style, price or price range of the watches purchased by Target, nor is there any evidence of the exact dates of those purchases.

259. The tabulations in the record, summarizing sales by Waltham to Gibson stores and other customers in New Mexico and Texas during 1973 and 1974, reveal contemporaneous transactions involving sales of watches by Waltham to various Gibson stores and other Waltham customers located in the same town or city (CX 216A–D).

However, there is virtually no record evidence regarding the functional level of any of the alleged nonfavored customers who are shown in the tabulations.[55] They may be wholesalers, retailers, warehousers or even perform some other function. Thus, the record evidence does not show that these alleged nonfavored customers were in competition with Gibson retail stores.

Moreover, the tabulations do not specify what products were purchased in a specific transaction. The only description given for the type of products purchased in all of the transactions shown is "watches." There is also no way to determine the prices of the products involved.[56] Given the great assortment of Waltham watches,[57] the information contained in the tabulations is insufficient to make the determination of whether the goods sold to Gibson retail stores and the goods sold to alleged competitors of Gibson stores were of like grade and quality. **[103]**

G. Wagner Products

260. E. R. Wagner Manufacturing Company, Wagner Products Division ("Wagner"), of Hurtisford, Wisconsin, manufactured and sold carpet sweepers, rug shampooers, rug shampoo, an electric clothes dryer and home food craft kits during the period 1969 through 1973 (Hornick 3156–57).

Wagner sells and ships its products throughout the United States and Canada (Hornick 3156–57), including shipments to Gibson Stores located outside of Wisconsin (CX 640A–N). Wagner is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such sales, are in the course of such commerce.

261. In 1973, Wagner had approximately 300–400 customers for its carpet sweeper product line, including Gibson, OTASCO, TG & Y, White stores, Nash Hardware, hardware retailers and hardware distributors and wholesalers (Hornick 3164–65, 3211–12, 3214, 3259–61).

[55] Southwestern Drug, one of the alleged nonfavored customers (CX 216C), is a wholesale drug distributor (Levitt 1784) and, thus, is not at the same functional level of operations as the Gibson stores.

[56] Waltham watches fall into several price categories, with many watches within each category (Findings 255, 256).

[57] Finding 255.

In 1973, Wagner's volume of sales on carpet sweepers to all of its customers was approximately $600,000 to $700,000 (Hornick 3194). In the same year, Wagner's sales of carpet sweepers to all the Gibson stores amounted to $69,531.73, or approximately 10% of its total sales volume on this product (Hornick 3191–93; CX 634D, 637D).

262. Wagner received orders from different Gibson franchisees in their individual capacity. The products were shipped to the franchisees' stores (Hornick 3239).

263. Wagner's sales force was comprised of independent manufacturer's representatives located throughout the country. Its manufacturer's representative in the Texas and Oklahoma area during the 1969 to 1973 period was the Weldon Jacobs Company ("Jacobs").[58] Jacobs was paid on a commission basis (Hornick 3157). The duties of Wagner's manufacturer's representatives were to solicit business and service Wagner's accounts (Hornick 3158).

Neither H. R. Gibson, Sr., Tommy Perkins nor any of Gibson, Sr.'s employees was ever a manufacturer's representative for Wagner (Hornick 3196).

264. Wagner participated in the Gibson Trade Show in the years 1969 through 1973 (Hornick 3167). Wagner's purpose in **[104]**attending the Gibson Trade Show was to be able to display and sell its products to the Gibson retail store buyers who were at the show (Hornick 3169–70, 3217–18, 3227, 3250). Wagner utilized show sheets in connection with the Gibson Trade Show (Hornick 3170; CX 632A–B, 635A–B).

265. The requirements imposed upon Wagner by the Gibson Trade Show for Wagner to participate in the show were: payment for rental of booth space; and, in 1973, payment of a percentage fee based on total sales to all Gibson stores (Hornick 3167, 3190–91, 3195). **[105]**

266. Wagner made the following booth fee payments to the Gibson Trade Show:*

[58] Jacobs was Wagner's manufacturer's representative at the Gibson Trade Show (Hornick 3196).

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
1970			$125.00	Check	Weldon M. Jacobs Co. Inc.** 1616 Dallas Trade Mart Dallas, Texas	CX 626A-C
August 1970			$125.00	Check	The Weldon Jacobs Co., Inc.** 1616 Dallas Trade Mart Dallas, Texas	CX 627A-C
February 1971			$125.00	Check	Weldon Jacobs Company** 1616 Dallas Trade Mart Dallas, Texas	CX 628A-C
November 1971			$125.00	Check	The Weldon M. Jacobs Co., Inc.** 1616 Dallas Trade Mart Dallas, Texas	CX 629A-D

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

**/ Wagner's manufacturer's representative, Jacobs, would pay the bills for rental of booth space at the Gibson Trade Show and, subsequently, was reimbursed by Wagner (Hornick 3167-68, 3251).

[106]267. In 1973, and again in 1974, Wagner agreed to pay to the Gibson Products Co. three percent of total sales to all Gibson retail stores for promotional services rendered (Hornick 3190–91, 3195, 3198–99; SR 17B, C). Wagner agreed to make such show fee payments because "[i]t was our understanding that if we didn't do that, we might not be able to get into the trade show" and, if that were to result, "[w]e felt that our sales would suffer" (Hornick 3195, 3202, 3215, 3237). [107]

268. Wagner made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Wagner Records
$1,234.36	7/19/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3%	January-June 1973	Volume rebate through June 1973*
851.59	4/1/74	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3%	July-December 1973	Volume rebate - July-Dec. 1973 - Our credit memo #56855**

* CX 634A-D

** CX 637A-D; SR 17A.

[108]269. Wagner did not receive any services from the Gibson Trade Show for the payment of the three percent show fee in 1973, above and beyond the services it had received in prior years when it

had not made any show fee payments (Hornick 3195). The show fee was paid in connection with the original sale of Wagner's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Wagner's products to consumers (Findings 68, 73, 97, 264, 265, 267).

270. Similarly, the booth fee was paid in order to enable Wagner to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Wagner's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Wagner's products to consumers (Findings 64, 68, 73, 95, 264, 265).

271. Wagner did not have a volume rebate program in 1973 (Hornick 3196). In that year, Wagner neither made nor offered to make payments based upon a percentage of total sales or alternate payments to any of its customers, other than Gibson Products Company, for services rendered (Hornick 3200–02).

During the 1969 to 1973 period, Wagner neither made nor offered to make payments based upon a percentage of total sales to any of the other trade shows that it attended (Hornick 3202–03).

272. In the years 1969 to 1973, Wagner neither made nor offered to make booth payments or alternate payments, other than newspaper or tabloid advertising, to any of its customers that did not hold trade shows (Hornick 3203–04).

273. Wagner had an advertising and promotional program which was made available to all of its customers, including all Gibson stores. The program encompassed the use of tabloids, newspaper advertising and sales floor demonstrations (Hornick 3196–97, 3201, 3229–32). The payments made by Wagner would vary, depending on the type of service utilized by the customer (Hornick 3231).

274. Wagner participated with the Gibson stores, in 1972 and 1973, in advertising in Gibson tabloids which were directed at the ultimate consumers[59] (Hornick 3171, 3174, 3176, 3254). Wagner paid $500.00, by check dated May 3, 1973, [109]to the Gibson Products Corp. for advertising in the April 1972 Gibson tabloid[60] (CX 633A–F. See also Hornick 3179–80, 3186, 3187, 3190). The tabloid payment to Gibson Products Company was not based upon a percentage of total sales (Hornick 3198). Moreover, it was in addition to the show fee payments made in 1973 (Hornick 3200, 3232).

There is no showing that Wagner's tabloid payments were not within the scope of its cooperative advertising and promotional program made available to all of its customers (Finding 274). A

[59] Wagner believed that participation in the Gibson tabloid advertisements would facilitate sales to Gibson retail stores (Hornick 3255, 3265).

[60] The products advertised were the following model carpet sweepers: Tidy-Up, Handy, Un-Litter Bug and Sweep-A-Smile (CX 633F).

discrimination cognizable under Count I of the complaint with respect to tabloid payments has not been proven.

275. Wagner participated in Gibson store directory advertising in which Wagner's name and products, along with other vendors, were listed for purposes of distribution to the Gibson retail stores (Hornick 3171–72, 3228–29). Wagner paid $50.00, by check dated September 21, 1972, to the Gibson Products Company for advertising in the January-June 1973 Gibson store directory (CX 631A–E). Wagner viewed the store directory advertisement as an aid in making sales to the Gibson retail stores (Hornick 3228).

276. Wagner considered its carpet sweepers as one product line. However, there were four basic types of chassis for the carpet sweepers (Hornick 3159). There were three basic sizes. Other variations included still larger units, a unit with a dial and a larger unit with a dial and a bigger bumper (Hornick 3163–64, 3225). Even where the only variations were that of color and name, such a carpet sweeper would have its own part number (Hornick 3223).

Aladdin was the smallest carpet sweeper in size, with the least number of features; it would come in different colors and have different names, such as Aladdin Sunset Red or Aladdin Avocado Handy (Hornick 3159–60. See *e.g.*, CX 640A, B). Floormaster was another chassis type; it also came in different colors with different names, such as Floormaster Bittersweet, Floormaster Lettuce Green, Floormaster Bright Yellow, or Floormaster Brown (Hornick 3161. See, *e.g.*, CX 640A, D). The Lite N Easy Blue Mist, Aladdin, Dial A Sweep, Calico Daisies, Tidy Up and Whisk Up models were all the same type carpet sweeper, differing only in terms of color and name (Hornick 3161–62. See, *e.g.*, CX 640A, E).

Wagner also offered and sold a promotional carpet sweeper, which was specially priced at a lower price to move well. This promotional product, described only as "Carpet Sweeper A" on some of Wagner's invoices (CX 640J, L), is the [110]same type carpet sweeper as the Lite N Easy Blue Mist, Aladdin, et al. (Hornick 3162–63); for instance, the Light N Easy Blue Mist and the promotional "Carpet Sweeper A" have the same part numbers (CX 640E–N). This promotional carpet sweeper is the product sold in the case of the invoices numbered CX 640E–N.

277. The invoices in the record disclose the following contemporaneous transactions involving sales of goods of like grade and quality (CX 640A–N).

San Antonio, Texas: Aladdin/Lite N Easy Blue Mist/Carpet Sweeper A (Gibson - 3/30/73, 8/29/73; White Stores[61] - 2/6/73, 3/14/73, 5/18/73, 6/13/73, 8/20/73, 4/25/73, 12/5/73, 3/8/74).

H. Farber Brothers

278. Farber Brothers ("Farber"), of Memphis, Tennessee, sells interior automotive products, including seat covers, slip covers and air cooled cushions (Farber, 1104–05).

Farber normally sends all of its shipments out of Memphis (Farber 1105–06), including sales to Gibson stores located outside of Tennessee (CX 1204A–J). Farber is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such sales, are in the course of such commerce.

279. Farber has had employees who worked on a commission basis as well as direct sales representatives (Farber 1143–44). Sales representatives normally received a five percent commission (Farber 1145).

280. Farber's major accounts are Montgomery Ward, Western Auto, TG & Y, Gibson stores and White's (Farber 1105, 1107).

281. Farber has participated in the Gibson Trade Show from its inception (Farber 1112–13, 1118–19). Its purpose in participating in the Gibson Trade Show was to obtain more sales from retailers attending the show (Farber 1142).

282. Farber usually has two to three of its employees attending the Gibson Trade Show. These employees are responsible for displaying merchandise to Gibson store buyers, presenting them with show sheets and taking their orders (Farber 1118). **[111]**

Farber has paid for the expenses incurred by its employees while attending the show (CX 1180, 1181A–D, 1182A–B, 1183A–D, 1174A–D, 1175A–C, 1176A–B, 1178, 1179, 1170A–B, 1171A–B, 1172, 1173, 1163, 1164, 1165; Farber 1117, 1122–23, 1126, 1129, 1132, 1139).

283. Farber listed the merchandise that it would exhibit at the Gibson Trade Show on show sheets (Farber 1164). This supplier suggested the items to be listed, and H.R. Gibson, Sr. and Bobby Regeon selected those products that they believed would sell to the buyers at the trade show (Farber 1164–65, 1183–84). Farber considered the trade show buyer to be a "merchandise selector" (Farber 1165). Regeon did not actually purchase any merchandise but "would select the products that he considered worthwhile to go to the shows, to the Gibson stores" (Farber 1182, 1184).

284. The requirements placed upon Farber to participate in the Gibson Trade Show were: payment for the rental of booth space; and,

[61] White Stores function at the retail level of operations (Finding 369).

beginning in 1973, payment of a two percent rebate to H.R. Gibson, Sr., doing business as the Gibson Trade Show, based on total annual sales to Gibson stores (Farber 1119, 1132–36, 1147–48; CX 1084, 1085, 1157A–B). [112]

285. Farber made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Aug. 18-22, 1969	3		$675.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 1127, 1104A
Nov. 3-7, 1969	2		500.00	Check	"	CX 1126, 1103A
Feb. 14-18, 1970	1		250.00	Check	Ideal Travel Agency	CX 1125, 1102A
May 4-8, 1970	1		250.00	Check	"	CX 1124, 1101A
Aug. 17-21, 1970	2		500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 1123, 1100A
Aug. 16-20, 1971	1		275.00	Check	Ideal Travel Agency	CX 1121, 1097A
Nov. 1-5, 1971	2		550.00	Check	"	CX 1122, 1096A
Aug. 14-18, 1972	1		350.00	Check	"	CX 1118; Farber 1129
Feb. 10-14, 1973	1		350.00	Check	H.R. Gibson	CX 1116, 1095; Farber 1132
May 14-18, 1973	1		350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 1115, 1094; Farber 1132
Aug. 13-17, 1973	1		350.00	Check	"	CX 1114, 1093A; Farber 1132
Nov. 5-9, 1973	3		1,050.00	Check	H.R. Gibson, Sr.	CX 1113, 1092; Farber 1132
Feb. 8-12, 1975	1		350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 1108, 1088; Farber 1138
May 12-16, 1975	1		350.00	Check	H.R. Gibson, Sr.	CX 1107, 1087; Farber 1138
Aug. 4-8, 1975	1		350.00	Check	H.R. Gibson, Sr. 1266 E. Ledbetter Dr. Dallas, Texas	CX 1106, 1086A; Farber 1138

[113]286. On November 1, 1973, after discussions with H. R. Gibson, Sr., Farber signed an agreement to pay to the Gibson Trade Show "2% of all sales made at this show and on all sales made as a result of Supplier being represented by THE GIBSON TRADE SHOW" (CX 1084, 1157A–B; Farber 1132–35). This agreement covered 1974 (Farber 1141). Farber signed an agreement on January 2, 1975, containing the same provisions as the above agreement (CX 1085). This agreement covered 1975 (Farber 1140).

The two percent fee arrangement based on sales to Gibson stores was intended to be for H.R. Gibson, Sr.'s services in bringing customers to Farber's booth at the trade show (Farber 1133–34, 1193; CX 1157A). The services that Farber received from H.R. Gibson, Sr. included preselecting merchandise to put in the show, distributing show sheets to retailers, bringing Gibson store buyers to the trade show, encouraging them to buy merchandise and calling delinquent accounts on behalf of Farber (Farber 1142, 1193–96, 1207–08).

287. Farber regarded H.R. Gibson, Sr. as its manufacturer's representative, albeit not as an exclusive manufacturer's representa-

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

tive, since 1973, the time at which Farber began making two percent volume rebates to the Gibson Trade Show (Farber 1176–78). However, Farber paid its direct sales force their percentage commission and paid H.R. Gibson, Sr. his two percent volume rebate, all on the same sales (Farber 1211).

288. The two percent payments to the Gibson Trade Show are carried on Farber's books as a sales expense (Farber 1167). **[114]**

289. Farber made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment	
$4,000.00	1/22/75	Check	Gibson Products Co.	ZZ	1974	ZZ of dollar volume for 1974	CX 1155A-D; Farber 1148-50
7,648.02	1/23/75	Memo Billing (no charge)	Mr. H.R. Gibson, Sr. Gibson Products Co. 519 Gibson St. Seagoville, Texas	ZZ	1974	ZZ of dollar volume for 1974	CX 1155E, 1156A-D; Farber 1148-50
3,059.53	6/13/75	Check	H.R. Gibson, Sr.	ZZ	2nd quarter 1975	Show expense - ZZ of $152,976.55 quarterly sales	CX 1154A-B; Farber 1159B
2,496.67	7/15/75	Check	Gibson Trade Show	ZZ	Not known	Not known	CX 1152; Farber 1163
3,155.30	10/8/75	Check	The Gibson Trade Show	ZZ	July, Aug., Sept. 1975	ZZ trade show fee as per contract	CX 1151A-B

[115]290. The show fee was paid in connection with the original sale of Farber's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Farber's products to consumers (Findings 68, 73, 97, 281, 284, 286).

291. Similarly, the booth fee was paid in order to enable Farber to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Farber's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Farber's products to consumers (Findings 64, 68, 73, 95, 281, 284).

292. Farber did not make any percentage payments to any other customer during the time period, beginning in 1973, in which it made two percent payments to the Gibson Trade Show (Farber 1167).

293. The Gibson Buyers Guide is a show directory that lists the trade show exhibitors and indicates their location at the show (Farber 1167–68). There were no requirements for any payments in order to be listed; however, if an exhibitor wished to place an advertisement in the directory, a payment was required (Farber 1168). Advertisements in the Buyers Guide were directed at buyers for the retail stores and did not constitute advertising to consumers (Farber 1194–95). **[116]**

294. Farber made the following payments to the Gibson Trade Show for advertisements in the show directory:

Amount	Date of Payment	Payee	Description of Payment	
$30.00	1/18/72	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	Ad in January 1972 store directory	CX 1161
17.00	2/29/72	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	Page ad in February Gibson Trade Show Buyers Guide	CX 1162A-B
17.00	5/7/73	The Gibson Trade Show 517 Gibson St. Seagoville, Texas	Page ad in May Gibson Trade Show Buyers Guide	CX 1160A-B

[117]295. Farber has continued its participation in the Gibson Trade Show in 1976 and 1977. In those years, it paid booth rental fees and a two percent volume rebate (Farber 1170–71).

296. Farber has never offered nor operated a standard advertising program (Farber 1168). However, during the period 1969 through 1975, Farber did offer to make advertising allowances available on the same basis to its customers, such as Gibson stores, TG & Y, Wal-Mart and Woolco (Farber 1203–05, 1212–13; CX 1203A–B; Pettit 4195–96, 4199). According to Farber, it offers advertising payments "the same to all customers" (Farber 1204).

Farber participated in placing advertisements in the Gibson tabloid, including an advertisement authorized on February 6, 1970, for which Farber agreed to pay Gibson Products Company $500.00 (CX 1158D; Farber 1213–14).

Farber, which did not conduct a standard advertising program, nevertheless claimed that advertising allowances were offered on the same basis to all customers. Such ambiguous evidence affords no basis for a finding that the tabloid payments constituted a cognizable discrimination under Count I of the complaint. In any event, complaint counsel have not sustained their burden of proof regarding a showing that the tabloid payments discriminated between Gibson stores and other customers competing in the products featured in such advertisements. The tabloid payment in question was made by Farber in 1970. The tabulations and other evidence in the record with respect to goods purchased by Farber's customers covers the period 1972 to 1975 (CX 1204A–B). There is no record evidence as to any sales transactions in 1970.

297. Farber manufactures approximately 14 to 15 different grades

of vinyl slip covers in order to meet consumer preferences (Farber 1202). It also manufactures about 14 to 15 different grades of cushions and ventilated or cooled cushions (Farber 1203).

298. The tabulations of purchases from Farber by Gibson stores and other customers generally give only descriptions such as "cushions" or "slip covers" (CX 1204A–B). This is insufficient to sustain a finding that such transactions involved sales of goods of like grade and quality. The following contemporaneous sales were recorded with more precision and meet the like grade and quality requirements (CX 1204A–B): [118]

Fayetteville, Ark. - carpet roll (Gibson 3/11/74; Wal-Mart[61a] - 1/4/74).

Shreveport, La. - nylon cushion (Gibson - 3/14/75 and 6/24/75; TG & Y[61a] - 1/14/75).

Abilene, Tex. - truck vinyl (Gibson - 3/14/75; TG & Y - 3/11/75).

I. Armstrong Environmental Industries

299. Armstrong Environmental Industries ("Armstrong"), of Los Angeles, California, manufactures both aboveground and underground home sprinklers (Fox 3046–47).

Armstrong sells its products throughout the United States, including sales to Gibson stores located outside of California (Fox 3046, 3050–51). Armstrong's products are shipped from California and Florida (Fox 3080). Armstrong is engaged in interstate commerce and its transactions with respondents, including show fee payments based on such sales, are in the course of such commerce.

300. Armstrong sells to distributors, chain retail establishments, retail stores and catalog houses (Fox 3048). Armstrong's retail customers in 1969 included J. C. Penney, Montgomery Ward, Oklahoma Tire, White Stores, Leonards, Angels, Builders Emporium, Gamble-Skogmo, H.B. Meyers, K-Mart, Handy Dan and Gibson stores (Fox 3048–50).

The Gibson stores, collectively, were Armstrong's eighth or ninth largest customer (Fox 3055, 3093). Armstrong did a total volume of net sales with all Gibson stores of $28,000.00 for the business year ending June 24, 1970 (CX 781B; Fox 3068–69).

301. Individual franchisees using the Gibson name placed orders with Armstrong. The franchisees were billed on an individual basis (Fox 3094).

302. Armstrong's sales force consists solely of manufacturer's

[61a] Wal-Mart and TG & Y function at the retail level of operations (Finding 369).

representatives located throughout the country (Fox 3046–47). The manufacturer's representatives are compensated on the basis of the gross sales they make on behalf of Armstrong (Fox 3059–60). They call on customers, solicit business and take orders (Fox 3061). The F.F. Tranchina Company ("Tranchina") is Armstrong's manufacturer's representative in Texas; it helped Armstrong begin selling to Gibson stores (Fox 3051–52). H.R. Gibson, Sr. was never Armstrong's manufacturer's representative (Fox 3061). **[119]**

303. Armstrong participated in the Gibson Trade Show in 1969, 1970 and 1971 (Fox 3052–55). In the course of such participation, it listed the merchandise, along with the prices, that it presented for sale at the 1969, 1970 and 1971 Gibson Trade Shows on the show sheets provided by the Gibson Trade Show. The show sheets served as purchase order forms (Fox 3065–66; CX 778A–F, 779, 780A–F, 784A–G). Armstrong participated in the Gibson Trade Show in 1969, facilitated its sales to retailers (Fox 3091). And, the services provided by the Gibson Trade Show such as show sheets, show directories and the introduction of customers to Armstrong representatives by trade show personnel also facilitated such sales to retailers (Fox 3091–92).

304. The only requirement imposed upon Armstrong by the Gibson Trade Show for Armstrong to be in the 1969 show was payment for the rental of booth space (Fox 3053). In 1970 and 1971, Armstrong was required to pay rental for booth space and a five percent fee on total annual gross sales to all Gibson stores in 1969 and 1970, respectively, in order to participate in the Gibson Trade Show (Fox 3053–55, 3077–78, 3100). **[120]**

305. Armstrong made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Nov. 1970			$175.00	Check	F.F. Tranchina Co. Inc.**	CX 782A-B
Nov. 1-5, 1971			$275.00	Check	F.F. Tranchina Co. Inc.**	CX 788A, D

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

**/ Tranchina is Armstrong's manufacturer's representative in the area that encompasses the Gibson Trade Show (Fox 3051-52). Tranchina paid out the expenses for Armstrong's participation in the trade shows and was subsequently reimbursed (CX 782A; Fox 3062, 3064).

306. Armstrong made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Armstrong Records	
$1,390.58	10/21/70	Check	Gibson Products Co. Seagoville, Texas	5%	Business year ending June 24, 1970	5% of net sales for past season	CX 781A-C; Fox 3068-69
$2,636.55	10/27/71	Check	Gibson Products Co.	5%	October 15, 1970 - October 15, 1971	5% rebate of total net sales of $52,730.94 for 10/15/70 through 10/15/71	CX 785A-C

[122]307. Armstrong paid the Gibson Trade Show five percent of gross sales to all Gibson stores in the year prior to the trade show because, "[i]f we [Armstrong] hadn't paid the five percent for the prior years' gross sales, we would not be invited to the next Gibson show" (Fox 3077). The show fee had nothing to do with promoting or advertising goods for resale at the retail level (Fox 3093).

