counsel or GM." (*Id.*, ¶¶ 5, 6)

With the adoption of the Stipulation, complaint counsel's theories of violation of Section 5 of the FTC Act are as follows:

(a) That the GM acts and practices covered by the complaint violate Section 5 of the Federal Trade Commission Act because they constitute a violation of Section 2(d) of the Clayton Act.

(b) That these GM acts and practices also violate the spirit of Section 2(d) and, thereby, violate Section 5. Under this theory, Section 5 would fill gaps, if any, in the proof of the Section 2(d) violation. (Stip., ¶ 1)

On September 14, 1982, less than three weeks before the trial was scheduled to commence, complaint counsel filed a motion for summary decision. By order dated October 4, 1982, complaint counsel's motion was denied as tardy. As required by Rule 3.24(a)(5) of the Commission's Rules of Practice, an order specifying facts that appear without substantial controversy was entered on October 8, 1982.

Trial commenced on October 5, 1982 in Washington, D.C. and concluded there on November 15, 1982. Complaint counsel called 13 witnesses; GM called three. Additional testimony was received from four other Commission witnesses by deposition, affidavit and interrogatories. The record includes 3,177 transcript pages and 485 exhibits, many multi-paged. On April 18, 1983, the parties filed proposed findings and post-hearing briefs. On June 24, 1983, the parties filed reply findings and briefs.

The parties were directed to prepare document lists in accordance with the Commission's guidelines in *General Motors Corp.*, 99 F.T.C.

464, 555 n. 1 (1982). The parties complied and those lists were admitted as exhibits CX 1A–Z–30, CX 2A–R, and RX 144A–O, and the record was closed on August 15, 1983.

Any motions not specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of facts made herein are based on a review of the entire record and upon consideration of the demeanor of the witnesses who gave testimony in the proceeding. [4]

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.

Abbreviations

The following abbreviations are used in references to the record of this proceeding:

tr.	– Transcript page and line number, sometimes preceded by witness' name
CX	– Complaint counsel's exhibit, followed by its number and in some cases pages
RX	– Respondent's exhibit, followed by its number and in some cases pages
f.	– Finding, followed by its number
ff.	– Findings
RAD-Supp	– Respondent's response to request for admissions, dated August 23, 1982, followed by a reference to a numbered paragraph.
GM	– General Motors Corporation
GMAC	– General Motors Acceptance Corporation
car	– automobile and/or truck
Avis	– Avis Rent-A-Car System, Inc.
Budget	– Budget Rent-A-Car Corporation
Hertz	– Hertz Corporation
National	– National Car Rental System, Inc.

Definitions

a. *Fleet* is a new car customer registering at least ten new vehicles annually, and includes commercial companies, political subdivisions, and rental and leasing firms. (Vader tr. 3018, Vader CX 7780Z–10; McClintock tr. 1138, 1242) [5]

b. *Leasing transaction* is the lease of a car to a customer for a period of six months or longer, normally ranging from twenty-one to thirty-

six months for automobiles to over five years for trucks. (CX 7777–11, Z–38; Oshry tr. 1903–14; CX 7743D)

c. *Rental transaction* is the rental of a car to a customer for a period ranging from one day to six months. (CX 7777Z–11, Z–38; Nevel tr. 1032–33; CX 7743D)

d. *Favored* rental and leasing firms use GM cars and receive more advertising payments per car from GM pursuant to an advertising agreement than their competitors.

e. *Disfavored* rental and leasing firms use GM cars but receive either no advertising payments from GM or less than their competitors pursuant to an advertising agreement. **[6]**

I. Findings of Fact

A. *General Motors*

1. General Motors ("GM") is a Delaware corporation, with its principal office and place of business located at 3044 West Grand Boulevard, Detroit, Michigan. (Complaint, ¶ 1; Answer, ¶ 1)

2. GM is the largest manufacturer of cars in the United States. During 1977, GM sold 6.7 million cars and trucks in the United States, and had net sales of $54.9 billion and net income of $3.3 billion. (Complaint, ¶ 2, Answer, ¶ 2)

3. GM sells its new cars and trucks to franchised dealers who sell them to consumers, including rental and leasing firms. (Complaint, ¶ 4, Answer, ¶ 4)

4. GM is engaged in interstate commerce and is acting in the course of such commerce. (Order Specifying Facts, dated October 8, 1982)

B. *GM and Franchised Dealers*

5. GM has franchise contracts with new car retail dealers. These franchise contracts are called sales and service agreements. (McClintock tr. 1209)

6. In 1983, GM has franchise sales and service agreements with about 12,000 dealers. (McClintock tr. 1199)

7. GM has five car divisions: Chevrolet, Buick, Oldsmobile, Pontiac and Cadillac. (CX 7741B; CX 7758C) Some dealers have franchise agreements with a single GM division. Others have franchise agreements with two or more divisions. (McClintock tr. 1201–03, 1206–07, Quick tr. 1455)

8. The sales and service agreement permits a dealer to purchase and resell to consumers the products of a GM division at a particular location, and to use that division's mark. (McClintock tr. 1210) In return, the agreement requires the dealer to sell new cars manufac-

tured by the division, to carry and sell replacement parts for those cars, and to operate a service department for repair and maintenance of those cars. (McClintock tr. 1213, 1216–17; Quick tr. 1405–06, 1457)

9. GM franchised dealers are independent businessmen. (Quick tr. 1462; McClintock tr. 1213, 1221; Uliano tr. 2450) They are not owned or controlled by GM. (Quick tr. 1408) [7]

10. Other lines of business in which a franchised dealer may become involved commonly include the rental and leasing of cars, as well as sales of competing makes of new cars (*e.g.*, Datsun or Saab), operation of a used car lot, operation of a body shop for the repair of wreck damage, financing or insurance. (McClintock tr. 1213–16; Quick tr. 1406–07, 1409).

11. Franchised dealers may participate in car rental and leasing businesses through common ownership, a separate subsidiary, or a department or division of the dealership. (*E.g.*, McDougal CX 3244Z–16 - separately incorporated rental and leasing operations; Avery CX 2219A–C, RX 1E - one-third ownership interest in a rental business run as a division of the dealership as well as a leasing business owned by the dealership and run as a division; Quick tr. 1370–73, 1406–07 - rental and leasing division or department)

12. Most franchised dealers who operate a car rental business restrict their operation to "shop or service rentals," providing substitute transportation to a person whose own car is being repaired in the dealership's service department. (Vader tr. 3015–16; Vader CX 7780Z –11; Avery RX 1C)

13. In 1979, of 10,369 GM dealers, there were 6,912 leasing cars. There were 4,957 GM dealers who ran their leasing operation as a department of the dealership rather than as a separate business entity. (CX 7778M, F)

14. In 1979, there were 4,995 GM dealers renting cars. There were 4,194 dealers who ran their rental operation as a department of the dealership. There were 3,081 GM dealers engaged in shop rentals only, 267 in public rentals only and 1,647 in both shop and public rentals. There were 578 GM dealers who were members of a daily rental system such as National, Avis, Hertz or Budget. (CX 7778F)

C. *Distribution of GM Cars*

1. Orders for Cars

15. GM franchised dealers submit orders to GM for new GM cars on an ongoing basis. (McClintock tr. 1221–22) New GM cars are only built to a dealer's order, with the exception of cars that GM uses itself or sells to the federal government or the Red Cross. (Brazill tr. 2763)

16. Dealer orders for new GM cars are either "stock orders" or "sold

orders." A stock order is one where the dealer is purchasing the car for his new car inventory for subsequent retail sale. A sold order is one where the dealer is buying the car for resale to a consumer with whom he has negotiated a contract of sale. (McClintock tr. 1221–22) [8]

17. Upon receipt of a dealer order, GM forwards it to the assembly plant for production. (McClintock tr. 1222) Once built, a new GM car is shipped to the ordering dealer's premises or to a location he designates. (McClintock tr. 1226)

18. At the time of shipment, GM receives payment from the dealer for the new car, and ownership and title to the car is transferred from GM to the dealer, either by certificate of origin or bill of sale. (McClintock tr. 1227–31)

2. Prices of New Cars

19. The "dealer invoice price" is the amount a franchised dealer pays GM for the new car upon shipment. (McClintock tr. 1253; Ashbaugh tr. 999–1000; Brazill tr. 2725) The dealer invoice price is the same for all dealers for the same make, model and equipment at any given time. (McClintock tr. 1254; Brazill tr. 2732; Uliano tr. 2463)

20. Included in the dealer invoice price is a small amount (from 1% to 3%), called a "holdback," that is later paid to the dealer on a periodic basis that he selects. This amount is "held back" and credited to the dealer's account with GM so as to provide the dealer with a contingency reserve fund in the event of an unexpected financial emergency. (Brazill tr. 2725–26; Ashbaugh tr. 999–1000)

21. Federal law, 15 U.S.C. 1231–1233, requires all automobile manufacturers to post a manufacturer's suggested retail price ("MSRP") on the window of a new car. (McClintock tr. 1254; CX 7751W, Vader CX 7780Z–17–18) The dealer and the consumer frequently agree on a price different from the MSRP. (McClintock tr. 1254–55)

22. On occasion, GM offers "price protection," agreeing that the price of a car to the dealer will not be increased between the time the dealer enters into the contract of sale with his customer and the time the car is delivered to the dealer. (Vader tr. 3047; Vader CX 7780Z–114–15; Ashbaugh tr. 991)

23. State law in some jurisdictions requires that automobile manufacturers offer price protection to their franchised dealers. (*E.g.*, Cal. Veh. Code Section 11713.3(h) (West 1982); Mich. Stat. Ann. Section 19.856(34)(d) (Callaghan 1982); Minn. Stat. Ann. Section 80E.13(d) (West 1983))

24. On occasion, GM also offers "price assurance," agreeing that, as to a new model car, the price to the dealer will not exceed the price

for the prior year's model plus a certain percentage. (Vader tr. 3048–51) **[9]**

25. The price and other terms at which a consumer purchases a new GM car from a franchised dealer are negotiated between the consumer and the selling franchised dealer. (McClintock tr. 1221; Quick tr. 1410–11; CX 7735F)

3. Delivery of Cars

26. Upon its arrival from the factory at the dealership or other dealer-designated location, a new GM car is inspected and conditioned by the dealer or his authorized representative. Thereafter, delivery of the car is made to the consumer. (McClintock tr. 1261–62; Brazill tr. 2711)

27. GM usually delivers new cars ordered by its franchised dealers to their dealership premises. (McClintock tr. 1226; Brazill tr. 2724–25; Uliano tr. 2455) However, at a franchised dealer's request, a new car may be delivered to another location designated by the dealer pursuant to GM's drop shipment policy. (McClintock tr. 1226, 1260–67)

28. GM franchised dealers may request drop shipment of new cars from GM where the dealer has agreed to deliver the cars directly to the fleet user. Either the selling dealer or another franchised dealer receives the cars and completes the inspection and conditioning at the fleet user's location. (CX 7774A–B, G, I)

D. *Dealers Rent and Lease Cars*

1. GM Encouragement

29. The GM Dealer Sales and Service Agreement has a standard agreement for all five GM car divisions providing that it is the responsibility of the dealer to:

> Fulfill the transportation needs of customers on an active, effective and competitive basis, by Dealer's direct sales of new Motor Vehicles and the rental and leasing of Motor Vehicles through rental and leasing operations conducted by Dealer pursuant to the provisions of . . . this Section. . . .

(CX 7781Q, E; McClintock tr. 1209; *see also* CX 7777Z–19, CX 7781S–T)

30. In 1975, there were more than 300 GM dealers that were National licensees. (CX 4062–I; Uliano, tr. 2366–67; CX 4037A, F–G, Q; CX 4035D) **[10]**

31. Some Avis licensees are GM dealers. (CX 2065–I - Brad Smith Chevrolet serving Crested Butte, Gunnison, Montrose, and Telluride, Colorado, tr. 826–27; CX 7778M)

32. In 1972, sixty-three Budget licensees were GM dealers. (CX 2211T; CX 2220Z–97 - Belzberg)

33. Some Dollar Rent-A-Car outlets are GM dealers. (CX 2715, pp. 3–4, 14, 1)

2. Genway Corporation

34. The Dealer Division of Genway Corporation ("Genway") provides financial and insurance services to GM dealers. It has about 500 GM dealers licensed, with at least one dealer in every state and about half of them in the northeast quadrant of the country. (CX 3244N, P)

35. Genway buys cars from a GM dealer and leases the cars back to the same dealer, who then rents or leases the cars to the public. (CX 3244T)

36. As of June 30, 1982, there were 13,540 vehicles leased under the Genway logo. (CX 3244V)

37. Genway provides GM dealers with financing for the cars, insurance, financial management and control information, and with experienced field personnel to help the dealer in the rental and leasing business. (CX 3244S)

38. GM dealers pay $1250 for a Genway lease and rental license. (CX 3244W)

39. Genway finances the purchase of vehicles from GM dealers with money borrowed from GMAC. (CX 3244Z–43)

40. The GM dealers in the Genway network purchase cars directly from GM. (CX 3244Z, Z–41; McClintock tr. 1153–54, 1211–12) For financing purposes, the Genway GM dealers later transfer title to some of the cars already being used in their rental and lease fleets to Genway. They lease these cars back immediately for their rental and lease fleets, without ever giving Genway physical possession of the cars. Typically, by the time Genway purchases the car for immediate leaseback, the car has already been leased out by the dealer to a customer and is in the customer's hands. (CX 3244Z–40–43, Z–32 - McDougal; CX 3238K)

41. Genway and its Chevway Division had advertising agreements with GM during the period 1973 to 1980. Under these agreements, GM reimbursed, among other things, 50% of the cost [11] of local yellow page telephone directory listings appearing under the name "CHEVWAY" and including the names of local Chevrolet dealers. (CX 3243A)

E. *GM's Connection with Fleet Sales*

1. Prices

42. GM provides its dealers with price lists showing the dealer invoice price, the MSRP, and the price of optional equipment. (McClintock tr. 1257–58)

43. Rental and leasing firms sometimes receive these current price sheets for GM cars from a GM division. (Ashbaugh tr. 869–70; Uliano tr. 2407–08)

44. GM representatives sometimes discuss with rental and leasing firms prices at which they can get cars from GM dealers. (Uliano tr. 2407–08; Kieffer 2265–69)

45. GM representatives sometimes suggest to a rental and leasing firm a dealer to buy cars from. (Kieffer 2265–69)

46. A GM factory representative has advised Trans Rent-A-Car of potential price increases. (Furman tr. 1613–14)

47. GM fleet representatives tell rental and leasing firms when GM is offering free air-conditioners to its dealers that will reduce the price. (Korn tr. 2120–21; Kieffer tr. 2261–62)

48. In 1982, GM mailed fleet buyers an itemized list of the MSRP of various options, such as tilt steering wheels and tinted windows. GM wrote these fleet buyers that their "savings" per car under the program would be $200. (CX 5227Y; CX 7510–I ("$400 savings"))

49. In 1981, GM notified Colonial Car Lease Inc., that guaranteed interest rate financing will be offered for fleet orders on certain GM models, if the orders are received prior to that model's announcement date. (CX 7510C)

50. GM provides cash bonuses to fleets for fleet orders received by a certain date. GM writes rental and leasing firms directly to notify them of this fleet order program and tells them to contact its GM fleet account personnel if they have any questions. (CX 4109F; CX 7510B)

51. When GM offers a price assurance program for all orders received prior to official announcement of the prices on the new cars, GM notifies rental and leasing firms by letter. For example, in 1982, GM promised Colonial Car Lease in a letter that 1983 prices of certain GM models would be no higher than [12] they were on June 14, 1982, for orders received prior to the official price announcement date, and no higher than June 14 prices plus 2% on other models. (CX 7510–I)

2. Advertising

52. GM advertises its cars in national publications such as *Newsweek* and *People* using MSRP. (CX 7766D–F; CX 7751Z–6)

53. GM sometimes advertises price comparisons based on dealer invoice prices. In a 1982 GM *Business Week* advertisement aimed at fleets, GM stated that "with Chevrolet Celebrity based on dealer invoice costs of higher priced nameplate versions of similar fleet-equipped front-wheel-drive cars, the price is up to $504 less." The advertisement asks: "Why should Celebrity be on your selector list? Multiply $500 times your number of fleet cars." (CX 7766C)

54. *Automotive Fleet* magazine is aimed at rental and leasing firms

and other fleet operators. (McClintock tr. 1241–42; CX 7734A, Q, Z53–54) GM advertises its prices in *Automotive Fleet.* (CX 7734K–L) ("Consider the advantages of a low-cost, low scheduled maintenance fleet car: Chevette . . . . Chevy Chevette 4–door is the lowest priced 4–door hatch-back in America!") (CX 7734L)

55. GM advertises its cash bonuses to consumers publicly through advertisements in *The Wall Street Journal, Time, Business Week,* and other publications. (CX 7728E–F, CX 7766A–B)

3. Sales Contacts

56. GM's new model year begins in September or later. (CX 4109B, E; CX 7510C, I; Brazill tr. 2666–67) During the summer preceding the model year, GM contacts fleets directly, encouraging them to place their orders. (CX 2220Z84 – Belzberg; CX 5701; CX 4109)

57. In April or May, GM dealers begin placing their own orders with GM for cars with a September introduction date. In June, the dealers begin taking orders from fleets and other accounts and submitting them to GM. (Brazill tr. 2666–68, 2721–22)

58. Rental and leasing firms such as Colonial Car Rental, Budget, and Sun Auto Rentals typically order new model GM cars months in advance of delivery. (Uliano tr. 2460–62; Korn tr. 2134; CX 2220Z–80–81 - Belzberg)

59. When rental and leasing firms such as National and Thrifty Rent-A-Car System go to purchase GM cars, the starting point for discussion is the GM factory invoice price. (Uliano tr. 2369–71; CX 5300Z–67–68Z–10 - Stemmons; Vader tr. 3047–49) **[13]**

60. Rental and leasing firms such as National, Thrifty Rent-A-Car System, and Sun Auto Rentals frequently buy GM cars at a price based on an agreed amount above the dealer's invoice price, without knowing what the invoice price is. (Korn tr. 2134, 2130–31; CX 5300Z–67–68 - Stemmons; CX 2220Z–80–81 - Belzberg; Uliano tr. 2369–71)

61. In purchasing a GM car, most rental and leasing firms agree to pay the factory invoice price plus a markup which usually is $50 or less. (Furman tr. 1638–39, 1625; CX 5300Z–11 - Stemmons)

62. Under the Price Protection Program, GM notifies rental and leasing firms, as well as GM dealers, that there will be price protection for all cars ordered and delivered by specified dates. GM tells the rental and leasing firms that when they take delivery of the car six months later, they will pay the price at which they ordered the car. (CX 2220Z–84–85; Uliano tr. 2460–61; Brazill tr. 2775–76) GM "want [s] to make sure that all customers are aware of those programs." (Brazill tr. 2775–76)

63. GM's announcement of price assurance is sent both to the dealer

and to the dealer's rental and leasing firm customer. (Uliano tr. 2456–57; CX 7510–I)

64. GM has some rebate programs and some bonus programs that involve only fleet customers. (Brazill tr. 2769; CX 4109F; CX 7770A; CX 7771B) For example, in 1981, GM had bonus programs for fleets. Cars transferred or delivered to the dealers' rental and leasing departments were eligible for the bonus. (CX 7770C; CX 7771–I, Y; CX 7773P–Q)

65. GM writes directly to rental and leasing firms to inform them of the amount of the GM bonus or allowance they will receive if they place an order for a GM car. (CX 4109F; CX 7510A–B, I)

66. GM sends bonuses, rebates, and allowances directly to fleet purchasers of GM cars. GM sends these purchasers a check for the money. (CX 2219C–D - Avery; CX 7728N; CX 7728P)

67. Prior to the beginning of a model year, GM has new model shows for its franchised dealers, the media, fleet users and the general public, at which its new cars are displayed and information regarding the models and equipment to be offered is made available. (McClintock tr. 1283–86; Reiter tr. 1821; Korn tr. 2134–35) [14]

68. Among product information literature, GM distributes a booklet called the Fleet Buyer's Guide. This booklet contains information on new models, standard and optional equipment, colors and trim selections. (Brazill tr. 2669; Reiter tr. 1823; Korn tr. 2136) The booklet does not contain any pricing information. (Reiter tr. 1823)

69. In support of the sales efforts on the franchised dealers, GM field personnel act as "goodwill ambassadors" who promote GM cars. (Korn tr. 2127–28; Brazill tr. 2669–70; Ashbaugh tr. 961–64; Kieffer tr. 2260; Uliano tr. 2373) These factory representatives also provide assistance to franchised dealers in solving delivery, warranty and related problems encountered by consumers. (Berg CX 7779Z–10; Nevel tr. 1070; Korn tr. 2127–28, 2140–41; Ashbaugh tr. 873; Brazill tr. 2669–70; Ashbaugh tr. 961–64; Kieffer tr. 2260; Uliano tr. 2373)