308. The show fee was paid in connection with the original sale of Armstrong's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Armstrong's products to consumers (Findings 68, 73, 97, 303, 304, 307).

309. Similarly, the booth fee was paid in order to enable Armstrong to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Armstrong's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Armstrong's products to consumers (Findings 64, 68, 73, 95, 303, 304).

310. In the period 1969 through 1971, Armstrong neither made nor offered to make any payments based on a percentage of total sales to any of its customers, other than the five percent paid to Gibson to participate in the Gibson Trade Show (Fox 3058).

During the period 1969 through 1971, Armstrong neither paid nor offered to pay any percentage fee based on total sales to any of the other trade shows that it attended (Fox 3055–57).

311. During the period 1969 through 1971, Armstrong neither made nor offered to make an alternate payment equal to the cost of the booth fee to any of its customers that did not hold a trade show (Fox 3057).

312. During the period 1969 through 1971, Armstrong offered to all of its customers, including Gibson stores, an advertising allowance with proof of advertising of five percent of gross sales (Fox 3059). This advertising allowance is to be distinguished from the five percent show fee paid to the Gibson Trade Show (Fox 3074–75, 3092–93). The five percent show fee paid to participate in the Gibson Trade Show was in addition to the five percent cooperative advertising allowance also made available to Gibson retail stores (Fox 3075).

In 1970, Armstrong had an industry-wide promotional program consisting of a sprinkler display unit, which it offered to all of its customers (Fox 3054). [123]

313. During the period 1969 through 1971, excluding the show fee payment to the Gibson Trade Show and its five percent cooperative advertising program, Armstrong neither offered to pay nor made available to any customer a percentage payment based on total sales or an alternate payment for promotional services rendered (Fox 3076–77).

314. Armstrong manufactures 53 different types of sprinkler devices, which fall into two basic product lines. One line consists of above ground sprinklers and includes impulse sprinklers, oscillating sprinklers and spike sprinklers. The other line consists of underground products and includes pop-up sprinklers, flathead sprinklers and bubblers (Fox 3047–48).

315. Armstrong's customers, including Gibson stores, selectively purchased certain items from among the different types of sprinklers in Armstrong's two sprinkler lines (Fox 3096, 3105–06).

316. The record contains no documentary evidence bearing on the question of whether Gibson stores and other Armstrong customers competing with them in the resale of Armstrong products purchased goods of like grade and quality in the relevant period.

J. Unitron

317. Unitron, of Hawthorne, California, imports and distributes home improvement and do-it-yourself merchandise, including mahogany shelving, roll-up blinds, interior decorative products, filigreed grilles, framing, beads, window shades, folding floor screens, casters, miscellaneous hardware, louvered doors, window shutters, mahogany stools and rattan chairs (Kern 2795–96).

Unitron warehouses its products in California, Texas, Florida, New York and Illinois (Kern 2796).

Unitron sells and ships its products throughout the United States, including sales to Gibson stores located outside of the above states (CX 835A–M; Kern 2796). Unitron is engaged in interstate commerce and its transactions with respondents, including show fee payments based on such sales, are in the course of such commerce. [124]

318. Unitron sells to both retailers and distributors (Kern 2870). During the period 1969 through 1972, some of Unitron's customers were Sears Roebuck, J.C. Penney, Montgomery Ward, Acme Quality Paint, Gibson Discount Stores, Gulf Mart Stores, Handy Dan, Angels Home Centers, Baldridge Lumber Company, Oklahoma Candy, Saxon Paint Company, Fred Meyer and Thrifty Drug Stores (Kern 2799–2800).

In 1969, the Gibson group of stores constituted one of Unitron's ten largest customers, making up about ten percent of its business (Kern

2822). Unitron's total net sales to all Gibson stores in 1969 was $107,089.50 (CX 816; Kern 2848–49).

319. Unitron personnel and manufacturer's representatives were utilized in soliciting and servicing customer accounts (Kern 2797–98). Manufacturer's representatives were employed on a commission basis, receiving between three and ten percent commission depending upon the product sold (Kern 2798). In the period 1969 through 1972, Unitron's manufacturer's representative in the Southwest was Bill Blair and Associates (Kern 2797).

320. Unitron participated in four Gibson Trade Shows per year in the period 1969 to 1972 (Kern 2823).

321. Unitron personnel as well as its manufacturer's representative in the area, Bill Blair and Associates, attended the trade shows and staffed Unitron's booths at the shows (Kern 2824, 2884).

322. Unitron never made sales to customers other than Gibson stores while at the Gibson Trade Show. The show was open only to exhibitors, Gibson employees, Gibson store personnel and other persons whose admission was authorized (Kern 2824–25).

323. Attendance at the Gibson Trade Show by a Gibson franchisee did not guarantee purchases from Unitron. For example, Pamida, a group with a large number of franchised stores, did not purchase from the supplier (Kern 2896–97).

324. Gibson franchisees placed their orders individually with Unitron on their own order forms imprinted with the Gibson name (Kern 2884, 2893–94, 2898). Where an organization such as West and Company operated stores under its own name as well as under one of the Gibson trade names, Unitron could only sell to the group's Gibson franchise stores at the Gibson Trade Show (Kern 2895–96). [125]

Although individual franchisees were responsible for paying their bills, Unitron customarily contacted H.R. Gibson, Sr. or the Gibson accounts payable staff at the Seagoville headquarters office to provide assistance in resolving delinquent franchisee accounts (Kern 2898–99, 2966; SR 23J).

325. In 1969, the requirements for Unitron's participation in the Gibson Trade Show were: payment of booth fees; and, payment of special allowances on sales volume (Kern 2804–05). [126]

326. Unitron made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Spring 1969	2		$370.00	Check		CX 810; Kern 2835
February 1970	2		$500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 817, 818
May 1970	2		$500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 819A-B
August 1970			$500.00	Check	Ideal Travel Agency	CX 820A-B
November 1970			$750.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 821A-B
November 1971	2		$550.00	Check	Ideal Travel Agency	CX 824, 826
[Date of payment: 4/13/72]			$600.00	Check	Ideal Travel Agency	CX 829; Kern 2838-39
May 1972			$350.00	Check	Ideal Travel Agency	CX 830A-B
November 1972	2		$700.00	Check	Ideal Travel Agency	CX 831A-B

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

[127]327. In 1968, Bobby Regeon traveled to California in response to Unitron's invitation to see its new mobile showroom which it wanted to use in the Gibson Trade Show. Regeon requested a five percent special compensation on the total gross volume done with all Gibson stores[62] (Kern 2805–08).

Unitron discussed the special allowance with Regeon in light of its desires to develop its business relationship with Gibson Discount stores and obtain Gibson assistance in promoting the advertisement and sale of Unitron products (Kern 2806–07). Subsequently, Unitron agreed to make payments, beginning in 1969, based on two and one-half percent of adjusted gross sales[63] to all Gibson stores[64] (Kern 2808).

Unitron made the payments of two and one-half percent of adjusted gross sales to the Gibson Trade Show because it was promised promotions, advertising, special marketing assistance, generation of greater sales volume, choice of prime booth space at the trade shows and "a trouble-free relationship between Gibson and Unitron"[65] (Kern

[62] Sidney Kern, Unitron's executive vice president between 1969 and 1972 (Kern 2794–95), testified: "In order to be assured of booth space in a prime location, there was the requirement that we [Unitron] participate in the payment of special allowances on volume" (Kern 2805).

[63] Adjusted gross sales refers to gross sales less any sales discounts that appeared on the invoice (Kern 2808).

[64] The two and one-half percent payments, which were above and beyond normal discounts and allowances, did not go to Gibson retail stores; consequently, these payments did not appear on the face of the invoices (Kern 2965, 2972).

[65] In fact, Unitron's Sidney Kern had a telephone conversation with H.R. Gibson, Sr., in 1971 or early 1972, in which Gibson, Sr. complained that Unitron's regular prices on its shelving products were too high. Kern testified that:

(Continued)

2817, 2858–59, 2861–63, [128]2908–10). Discussions with Gibson personnel, such as Bobby Regeon, had indicated that Unitron would be afforded tabloid advertising if the two and one-half percent allowance were paid (Kern 2841–42, 2844–45, 2906–07, 2908–09; CX 812, 822). Unitron wanted tabloid advertising since this would force the Gibson stores to stock the items advertised to the public (Kern 2845–46, 2906–07). Although Unitron expected the show fee percentage payments to generate advertising at the retail level,[66] these expectations were never realized. No tabloids featuring Unitron's products were issued (Kern 2914–15, 2840; CX 822).

Effective January 1, 1972, Unitron and Gibson Products Company agreed to Unitron making payments on two, rather than two and one-half, percent of adjusted gross sales to all Gibson stores (CX 827A–B; Kern 2851–53).

Unitron believed that if it had not made the percentage payments to Gibson Products Company, it would not have been allowed to participate in the Gibson Trade Show (Kern 2857). [129]

328. Unitron made the following show fee payments to the Gibson Trade Show:*

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment	
$ 877.42	7/3/69	Check		2 1/2%	Second quarter of 1969	Allowance of 2 1/2% on the second quarter sales to Gibson stores as per agreement	CX 812
$1,029.32	12/26/72	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	January-September 1972	Payment of the rebate computations	CX 813X Kern 2855-5 2917
$ 392.55				2%	January-March 1972	2% of sales to Gibson Products for Jan. - March 1972	CX 828;

*/ Unitron's Sidney Kern testified that Unitron paid a percentage show fee to the Gibson Trade Show in each of the years during the 1969 to 1972 period; however, the only record documentation of actual show fee payments is as indicated on this chart - thus, there is no record proof of any payments for the years 1970 or 1971 (Kern 2914-20).

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

[130]329. The show fee was paid in connection with the original sale of Unitron's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Unitron's products to consumers (Findings 68, 73, 97, 325, 327).

330. Similarly, the booth fee was paid in order to enable Unitron to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Unitron's goods to Gibson retail stores. The booth fee was not a

. . . I recalled to him that we were part of his rebate team, so to speak, and that suffered the end to any other questions on his part, any other problems, and that was the end of it, and we continued offering the product at the same pricing and without any other additional difficulties (Kern 2859. See also Kern 2858–59, 2861–63).

[66] Consistent with this, Unitron did not expect its payment of booth fees to generate any advertising; the booth fees were paid for the rental of space used to participate in the Gibson Trade Shows (Kern 2914).

promotional allowance made in connection with the resale of Unitron's products to consumers (Findings 64, 68, 73, 95, 325, 327 n. 66).

331. During the 1969 to 1972 period, Unitron did not make available to all of its customers either a percentage payment based on adjusted gross sales or an alternate payment for promotional services rendered (Kern 2811, 2863–64).

332. In regard to the booth fee payments that Unitron made at all the trade shows it attended, Unitron did not make available alternate payments to those customers that did not conduct a trade show (Kern 2833–34).

333. In this period, however, Unitron paid Thrifty Drug Stores and Fred Meyer one and one-half percent of adjusted gross sales and one percent of adjusted gross sales, respectively. These were not standard allowances available to all customers; they were made because of the sales volume of these powerful buyers coupled, in the case of Thrifty, with a threat to discontinue doing business if the discount were not paid (Kern 2811–12, 2816–17, 2957–58).

334. Unitron made available to all of its customers, including Gibson stores, a standard promotional program, which consisted of a ten percent discount[67] given to any customer merely for the asking. The discount was variously designated as a sales promotion, advertising allowance or freight allowance, depending on what use the customer applied it to (Kern 2808–10, 2966). The show fee payment to Gibson, Sr. was over and above that program.

335. On occasion, Unitron dealt directly with Gibson franchisees in regard to advertising Unitron products to consumers (Kern 2903–04; SR 23–0). Unitron did not make or offer to make any payments to compensate individual Gibson retail stores that chose to advertise Unitron products (Kern 2905–06). **[131]**

336. There is wide variation in Unitron's product lines. It sells about 10 or 12 different kinds of mats, including the Cecil mat and the Diamond Weave mat (Kern 2942). There are different styles of chairs, including Luan mahogany stools in four different sizes and two or three different types of rattan chairs (Kern 2943, 2945–46). Unitron's interior decorative items include grillwork of Luan mahogany, frames of Luan mahogany, plungers that go with the frame sets, different sizes of grills, different sizes of frames, and decorative bead curtains for draperies, for short curtains and for long curtains (Kern 2943–44). It sells two types of shutters in different sizes, made of Luan mahogany and beechwood (Kern 2944). Unitron's decorative folding screens come in a variety of different designs, different materials and

[67] This ten percent allowance would normally appear on the face of an invoice (Kern 2966).

different styles (Kern 2944–45). Its bamboo blinds and plastic blinds also come in different sizes and styles (Kern 2947).

337. The tabulations in the record, summarizing Unitron sales in 1970 and 1971, show the following contemporaneous transactions which involve sales of goods of like grade and quality[68] to competing customers (CX 835A–M):[69]

San Antonio, Texas: Deluxe Mahogany Shelves (Gibson - 9/8/70, 4/30/71, 8/13/71; Handy Dan Hardware[70] - 3/2/70, 4/14/70, 7/20/70, 8/21/70, 11/25/70, 12/1/70, 12/4/70, 12/29/70, 1/12/71, 3/2/71, 3/25/71, 3/26/71, 5/17/71, 5/18/71, 7/19/71, 8/12/71, 8/17/71, 8/23/71, 8/30/71, 10/7/71, 10/11/71, 10/15/71, 10/21/71, 11/4/71, 11/5/71, 11/19/71, 12/1/71, 12/6/71); [132]Milk Stools (Gibson - 8/26/70, 9/8/70, 9/28/70; Handy Dan Hardware - 2/13/70); Bookcase Kit (Gibson - 9/8/70; Handy Dan Hardware - 2/13/70, 5/14/70, 11/25/70, 12/1/70); Louver Door (Gibson - 9/8/70; Handy Dan Hardware - 12/1/70); Cork Panels (Gibson - 6/24/71, 8/3/71; Handy Dan Hardware - 8/17/71, 9/22/71, 10/15/71); Swivel Casters (Gibson - 5/20/71; Handy Dan Hardware - 1/22/71, 9/29/71); Oval Blinds (Gibson - 6/4/71, 6/24/71, 8/3/71; Handy Dan Hardware - 1/21/71, 10/7/71).

This is the only documentary evidence concerning such sales. As already noted, booth fees were paid in 1969, 1970, 1971 and 1972. However, there is no documentary evidence of show fee payments in 1970–1971, and some doubt whether they were paid in those years.[71] Under the circumstances, there has been a failure to document sales of goods of like grade and quality to Gibson stores in the relevant period with respect to show fee payments.

K. Comfort Products, Inc.

338. Comfort Products, Inc. ("Comfort"),[72] of Memphis, Tennessee, manufactures and sells ventilated cushions and slip-on seat covers (F. Miller 500–01). In the past, Comfort has manufactured and sold electronic equipment such as radios, CB's and stereos (F. Miller 502).

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[68] For each of the products listed, there is no evidence of variations going to like grade and quality, such as ifferences in size, style or type of material used.

[69] The tabulations show other contemporaneous transactions. However, in the majority of these sales, there is no cord evidence of the functional level that the customer was operating at. Thus, it is not possible to determine hether the customer was competing with Gibson retail stores in the resale of Unitron's merchandise. Moreover, there no record evidence that these transactions involve goods of like grade and quality. For instance, the tabulations scribe some products only as "mats," "stools," "doors," "grills," "fences" and "casters," despite the fact that these ducts come in different sizes and styles along with other possible variations (Finding 336).

[70] Handy Dan Hardware functions at the retail level of operations (Finding 369).

[71] The record is unclear. It shows booth fee payments in 1970 to 1971 (Finding 326), and Mr. Kern testified that w fee payments were made in those years (Kern 2920). Nevertheless, the documentary evidence pertaining to show payments relates only to 1969 and 1972 with no explanation why records of show fee payments for 1970 and 1971 not secured, if they had, in fact, been made. In view of this ambiguity in the record, no confident finding can be that Unitron made show fee payments in 1970 and 1971.

[72] Comfort is an affiliate of a company called Arthur Fulmer (Miller 501).

Comfort's manufacturing plant is located in Olive Branch, Mississippi (F. Miller 503). [133]

Comfort ships its products from its Mississippi plant to various customers (F. Miller 503), including shipments to Gibson stores located outside of Mississippi (CX 909F–H). Comfort is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

339. Some of Comfort's major accounts are Fed-Mart, Pep Boys, Advance Stores and Gibsons (F. Miller 502–03).

340. Comfort employs manufacturer's representatives who act as the company's sales agents. These representatives usually receive a five to six percent commission (F. Miller 523–24).

341. Comfort participated in the Gibson Trade Show because it thought the show would increase its sales by performing certain services (F. Miller 504–05, 593, 602–03). Comfort's primary purpose in attending a trade show such as the Gibson Trade Show is to sell its products to retailers (F. Miller 603).

342. Comfort considered the Gibson Trade Show to represent it at the trade show with respect to the sale of merchandise (F. Miller 523). However, Comfort personnel staffed its booth and took orders at the Gibson Trade Show (F. Miller 512, 557). Comfort also had a sales representative in the Dallas area who attended the trade show and received the regular commission on sales made at the show; this sales commission was in addition to the show fee percentage payments made to the Gibson Trade Show (F. Miller 557–58).

343. Comfort and Bobby Regeon, who the supplier knew as the buyer for Gibson Products Company (F. Miller 558–59, 582–83), together decided what merchandise would be listed on the show sheets and, thus, the products to be offered for sale at the trade show (CX 848C–H, 854B–C, 855D–J; F. Miller 535–36, 541). The show sheets are made available to buyers at the trade show, and are generally the only forms used in writing orders for buyers that visit Comfort's booth (F. Miller 536–37, 541–42).

344. The requirements for Comfort's participation in the Gibson Trade Shows were: payment of a booth fee; and, show fee payments based on a percentage of sales volume (F. Miller 505, 516, 549–50, 553–54; CX 855C, 899A–B). [134]

345. Comfort made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
February 12-17, 1972	1		$275.00	Check	Smokey Hale Sales** 7616 LBJ Freeway Dallas, Texas	CX 844A-C; Miller 507
November 6-10, 1972	1		$350.00			CX 847A, C-D
February 10-14, 1973***						CX 853B; Miller

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

**/ Smokey Hale Sales, Comfort's representative in Dallas, paid the booth fees for Comfort and was subsequently reimbursed (Miller 507).

***/ CX 853B, the contract governing Comfort's participation in the February 10-14, 1973 Gibson Trade Show, shows that $1,400.00 in booth fees were to be paid to the Gibson Trade Show by Keller-Hyden, Comfort's sales representative. However, Keller-Hyden was also representing two other companies who, presumably, occupied at least two, and perhaps three, of the booths indicated on the contract. Thus, the record does not show what portion of this $1,400.00 was paid by Comfort (Miller 539-40; CX 853B).

[135 346. On December 21, 1972, Comfort, with Keller-Hyden representing it,[73] agreed "that in consideration of the services rendered by THE TRADE SHOW that it will pay to THE GIBSON TRADE SHOW two percent of all sales made by Supplier at the TRADE SHOW and on all sales made as a result of Supplier being represented by THE TRADE SHOW" (CX 855C; F. Miller 518–19, 527).

Comfort viewed the agreement to pay two percent of all sales to the Gibson Trade Show as "[a] fee for services rendered . . . at the trade show" (F. Miller 521–22; CX 855C).

The two percent trade show fee in 1973 was to be paid on sales of manufactured products, *i.e.*, ventilated cushions and seat covers. A three percent trade show fee in 1973 was to be paid on sales of stereos (CX 862B, C, 874C; F. Miller 533–34, 543). In 1974, Comfort agreed to an increase in its percentage payment based on sales resulting from the Gibson Trade Show from two percent to three percent for nanufactured products, such as ventilated cushions and seat covers, ınd from three percent to four percent for stereos (F. Miller 549–50, 53–54; CX 899A–B, 876C, 877B).

347. The services that Comfort expected to receive and did receive 'om the Gibson Trade Show included getting many Gibson store ıyers together in one place, help of the trade show operators in inging customers to Comfort's booth and help in explaining Com-rt's products and programs (F. Miller 522, 593, 602–03). Comfort did t expect the show fee to be used in connection with advertising at

[73] Keller-Hyden served as Comfort's sales representative (F. Miller 540).

the retail level or otherwise with promoting the resale of Comfort products[74] (F. Miller 591–93). **[136]**

348. Comfort made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Comfort Records	
$ 3,218.42	7/20/73	Check	Gibson Products	3%-Stereos 2%-Mfg. prod.*	First half of 1973	Rebate on merchandise purchased from December 1972 through June 1973	CX 862B-F
6,263.71	1/9/74	Credit Memo	Gibson Products Co. 519 Gibson St. Scagoville, Texas	3%-Stereos 2%-Mfg. prod.*	Second half of 1973	Special allowance on purchases - July through Dec. 1973	CX 874A-C
11,034.33	8/7/74	Credit Memo	"	4%-Stereos 3%-Mfg. prod.*	First half of 1974	Special allowance on purchases - Jan. through June 1974	CX 877A-C
6,208.69	1/15/75	Credit Memo	"	4%-Stereos 3%-Mfg. prod.*	Second half of 1974	Special allowance on purchases - July through Dec. 1974	CX 876A-C

*/ The manufactured products consist almost exclusively of ventilated cushions and seat covers (Miller 532-33).

[137]349. The show fee was paid in connection with the original sale of Comfort's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Comfort's products to consumers (Findings 68, 73, 97, 341, 344, 347).

350. Similarly, the booth fee was paid in order to enable Comfort to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Comfort's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Comfort's products to consumers (Findings 64, 68, 73, 95, 341, 344).

351. Comfort did not make any percentage payments based on volume of purchases to anyone other than Gibson Products for the years 1972, 1973 and 1974 (F. Miller 564–65).

352. The invoices in the record disclose contemporaneous transactions involving sales of goods by Comfort to Gibson stores and other Comfort customers located in the same town or city (CX 909A–H, J, L, N, O). However, the record evidence is silent as to the functional level at which the non-Gibson customers operated. Moreover, the invoices show the sale of goods to Gibson stores that are entirely different from the goods sold to the non-Gibson customers. Thus, complaint counsel have not satisfied their burden of proof with respect to a showing that Gibson retail stores and other Comfort customers competed in the resale of Comfort products of like grade and quality.

L. Beagle Manufacturing Company

353. Beagle Manufacturing Company ("Beagle"), of El Monte, California, manufactures wrought iron, planter stands, flower arranging accessories, candle holders, baker's racks and decorative furniture, fabricates styrofoam and supplies a general line of clay products to the florist supply business (McCracken 52–53, 201).

Beagle sells its products throughout the United States, including

[74] The Comfort witness, Fred J. Miller, testified that "[n]obody ever told me what it [the trade show fee] was going to be used for" (F. Miller 592).

sales to Gibson stores located outside of California (McCracken 54, 200–01). Beagle is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are made in the course of such commerce. [138]

354. Beagle has 800 to 1,000 customers, including K-Mart, Woolworth, McCrory-McClellan, Gibson, Pacific Coast Commercial Company, Arett Sales, Motts and House of Decorative Accessories (McCracken 53–54, 200). Beagle made sales of approximately $40,000 to the Gibson stores in 1972 (McCracken 223–24).

355. Invoices for orders received from Gibson stores are sent by Beagle to the individual Gibson stores (McCracken 211–13, 230).

356. Beagle's sales force has been comprised of manufacturer's representatives from 1968 to the time of trial (McCracken 60–61). The manufacturer's representatives received a five percent commission based on what they sold and what was shipped (McCracken 61–62). In 1970, Beagle hired Dick Snow as its manufacturer's representative to cover Oklahoma and Texas[75] (McCracken 59–60, 200). Snow represents Beagle at the Gibson Trade Shows (McCracken 205). H.R. Gibson, Sr. is not Beagle's manufacturer's representative (McCracken 205).

357. Beagle began attending the Gibson Trade Show in 1970 (McCracken 64, 185–86). Beagle desired to participate in the Gibson Trade Show in order to facilitate sales to Gibson stores (McCracken 213). Prior to 1970, the first year in which Beagle was listed on the Gibson show sheets and allowed to participate in the Gibson Trade Show, Beagle was able to make only minimal sales to Gibson stores. Beginning in 1970, however, Beagle was able to sell its merchandise to Gibson stores in considerable volume (McCracken 62, 64, 220–21).

358. The requirements imposed on Beagle by the Gibson Trade Show for Beagle to attend the show were: payment for rental of booth space; acceptance by the Gibson buyer of Beagle's merchandise to be listed at the show; and, beginning in 1972, payment of a three percent fee based on total sales to all Gibson stores (McCracken 64–66, 79–81, 82, 208; SR 45B, C, D, E).

359. Beagle listed the merchandise that it would present for sale to Gibson store buyers at the Gibson Trade Show on show sheets. The show sheet forms were provided by Gibson and were to be used throughout the year by the Gibson [139]stores to order listed merchandise.[76] Beagle, through its manufacturer's representative, Dick Snow, furnished the product and price information to Gibson to put on the

[75] Beagle also utilizes the services of another manufacturer's representative in Dallas, Claude Garrison & ssociates. This representative covers the entire south for Beagle, selling to floor supply jobbers only (McCracken 205).

[76] Robert Stanton McCracken, sales manager and vice president of Beagle (McCracken 52–53), testified that ractically every order we ever got from them [the Gibson stores] was on this document [the show sheets — CX 5A–M and CX 797A–P] here" (McCracken 223, 225).

forms (McCracken 215, 219–20, 222–23, 225, 249T–Y; CX 796A–M, 797A–P). [140]

360. Beagle made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
February 1970			$250.00	Check	R.J. Snow & Associates** P.O. Box 24273 Dallas, Texas	CX 799
February 1971			$300.00	Check	Snow Associates** P. O. Box 24273 Dallas, Texas	CX 800
February 1972			$300.00	Check	R.J. Snow & Associates** P. O. Box 24273 Dallas, Texas	CX 801A-B

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

**/ Snow, Beagle's manufacturer's representative in the area that includes the Gibson Trade Show (McCracken 59-60, 200, 205), paid out the expenses for Beagle's participation in the trade shows and was subsequently reimbursed (McCracken 195).

[141]361. In 1972, Beagle was advised by Tommy Perkins, acting on behalf of "the Gibson buying office," that it would have to pay five percent of total sales made to all Gibson stores in order to be listed in the Gibson Trade Show (McCracken 66, 71–72). Subsequently, Beagle and Perkins agreed that Beagle would make payments based on three percent of total sales to all Gibson stores (McCracken 79–81). The three percent payments were made, beginning in 1972, on a monthly basis, paid to Gibson Products Company[77] and sent to Tommy Perkins (McCracken 81–82, 208; SR 45B–E). Such payments have continued from 1972 to the present (McCracken 208).

Beagle made the three percent payments in order to be able to sell to the Gibson retail chain (McCracken 82). [142]

362. Beagle made the following show fee payments to the Gibson Trade Show:

[77] Beagle made these payments, in the form of check, payable to Gibson Products Company until October 1975, after which time the checks were made payable to the Gibson Trade Show (McCracken 192, 249K, N–Q; SR 48).

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Beagle Records	
$135.66	3/1/72	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn. Mr. T. Perkins	JL	February 1972	JL discount for month of February/1972 purchases on $4,321.99	CX 796X
$313.99	4/3/72	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn. Mr. T. Perkins	JL	March 1972	JL discount for total sales month of March/1972 on $10,466.17	CX 796Y
$ 70.41	4/12/72	Check	"	JL	April 1972	JL discount for total sales month of April/1972 after 6% freight allowance	CX 796V
$215.95	6/5/72	Check	"	JL	May 1972	JL discount for month of May/1972 sales on $7,198.24	CX 796U
$154.60	7/5/72	Check	"	JL	June 1972	JL discount for purchases for month of June/1972 on $5,153.33	CX 796T
$102.48	8/1/72	Check	"	JL	July 1972	JL discount on purchases for month of July/1972 on $3,415.96	CX 796S
$142.25	8/30/72	Check	"	JL	August 1972	JL discount for total sales month of August/1972 on $4,741.60	CX 796R
$404.15	10/3/72	Check	"	JL		JL discount due as of end of Oct. 1972 on $13,471.72	CX 796Q
$332.13	11/7/72	Check	"	JL	October 1972	JL discount for month of Oct. 1972 purchases on $11,070.85	CX 796P
$ 87.44	12/7/72	Check	"	JL	November 1972	JL discount on purchases for month of Nov. 1972	CX 796O
$ 27.77	12/29/72	Check	"	JL	December 1972	JL discount on purchases for month of Dec. 1972 on $925.58	CX 796N
$ 50.54	1/31/73	Check	"	JL	January 1973	JL discount for total sales Jan. 1973	CX 796M
$ 43.50	3/2/73	Check	"	JL	February 1973	JL discount on purchases for month of Feb. 1973	CX 796L
$365.36	4/3/73	Check	"	JL	March 1973	JL discount for total sales during March/1973 on $12,845.46	CX 796K
$215.56	5/1/73	Check	"	JL	April 1973	JL discount for purchases for month of April/1973 $7,185.07	CX 796J
$ 96.51	5/5/73	Check	"	JL	May 1973	JL discount on purchases for month of May/1973 on $3,130.26	CX 796I
$137.03	7/3/73	Check	"	JL	June 1973	JL discount for total sales June/ 1973 on $4,567.67	CX 796H
$ 31.90	8/3/73	Check	"	JL	July 1973	JL discount due as of end of July/ 1973 on $1,329.93	CX 796G
$141.60	9/10/73	Check	"	JL	August 1973	JL discount on sales of August/ 1973 after 6% freight allowance	CX 796F
$290.52	10/2/73	Check	"	JL	September 1973	JL discount for total sales Sept. 1973 on $9,684.00	CX 796E
$316.15	11/6/73	Check	"	JL	October 1973	JL discount for total sales Oct./ 1973 on $10,538.38	CX 796D
$119.47	12/4/73	Check	"	JL	November 1973	JL discount due as of end of Nov. 1973 on $3,982.36	CX 796C
$ 28.03	1/3/74	Check	"	JL	December 1973	JL discount on purchases for month of Dec./1973	CX 796B

[143]363. The show fee was paid in connection with the original sale of Beagle's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Beagle's products to consumers (Findings 68, 73, 97, 357, 358, 361).

364. Similarly, the booth fee was paid in order to enable Beagle to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Beagle's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Beagle's products to consumers (Findings 64, 68, 73, 95, 357, 358).

365. In 1972, Beagle neither made nor offered to make a payment based on three percent of total sales or an alternate payment to any of its other customers (McCracken 81, 82).

366. Beagle has six basic product lines, which include about 500 different products. Each of the six lines is comprised of at least 20 different items (McCracken 53, 239). Beagle's styrofoam line has about 300 products of different size, shape and form. Some of the products fabricated in the styrofoam line are eight sizes of balls ranging from one inch to 12 inches, cones, adhesive-based foam, round foam for sticking artificial flowers in, wreaths, pyramids, Easter eggs, sheets, discs and pedestals (McCracken 239).

367. Beagle's customers do not buy all of the product lines sold by Beagle (McCracken 200–01).

368. The record contains no documentary evidence bearing on the question of whether the Gibson stores and other Beagle customers competed in the resale of goods of like grade and quality. **[144]**

M. General Findings

369. The following firms function at the retail level of operations (Tocci 2159–60, 2168–69, 2212–15, 2361–62; Hare 2571–72, 2574–77, 2580–86, 2596; Hornick 3166; Evans 3937, 3946–49; Pettit 4093, 4108–12; Doyle 4288–89): TG & Y, K-Mart, Wal-Mart, Target, Gibson, Woolco, Roses, M.E. Moses, Wackers, J.C. Penney, Sears Roebuck, W.T. Grant, J.J. Newberry, Montgomery Ward, Western Auto Supply, Ben Franklin, Handy Dan Hardware, Ace Hardware, Cotter and Company, Wynn Stores, Duke and Ayers, H.L. Green, McCrory, Kress, Merchants' Buying Syndicate, D & J Supermarket, Parkit Market, Silver Dollar Grocery, Duggers Food Mart Inc., La Boya Grocery, Burton Dairy Way, Food Basket, Cherry's Drive-in, Sundown Food Store, Landers Little Giant, Minyard's, Luther Jenkins, West and Company,[78] Howard Brothers,[78] Abbey Sales, Surplus City, Sterling Stores, W.E. Walker, Perry Brothers, OTASCO, White Stores.

370. The agreements between suppliers and the Gibson Trade Show, governing the suppliers' participation in the trade show, contain the following provisions or provisions similar in effect:

WHEREAS Lessor has reserved the right to sub-lease exhibition booth space in said Market Hall (during the term of said primary lease) to such persons, firms, and corporations as he may choose in his sole discretion for the purpose of exhibiting and selling goods, wares, merchandise or services to owners, operators, and managers of GIBSON DISCOUNT CENTERS which are admitted by Lessor to said GIBSON TRADE SHOW (CX 1097A).

6. All equipment furnished by Lessor herein for the construction of Lessee's booth and any additional personal equipment such as pegboards, carpets, coat racks or additional signs (which Lessee shall order at its own expense), shall be obtained from Freeman Decorating Company, 1300 Wycliff Ave., Dallas, Texas 75207, **[145]**the official exhibit contractor and decorator of said Gibson Trade Show. All such equipment shall be delivered up by Lessee to Freeman Decorating Company at the end of this sublease in substantially as good condition as when obtained, reasonable wear and tear excepted (CX 1097B).

3. Lessee shall not exhibit or sell or take any order for the sale of any goods, wares, merchandise or services at Gibson Trade Show other than those itemized on the printed SHOW ORDER SHEETS supplied to Lessee by Lessor pursuant to previous agreements between Lessee and Lessor (CX 1097B).

[78] West and Company and Howard Brothers operate under their own name in some locations and under the Gibson name as Gibson franchisees in other locations. See Finding 185.

This sub-lease agreement is conditioned upon Lessee agreeing that he will sell merchandise to all Gibson Franchise Holders at the same price for like quantities. Lessee further agrees that in the event he offers merchandise to any Gibson Franchise Holder at a price lower than that specified on the Gibson Show Sheet that he will make the same price available to all Gibson Franchise Holders, making retroactive price adjustments, if necessary, to comply (CX 1097A).

See CX 207A–B, 210A, 211A–B, 301A, 302A, 308A, 470D–E, 473D–E, 482C–D, 488D–E, 492C–D, 497D–E, 500D, 580A–B, 645, 648B–C, 658, 662B–C, 668B–C, 674A–B, 681, 687, 692, 847A, 1086A–C, 1087, 1088, 1092, 1093A–B, 1094, 1095, 1096A–B, 1097A–B, 1098A–B, 1099A–B, 1100A–B, 1101A–B, 1102A–B, 1103A–B, 1104A–B, 1105A–B; SR 35A, 35E.

371. The agreements in effect between Gibson, Sr. and suppliers participating in the Gibson Trade Show in the period 1969 to 1972 limited the supplier's sales presentations at the Gibson Trade Show to sales efforts directed almost exclusively to the Gibson Discount Centers by providing that: **[146]**

WHEREAS *Lessor has reserved the right to sub-lease exhibition booth space* in said Market Hall (during the term of said primary lease) *to such persons, firms, and corporations as he may choose* in his sole discretion *for the purpose of exhibiting and selling goods, wares, merchandise or services to owners, operators, and managers of GIBSON DISCOUNT CENTERS which are admitted by Lessor* to said GIBSON TRADE SHOW (CX 1097A. See also CX 301A, 308A, 470D, 1103A) (emphasis added).

3. *Lessee shall not exhibit or sell or take any order for the sale of any goods, wares, merchandise or services at Gibson Trade Show other than those itemized on the printed SHOW ORDER SHEETS* supplied to Lessee by Lessor pursuant to previous agreements between Lessee and Lessor (CX 1097B) (emphasis added).[79]

This sub-lease agreement is conditioned upon Lessee agreeing that he will sell merchandise to all Gibson Franchise Holders at the same price for like quantities. Lessee further agrees that in the event he offers merchandise to any Gibson Franchise Holder at a price lower than that specified on the Gibson Show Sheet that he will make the same price available to all Gibson Franchise Holders, making retroactive price adjustments, if necessary, to comply (CX 1097A. See also CX 308A, 648B) (emphasis added).

In fact, participating suppliers made sales at the Gibson Trade Show in the relevant period only to retail stores operating under the Gibson name (Findings 147, 172, 241, 322).

The Gibson Trade Show, at least in that period, was limited to the Gibson Discount Centers and, thus, run for their benefit. **[147]**

372. The provision on the show sheets regarding price approval by he respondents' Seagoville offices with respect to any changes in the rices listed on the show sheets is inconsistent with the claim that the

[79] Show sheets were preprinted with the Gibson Products trade name under the "ship to column" in the period 69–1972 (Finding 91).

Gibson Trade Show acts as a manufacturer's representative (Finding 93).

373. The staffing of booths at the trade show involved the furnishing of services for the benefit of Gibson Discount Centers attending the trade show. However, such services were furnished in connection with the original sale of such goods to the retail stores and not in connection with their promotion for resale (Findings 64, 71, 73).

374. The suppliers incurred various costs associated with operating booths at the Gibson Trade Show. Decorating, electrical, telephone, drayage and assorted other expenses were paid directly by suppliers to the company providing the particular service. There is no record evidence that these payments were received by the Gibson Trade Show (see, *e.g.*, CX 468A–C, 472A–J, 481A–F, 484A–H, 844A–C, 845A–C, 847B, 849A–B; Mehring 1606–07). Such payments, associated with the staffing of booths by suppliers, were for the benefit of the Gibson stores attending the show (Finding 71). Such services were in connection with the original sale to such retailers (Finding 373).

375. The trade show and the services to suppliers associated therewith, such as the show sheets, authorization to sell to the Gibson stores, etc., facilitated sales by the participating suppliers to the Gibson Discount Centers (Findings 64, 68, 71, 85, 90, 97, 128, 158–59, 209, 211, 216, 217, 242, 303, 347). Show fees and booth fees received by respondents constituted payments in connection with services related to the original sale (*e.g.*, Findings 64, 68, 71, 97, 128, 158, 216, 217, 249, 286, 290, 307, 308, 347, 349), and were not promotional payments in connection with the resale of such merchandise. Similarly, supplier advertising in show directories and buyer's guides, directed to the buyers of Gibson retail stores, was not a promotion in connection with the resale of goods at the retail level (Finding 293).

376. The trade show and the payments received in connection therewith originated with respondents. In the case of each supplier, respondents or their employees solicited the show fee and booth fee payments (Findings 95, 97, 99, 127, 153, 176, 286, 327, 361). The show fee payments, based on varying percentages of sales volume, were solicited by respondents or their employees seeking whatever the traffic would bear (Findings 98, 99). Such payments were solicited whether or not a supplier had a standard cooperative advertising or promotional program (*e.g.*, Findings 127, 133, 153, 163, 176, 182). When suppliers had a standard promotional program, the show fees were not paid pursuant to such programs (*e.g.*, Findings 163, 226, 312). **[148]**

377. The payments were solicited and received even after a supplier had raised the possible illegality of the payment (Findings 153, 156). Respondents were on notice that the show fee payments had no

relationship to any supplier's standard advertising or promotional program (Findings 133, 163, 226, 273, 274, 312, 334). As a result, respondents knew or should have known that the show and booth fee payments were not available to other customers competing with the Gibson retail stores on proportionally equal terms. [149]

III. Evidence under Count II of the Complaint

A. Toastmaster Division, McGraw-Edison Company

378. The Toastmaster Division of the McGraw-Edison Company ("Toastmaster") is a division of the portable appliance and tool group of that corporation (May 3395–96).

Toastmaster, in the period 1969–1973, produced small appliances, power tools, garden tools, electric fans and heaters. These products were produced primarily in Missouri, Iowa and Arkansas and shipped to all of the 50 states (May 3396–97).

379. Toastmaster, which participated in the Gibson Trade Show in the period 1966 through May of 1970, sold its products to the Gibson Discount Centers (May 3399, 3401).

380. The Gibson Trade Shows in which Toastmaster participated were attended only by Gibson stores (May 3409, 3412).

381. Toastmaster's sales volume with the Gibson stores, as of August 1970, had been increasing steadily. The orders written at various Gibson Trade Shows, although sizable, represented only a small percentage of Toastmaster's sales volume with the Gibson stores (CX 102A).

382. Toastmaster's salesman went to the Gibson office, in Seagoville, Texas, to line up booth space for the upcoming shows. In this connection, he dealt mainly with Bobby Regeon and Tommy Perkins (May 3402). Tommy Perkins was the contact for appliances and fans and Bobby Regeon was the person to be contacted on power tools and electric heaters. Perkins, Regeon and the Toastmaster representative agreed on the items to be displayed at the Gibson Trade Show and the booth space to be assigned (May 3402–03).

Toastmaster's representative made a sales presentation to Perkins and Regeon as he would to a customer (May 3405).[80] The Toastmaster representative and the trade show buyers attempted to pick those items which would move in the greatest volume (May 3411). Prices and special deals were discussed at such meetings (May 3404). The decision

[80] Toastmaster's sales representative referred to Perkins and Regeon as "buyers." They made no actual purchases, but one of the functions of a buyer is to select merchandise (May 3406). Perkins, Regeon and the Toastmaster salesman selected the items to be displayed at the show (May 3407–08).

on the items to be shown was reached as a result of such discussions (May 3405). [150]

Perkins, in his discussions with the Toastmaster representative, was interested in the lowest possible prices for the Gibson stores (May 3414). The prices in question applied to both franchised and Seagoville-owned stores (May 3415). Billing and special dating terms for all the Gibson stores were also discussed between Toastmaster representatives and the trade show buyers (May 3415–16).

383. Toastmaster, at the Gibson Trade Show, utilized show sheets and sold orders to buyers for individual stores (May 3408). It intended to sell to all Gibson stores whether franchised or Seagoville-owned (May 3409–3412). Toastmaster participated in the Gibson tabloid; the items featured in the tabloid were publicized by a sign at its display booth at the Gibson Trade Show (May 3423, 3424, 3439).[81]

384. In 1969, Toastmaster's salesman, Henry May, and Tommy Perkins had a conversation pertaining to an upcoming show (May 3432–33). At that time, Perkins stated that he needed a better price to continue promoting or showing Toastmaster in the Gibson Trade Show (May 3433). When Toastmaster's representative stated, "I don't have a better price. We have one price for all" (May 3433), Perkins replied, "You do not cooperate with Seagoville" (May 3434).[82]

In several conversations, Perkins repeated that Toastmaster was not "'cooperating with Seagoville'" (May 3434).[83] Such conversations took place in the period September 1969 - June 1970 (May 3437–38; CX 101). Eventually, Perkins explained that cooperation meant a three percent better price. This was to cover Toastmaster sales both to Gibson franchised and Seagoville stores (May 3440). This request was over and above Toastmaster's three percent standard advertising program (May 3440). [151]

385. At a meeting on June 22, 1970, concerning the upcoming August show, Perkins stated that he did not know whether there would be room for Toastmaster at the show (May 3441). "Cooperation" was again discussed, with Perkins asking for a payment of three percent of sales volume to the Gibson stores (May 3443; CX 101A–B). Toastmaster refused to make such a payment on the ground that it sold to all distributors at the same price (May 3443).[84] [152]

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[81] Buyers for retail stores were more apt to purchase a tabloid item knowing that it was backed up by advertising in their area (May 3422–23).

[82] Toastmaster was able to participate in the upcoming show in August 1969 (May 3434).

[83] Perkins, on approximately three occasions, demanded a better price and stated that Toastmaster did not cooperate after the initial conversation on this subject (May 3439–40).

[84] The contemporaneous memorandum of Henry May, Toastmaster's sales representative, summarized this conversation, in pertinent part, as follows:

> On September 3, 1969, I wrote you regarding the Gibson Seagoville kick-back conversation I get when I am with the Seagoville buyers. You wrote me on September 12, 1969 that you agree with the way I have handled

(Continued)

386. Toastmaster was unable, at the June 22, 1970, meeting or in subsequent attempts, to get booths for the August 1970 show (May 3347, 3348). Subsequently, it was also unable to get into the November 1970 show because the trade show buyer felt that Toastmaster was not "cooperating" (May 3450–51). This show was important to Toastmaster because of its fan business. The Gibson stores sell a lot of fans (May 3450). Toastmaster was in none of the Gibson Trade Shows in the succeeding period from August 1970 through 1973 (May 3468, 3470).

387. After its exclusion from the August 1970 Gibson Trade Show, Toastmaster made extensive efforts to maintain its sales volume by making sales to the individual Gibson stores (CX 102A–B). In the fall of 1970, Toastmaster's representative told Tommy Perkins that:

. . .all of our men were continuing calling on the stores and trying to get orders, and servicing, still taking care of defectives, and so forth. And that we certainly would like to be in it. [153]

And I hoped that he was not going to put out a letter on me, and he said he wouldn't (May 3452).[85]

388. In January or February 1971, Henry May saw a copy of a letter sent by Tommy Perkins regarding Toastmaster on a bulletin board in a Gibson store in Fort Worth, Texas on West Highway 80 (May 3462–63; CX 104). This letter, signed by both Bobby Regeon and Tommy Perkins as "Seagoville Buyers," states as follows: [154]

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this matter. Well, three Gibson Shows have gone by since then and there is still the same kick-back conversation in Seagoville. Today at 10:00 a.m. I had an appointment with Tommy Perkins, the appliance buyer in Seagoville, to line up my booths for the August 17th thru 21st Show. I went over our new items, new colors, special offers, etc., and he remarked that Toastmaster and McGraw-Edison Co. do not cooperate with Gibsons enough. He thinks Mr. Gibson should decide whether Toastmaster should be in the next show or not. He says he has talked this with me for over a year and nothing has happened. He says Mr. Gibson can explain a way that the kick-back is not illegal. He wants to have a meeting in Chicago with you and Mr. Gibson, maybe the 11th or 12th of July, before the Housewares show. Tommy thinks Mr. Gibson can convince you to come around to their thinking.

Tommy states that he has written Toastmaster asking for their volume dollar figures and does not get any type answer. He questions whether Toastmaster volume is huge enough to continue being in their shows. However, he says it may be bigger than he thinks. I know why we have not given Gibson this figure. They would use it as a wedge threatening us.

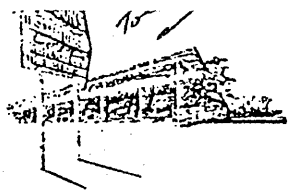
(Memorandum, Henry May to Scott Rexinger, dated June 22, 1970, CX 101A).

[85] Q. What do you mean "put out a letter on you?"
A. I had heard rumors that there was letters that they had sent out on some different companies, that I didn't want it to be one against me (May 3452).

* * * * *

THE WITNESS: Well, my understanding was that the letter would more or less disapprove your line as a source of doing business with. Disapprove your company (May 3455).

The rumors were in fact well-founded. See CX 104, 136 and 303.



Gibson Products Company

OF SEAGOVILLE, TEXAS A/C 214/287-3578

January 22, 1971

TO: ALL STORES

FROM: BOBBY REGEON & TOMMY PERKINS, SEAGOVILLE BUYERS

SUBJECT: TOASTMASTER DIVISION
MCGRAW-EDISON COMPANY
ELGIN, ILLINOIS 60120

The above company will not sell us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or authorize this line, and suggest that you discontinue the same.

Please give this your attention, and we appreciate your continued co-operation.

Thank you,

Bobby Regeon & Tommy Perkins
Seagoville Buyers

BR&TP/je

317 GIBSON STREET SEAGOVILLE, TEXAS 75159

[155]The language of this letter was discussed with Lynn Low, Assistant to H.R. Gibson, Sr., by its author and one of its signatories, Bobby Regeon (Regeon 6641–42).

Toastmaster's sales representative, Henry May, after CX 104 came to his attention, made several attempts to talk to Perkins who told him that there was no longer room for Toastmaster in the show. May was unable to reach Gibson, Sr. when he attempted to do so (May 3469).