70. Certain GM factory representatives work with franchised dealers to address the "special needs" of fleet users. These representatives explain the technical specifications of GM products and equipment. (Brazill tr. 2654–58) At times, a GM representative and a GM dealer make a joint call during which the rental and leasing firm negotiates car purchases with the dealer. (Uliano tr. 2372, 2421, 2408–09; Ashbaugh tr. 868–69)

71. GM on occasion offers rebates on new GM cars. (Vader tr. 3045) Rebates are paid to franchised dealers, who may retain them or pass them on to their customers. (Vader tr. 3091) GM also has offered and paid rebates to consumers, including fleet users. (Vader tr. 3090–91; CX 7771B–D)

72. During the 1983 model year, GM offered an early order incentive program of providing free air-conditioners in sales to fleet users. Under this program, GM agreed not to charge its dealers for air-conditioners on cars they ordered by a certain date for their sales to fleet users. (Brazill tr. 2794–95; Vader tr. 3078; Kieffer tr. 2261–62)

73. Another program directed at fleet sales is the fleet distance delivery program. Under this program, GM pays a GM franchised dealer a $50 delivery allowance on his sales to large fleet users where the selling dealer is required to arrange for another dealer to make delivery of the car to the selling dealer's customer. This program helps compensate the delivering dealer for the car for receiving, inspecting, conditioning and delivering the car to the fleet consumer. (CX 7775)

74. In the late 1960's, GM offered buy-back and guaranteed value programs for its dealers' sales to fleet users. (Vader tr. 3045, 3087–88; Brazill tr. 2772, CX 7736C) GM has not had any similar fleet plans since the late 1960's. (Brazill tr. 2772) **[15]**

75. Under the guaranteed value program,[2] GM agreed with the dealers to guarantee a minimum used car value for the car when retired from rental and leasing service. Under the buy-back program, GM agreed to buy a used GM car after it was retired from fleet service. (Brazill tr. 2772; Vader tr. 3088–89)

76. GM notifies fleet buyers directly about various incentives for fleet orders. These incentives are free equipment or equipment at a reduced price for rental and leasing firms. (CX 7510C, I; CX 4109E; CX 5227Y; Brazill tr. 2769; Kieffer tr. 2261–62)

4. Servicing GM Cars

77. GM franchised dealers perform service on GM cars they sell to consumers. (Brazill tr. 2798; Furman tr. 1638)

78. GM extends a limited warranty to consumers of GM products, including fleet users. (Brazill tr. 2713)

79. GM's warranty covers the repair or replacement of defective parts on the consumer's car during the first 12 months or 12,000 miles of use. (CX 7744H; Ashbaugh tr. 963)

80. Ordinarily, the consumer takes the GM car to a GM franchised dealer for the performance of warranty service. (Brazill tr. 2713; Uliano tr. 2428–29; Ashbaugh tr. 963) However, under a GM in-shop warranty program fleet users who have qualified service personnel and facilities that meet certain inspection standards are permitted to service their own cars rather than bringing them to a dealer. (Brazill tr. 2774)

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[2] Cadillac, whose cars are sometimes used by rental and leasing firms, offered a guaranteed value program during the model year 1982 to rental firms. (CX 2220Z–150–51 - Belzberg)

81. Federal law imposes recall obligations on all automobile manufacturers which, when applicable, require the manufacturer to notify the consumer to bring his car in for inspection and possible adjustment by a dealer. (*See* 15 U.S.C. 1381 *et seq.* (esp. Sections 1411–1420)

5. GMAC

82. General Motors Acceptance Corporation ("GMAC") is a wholly-owned GM subsidiary. (Vader tr. 3057) GMAC is managed separately from GM, operates separate facilities, employs **[16]** separate personnel and makes its own independent business decisions. (Vader tr. 3053; 3064)

83. GMAC offers credit and financial services. Such services consist of "wholesale financing," "retail financing," and "dealer loans." (CX 7750G–I, K; Vader tr. 3057–58)

84. Under its wholesale financing plans, GMAC offers a service to GM dealers which enables them to stock products for sale at retail. (CX 7750G) Franchised dealers are not required to finance their purchases of new GM cars through GMAC. Many dealers finance such purchases themselves or through other lending institutions, including banks. (Vader tr. 3058; CX 3057–58; CX 7750G)

85. GMAC provides wholesale financing. Under its wholesale financing plans, GMAC finances more than 80% of the new vehicles shipped from GM factories to GM dealers. (CX 7750G) In some jurisdictions, GMAC is the only source of financing for GM dealers. (CX 7750H)

86. GMAC also provides retail financing. In 1979, GMAC financed almost 24% of the new vehicles delivered by GM dealers. (CX 7750–I)

87. GMAC purchases an installment contract from a franchised dealer, after the dealer sells a car to a customer. GMAC is not a party to the transaction between the dealer and his customer. (CX 7749G; CX 7750–I)

F. *Rental and Leasing Firms*

88. Estimates of the number of firms engaged in the rental and leasing of automobiles to the general public vary. According to the federal government's census data, in 1977, there were 4,236 establishments primarily engaged in the car rental and leasing business, with annual receipts totalling nearly $3.2 billion. (RX 58–I) According to R.L. Polk data,[3] in 1978, there were 8,927 car rental and leasing firms registering ten or more new vehicles annually. (RX 134; Vader tr. 3020–21) **[17]**

[3] The R.L. Polk & Company tracks and reports data on new vehicles registered by fleet users. R.L. Polk obtains such registration data from motor vehicle departments of the various states. It then compiles and reports the data to its subscribers, which include GM. (Vader tr. 3017–19; Crawford tr. 2519)

1. Service Business

89. Rental firm witnesses all testified that they are engaged in a service business. (Ashbaugh tr. 876; Nevel tr. 1093; Quick tr. 1445; Furman tr. 1648; Reiter tr. 1860; Kieffer tr. 2317; Epplen tr. 2091; Korn tr. 2178; Belzberg CX 2220Z–122; Stemmons CX 5300Y; Avery RX 1–G)

90. Leasing firm witnesses testified that they are engaged in a service business. (Nevel tr. 1085; Quick tr. 1445; Avery RX 1D)

91. The Standard Industrial Classification ("SIC") Manual, published by the federal government's Office of Management and Budget, classified automotive rental and leasing establishments as Industry No. 7512 under the "Services" division (RX 55E, P–Q), which includes hotels and other lodging places, establishments providing personal, business, repair and amusement services, and health, legal, engineering and other professional services. (RX 55P)

92. In its 1977 Census of Service Industries, the federal government classified automotive rental and leasing firms as service establishments. (RX 58G, I)

93. The federal government classified automobile dealers in the "Retail Trade" division in the SIC manual, (RX 55M–N), which includes the "[b]uying of goods for resale to the consumer." (RX 55M)

2. Rental Firms

94. The transportation service that rental firms offer includes: providing a well-maintained, safe and clean car for driving use; offering on-airport convenience, one-way rentals, reservation systems, and prompt check-ins and check-outs; honoring various credit card and corporate billing account procedures; extending rate and insurance options; having 24–hour operations and pick-up, delivery and repair services; and offering different models and sizes of cars to suit the renter. (Kieffer tr.2317–19; Stemmons CX 5300Y–Z–4; Belzberg CX 2200Z–122–26)

95. Some rental firms feature current model year cars in their fleets. (Belzberg tr. 1541; Avery RX1G) Other firms rent older, non-current model year cars. (RX 14; RX 27; Korn tr. 2168)

96. Many rental firms maintain fleets which include a mix of model sizes to meet a range of customer preferences. (Stemmons CX 5300Z–3; CX 1614C) A few firms emphasize the [18] availability for rental of special types of vehicles, such as luxury cars, jeeps, high gas mileage rating cars, compact cars or vans. (Nevel tr. 1096; RX 13B; RX 10Q-R; CX 7506Z–165, Z–168)

97. Some rental firms offer one-way rentals, allowing the customer to rent a car at one location and return it to another. (Stemmons CX

5300Z–2–3; CX 3588D-E) Others do not. (Korn tr. 2177; Nevel tr. 1099; Quick tr. 1429–30)

98. Some rental firms maintain a toll-free 800 telephone number for their customers' use in making reservations. (Korn tr. 2177; CX 1614B; Stemmons CX 5300Z–1) Others do not. (Nevel tr. 1099; Korn tr. 2117)

99. Rental firms vary in the insurance coverage they provide for their customers. Some firms, for example, offer primary liability coverage to its customers. (Reiter tr. 1853; RX 1614B; Stemmons CX 5300Z–3) Others offer only secondary liability coverage. (Nevel tr. 1097–98) Some firms offer personal injury accident insurance. (CX 1614B) Others do not. (Korn tr. 2104)

100. Rental firms vary in their hours of operation. Some firms keep their operations open 24 hours a day, 7 days a week. (CX 1614B) Other firms limit their operations to 9–10 hours a day, 5–6 days a week. (Quick tr. 1433–34; Avery RX 1G)

101. Some rental firms maintain computerized reservation systems. (CX 1614B; Stemmons CX 5300Z-Z–1; Belzberg CX 2220Z–125) Others do not. (Nevel tr. 1098)

102. Some rental firms provide on-airport convenience. (Uliano tr. 2350–51; RX 70C; Belzberg CX 2220Z–125) Others do not. (Korn tr. 2177–78; Nevel tr. 1099)

103. Some rental firms maintain a single location. (Kieffer tr. 2239) Other firms maintain locations in only one metropolitan area (Ashbaugh tr. 841; RX 13B; Nevel tr. 1054), or in a few such areas in a single state. (Epplen tr. 2063–64; Korn tr. 2163–64) Some maintain locations on a multi-state, regional basis. (Reiter tr. 1765–66; RX 1614E; RX 107–I) Others maintain locations on a nationwide or worldwide basis and can provide rental service to their customers almost anywhere they travel. (Uliano tr. 2359; RX 72C; Belzberg tr. 1474)

104. Some rental firms have special reservation clubs, which enable them to maintain customer information on file so as to permit prompt preparation of the rental contract. (Belzberg CX 2220Z–122) Other firms do not. (Nevel tr. 1098)

105. Some rental firms require a minimum multi-day rental period. (Korn tr. 2100; RX 44B) Others impose no such rental period restrictions. (RX 82; CX 1614C) [19]

106. Some rental firms offer special services that are unique to the area they serve. For example, I.R.A. Car Rental offers its customers "instant rental on-airport service," which permits the customer to avoid the inconveniences and delays often involved in airport car rental. (Kieffer tr. 2279–80; RX 4 5–I) Under this service, I.R.A. prepares the customer's rental contract in advance and has a rental car waiting for him at the airport terminal door when his flight arrives,

with the motor running and, "cool in the summer and hot in the winter." (Kieffer tr. 2249–50, 2279–80; RX 45I) No other rental firm in I.R.A.'s area provides a similar service. (Kieffer tr. 228)

a. *Rates*

107. The rates charged by rental firms for their transportation service vary substantially among firms. (Ashbaugh tr. 936; Reiter tr. 1837)

108. Examples of the rate differences among rental firms operating in the same vicinity include:

(a) In Denver, Hi-Country Rental charged rates that were lower than National's whose were lower than Avis' and Hertz's. (Epplen tr. 2082)

(b) In Minneapolis, I.R.A. Car Rental's commercial account rates are 10 to 15 percent lower than those offered by Hertz, and its over-the-counter rates are about 40 percent lower than Hertz's. (Kieffer tr. 2257–59)

(c) In Houston, Ashbaugh Auto Rental Service offers rates that are lower than the national rental firms. (Ashbaugh tr. 936)

(d) At its airport locations around the country, Ajax Rent-a-Car charged rates that were up to 40 percent lower than Hertz's, Avis' and National's. (CX 804; CX 809)

109. Rental firms may charge different rates for renting identical makes and models in the same vicinity at the same time. Thus, in late December 1974 in Florida, Hertz charged $119 per week for renting a Chevrolet Vega, while Atlantic Rent-a-Car charged $54 per week for the same model. (CX 1611A) In late 1978 in California, Hertz charged $41.95 for a one-day, 100–[20] mile rental of a Buick Regal, while Ajax charged $19.90 for the same rental on the same model (CX 4305C); and, Aero Rent-a-Car charged $15.95 for a one-day, 100–mile rental of a Ford Fiesta, while Aztec Rent-A-Car charged $9.99 for the same rental on the same model. (CX 4305D, N) In early 1979 in Florida, Avis charged $16.95 per day for renting a Chevrolet Chevette, while Greyhound Rent-a-Car charged $13 per day for the same model. (CX 2065Z –42)

110. A rental firm also may charge different rates to different customers for renting identical makes and models. National, Hertz and Avis, for example, negotiate with customers and their rates may vary among customers. (Uliano tr. 2364–66, 2463–64)

b. *Customers*

111. Customers for rental cars vary. Some firms focus on commercial or business travellers. (Kieffer tr. 2248–49; Epplen tr. 2079–80;

Stemmons CX 5300U; RX 143F) Others do not. (Korn tr. 2165) Some firms concentrate on obtaining rental business from tourists or vacation travellers. (Korn tr. 2165; Reiter tr. 1799) Others do not. (Avery RX 1F-G) Some rental firms actively solicit insurance replacement rental business. (Kieffer tr. 2325; Ashbaugh tr. 932–33; Quick tr. 1390) Others do not. (Korn tr. 2166; Stemmons CX 5300S-T)

112. Some firms specialize in local or neighborhood rentals. (Avery RX 1F; Stemmons CX 5300T) Others do not. (Korn tr. 2166–67) Some firms focus on rental business from hotel concessions. (Never tr. 1092) Others do not. (Reiter tr. 1834) Some rental firms, such as Rent-a-Wreck and Ugly Duckling Rent-a-Car, concentrate on obtaining rental business for older used cars at lower rates. (RX 125; RX 126; RX 128) Other firms do not. (Ashbaugh tr. 957; Belzberg CX 2220Z–9; Stemmons CX 5300T-U) **[21]**

3. Leasing Firms

113. Leasing firms offer a transportation service, which varies among firms, but may include: providing a well-maintained, safe and clean car; extending rate and insurance options; providing maintenance and repair services and the use of a loaner car; arranging for licensing, pick-up and delivery; making recommendations regarding suitable cars and appropriate colors and equipment for the lessee's needs; providing computerized cost information and reports to fleet leases; and offering different models and sizes to suit the lessee. (Oshry tr. 1903–05; 1944; RX 40A-F; Quick tr. 1387–88; Avery RX 1D: RX 2A-F; CX 2076A-F; CX 4405E-N; RX 142C)

114. Some leasing firms operate only locally. (Quick tr. 1387; Nevel tr. 1086–87) Other leasing firms operate regionally. (McDougal CX 3244L-M) Some firms are engaged in leasing cars nationwide. (Quick tr. 1389; RX 2B; RX 142C)

115. Some leasing firms lease cars to individuals. (Nevel tr. 1087; Avery RX 1D) Other firms lease cars to businesses. (RX 2A-F) Some firms lease to both. (CX 2076A-F)

116. Leasing rates for an identical make and model car may vary among leasing firms and among a single leasing firm's customers because of differences in the leasing services, a customer's bargaining skill, the depreciation anticipated, and the length of the lease. (Oshry tr. 1943–44; Nevel tr. 1059–60; Avery RX 1D)

4. Purchase of New Cars

117. Rental and leasing firms purchase new GM cars from GM franchised dealers. (Ashbaugh tr. 886, 892; Nevel tr. 1033; Furman tr. 1649; Reiter tr. 1812; Epplen tr. 2077; Oshry tr. 1935–36; Oshry RX

42B; Uliano tr. 2430, 2453–55; RX 50; McDougal CX 3244Z–37; Stemmons CX 5300Z–9; Belzberg CX 2220Z–132; Vader CX 7780Z–16)

118. The prices and other terms and conditions at which rental and leasing firms buy new GM cars are negotiated between the purchasing firm and the selling franchised dealer. (Kieffer tr. 2291–92; Nevel tr. 1106; Reiter tr. 1830–32; Uliano tr. 2430, 2452; Stemmons CX 5300Z–9; Oshry tr. 1935–36; Oshry RX 42B; Ashbaugh tr. 926)

119. Rental and leasing firms sometimes negotiate with a GM franchised dealer for the purchase of new GM cars which are planned for the forthcoming model year prior to the time when GM [22] has announced the prices. (Korn tr. 2134) On those occasions, the rental and leasing firms and the selling dealers may agree upon a purchase price that is above or below the yet-to-be-announced dealer invoice price. (Korn tr. 2131)

120. Rental and leasing firms decide which makes and models to acquire for their fleets based on a variety of factors: the prices offered by dealers; operating costs, including depreciation, maintenance and repair expense; customer preferences; reliability; and resale value. (Reiter tr. 1825; Stemmons CX 5300Z–13–14; Belzberg CX 2220Z–134; Berg CX 7779Z–181–82; Oshry tr. 1911–12; CX 7755B)

5. Cars As Assets

121. Rental and leasing firms use automobiles by renting and leasing them to a customer who drives the car on the road. (Ashbaugh tr. 877) Cars used in rental and leasing service accumulate mileage and suffer wear and tear. (Ashbaugh tr. 885; Oshry tr. 1956–57)

122. The length of time that rental and leasing firms use cars in fleet service varies. The record shows the period of time for certain firms:

(a) All-State Vehicle Leasing—24 to 26 months (Oshry tr. 1903);
(b) Ashbaugh Auto Rental Service—1 to 2 years (Ashbaugh Tr. 865);
(c) Budget Rent-a-Car—12 months (Belzberg CX 2220Z–108);
(d) General Rent-a-Car—14 months (Reiter tr. 1825);
(e) I.R.A. Car Rental—12 to 18 months (Kieffer tr. 2254);
(f) Thrifty Rent-a-Car—1 year (Stemmons CX 5300Z–7); and
(g) Trans Rent-a-Car—12 to 18 months (Furman tr. 1650).

123. The mileage that rental and leasing firms accumulate on cars while in fleet service varies. The record shows the mileage at which some rental and leasing firms retire their cars [23] from fleet service:

(a) All-State Vehicle Leasing—48,000 to 52,000 miles (Oshry tr. 1903, 1916);
(b) Ashbaugh Auto Rental Service—17,000 to 24,000 miles (Ashbaugh tr. 908);

(c) Budget Rent-A-Car—24,000 miles (Belzberg CX 2220Z–109);

(d) General Rent-A-Car—somewhere in the mid–20,000 range (Reiter tr. 18260;

(e) I.R.A. Car Rental—12,000 to 15,000 miles (Kieffer tr. 2254–55)

(f) Thrifty Rent-A-Car—20,000 miles (Stemmons CX 5300Z–7); and

(g) Trans Rent-A-Car—18,000 to 27,000 miles (Furman tr. 1650).

124. The average useful life of a GM car is about twelve years, ranging from 100,000 to 150,000 miles. (CX 7751N, Nevel tr. 1074; Ashbaugh tr. 866–67) Rental and leasing firms generally do not fully use or consume automobiles in their fleets. Ordinarily, cars used in rental and leasing service are disposed of before their useful life has expired. (Nevel tr. 1074)

125. Rental and leasing firms consider a variety of factors in determining when to dispose of a used car out of their fleets. Ashbaugh Auto Rental Service, for example, looks at car's time in fleet use, its odometer reading and its current used car market value. (Ashbaugh tr. 865, 980) Colonial Car Rental considers the condition of the used car market and the prevailing market prices for used cars. (Uliano tr. 2431)

126. Cars disposed of out of the fleets of rental and leasing firms are used cars. (Ashbaugh tr. 887; Quick tr. 1436–37; Oshry tr. 1958; Uliano tr. 2431; Stemmons CX 5300Z–8; Belzberg CX 2220Z–130) [24]

127. Rental and leasing firms dispose of cars out of their fleets at used car prices. (Ashbaugh tr. 895; Kieffer tr. 2316; Stemmons CX 5300Z–8) The prices such firms receive for their used cars depend on a variety of factors including the used car market, the individual condition of the car being sold, and its popularity as a used car. (Furman tr. 1663; Ashbaugh tr. 967; Reiter tr. 1839; Oshry tr. 1957)

128. Rental and leasing firms use several different distribution channels to dispose of used cars out of their fleets, including sales through auto auctions, sales to used car wholesalers, sales to used car dealers, and sales to the general public. (Nevel tr. 1043–44; RX 68B-D)

129. Rental and leasing firms occasionally scrap cars from their fleets when they are wrecked (Kieffer tr. 2316; Ashbaugh tr. 914–15; RX 5E) Rental and leasing firms occasionally have cars stolen from their fleets. (Ashbaugh tr. 913–14; RX 5D)

130. Some rental and leasing firms may dispose of used cars out of their fleets by transferring or selling them to used car lots. Pershing Auto Leasing, for example, has a used car dealer's license and maintains a separate used car lot, which buys and sells used cars, takes trade-ins, and rehabilitates used cars. (Nevel tr. 1083–85) Pershing advertises its used cars for sale in the used car classified section of the newspaper, which includes advertisements placed by used car lots and

private individuals selling their own used automobiles. (RX 15A-B; Nevel tr. 1112, 1114–15)

131. Rental and leasing firms do not sell or resell new GM cars. (Ashbaugh tr. 887; Furman tr. 1649; Korn tr. 2169; Kieffer tr. 2320; Oshry tr. 1937; Stemmons CX 5300Z–5; Belzberg CX 2220Z–128)

132. Rental and leasing firms capitalize cars used in rental and leasing service as assets on their accounting books and records, and do not treat such cars as inventory held for resale. (Ashbaugh tr. 888, 919; RX 6B; Kieffer tr. 2309)

133. Rental and leasing firms enter new cars they acquire for their fleets on their books and records at the price paid to the selling dealer. (Kieffer tr. 2311; Oshry tr. 1940) That amount is the initial book value assigned to the asset. (Ashbaugh tr. 893)

134. Cars are depreciated on rental and leasing firms' books and records while the cars are in fleet service. (Kieffer tr. 2310) The depreciation taken reduces the book value of the asset. (Ashbaugh tr. 893) **[25]**

135. The depreciation taken by rental and leasing firms on cars in fleet service reflects the change in condition and reduction in value through use in the fleet, the accumulation of mileage and wear and tear, and the passage of time. (Reiter tr. 1832; Quick tr. 1435–36; RX 69H; RX 70–I)

136. Rental and leasing firms treat depreciation as one of the expenses or operating costs of their businesses. (Furman tr. 1658; Kieffer tr. 2311; Reiter tr. 1833; Korn tr. 2174; RX 69E; RX 70E)

137. When rental and leasing firms dispose of cars out of their fleet for an amount different from the depreciated book value, the firms adjust the depreciation taken on the cars to reflect either an increase or a decrease in the depreciation expense. (Kieffer tr. 2312; Furman tr. 1657; Oshry tr. 1958–59)

138. When the used car is sold for more than its depreciated book value, the difference reduces the depreciation expense. Conversely, if the car is sold for less than its depreciated book value, the difference increases the depreciation expense. (Ashbaugh tr. 894; Reiter tr. 1833; Oshry tr. 1958–59)

139. In disposing of used cars after taking them out of fleet service, rental and leasing firms do not receive a "markup" or "profit" on the sale, since such cars are typically sold as used cars for substantially less than the firm paid to acquire them as new cars. (Stemmons CX 5300Z–8–9; Furman tr. 1665)

G. *Contracts With Customers*

140. During the agreed rental or lease period, the rental and leasing firms retain title to and ownership of the car. (Oshry tr. 1947; Oshry

RX 42D-E; Belzberg CX 2220Z–126) The agreements used by rental and leasing firms explicitly recognize the firm's continuing ownership of the car during the rental period. (RX 3B, ¶ 2; RX 28B, ¶ 1; RX 28D, ¶ 1; RX 43B, ¶ 1; RX 49B, ¶ 1; RX 132B, ¶ 2)

141. The rental and leasing firm's customer must return the car to the firm at the end of the stated time. (Ashbaugh tr. 879–80; RX 3B, ¶ 2; Belzberg CX 2200Z–127–28; RX 28B, ¶ 1) However, regardless of the stated time period, the agreements used by rental firms in renting cars to their customers generally provide that the firm may, in its discretion, demand **[26]** that the rented car be returned at a sooner time and seize the car at any time or place. (Ashbaugh tr. 883–84; RX 3B, ¶ 6; Kiefer tr. 2339; RX 49B, ¶ 2)

142. The agreements used by rental and leasing firms contain restrictions on the customer's temporary use of the car. For example, such agreements may prohibit the renter from using the car: in violation of any law or for any illegal purpose; to propel, push or tow any vehicle, trailer or object; in any race, speed test or contest; for transportation of persons or property for hire; while the odometer is not functioning properly; while under the influence of intoxicants or narcotics; to instruct an unlicensed driver; or out of the state. (Kieffer tr. 2339–40; RX 49B, ¶ 4; RX 3B, ¶ 3; Korn tr. 2177; RX 43B, ¶ 8; RX 28B, ¶ 2; RX 28D, ¶ 2; RX 132B, ¶ 7)

143. Rental and leasing firms recognize in the agreements that their cars will accumulate mileage and suffer wear and tear during the rental period. (Ashbaugh tr. 885; RX 3B, ¶ 2; RX 28B, ¶ 1; RX 28D, ¶ 1; RX 43B, ¶ 6; RX 49B, ¶ 2; RX 132B, ¶ 3) Customers are not responsible for normal wear and tear incurred during the time they have temporary use of the car and that cost is borne by the rental and leasing firm. (Nevel tr. 1103; Ashbaugh tr. 882–83)

H. *Advertising Agreements*

144. GM purchases advertising from some rental and leasing firms. (Complaint, ¶ 5; Answer, ¶ 5) Under these agreements, the rental and leasing firms agree to feature in their advertising current model GM cars by name and picture, and GM agrees to pay a portion of the advertising cost up to a maximum. (CX 1010; CX 3418)

145. In addition to showing GM cars, the advertising may provide two additional benefits to GM. One is an endorsement from a rental and leasing firm which may be perceived as a sophisticated buyer and consumer of new cars by the general public. (Stemmons CX 5300Z–62–63; Brazill tr. 2705–06)

146. The other benefit is the demonstration value in which the picture of a GM car may stimulate interest in a potential purchaser

to consider test-driving the car. (Stemmons CX 5300Z–24; Vader CX 7780Z–29; Reiter tr. 1851; Quick tr. 1412–13; RX 115H, V, X)

147. GM purchases rental and leasing advertising by corporate or divisional advertising agreements with such firms. Under a corporate contract, the rental and leasing firms agree to feature in their advertising current model GM cars from the [27] various GM divisions. Under divisional agreements, the firms agree to feature in their advertising current model GM cars from a particular division. (McClintock tr. 1307–08; Vader CX 7780Z–56–57, tr. 3002)

148. Requests for advertising agreements are initiated by rental and leasing firms. (McClintock tr. 1158; Berg CX 7779Z–11; Vader CX 7780Z–25) GM does not solicit advertising agreements from rental and leasing firms because GM receives sufficient requests to meet its needs. (McClintock tr. 1159; Berg CX 7779Z–30)

149. In requesting advertising agreements, rental and leasing firms normally outline their proposed advertising program, including the types of advertisements and media they intend to use, their advertising budget, and the amount of GM's requested participation in the program. (Berg CX 7779Z–17; Brazill tr. 2788; Reiter tr. 1780–81; Stemmons CX 5300Z–21–23; Belzberg CX 2220Z–139; RX 107A-Z–1; RX 109A-G)

150. In requesting an advertising agreement, rental and leasing firms include information and projections about the number of cars in their fleet. (CX 2112)

151. GM evaluates rental and leasing firms' requests for advertising agreements by looking at: the nature and scope of the firm's marketing plans and advertising program; the nature and scope of its operations; its integrity, reputation and image; its financial stability and competitive vitality; its historical fleet composition and size, and the way in which its fleet is maintained; and the availability of funds for rental and leasing advertising. (McClintock tr. 1161–64; Vader tr. 3004; Vader CX 7780Z–24–25, Z–39–40; Berg CX 7779Z–64–65)

152. In evaluating the nature and scope of rental and leasing firms' advertising program, GM considers the types of advertisements and media that the firm has been using and proposes to use for future advertising and considers whether the mix and variety of media are similar to those that GM itself would choose for its advertising. (McClintock tr. 1293) On the basis of its review, GM makes an assessment of the advertising value offered by the requesting firm's program. (Brazill tr. 2786; Vader tr. 3030–31)

153. GM is interested in rental and leasing advertising programs of broad regional or nationwide scope that call for placement of advertisements in a variety of media, with frequent insertions so that the advertising would appeal to a cross-section of the consuming public.

(McClintock tr. 1163; Vader [28] tr. 3004) With regard to types of media, GM is interested in rental and leasing advertising appearing on the television and radio, and in national magazines, inflight magazines, newspapers and other media. (McClintock tr. 1293–94)

154. GM considers a requesting firm's historical fleet composition to ascertain whether the firm has been using GM cars. (McClintock tr. 1162; Berg CX 7779Z–96)

155. GM also considers historic information on the size of a requesting firm's fleet and operations. (Berg CX 7779Z–115; Reiter tr. 1781–82; McClintock tr. 1170)

156. In its evaluation process, GM generally finds that leasing firms are unable to offer as much advertising value in terms of product exposure and demonstrative value as rental firms. (Brazill tr. 2704) Leasing firms typically advertise less frequently than rental firms and in a media whose circulation is more limited. In addition, leasing firms generally offer lower demonstration value than rental firms because cars in leasing service are typically test-driven by fewer potential new car buyers than cars in a rental fleet. (Vader tr. 3011)

157. Due to these differences in relative advertising value, most of GM's advertising agreements have been with rental firms rather than leasing firms. For the same reason, GM's purchases of advertising from leasing firms are generally for smaller dollar amounts than its rental advertising expenditures. (Brazill tr. 2704–05)

158. The amount of money GM pays for rental and leasing firms' advertising depends on GM's opinion of the advertising value offered, GM's effort to get the best deal it can for its advertising dollar, and the results of negotiations between GM and the requesting firm. (Brazill tr. 2685–86, 2704–05, 2743; McClintock tr. 1344, 1357)

159. GM has not purchased advertising from rental and leasing firms that simultaneously have advertising affiliations with another automobile manufacturer. (Vader tr. 3036–37)

1. Terms of Agreement

160. All advertising agreements between GM and rental and leasing firms provide that the rental and leasing firms' advertising and promotional materials specifically refer to current model GM vehicles. (CX 1010A-B, N-O, Z-Z–1) [29]

161. Some advertising agreements executed between GM and rental and leasing firms provide that all of the rental and leasing firms' advertising and promotional materials shall use:

(a) . . .

(i) A pictorial reproduction acceptable to [GM] of a current model [GM] passenger car and/or truck;

(ii) The name of such [GM] passenger car and/or truck at least once in the phrase "[Rental/Leasing Firm] will provide a [GM] passenger car or truck or other passenger car" or a similar phrase acceptable to [GM]:

With such pictoral reproductions and phrases to be at least as prominent as the manner in which such pictorial reproductions and phrases of that character appear in the samples of advertising material and promotion material heretofore submitted to [GM] by [Rental/Leasing Firm].

(b) [Rental/Leasing Firm] shall not use or permit the use of, in any advertising material and/or promotion material for which reimbursement is claimed under the terms of this Agreement,

(i) Any statement that is detrimental to the goodwill of [GM] or that disparages any vehicle manufactured by [GM];
(ii) Any pictorial reproductions of a vehicle manufactured by any manufacturer other than [GM]; or
(iii) Any reference to any manufacturer other than [GM] or the trade name of any vehicle other than a vehicle manufactured by [GM].

(*E.g.*, CX 1010D-E, Q-R, Z–3–4; CX 3418J-K; CX 5226Z–62–63, Z–74–75, Z–86–87) **[30]**

162. Some advertising agreements executed by GM and rental and leasing firms provide that all of the rental and leasing firms' advertising and promotional material shall use:

(i) A distinct picture of a current model [GM] vehicle that is specifically identified in each advertisement.
(ii) The specific phrase "We feature [GM] cars and/or trucks" and any other phrase acceptable to [GM].
In all printed advertising material and promotional material listed in paragraphs 2(a) and 2(b), the [GM] vehicle picture and feature statement shall, wherever possible, represent a minimum of 20% of the total size of the advertisement.

(*E.g.*, CX 2192E; CX 2064D-E; CX 4421E)

163. All advertising agreements executed between GM and rental and leasing firms provide that:

10. This Agreement is not made in connection with or as part of any transaction relating to the sale of any [GM] products, and nothing contained herein shall be construed as (a) an obligation of [Rental/Leasing Firm] to purchase or influence the purchase of any such products either from [GM] or others, or (b) an obligation on part of [GM] to supply [Rental/Leasing Firm] with any such products.

(*E.g.*, CX 1010J-K, W-X, Z–9–10; CX 3418P-Q; CX 5226Z–68–69, Z–80–81, Z–92–93)

164. Pursuant to the terms of the advertising agreements, GM monitors the advertising of rental and leasing firms under the contracts and regularly audits all reimbursements claimed. (Belzberg CX 2220Z–142; Anderson tr. 2808–09, 2813–17) **[31]**

165. The advertising agreements call for GM to reimburse the rental and leasing firm for 50 percent of its qualifying advertising expenditures up to a certain negotiated maximum amount. (CX 1010; CX 3418; CX 5226)

2. Typical Advertisement

166. The following is an example of a print advertisement reimbursed by GM under an advertising agreement (RX 78): **[32]**

[33] 167. Television commercials are also reimbursed by GM under its advertising agreements. (CX 10000; CX 2043A-B; CX 2044A-B; CX2045A-B; CX 2046A-B)

3. Competitors' Advertising Agreements

168. Certain rental and leasing firms with which GM has not entered into an advertising agreement have had advertising agreements with other automobile manufacturers. From at least 1972 through the present, Hertz has had an advertising agreement with Ford. (Stipulation tr. 705–06) Hi-Country Rental has had an advertising agreement with Ford. (Epplen tr. 2084) Colonial Car Rental has had an advertising agreement with Chrysler. (Uliano tr. 2417) Americar Rental System has had advertising agreements with Ford and Chrysler. (CX 7516A) Fairway, Econo-Car and Holiday rental systems, Aztec Rent-A-Car, Thompson Car Rentals, A-OK Rent-A-Car and Aero Rent-a-Car have featured Ford products in their advertising. (CX 4306F; RX 74A-D; CX 4306I; RX 10K; CX 4306H; RX 64A-B; CX 5310T; CX 4305D)

169. Certain rental and leasing firms with which GM does not currently have an advertising agreement have advertising agreements with other automobile manufacturers. Payless and Ajax rental systems have had advertising agreements with Ford. (Epplen tr. 2075–76; Kieffer tr. 2240, 2247) From 1977 through the present, Budget Rent-a-Car has had an advertising agreement with Ford. (Belzberg tr. 1548, 1551–53) From 1975 through the present, Dollar Rent-a-Car has had an advertising agreement with Ford. (Stipulation tr. 651–52, 2582–84) American International Rent-a-Car has featured Ford products in its advertising. (CX 4306K)

4. GM Payments

170. From 1976 through 1978, GM entered into advertising agreements with numerous rental and leasing firms. (CX 7733C-F) Pursuant to these agreements, GM paid money to rental and leasing firms ranging from approximately $6,013 to Leasing Associates during 1976, to $8,145,005 to National in 1978. (CX 7733K-L)

171. GM's advertising payments to selected rental and leasing firms during 1976–1978, were as follows (CX 7731A): [34]

COMPARISON OF GENERAL MOTORS CORPORATION'S ADVERTISING PAYMENTS TO SELECTED COMPANIES IN THE PERIOD 1976-1978

A Selected Vehicle Rental And/Or Leasing Companies	B General Motors Corporation's ("GM's") Payments In The Period 1976-1978	C Number Of GM Vehicles Purchased Or Registered By Each Column A Company In The Period 1976-1978	D GM's Payments On A Per Vehicle Basis
Airways Rent A Car System	$ 0	7,230	$ 0
Ajax Rent-a-Car, Inc.	297,031	3,395	87.49
All-State Vehicles, Inc.	45,000	4,999	9.00
American Int'l Rent A Car System	0	11,198	0
Avis Rent A Car System, Inc.	4,021,732	26,308	152.87
Budget Rent-a-Car Corp.	3,528,588	30,752	114.74
Dollar Rent A Car System	0	4,827	0
Econo-Car Int'l System	0	2,746	0
Four Wheels Company	196,954	31,065	6.34
Full Service Car Rental System	0	756	0
Greyhound Rent-a-Car	187,279	3,003	62.36
Leasing Associates	16,713	2,265	7.38
National Car Rental System	18,993,035	118,347	160.49
Pershing Auto Leasing, Inc.	0	537	0
Rollins International, Inc.	62,007	4,233	14.65
Thrifty Rent-a-Car Systems, Inc.	859,997	14,349	59.93

CX 7731-A (Revised) **[35]**

172. Since 1976, GM has had advertising agreements with 12 to 15 rental and leasing firms in any year. (CX 7780Z–65–66)

173. Rental and leasing systems direct their franchised licensees as to what cars to buy (CX 2217B) and rely on the licensees' marketing power when soliciting advertising payments from GM. (CX 4033W) GM calculates its cost of advertising on a per car basis for all cars purchased by the system, including those purchased by licensees. (CX 2218E). The licensees are reimbursed for local advertisements as well as receiving the benefit of the advertising for which GM pays the rental system. (CX 2220Z–70–71; CX 2714C; Quick tr. 1397; CX 4037F-G, P; CX 4062G, I; CX 4421C; CX 2064C; McClintock tr. 1180; CX 2219G)

174. In 1978, GM paid the following amounts to the following rental and leasing firms pursuant to advertising agreements (CX 7731C-F):

Ajax Rent-a-Car, Inc.	$ 177,4432
All-State Vehicles, Inc.	25,000
Avis Rent A Car System, Inc.	4,021,732
Chestnut Fleet Rentals, Inc.	21,565
The Curry Corporation	12,428
Emkay, Inc.	6,567
Four Wheels Company	102,781
General Rent-a-Car	45,268
Genway Corporation	46,909
Greyhound Rent-a-Car	173,514
Leaseway Transportation Corporation	47,904
Leasing Associates, Inc.	8,057
National Car Rental System, Inc.	8,145,005
Rollins International, Inc.	33,494
Thrifty Rent-a-Car Systems, Inc.	325,000

175. In deciding what dollar amount to pay in an advertising agreement GM analyzes the rental and leasing firms' fleet size, fleet make-up by manufacturer, past car purchases, and past growth rate. GM also analyzes that rental and leasing firms' anticipated car purchases and projected growth rate for the upcoming model year. (CX 7780Z–27; CX 7779Z–70–71; CX 2213G; CX 3418B; CX 5221E)

176. In evaluating a proposed advertising agreement, GM obtains information for estimating the number of GM cars in the rental and leasing firms' fleet. (CX 7779Z–117–18; CX 7780Z–27–28)

177. GM evaluates proposed advertising agreements on a cost per unit basis, by dividing the cost of a proposed advertising **[36]** agreement by the number of GM cars registered to those rental and leasing firms. (CX 7780Z–28 - Vader; CX 4026; CX 4017B-C; CX 2112–I)

178. GM entered into advertising agreements with National, at least in part, to increase rental fleet sales. In 1970, a GM official gave the history of those agreements (CX 4019C-D):

During the 1966 model year, General Motors' participation in daily rental fleet sales had declined to 22% with second cycle participation estimated at only 12%. Ford had entered into agreements with Hertz and National Car Rental while Chrysler had arranged similar agreements with Avis. General Motors' products were, as a practical matter, not available at airport daily rental counters.

To improve General Motors' position in daily rental fleet sales and to again make our products available through airport rental stations and, thereby, derive the exposure and demonstration advantages, negotiations were entered into with National Car Rental late in 1966. The result of these negotiations was the current General Motors-National Car advertising and service agreements which took effect on January 1, 1967.

* * * * * * *

During 1976, the year prior to the National Car Rental agreements, General Motors' participation with this account was 39.8%. Since the inception of the agreement, the lowest level of General Motors' participation was 62.9% with our estimates indicating continued improvement . . . . It is also important to note volume projections made prior to the original agreement were based on approximately 216,000 total National Car Rental purchases 1967 through 1971 and 130,000 General Motors purchases . . . . [C]onservative General Motors' estimates indicate [37] National will exceed the figures by a minimum of 47,000 units, and based on National Car Rental figures, the original estimates will be exceeded by more than 100,000 units. We are estimating, with an extended agreement, National Car Rental purchases 1967 through 1972 will total 352,000, of which 68%, or 240,000 will be General Motors' products.