389. Toastmaster, after it received notice of CX 104, continued to

try to make sales to both the Seagoville-owned and franchised Gibson stores (May 3464–65; CX 105A–B). After Toastmaster received notice of CX 104, Roy Love, a franchisee in Oklahoma City, stated to Henry May, "if he wanted to keep his sign out in front of his store, saying Gibsons, he had to go by what Seagoville ordered or told him to do." Love had received CX 104 at the time of this conversation (May 3466, 3501).[86] Previously, Love's store had been doing business with May (May 3466).

Subsequent to the dissemination of CX 104, May continued to try to sell to franchised stores with the result that some stores continued to buy from him and some didn't (May 3466–67). He also continued to call on "Seagoville" stores and was unable to make any sales to them (May 3468).[87]

A Toastmaster salesman who called on a Gibson store in Columbia, Mo. was informed by E.A. Drewel of that store "that they were going along with Gibsons Hqs. instructions — not to purchase Toastmaster" (Memorandum of V.W. Moritz, 2–20–71, CX 106A).

390. Toastmaster had the following sales volume with the Gibson stores in the period 1970–1973: **[156]**

1970	$953,656.53
1971	$296,778.33
1972	$501,036.97
1973	$446,528.74 (CX 117A–D).[88]

391. As of April 25, 1972, there were 93 Gibson stores in the territory of Henry May and he was selling to only 20 of them (CX 116A).

392. Toastmaster again participated in the August 1974 show after Perkins had exlained to them the services which the trade show would perform and that a show fee was to be charged therefor (May 3470). Toastmaster's sales to the Gibson stores went up after it again began to participate in the Gibson Trade Show. For that privilege, it pays a show fee on all sales to franchised and Seagoville stores, namely, two percent on fans and three percent on appliances (May 3471–72).[89]

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[86] Roy Love was a brother-in-law of Gibson, Sr.; on that basis, the witness felt that the store in question could be classified as a family store (May 3500–02).

[87] Toastmaster personnel referred to the stores owned by Gibson, Sr. as "Seagoville-owned" (May 3400–01).

[88] Similarly, the sales statistics of Henry May reflect a sales volume of $278,000 in 1970, the last full year Toastmaster was in the Gibson Trade Show, as compared to a sales volume of $83,914 for 1971 (CX 116A). See also the sales figures for Bill Anderson for his sales volume to Gibson stores:

1969	$208,960
1970	$222,694
1971	$ 84,173
(4 months) 1972	$ 75,000 (CX 116C).

[89] The show fee payments are in addition to Toastmaster's standard advertising allowance (May 3471–72).

393. CX 104 was a request to Gibson franchised and family-owned stores to boycott Toastmaster because it refused to pay H.R. Gibson, Sr. the three percent rebate requested (Findings 384–89). The withdrawal of authorization and the recommendation by H.R. Gibson, Sr.'s "Seagoville Buyers" to discontinue the Toastmaster products resulted in a precipitous drop in sales volume to Gibson stores by Toastmaster in 1971 (Finding 390). The request by Gibson, Sr.'s buyers to discontinue the Toastmaster line gave rise to a combination between respondents and a substantial number of Gibson stores to boycott Toastmaster. [157]

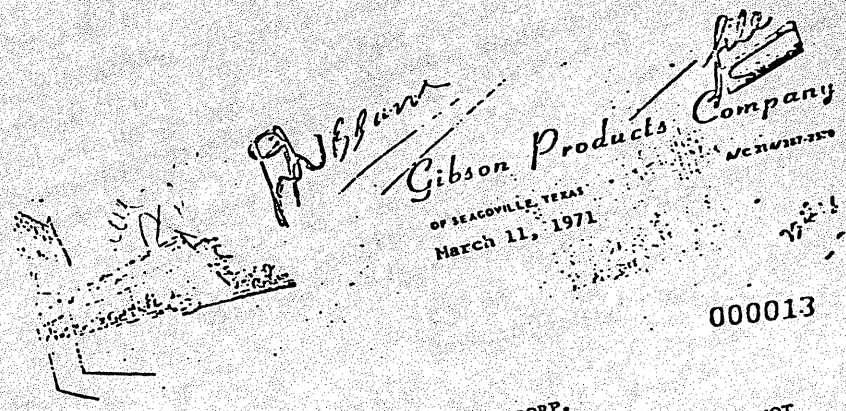
B. Tucker Manufacturing Company

394. In connection with the February 1971 Gibson Trade Show, Tommy Perkins, a trade show buyer, advised Tucker Manufacturing Company that Tucker would have to pay a volume rebate for its trade show participation (Tocci 4548–49). When Tucker refused to make such a payment, it was advised that it would not be allowed to participate in the trade show (Tocci 4549).[90] Tucker did not want to pay the two percent volume rebate demanded because of low profit margins (Tocci 4549).

395. Tucker had already, on January 4, 1971, sent in its deposit for payment of booth numbers 585 and 586 for the February 1971 show. On April 8, 1971, it requested return of the deposit after being informed that it would not be allowed to participate in the show (Tocci 4549–50, 4560; CX 304).

396. In the meantime, on March 11, 1971, Tommy Perkins had sent the following letter: [158]

[90] The volume rebate in question was two percent of sales to the Gibson stores (Tocci 4549).



TO: ALL STORES
SUBJECT: TUCKER MANUFACTURING CORP.
ARLINGTON, TEXAS

WE HAVE REVIEWED THIS LINE AND FEEL THAT THEY WILL NOT SELL US AT A PRICE WE WOULD RECOMMEND AS BEING PROFITABLE AND BENEFICIAL FOR YOUR OPERATION. WE THEREFORE DO NOT RECOMMEND OR AUTHORIZE THIS LINE, AND SUGGEST THAT YOU DISCONTINUE THE SAME.

PLEASE GIVE THIS YOUR ATTENTION.

THANK YOU FOR YOUR COOPERATION.

Tommy Perkins

TOMMY PERKINS
HOUSEWARES BUYER

TP:ib

[159]397. Tucker, at the time that it was refused admission to the February 1971 Gibson Trade Show, was selling at a competitive price (Tocci 4559).

398. Tucker's representatives had conversations with Perkins about getting back into the trade show (Tocci 4561). Tucker's representatives were advised that payment of the two percent volume rebate was prerequisite to getting back into the trade show (Tocci 4561–62).

Tucker, as a result, agreed to reestablish the volume rebate of two percent of Tucker's total sales to the Gibson stores (Tocci 4562). Tucker participated in the August 1971 Gibson Trade Show, having agreed to pay the volume rebate approximately two months prior to the actual show date (Tocci 4563).

Tucker had been advised by its sales representatives that the family-owned stores were not authorized to purchase products from it and that the reason it was unable to make sales to such stores was the failure to pay the volume rebate (Tocci 4563–65). Tucker decided to again pay the two percent for that reason (Tocci 4565). Tucker decided to Show because of its low profit margin and the requirement for the two percent volume rebate (Tocci 2326–27).

399.

C. Jeannette Glass Company

400. Jeannette Glass Company ("Jeannette"), of Jeannette, Pennsylvania, is engaged in the business of manufacturing and selling glassware (Pawlik 887, 889). These products are shipped throughout the United States and most of the world from Jeannette, Pennsylvania (Pawlik 889–90).

401. Jeannette, in the period 1967 to the end of 1970, sold to Gibson franchised stores and family-owned stores (Pawlik 909–10). Jeannette contacted Tommy Perkins with respect to both categories of stores (Pawlik 911).

402. In the period 1967–1971, Jeannette did not offer advertising allowances to its customers (Pawlik 915). It offered quarterly specials to all its customers. Jeannette also had a jobbers' discount of ten percent off list price available to jobbers, mass merchandisers and volume users, including the Gibson stores (Pawlik 921–22). **[160]**

403. Jeannette participated in the Gibson Trade Show (Pawlik 922). Prerequisite to getting into the trade show, Jeannette had to have its line approved by trade show personnel (Pawlik 923). In order to get its lines approved in the period 1967–1971, Jeannette dealt with Tommy Perkins (Pawlik 924, 926).

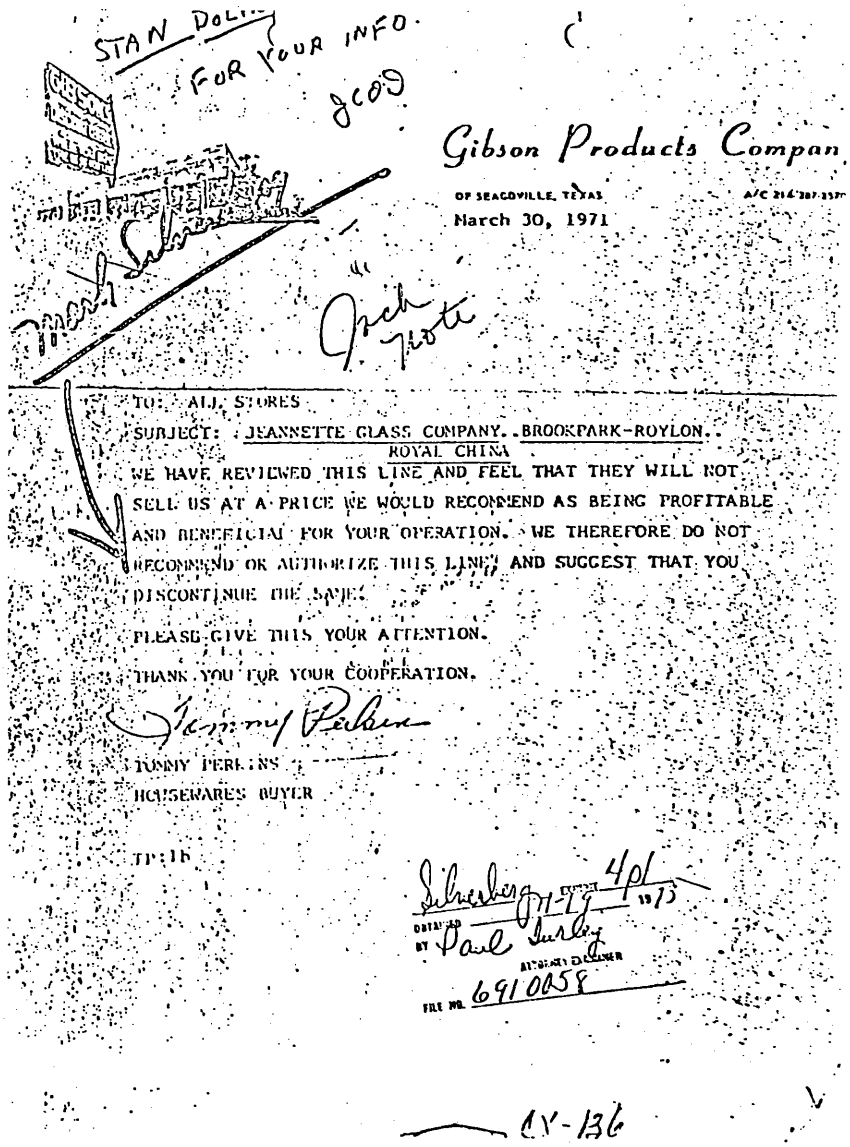
Jeannette wanted to get into the Gibson Trade Show because "Gibson does a terrific amount of business" (Pawlik 926–27). The only stores attending the Gibson Trade Show in the period 1967–1970 were Gibson stores (Pawlik 927–28). And, this was also true in 1974 and 1975 (Pawlik 930).

404. Jeannette's brokers advised its officials that Tommy Perkins had asked for a five percent rebate on sales to Gibson stores (Pawlik 941–43. See also CX 124A). This rebate was to be paid to Gibson, Sr. and not to the individual stores (Pawlik 943). Jeannette's officials

rejected the suggestion by its brokers as well as similar requests by trade show officials that rebates be paid to Gibson Products Company in the period 1969–1971 (CX 124A–B, 132A–B, 134A–B; Pawlik 963–64). They refused to pay the five percent rebate requested (Pawlik 974).[91]

405. On March 30, 1971, Tommy Perkins, on behalf of Gibson Products Company, wrote the following letter to "All Stores": **[161]**

[91] Jeannette made no payments to its customers based on a percentage of sales in the period 1968–1971 (Pawlik 974).



STAN DOLL
FOR YOUR INFO.
JCOD

Gibson Products Compan
OF SEAGOVILLE, TEXAS
March 30, 1971

TO: ALL STORES
SUBJECT: JEANNETTE GLASS COMPANY - BROOKPARK-ROYLON - ROYAL CHINA
WE HAVE REVIEWED THIS LINE AND FEEL THAT THEY WILL NOT SELL US AT A PRICE WE WOULD RECOMMEND AS BEING PROFITABLE AND BENEFICIAL FOR YOUR OPERATION. WE THEREFORE DO NOT RECOMMEND OR AUTHORIZE THIS LINE AND SUGGEST THAT YOU DISCONTINUE THE SAME.
PLEASE GIVE THIS YOUR ATTENTION.
THANK YOU FOR YOUR COOPERATION.
Tommy Perkins
TOMMY PERKINS
HOUSEWARES BUYER
TP:lb

Subscribed 4pl
OBTAINED BY Paul Surley
FILE NO. 6910858

CV-136

[162]406. Subsequently, Jeannette's sales representative[92] attempted to contact Tommy Perkins to get back in the show (Pawlik 975). Perkins rejected the Jeannette lines and refused to approve them, since Jeannette had dropped out of the show. According to Perkins, other lines had replaced Jeannette and there was no need for

[92] This individual, up to June 1971, had been Jeannette's midwest sales manager and then went into business for himself as a sales or manufacturer's representative (Pawlik 975).

additional lines (Pawlik 976). Perkins, moreover, refused to see Jeannette's representatives when contacted on numerous occasions (Pawlik 980).

407. In the period July 1971 to January 1972, Perkins did offer to represent Jeannette to the Gibson stores for a fee of five percent. Jeannette's representative, however, refused to enter into such an agreement (Pawlik 1013–16).

408. Since June 1971, Jeannette's sales representative, Steve Pawlik has made an effort to sell glassware products to Gibson family stores (Pawlik 982). He has made no sales to family stores since that time because the lines were not approved (Pawlik 982, 987–88). Since June 1971, Pawlik's sales in the case of the Gibson stores have been confined to the franchised stores (Pawlik 988, 990). Pawlik has sold Jeannette products to franchised stores on an individual basis but not to respondents' warehouse (Pawlik 1011). He has also been unable to make sales to certain franchisees such as Love of Oklahoma City and the San Benito, Texas group (Pawlik 991–92). **[163]**

IV. Evidence under Count III of the Complaint

409. The Ray-O-Vac Division of ESB Incorporated[93] ("Ray-O-Vac"), of Madison, Wisconsin, is a manufacturer of dry cell batteries and lighting products (CX 140A, 154A, 169A).

Its sales to the Gibson stores in 1975 were in excess of $2 million (Blake 4449–50).

A. Barshell, Inc.

410. Jim Miller was a broker employed by Ray-O-Vac to represent its products to the Gibson stores for approximately five years in the period 1969 to January 1, 1974 (Blake 4430).

411. Barshell, Inc. ("Barshell") was a distributor of health and beauty aid products, redistributing such products to various retailers and wholesalers throughout the Southwest (Miller 3118). Jim Miller wholly owned the stock of this corporation which was incorporated in 1971 (Miller 3118–19).

412. Ray-O-Vac did not consider the Gibson Trade Show to be its sales representative at the time that it was represented by Barshell, Inc. In Ray-O-Vac's view, the Gibson Trade Show is a service organization which helps a manufacturer to display his wares (Blake 4436).

413. Gibson, Sr. placed an order in 1969 for some 60–70 of the so-

[93] Acquired by International Nickel Company (Blake 4418).

called family stores. This order was given to start off Ray-O-Vac with the Gibson stores pursuant to a sales call by Jim Miller, Ray-O-Vac's broker, and Frank Blake, Ray-O-Vac's Regional Sales Manager. The order in question, moreover, was not a recommendation but a flat shipment (Blake 4422–23, 4479).

414. Beginning in 1971, Barshell became the sales representative of Ray-O-Vac (Miller 3119–20).[94] Ray-O-Vac retained Barshell to represent it to the Gibson stores. Under this arrangement, Barshell was to present Ray-O-Vac's sales promotions to Gibson headquarters, conduct necessary negotiations, have Ray-O-Vac's products listed and attend the Gibson Trade Show (Miller 3121, 3126; CX 154A–F).

415. Barshell paid Ray-O-Vac's booth fees for participation in the Gibson Trade Show and was reimbursed for such payments by the supplier (Blake 4448). **[164]**

416. Ray-O-Vac, through its broker Barshell, Inc., participated in every Gibson Trade Show to the end of 1973 (Blake 4424). In the period 1969–1975, Ray-O-Vac, however, paid no show fee to the Gibson Trade Show, although its representatives participated therein (Blake 4443).

417. Ray-O-Vac compensated Barshell with a ten percent brokerage fee (CX 154B).

418. As far as Barshell was concerned, at the time that it sold to the Gibson accounts, Gibson, Sr. was a very enormous and powerful customer (Miller 3135). About eighty percent of Barshell's sales at the time it represented Ray-O-Vac were to the Gibson stores (Miller 3139).

419. When Ray-O-Vac got into the Gibson Trade Show, Gibson, Sr. approved Ray-O-Vac products for purchase by Gibson franchised and Gibson family stores (Miller 3141).

Barshell had numerous meetings with Gibson, Sr. or his buyers after it began representing Ray-O-Vac. Such meetings, concerning Ray-O-Vac, occurred prior to almost every Gibson Trade Show (Miller 3126–27).[95]

Prices were discussed at some of those meetings. On one occasion, there was a discussion concerning a nine percent discount, either in deal form or in advertising, to Gibson or Gibson stores buying the Ray-O-Vac line (Miller 3128–29).

420. On a number of occasions, H.R. Gibson, Sr. visited the office of Jim Miller in connection with Ray-O-Vac (Miller 3132). On such visits, Gibson, Sr. negotiated deals with Miller and Barshell to pay Gibson or the Gibson Trade Show promotional allowances based on sales and the

[94] Prior thereto Miller owned another corporation which had represented the Ray-O-Vac account at that time (Miller 3120).

[95] Frank Blake, of Ray-O-Vac, was present at a number of those meetings (Miller 3128).

activities Gibson performed to sell Ray-O-Vac products to the Gibson stores (Miller 3132).[96]

[165]The basis of such payments to Gibson, Sr. by Barshell, pertaining to Ray-O-Vac (Miller 3132–33), varied:

> Well, it would just depend. Mr. Gibson, was never consistent with that. It would depend on what he felt like he did for you.
>
> If he had written a general order, where he had insisted that the stores, or suggested that the stores buy a certain quantity of merchandise, and if this order amounted to a hundred thousand dollars, he would expect more from the agency than he would if you had solicited the business yourself from those stores (Miller 3133).

421. Ray-O-Vac automatically sent commission statements to Barshell (Miller 3134). The commission statements recorded all of Ray-O-Vac's shipments to the individual Gibson stores, showing the dollar volume shipped to those stores; along with the dollar volume figures, such statements showed the commission which Barshell had earned through those sales (Miller 3134). Gibson, Sr. checked Barshell's commission statements received from Ray-O-Vac in connection with his visits to Miller concerning Barshell's activities for that supplier (Miller 3132–33).

422. After Gibson, Sr. had checked Ray-O-Vac's commission statements, Barshell made payments to Gibson, Sr., termed promotional allowances, on the basis of Ray-O-Vac sales recorded in such commission statements (Miller 3132–35). CX 192, a Barshell check in the amount of $13,173.43, dated September 23, 1972, is one such payment (Miller 3134–35).[97] **[166]**

423. CX 192 is a check transmitting brokerage fees by Barshell, received from Ray-O-Vac, to H.R. Gibson, Sr. (Miller 3132–35, 3140, 3147–48)[98] at a time when Gibson, Sr. was owner and operator of

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[96] Q. Now, when you are referring to Gibson, who are you speaking of?
A. Well, that would be Mr. Gibson, Sr., or Gibson Trade Show. Because it was, you know, kind of interwoven there. We really never knew who we were dealing with (Miller 3132).

[97] The check is made out to H.R. Gibson, and endorsed "H.R. Gibson DBA Gibson Products Company" (CX 192). The witness testified:

> JUDGE VON BRAND: All right. Where did the commission statement originate?
> THE WITNESS: They would originate with the Ray-O-Vac Company. They would be sent to us automatically.
> JUDGE VON BRAND: Proceed.
> (A paper was marked for identification as Commission's Exhibit No. 192.)
> By Mr. Brookshire:
> Q. Mr. Miller, I hand you what has been marked as CX-192 for identification. And I ask if you can identify that document, please, sir?
> A. Yes. This is a check drawn on North Central State Bank on Barshell, Incorporated, dated 9-23-1972, in the amount of $13,173.43.
> Q. What was the purpose of that check?
> A. This would have been promotional allowance given to Gibson for whatever group of commission statements or activity covered for a period of time with Gibson (Tr. 3134–35).

[98] Q. Mr. Miller, referring to a document which has been identified, or been admitted into evidence as CX-192, were there ever any other checks issued under the same or similar circumstances by Barshell?

various retail stores or, in short, a buyer from Ray-O-Vac (Findings 5, 6). [168]

424. Frank Blake, the Ray-O-Vac official responsible, has not discussed with brokers their disposition of the Ray-O-Vac commissions. "We pay the commissions, what he [the broker] does with them is his business" (Blake 4484).

B. Al Cohen Associates, Inc.

425. Al Cohen Associates, Inc. ("Al Cohen"), of 12514 Gulf Freeway, Houston, Texas, is a corporation formed in 1961 or 1962 (Cohen 3981–82). Al Cohen, a sales representative, is essentially a one man business (Cohen 3980). Its only officers and shareholders are Alpha Meyer Cohen and his wife (Cohen 3981).

426. Al Cohen acquired the Ray-O-Vac account on December 28, 1973, to become effective on January 1, 1974 (Cohen 3987–88, 3992; CX 169A–C). The representation agreement provides that Al Cohen is to represent Ray-O-Vac to:

A. Gibson Discount Centers, Inc. Seagoville, Texas
B. All Gibson franchise stores (CX 169A).

The agreement further provides, in pertinent part:

PERFORMANCE

The REPRESENTATIVE agrees to do the following:

A. To maintain continuous headquarters contact with Gibson Discount Centers in Seagoville, Texas.

B. To secure adequate space in any dealer shows the COMPANY desires to enter through Gibson Discount Centers, Inc.

C. To supply adequate manpower in conjunction with the COMPANY'S manpower to adequately man the booths at any of these dealer shows.

D. To assist COMPANY personnel to service at retail all Gibson Discount Centers throughout the United States. [169]

E. To refrain from acting in any capacity as a promoter of sales of product which compete with those listed in Paragraph #2 above, and which are not manufactured by the COMPANY.

F. To send orders to the COMPANY promptly as they are received.

A. Yes.
Q. To who?
A. To Gibson. Mr. Gibson, Sr.
Q. Do you recall whether or not such checks were issued in 1971?
A. I would have to assume that they were. Offhand, I don't recall. I would have to assume, yes, depending upon what time of the year that Barshell took over the representation of Ray-O-Vac.
Q. How often were these checks payable?
A. Well, most of the time, it would depend upon when Mr. Gibson came by and sat down to negotiate with us. And that could be anywhere from, usually every other month, to three or four months (Tr. 3140).

COMPENSATION

In return for performance of the duties specified in Point #2 above, the COMPANY agrees to pay the REPRESENTATIVE ten per cent (10%) of net sales billed for sales which result from orders solicited by the REPRESENTATIVE (CX 169A–B).

427. Ray-O-Vac also paid commissions to Al Cohen on sales to the Gibson stores generated by the calls of Ray-O-Vac's own sales staff (Blake 4488).

428. Alpha M. Cohen contacted H.R. Gibson, Sr. after he received the Ray-O-Vac contract, and an oral agreement between these two respondents was reached (Cohen 4007–08).[99] Under that agreement, Gibson, Sr. was to increase the sales volume of Ray-O-Vac the best way he knew how. Otherwise, Gibson, Sr.'s functions pursuant to this verbal agreement were not spelled out (Cohen 4008). Cohen, under this agreement, undertook to pay Gibson, Sr. ninety percent of the ten percent commission which Al Cohen received from Ray-O-Vac (Cohen 4011–12). Put another way, Gibson, Sr. received a payment equivalent to nine percent of Ray-O-Vac's sales to the various Gibson stores. **[170]**

429. Al Cohen made such payments monthly by check to Gibson, Sr. after receipt of a commission check and statement from Ray-O-Vac (Cohen 4012–15; CX 1212–17). Such payments commenced in 1974 and continued up until at least March 1978 (Cohen 4015–16).