179. In the early 1970's, GM amended an advertising agreement with National by reducing the dollar amount of the agreement because of National's discontinuance of certain rental and leasing operations which was expected to result in reduced National purchases of GM cars. (CX 4026; CX 4017)

180. The following list includes all rental and leasing firms that had advertising agreements with GM at any time during the period 1966 to 1978:

1. Airways (CX 7779Z–189, Z–11–13)
2. Ajax Rent-a-Car, Inc. (CX 7779Z–188, Z–11–13)
3. All-State Vehicles, Inc. (CX 7779Z–188, Z–11–13)
4. American International Rent-a-Car Corporation (CX 7779Z–189, Z–11–13)
5. Atlantic General ("General") (CX 7779Z–188, Z–11–13)
6. Avis Car Leasing (CX 2016A-I; CX 7779Z–189, Z–11–13)
7. Avis Rent A Car System, Inc. (CX 2064A-N)
8. Briggs Leasing (CX 7779Z–189, Z–11–13)
9. Budget Rent-a-Car Corporation (CX 7779Z–188, Z–11–13)
10. Chestnut Fleet Rent-a-Car Corporation (CX 7779Z–188, Z–11–13)
11. The Curry Corporation (CX 7779Z–188, Z–11–13)
12. Dollar Rental Car Systems (CX 7779Z–189, Z–11–13)
13. Emkay, Inc. (CX 7779Z–188, Z–11–13)

14. Four Wheels Company (CX 7779Z–188, Z–11–13)
15. Genway Corporation including the GM dealer division of Genway, Cars for Commerce, and Chevway (CX 7779Z–188, Z–11–13; CX 3235A-L; CX 3243A-B; CX 3244Z–3)
16. Greyhound Rent-a-Car (CX 7779Z–189, Z–11–13)
17. Hilton (CX 7779Z–189, Z–11–13)
18. Kincar (CX 7779Z–189, Z–11–13) [38]
19. Leaseway Transportation Corporation (CX 7779Z–188, Z–11–13)
20. Leasing Associates, Inc. (CX 7779Z–188, Z–11–13)
21. Luby Leasing (CX 7779Z–189, Z–11–13)
22. National Car Leasing System, Inc. (CX 7779Z–188, Z–11–13)
23. O. Hodgkins Sales Corp. ("Minicost") (CX 7779Z–189, Z–11–13)
24. Olins of New York (CX 7779Z–189, Z–11–13)
25. Payless Car Rental (Kieffer, tr. 2240)
26. Rollins International, Inc. (CX 7779Z–188, Z–11–13)
27. Thrifty Rent-A-Car System, Inc. (CX 7779Z–188, Z–11–13)
28. Trans (CX 7779Z–189, Z–11–13)
29. Transportation Vehicles, Inc. (CX 7779Z–189, Z–11–13)
30. Valcar (CX 7779Z–189, Z–11–13)
31. Yellow (CX 7779Z–189, Z–11–13)

181. The following rental and leasing firms had advertising agreements with GM since 1978:

1. Ajax Rent A Car, Inc. (CX 817A-K)
2. All-State Vehicles, Inc. (CX 1010Z-Z–11)
3. Avis Rent-A-Car Systems, Inc. (CX 2064A-N)
4. Curry-General Rent-A-Car, Inc. ("General") (CX 1615A-K; Reiter tr. 1772)
5. Genway Corporation (including Chevway, a division of Genway operating through Chevrolet dealers, and Cars for Commerce) (CX 3243A-B)
6. Greyhound Rent A Car (CX 3430A-L)
7. Leaseway Transportation Corporation (CX 3904A-K)
8. National Car Rental System, Inc. (CX 4421A-M)
9. Thrifty Rent A Car System, Inc. (CX 5300Z–34–35, G-H)

I. *Competition Among Rental and Leasing Firms*

1. Price Competition

182. Budget, Thrifty, Avis and National compete with comparative price advertising of GM cars. (CX 2210B; CX 2220Z–121 - Belzberg; CX 4305K; CX 4305J) Independent rental and leasing firms like Paige

also compete with comparative price advertising of GM cars. (CX 4305L) [39]

183. Eric D. Uliano, who had been a station manager for National, testified that he made rate surveys, calling all car rental locations in the area. (Uliano tr. 2361–63) National competes with GM dealers in renting cars. (Uliano tr. 2366)

184. Colonial Car Lease Company conducts rate surveys on rental cars by calling Hertz, Avis, National, Budget, Dollar, and Ajax. (Uliano tr. 2410) Colonial competes with GM dealers in renting cars. (Uliano tr. 2412, 2470)

185. "Off-airport" rental and leasing firms like I.R.A. may charge from 10% to 40% lower rates on the same cars rented by "on-airport" competitors like Hertz, Avis and National. (Keiffer tr. 2259)

2. Airport Rental and Leasing Firms

186. An "on-airport" rental location is a location that has a booth in an airport terminal. (Belzberg tr. 1479; Nevel tr. 1057)

187. An "off-airport" rental location is a location that is close to and serves an airport, but does not have a booth in the airport terminal. (CX 2220P - Belzberg; Kieffer tr. 2258)

188. Thrifty Rent-A-Car and General Rent-A-Car have all or virtually all off-airport locations. (Reiter tr. 1788–89; CX 1614; CX 5300G-H, S - Stemmons) Thrifty and General are favored rental and leasing firms. (Reiter tr. 1772; CX 7732R; CX 7733D, F)

189. Some off-airport rental and leasing firms are located less than one mile from the airports served by them. (Uliano tr. 2404–05; Reiter tr. 1795; CX 1614D-H; Nevel tr. 1044, 1121) The time that it takes off-airport rental and leasing firms to transport a deplaning customer to his rental or leased car often varies only slightly from on-airport rental and leasing firms. (Reiter tr. 1788–91, 1811; CX 1614D-H; Nevel tr. 1121–22)

190. In Florida, there are many off-airport rental and leasing firms, including those favored by GM advertising agreements as well as disfavored firms, in the same vicinity as the off-airport rental locations of General Rent-A-Car, a favored rental and leasing firm. In Fort Lauderdale, for example, General is approximately one mile north of the airport terminal building; there are other off-airport rental locations on the same street as General, including Dollar Rent-A-Car, Budget, Greyhound Rent-A-Car, Alamo Rent-A-Car, Sun Auto Rentals [40] of Florida, Swad, Gold Coast, Charter, and one or two others. While Budget and Greyhound have booths in the terminal, they still maintain off-airport lots for their rental cars. Outside the Miami airport, Dollar, Greyhound, Budget, Alamo, Pershing Auto Leasing, Thrifty Rent-A-Car, and some other rental and leasing firms have

rental locations in the vicinity of General; Dollar, Greyhound, and Budget have booths in the airport terminal, but still maintain off-airport lots. (Reiter tr. 1795–98)

191. Off-airport rental and leasing firms, including GM dealer rental and leasing firms, often have direct telephone lines in airport terminals. (Uliano tr. 2414–25; Reiter tr. 1793–94; CX 2219F-G - Avery; Quick tr. 1392)

192. Off-airport rental and leasing firms, including GM dealer rental and leasing firms, compete with on-airport rental and leasing firms in renting GM cars. (CX 2220Z–74 - Belzberg; Reiter tr. 1798; CX 7777Z–20; CX 2105B)

3. General Competition

193. Budget competes with GM dealers in renting cars and with rental firms having only one location. (CX 2220Z–72–73 - Belzberg)

194. Quick Motors, Inc., a GM dealer in Watertown, New York, operated a Budget rental business as well as a leasing business as divisions of the dealership and competed with Hertz and Avis in renting cars, and to some extent with national firms like Hertz and Peterson, Heather & Howell, as well as other car dealers, including GM dealers, in leasing cars. (Quick tr. 1372, 1388–90)

195. Harris Pontiac, a GM dealer, operated a Budget rental franchise and a leasing business as divisions of the dealership. It competed to some extent with Hertz, Avis, National and all rental and leasing firms in the Wilmington, North Carolina area, including other GM dealers. (Avery CX 2219A-B, F; RX 1D, E)

196. Pershing Auto Leasing has had rental locations in south Florida serving Dade and Broward counties (which include Miami, Miami Beach, Ft. Lauderdale, Hollywood); Pershing has a rental location just outside Miami International Airport. (Nevel tr. 1044–45, 1046, 1054, 1078; CX 4508) It has about 800 cars for rental or lease, which are 90% GM. (Nevel tr. 1108) Pershing's most significant competitors in renting cars include Hertz, Avis, National, Budget, and Dollar Rent-A-Car; Pershing [**41**] also competes with Greyhound Rent-A-Car and General Rent-A-Car. (Nevel tr. 1056–57) Pershing's most significant competitors in leasing cars include GM dealer rental and leasing firms and Avis. (Nevel tr. 1057–58)

197. Trans Rent-A-Car, is a west coast rental car firm which had 900 cars in 1978, more than 50% of which were GM. Its major competitors in renting cars were Hertz, Avis, National, Budget, Dollar Rent-A-Car, and off-airport rental and leasing firms such as Thrifty Rent-A-Car, Econo-Car, American International Rent-A-Car, and others. (Furman tr. 1567, 1569, 1577)

198. I.R.A. Car Rental, an Ajax franchise since 1980, is located in

Minneapolis. About 75% of the cars in its fleet of 200 cars have been GM. (Kieffer tr. 2236, 2247) I.R.A.'s competitors in renting cars include Avis, National, Hertz, Budget, Thrifty Rent-A-Car, Econo-Car, and small independent rental and leasing firms. (Kieffer tr. 2247, 2250)

199. Sun Auto Rentals of Florida, Inc. had a fleet of about 530 cars in 1980, almost all of which were GM cars. (Korn tr. 2107) It competed with Hertz, National, Avis, Alamo, Greyhound and General Rent-A-Car. (Korn tr. 2115)

200. Ashbaugh Auto Rental of Houston, Texas rents about 300 cars, 80% of which are GM. (Ashbaugh tr. 840, 843). It competes with National, Hertz, Avis and Budget and others, including two GM dealers. (Ashbaugh 850, 856–57)

201. Ashbaugh Auto Rental's GM cars and the cars offered by its competitors, including National, are the same kind of cars. (Ashbaugh tr. 846, 850)

202. General Rent-A-Car has up to 7,000 cars in its fleet, with between 80 and 90 percent GM, and it competes with Alamo, Hertz, Avis, National, Greyhound, Budget, Pershing and Dollar. (Reiter tr. 1803–04, 1796–97)

203. In 1977, twenty of the largest rental and leasing firms all bought GM cars. (CX 7708)

204. Competing favored and disfavored rental and leasing firms purchase the same models of GM models for their fleets. (Uliano tr. 2425; Nevel tr. 1053–54, 1046–47; Quick tr. 1385; Reiter tr. 1806; CX 2220Z–105–06 - Belzberg; Ashbaugh tr. 846; Kieffer tr. 2256; Korn tr. 2109) [42]

4. Referrals

205. Rental and leasing firms refer customers to one another when they run out of rental cars. Hertz, Avis, National, and Budget (including licensees that are affiliated with GM dealers) make referrals to and receive referrals from each other as well as small, independent rental and leasing firms like Pershing and Sun Auto Rentals. (Nevel tr. 1059; Korn tr. 2118–19; Uliano tr. 2367; Quick tr. 1392–93)

5. GM Dealers

a. *Quick Motors, Inc.*

206. Quick Motors, Inc., a GM dealer, had a Budget rental franchise. It operated this franchise as a department of Quick Motors from the late 1960's to 1978. (Quick tr. 1370, 1372–73, 1406)

207. Quick Motors operated its leasing business as a department of the dealership from 1950 to 1978. (Quick tr. 1372–73, 1407)

208. Quick Motors purchased most of the GM cars in its Budget rental division from the Oldsmobile Division. Quick Motors purchased most of the GM cars in its leasing division from the Oldsmobile and Cadillac divisions of GM. (Quick tr. 1376–77, 1385)

209. Title to the cars in the Budget rental division of Quick Motors, Inc. was in the name of Quick Motors, Inc., d/b/a Budget Rent-A-Car of Watertown. Quick Motors, Inc., rather than its Budget division, owned and retained title to these cars. Title to the cars in its leasing division was in the name of Quick Motors, Inc. (Quick tr. 1375, 1434)

210. The new car sales department, the Budget rental division, and the leasing division of Quick Motors were all located at the same address. (Quick tr. 1375–76, 1403–04)

b. *Harris Pontiac, Inc.*

211. Harris Pontiac, a new car dealership, had a Budget rental franchise from 1967 to 1978. The franchise was a division of the dealership. Harris Pontiac also had a leasing division. (CX 2219A-C - Avery)

212. Harris Pontiac's rental and leasing fleet was made up of cars purchased from GM. GM cars were transferred from the dealership to its Budget division. Title to the cars in the [43] fleet of the Budget division was in the name of Harris Pontiac, Inc., d/b/a Budget Rent-A-Car of Wilmington. (RX 1D; CX 2219A-B, D - Avery)

213. At Harris Pontiac the dealership, the Budget franchise, and the leasing operation shared the same location. (CX 2219E - Avery)

J. *GM Advertising Payments Are Not Made Available*

214. GM has not informed the rental and leasing industry about the availability of advertising agreements from GM. (McClintock tr. 1159; CX 7780Z–26–27 - Vader; CX 7779Z–30–33)

215. GM responds only to requests from rental and leasing firms soliciting GM advertising agreements. GM has never offered advertising agreements to rental and leasing firms on its own initiative. (CX 7779Z–156–57 - Berg; McClintock tr. 1158–59; CX 7730B)

216. GM denied all requests from Sun Auto Rentals of Florida, Inc. for advertising agreements. (Korn tr. 2111–13)

217. GM denied all requests from Colonial Car Rental for advertising agreements. (Uliano tr. 2415–17)

218. GM denied all requests from Ashbaugh Auto Rental, Inc. for advertising agreements. (Ashbaugh tr. 858–61, 863–64)

219. GM denied a request from Pershing Auto Leasing, Inc. for an advertising agreement. (CX 4508; Nevel tr. 1078)

220. GM denied a request from I.R.A. Car Rental for an advertising agreement. (Kieffer tr. 2271–72, 2235, 2238)

221. GM denied a request from Fairway Rent-A-Car for an advertising agreement. (CX 7504S)

222. GM denied a request from Ajax Rent-A-Car for an advertising agreement (CX 811)

223. GM denied a request from Olin of New York, Inc. for an advertising agreement. (CX 1652A-C)

224. GM denied a request from Dollar Rent-A-Car Systems, Inc. for an advertising agreement. (CX 2704)

225. GM's Chevrolet Division denied Trans Rent-A-Car's requests for advertising agreements. (Furman tr. 1587–88, 1602; CX 5401–I) [44]

226. GM denied a request from U.S. Auto Leasing for an advertising agreement. (CX 5502C)

227. GM denied a request from Americar Rental System for an advertising agreement. (CX 7516A-E)

228. GM has admitted that (RAD-Supp. 60):

> During the period of October 1, 1971 through December 31, 1978, GM's payments for advertising under its agreements have not reflected an equal or proportional payment among all rental and leasing companies including those which compete against each other, based on the numbers of GM vehicles purchased by them. [45]

II. Analysis

This case involves millions of dollars in annual payments made by General Motors Corporation, the largest manufacturer of cars in the United States, to a few of the largest rental and leasing firms who agree to promote GM cars in their advertising. The impact of these payments on competition in the rental and leasing business is indicated by the amounts involved.[5] In 1978, for example, GM paid National Car Rental over $8 million in advertising allowances of $160 for each GM car purchased by National that year. (ff. 170–71) Many rental and leasing firms using GM cars and directly competing with National received nothing. (ff. 214–28)

I believe this arrangement violates the very purpose of Section 2(d) of the Robinson-Patman amendment to the Clayton Act. That statute is, however, technically complex and has been interpreted to require that the advertising payments be in connection with the resale of the product—a finding which cannot be made on this record. While all of the other technical elements of a Section 2(d) violation have been proved, Count I of the Complaint should therefore be dismissed.

Count II alleges these facts to be an unfair method of competition

[There is no footnote 4.]

[5] Because of the stipulation of April 21, 1982, the record does not detail the competitive effects of the advertising agreements.

in violation of Section 5 of the FTC Act. The Supreme Court of the United States has held that this statute provides broad powers to the Federal Trade Commission to stop a trade practice which conflicts with the spirit of the Clayton Act even though it does not technically violate that law. Precedent and the preponderance of the evidence show that respondent General Motors has engaged in just such an unfair method of competition in violation of Section 5 and Count II must be sustained.

A. COUNT I

In Count I of the Complaint, alleging a violation of Section 2(d) of the Robinson-Patman amendment to the Clayton Act,[6] the parties have joined issue on two questions, namely: [**46**]

(1) whether rental and leasing firms are "customers" of GM; and
(2) whether they are engaged in the "distribution" of cars.

1. Rental and Leasing Firms As "Customers" of GM

GM sells new cars to franchised dealers. (f. 3) Many of these dealers have an additional business endeavor as a rental and leasing firm. (ff. 11, 29–41) In 1979, there were 578 GM dealers licensed by rental and leasing systems such as National, Budget and Avis. Many were receiving the benefit of payments by GM under advertising agreements with the system. (ff. 14, 30–32, 173, 181) About 500 GM dealers also receive the benefit of advertising payments from GM to Genway Corporation. (ff. 34–41)

Since these GM dealers are customers of GM, firms which compete with the GM dealers in renting and leasing GM cars are also "customers" of GM. That is the holding in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). There, a favored direct buying retailer was in competition with firms that bought the manufacturer's products through wholesalers, and the Court affirmed that for the purposes of Section 2(d) the firms buying through middlemen were "customers" of the manufacturer. Here, GM dealers with affiliated rental and leasing businesses buy directly from GM and compete with other rental and leasing firms buying cars from "middlemen" GM dealers. (ff. 183–84. 191–96, 200, 205–13) Those rental and leasing firms buying through middlemen also become, therefore, "customers" of GM for purposes of Section 2(d).

[6] Section 2(d) of the Robinson-Patman amendment to the Clayton Act, provides, 15 U.S.C. 13(d):

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furthermore, some rental and leasing firms are customers of GM through the indirect purchaser doctrine. *American News Co.* [47] *v. FTC,* 300 F.2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962).[7] GM has sufficient contacts with rental and leasing firms and sufficient influence over the price and terms upon which they buy GM cars for the doctrine to apply.

GM directs advertising at, solicits, and recognizes rental and leasing firms as customers. (ff. 53–54, 56, 62) GM contacts rental and leasing firms directly about low prices compared to competing cars (ff. 53–54), price incentives, such as free air-conditioners and options at a reduced price (ff. 47–48, 72, 76), and cash bonuses (ff. 50, 55, 64–66, 71), as well as direct offers of price protection and assurances. (ff. 22–24, 62–63) GM's factory invoice price substantially controls the price paid by rental and leasing firms to dealers. (ff. 19–21, 53, 59–61) GM sales personnel contact rental and leasing firms directly as well as with dealers, and discuss prices and solicit orders. (ff. 42–56, 70) GM sometimes delivers cars directly to the rental and leasing firms (f. 73), and authorizes those firms to do their own new car and warranty servicing. (f. 80)

Thus, the degree of control exercised by GM over fleet sales to rental and leasing firms is sufficient to make those firms customers of GM within the meaning of the Clayton Act. *Whitaker Cable Corp.,* 51 F.T.C. 958, 972–73 (1955), *aff'd,* 239 F.2d 253 (7th Cir. 1956). GM recognizes rental and leasing firms as customers by soliciting them, dealing directly with them in promoting sales, and exercising control over the terms upon which they buy. *Kraft-Phenix Cheese Corp.,* 25 F.T.C. 537, 546 (1937).

2. "Distribution" of Rental and Leasing Cars

Complaint counsel argue that rental and leasing firms "sell" cars because: (1) the firms are engaged in reselling cars on a time sharing basis, and (2) after the term of use in the rental or leasing fleet, the cars are resold by the firms. They also argue that, even if the firms do not sell cars, they "handle" cars within the meaning of the Act. Respondent argues, on the other hand, that rental and leasing firms do not compete in the [48] distribution of cars because Section 2(d) is only directed at discriminatory advertising allowances granted in connection with the resale of products, and that rental and leasing firms do not resell cars but are engaged in a service business.

[7] The indirect purchaser doctrine even applies where the direct purchaser is disfavored and the indirect purchaser benefits from the discrimination. *Perkins v. Standard Oil Co.,* 395 U.S. 642, 644, 647–48 (1969). Here, many disfavored GM dealers who are in the rental and leasing business buy direct from GM and compete with favored rental and leasing firms who are indirect purchasers. (ff. 183, 192–96, 200–01, 205–13)

a. *"Competing in the Distribution" Means Selling*

Complaint counsel argue that "distribution" as used in Section 2(d) means more than activity involved in selling and includes renting and leasing cars. While "distribution" is not defined in the statute or legislative history, I believe that the meaning of the word is limited to acts involved in the sale of commodities.

Judicial reading of the statute unanimously supports a holding that a Section 2(d) violation must involve the sale of a product.[8] In *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), the Court held that "the competition with which Congress was concerned in Section 2(d) was that between buyers who competed in *resales* of the supplier's products." (Emphasis added.) 390 U.S. at 356. In *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975), the court stated: "Section 2(d) . . . refers to payments in connection with the resale by the buyer of the goods . . . ." In *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973) the court stated: ". . . [S]ections 2(d) and 2(e) focus on resale."[9] And, the [49] Commission recently stated that Section 2(d) requires the payment to bear "a nexus to the resale or preparation for resale." *Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 725 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 103 Sup.Ct. 1521 (1983).[10]

b. *Time-sharing*

Complaint counsel argue that car rental and leasing firms sell cars on a time sharing basis. For comparison they point to the photocopier business where photocopy machines are distributed by leasing. (CSC brief 55–56) This same argument—that leases of photocopy machines are subject to the Robinson-Patman Act—was rejected in *SCM Corp. v. Xerox Corp.*, 394 F.Supp. 384 (D. Conn. 1975). Furthermore, the court coincidentally relied in part on an analogy to automobile rentals, 394 F.Supp. at 385:

> [T]he person who rents a car and pays by the miles driven could be said to have purchased a quantity of transportation . . . . [Plaintiff] does not claim Robinson-Patman

[8] The commentators agree that Section 2(d) is directed at resales. "The product that is the subject of the promotional favoritism must have been bought with the intention of resale." Kintner, *A Robinson-Patman Primer* at 235 (1970). "[Section 2(d) applies] to discrimination in allowances or services only between competing resellers of the supplier's goods." Austin, *Price Discrimination* at 124 (1959). "Although the semantic vagueness of the statutory terms of 'services or facilities,' coupled with the stricter sanctions available under Sections 2(d) and 2(e), invites strained interpretations by FTC or private plaintiffs, the legislative purpose and governing judicial rulings confine these provisions to cooperative promotional arrangements between the supplier and customer *in connection* with the customer's *resale* of the particular product." Rowe, *Price Discrimination under the Robinson-Patman Act* at 376 (1962). (Emphasis in original.)