In 1974, payments of commissions by Al Cohen to Gibson, Sr. totaled $174,907.10 (CX 1218).

The record shows the following commission payments by Cohen to Gibson, Sr. in 1975:

January 15	$ 17,972.39	
January 31	10,901.47	
March 10	7,327.26	
April 14	25,398.00	
April 30	31,634.99	
June 10	10,127.29	
July 7	12,986.47	
July 31	17,746.04	
September 4	16,367.02	
Total	$150,460.93	(CX 1215–17).

430. Alpha Cohen's assertion that H.R. Gibson, Sr. is a salesman to whom he sublet the Ray-O-Vac line is undercut by his recognition of Gibson, Sr.'s buying function in behalf of the Gibson stores:

[99] According to Alpha Cohen:

> Mr. H.R. Gibson, Sr. agreed to do the lion's share of the work in advancing the sale of Ray-O-Vac products to the Gibson stores through his trade show and we worked out an agreement where he would do the lion's share of the work and I would pay him for that work (Tr. 4007).

Q. Did Mr. Gibson ever solicit you to give a special reduced price to the stores that use the Gibson name?

A. I dont't believe I understand your question, Mr. Steele.

Q. Let me take it this way; in the period 1969 through 1974, to your recollection, did Mr. Gibson, Herbert R. Gibson, Sr. come to you and request that you work out any reduced prices for the Gibson stores on any line?

A. Mr. Steele, awhile ago I told you that all buyers are interested in price, everyone of them, whether they be H.R. Gibson, Sr. or Mr. Bill Houton with Winn stores or regardless of who it is, they are always bucking for a better price. I don't care who you are. [171]

To specifically say that he has bucked for a better price for the Gibson stores with the Gibson name, it would be difficult for me to answer that either way because everyone of them tried to get a better price (Cohen 4077–78).[100]

431. Gibson, Sr., although "bucking for a better price" (Finding 430), was not himself a buyer in 1974 or 1975 (Finding 25). [172]

DISCUSSION

I. The Issues

The complaint alleges that respondents, through the operation of a trade show, violated Section 5 of the Federal Trade Commission Act and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. The details of the complaint have already been outlined and need not be repeated here (See Preliminary Statement). Essentially, the Section 5 charges under Count I allege that respondents have induced and/or received from suppliers various promotional payments and services not available on proportionally equal terms to those who compete with them in the resale of such products. Count II alleges that respondents have agreed, combined and engaged in an understanding and conspiracy with all or some of the Gibson family-owned and franchise stores to eliminate or boycott suppliers who did not grant the special allowances charged as illegal under Count I. Count III of the complaint charges that the Gibson respondents and certain brokers or sales representatives have, in violation of Section 2(c) of the Robinson-Patman Act, collected brokerage, commissions or other compensations from sellers of various products when, in fact, the brokers were acting for or in behalf of the Gibson family or corporate respondents or subject to the direct or indirect control of the Gibson respondents.

At this stage, the case presents a multiplicity of issues under all counts of the complaint. Common to all counts are the following questions: (1) is the Gibson Trade Show conducted by H.R. Gibson, Sr.

[100] Cohen's recognition of Gibson, Sr.'s buying function is not vitiated by his assertion, at Tr. 4078, that he did not consider Gibson, Sr. to be a buyer in 1973 and 1974 because he then owned no stores. While technically correct, it ignores the practicalities of the situation he had recognized in his previous answer. Compare also Finding 81 and note 15.

a bona fide manufacturer's agent representing suppliers participating therein; (2) is the Gibson Trade Show so interrelated with the various Gibson family and corporate respondents that respondents' franchising, trade show and retailing operations should be considered as an integrated enterprise; (3) should the services of the trade show and related payments be regarded as for the benefit of participating retailers or for the benefit of participating manufacturers or both; (4) was the Gibson Trade Show open to all retailers desiring to participate therein; and, (5) is the Gibson Trade Show oriented to the Gibson Discount Centers.

Under Count I, the following issues should be resolved: (1) under Count I, must the government prove the requisite elements of a violation under Sections 2(d) and 2(e) of the Robinson-Patman Act; (2) is the Gibson Trade Show a promotional service furnished by respondents in connection with the resale of goods or is it essentially a vehicle for suppliers to make the original sale to retailers; (3) should the legality of the [173]Gibson Trade Show fees more properly have been tested under the price discrimination sections of the Robinson-Patman Act; (4) has the government sustained its burden of proof in showing that respondents have knowingly induced suppliers to pay allowances not available on proportionally equal terms to customers competing in the resale of such goods; (5) has the government sustained its burden of proof in showing that allegedly nonfavored customers were on the same functional level and in sufficient geographic proximity to warrant a finding that they compete with retailers operating under the Gibson name; and, (6) has the government sustained its burden of proof in demonstrating that Gibson stores and nonfavored customers purchased goods of like grade and quality at contemporaneous times.

The primary questions to be resolved under Count II of the complaint are the following: (1) did respondents issue an invitation to boycott by virtue of letters from trade show buyers asking "All Stores" to discontinue purchases of certain suppliers, and did a boycott and/or combination in restraint of trade result from such invitations; (2) were such letters sent or circulated to all the Gibson stores or a substantial number thereof; and, (3) did trade show buyers employed by Gibson, Sr., signing and sending such letters, have authority to request stores operating under the Gibson name to discontinue dealing with certain suppliers.

Count III presents the following issues: (1) under complaint counsel's theory of the case, is it necessary to demonstrate that H.R. Gibson, Sr. received the brokerage or commission payments in issue as a "buyer." If so, has that criterion been met; (2) in any event, are the payments in question sanctioned by the "for services rendered" section of the

statute; (3) is the element of price discrimination prerequisite to a showing of a violation of Section 2(c) of the Robinson-Patman Act; and, (4) after October 31, 1972, was H.R. Gibson, Sr. a dummy broker, agent or intermediary acting in behalf of the other respondents. If so, does the theory under which the case was tried preclude the finding of a violation on that basis. [174]

II. The Function of the Gibson Trade Show

An issue common to all counts of the complaint is the nature of the functions performed by the Gibson Trade Show. Complaint counsel urge that the trade show, the individual respondents and their various corporations, including the retailing operations, should be considered a single economic entity. Respondents, on the other hand, contend that the trade show functions as a manufacturer's representative selling to retailers, with no relationship to the retailing operations under the Gibson name, whether "family" or franchised stores.

The central fact is that Gibson, Sr., in the period 1969 to October 31, 1972, simultaneously operated the trade show as an individual proprietorship, controlled various retail stores and individually licensed several hundred retailers, from whom he also collected a monthly licensing fee, to use the Gibson trade names (Findings 3, 4, 5, 6, 44, 47, 50). After Gibson, Sr. divested himself of his retail interests to his sons on October 31, 1972, the trade show continued to operate without essential change from its past operations.

The Gibson Trade Show, in the period 1969–1972, was confined essentially to retailers operating under the Gibson name (Findings 59, 60–61, 91). Trade show buyers from the "Seagoville Office" contacted suppliers in connection with "all the Gibson chain stores regardless of owner" (CX 307). Meetings of Gibson franchisees were held in conjunction with the trade shows (Finding 72). Trade show buyers authorized and listed the items which could be sold through the trade show (Finding 75). Trade show buyers' culled deadwood from the suppliers lines and, in effect, preselected the items to be sold at the show (Finding 80). Gibson Trade Show buyers negotiated for better or competitive prices and billing terms [175](Finding 81).[101] Show sheets,

[101] Respondents assert that evidence as to price negotiations may not be relied upon in connection with the interrelationship issue, viz., the relationship of the Gibson Trade Show to the retailers. However, the December 7, 1977 Order, on which they rely, was limited to Count I evidence because respondents had no opportunity for third party discovery on the issue of proportional availability as it might relate to show prices and billing terms. Evidence on this point by the general witnesses was expressly permitted on "the interrelationship issue, including the function which Respondents' trade show officials perform" (Tr. 3773). In connection with this ruling, it was noted that insofar as the general witnesses testified as to the methodology of negotiating and approving show prices and billing terms, no third party discovery was necessary (Tr. 3765–66, 3777. See also Tr. 3537–38, 3553–60). Where the evidence is limited to the function performed by trade show employees and proportional availability is not involved, respondents need no discovery from nonparties. For example, respondents clearly did not need nonparty discovery as to Gibson, Sr.'s

(Continued)

i.e., order forms and price lists, which were an integral part of the trade show operation, were preprinted with only the Gibson Products name on that section of the form identifying the retailer giving the order (Finding 91). Respondents' show sheets instructed manufacturers not to ship at prices higher than those listed thereon and to contact respondents' "Seagoville, Texas offices" for price approval (Finding 93). At the shows, the trade show buyers or merchandise managers could do little more than introduce retailers to the supplier's sales representatives. The trade show buyers, because of the number of lines that they represented, had to leave the actual selling at the shows to the "factory" (Finding 87). The Gibson Trade Show simultaneously handled [176]competing suppliers (Finding 86). Gibson, Sr., while simultaneously owning and operating certain Gibson stores, franchising others and conducting his trade show, requested suppliers to participate in newspaper advertising promoting merchandise in the Gibson stores to the consumer (Findings 113–16). There was extensive overlap in the directors and officers of the respondent corporations and certain nonrespondent corporations operating Gibson stores by virtue of the offices held by the individual respondents, including Gibson, Sr., in the period 1969–1972 (Finding 12; Appendix A). The four individual respondents, through publication of store directories in 1970–1971, made or were responsible for making representations creating the net impression that the businesses of the four individual respondents and the corporate respondents were an integrated operation (Findings 39–41). Finally, trade show buyers suggested that the Gibson retailers stop buying from certain suppliers because "They will not sell us at a price we would recommend as being profitable and beneficial for your operation" (CX 104, 136, 303).

In the period 1969-October 31, 1972, Gibson, Sr., while he operated the trade show, had a direct financial interest in the stores he operated as well as in the financial health of the franchised stores from whom he derived franchise fees (Findings 6, 47, 49). The Gibson Trade Show, as already noted, benefited the retailers operating under the Gibson name in various ways. At the same time, the trade show, whose revenues Gibson, Sr. pocketed, depended on the attendance of the Gibson stores to attract the participation of suppliers. The Gibson family-owned retail operation, the franchising business and the trade show, as well as

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testimony that he sought a competitive price so that the Gibson stores, in making a purchase, "wouldn't get stuck on it" (Finding 81 and note 15). There is no need to find a price discrimination to define the Gibson Trade Show's role. The benefit to the Gibson retailers from Gibson, Sr.'s concern on this point is plain as is the role played by the trade show on behalf of the retailer.

On this point, see also Order Pertaining to General Witness' Testimony Concerning Show Prices and Billing Terms dated March 14, 1978.

ancillary operations such as Ideal Travel, were mutually interdependent.

The trade show or Gibson, Sr., in dealing with suppliers, accordingly acted on behalf of retailers operating under the Gibson name, and payments to the Gibson Trade Show were for the benefit of participating retailers. In the period 1969 to October 31, 1972, Gibson, Sr. was also a "buyer" (Findings 5–6). The Gibson Trade Show cannot be considered a manufacturer's representative. To the extent that he "represented" manufacturers, the loyalties of Gibson, Sr. or his trade show must be considered divided between suppliers and retailers.

The pattern of the various enterprises, as a whole, conducted by the Gibson respondents and the respondents' mutual interdependence, compels the finding that the Gibson respondents in the period 1969–1972 operated as an integrated enterprise. [177]

III. The Count I Charges

The complaint charges that respondents violated Section 5 of the Federal Trade Commission Act by inducing suppliers to violate Sections 2(d) and 2(e) of the Robinson-Patman Act. Complaint counsel have tried the Count I allegations under the theory that respondents' acts are *per se* illegal (Tr. 39; CPF p. 153). Under the circumstances, they have the burden of proving in this Section 5 proceeding that the statutory elements of Sections 2(d) and 2(e) have been met. There is a "general assimilation of Robinson-Patman standards of liability and proof" in these cases. *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351, 365 (9th Cir. 1966), *rev'd and remanded on other grounds*, 390 U.S. 341 (1968). See also *J. Weingarten, Inc.*, 62 F.T.C. 1521, 1524–25 (1963). In short, the Count I charges, although under Section 5, are not being tried under an incipiency standard.

Under Count I, the Commission must prove the following basic factual elements to demonstrate that respondents have engaged in unfair methods of competition by inducing discriminatory payments violative of the Clayton Act:

(1) that a respondent in commerce knowingly solicited or induced and received from a supplier promotional allowances, services, or facilities;

(2) that the solicited promotional considerations were received in connection with the resale of the supplier's product;

(3) that respondents had competitors at the same functional level; and,

(4) that respondents knew or should have known that its competitors

were not offered the promotional considerations in question on proportionally equal terms.

Alterman Foods, Inc. v. *FTC*, 497 F.2d 993, 997 (5th Cir. 1974).

Respondents contend that neither Gibson, Sr. nor his trade show are "customers" of suppliers participating in the trade show within the meaning of the Robinson-Patman Act. As a result, they argue that no discrimination cognizable under Sections 2(d) and 2(e) of the Robinson-Patman Act has been shown. Respondents urge that a finding that a supplier's "customer" has received the allegedly discriminatory allowance or services is prerequisite to a finding of violation. [178]

The argument misses the mark on two grounds. First, Section 2(d) is not limited to payments "to" a customer. It covers also payments "for the benefit of a customer." See *Swanee Paper Corp.* v. *FTC*, 291 F.2d 833, 836 (2nd Cir. 1961), *cert. denied*, 368 U.S. 987 (1962). In short, there is no need to make a finding that the payments in question were made directly to a buyer. Laying aside, for the moment, the question of whether the trade show constituted a promotional service in connection with the resale, it is clear that the trade show benefited the Gibson retailers as a group. As a result, payments to the trade show in the person of H.R. Gibson, Sr. were, at minimum, payments for the benefit of such customers.

Relying on precedents holding that the corporate entity should not be disregarded, respondents assert that Gibson, Sr. cannot be regarded as a customer since the retail operations in which he had a financial interest, in the period 1969-October 31, 1972, were incorporated. They contend that "[t]he crystal clear fact is that H.R. Gibson, Sr. never had anything to do with the operation of any retailers in this case" (RPF SR p. 236). Gibson, Sr.'s own testimony makes it clear that he played an active role at least in those corporations operating retail stores in which he was a majority stockholder. He hired the key employees, the store managers, and actively reviewed store financial records. And, "Anytime they didn't make money, I had to do something about it. Might get a new manager real quick. I would try to get the store to making money" (Tr. 5573; Finding 6). Gibson, Sr. had the authority to make managerial decisions in those areas that counted and did not hesitate to exercise it. The individual who reviews the performance of key corporate employees and fires them for inadequate performance, as a practical matter, runs that corporation. Gibson, Sr. clearly controlled the retail corporations wherein he had a majority interest in the period 1969 to October 31, 1972.

This testimony and the showing in the record that the trade show operated for the benefit of the Gibson retailers as a group compels the

finding that Gibson, Sr., in 1969–1972, combined the function of trade show operator and buyer from the participating suppliers. Trade show payments to Gibson, Sr., in the period 1969-October 31, 1972, were payments to a buyer and for the benefit of retailers operating under the Gibson name. Subsequent to October 31, 1972, they were for the benefit of such retailers. **[179]**

A crucial point is that the Gibson Trade Show was oriented to the retailers operating under the Gibson name.[102] Accordingly, trade show payments necessarily were for the benefit of the Gibson stores, irrespective of whether Gibson, Sr. had an ownership interest therein or whether the trade show fee payments were passed on. The cases cited by respondents for interposing the corporate veil between Gibson, Sr. and the retail corporations do not apply.

A. Payments or Services Challenged under Sections 2(d) and 2(e) Must Be in Connection with the Promotion of the Goods for Resale

Sections 2(d) and 2(e) impose a more rigid standard than the flexible criteria of the pricing provisions of the statute. As a result, the first essential step in the legal analysis is to ascertain whether the price or promotional provisions of the Act apply. Rowe, *Price Discrimination Under the Robinson-Patman Act*, Little Brown & Company, 372 (1962). Under Section 2(a) of the Act, price discriminations are lawful unless the prescribed adverse effect on competition is shown and unless such discrimination cannot be justified under one of the defenses provided by the statute. Sections 2(d) and 2(e), on the contrary, have a *per se* standard of illegality irrespective of the competitive impact, and the opportunity to defend on the basis of the statutory defenses is sharply circumscribed. *Ibid.* As a result, "the stricter sanctions of these provisions [Sections 2(d) and 2(e)] create a legal premium for the FTC or other plaintiffs to ease their evidentiary burdens by classifying trade practices under Sections 2(d) and 2(e) rather than the price provisions in Section 2(a) [or 2(f)]." *Ibid.*

Payments, allowances or discounts in connection with the seller's *original* sale to the buyer are not within the scope of Section 2(d). *New England Confectionary Co.*, 46 F.T.C. 1041, 1059 (1948);[103] *Rutledge* v.

[102] Consider, for example, Becker's agreement with Gibson Products Company to pay the 10% show fee on purchases by the Gibson stores in consideration for "the listing of our approved products to your stores and allowing us to display our approved products in your private trade show" (Finding 127). Moreover, supplier sales in the relevant period through the Gibson Trade Show were confined to Gibson stores (Finding 371).

[103] The "[m]ere acceptance by a purchaser of a promotional offer intended to facilitate the *original* sale, does not constitute the rendering of a service or facility by the purchaser within the meaning of Section 2(d)." *New England Confectionary Co.*, 46 F.T.C. at 1059 (emphasis added). That decision dismissed allegations charging as illegal under Section 2(d) the payment of rebates or discounts equal to the savings and costs attributed to different procedures followed in packing, selling or delivering its products where respondent compensated the favored customers for such services or facilities performed by them. Such payments, the Commission held, were made in connection with the original sale to the favored customers and not in connection with the resale.

Electric Hose & Rubber Company, [180]511 F.2d 668, 678 (9th Cir. 1975). And, the coverage of Sections 2(d) and 2(e) is limited by their implicit restrictions to *promotional* arrangements excluding thereby other incidents or terms of sale. Rowe, *supra* at 377.

The reach of Sections 2(d) and 2(e) should be limited to *promotional* arrangements related to the customers' resale of the product, although the literal text of these provisions might reach distributive arrangements in connection with the resale.[104] "[S]uch a limitation is essential to prevent incongruity and overlap between several statutory provisions. If the 'proportional equality' requirements of the provisions governed all distributive 'services' or 'facilities' rather than cooperative promotions alone, the 'functional' discounts implicitly permitted by the price provisions of Section 2(a) for rewarding pure 'wholesalers' marketing functions might be viewed as 'payments' for 'services,'" and, thus, made subject to the proportional availability requirements of Sections 2(d) and 2(e). In addition, legitimate brokerage allowances regulated by Section 2(c), might also be governed by the proportional equality requirement of Section 2(d). Rowe, *supra* at 380–81. Accordingly, unless Sections 2(d) and 2(e) are limited to cooperative promotional arrangements, they would conflict with the separate price and brokerage provisions of the Act. *Id.* at 381. See also *New England Confectionary Co.*, 46 F.T.C. at 1060; *Carpel Frosted Foods*, 48 F.T.C. 561, 602 (1951).

The Commission in cases of this nature has, in fact, defined as one of the basic elements of this violation:

> The solicitation and receipt by respondent in commerce of payments for *promotional* services in connection with the resale of a supplier's product.

J. Weingarten, 62 F.T.C. at 1524.

[181]The principle that the reach of Sections 2(d) and 2(e) should be limited to promotions in connection with the resale was again confirmed in 1975 by the Ninth Circuit:

> *Section 2(d) does not refer to benefits to "favored buyers" in connection with the original sale to the buyer*, such as discounts, nor does it refer to a seller who charges different prices to different buyers according to the qualification or functional level of the buyer; rather *it refers to payments in connection with the resale by the buyer of the goods, for advertising, promotion or other similar purposes.* Exquisite Form Brassiere, Inc. v. F.T.C., 112 U.S. App. D.C. 175, 301 F.2d 499 (1961); Rowe, Price Discrimination Under the Robinson-Patman Act, at 371. Cf. Surprise Brassiere Co. v. F.T.C., 406 F.2d 711 (5th Cir. 1969).

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[104] *E.g., Champion Spark Plug Co.*, 50 F.T.C. 30, 50 (1953), held that payments for distributional services such as Special Warehouse Compensation were, in fact, reductions in net price not properly alleged as violations of Section 2(d) of the Robinson-Patman Act.

Rutledge v. *Electric Hose & Rubber Company*, 511 F.2d at 678 (emphasis added).

Payments by a supplier to customers or their intermediaries for services performed by the customer or intermediaries of the customer in connection with the *original sale* to such customers, as, for example, sending bulletins to encourage such retailers to make purchases, are not promotional payments within the scope of Section 2(d) of the Act. *Carpel Frosted Foods, Inc.*, 48 F.T.C. at 602. Payments for advertising and promotional services in order to stimulate the resale of the supplier's products *after* the product reaches the store are within the purview of this section. *Ibid.*

The Gibson Trade Show served as a vehicle to facilitate the original sale by suppliers to Gibson family and franchise stores attending such shows. As a practical matter, it enabled participating suppliers to make a sales pitch to Gibson retailers attending the show. The show did not admit consumers and the services performed by respondents for which they were compensated by suppliers were services facilitating the suppliers' sales to the retailers, analogous to the DGS bulletins aiding supplier sales to members of that cooperative in *Carpel*. The Gibson Trade Show, facilitating the vendors' original sales to the retailers, is not a case like *Macy's*, where the buyer "used the payments for institutional advertising and promotions to get more people into its store to buy the goods of all its vendors." *R.H. Macy & Co., Inc.* v. *FTC*, 326 F.2d 445, 450 (2nd Cir. 1964).

The services for which the show fees were paid included authorization to display and sell certain merchandise, listing on the show sheets, introduction to retailers at the show, etc. [182]The booth fees permitted suppliers to display their wares and sell to the Gibson retailers. Supplier advertising in the store directories and buyers guides, circulated to persons attending the show but not to consumers, again related only to the manufacturer's sale to the retailers (Finding 293). The show fees, booth fees and advertising in store directories and buyers guides were compensation for services furnished in connection with the original sale to the retailers. Services such as the staffing and decorating of booths were similarly related to the original sale (See generally Findings 373–75).

Credit arrangements, such as billing terms, are not within the scope of the promotional provisions of the statute since they are connected only with the original sale of the product and not with its further handling or resale. *Secatore's, Inc.* v. *Esso Standard Oil Company*, 171 F. Supp. 665, 668 (D. Mass. 1959). As another court has recently stated, credit terms are not a cause of action under Sections 2(d) or 2(e); rather, they may state a cause of action under Section 2(a). *Robbins*

Flooring, Inc. v. *Federal Floors, Inc.*, CCH Trade Reg. Rep. ¶ 62,259 at 75, 616 (E.D. Pa. 1977).[105] The charge in the complaint that show prices and billing terms induced by respondents were not made available to their competitors on proportionally equal terms is an anomaly.

The determination in *Alterman* that the food shows in that case were in connection with retail resales of the participating suppliers' products has been taken into consideration.[106] Complaint counsel, in urging that the instant proceeding is within the scope of *Alterman*, stress [183]the benefits derived by the Gibson stores from the trade show. The Gibson stores, in fact, benefited from the trade show and from supplier payments underwriting its operation. Such benefits include a convenient place for the retailers to make their purchases (Finding 71), Gibson, Sr.'s attempt to assure them a competitive price so they would not get "stuck" (Finding 81 n. 15),[107] preselection of merchandise (Finding 80), an opportunity to confer with other retailers (Finding 72), etc. Such benefits, however, are not concerned "with any of the services with which Section 2(d) concerns itself, to wit, promotion, advertising or similar activities connected with the resale of goods." *Rutledge* v. *Electric Hose & Rubber Company*, 511 F.2d at 678. [184]The legality of the show fees, booth fees, and payments for advertising in the buyers guides and store directories could have been challenged under Section 2(f) of the Act. See *New England Confectionary Co.*, 46 F.T.C. at 1060; *Champion Spark Plug Co.*, 50 F.T.C. at 50. An expansive reading of *Alterman*, which would bring such payments within the purview of Section 2(d), as a practical matter, would erase

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[105] See also *Clausen & Sons, Inc.* v. *Theo. Hamm Brewing Co.*, 284 F. Supp. 148, 155 (D. Minn. 1967): ". . .Neither the price discriminations nor the credit preferences alleged in Count III can be considered to be services or facilities furnished in connection with 'the processing, handling, sale, or offering for sale' of Hamm's beer. . . ."

[106] The Fifth Circuit held:

> The record contains substantial evidence supporting the Commission's determination that the food shows were in connection with Alterman's retail resales of the participating suppliers' products. Suppliers were invited by Alterman's buyers who purchased for the Company's retail division as well as for its wholesale business. The Alterman vice-president in charge of retail operations testified that the Company's retail stores and their managers definitely benefit from the food shows. Company literature encouraging retailers to attend the shows stresses the benefits to them of participation. The store managers have general discretion in stocking methods of promoting sales and building up his store. According to another Alterman vice-president, the food shows "cement the relationship between a food supplier and the retailer." Thus, the suppliers' promotional services at food shows benefited Alterman at the retail level.
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> The profits on booth rentals were, in effect, price reductions on suppliers' products. See *Grand Union Co.* v. *FTC*, 300 F.2d 92, 99 (2d Cir. 1962). Although, as Alterman argues, there is no formal proof that its profits on the food shows were put to use at the retail level, the Commission could properly infer that this additional source of profit enabled the Company to maintain a given overall profit level while charging less in its other operations, an advantage denied to Alterman's competitors. This inference lies within the competence of the Commission and constitutes substantial evidence in the absence of contrary evidence produced by Alterman. See *Colonial Stores, Inc.* v. *FTC*, 450 F.2d 733, 739 n. 13, 741 nn. 17 & 18 (5th Cir. 1971).
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> *Alterman Foods, Inc.* v. *FTC*, 497 F.2d at 999.

[107] It is irrelevant that show specials may have been no more advantageous than those available at other shows. The show specials were available at a show oriented to the Gibson retailers.

the distinction between the promotional and price provisions of the Act. Confining the application of Sections 2(d) and 2(e), under the rule of *Rutledge*, "to payments in connection with the resale by the buyer of goods for advertising, promotion or other similar purposes" is the sounder approach.

The record does show that certain suppliers made payments for tabloid advertising to consumers. Such payments are promotional allowances for services in connection with the resale. The fact that some tabloid payments may have been received from certain suppliers does not alter the critical fact that the show fees and other challenged payments made in relation to the Gibson Trade Show are in connection with the original sale. Even where payments are made pursuant to a common program, the applicability of the various allowances to the specific Robinson-Patman provision depends on the nature of the service for which the compensation is paid. See *Carpel Frosted Foods, Inc.*, 48 F.T.C. at 602.[108] The elements of the violation must be proven with respect to each category of payment. All the elements of the violation have not been established in connection with the tabloid payments documented by this record. Complaint counsel have not sustained their burden of showing sales of goods of like grade and quality to respondents and customers competing in the resale of items promoted in the tabloids (See pp. 188–89 *infra*).

The Count I charges will be dismissed since the show fees, booth fees and related services in connection with the original sale are not properly within the scope of Sections 2(d) and 2(e). The other elements of a violation under these [185]sections will, nevertheless, be discussed to facilitate review. Complaint counsel must also demonstrate that the challenged discriminatory allowances or services were knowingly induced, and that such discrimination involved customers purchasing goods of like grade and quality who were competing in the resale of such products. This includes a showing that the favored and nonfavored customers operate at the same functional level in sufficient geographic proximity to support a finding that they compete.

B. Evidence as to Competition in the Resale of Goods of Like Grade And Quality Involved in the Alleged Discriminations

The concept of like grade and quality "was designed to serve as one

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[108] The challenged payments to the retailer cooperative in *Carpel* were made pursuant to one contract and in a lump sum. The Commission, in evaluating the nature of the services for which payment was made, noted, "but the activities were of a distinctly different character and involved important differences in their competitive and legal effects." Compensation for distributional services in connection with the original sale to the cooperative acting in behalf of the buyers was ruled within the scope of Section 2(c), since "Those activities were equivalent to the functions of brokers, and the compensation for them was in lieu of brokerage." Payments for services to stimulate the resale of the products *after* they reached the store were held covered by Section 2(d).

of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute." *Report of the Attorney General's Committee to Study the Antitrust Laws*, 157 (1955); *Moog Industries, Inc.* v. *FTC*, 238 F.2d 43, 49–50 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958). Although Sections 2(d) and 2(e) of the Robinson-Patman Act do not explicitly refer to the like grade and quality concept contained in the pricing provision of the statute, they are, nevertheless, governed by that limitation. *Atalanta Trading Corp.* v. *FTC*, 258 F.2d 365, 368–69 (2d Cir. 1958). See also *Shulton, Inc.*, 59 F.T.C. 106, 111 (1961). Under the Robinson-Patman Act, unlike the older Clayton Act, the burden is on the plaintiff, here the government, to prove that the goods involved in the allegedly discriminatory transactions are of like grade and quality.[109] the standard of proof which must be met in demonstrating that favored and nonfavored customers compete in the sale of goods of like grade and quality has been formulated as follows:

> . . .Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made. . . .

J. Weingarten, 62 F.T.C. 1527–28.

[186]The question of whether products are of like grade and quality is to be determined by the characteristics of the products themselves. *FTC* v. *Borden Co.*, 383 U.S. 637, 641 (1966). Physical differences in products are one of the prime determinants in deciding whether or not the like grade and quality criteria are met. *Bona fide* physical differences affecting marketability preclude a finding of like grade and quality even though the differences are small and have no effect on the seller's cost. *Antitrust Law Developments* ABA, 115 (1975). *Universal-Rundle Corp.*, 65 F.T.C. 924, 955 (1964), *order set aside*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded*, 387 U.S. 244 (1967); *The Quaker Oats Co.*, 66 F.T.C. 1131, 1192 (1964); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F. Supp. 312, 314 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir. 1961), *cert. denied*, 368 U.S. 829 (1961). Price differences demonstrating cross-inelasticity and the nonsubstitutability of items also militate against a finding of like grade and quality.[110] *Willow Run Garden Shop, Inc.* v. *Mr. Christmas, Inc.*, 1973–2 Trade Cases ¶ 74,816 (D.N.J. 1973).

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[109] Rowe, *supra* at 64. Under the Clayton Act provisions, preceding the Robinson-Patman Act, a seller might defend by relating pricing variations to the grade or quality of the different products. *Ibid.*

[110] Consider, for example, Parker Pen's "midline" and its "prime line" involving 50 to 100 different priced pens (Finding 165).

Complaint counsel urge that since the show fees are based on a percentage of all sales to Gibson stores during the course of a year, the *Weingarten* criteria need not be met in this instance. Relying on cases such as *Moog Industries, Inc., supra,* they contend that an item-by-item analysis of purchases by favored and nonfavored customers is unnecessary. Cases such as *Moog, Dayton Rubber Company,* 66 F.T.C. 423, 466 (1964), *rev'd in part on other grounds,* 362 F.2d 180 (6th Cir. 1966), and *Joseph A. Kaplan & Sons, Inc.,* 63 F.T.C. 1308, 1348 (1963), *modified on other grounds,* 347 F.2d 785 (D.C. Cir. 1965), held that where a supplier sells or promotes merchandise as a line and the rebates are granted on the line, there is no need to show that favored and nonfavored customers purchased identical items.[111] Those cases are not controlling here. For, although [187]these precedents do not require a showing that all items in the line are identical, at least a minimal showing must be made that the items comprising a "line" are of one grade and quality. There is no basis for the contention that the extraction by a customer of a uniform discount or allowance on all items purchased converts all products that a supplier sells into a "line" within the scope of *Moog, Dayton Rubber,* or *Joseph Kaplan.* To the contrary, those cases involved a fact situation where it was the supplier's determination that goods were to be sold as a "line." Furthermore, the records in those proceedings showed that the items within such lines were of the same grade and quality. In *Moog,* the respondent conceded that its products " 'may all be of one grade and quality.' " *Moog,* 238 F.2d at 49. In *Dayton Rubber,* the Commission found that the record affirmatively showed that "[r]espondent's line was composed of products of only one grade and quality." 66 F.T.C. at 466. In *Joseph Kaplan and Sons,* 63 F.T.C. at 1348, the Commission found, "[w]e have here a line of products promoted as a line, that is, the shower curtain line, and all of the items in the line are used for the same purpose. The fact that this case deals with such a unified line of goods clearly distinguishes the case from *Atalanta.*" In addition, the Commission, in holding that

[111] The court in *Moog* held, in pertinent part:

> . . .while leaf springs, coil springs or piston rings may not be interchangeable and usable in all makes, models and ages of automobiles, we believe that when such items are sold to competitors in lines, as petitioner has sold them, and when, as here, a discriminatory rebate is paid upon all items in a line, the Commission may properly find that such items are 'sufficiently comparable for price regulation by the statute.'
>
> The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not.

Moog, 238 F.2d at 50.

different patterns in shower curtains did not preclude a finding of like grade and quality, also found that some of the products involved in the discrimination "were apparently the same in everything except pattern." 63 F.T.C. at 1348. [188]

In this case, for most of the suppliers involved, there is little evidence that the goods sold were sold as "lines" by the supplier. More significantly, there appears to be no affirmative evidence with respect to most of the suppliers involved herein that all the items marketed by such suppliers were of the same grade and quality as was shown in the case of certain lines sold by the manufacturers in *Moog*. Rather, with respect to many of the suppliers involved in this proceeding, the record shows substantial differences in price and in the physical qualities of the products which they marketed to their customers. Variation of merchandise within a line precludes the facile assumption that different customers each purchased an identical or even a similar cross section of merchandise within each line. *Willow Run Garden Shop, Inc.* v. *Mr. Christmas, Inc., supra*. The meaningful way to compare commodities between two competing retailers is on an "'individual item'" basis, not on a "'line item'" basis. *Id.*

In summary, insofar as most of the suppliers herein are concerned, there is little affirmative evidence that all of the items upon which the trade show fees were paid were of the same grade and quality. Under the circumstances, the Commission cannot rely on the auto parts cases or *Joseph Kaplan* for the proposition that an across-the-board discount over the period of a year, in and of itself, obviates the need for analysis of the products purchased by favored and nonfavored customers.

In the case of payments for tabloid advertising, complaint counsel could not prevail even under their interpretation of *Moog*. Complaint counsel recognize that where the payment is for the promotion of a particular item or limited number of items, they have the burden of showing competition in the resale of those items between favored and nonfavored customers[112] (CPF p. 134). Suppliers are not obliged to give advertising allowances on all of their products if they choose to accord them on only some of their products. *Sunbeam Corporation*, 67 F.T.C. 20, 55 (1965); *Atalanta Trading Corp.*, [189]258 F.2d at 369. In short, where a specific item is promoted, a showing must be made that

[112] See *Shulton*, 59 F.T.C. at 111–12, holding:

> In further excepting to the order, respondent has interpreted such order to require that if it elects to accord advertising or promotional allowances on any product within a product line, such as toiletries, such allowances must be granted on all other products within that line, including those which are not of like grade and quality. Section 2(d), of course, does not impose such a requirement, but neither, however, does the order to cease and desist. Although the order covers all products which respondent sells, respondent will be required thereby to extend allowances granted in connection with a particular product only to those customers competing in the distribution or resale of that product or products of like grade and quality purchased from respondent.

favored and nonfavored customers competed in the resale of that particular product at a time contemporaneous with the challenged promotion.

The tabloids generally did not involve across the board promotions; rather, as the Gibson Tabloid Authorization forms showed, they related to particular items, as for example in the case of Parker (Finding 164). With respect to the tabloid advertising shown in this record, the Section 2(d) criteria have not been met. There has been no showing that specific items promoted in the tabloids were resold by favored and nonfavored customers contemporaneously with the promotional event.[113] Thus, no finding of violation can be based thereon.

An additional factor precluding a finding of discrimination or the knowing inducement thereof with respect to tabloid payments in the case of some suppliers, such as Regal and Wagner, is the fact that the payments were within the suppliers' standard advertising or promotional programs (Findings 220–22, 273–74).

The parties also disagree as to proof of geographic proximity prerequisite to a finding of competition between favored and nonfavored customers. Under *Sunbeam Corporation*, 67 F.T.C. at 55, and *Viviano Macaroni Co.*, 73 F.T.C. 313, 341, *aff'd*, 411 F.2d 255 (3d Cir. 1969), there is a rebuttable presumption that competition exists between customers operating at the same functional level so long as they are located in the same trade area. Similarly, there is no need to trace goods to the shelves of competing outlets, where the direct customers of a supplier operate only at one functional level. Then, it is sufficient to prove: **[190]**

> . . .that one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer.

Tri-Valley Packing Association v. *FTC*, 329 F.2d 694, 708 (9th Cir. 1964).

In order to meet the requirement of contemporaneous sales of goods of like grade and quality to favored and nonfavored customers competing in the resale of the goods involved in the alleged discriminations, complaint counsel introduced tabulations of invoices for certain of the suppliers.[114] In the case of other suppliers, invoices were

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[113] As respondents note, RRB Sr. p. 77 n. 30, complaint counsel have proposed no findings from which a determination can be made on this point. In the case of Farber, for example, this would have been hard to do. The documentary evidence pertaining to Farber's tabloid participation pertains to 1970, while the tabulations of purchases by Gibson stores and Farber's other customers cover the period 1972–1975 (Finding 296).

[114] Respondents urged that these documents could not be so used because of complaint counsel's explanations of

(Continued)

provided for the same purpose. For some of the suppliers, there are neither tabulations nor invoices, thus making a finding of contemporaneous sales of goods of like grade and quality to customers competing with Gibson retailers impossible as to such suppliers. Significantly, the tabulations were prepared with no attempt to determine whether the customers listed were wholesalers or retailers (Underwood 4529).[115] Nor was there an attempt made in the preparation of such tabulations to record the individual model or item numbers of the particular products that appeared on the underlying invoices (Underwood 4528–29). As a result, where the record shows that a supplier has a widely differentiated product line, the tabulations are of little help in establishing competition between the Gibson retailers and others in the resale of such merchandise. Other problems of proof also **[191]**exist. Without going into an exhaustive recitation, a number of examples will be noted.

There was insufficient documentary proof of sales to Gibson stores and their competitors with respect to Tucker Manufacturing Corp., Armstrong Environmental Industries and Beagle Manufacturing Company (Findings 168, 316, 368, 369 n. 78).

In the case of Waltham Watch Company, as with a number of other suppliers, the record does not define with sufficient precision the products involved in the alleged discrimination. The Waltham tabulations describe the products sold only as "watches." The record, however, shows that Waltham's watches differ significantly in quality, style and price, among other factors (Findings 255–56, 259).

With regard to the Parker tabulation, there was no adequate showing that the allegedly nonfavored customers functioned at the retail level of operations and, thus, competed with Gibson stores in the resale of Parker products (Finding 166). Similarly, the record is devoid of proof of the functional level of the allegedly nonfavored customers of Comfort (Finding 352). With respect to Waltham, the showing on this point was also weak (Finding 259).

In the case of Unitron, the only documentary evidence concerning sales to Gibson retailers and their allegedly nonfavored competitors is CX 855. This tabulation covers the period 1970 to 1971. But, for that

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their purpose during pretrial. That objection was overruled on March 16, 1978, when the documents were received (Tr. 4533). Moreover, earlier in the trial, on December 7, 1977, respondents recognized that these were "tabulation[s] of disfavored competitors" (Tr. 278). By definition, a "disfavored competitor" is one who is operating at the same functional level as the favored customer and whose purchases are of like grade and quality as those bought by a favored customer. Thus, the purpose for which the tabulations were to be used was clear at the beginning of the trial.

[115] In many instances, that gap was not filled by other evidence.

period, there was no documentary proof of the payment of the 2 1/2% show fee (Finding 337 and note 71).[116] As far as show fees are concerned, no case has been made with respect to Unitron. In a number of isolated instances, the burden of proof on this point has been met in the case of some suppliers, such as Becker, Wagner,[117] Revell, Unitron as to booth fees, Regal and Farber (Findings 140, 203, 234, 276–77, 298, 337). [192]

The Commission noted in *Weingarten*:

. . .The evidence adduced in this record in support of the element under consideration is, of course, not totally lacking in probative value, for a good deal of reliable and important information was secured. . . . But the evidence does not quite reach the level of reliability and substantiality necessary for a concrete finding on this particular point.

J. Weingarten, 62 F.T.C. at 1528. That observation is pertinent here. This record demonstrates the validity of the *Weingarten* criteria. As the Fifth Circuit held:

. . .it seems plain to us that apart from mechanical difficulties, there could hardly be any real problem in getting data as to exact sales and purchases, item by item, made by these suppliers and competitors.

FTC v. *J. Weingarten, Inc.*, 336 F.2d 687, 695 (5th Cir. 1964). "[T]he problem of establishing that the goods sold were of like grade and quality cannot be left to inference." *Castlegate, Inc.* v. *National Tea Company*, 34 F.R.D. 221, 230 (D. Colo. 1963).

C. Knowing Inducement

Complaint counsel must establish that respondents knew or should have known that the payments and services induced and received were not available on proportionally equal terms to their competitors. The evidence need not be direct, and circumstantial evidence permitting the inference that respondents knew or, in the exercise of normal care, should have known of the disproportionality is sufficient. *American News Co.* v. *FTC*, 300 F.2d 104, 110 (2nd Cir. 1962), *cert. denied*, 371 U.S. 824 (1962). See also *R.H. Macy & Co.* v. *FTC*, 326 F.2d 445, 447 (2d Cir. 1964).

Had the show fees and booth fees and other payments been compensation for promotional services in connection with the resale of the goods involved in the discrimination, then the burden would have

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[116] In fairness, it should be noted that there is proof of booth fee payments by Unitron in 1970–1971 and some evidence meeting the requisite criteria as to competition in the resale of goods of like grade and quality in that period (Findings 326, 337).

[117] The only difference between the Wagner products in question was in color (Hornick 3161, 3164). Color, contrary to respondents' position, does not preclude a finding of like grade and quality where products are otherwise identical. See *Joseph Kaplan*, 63 F.T.C. at 1348, where differences in the pattern of shower curtains were held immaterial.

been met. Respondents initiated the show fees, booth fees and related services which they solicited in connection with the Gibson Trade Show. Basically, Gibson, Sr. fixed the rate for the booth fees and charged whatever the traffic would bear for the show fees (Finding 376). In one instance, a supplier's representative objected that the payments demanded were illegal (Finding 377). Under the circumstances, [193]respondents had sufficient notice to put them under the duty of inquiring as to whether the suppliers were taking steps to make such payments available to other buyers. *Fred Meyer, Inc.*, 63 F.T.C. 1, 59 (1963), *modified on other grounds*, 359 F.2d 351 (9th Cir. 1966), *rev'd*, 390 U.S. 341 (1968). The record is devoid of evidence showing such inquiry by respondents. Failing to take such steps, respondents were chargeable at least with constructive knowledge of the discriminatory nature of the payments induced.

D. Public Interest

The Robinson-Patman Act was promulgated to foster smaller independent business enterprises because Congress felt that "the buying practices of large retailers, particularly the chain stores . . . were threatening the continued existence of the independent merchant." *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 350 (1968). The three "nonfavored" customers testifying herein were Woolworth, TG & Y[118] and Target, all large chain retailers. No independent merchant appeared. The statute does not preclude a finding that a cognizable discrimination exists where a "Woolworth" is the nonfavored customer. Nevertheless, in view of the complete absence of testimony by smaller independent merchants, it is unclear whether the Count I proceedings are entirely consistent with the Congressional intent. Complaint counsel urge that "[t]he central issue is the inducement of allowances which gives Gibson stores an advantage over nonfavored competitors" (CPF p. 153). They assert, further, that "[t]here is no defense once discriminatory treatment is proved especially when results benefit respondents." *Ibid.* The government's reliance on the testimony of "nonfavored" customers with the size and economic power of Woolworth and the absence of testimony from independent merchants further supports application of the "original sale" doctrine to this case. On the basis of these facts, the existence of discrimination should not mark the end of analysis; rather, it should initiate an examination of the impact of such practices on the marketplace. The economic power of the nonfavored customers, whose testimony has

[118] TG & Y is a subsidiary of City Products Corporation which, in turn, is owned by the Household Finance Corp. Household Finance also own other chains, such as White stores, Von's Groceries and Ben Franklin stores (Pettit 4205-06).

been adduced, argues compellingly for a test under the pricing provisions of the Robinson-Patman Act. Section 2(f) of the statute, unlike Sections 2(d) and 2(e), permits and, in fact, requires an evaluation of the competitive impact of the "advantage" conferred by discriminatory transactions. That approach would harmonize Robinson-Patman enforcement with the general antitrust objective of promoting competition. [194]

IV. The Count III Brokerage Charges

Section 2(c) of the Robinson-Patman Act provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Respondents assert that the jurisdictional requirements of sales in commerce have not been met. Section 2(c) of the Robinson-Patman Act covers the receipt of brokerage in the course of commerce by a person engaged in commerce. The brokers in question were appointed by Ray-O-Vac as its representatives to all the Gibson stores; they were to assist with respect to the servicing of such accounts throughout the United States (CX 154B, 169A–C). The area involved covered some 20 states (Blake 4499). Gibson, Sr., at that time, licensed Gibson Discount Centers in a multistate area. The challenged brokerage payments covered sales to the Gibson stores wherever made. The payments in question met the jurisdictional requirements of the Act. See *Shreveport Macaroni Mfg. Co., Inc.* v. *FTC*, 321 F.2d 404, 409 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1969), holding:

> We do not read the statute to qualify payment in the "course of * * * commerce," once that appears, by a further requirement that the payment be in connection with goods sold in interstate commerce, resold in interstate commerce, or that the competition between competing customers be in interstate commerce where there is ample nexus to interstate commerce in the whole transaction as here. There is no warrant in the law for any such fragmentation.

Shreveport involved a violation under Section 2(d). However, the commerce requirements under Sections 2(c) and 2(d) are essentially the same. In light of that precedent, it is evident that the jurisdictional requisite of payments made and received in the course of commerce have also been met under Count I. Under both Counts I and III, there

is ample nexus to interstate commerce in the whole transaction in the case of the challenged payments. **[195]**

The statute absolutely bars payments of brokerage by one party in a transaction to the other and by either party to the other's agent. A principal may pay brokerage to his own agent for services rendered. In short, the Act permits a seller to compensate his broker for services actually rendered on the seller's behalf. Direct or indirect payments of commissions or brokerage to a person buying on his own account for resale are, however, banned. *Tillie Lewis Foods, Inc., et al.*, 65 F.T.C. 1099, 1134–35 (1964), *rev'd on other grounds*, 358 F.2d 224 (9th Cir. 1966).

The rule has been stated succinctly by the First Circuit:

. . . It is plain enough that the paragraph, as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.

Quality Bakers Co. of America v. *FTC*, 114 F.2d 393, 398 (1st Cir. 1940). See also *Southgate Brokerage Co., Inc.* v. *FTC*, 150 F.2d 607, 609 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

Complaint counsel evidently have elected not to try the Count III charges on the theory that H.R. Gibson, Sr., in receiving brokerage or commission payments, was the agent or intermediary of other respondents or nonrespondent franchisees engaged in retail operations.[119] The charges of illegal **[196]**brokerage involve the receipt of

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[119] Complaint counsel, in replying to Gibson, Sr.'s motion to exclude evidence, explained their theory of the case under Count III as follows:

. . .we do *not* intend to attempt to prove that Gibson Senior[1] is a dummy broker under Count III. This is entirely consistent with complaint counsel's position taken in our answer to motions to exclude evidence where it was stated:

In support of Count III complaint counsel intend to show that the payments in question were made to members of the Gibson organization including H.R. Gibson, Sr. by various manufacturer's representatives and brokers such as Al Cohen. Complaint counsel have never asserted that respondents H.R. Gibson, Sr. and Belva Gibson have made the payments referred to in Count III. Complaint counsel have been consistent on this position throughout the entire pretrial. To the contrary, we intend to show that respondents H.R. Gibson, Sr. and Belva Gibson are a part and parcel of the Gibson organization which receives the payments and that for example, respondent Al Cohen shared his commission with Herbert R. Gibson, Sr. (Answer to Motions to Exclude Evidence p. 2, dated December 1, 1977).