[9] *See also, Lang's Bowlarama, Inc. v. AMF, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,158 (D.R.I. 1974); *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499, 500 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

[10] In *Clairol, Inc.*, 69 F.T.C. 1009, 1047 n. 13 (1966), 410 F.2d 647, 648 (9th Cir. 1969), the Commission held that there was a resale and refused to address the question whether "distribution" in Section 2(d) requires that "there must necessarily be a 'resale' in all cases." The statement in *Gibson*, however, shows that, while "distribution" may not require an actual sale, the commercial transaction involved must be part of the resale process.

coverage of all such cost-per-usage leases, apparently recognizing that examples such as those given do not involve a "commodity" within the meaning of the Act, even if they could be thought to involve a purchase.

c. *Used Cars*

Complaint counsel also argue that rental and leasing firms in fact sell cars since they resell the cars after using them in the rental or leasing fleet. Rental and leasing firms, however, do not resell new cars. (f. 132) They use cars in their business, and, after these assets accumulate mileage and suffer wear and tear, they are sold as used cars which are commodities of a different quality. (ff. 129–39) **[50]**

d. *"Handling" Is Part of "Sale"*

Complaint counsel argue that even if they do not sell cars, rental and leasing firms are "handling" cars and are therefore engaged in distribution within the meaning of Section 2(d). While the legislative history does not provide a definition, the term "handling" in the commercial sense is part of the business of selling such as the physical act of grading, packaging, storing or transporting goods.[11] That "handling" is part of, and was not meant to be different from, "sale" as used in the statute is indicated by the interpretation of "processing" as used in the statute. "Processing" is used in both Section 2(d) and Section 2(e) of the Act and is defined in *Corn Products Refining Co. v. FTC,* 324 U.S. 726, 744 (1945) to be a mode of treatment of materials to be changed as part of the distribution process to a different state preparatory to resale of the commodity. The Court stated that the "statute is aimed at discrimination . . . in all cases *where the commodity is to be resold,* whether in its original form or in a processed product." (Emphasis added.) Similarly, "handling" should be defined to mean the act of physically dealing with the commodity in connection with the resale, and since rental and leasing firms do not resell new cars, they do not "handle" or "compete in the distribution" of cars within the meaning of Section 2(d).

e. *Furnishing Services*

GM pays promotional allowances to a few "favored" rental and leasing firms pursuant to advertising agreements.[12] If these **[51]** rent-

[11] "Handling" was defined in *Clairol, Inc.* (initial decision adopted as the decision of the Commission), (69 F.T.C. 1009, 1031 (1966) (dicta):

> "Handling" is defined in Black's Law Dictionary (4th ed. 1951) as meaning ". . . to control, direct, to deal with, to act upon, to perform some function with regard to or to have passed through one's hands, to buy and sell or to deal or trade in" . . . .

The definition of "handle" found in Webster's International Dictionary (2d ed. 1934) includes: "to have pass through one's hands; to buy and sell; to deal, or trade in; as, they handle only fruit."

[12] GM does not make payments on a proportional basis, even among favored rental and leasing firms, so some of them are more favored than others. (f. 171)

al and leasing firms are engaged in the furnishing of a service, rather than the resale of products, Count I must be dismissed because the Robinson-Patman Act does not apply to discriminatory allowances paid to purchasers who use the product in furnishing a service, *The Times Mirror Co.*, 92 F.T.C. 230, 231 (1978):

> It is clear that the Robinson-Patman Act applies only if a challenged price discrimination involves the sale of commodities. Price discrimination in noncommodity transactions, such as the furnishing of services, is not actionable under the statute.

The test for deciding whether a business involves the sale of a commodity or the furnishing of a service is found in the *Times Mirror* case. There, the Commission held that newspaper advertising was a "commodity"—and not a service—within the meaning of Section 2(a) of the Robinson-Patman Act.[13] It is not necessary to apply that test here, however, because the Commission specifically declared that the Act was not intended to reach transactions of a purely service nature such as discriminatory bus transportation rates.[14] Although a bus company, as different from car rental and leasing firms, retains possession of the vehicle while rendering the transportation service, the businesses seem to be sufficiently similar to encourage a finding that car rental and leasing firms **[52]** are engaged in the sale of a service, or at least to discourage a finding that they are in the business of reselling commodities.

f. *A Lease Is Not A Sale*

That Section 2(d) does not apply to the business of rental and leasing firms is buttressed by *Lang's Bowlarama, Inc. v. AMF, Inc.*, 1974–2 Trade Cases (CCH) ¶ 75,158 (D.R.I. 1974). There, a bowling lane operator sued AMF, Inc., his supplier of bowling equipment (*e.g.*, lanes, balls, pin setters), alleging that AMF's sponsoring of a tournament at a competing bowling lane violated Section 2(d) of the Robinson-Patman Act. The court dismissed the complaint, holding that Section 2(d) protects only customers competing in the resale of a product, and that the operation of a bowling lane was more in the nature of a lease and was not covered by the Act. The business of car

[13] The Commission's test set out in that decision involves determining: (1) "the dominant or essential nature of the transaction"; (2) whether the product sold is "sufficiently fungible in nature to be susceptible to the kind of non-discriminatory pricing which the legislative scheme seems to encourage"; and (3) whether there is anything inherent in the transaction that "requires the particularized skills or treatment for different customers." (92 F.T.C. at 233–34)

The record here indicates that many services are furnished by car rental and leasing firms. (ff. 89–94) Using the *Times Mirror* test, however, would seem to indicate that they are not primarily in the business of furnishing services. Nor are they resellers. They are in fact in the business of leasing cars, for long or short term, and, like most firms dealing with the public, they also render services.

[14] The Commission adopted, 92 F.T.C. at 233, the holding of *Fleetway, Inc. v. Public Service Interstate Transportation Co.*, 72 F.2d 761 (3rd Cir. 1934).

rental and leasing firms, involving long or short term leases, is clearly analogous to the bowling lane operator's business and therefore does not involve the resale of cars. (ff. 89–143)

g. *Rental and Leasing Firms Consume Cars*

Another way of looking at the question is to determine who actually consumes the product—here, automobiles. If they are consumed by each customer of the rental and leasing firm, the transaction would involve a resale. If the rental and leasing firm consumes the cars in their business, however, it does not.

This was the approach in *Clairol Inc. v. FTC*, 410 F.2d 647 (9th Cir. 1969), where the court upheld the Commission's finding that beauty salon operators had resold hair dye, and that Section 2(d) of the Robinson-Patman Act therefore applied to discriminatory advertising allowances paid by Clairol to favored beauty salons. The court's reasoning centered on the question of who consumed the product. The court noted, 410 F.2d at 648:

> . . . [T]he product is not consumed by the salon in performing or equipping itself to perform such a service. The service rather is individualized and the product is used directly on the customer herself. The products are not used in bulk but in individualized packages such as would be secured in a drugstore sale.

Here, by contrast, the rental and leasing firms consume the cars in their fleets. (ff. 121–39) The customer who rents the car does not use up the product. Instead, the car must be returned at the end of the rental period and then it is rented [53] again. (ff. 140–43)[15] Fleets purchase cars for use in their own business and not for resale.[16] *Merit Motors, Inc. v. Chrysler Corp.*, 417 F.Supp. 263, 271 (D.D.C. 1976), *aff'd*, 1977–2 Trade Cas. ¶ 61,772 (D.C. Cir. 1977):

> Commercial fleets buy cars to use as capital assets in their businesses and the fact that they dispose of them just as any business disposes of its depreciated capital assets does not, in any way, put them in the automobile business.

B. COUNT II

Count II of the Complaint alleges that GM's advertising payments to rental and leasing firms is an unfair method of competition in violation of Section 5 of the FTC Act. The Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clay-

[15] Leased cars, which may be used by the customer for a relatively longer period than rental cars (ff. 122–24), come closer to the holding of the *Clairol* case, but are still an asset consumed by the leasing firm. (ff. 121–39)

[16] The proof that rental and leasing firms sometimes resell new cars is *de minimis*.

ton Acts even though such practices may not actually violate those laws. *FTC v. Brown Shoe Co.,* 384 U.S. 316, 321 (1966); *FTC v. Motion Picture Advertising Service Co.,* 344 U.S. 392, 394 (1953); *Fashion Originators' Guild v. FTC,* 312 U.S. 457, 463 (1941).

Section 2(d) applies only to promotional allowances granted by the seller. The use of Section 5 has been upheld where the Commission proceeded against the buyer for inducement of the allowances. *R.H. Macy & Co. v. FTC,* 326 F.2d 445 (2d Cir. 1964); *Giant Food Inc. v. FTC,* 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 910 (1963). The omission of buyers from the coverage of Section 2(d) was held to be more inadvertent than studious. *Grand Union Co. v. FTC,* 300 F.2d 92, 98 (2d Cir. 1962) Similarly, in this case GM's practice of paying advertising allowances to only a few large rental and leasing firms while refusing to provide the allowances to smaller competitors violates the basic policy of Section 2(d), and failure of that statute to cover payments made in connection **[54]** with the rental and leasing business seems more inadvertent than studious.[17]

1. Basic Policy of the Robinson-Patman Act

The basic policy of the Robinson-Patman amendment to the Clayton Act is found in its statutory language and legislative history. The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. *FTC v. Henry Broch & Co.,* 363 U.S. 166, 168 (1960). And the legislative history of the Act shows that promotional allowances "become unjust when [the favored buyer] is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitors, unable to command such allowances, cannot do so." H.R. Rep. 74th Cong., 2d Sess. 15–16 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936). In passing Section 2(d), Congress intended "to assure that all sellers, regardless of size, competing directly for the same customers would receive even-handed treatment from their suppliers." *FTC v. Fred Meyer, Inc.,* 390 U.S. 341, 356 (1968).

2. The Facts

GM started making advertising payments because it realized in 1968 that it was losing sales of thousands of cars, with the concomitant loss of exposure and demonstration value. (f. 178) The rental and leasing firms which have been able to obtain advertising agreements with GM are generally large, national firms (ff. 151–55, 178, 202),

[17] Congress obviously intended to exclude the furnishing of services from the coverage of the Robinson-Patman Act because of the difficulty of determining the "like grade and quality" of a service—for example, the furnishing of economic or legal advice. The rental or leasing of a product, on the other hand, does not present this difficulty.

which are thus able to shift to GM a substantial portion of their advertising expenditures (ff. 171–74), while smaller competitors are unable to command such allowances. (ff. 216–28)

Although rental and leasing firms may vary in size, rates, customers, services rendered and marketing direction (ff. 94–116), there is general competition among such firms using GM cars.[18] They compete with comparative price advertising for [55] GM cars. (ff. 182–85). Off-airport firms compete successfully with those having locations on the airport premises. (ff. 186–92) Local firms compete with those having a national franchise. (ff. 193–204) GM dealers engaged in renting and leasing cars compete with other rental and leasing firms. (ff. 183–84, 192–96, 200, 205) And when they run out of rental cars, firms refer customers to one another. Hertz, Avis, National, Budget, and GM dealers licensed by these firms, make referrals to and receive referrals from each other as well as small, independent rental and leasing firms. (f. 205)

Pursuant to its advertising agreements, in 1978 GM favored 15 rental and leasing firms or systems. (f. 174)[19] However, GM does not make proportionally equal advertising payments. (f. 228) Among the favored firms some were more favored than others. National Car Rental System received about $160 per GM car purchased during 1976–1978, while other favored customers received less, ranging down to $6 or $7 per car. (f. 171) GM has not made advertising payments available to all competing customers (ff. 214–15), and has denied requests for advertising agreements from some of its customers. (ff. 216–27)

The facts in this case show a violation of the basic policy of Section 2(d) of the Robinson-Patman Act.

3. Case Law Under Section 5

As found above, GM's discriminatory advertising payments technically do not violate Section 2(d) of the Robinson-Patman Act because rental and leasing firms do not compete in the resale of cars. Those payments do, however, violate the central policy of the statute as shown in the legislative history. Section 5 of the FTC Act was passed precisely to apply to such technical deficiencies.

In *Brown Shoe,* the shoe company had franchise agreements with some 650 show stores whereby, in return for merchandising aid, the stores agreed not to deal in shoes made by other manufacturers. The Supreme Court upheld a finding that this agreement conflicted with central policy of Section 3 of the Clayton Act against competitively

[18] *Liggett & Myers Tobacco Co., Inc.,* 56 F.T.C. 221, 248 (1959).

[19] GM payments to rental systems are of direct benefit to the franchised licensees of those systems who are essential to the transaction. (ff. 41, 173) *Swanee Paper Corp. v. FTC,* 291 F.2d 833, 836 (2d Cir. 1961), *cert. denied,* 368 U.S. 987 (1962); *Herbert R. Gibson, Sr.,* 95 F.T.C. at 728–29.

injurious exclusive dealing contracts made in connection with the sale of a commodity. There was no technical violation of Section 3, however, because **[56]** the exclusive dealing contract was in connection with the furnishing of services which is not covered by that statute. Yet, the Court upheld the use of Section 5 to avoid this technical deficiency.[20]

Furthermore, even if there were no stipulation eliminating the need for competitive injury in this case, Count II could be upheld on the incipiency theory. In *Brown,* the respondent contended that the Commission had no power to declare the franchise program unfair without proof that its effect "may be to substantially lessen competition or tend to create a monopoly" which would have to be proved if the Commission had proceeded under Section 3 of the Clayton Act rather than Section 5 of the FTC Act. The Supreme Court stated, 384 U.S. at 322: "We reject the argument that proof of this Section 3 element must be made for as we pointed out above our cases hold that the Commission has the power under Section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws." Moreover, where the central policy of a *per se* statute has been violated, but that statute is unenforceable because of some technical deficiency, a Section 5 violation clearly will occur without proof of competitive injury. *Perpetual Federal Savings & Loan Ass'n.,* 90 F.T.C. 608, 657 (1977), *vacated on other grounds,* 94 F.T.C. 401 (1979): "Where Section 5 is employed to adapt the policy of a *per se* statute, the *per se* standard remains applicable."[21] **[57]**

III. Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding.

2. The Federal Trade Commission has jurisdiction over GM.

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[20] That a discriminatory practice is in connection with the lease of a product rather than a resale is not an impediment to a Section 5 case. The use of Section 5 was upheld to prohibit discriminatory rates in leases in *Grand Caillou Packing Co.,* 65 F.T.C. 799 (1964), *modified and enforced sub nom., La Peyre v. FTC,* 366 F.2d 117 (5th Cir. 1966). There a monopolist charged a higher rate for leases of shrimp peeling machines used on the West Coast than those used on the Gulf Coast.

[21] Respondent GM argues that its business decision of which rental and leasing firms to buy advertising from should not be disturbed, and that it has the right to choose its suppliers of advertising under *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919); *Official Airline Guides, Inc. v. FTC,* 630 F.2d 920 (2d Cir. 1980), *cert. denied,* 450 U.S. 917 (1981); and *General Motors Corp.* (crash parts), 99 F.T.C. 464, 580–81 (1982).

The business reason for the allegedly unfair practice is not relevant to a *per se* theory of violation. *FTC v. Simplicity Pattern Co.,* 360 U.S. 55, 65–68, 70–71 (1959). Moreover, the cases cited are not applicable. *Colgate* and *General Motors* (crash parts) deal with the suppliers' right to select customers, not the duty of a supplier to deal with established customers on non-discriminatory terms. *OAG* involved the monopolist's right to discriminate among established customers (630 F.2d at 922; 95 F.T.C. at 41, 75 n. 34), but the Commission has declined to follow that decision, *General Motors* (crash parts), 99 F.T.C. at 580 n. 45.

3. GM is engaged in interstate commerce as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act.

4. GM has paid for advertising furnished by selected rental and leasing customers in connection with their business.

5. The advertising has not been furnished, however, in connection with the handling or resale of cars sold by GM, and rental and leasing firms do not compete in the distribution of cars.

6. Rental and leasing firms compete in renting and leasing cars.

7. GM has not made or offered to make payments for advertising available on proportionally equal terms to all of its other rental and leasing customers competing with the favored rental and leasing customers.

8. Count I must be dismissed.

9. GM's acts and practices as charged in Count II of the Complaint, and as hereinabove found, are in violation of the policy of Section 2(d) of the Robinson-Patman Act and of Section 5 of the Federal Trade Commission Act.

10. GM has failed to sustain its burden of proof upon the various defenses that it pled and presented herein. [58]

IV. Remedy

GM grants advertising allowances to only a few rental and leasing firms, and even to those favored few on a disproportionate basis. To remedy this violation of Section 5 of the Federal Trade Commission Act, and of the policy of Section 2(d) of the Robinson-Patman Act, an order is needed directing respondent to cease and desist from granting any advertising allowances unless they are made available on proportionally equal terms to all competing rental and leasing firms. This is the remedy traditionally employed by the Commission in cases brought under Section 2(d). *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1048 (1960), *aff'd*, 301 F.2d 499 (D.C. Cir. 1961).

The Order requires GM to comply with the law. If respondent continues to grant advertising allowances to rental and leasing firms, it must do so proportionally. Respondent can satisfy this requirement by granting allowances on a per vehicle basis.[22]

The Order also requires respondent to advertise the existence of its advertising allowance program once a year for five years to the rental and leasing industry through two of the five publications in which it has advertised its cars. (*E.g.*, CX 7507, CX 7511.)

Finally, the Order requires respondent for a reasonable period to keep and produce a record of any termination, nonrenewal or refusal

[22] Chrysler Corporation grants advertising allowances based on the number of Chrysler cars purchased by the rental and leasing firms. (Uliano tr. 2468–69)

to enter any advertising allowance program with a rental and leasing firm. This requirement is within the Commission's discretion to cope with unlawful practices. *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 611 (1946).

ORDER

For purposes of this Order, the term *respondent* refers to General Motors Corporation, its successors and assigns, and its officers, directors, agents, representatives, and employees. The term *vehicle* refers to an automobile or a truck. The term *rental and leasing firm* refers to any firm engaging in offering to rent, renting, offering to lease, or leasing vehicles to the public in the United States. [**59**]

It is ordered, That respondent, directly or indirectly through any corporation, subsidiary, division, or other device, in connection with the offering for sale, sale, or distribution of vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

Paying or contracting to pay to or for the benefit of any rental and leasing firm anything of value as compensation or in consideration for advertising, promotion, or any other services or facilities furnished by or through such rental and leasing firms in connection with the offering to rent, renting, offering to lease, or leasing of vehicles, unless such payment or consideration is available on proportionally equal terms to all other competing rental and leasing firms.

It is further ordered, That respondent may provide for termination or nonrenewal of joint advertising programs for cause. Such cause may include, for example, false or deceptive advertising or claims for payments, advertising which, or in media which, reflect negatively on respondent, its products or its goodwill or failure to maintain reasonable standards of automobile maintenance, safety or cleanliness. Respondent may decline to enter into a joint advertising program where it reasonably appears such affiliation would negatively reflect on respondent, its products or its goodwill, but the decision will be based on standards consistent for all rental and leasing firms and GM shall maintain a written record of the specific basis for such decision for two years which shall be made available to the Commission upon request following reasonable notice.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to cease and desist to all officers and directors of respondent and to each of respondent's operating divisions that is engaged in the sale of respondent's vehicles within the United States.

It is further ordered, That respondent shall advertise nationally in

at least two of the following publications annually for a period of five years the existence and availability of any advertising or promotional program offered to rental and leasing firms in compliance with the terms of this Order: *Automotive Fleet* magazine, *The Vehicle* (the annual membership directory of American Automotive Leasing Association, American Car Rental Association, Truck Renting and Leasing Association, and Alliance of State Car and Truck Renting and **[60]** Leasing Associations), *Time* magazine, *Newsweek* magazine, or *Business Week* magazine.

It is further ordered, That respondent shall within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

It is further ordered, That respondent shall 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 that may affect compliance obligations arising out of this Order.