In other words we intend to prove under Count III that they were receiving, not that they were paying illegal brokerage. Count III of the complaint also incorporates paragraphs 1–11 and pursuant to those paragraphs complaint counsel intend to prove that substance and market realities prevail over form and that the reality is that Gibson Senior is still a part and Parcel of the Gibson organization because there is, and has continued since November of 1972 to be a continuing interrelationship between Gibson Senior and Gibson Junior. Complaint counsel submit that this explanation should once and for all satisfy the respondents. Since complaint counsel have cleared any misunderstandings respondents could reasonably have had as to Count III, respondents' three proposed order paragraphs are improper.

The Order of January 31, 1978, held on the basis of the foregoing:

Complaint counsel's foregoing outline of the proof they intend to introduce under Count III delineates the

(Continued)

commissions by Gibson, Sr. from two brokers representing the Ray-O-Vac Company, Barshell, Inc. and Al Cohen Associates, Inc. The status of Gibson, Sr. as a buyer is critical in resolving the Section 2(c) charges in each of the two instances. [197]

The record shows that Jim Miller doing business as Barshell, Inc., a corporation which he wholly owned, had been appointed as a seller's broker by Ray-O-Vac. Miller, who was appointed to represent Ray-O-Vac products to the Gibson stores, held the position for approximately five years in the period 1969-January 1, 1974 (Findings 410, 411, 414). Miller or Barshell split the Ray-O-Vac commission with H.R. Gibson, Sr. (Findings 419–23). One such payment was received in September 1972 (Findings 422–23).

Gibson, Sr. checked Ray-O-Vac's commission statements furnished to Miller in connection with his receipt from Barshell of split commissions based on Ray-O-Vac's sales (Findings 421–22). Gibson, Sr.'s review of Ray-O-Vac's commission statements to Miller, ostensibly a seller's broker, to determine how much brokerage he should receive, demonstrates respondent's control of the latter.

From his review of the commission statements in connection with his demand for rebates, Gibson, Sr. knew or should have known that he was requiring Miller to pass on part of his brokerage fee received from Ray-O-Vac. Knowledge by the buyer that he is receiving brokerage from the seller's broker is not a statutory element of the violation. Nevertheless, it may [198]under certain circumstances be material to determining the nature of the payment. See *Rowe, supra* at 346. Here, Gibson, Sr.'s knowledge of the nature of the payment effectively negates any contention that these gratuities were not, in fact, brokerage passed on by the seller's broker to Gibson, Sr.

The record shows one such payment, on September 23, 1972.[120] At that time, Gibson, Sr. was owner and operator of various retail stores while simultaneously conducting his trade show (Findings 3, 5, 6). This payment to Gibson, Sr., a buyer, was within the absolute prohibition of

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issues on the basis of which the case will be tried and decided. Complaint counsel state "we do *not* intend to prove Gibson, Sr. is a dummy broker." *It is clear that complaint counsel do not intend to prove under Count III that Gibson, Sr. was an "intermediary or representative" acting for or on behalf of the other respondents.* Rather, they intend to prove that "H.R. Gibson, Sr. and Belva Gibson are a part and parcel of the Gibson organization which receives the payments and that for example, respondent Al Cohen shared his commission with H.R. Gibson, Sr." The agency, through complaint counsel, in this instance has given its statement of the theory on which the case is to be tried. Under the circumstances, there is no justification for the relief sought (emphasis added).

Under the circumstances, for the purposes of the transactions relevant to Count III, a finding that Gibson, Sr. is a buyer is deemed prerequisite to the determination that a law violation has been proven under those allegations.

[120] There is a conflict between the testimony of Miller and one of respondent's trade show buyers as to whether CX 192 represents a split of the Ray-O-Vac commission between Barshell and Gibson, Sr. The testimony that CX 192 represents a three percent show fee on sales of health and beauty aid products owned and warehoused by Miller has been reviewed. See, *e.g.*, Tr. 7532, 7540–43. The testimony of Miller is relied upon in making the finding.

Section 2(c), and within the theory of violation espoused by complaint counsel.

Pursuant to an oral agreement between Al Cohen Associates, Inc. and Gibson, Sr., the former, beginning in January 1974, split his commissions with the latter on Ray-O-Vac purchases by all the Gibson stores. The commissions paid to Gibson, Sr. by Al Cohen were substantial, amounting in 1974 to $174,907.10, and in 1975 to $150,460.93 (Findings 425–29).

In 1974 and 1975, Gibson, Sr. no longer had any ownership interest in any retail operation (Finding 25). In that time period, he cannot be considered a buyer. An agent or intermediary for the buyer cannot lawfully collect brokerage fees directly or indirectly from the seller even where the intermediary performs services for the seller for "'[t]he agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both.'" *Quality Bakers Co. of America*, 114 F.2d at 399; Patman, *Complete Guide to the Robinson-Patman Act*, 109 Prentice Hall Inc. (1963). Moreover, the passing on of brokerage by a buyer's agent or intermediary receiving such commissions to his principals is not prerequisite to a finding of violation under Section 2(c) of the statute. See *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851, 858 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966). Nevertheless, complaint counsel did not proceed under Count III on the theory that such payments were made to Gibson, Sr. as an agent or intermediary acting for or on behalf of the Gibson retailing operations. See note 119, *supra*. The complaint against Al Cohen should, accordingly, be dismissed. See *Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971). **[199]** Respondents urge that the payments in question fall within the "except for services rendered" proviso of Section 2(c) and that a showing of price discrimination is prerequisite to finding a violation of this section (RPF Sr. pp. 139, 142). These contentions require analysis in light of *FTC* v. *Henry Broch & Co.*, 363 U.S. 166 (1966), and succeeding cases. Respondents' reliance on the "except for services rendered" proviso is misplaced. Gibson, Sr. received such payment in 1972 from Barshell as a buyer, before he had divested himself of his retail assets. The services he rendered in connection with the trade show were, in effect, rendered for himself and, thus, not cognizable under the exception. The fact that the supplier may also have benefited is immaterial. *Southgate*, 150 F.2d at 610.

Hruby Distributing Co., 61 F.T.C. 1437 (1962), and *Empire Rayon Yarn Co., Inc.* v. *American Viscose Corp.*, 364 F.2d 491 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967),[121] raise the question whether

[121] That decision adopted the statutory interpretation set forth in the dissent to *Empire Rayon Yarn Co., Inc.* v. *American Viscose Corp.*, 354 F.2d 182, 188–92 (2nd Cir. 1965).

respondents here performed a service entitling them to a functional discount which should be evaluated under the pricing provision of the statute irrespective of the form of the payment. In making that determination, the central question is what was the purpose and reason for the concession. *Empire Rayon Yarn Co.*, 354 F.2d at 189. There is no showing that, in connection with the split commissions he received from Barshell, Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. *Cf. Hruby*, 61 F.T.C. at 1446; *Empire Rayon Yarn Co.*, 364 F.2d at 492. Moreover, at Gibson, Sr.'s trade show, participating suppliers had to depend largely on their own personnel or that of their brokers to do the selling (Finding 87). In addition, there is no showing that Gibson, Sr., who operated retail stores in 1969-October 31, 1972, operated at a different functional level which would justify the pricing variations.[122] Further, unlike the **[200]**customers in *Hruby* and *Empire Rayon,* Gibson, Sr. was regarded as a powerful buyer by the broker who split his commission with him (Finding 418). In light of the foregoing, there is no showing here that Gibson, Sr. performed a distributional service entitling him to a functional discount which should be evaluated under Section 2(a).

Gibson, Sr. pocketed the split commission based on the purchases of all Gibson stores. No finding can therefore be made that the payments were immune from Section 2(c) because they were part of a "worthy effort" on behalf of retailers "to reduce the ultimate sales prices to the consumer" by entering into arrangements making them stronger in their competition with large chain stores. *Cf. Central Retailer-Owned Grocers Inc.* v. *FTC*, 319 F.2d 410, 415 (7th Cir. 1963). There is no evidence that the split commissions received by Gibson, Sr. strengthened the competitive position of the nonfamily franchised stores in any way.

Applying the "purpose and effect" test to the payment,[123] it is significant that Ray-O-Vac did not discuss with its brokers their passing on of brokerage to Gibson, Sr. (Finding 424). Accordingly, Ray-O-Vac's broker chose to split his commission with Gibson, Sr. in transactions which may not have been known to the broker's principal, the supplier. This militates against any finding that the split brokerage

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[122] *Cf. Hruby*, 61 F.T.C. at 1446:

> In its Section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices. The lawfulness of such functional price differences derives from the fact that they result in no adverse economic effects upon particular competitors or competition in general. Thus, since Hruby operates at a higher competitive or functional level than wholesalers, the granting to Hruby or receipt by him of a lower price than afforded to wholesalers would ordinarily not be questioned. But the manner and form in which Hruby received his lower prices created the doubts concerning their validity which led to this complaint.

[123] See *Empire Rayon Yarn Co.*, 354 F.2d at 189.

constituted a functional discount for distributional services. Rather, this is precisely the kind of transaction which Section 2(c) was designed to reach in order to force hidden price discriminations into the open. **[201]**

In summary, developments under Section 2(c) since *Broch* do not warrant an exception to the rule of *Southgate* in this proceeding.

Even if the "except for services rendered" proviso were available under these circumstances, the burden would still be on respondents to establish it. The provision would become a sham unless those seeking to take advantage of it established the value in concrete terms of the services rendered in relation to the commission payments received. In addition to a claim that brokerage was paid for services rendered, there must be a showing that the distribution costs saved justified the amount of the allowance. No such showing has been made here and respondents' reliance on the provision is rejected.[124]

[202]The Supreme Court's *Broch* decision does not stand for the proposition that price discrimination is prerequisite to a finding of violation in each Section 2(c) case. The prior Supreme Court decision in *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959), distinguishing Sections 2(c), (d) and (e) from the pricing provisions of the Act, indicates that *Broch* imposed no universal requirement that price discrimination must be proven in each 2(c) case. As the Court stated, while holding Section 2(b) inapplicable in a 2(e) proceeding:

> *Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations.* * * * In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition (emphasis added).

360 U.S. at 65.

Neither the text of Section 2(c) nor the statutory context of that section requires that it be limited to instances of price discrimination. *Rangen Inc.*, 351 F.2d at 856. In light of *Broch*, the element of price

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[124] Implicit in the *Broch* dicta concerning the "except for services rendered" proviso is a requirement that the party asserting the defense demonstrate that the services in question gave rise to sufficient cost savings to warrant the reduction in brokerage. In this connection, the Court stated in pertinent part:

> We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. *There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge.* We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances. *One thing is clear — the absence of such evidence and the absence of a claim that the rendition of services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated* (emphasis added).

363 U.S. at 173–74.

discrimination may be helpful under certain circumstances in determining whether a payment was made in "lieu of brokerage." However, the holding on this point does not apply to cases, such as the instant proceeding, involving the outright payments of unearned brokerage by a seller's broker to a buyer. As the Ninth Circuit held in *Rangen:*

> There has been some speculation that the Broch case may have superimposed a requirement of price discrimination on section 2(c). Rowe, Price Discrimination Under the Robinson-Patman Act 344–45 (1962); Federal Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 189, 80 S.Ct. 1158 (dissenting opinion). However, discrimination was used in Broch to determine if the price arrangement was an "in lieu" of brokerage transaction; and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage.

351 F.2d at 858.

The Count III allegations against H.R. Gibson, Jr. and Gerald Gibson have not been sustained. Complaint counsel apparently intended to tie these respondents to the receipt of illegal brokerage by showing that they had stock ownership in a manufacturer's representative, Jim Miller Sales Company, [203]another firm owned by Jim Miller (Tr. 3629–31).[125] Two of complaint counsel's nonrespondent witnesses should have had firsthand knowledge of such transactions, if they took place. One was Omer Nix, the other was Jim Miller. Complaint counsel struck Omer Nix from their witness list after he had declined to respond to two subpoenas during the course of trial and failed to appear for a deposition scheduled for the pretrial. Jim Miller appeared and testified but was asked no questions concerning this matter. The record gives no indication why Miller was not questioned on this subject. Under the circumstances, these respondents are entitled to the application of the adverse inference rule, for:

> The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Clifton v. United States, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. Runkle v. Burnham, 153 U.S. 216, 225; Kirby v. Tallmadge, 160 U.S. 379, 383; Bilokumsky v. Tod, 263 U.S. 149, 153, 154; Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 111, 112; Mammoth Oil Co. v. United States, 275 U.S. 13, 52; Local 167 v. United States, 291 U.S. 293, 298.

Interstate Circuit v. *U.S.*, 306 U.S. 208, 226 (1939). The Count III allegations as to H.R. Gibson, Jr. and Gerald Gibson will be dismissed. Similarly, the allegations under this count should also be dismissed as

[125] Complaint counsel expected to prove that H.R. Gibson, Sr. owned fifty percent of the stock in Jim Miller Sales Company, a manufacturer's representative, which he subsequently gave to his sons, Gerald and Herbert, Jr. (Tr. 3629). Jerry Moland testified that Gerald Gibson, in 1967 or 1968, had admitted such facts to him (Tr. 3634). Complaint counsel apparently relied on Omer Nix to testify that this transaction continued in the relevant period 1969–1975 (Tr. 3629–30).

to the other respondents, with the exception of Gibson, Sr., since the evidence fails to link them with these practices.

V. The Boycott Allegations

The purpose of the Gibson Trade Show was to make money (Leverett 3800), and suppliers who refused to pay a show fee were not permitted to participate therein (Leverett 3792, 3812).

In at least three instances, suppliers who refused to make the trade show payments that had been demanded of them were excluded from further participation in the shows. Subsequent to such exclusions, letters were sent out by trade show or "Seagoville" buyers to "All Stores" stating that the company would not "sell us at a price we would recommend as being profitable and beneficial for your operation." The letters **[204]**continued that such lines were no longer recommended or authorized and suggested that the stores discontinue them. They concluded with the request that this be given attention coupled with an expression of appreciation for the stores' continued cooperation. These letters, dealing with the Toastmaster Division of the McGraw-Edison Company, Tucker Manufacturing Corporation and Jeannette Glass Company, were sent out in January and March 1971 (CX 104, 136, 303).

The letter by two Seagoville Buyers, Tommy Perkins and Bobby Regeon, requesting the Gibson stores to discontinue Toastmaster purchases, was sent in January 1971. The record shows that Toastmaster's sales volume to the various Gibson stores in 1970 amounted to $953,656.53, and dropped to $296,778.33 in 1971. Corresponding sales figures for the territories of individual sales personnel showed similar declines (Finding 390; CX 116A, C, 117A–D).

CX 104 was written and mailed out (Findings 388, 389, note 129, *infra).* The parties disagree as to the motive for the letter, the extent of its dissemination and whether it was acted upon. One of the signatories to CX 104 explained that the letter was written so that the trade show would not be blamed by its customers for problems they were experiencing with Toastmaster (Regeon 6639, 6643).[126] The testimony is not persuasive. The explanation is inconsistent with the plain meaning of the contemporaneous document. Moreover, the

[126] The witness explained the difficulties he had experienced with Toastmaster, which impelled the writing of this letter, as follows:

> We had a lot of problems in getting merchandise shipped, especially into the metropolitan areas around Christmas time, as they just wouldn't ship the merchandise in. They just wouldn't get it in there. Of course I know that they had some distributors in the area, and maybe they wanted to protect their distributors. But I know that we could not get merchandise, and numerous customers called in complaining about it, and that's the reason I put the letter out, because I didn't want the trade show to be blamed for the problems that were happening with Toastmaster (Regeon 6639. See also Low 7735–37, 7552–57).

witness claimed that CX 104 arose out of "a very unusual situation" (Tr. 6639). However, the letters in question, sent out by the trade show, also use essentially the same boilerplate language in the case of Jeannette and Tucker. It is inherently unlikely that CX 104 was written because of problems unique to Toastmaster when identical letters were employed in the case of two other manufacturers who similarly refused to make show fee payments. The logical inference is that in all three [205]instances trade show personnel requested the Gibson stores to discontinue purchases because of a failure or refusal to pay the trade show fees.[127]

There is also the testimony by one of the signatories to CX 104 that, after sending the letter, he did not expect or anticipate that franchisees would drop the Toastmaster line (Regeon 6643). This testimony also conflicts with the plain meaning of the contemporaneous document which is studded with phrases such as that Toastmaster would not sell at a price "We would recommend as being profitable and beneficial for your operation" and that the buyers no longer "recommend" or "authorize" the line and "suggest that you discontinue the same." The stores are asked to give this matter their "attention" and are assured that "We appreciate your continued cooperation." The suggestion that stores discontinue purchases, coupled with the request that the stores give this matter their attention and cooperation can be construed only one way. The authors of the letter wrote it with the expectation that the recipients would discontinue purchasing from Toastmaster.

Similarly, testimony by respondents' employees that the letter was only sent to a limited class of Gibson retailers is unconvincing. There are conflicts in the testimony on this point. See note 129, *infra*. Moreover, it is unlikely that CX 104 was sent only to those Gibson stores complaining about Toastmaster since the letter employed language essentially identical to the letters sent in the case of Jeannette Glass Company and Tucker Manufacturing Company. The record, as a whole, compels the finding that "All Stores" on CX 104 means all stores operating under the Gibson name.[128]

[206]Respondents' explanation that retailer dissatisfaction with Toastmaster shipments gave rise to the writing of CX 104 must be

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[127] As one of respondent's employees, Bobby Regeon, stated, the "Number one" reason for writing CX 104 was that Toastmaster would not pay its show fee (Tr. 6706):

> Q. If you were having these problems with the Toastmaster line, why did you send the letter out when they were no longer in the show? Why did you wait until January to do that?
>
> A. Number one, they wouldn't pay their trade show fee; number two, we had problems, and I did not want the Gibson Trade Show to be blamed for the problems.

[128] In this connection, see CX 27, a letter dated July 31, 1972 from H.R. Gibson, Sr. to "H.R. GIBSON STORES (also for information of all stores)." This letter demonstrates that "all stores" means what it says; if limited distribution of such a letter were intended, it would be indicated on the face of the letter.

rejected for the reasons stated. The record, accordingly, does not support a finding that Toastmaster's drastic decline in sales to the Gibson stores in 1971 resulted from business reasons, such as customer dissatisfaction, independent of the appeal to boycott in CX 104.

Certain franchisees testified that they had not received CX 104 or similar letters from the trade show.[129] However, on the facts of this case, there is no need to show that specific retailers stopped or diminished their purchases from Toastmaster in response to CX 104. The precipitous sales drop of Toastmaster to the Gibson stores, from $953,656 in 1970 to $296,778 in 1971, [207]compels the inference that the letter requesting the Gibson stores to boycott Toastmaster was received and acted upon by a substantial number of stores.[130]

In summary, CX 104 was a request by respondents that the Gibson stores boycott Toastmaster. The letter to "All Stores" requesting their "attention" and "cooperation" clearly contemplated concerted action by the recipients and must have been so construed by them. The extent of the drop in Toastmaster's sales in 1971 to the Gibson stores demonstrates that a substantial number of stores participated in the combination. The necessary consequences of such a combination are to diminish the suppliers' freedom to sell to retailers and to curtail the retailers' choice of the suppliers with whom they may deal.

The allegations under Count II of the complaint have been sustained.

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[129] The testimony does not preclude a finding of a combination in restraint of trade. Significantly, one of respondents' franchisee witnesses was unable to recall whether or not he received CX 104, 136 and 303 (McCrea 6828–29). Moreover, one of respondents' employees conceded that the letters were mailed to "HRG" stores, while the other signatory to CX 104 admitted that the letter had been sent to customers in the metropolitan areas making complaints about Toastmaster (Perkins 3332–33; Regeon 6710–11). Regeon's admission that, before taking the stand, he had stated to complaint counsel that the letter had been sent to the trade show customers generally detracts from the weight of his testimony that the distribution was limited:

> Q. Do you recall I asked you regarding "all stores"? And do you remember when I asked you what "all stores" referred to in regard to this letter, you indicated that it referred to all Gibson Trade Show customers?
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> • • • • • • •
>
> [Question read by reporter]
>
> A. Yes, I did.
>
> Q. When I asked you what you meant by that, do you recall saying "all retail stores attending the trade show"?
>
> A. I believe I said "all Gibson Trade Show customers."
>
> Q. And that would be all of the retail stores attending the Gibson Trade Show would be the customers of the Gibson Trade Show?
>
> A. Any customer of the Gibson Trade Show, whether he was a Gibson store or otherwise (Regeon 6711–12).

[130] This alone is sufficient to support a finding of unlawful combination. That finding is further corroborated by the testimony of Henry May, a Toastmaster sales representative. May, after Toastmaster received notice of CX 104, was informed by Roy Love, an Oklahoma City franchisee who was also Gibson Sr.'s brother-in-law, that if he wanted to keep the Gibson sign, Love had to go by what Seagoville told him to do. Love had received CX 104 (Tr. 3466; Finding 389). And, in January or February 1971, May saw CX 104 in a Fort Worth Gibson store (Finding 388). The finding concerning the Fort Worth store is made taking into consideration the conflict with another witness on this point (See Tr. 7307–09). The May testimony is further corroborated by the contemporaneous memorandum of another salesman in February 1971, concerning a Columbia, Mo. Gibson store, stating that he had been informed by one Ed Drewel of this store "that they were going along with Gibson Hqs. instructions not to purchase Toastmaster" (Finding 389).

The Commission need not establish an express agreement to boycott. A combination or conspiracy may be found in a course of dealing or other circumstances; a formal agreement or exchange of words is not necessary. *Fort Howard Paper Co.* v. *FTC*, 156 F.2d 899, 905 (7th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946); *American Tobacco Co.* v. *U.S.*, 328 U.S. 781, 809–10 (1946). Business behavior is admissible circumstantial evidence from which agreement may be inferred. See *Interstate Circuit* v. *U.S.*, 306 U.S. 208 (1939). And, an agreement may be implied from a contemplated pattern of conduct. It is enough that concerted action is contemplated and that those invited to do so give their adherence to the scheme and participate therein. *Id.* at 226. Further, an unlawful conspiracy may be formed without simultaneous action or agreement by the conspirators. *Id.* at 227. **[208]**

Respondents assert that they were concerned that shipment problems with Toastmaster stemmed from the supplier's desire to protect certain of its distributor customers from price competition with the Gibson stores. Even if these contentions were accepted for the sake of argument, they would not constitute a defense to the group boycott initiated by CX 104. Group boycotts and concerted refusals to deal are *per se* illegal. Allegations that they were reasonable in specific circumstances is no defense. Nor are they saved by a failure to show adverse economic affect or actual restraint on competition. *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 468 (1941).

The fact that not all stores may have participated in the boycott and that some stores continued to purchase from Toastmaster is immaterial. A combination is unlawful even though it may not as yet have resulted in a restraint. And, an agreement to follow a course of action which would necessarily restrain or monopolize a part of commerce violates the Sherman Act whether "'wholly nascent or abortive on the one hand, or successful on the other.'" *Associated Press* v. *U.S.*, 326 U.S. 1, 12 (1945). Moreover, it is the object of the Federal Trade Commission Act to reach in their incipiency combinations which could lead to trade restraints or other unfair practices. *Fashion Originators' Guild*, 312 U.S. at 466. The Commission under Section 5 of the Federal Trade Commission Act has the power to arrest trade restraints in their incipiency without proof that they amount to an outright violation of the provisions of other antitrust laws. *FTC* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 322 (1966).

The interrelationship of the respondents herein and their various affiliates does not preclude a finding of conspiracy. Parties closely affiliated with each other such as parent companies, their affiliates, as well as their officers and directors, are not immune from conspiracy

charges merely by virtue of their relationship. *Schine Theatres* v. *U.S.*, 334 U.S. 110, 116 (1948); *U.S.* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); *Timken Co.* v. *U.S.*, 341 U.S. 593, 598 (1951).