Opinion of the Commission

By Calvani, *Commissioner:*

I. Introduction

A. *Background*

By Complaint issued on July 19, 1978, Respondent General Motors Corporation (hereinafter "GMC") is charged with violation of Section 2(d) of the Robinson-Patman Act, 15 U.S.C. 13(d), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1980). GMC sells automobiles and trucks to dealers which, in turn, sell vehicles to rental and leasing companies. Some GMC dealers also operate rental and leasing fleets. The Complaint alleges that GMC paid some rental and leasing companies for advertising furnished by those companies, *e.g.,* "We Feature General Motors Cars." The Complaint further alleges that GMC has not made such payments available on proportionally equal terms to all competing rental and leasing companies.

In order to expedite this litigation, the parties entered into a stipulation on April 21, 1982. Under the stipulation, "Complaint counsel abandoned any claim that GM's acts and practices in issue caused any injury to competition." Initial Decision ("I.D."), p. 2. Having stipulated away the issue of competitive injury, Complaint Counsel placed

exclusive reliance on a finding of *per se* liability. Specifically, Complaint Counsel relied on two theories of violation: First, GMC had [2] violated Section 2(d) of the Robinson-Patman Act, thereby violating Section 5 of the Federal Trade Commission Act, (Count I). Second, GMC's acts violated the "spirit" of Section 2(d) and thereby violated Section 5 of the Federal Trade Commission Act (Count II). Complaint Counsel's second theory of the case is thus predicated on the so-called "spirit" or "gap filler" doctrine.

Following the denial of Complaint Counsel's motion for summary decision on October 4, 1982, trial commenced the following day before Administrative Law Judge James P. Timony. Complaint Counsel called thirteen witnesses; GMC called three. Additional testimony was received from four other Commission witnesses by deposition, affidavit, and interrogatories. The Record included 3,177 transcript pages and 485 exhibits. Trial concluded on November 15, 1982.

The evidence produced at trial indicated that GMC made millions of dollars in annual payments to a few of the largest rental and leasing firms that agreed to promote GMC cars in their advertising. Many rental and leasing firms using GMC cars, however, received nothing, and GMC denied a number of requests for advertising agreements. I.D., pp. 43, 45.

Judge Timony dismissed Count I, finding that Complaint Counsel had failed to establish that the advertising payments were made in connection with the resale of the product—a requisite element of a Section 2(d) case. The evidence indicated that, although the rental and leasing companies eventually resold [3] their automobiles, this was done to dispose of worn inventory for reasonable value and not as a primary business activity.

However, Judge Timony found that GMC's arrangement for making selective advertising payments "violates the very purpose of Section 2(d) of the Robinson-Patman Act." I.D., p. 45. Invoking the so-called "gap filler theory," he found GMC to have violated Section 5 of the Federal Trade Commission Act.

B. *The Issues Presented For Review*

Two questions are presented for review. First, Complaint Counsel assigns error to Judge Timony's conclusion that GMC's purchase of advertising from some car rental and leasing companies was not the grant of discriminatory advertising allowances in violation of Section 2(d). The Commission agrees with Judge Timony, eschewing the opportunity to expand the case law beyond its present contours, and affirms his decision with respect to Count I. Second, respondent GMC assigns error to Judge Timony's conclusion that the grant of a discriminatory allowance, not properly cognizable under Section 2(d) of

the Robinson-Patman Act, 15 U.S.C. 13(d) (1980), may nevertheless violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1980), under the "spirit" or "gap-filler theory." The Commission declines this opportunity to expand the law and reverses the decision below as to Count II. [4]

Before undertaking an analysis of these issues, a brief introduction to the relevant statute is appropriate. An understanding of the protectionist purposes and effects of the Act provides guidance where, as here, the Commission is asked to expand its literal reach beyond that established by Congress—especially in light of the Commission's public interest mandate.

C. *Purpose of the Robinson-Patman Act*

Prior to World War I a three-tiered channel of distribution, *i.e.*, manufacturer-wholesaler-retailer, characterized the sale of most consumer goods. After the War the distribution of these products underwent significant change in many industries. One of the factors precipitating this change was the emergence and rapid growth of multi-location vendors, *i.e.*, "the chain store." Between 1926 and 1933 the chain store segment of total retail sales increased from 9% to 25%. J. Palamountain, *The Politics of Distribution* 7 (1955). By 1929, 29% of grocery industry sales had been captured by chain stores. B. Zorn & G. Feldman, *Business Under the New Price Laws: A Study of the Economic and Legal Problems Arising Out of the Robinson-Patman Act and the Various Fair Trade and Unfair Practices Laws* 20 (1937).

While the success of the chain stores was due to a myriad of factors, their direct purchasing procedures and the exercise of their combined purchasing power were important. The success of the chain stores posed a direct threat to competing independent single unit establishments and—perhaps more [5] importantly—to their suppliers. In 1928, the National Association of Retail Grocers lobbied the Congress to investigate the legality of chain store purchasing practices. That same year, a Senate resolution directed the Federal Trade Commission to study the subject. In December 1934, the Commission submitted its Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935) (hereinafter the "Final Report"), to the Senate. Quite surprisingly, at least to the independents and their suppliers, the Commission found that a significant proportion of the difference between chain and independent retail purchasing prices was associated with more efficient operations rather than the abuse of buying power. The Final Report concluded that the difference in purchasing prices was only 1%. J. Palamountain, *supra*, at 65, *citing* FTC, Chain Stores; Special Discounts and Allowances to Chain and

Independent Distrib.; Grocery Trade, 73d Cong., 2d Sess., S. Doc. No. 89 (1934). Interestingly, there is some evidence that these efficiencies were still grossly underestimated. *See* Adelman, "Price Discrimination as Treated in the Attorney's General Report," 104 *U. Pa. L. Rev.* 222, 232 (1955).

Section 2 of the Clayton Act, as originally enacted, contained proscriptions against price discrimination. The case law, however, had rendered these provisions impotent in the view of many. In *Mennen Co. v. FTC,* 288 F. 774 (2d Cir.), *cert. denied,* 262 U.S. 759 (1923), and *National Biscuit Co. v. FTC,* 299 F. 733 (2d Cir.), *cert. denied,* 266 U.S. 613 (1924), the Second Circuit held that Section 2, as originally enacted, did not apply [6] to secondary-line sales. It was not until the Supreme Court's decision in *George Van Camp & Sons v American Can Co.,* 278 U.S. 245 (1929), that it was finally established that the provisions of Section 2 applied to secondary-line discrimination. Although interpretations limiting the application of Section 2 were reversed in the *Van Camp* decision, the years preceding *Van Camp* were critical years when chain stores enjoyed extensive growth. *See ABA* Antitrust Section, Monograph No. 3, *The Robinson-Patman Act: Policy and Law* 12 (1980). A further limitation was subsequently engrafted onto the Act. Following *Van Camp,* the Commission instituted proceedings in *Goodyear Tire & Rubber Co.,* 22 F.T.C. 232 (1936). The respondent ultimately prevailed when the Sixth Circuit held that the statute unconditionally exempted price discrimination made on account of differences in quantities sold. *Goodyear Tire & Rubber Co. v. FTC,* 101 F.2d 620 (6th Cir.), *cert. denied,* 308 U.S. 557 (1939). Thus, the law, as originally enacted and interpreted by the Court of Appeals, would immunize *any* quantity discount without regard to cost justification.

Those who believed their interests hurt by the growth of chain stores adopted courses of conduct to stem that tide. Many independent single unit merchants, with the assistance of their wholesale suppliers, organized boycotts of manufacturers who sold directly to chain stores. Other independents formed cooperatives in an effort to achieve scale economies and to exert buyer power. A third defensive strategy sought state legislation to impose discriminatory taxes, sometimes predicated on the number [7] of units within a particular state, on chain stores. Indeed, by 1939, some twenty-seven states had passed such legislation. *See* J. Palamountain, *supra* at 162. Interestingly, the United States Supreme Court sustained that legislation on several occasions. *See, e.g., Louis K. Liggett Co. v. Lee,* 288 U.S. 517 (1933).

When voluntary modes of resistance and state tax legislation failed to discourage the growth of the chains, independents and their suppliers turned to Congress. Codes of Fair Competition, promulgated pur-

suant to the National Industrial Recovery Act of 1933, 48 Stat. 195 (1933), mandated that manufacturers abide by a minimum wholesale discount in some industries and forbade discriminatory sales in others. The Codes sought to preserve traditional patterns of distribution which had been threatened by competition. In 1935, however, the Supreme Court held NIRA unconstitutional as an impermissible delegation of legislative powers in *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). The independents and their suppliers went back to the proverbial drawing boards.

The United States Wholesale Grocers Association, through their associate counsel, C. B. Teegarden, drafted the original bill of what was to become the Robinson-Patman Act. Representative Wright Patman introduced the bill as H.R. 8442 some fifteen days after the *Schechter* decision. *See* H.R. 8442, 74th Cong., 1st Sess. (1935). [8]

The course of the bill through Congress well illustrates the protectionist, non-efficiency oriented nature of the legislation. *See generally* Dept. of Justice, Report on the Robinson-Patman Act 101–139 (1975) (hereinafter "DOJ Report"). Huey Long's observation that "he would rather have thieves and gangsters than chain stores in Louisiana" is representative of the views of many policy makers. *Cf.* Fulda, "Food Distribution in the United States, the Struggle Between Independents and Chains," 99 *U. Pa. L. Rev.* 1051 (1951). Others said the same thing: "I believe the chain store should not only be curbed, but . . . should be eliminated . . ." 80 Cong. Rec. 8136 (1936) (Remarks of Rep. Moritz). *See also* DOJ Report 104–108. The bill was enacted and subsequently signed into law by President Roosevelt on June 19, 1936.

It is quite clear that the underlying predicate of the Robinson-Patman Act was *not* consumer welfare. Rather, the Act was protectionist legislation. The legislative history and subsequent scholarship overwhelmingly support this conclusion. *See, e.g.,* DOJ Report; R. Posner, *The Robinson-Patman Act* (1976). Interestingly, the Supreme Court has recently explicitly recognized the protectionist purpose of the law. *See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories,* 103 S. Ct. 1011, 1023 n.39 (1983). As with most protectionist legislation, it comes at a cost to the American consumer. [9]

Moreover, although the original intent of Congress in enacting the Robinson-Patman Act may have been to help small business, historically the brunt of the Commission's enforcement efforts has fallen on small businesses. For instance, of the 564 companies named in FTC Robinson-Patman complaints between 1961 and 1974, only 36, or 6.4%, had annual sales of 100 million dollars or more at the time of complaint. F. Scherer, *Industrial Market Structure and Economic Performance* 581 (2 ed. 1980). Professor Scherer further observes that when large companies were sued, their greater incentive and finan-

cial resources allowed them to resist FTC prosecution efforts more vigorously and with greater success. Roughly 90% of respondents with sales of less than 10 million dollars accepted consent decrees, whereas only 37% of the 100 million dollar companies did the same. Twenty-three of the companies with sales exceeding 100 million dollars ultimately succeeded in having their complaints dismissed, whereas none of the smaller companies were able to do likewise. F. Scherer, *supra.*

The Commission's prosecution of group buying ventures also illustrates this point. Most of the cases focused on cooperatives in the food, auto parts, and toy industries. In the main, these respondents were small companies that banded together to benefit from scale economies and other efficiencies associated with larger purchases. *See generally* Mezines, "Group Buying—When Is It Permitted Under the Robinson-Patman Act?" 44 *N.Y.U.L. Rev.* 729 (1969). *See also* Statement of F. M. Scherer Before the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and **[10]** Related Matters of the Committee on Small Business 5 (January 26, 1976).

That is not to say that passage and maintenance of the Act was, or is, ill advised. Congress can—and, indeed, does—opt to protect by subsidy or regulation certain special interests at a cost to the public. Care must be taken, however, that the Commission and the courts, to whom the Act's interpretation and enforcement have been entrusted, not expand the ambit of legislation beyond that set forth by Congress. The United States Supreme Court has recently admonished that Congress has mandated competition to be "the heart of our national economic policy." *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978). *See also United States v. U.S. Gypsum Co.,* 438 U.S. 422 (1978). Accordingly, the Commission will eschew efforts to broaden application of the Robinson-Patman Act beyond that established by law.

II. Section 2(d): The Allowances Section

In 1935, the Final Report concluded that one way in which chains garnered special treatment from their suppliers was the receipt of unearned advertising allowances. In enacting the Robinson-Patman Act, Congress sought to prohibit indirect price discrimination through discriminatory advertising allowances. Section 2(d) specifically provides:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the **[11]** course of such commerce as compensation or in consideration for any services

or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any product or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C. 13(d) (1980). This Section differs from the price discrimination proscription of Section 2(a) in two noteworthy ways. First, the cost justification defense contained within Section 2(a) is not available. Secondly, the presence or absence of competitive injury is irrelevant in a Section 2(d) case. In a series of cases, the United States Supreme Court has held that "neither absence of competitive injury nor the presence of 'cost justification' defeats enforcement of the provisions of Section 2(e) of the Act." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 58–59 (1959). *See also Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962). Thus, Section 2(d) employs a *per se* standard of illegality.[1]

It is axiomatic that Section 2(d) is limited in application to discriminatory advertising allowances granted in connection with the *resale* of products. *See FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 356 (1968); *Rutledge v. Electric Hose & Rubber Co.*, 511 [12] F.2d 668, 678 (9th Cir. 1975); *Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); *Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 725 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1521 (1983). *Cf. Clairol, Inc.*, 69 F.T.C. 1009, 1047 n. 13 (1966), *aff'd*, 410 F.2d 647, 648 (9th Cir. 1969). The commentators agree. ABA Antitrust Section, Monograph No. 4, *The Robinson Patman Act: Policy and Law Vol. II* 53 (1983). *See* E. Kintner, *A Robinson-Patman Primer* 235 (1970); C. Austin, *Price Discrimination* 124 (1959); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 376 (1962).

Complaint Counsel first confronts the "resale requirement" by urging us to abandon it. Counsel relies on the statutory language "processing, handling, sale, or offering for sale" in arguing that subsuming "processing," "handling," and "offering" within the word "sale" would render the others surplus. Thus, proof of *either* handling *or* resale ought satisfy the statutory requirement. Complaint Counsel cites authority for the proposition that disjunctive language in a statute demonstrates a legislative intent to establish distinct categories. However, we decline to embrace Complaint Counsel's theory.

While Complaint Counsel's proffered statutory interpretation has

[1] The legislative history of Sections 2(d) and (e), however, makes clear that Congress intended these sections to have "relatively narrow scope"; thus Courts "have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a)." *Herbert R. Gibson Sr.*, 95 F.T.C. 553, 726 (1980), *aff'd* 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1521 (1983).

some initial appeal, *see Reiter v. Sonotone Corp.,* 442 U.S. 330 (1979), the language of Section 2(d) is not susceptible to more precise definition. The word "handle" may properly include everything from "to touch" to "have within its jurisdiction." *Webster's Third New International Dictionary* 1027 (1961). [13] Obviously, abrogating the well-established "resale requirement" by focusing on the word "handling" would render the terms "sale, or offering for sale" meaningless. More importantly, the "resale test" provides a relatively clear demarcation of what is within and without the statutory ambit. For these reasons it is well established that a discriminatory allowance must be made in connection with the *resale* of the product in order to be actionable under Section 2(e). This Commission has recently held that "the payment . . . must be in connection with the 'processing, . . . *i.e.,* it must bear a nexus to the resale or preparation for resale by the retailer.' " *Herbert R. Gibson, Sr.,* 95 F.T.C. 553, 725 (1980), *aff'd,* 682 F.2d 554 (5th Cir. 1982), *cert. denied,* 103 S.Ct. 1521 (1983), citing *Rutledge v. Electric Hose & Rubber Co.,* 511 F.2d 668, 678 (9th Cir. 1975). *See also FTC v. Fred Meyer, Inc.,* 390 U.S. 341, 356 (1968); *Foremost Pro Color, Inc. v. Eastman Kodak Co.,* 703 F.2d 534, 546 (9th Cir. 1983); *Kirby v. P. R. Mallory & Co. Inc.,* 489 F.2d 904, 909 (7th Cir. 1983), *cert. denied,* 417 U.S. 911 (1974); *Bouldis v. U.S. Suzuki Motor Corp.,* 711 F.2d 1319, 1328 (6th Cir. 1983); *Glowacki v. Borden Inc.,* 420 F.Supp. 348, 358 (N.D.Ill. 1976); *General Foods Corp.,* 52 F.T.C. 798, 814–15 (1956); *Carpel Frosted Foods, Inc.,* 48 F.T.C. 581, 602 (1951); *New England Confectionery* [14] *Co.,* 46 F.T.C. 1041, 1059 (1949). Accordingly, we decline the invitation to extend the proscription of Section 2(d).[2]

The question then becomes whether the discriminatory advertising allowances before us were made in the context of a resale of automobiles by the recipients of the allowances. Complaint Counsel urges an imaginative theory upon which the Commission might find the requisite resale nexus, suggesting that the piecemeal resale of cars by the rental and leasing agencies satisfies the "resale test." In support of its argument Complaint Counsel relies on the Commission's decision in *Clairol, Inc.,* 69 F.T.C. 1009 (1966), *order modified on other grounds,* 410 F.2d 647 (9th Cir. 1969). There the Commission held that the dispensing of hair dyes by beauty salons was a resale within the meaning of Section 2(d) of the statute. Complaint Counsel relies on other similar cases. *See, e.g., Standard Oil Co. v. FTC,* 340 U.S. 231, 235–36 (1951) (gasoline purchased in tank-car and tank-wagon quantities by retailers for piecemeal resale to the public by the gallon and fraction thereof); *FTC v. Morton Salt Co.,* 334 U.S. 37, 41, 49 (1948)

[2] It should be noted that Section 2(e) specifically refers to "commodities bought for *resale.*" Although the text of Section 2(d) differs from that of Section 2(e), the courts have consistently held that the two sections must be construed *in pari materia. See Bouldis v. U.S. Suzuki Motor Corp.,* 711 F.2d 1319, 1327–28 (6th Cir. 1983).

(salt purchased by the carload or by the case by chain store retailers for piecemeal resale to the public by the individual package); *Corn Products Refining Co. v. FTC,* 324 U.S. 726, 743–45 (1945) (dextrose purchased by the pound by a candy manufacturer for piecemeal resale in candy bars); **[15]** *Hampton v. Graff Vending Co.,* 478 F.2d 527, 530–31 (5th Cir.), *cert. denied,* 414 U.S. 859 (1973) (gum balls sold to vending machine operators by the case and resold to the public one by one through vending machines); *National Dairy Products Corp. v. FTC,* 412 F.2d 605, 608–9 (7th Cir. 1969) (fruit spreads purchased by the case by retailers for piecemeal resale to the public by the jar); *Guyott Co. v. Texaco, Inc.,* 261 F.Supp. 942, 946, 951 (D.Conn. 1966) (paving asphalt purchased by the ton for piecemeal resale as an ingredient of a different product); *Curtiss Candy Co.,* 44 F.T.C. 237, 260–61 (1947) (candy sold to vending machine operators by the carton and resold to the public by the bar through vending machines), *order modified on other grounds,* 48 F.T.C. 161 (1951); *Sherwin-Williams Co.,* 36 F.T.C. 25, 50 (1943) (paint purchased by the carload, truckload, or gallon by dealers for piecemeal resale to occasional consumers buying the paint "in very small quantities").

Judge Timony rejected this argument below as we do here. The cases cited by Complaint Counsel in support of its theory are true piecemeal distribution cases. The instant case is not. There is no allegation that the leasing companies, qua leasing companies, simply purchase cars in bulk and then immediately resell them. Yet, that is the gist of the "piecemeal" **[16]** distribution cases cited above. While rental and leasing firms do resell cars after using them in their fleets, the resold cars are commodities of a different quality. These cars, having accumulated mileage and suffered wear and tear, are qualitatively different from the vehicles originally purchased. Were Complaint Counsel's argument to be accepted, then any dealer who resells a commodity used in its business after the conclusion of its useful life would satisfy the resale requirement of the Act.

Rather clearly, the allowance in question is *not* made for the purpose of discriminatorily aiding the recipient in the resale of the product. Accordingly, Complaint Counsel has failed to satisfy "the resale test." In *Herbert R. Gibson, Sr.,* 95 F.T.C. 553 (1980), *aff'd,* 682 F.2d 554 (5th Cir. 1982), *cert. denied,* 103 S.Ct. 1521 (1983), we observed that Section 2(d) of the Robinson Patman Act ought not be expansively construed and noted that most courts have "resisted expanding the 'scope of Sections 2(d) and 2(e) beyond the limited area of applicability intended by Congress.' " *Herbert R. Gibson Sr., supra* at 727, *quoting Cecil Corley Motor Co. v. General Motors Corp.,* 380 F.Supp. 819, 850 (M.D.Tenn. 1974). For reasons set forth above, we hold that Judge Timony correctly dismissed Count I.

III. Section 5: The Spirit Theory

Complaint Counsel argues that even if the Commission were to find no Robinson-Patman violation for reasons set forth above, the conduct in question may violate Section 5 of the Federal [17] Trade Commission Act. Counsel urges that conduct that violates the "spirit," *though not "letter" of the Robinson-Patman Act,* is actionable under the so-called "spirit" theory of Section 5. True, Section 5 of the Federal Trade Commission Act has been held to apply to conduct that violates the policy or "spirit" of the antitrust laws, even though it may not come technically within its terms. *See generally* Averitt, "The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal Commission Act," 21 *B.C.L. Rev.* 227, 251, 271 (1980). *See also FTC v. Brown Shoe Co.,* 384 U.S. 316, 321 (1966); *FTC v. Motion Picture Advertising Service Co.,* 344 U.S. 392, 394 (1953); *Fashion Originators' Guild v. FTC,* 312 U.S. 457, 463 (1941).

Previous cases presenting allowance issues, otherwise cognizable under Section 2(d) of the Robinson-Patman Act, have been fertile ground for application of the "spirit" theory. Several courts have held that a *buyer* may be prosecuted under Section 5 for *inducing* a seller to grant him discriminatory promotional allowances notwithstanding the fact that the statutory language of the Robinson-Patman Act only prohibits a *seller* from *granting* discriminatory promotional allowances. *See Alterman Foods, Inc. v. FTC,* 497 F.2d 993 (5th Cir. 1974); *Colonial Stores, Inc. v. FTC,* 450 F.2d 733 (5th Cir. 1971); *Fred Meyer, Inc. v. FTC,* 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968); *R. H. Macy & Co. v. FTC,* 326 F.2d 445 (2d Cir. 1964); *Giant Food Inc. v. FTC,* 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 910 (1963); *Grand Union Co. v. FTC,* 300 F.2d 92 (2d Cir. 1962); *American News Co. v. FTC,* 300 [18] F.2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962) These decisions have been predicated on the "spirit theory" of Section 5, with Courts concluding that the omission of buyer liability was "inadvertent rather than studious." *Grand Union, supra,* at 96. Does then the grant of discriminatory allowances under these facts violate the "spirit," if not the letter, of the Robinson-Patman Act? This presents an issue of first impression.

Judge Timony found that the grant of advertising allowances by GMC "violates the very purpose of Section 2(d) of the Robinson-Patman Act" and therefore found liability under Section 5. I.D. 45. The most recent Commission and judicial opinions on the scope of Section 5 do not support such an expansive approach to *per se* liability. In *Ethyl Corp.,* 101 F.T.C. 425 (1983), *rev'd on other grounds, sub. nom. DuPont v. FTC,* 729 F.2d 128 (2d Cir. 1984), the Commission noted that Section 5 may extend *beyond* the limitations of the Clayton Act only

"when there is good evidence that the challenged practices have anticompetitive effects very similar to those prohibited by [that Act] and when prohibiting such practices is not inconsistent with any other legislative goal of the antitrust laws." Thus, the Commission has applied Section 5 to activities that violate the spirit of certain Sherman and Clayton Act sections that were clearly intended to promote competition and deter anticompetitive acts. However, the legislative history of Section 2(d) discussed above, makes clear that unlike the Sherman and Clayton Acts, the underlying goal of the Robinson-Patman Act is the protection of competitors, not competition. Accordingly, the "spirit" theory **[19]** must be applied with great caution in the context of cases brought under that Act.

While the "spirit" theory, as embraced by the courts, may provide a useful technique in some cases, we decline to apply it in cases such as this *where there has been no demonstration of an anticompetitive impact,* and there is no underlying Section 2(d) violation. While Section 2(d) of the Act itself may not require proof of an anticompetitive impact, we hold today that this *per se* quality ought be limited to the Robinson-Patman Act and not extended beyond established case law.[3] **[20]**

Accordingly, for reasons set forth above we affirm Judge Timony's

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[3] In a series of buyer-inducement cases brought pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, challenging the receipt of discriminatory allowances and services, the Commission has held that the *per se* quality of Sections 2(d) and 2(e) of the Robinson-Patman Act applies as well to Section 5 inducement cases. *See Alterman Foods, Inc. v. FTC,* 497 F.2d 993 (5th Cir. 1974); *Colonial Stores, Inc. v. FTC,* 450 F.2d 733 (5th Cir. 1971); *R. H. Macy & Co. v. FTC,* 326 F.2d 445 (2d Cir.1964); *Giant Food Inc. v. FTC,* 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 910 (1963); *Grand Union Co. v. FTC,* 300 F.2d 92 (2d Cir. 1962); *American News Co. v. FTC,* 300 F.2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962). In four of these cases, the courts addressed the Commission's position that injury need not be proved. Each decision sustained the *per se* characterization of a Section 5 buyer's inducement violation. *Grand Union, supra* at 99–100; *Giant Food, supra* at 186; *R. H. Macy & Co., supra* at 450; *Alterman Foods, supra* at 1000.

Several of these courts explained why the *per se* character of a Section 2(d) violation should be carried over to a Section 5 buyer's inducement violation. The explanation was fleshed out in most detail in *Grand Union,* where the court said

> . . . Section 2(d) defines an offense which is illegal *per se.* There is no reason why this rule should not apply to the buyer as well as to the seller. Congress has made no such distinction; § 2(f), being the corollary of § 2(a), requires proof of injury to competition in cases brought against buyers, while § 2(c) applies a *per se* rule to buyers as well as sellers. Since § 5 is here utilized to reach an integral part of a violation of § 2(d), and the rationale of the proceeding is to fulfill the policies of that prohibition, it would seem an unwarranted amendment of the legislative scheme to apply a different standard on the question of competitive effects to the buyer than it applies to the seller. In making some, but not all, of the practices outlawed by the Robinson-Patman Act illegal *per se* Congress indicated that those selected for *per se* treatment always led to the undesired effects on competition. 300 F.2d at 99 (citations omitted).

The strong language of the *Grand Union* court suggested that it would be inappropriate for the Commission to require proof of injury in a Section 5 buyer inducement case. To the extent that a Section 2(d) violation for granting a discriminatory promotional allowance is a *per se* violation, the court indicated, a Section 5 violation for inducing that allowance *should* also be a *per se* violation. *See also Giant Food, supra* at 186. *Cf. Perpetual Federal Saving and Loan Ass'n,* 90 F.T.C. 608, 657 (1977) (citing *Grand Union* for the proposition that "where Section 5 is employed to adopt the policy of a *per se* statute, the *per se* standard remains applicable"). We decline to extend this rationale to the instant case.

dismissal of Count I and reverse his finding of liability on Count II.[4] An Order Dismissing the Complaint is to [21] be issued accordingly.[5]

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

Most fundamentally, the majority's opinion is an exercise in law-making in the guise of law interpretation. On the grounds that Congress did not have "consumer welfare" in mind when it passed the Robinson-Patman Act, the majority has decided to reject every applicable legal precedent in order to construe the Act as narrowly as possible and avoid finding liability. The practical result is that the majority has substituted its own understanding of "consumer welfare" for the version that previous court opinions and Congress have expressed.

The key legal issue in the Commission's decision to dismiss the complaint is whether the prohibition on the type of discriminatory promotional allowances examined here is subject to a *per se* or rule of reason analysis if it is addressed under the FTC Act rather than the Robinson-Patman Act.[1] The majority cannot quite bring itself to concede that discriminatory promotional allowances are *per se* unlawful if analyzed under the [2] Robinson-Patman Act, though the law is quite clear that the *per se* standard applies.[2] Furthermore, long series of court opinions have held that when the Commission is analyzing conduct closely analogous to practices prohibited as *per se* by the Robinson-Patman Act, the *per se* standard should apply under Section 5 analysis as well.[3]

As the Second Circuit Court of Appeals explained in *Grand Union*:[4]

[S]ection 2(d) defines an offense which is illegal *per se*. There is no reason why this rule

[4] Since the parties stipulated the absence of a necessary element of Complaint Counsel's case, we have considered remanding this case to Judge Timony to determine whether the requisite competitive impact is present. We conclude that remand is inappropriate. First, it may well be that Complaint Counsel has concluded such evidence does not exist or could not be developed at trial. Second, having entered into a stipulation it seems unfair to now force Respondent *in this case* to face yet another trial on a different theory of the case. However, the Commission cannot sacrifice its obligation to a competitive economy because of hardship to a particular litigant. This Commissioner would be receptive to the issuance of a new complaint against Respondent if the practice continues and *if* injury to competition could be demonstrated.

[5] As stated at the outset, GMC sells its automobiles to its franchised dealers which, in turn, resell to rental and leasing companies. We do not today address the matters of whether the rental and leasing companies may be "customers" of GMC within the meaning of Section 2(d) or whether Section 5 of the Federal Trade Commission Act may be employed to police Robinson-Patman Act-type problems in a rental and leasing context, where competitive injury is present.

[1] I agree with the Commission's decision that the highly technical requirements of the Robinson-Patman Act are ot met here because promotional allowances from automobile manufacturers for car leasing firms are not rovided "in connection with the processing, handling, sale or offering for sale" as provided in Section 2(d) of the ct.

[2] *See* the qualified language in the majority opinion at pp. 18–19. In fact, the *per se* standard under Section 2(d) well established. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Alterman Foods, Inc. v. FTC*, 497 F.2d 993 th Cir. 1974); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

[3] *See* the cases cited at p. 16, fn. 2 of the Majority Opinion.

[4] *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

should not apply to the buyer as well as to the seller. . . . Since § 5 is here utilized to reach an integral part of a violation of § 2(d), and the rationale of the proceeding is to fulfill the policies of that prohibition, it would seem an unwarranted amendment of the legislative scheme to apply a different standard on the question of competitive effects to the buyer than it applies to the seller. 300 F.2d at 99 (citations omitted)

Not surprisingly, in view of the unanimity of the prior opinions on this point, complaint counsel and respondent dispensed with the issue of competitive impact and did not submit proof on it. Nevertheless, the majority now concludes that a *per se* theory is not appropriate. The reader will find little [3] explanation for this departure from precedent other than an extensive recitation of the line of cases that it is abandoning and an attempt to rely on the Commission's decision in *Ethyl Corp.*[5] In *Ethyl,* a rule of reason case, the Commission stated that the FTC Act prohibits conduct which does not violate the Sherman Act and Clayton Act "when there is good evidence that the challenged practices have anticompetitive effects very similar to those prohibited by those two Acts and when prohibiting such practices are not inconsistent with any other legislative goal of the antitrust laws."[6] The majority would like to read this language to mean all conduct analyzed under Section 5 that does not technically violate the Clayton Act or Sherman Act should be subject to a rule of reason analysis, even if the conduct is closely analogous to conduct which is prohibited under a *per se* standard under the Clayton or Sherman Acts.

If the Commission in *Ethyl* had wanted to abandon prior precedent on this point, it would have said so. It did not. In fact, it is clear that Congress or the courts may decide that some types of conduct are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are illegal *per se.*"[7] As the court of appeals put it in *Grand Union:* "In making some, but not all, of [4] the practices outlawed by the Robinson-Patman Act illegal *per se* Congress indicated that those selected for *per se* treatment always led to the undesired effects on competition."[8] Consequently, it is perfectly appropriate for the Commission to dispense with proof of anticompetitive effects when Congress determined that the closely analogous practices under the Clayton Act are *per se* unlawful.

Does the majority believe that the competitive effects of the discriminatory allowances at issue here are different from the effects of the conduct prohibited as *per se* unlawful by Section 2(d)? Apparently, since the majority opinion does not identify a single reason why the

[5] *Ethyl Corp.,* 101 F.T.C. 425 (1983), *rev'd,* —F.2d (2d Cir. 1984).
[6] 101 F.T.C. at 597.
[7] *National Society of Professional Engineers v. U.S.,* 435 U.S. 679, 692 (1978).
[8] 300 F.2d at 99.

effect might be different. Indeed, I suspect that the majority would prefer not to find the practices prohibited by Section 2(d) unlawful either, without an economic analysis of competitive effects. It is perfectly proper to hold that opinion and to try to counsel Congress to change the law. But it is not acceptable to legalize conduct on the ground that Congress is "protectionist" rather than concerned about "consumer welfare," and that the Commission's judgment about what is best for the public interest can be substituted for a Congressional policy.

Finally, one might reasonably ask—if the parties and the ALJ applied an improper legal standard, particularly when the standard announced by the majority is an abandonment of prior precedent, shouldn't the case be remanded? The majority rejects [5] the alternative of remanding, in part because "having entered into a stipulation it seems unfair to now force respondent *in this case* to face yet another trial on a different theory of this case." (Majority Op. at 20, fn. 4; emphasis in original) The stipulation, entered into by GM and complaint counsel provided: "Injury to competition is not a prerequisite to finding a violation under complaint counsel's [Section 2(d) and Section 5 theories] and "GM agrees . . . that complaint counsel's Section 5 *per se* theory reflects an accepted principle of law under prior decisions of the Commission." The stipulation further stated: "neither the effects on competition nor the lack of effects on competition of the GM acts and practices covered by the complaint are in issue in this case" and "evidence regarding the competitive effects . . . is irrelevant and inadmissible."[9] Despite the stipulation, GM felt content to argue in its brief that its practices are procompetitive.[10] When a party stipulates that a case should be tried on a particular, established legal theory and avoids an adverse result because the reviewing body adopts a different legal theory, I fail to see any possible unfairness in a retrial based on the newly announced standard.

STATEMENT OF COMMISSIONER PATRICIA P. BAILEY CONCURRING IN PART AND DISSENTING IN PART

I agree with the majority that the Robinson-Patman count in this complaint should be dismissed. However, I do so on the narrow ground that the Robinson-Patman Act is a highly technical, specific statute which is not subject in this instance to the creative reading urged by complaint counsel. It is precisely because of the rigid nature of the statute that, in the past, it has been necessary to call upon Section 5 of the Federal Trade Commission Act to "fill the gaps". *See, e.g.,*

[9] *See* ¶¶ 2-4, 5, 6 of the Stipulation adopted as part of the pretrial order of April 29, 1982.

[10] *See, e.g.*, GM's appeal brief, 6, 19, 20, 41-42.

Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962). However, granting that the statute was not drafted with much interpretive latitude is not to presume that Congress intended it to be construed narrowly because of Congressional concern that the Act was protectionist or anti-consumer. That, I take it, is the majority's position (Slip op. at 10); my reading of the legislative history is otherwise.

It is quite clear that the drafters of the Robinson-Patman Act perceived no conflict between consumer welfare and the even-handed treatment of business which the statute mandates. For example, in introducing the bill to the House, sponsor Representative Patman said: "This bill is designed to accomplish what so far the Clayton Act had only weakly attempted, namely, to protect the independent merchant, *the public whom he serves,* and the manufacturer from whom he buys, from exploitation by his [2] chain competitor." (79 Cong. Rec. 9078 (1935) (emphasis added)). The Report of the House Committee on the Judiciary concludes in most emphatic terms:

> There is nothing in [the recommended bill] to penalize, shackle or discourage efficiency, or to reward inefficiency.
>
> * * * * * * *
>
> It is not believed that the restoration of equality of opportunity in business will increase prices to consumers. Unfair trade practices and monopolistic methods which in the end destroy competition, restrain trade, and create monopoly have never in all history resulted in benefit to the public interest. On the contrary, for the most part, they have been symbolic of lower wages, longer hours, lower prices paid producers, coercion of independent manufacturers, domination of that field of industry, and in the end high prices to the consumers and large profits to the owners. H.R. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936).

I am aware that these Congressional assumptions about the Act's consumer benefits have been severely criticized by economists, lawyers, certain business groups and even government task forces. However, the statute has survived virtually unchanged for nearly half a century now, so I must presume that the original intent is unaltered when making my decision to enforce the law. I am certainly uncomfortable with discovering, at this late date, that Congress meant its clearly expressed policy to be supplanted by whatever views of consumer welfare are currently in vogue.

As to the Section 5 count of the Complaint, I would remand, not dismiss. Whether the Commission uses the gap-filling powers [3] of Section 5 in a *per se* or rule of reason mode is discretionary with the Commission, turning upon both the facts of the case and the nature of the touchstone law. In this matter, the Commission's complaint may have intended to specify the rule of reason approach. In Paragraph 9 of the complaint the Commission arguably imposed upon

itself the burden of demonstrating that the challenged acts and practices had "the tendency and effect of preventing and hindering competition." Complaint counsel exceeded their authority in stipulating away this provision without informing the Commission. Such a significant change in the focus of any case should be accomplished by certification to the Commission for approval, under Commission Rule of Practice 3.15.

I would restore the Complaint to its original form (Section 5 count only) and remand for trial on the issue of competitive effects.

FINAL ORDER

This matter has been heard by the Commission upon the appeals of complaint counsel and respondent General Motors Corporation from the Initial Decision and upon briefs and oral argument in support of, and in opposition to, the respective appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm the Initial Decision regarding dismissal of Count I of the Complaint and to reverse, insofar as the Decision failed to dismiss the remaining Count II, and found liability under that Count. Accordingly, the appeal of respondent General Motors Corporation is granted and the appeal of Complaint Counsel is denied, and [2]

It is ordered, That the complaint is dismissed in its entirety.

Commissioner Pertschuk dissented. Commissioner Bailey concurred in part and dissented in part.

IN THE MATTER OF

PILKINGTON BROTHERS P.L.C.

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

Docket C-3136. Complaint, June 22, 1984—Decision June 22, 1984

This consent order requires a British corporation, among other things, to divest within five years, its shares in Ford Glass Limited (FGL) to either Ford Motor Company or another Commission-approved buyer. Respondent must remove any director, alternate director or representative also serving on the board of FGL or Vitro Plan S.A., its Canadian and Mexican joint venture partners engaged in the manufacture of float glass. Although the order permits the firm to discuss the technical aspects of float glass production with its partners, discussions concerning competitive issues are prohibited. The company is further required to waive most of its rights under the Pilkington-Ford Motor Co. Unanimous Shareholder Agreement; vote its Vitro Plan shares in favor of any proposal to increase the Mexican firm's production of float glass; and refrain from invoking a provision of a 1965 agreement barring Mexican investors from producing float glass independently of the joint venture. Additionally, the company is prohibited from acquiring any concern engaged in the production of float glass in North America without prior Commission approval, for a period of ten years.

Appearances

For the Commission: *Robert W. Doyle, Jr.*

For the respondent: *Miles W. Kirkpatrick, Morgan, Lewis & Bockius,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the acquisition by Pilkington Brothers P.L.C. (PB) of 30 percent of the outstanding voting securities of Libbey-Owens-Ford Company (LOF) violates 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, and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINTIONS

1. For the purpose of this complaint the following definitions shall apply:

(a) *Respondent* means PB, and its subsidiaries, divisions, affiliates, successors and assigns;

(b) *Flat glass* is a generic term for all glass produced in flat form and later cut or shaped into various products; and

(c) *Float glass,* in either clear or tinted form, is unprocessed flat glass manufactured by floating molten glass over a bed of molten material or materials.

II. PILKINGTON BROTHERS P.L.C.

2. PB is a corporation organized and existing under the laws of England, with its principal place of business located at Prescot Road, St. Helens, Merseyside, England. PB is engaged in the manufacture and sale of float glass, float glass products, and other glass products.

3. PB owns 49 percent of Ford Glass Limited, a Canadian float glass manufacturer. Ford Motor Company owns the remaining 51 percent of Ford Glass Limited.

4. PB owns 35 percent of Vitro Plan S.A., a Mexican corporation which owns Mexican operations engaged in the manufacture and sale of float glass, float glass products, or other glass products.

III. LIBBEY-OWENS FORD COMPANY

5. LOF is a corporation organized and existing under the laws of the State of Ohio with its principal place of business located at 811 Madison Avenue, P.O. Box 799, Toledo, Ohio. LOF is engaged in the manufacture and sale of float glass, float glass products, fluid power system components, and laminated and molded plastic products.

IV. JURISIDICTION

6. At all times relevant herein, PB has been engaged in and affected "commerce" as that term is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

7. Subject to an outstanding escrow agreement which expired on April 30, 1983, on or about December 31, 1982, PB acquired 30 percent of the outstanding voting securities of LOF.

VI. TRADE AND COMMERCE

8. The relevant market is the manufacture or sale of float glass in North America (the United States, Mexico, and Canada).

9. Both PB and LOF are substantial competitors in the relevant market.

10. Concentration in the relevant market is high.

11. Barriers to entry in the relevant market are substantial.

VII. EFFECTS OF THE ACQUISITION

12. The effect of the acquisition may be to substantially lessen competition in the United States in violation 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, in the following ways, among others:

(a) Substantial actual and potential competition between PB and LOF in the relevant market will be eliminated;

(b) Substantial actual and potential competition between LOF and other companies in the relevant market will be eliminated;

(c) LOF will be eliminated as a substantial independent technological innovator and competitor; and

(d) The already high levels of concentration in the relevant market will be significantly increased.

VIII. VIOLATIONS CHARGED

13. The acquisition constitutes a violation 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 Bureau of Competition 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 and Clayton Acts; and

The respondent, its attorneys, 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 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 respondent has violated the said Acts, 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 of its Rules, 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 Pilkington Brothers is a corporation organized, existing and doing business under and by virtue of the laws of England, with its offices and principal place of business located at Prescot Road, St. Helens, Merseyside, England.

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.

It is ordered, That for the purposes of this order, the following definitions shall apply:

1. *Pilkington* means Pilkington Brothers P.L.C., a corporation organized, existing and doing business under the laws of England, with its principal offices at Prescot Road, St. Helens, Merseyside, England, its officers, employees, agents, representatives, parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Pilkington's parents, divisions, subsidiaries, successors, and assigns.

2. *FGL* means Ford Glass Limited, a corporation organized, existing and doing business under the laws of Canada, with its principal offices at 101 Richmond Street West, Toronto, Ontario, Canada, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of FGL's parents, divisions, subsidiaries, affiliates, successors and assigns.

3. *Vitro Plan* means Vitro Plan S.A., a corporation organized, existing and doing business under the laws of Mexico, with its principal offices in Monterrey, Nuevo Leon, Mexico, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns.

and the officers, employees or agents of Vitro Plan's parents, divisions, subsidiaries, affiliates, successors and assigns.

4. *LOF* means Libbey-Owens-Ford Company, a corporation organized, existing and doing business under the laws of Ohio, with its principal offices at 811 Madison Avenue, Toledo, Ohio, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of LOF's parents, divisions, subsidiaries, affiliates, successors and assigns.

5. *Flat glass* is a generic term for all glass produced in flat form and later cut or shaped into various products.

6. *Float glass,* in either clear or tinted form, is unprocessed flat glass manufactured by floating molten glass over a bed of molten material or materials.

7. The *relevant geographic market* is the United States, Canada and Mexico.

II.

It is further ordered, That Pilkington, within five (5) years from the date of service of this order, shall divest its shares in FGL to one or more acquirers which shall be subject to the prior approval of the Federal Trade Commission, *provided, however,* that the divestiture of the shares to Ford Motor Company, or a subsidiary thereof, shall not require the prior approval of the Federal Trade Commission.

III.

It is further ordered, That Pilkington, within thirty (30) days from the date of service of this order, shall remove its directors, alternate directors, or any other representatives from the Boards of Directors of FGL and Vitro Plan and shall not thereafter have representatives of any kind on the Boards of FGL or Vitro Plan without the prior approval of the Federal Trade Commission.

IV.

It is further ordered, That Pilkington shall waive all rights under the Unanimous Shareholders Agreement between Pilkington and Ford Motor Company, dated July 29, 1981, except rights provided by Paragraph 5 of said Agreement, *provided, however,* (1) that such waiver shall not affect the rights provided by said Unanimous Shareholders Agreement to any acquirer or acquirers of Pilkington's shares in FGL, and (2) that if FGL seeks to make any major change, except as may be required by applicable law, in the pension or retirement plans

of FGL, including the principal methods of funding those plans, Pilkington may oppose any such change.

V.

It is further ordered, That if the Series "A" shares of Vitro Plan are voted in favor of (1) any proposal to increase Vitro Plan's production capacity, production operating rates, or sales of float glass in the relevant geographic market, or (2) any proposal necessary to implement a proposed increase in Vitro Plan's production capacity, production operating rates, or sales of float glass in the relevant geographic market, then Pilkington shall vote its Series "B" shares in favor of such proposals.

VI.

It is further ordered, That Pilkington, at all ordinary and extraordinary general shareholders' meetings of Vitro Plan and FGL, shall exclude itself from all discussions or communications regarding any issues of a competitive nature, including but not limited to, issues relating to float glass capacity expansions or restrictions, production operating rates, production costs or any other costs, pricing, sales, marketing, market projections or forecasts, and further that Pilkington, including a proprietary examiner as defined in Article 42 of the Estatutos Sociales of Vitro Plan, S.A., dated March 2, 1981, shall be prohibited from discussing, communicating or expressing its opinion, in any way, with any other shareholders, directors, or officials of Vitro Plan or FGL regarding these issues at any other time, either prior to or subsequent to the aforesaid meetings, *provided, however,* that nothing in this paragraph shall prohibit discussions or communications between Pilkington and Vitro Plan or FGL regarding technical support relating to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products, *provided further,* that nothing in this paragraph shall prohibit discussions or communications between Pilkington and Ford Motor Company on matters not related to FGL.

VII.

It is further ordered, That Pilkington shall, for a period of ten (10) years after the effective date of this order:

1. Maintain complete files and records of all correspondence and other communications, whether in the United States or elsewhere,

between Pilkington and Vitro Plan and between Pilkington and FGL, other than in providing technical support to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products.

2. Maintain logs of all meetings and nonwritten communications, other than in providing technical support to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products, whether in the United States or elsewhere, between Pilkington and Vitro Plan and between Pilkington and FGL, including in such logs the names and corporate positions of all participants, the dates and locations of the meetings or other communications and a summary or description of the matters discussed in each such meeting or other communications.

3. Retain and make available to the Federal Trade Commission on request the complete files, records and logs required by subparagraphs 1 and 2.

4. Submit annually to the Federal Trade Commission a detailed sworn statement setting forth the manner and form in which Pilkington has complied with Paragraphs VI and VII of this order.

Provided, however, That nothing in this Paragraph VII shall require Pilkington to maintain files, records or logs of any communications with Ford Motor Company on matters not related to FGL or to report the same to the Federal Trade Commission.

VIII.

It is further ordered, That Pilkington shall not vote its shares in Vitro Plan to amend or in any way alter the Estatutos Sociales of Vitro Plan, S.A., dated March 2, 1981, without the prior approval of the Federal Trade Commission.

IX.

It is further ordered, That Pilkington shall not invoke the provisions of Article VIII of the Agreement between Pilkington and Fomento de Industria y Comercio S.A., dated March 29, 1965, so as to prevent Vitro S.A. from engaging in the manufacture of float glass in Mexico through companies other than Vitro Plan.

X.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten (10) years from and after the date of service of this order, Pilkington shall cease and desist from acquiring, without prior approval of the Federal Trade Commission,

directly or indirectly, through subsidiaries or otherwise, any interest in, or the whole or any part of the stock, or share capital of any company engaged in the production of float glass in the relevant geographic market, or assets used in the production of float glass of any company which is now or has previously been engaged in the production of float glass in the relevant geographic market, *provided, however,* that such prior approval of the Federal Trade Commission is not required for (1) further acquisition of stock of LOF, or (2) further acquisition of the capital stock of Vitro Plan, *provided, however,* such further acquisition does not increase Pilkington's holdings in Vitro Plan above 35%.

XI.

It is further ordered, That Pilkington shall, within sixty (60) days from the date of service of this order, and annually thereafter until the tenth anniversary thereof, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with the terms of this order, and such additional information relating thereto as may from time to time reasonably be required.

XII.

It is further ordered, That Pilkington shall, within sixty (60) days from the date of service of this order, and every one hundred and twenty (120) days thereafter until it has fully complied with Paragraph II of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with the terms of Paragraph II of this order and such additional information relating thereto as may from time to time reasonably be required.

XIII.

It is further ordered, That Pilkington shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in itself, 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.

XIV.

It is further ordered, That Pilkington shall use its best efforts to obtain promptly any approval by the Canadian government, or any subdivision thereof, that is necessary to its compliance with this order.

Due to insufficient information supplied by respondent SCM Corporation, Commission was unable to determine whether proposed interlocking directorate would violate provisions of Final Order entered against SCM. (92 F.T.C. 416 (1978)) [*Kraftco Corporation, et al., Dkt. 9035*]

June 18, 1984

Dear Mr. Willis:

This is in response to your request for advice as to whether Dr. Richard R. West may serve simultaneously on the boards of directors of SCM Corporation ("SCM") and Bohemia, Inc. ("Bohemia") without violating the prohibition against interlocking directorates contained in the Commission's order in Docket No. 9035 ("the order") [92 F.T.C. 416 (1978)]. This request was made on behalf of SCM, which became subject to the Commission's order on October 6, 1980 [14 C.D. 23 (612 F.2d 707 (1980), *cert. denied,* 449 U.S. 821 (1980)].

According to your request, Dr. West is presently a member of the SCM board and would like to rejoin the Bohemia board, provided that his simultaneous service on the two boards would not violate the order. Your request involves a product overlap that occurs between SCM's subsidiary, Allied Paper, Incorporated ("Allied") and Bohemia; however, there is no direct product overlap between the two parent companies, SCM and Bohemia. You advise that Dr. West is not a director of Allied and that he is not involved with Allied's operating policies.

Your request states that Allied owns and operates a lumber mill in Jackson, Alabama which sells lumber products, primarily to customers in the Southeast, under the "M.W. Smith Lumber Company" ("M.W. Smith") trade name. For the fiscal year ended June 30, 1982, the total sales of Allied and its subsidiaries were $288 million including $6.9 million total sales of all forms of lumber. You state that Bohemia and M.W. Smith both sell lumber products in 18 states. The total annual sales of lumber products in the 18 states is $5.2 million for Bohemia and $4.1 million for M.W. Smith. Bohemia and M.W. Smith each have sales of $100,000 or more of lumber products only in two states, Louisiana and Oregon and neither company is aware of any instance in which they have sold products to the same customers. The total sales of Bohemia and M.W. Smith combined account for less than 1% of all sales included under SIC Code No. 2421 - Sawmills & Planing Mills, General. You state that the only information which the SCM board sees with respect to M.W. Smith "would be a sales and a profit line in the annual budget and in long range plans."

We believe that the order in Docket No. 9035 would be applicable by its terms to this interlock. Paragraph I of the order prohibits SCM

from having a common director with any corporation which competes with SCM in the production or sale of any product or service. The order does not contain any *de minimis* exception.

Nor can we say that any of the other possible grounds for exception are applicable here. The Commission has considered whether the Docket No. 9035 order is applicable to situations where the prospective interlock is between parent companies but the competition occurs between one parent and the subsidiary of the other parent. As stated above, the order prohibits SCM from having a director interlock with Kraft or with any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM in the production or sale of any product or service. The order thus contains a specific exemption for interlocks arising solely between SCM and its subsidiaries, and it does not provide any exemption for the activities of subsidiaries in other contexts. The Commission concludes that no such exemption was intended and that the language of the order is broad enough to encompass the prospective interlock described in your request.

The Commission has likewise considered whether it is appropriate to impute Allied's activities to SCM for the purpose of determining order coverage. In this connection, the Commission's opinion in *Borg-Warner Corporation,* Docket No. 9120 (Slip Opinion, June 3, 1983) [101 F.T.C. 863 at 919], discussed the question of when it was appropriate to impute a subsidiary's activities to a parent corporation for Section 8 purposes. The Commission stated that the relevant inquiry under Section 8

> is whether the parent company should be regarded as a "competitor" of the subsidiary's competitors, and whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decisionmaking at the director level so as to dampen competitive relationships between divided corporate interests. The common law "control" inquiry is relevant insofar as it is an indication of the likelihood of collusion and anticompetitive transfer of information among competitors.

The staff invited you to supply detailed information on the control and other factors deemed relevant by the Commission in *Borg-Warner* as they relate to the relationship between SCM and M.W. Smith, but you did not do so, with the exception of stating that SCM knows "of no communication whatsoever between M.W. Smith (or Allied) and Bohemia." Accordingly, based on the limited information that you have supplied, the Commission is unable to determine that it would be inappropriate in this instance to impute Allied's activities to SCM for the purpose of determining order coverage.

In the light of the fact that the information supplied in your request is insufficient to resolve the question of whether Allied's activities should be imputed to SCM, the Commission is unable to determine

whether the simultaneous service of Dr. West on the boards of SCM and Bohemia would violate Paragraph I of the order.

By direction of the Commission.

Letter of Request

February 15, 1983

Dear Mr. Feinberg:

This is a request made on behalf of respondent, SCM Corporation ("SCM"), for your determination that the simultaneous service of Dr. Richard R. West on the boards of directors of SCM and Bohemia, Inc. ("Bohemia") would not violate the Order in the above matter.

Dr. West became a member of the Board of Directors of SCM in December, 1982. He had previously been a member of the Board of Directors of Bohemia, but he resigned from that position pending resolution of the question which we are raising in this letter. If you determine that Dr. West's simultaneous service on the boards of SCM and Bohemia would not violate the Order, Dr. West intends to rejoin the Bohemia board.

Dr. West is the Dean of the Amos Tuck School of Business Administration, Dartmouth College. He is a director of The Dorsey Corporation (a manufacturer of cargo trailers and plastic containers), Liberty Communications Inc. (a cable TV and TV broadcasting company), Vornado, Inc. (a real estate holding company), and several investment companies.

Bohemia has its principal office in Eugene, Oregon and is engaged in the manufacture and sale of a variety of forest products, including lumber, plywood, veneer, particleboard and laminated beams, in marine construction and in the production of rock, gravel and aggregates. For the fiscal year ended April 30, 1982, Bohemia had total sales of $155 million; of those sales $65 million were sales of lumber.

SCM has its principal office in New York, New York and had total sales for the fiscal year ended June 30, 1982 of $1.9 billion. As you know, the company's major businesses are chemicals, coatings and resins, paper products, foods, and typewriters and appliances.

SCM owns Allied Paper, Incorporated, a Delaware corporation ("Allied"), with its principal office in Kalamazoo, Michigan. Allied's operations include a paper mill located in Jackson, Alabama. In conjunction with its paper mill, Allied owns and operates a lumber mill, also located in Jackson, Alabama; the lumber mill sells lumber products, mainly to customers in the Southeast, under the "M.W. Smith Lumber Company" trade name ("M.W. Smith"). For the fiscal year ended June 30, 1982, the total sales of Allied and its subsidiaries were $288 million, including $6.9 million total sales of all forms of lumber.

The lumber products of Bohemia and M.W. Smith are all included under SIC Code No. 2421 - Sawmills & Planing Mills, General. This product line is dominated by such industry giants as Weyerhaeuser Co. Inc., Louisiana-Pacific Corp., Georgia-Pacific Corp., St. Regis Paper Co. Inc., Boise Cascade Corp. and many others. Bohemia's market share of this category is approximately one-half of 1% and M.W. Smith's share is infinitesimal.

There are 18 states in which Bohemia and M.W. Smith both sell at least some quantity of lumber products. (*See* attached list.) The total annual sales of lumber products sold in those 18 states is $4.1 million for M.W. Smith and approximately $5.2 million for Bohemia (annualizing the six-months sales of the California mills—*see* footnote to attached list). You will note that the list shows only two states (Louisiana and Oregon) in which Bohemia and M.W. Smith each have sales of $100,000 or more of lumber products.

Of M.W. Smith's lumber sales, approximately 46% are to "office wholesalers" (non-stocking); 25% are to "yard wholesalers" (stocking); and the balance are direct sales to retailers or manufacturers. Of Bohemia's lumber sales, less than 15% are to office wholesalers; and most of Bohemia's sales are to yard wholesalers, contractors and retailers.

M.W. Smith and Bohemia have each checked with their sales personnel, and none knew of any direct competition between the two companies, that is, instances in which both companies were competing for the business of the same customer. It is, of course, possible that, unknown to the present sales personnel of the two companies, they have sold some product or products to the same customers. Even here there is not likely to be any substantial competition in view of the fact that the sales were quite small in each state and the principal channels of distribution employed by the two companies differ.

Dr. West does not serve on the board of the SCM subsidiary, Allied. Nor in his capacity as a director of SCM would he be involved with the operating policies of Allied or M.W. Smith.

Although both Bohemia and M.W. Smith market some of the same products, they market in only 18 states in common, the sales volume is minimal in each state and one markets principally to office wholesalers while only 15% of the other's sales are to such customers. Further, the sawmills and planing mills category is so large that even the combined share of Bohemia and M.W. Smith is miniscule.

In these circumstances, we do not believe that either the Act or the Order were intended to bar Dr. West's service on the boards of SCM and Bohemia.

We respectfully request that you indicate that you have no objection to service by Dr. West on the board of directors of Bohemia.

Thank you for your early consideration of this request.

Sincerely,

/s/ William E. Willis

Sales of Board ("B"), Standard Dimension ("D"), Industrial ("I"), Saps ("S"), Flooring ("F"), Sidings ("Si"), Prime ("P"), Wolmanized Lumber ("W") Products by Bohemia, Inc., (FY ended 4/30/82)* and M.W. Smith Lumber Co. (FY ended 6/30/82)

	Bohemia		M.W. Smith	
State	$000's	Prod.	$000's	Prod.
AL	70	B,D	2,340	B,D,I, S,F,Si, P,W
FL	100	D	90	D
GA	30	B,D	170	B,D,I, F,Si
IL	50	B,F	30	B,F,W
KY	10	B	290	B,D,I, F,Si,W
LA	470	B,D	100	B,D,I, Si,W
MD	20	B	10	B,Si
MI	110	D	10	D,I
MN	190	B	10	B
MO	160	B,D	70	B,D,I
NC	70	B	100	B,D,I
NY	30	D	20	B,D,I
OH	20	D	140	B,D,I, F,W
OR	2,120	B,D	180	B,D,F
PA	20	D	5	D
TN	30	B,D	430	B,D,F, Si
TX	950	B,D,I	50	B,D,I
VA	30	D	40	D,I,S

* Sales for Bohemia in these states are based on annual sales for Oregon mills (representing 80% of all sales) and six-months sales for California mills.

Second Letter of Request

August 26, 1983

Dear Mr. Feinberg:

In connection with our pending request on behalf of SCM Corporation ("SCM") for your determination that the service of Dr. Richard R. West on the Boards of Directors of SCM and Bohemia, Inc. is not in violation of the Order entered in the above Docket, I would like to call your particular attention to the recent decision of the Commission *In the Matter of Borg-Warner Corporation, et al.,* Docket No. 9120. [101 F.T.C. 863 (1983)]

The *Borg-Warner* decision confirms, I believe, that in view of all of the circumstances the service of Dr. West on the Boards of the two companies would neither violate the law nor the outstanding Order.

The Commission clearly articulated in *Borg-Warner:* "A parent corporation is not a competitor of another corporation merely because its subsidiary is. (citing cases)" (at p. 16), and further declared: "The relevant inquiry under Section 8 is . . . whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decision making at the director level so as to dampen competitive relationships between divided corporate interests" (at p. 18).

The Board of Directors of SCM is not involved in and does not participate in the operation and policies of the M.W. Smith Lumber Company, an operating group which is a part of SCM's subsidiary, Allied Paper, Incorporated. As we have previously disclosed to you, M.W. Smith's sales are a small fraction of 1% of SCM's total sales. M.W. Smith's sales are in a sense generated as a by-product of Allied's principal business, the manufacture of pulp and paper products; thus, the M.W. Smith Lumber Company is located near Allied's Jackson, Alabama pulp and paper mill and was acquired by SCM, in 1981, mainly as an adjunct to the pulp mill because it provided a local source of wood chips, timber and timber cutting rights.

The monthly and annual financial operating reports which are presented to the SCM Board of Directors include data as to each of SCM's divisions with some breakouts for operating groups; but there are no such breakouts for the small M.W. Smith operations. The only such information which the Board sees with respect to M.W. Smith would be a sales and a profits line in the annual budget and in long range plans.

In the case of SCM and M.W. Smith we have a relationship which is even more remote than the Commission faced in *Borg-Warner* inasmuch as the SCM subsidiary, Allied, is essentially a pulp and paper producer and only this small group in Jackson, Alabama, representing about 2% of Allied's sales, is engaged in activities which could be competitive with Portland, Oregon-based Bohemia, Inc.

In fact, of course, as indicated in our prior submission, neither the Bohemia management nor the M.W. Smith management consider the other company to be a competitor, and neither management knew of any specific instances in which any of their products were sold in competition with the products of the other company.

Unlike the situation in *Borg-Warner,* we know of no communications whatsoever between M.W. Smith (or Allied) and Bohemia.

The Commission in *Borg-Warner* placed great emphasis upon the purposes of Section 8, noting that interlocking directorates were seen by Congress as "likely to facilitate collusion" (p. 25) "and anti-competitive transfer of information among competitors" (at p. 18). It is the possibility of such "collusion", the Commission declared, that renders the "control" inquiry relevant.

The absence of SCM Board involvement in the M.W. Smith activities, the fact that M.W. Smith itself is merely part of a larger subsidiary of SCM and the fact that M.W. Smith's sales are tiny in comparison both to the total sales of SCM and of its subsidiary Allied, render non-existent the risk of collusion which underlies the purpose of Section 8 of the Clayton Act and the Order which has been rendered in this proceeding. Furthermore, when one realizes that the total share of the lumber market enjoyed by Bohemia and M.W. Smith together does not reach 1%, and that in fact the companies are not even aware of any competition between them, any fear of collusion is beyond belief.

We renew our pending request that you indicate no objection to the service of Dr. West on the Board of Directors of Bohemia, Inc.

Sincerely,

/s/ William E. Willis

TABLE OF COMMODITIES*

DECISIONS AND ORDERS

*Commodities involved in dismissing or vacating orders are *italicized*.

DECISIONS AND ORDERS

*U.S. GOVERNMENT PRINTING OFFICE: 1985 471-107