Finally, coming to the question of remedy, it is immaterial whether or not the individual respondents such as Gibson, Sr. gave the trade show buyers express authority to write letters such as CX 104. In this case, the record shows that the trade show buyers had broad authority to deal with suppliers and Gibson retailers in connection with their trade show functions. The writing of CX 104 was directly related to their principals' business. Accordingly, the principals, such as Gibson, Sr., are bound by their employees' or agents' unlawful acts in **[209]** instigating combinations or agreements to boycott. See *Continental Baking Company* v. *U.S.*, 281 F.2d 137, 149–50 (6th Cir. 1960). Under such circumstances, the principals must stand or fall with those they select to act for them. The failure of the principals, in such a case, to prevent the illegal acts of their agents constitutes the nonperformance of a nondelegable duty. *Id.* at 150; *U.S.* v. *Armour & Co.*, 168 F.2d 342, 344 (3d Cir. 1948).

In the period 1970–1971, respondents Gibson, Sr., Belva Gibson, Herbert Gibson, Jr. and Gerald Gibson represented through the Store Directories that they were, respectively, Chairman of the Board, Secretary, President and Executive Vice President of Gibson Products Company, 519 Gibson Street, Seagoville, Texas, and that the individuals listed as "Home Office" personnel or as "Buyers" were under their control and acted on their behalf (Findings 39–41). CX 104, under the Gibson Products Company letterhead, was within the scope of the apparent authority conferred by the individual respondents. Accordingly, all are liable for the buyers' acts in that period even though no express authority had been conferred and regardless of whether their own stores continued to buy from Toastmaster or not. In the case of Gibson, Sr., moreover, liability by way of apparent authority for the illegal acts may be found from the employment relationship alone.

An order to prohibit the practice will issue.

REMEDY

The violations found under Counts II and III of the complaint occurred prior to Gibson, Sr.'s divestiture of his retail assets to his sons on October 31, 1972. As respondents assert, after the divestiture of such assets, there is little or no evidence of control by Gibson, Sr. over Gibsons Inc. or its subsidiaries, including the retail operations. Nevertheless, the Gibson Trade Show continued to be oriented to those

retailers operating under the Gibson name. No finding can be made that the tie was completely broken.

In any event, there is no assurance that the practices in question have been surely stopped. In connection with the Section 2(c) violation, the payments received from Al Cohen were not within the scope of the theory of the case as it was tried. However, the payments by Cohen in 1974 and 1975 bore a distinct resemblance to the Section 2(c) violations found in connection with Barshell. In the case of the boycott violations, it is significant that the licensing agreement in effect since **[210]**October 31, 1972, under which Gibson Discount Centers, Inc. licensed various franchisees, continued to contain provisions whereunder the licensor promised merchandising advice to the licensees and reserved the right in his sole discretion to determine whether the goods and services of the licensed stores were of acceptable quality (Findings 51–54). Whether or not the powers conferred by those provisions have, in fact, been exercised, respondents' latent power to control the purchasing decisions of the franchisees continues. An order will issue to preclude both further violation of Section 2(c) of the Robinson-Patman Act and group boycotts by the respondents.

Although the evidence may be old, this does not *per se* mean that an order based upon it is vitiated. Where a law violation has been proven against an enterprise and is capable of being perpetuated or resumed, it may be presumed that it has continued. An order may issue to prevent it even upon a showing of discontinuance or abandonment. *P.F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 275 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970).

The mutual interdependence of the respondents, at least in the period 1969–October 31, 1972, compels the finding that the Gibson individual and corporate respondents operated an integrated business (pp. 174–76 *supra*). Under the circumstances, to prevent circumvention, an order may issue against all whether or not each engaged in the prohibited conduct. *Sunshine Art Studio Inc.* v. *FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *Delaware Watch Company* v. *FTC*, 332 F.2d 745 (2nd Cir. 1964). Accordingly, the provisions of the order dealing with the boycott violation will run against all the Gibson respondents. The exception is Gibsons Inc., which was not in existence at the time that the boycott violations took place in 1970–1971.

The order, in addition to prohibiting the boycott violations found, will also prohibit future use of licensing or franchising agreements which contain provisions for giving merchandising advice to franchisees or permit respondents to control the quality of merchandise sold and the services rendered by the licensees. CX 104, the letter giving rise to the illegal combination, on its face constituted merchandising

advice. This prohibition will prevent respondents from indirectly achieving the result prohibited by the order provision against boycotts. The Commission may prohibit practices which are related to the unlawful practices found to exist so as to make the order effective. *Jacob Siegel* v. *FTC*, 327 U.S. 608 (1946); *FTC* v. *National Lead Co.*, 352 U.S. 419, 428 (1957). For, it is obliged "not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices." *Id.* at 430. [211]In view of respondents' insistence that those provisions in the agreement have not been exercised, the imposition of such a provision in the order deprives them of no valuable right.

Respondents' operation as an integrated enterprise, at least in the period 1969-October 31, 1972, does not, in the case of the Section 2(c) violation, justify the imposition of an order against all respondents. In this respect, complaint counsel's failure to question the broker, Jim Miller, concerning the respondents other than Gibson, Sr. compelled the inference that such evidence would have been adverse (see pp. 202–03 *supra*). The provisions in the order dealing with the receipt of brokerage will be limited to Gibson, Sr.

Complaint counsel also ask for restrictions on the Gibson Trade Show, such as a five year moratorium on its operations and a ban on trade show profits when it is resumed. These provisions cannot be justified since the allegations under Count I alleging the discriminatory receipt of promotional allowances have not been sustained.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter in this proceeding and of the respondents:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva Gibson
Gerald Gibson
Gibsons Inc.
Gibson Discount Centers, Inc.
Ideal Travel Agency, Inc.
Gibson Warehouse, Inc.
Gibson Products Co., Inc.
Al Cohen Associates, Inc.

2. This proceeding is in the public interest.

3. The allegations under Count I of the complaint have not been sustained.

4. The aforesaid acts and practices of the respondents as herein found under Count II of the complaint were and are to the prejudice and injury of the public and constituted and now constitute unfair acts and practices and unfair methods of competition in and affecting commerce within the intent and meaning of the Federal Trade Commission Act.

5. The aforesaid acts and practices of respondent H.R. Gibson, Sr. as herein found under Count III of the complaint were and are to the prejudice and injury of the public and constitute violations of Section 2(c) of the Robinson-Patman Act. [212]

ORDER

It is ordered, That respondents Herbert R. Gibson, Sr., Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson Products Co., Inc. their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the operation of a trade show, the operation of any retailing business, or the operation of any business related to retailing in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Combining, agreeing, engaging in an understanding, or conspiring with any of said other respondents, or any other person, partnership or corporation, to boycott or eliminate any supplier in order to prevent or hinder the supplier's sales to or business dealings with any of the respondents or any other person, partnership, or corporation.

2. Coercing or intimidating any supplier in any manner to prevent such supplier from competing for the sale of any products to any retailer or any person, partnership or corporation.

3. Representing directly or indirectly or implying to any supplier that the supplier may not compete for the sale of any products to any retailer, or any person, partnership or corporation.

4. Taking any individual action to eliminate a supplier or to prevent or hinder the supplier's sales to or business dealings with any other person, partnership or corporation when such supplier does not utilize the services of the Gibson Trade Show or appear in shows conducted by the Gibson Trade Show.

5. Utilizing franchising or licensing agreements containing (a) provisions whereunder respondents undertake to give merchandising advice to the licensees or franchisees and (b) provisions whereunder respondents retain the right of quality control over the products sold

and services rendered by such licensees or franchisees. *Provided, however*, that this provision shall not apply to those retail operations wholly owned by respondent Gibson's Discount Centers, Inc. [213]

It is further ordered, That H.R. Gibson, Sr., individually, and his officers, agents, representatives and employees, directly or through any corporate or other device in connection with the purchase of merchandise in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Receiving or accepting directly or indirectly from any seller anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names such as "Gibson Discount Center."

2. Assuming control of or influencing any seller's broker to induce such broker to pay him anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names such as "Gibson Discount Center."

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

It is further ordered, That Count III of the complaint be, and it hereby is, dismissed as to respondents Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, Gibsons Inc., Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., Gibson Products Co., Inc. and Al Cohen Associates, Inc.

It is further ordered, That, for a period of 10 years from the date of service of this order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [214]

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

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Gibson Discount Centers, Inc.
The Incorporators of
the Corporation
on or about September 17, 1969

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Gerald Gibson (CX 2L) [ii]

Gibson Discount Centers, Inc.

Directors

On September 17, 1969, the names and addresses of the first Board of Directors of respondent Gibson's Discount Centers, Inc. were:

Names	Addresses
Herbert R. Gibson, Sr.	519 Gibson Street Seagoville, Texas
Mrs. H.R. Gibson, Sr.	519 Gibson Street Seagoville, Texas
Herbert R. Gibson, Jr.	519 Gibson Street Seagoville, Texas
Gerald Gibson	6814 Alexander Drive Dallas, Texas
Richard Gibson	2100 South Mobberly Longview, Texas

(CX 2, p. 9)

Elected at the annual meeting of the shareholders on April 7, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson
Richard Gibson
Gerald Gibson

(CX 1274)

Elected at the annual meeting of the shareholders on April 3, 1972:

Herbert R. Gibson, Sr.
Herbert R. Gibson, Jr.
Belva G. Gibson
Richard Gibson
Gerald Gibson

(CX 1275)

Elected at the annual meeting of the shareholders on April 9, 1973:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 1276A)

Officers

Elected at the annual meeting of the Board of Directors on April 7, 1971:

H.R. Gibson, Sr.	Chairman of the Board
H.R. Gibson, Jr.	President
Belva G. Gibson	Vice President
Richard Gibson	Vice President
Gerald Gibson	Scretary-Treasurer

(CX 1277A)

Elected at the annual meeting of the Board of Directors on April 3, 1972:

H.R. Gibson, Sr.	Chairman of the Board
H.R. Gibson, Jr.	President
Belva G. Gibson	Vice President
Richard Gibson	Vice President
Gerald Gibson	Secretary-Treasurer

(CX 1278) [iii]

Elected at the annual meeting of the Board of Directors on April 9, 1973:

H.R. Gibson, Jr.	President
Gerald P. Gibson	Vice-President
B.R. Mercer	Secretary-Treasurer
Robert E. Rader, Jr.	Asst. Secretary

(CX 1279)

Directors

Elected at the annual meeting of the shareholders on April 2, 1974:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 994)

Elected at the annual meeting of the shareholders on April 17, 1975:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 993)

The initial board of directors in May 1962 was:

H.R. Gibson, Sr.
Belva Grace Gibson
H.R. Gibson, Jr.

(CX 4C) [v]

Directors

Elected at the annual meeting of the shareholders on June 8, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson

(CX 1295)

Elected at the annual meeting of the shareholders on June 12, 1972:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson

(CX 1296)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1297)

Officers

Elected at the annual meeting of the Board of Directors on April 2, 1974:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
B.R. Mercer	Secretary-Treasurer
Robert E. Rader, Jr.	Asst. Secretary
J.W. Carter	Asst. Secretary

(CX 996)

Elected at the annual meeting of the Board of Directors on April 17, 1975:

H.R. Gibson, Jr.	President
Gerald P. Gibson	Vice-President
B.R. Mercer	Secretary-Treasurer

(CX 998) [iv]

Gibson Warehouse, Inc.

6814 Alexander Drive	Dallas, Texas
6814 Alexander Drive	Dallas, Texas
519 Gibson Street	Seagoville, Texas

Gibson Warehouse, Inc. Officers

Elected at the annual meeting of the Board of Directors on June 8, 1971:

H.R. Gibson, Sr.	President
H.R. Gibson, Jr.	Vice-President
Belva G. Gibson	Secretary-Treasurer

(CX 1299)

Elected at the annual meeting of the Board of Directors on June 12, 1972:

H.R. Gibson, Sr.	President
H.R. Gibson, Jr.	Vice-President
Belva G. Gibson	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1300)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill R. Mercer	Secretary-Treasurer

(CX 1301A)* [vi]

* H.R. Gibson, Sr. and Belva tendered their resignations as officers and directors on October 31, 1972 (CX 1301B, 1301D).

Ideal Travel Agency, Inc.

The initial board of directors on or about April 19, 1962:*

H.R. Gibson	6814 Alexander Drive	Dallas, Texas
Belva Grace Gibson	6814 Alexander Drive	Dallas, Texas
W.C. Greer	519 Gibson Street	Seagoville, Texas [vii]

(CX 3C)

* At that time Gibson Travel Service.

Ideal Travel Agency, Inc.

Directors

Elected at the annual meeting of the shareholders on April 15, 1970:

H.R. Gibson, Sr.
Roy R. Love
Belva Gibson

(CX 1282)

Elected at the annual meeting of the shareholders on April 15, 1971:

H.R. Gibson, Sr.
Roy R. Love
Belva Gibson

(CX 1283)

Elected at the annual meeting of the shareholders on April 14, 1972:

H.R. Gibson, Sr.
Belva Gibson
H.R. Gibson, Jr.

(CX 1284)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1285)

Officers

Elected at the annual meeting of the Board of Directors on April 15, 1970:

H.R. Gibson, Sr.	President
Roy R. Love	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1287)

Elected at the annual meeting of the Board of Directors on April 15, 1971:

H.R. Gibson, Sr.	President
Roy R. Love	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1288)

Elected at the annual meeting of the Board of Directors on April 14, 1972:

H.R. Gibson, Sr.	President
Belva Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1289)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1290A)* [viii]

* Belva Gibson and H.R. Gibson, Sr. resigned as officers and directors of the corporation on October 31, 1972 (CX 1290C, 1290E).

Gibson Products Company

Directors

Elected at the annual meeting of the shareholders on December 1, 1970:

H.R. Gibson, Sr.
Belva Gibson
Betty Rogers

(CX 1308, 1411A)

Elected at the annual meeting of the shareholders on December 8, 1971:

H.R. Gibson, Sr.
Belva Gibson
H.R. Gibson, Jr.

(CX 1309)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1310)

Elected at the annual meeting of the shareholders on December 19, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill R. Mercer

(CX 1311)

Officers

Elected at the annual meeting of the Board of Directors on December 1, 1970:

H.R. Gibson, Sr.	President
Betty Rogers	Vice-President
Belva Gibson	Secretary-Treasurer
Gerald P. Gibson	Asst. Secretary

(CX 1313)

Elected at the annual meeting of the Board of Directors on December 8, 1971:

H.R. Gibson, Sr.	President
Belva Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1314)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Sr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1315A)*

Elected at the annual meeting of the Board of Directors on December 19, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill R. Mercer	Secretary-Treasurer

(CX 1316) [ix]

* H.R. Gibson, Sr. and Belva Gibson resigned as officers and directors of the company on October 31, 1972 (CX 1315B, 1315D).

Gibson Products Company

Directors

Elected at the annual meeting of the shareholders on December 4, 1973:

H.R. Gibson, Jr.
Gerald Gibson
B.R. Mercer

(CX 1312) [x]

Officers

Gibson Products Company of San Antonio, Inc.

Directors

Elected at the annual meeting of the shareholders on June 2, 1970:

H.R. Gibson, Jr.
Belva Gibson
Sarah Wheat

(CX 1349)

Officers

Elected at the annual meeting of the Board of Directors on June 2, 1970:

H.R. Gibson, Jr.	President
Sarah Wheat	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1350)

Directors

Elected at the annual meeting of the shareholders on June 2, 1971:

H.R. Gibson, Jr.
Belva Gibson
Sarah Wheat

(CX 1348)

Elected at the annual meeting of the shareholders on June 12, 1972:

H.R. Gibson, Jr.
Belva Gibson
Gerald Gibson

(CX 1346)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1344A)

Officers

Elected at the annual meeting of the Board of Directors on June 2, 1971:

H.R. Gibson, Jr.	President
Sarah Wheat	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1347)

Elected at the annual meeting of the Board of Directors on June 12, 1972:

H.R. Gibson, Jr.	President
Gerald P. Gibson	Vice-President
Belva Gibson	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1345)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1344B)* [xi]

* Belva Gibson resigned as an officer and director of the corporation on October 31, 1972 (CX 1344C).

Gibson Products Company, Inc. of Garland

Directors

Elected at the annual meeting of the shareholders on February 10, 1971:

H.R. Gibson, Sr.
Gerald Gibson
H.R. Gibson, Jr.

(CX 1365)

Elected at the special meeting of the shareholders on November 8, 1972:

H.R. Gibson, Jr.
Gerald Gibson
B.R. Mercer

(CX 1359)

Officers

Elected at the annual meeting of the Board of Directors on February 10, 1971:

H.R. Gibson, Sr.	President
Gerald P. Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer

(CX 1364A)

Elected at the annual meeting of the Board of Directors on February 14, 1972:

H.R. Gibson, Sr.	President
Gerald P. Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1363)

Elected at the special meeting of the Board of Directors on November 8, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1360)* [xii]

* H.R. Gibson, Sr. tendered his resignation as Presider and Director of the Corporation on October 31, 1972 (C 1361).

Gibson Products Company, Inc. of Richardson

Directors

Elected at the annual meeting of the shareholders on February 3, 1970:

H.R. Gibson, Jr.
H.R. Gibson, Sr.
J.H. Acklin

(CX 1383)*

Elected at the annual meeting of the shareholders on February 3, 1971:

H.R. Gibson, Jr.
H.R. Gibson, Sr.
J.H. Acklin

(CX 1382)

Elected at the annual meeting of the shareholders on February 8, 1972:

H.R. Gibson, Jr.
J.H. Acklin
H.R. Gibson, Sr.

(CX 1380)

Elected at the special meeting of the shareholders on November 8, 1972:

H.R. Gibson, Jr.
J.H. Acklin
Bill Mercer

(CX 1376)**

Officers

Elected at the annual meeting of the Board of Directors on February 3, 1970:

H.R. Gibson, Jr.	President
J.H. Acklin	Vice-President
H.R. Gibson, Sr.	Secretary-Treasurer

(CX 1384)

Elected at the annual meeting of the Board of Directors on February 3, 1971:

H.R. Gibson, Jr.	President
J.H Acklin	Vice-President
H.R. Gibson, Sr.	Secretary-Treasurer

(CX 1381)

Elected at the annual meeting of the Board of Directors on February 8, 1972:

H.R. Gibson, Jr.	President
J.H. Acklin	Vice-President
H.R. Gibson, Sr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1379)

Elected at the special meeting of the Board of Directors on November 8, 1972:

H.R. Gibson, Jr.	President
J.H. Acklin	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1375) [xiii]

* One of the shareholders constituting the quorum at this meeting was Belva G. Gibson (CX 1383).

** On October 31, 1972, H.R. Gibson, Sr. tendered his resignation as officer and director of the corporation (CX 1377).

Gibson Products Company of Shreveport, Inc.

Directors

Elected at the annual meeting of the shareholders n October 5, 1970:

.R. Gibson, Sr.
ırbara Gibson
rald Gibson

ℓ 1397)

lected at the annual meeting of the shareholders ctober 5, 1971:

Gibson, Sr.
ara Gibson
d Gibson

395)

Officers

Elected at the annual meeting of the Board of Directors on October 5, 1970:

Gerald Gibson	President
H.R. Gibson, Sr.	Vice-President
Barbara Gibson	Secretary-Treasurer
H.R. Gibson, Jr.	Asst. Secretary-Treasurer

(CX 1396)

Elected at the annual meeting of the Board of Directors on October 5, 1971:

Gerald Gibson	President
H.R. Gibson, Sr.	Vice-President
Barbara Gibson	Secretary-Treasurer
H.R. Gibson, Jr.	Asst. Secretary-Treasurer

(CX 1394)

Directors

Elected at the annual meeting of the shareholders on October 3, 1972:

Barbara Gibson
H.R. Gibson, Jr.
Gerald Gibson

(CX 1393)

Officers

Elected at the annual meeting of the Board of Directors on October 3, 1972:

Gerald Gibson	President
Barbara Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1392) [xiv]

Gibson Products Company, Inc., of Plano

Directors

Elected at the annual meeting of the shareholders on April 28, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva Gibson

(CX 1410)

Elected at the annual meeting of the shareholders on October 26, 1971:

H.R. Gibson, Jr.
Gerald Gibson
Belva Gibson

(CX 1408)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1406B)

Officers

Elected at the annual meeting of the Board of Directors on April 28, 1971:

H.R. Gibson, Sr.	President
H.R. Gibson, Jr.	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1409)

Elected at the annual meeting of the Board of Directors on October 26, 1971:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Jack Weinblatt	Vice-President
Belva Gibson	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1407)

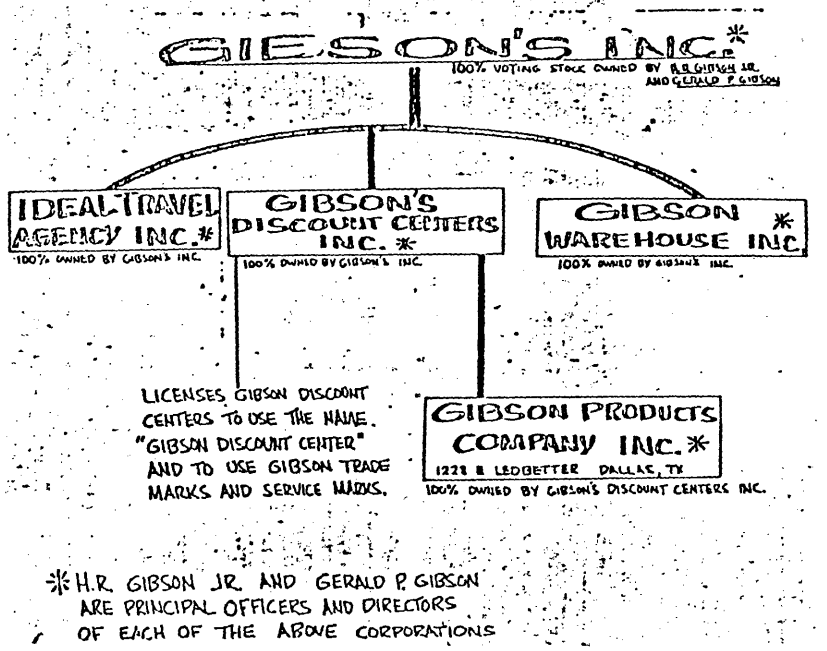
Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Jack Weinblatt	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1406A)*

* On October 13, 1972, Belva Gibson submitted her resignation as an officer and director of this corporation (CX 1406C).

APPENDIX B


GIBSON'S INC.*
100% VOTING STOCK OWNED BY H.R. GIBSON JR. AND GERALD P. GIBSON
IDEAL TRAVEL AGENCY INC.*
100% OWNED BY GIBSON'S INC.
GIBSON'S DISCOUNT CENTERS INC.*
100% OWNED BY GIBSON'S INC.
GIBSON WAREHOUSE INC.*
100% OWNED BY GIBSON'S INC.
LICENSES GIBSON DISCOUNT CENTERS TO USE THE NAME "GIBSON DISCOUNT CENTER" AND TO USE GIBSON TRADE MARKS AND SERVICE MARKS.
GIBSON PRODUCTS COMPANY INC.*
1223 E LEDBETTER DALLAS, TX
100% OWNED BY GIBSON'S DISCOUNT CENTERS INC.
*H.R. GIBSON JR. AND GERALD P. GIBSON ARE PRINCIPAL OFFICERS AND DIRECTORS OF EACH OF THE ABOVE CORPORATIONS

APPENDIX C CX 4-1

STORE DIRECTORY

GIBSON PRODUCTS COMPANY

JULY - DECEMBER

1970

CX 4-1

HOME OFFICE
A/C 214 - 287-2570
519 Gibson Street
Seagoville, Texas

934
SEAGOVILLE EXECUTIVES
FEDERAL TRADE COMMISSION
In the Matter of
MAYTEX
MERCHANDISE-TAILORED DISPLAY EQUIPMENT
MAYTEX MANUFACTURING COMPANY
manufacturers of displays that sell

Buyers
Home Office
935

BOB BROUGHTON
DIST. STORE SECURITIES

BILL BARNES
WAREHOUSE MANAGER

CHARLIE DAVIS
PACK SUPPLIES

TOM FERRELL
TRAFFIC MANAGER

DAVIS FOSTER
ADVERTISING - DALLAS AREA

MARGIE HAUTZ
IDEAL TRAVEL

B. W. HUDSON
DIXIE LABORATORIES

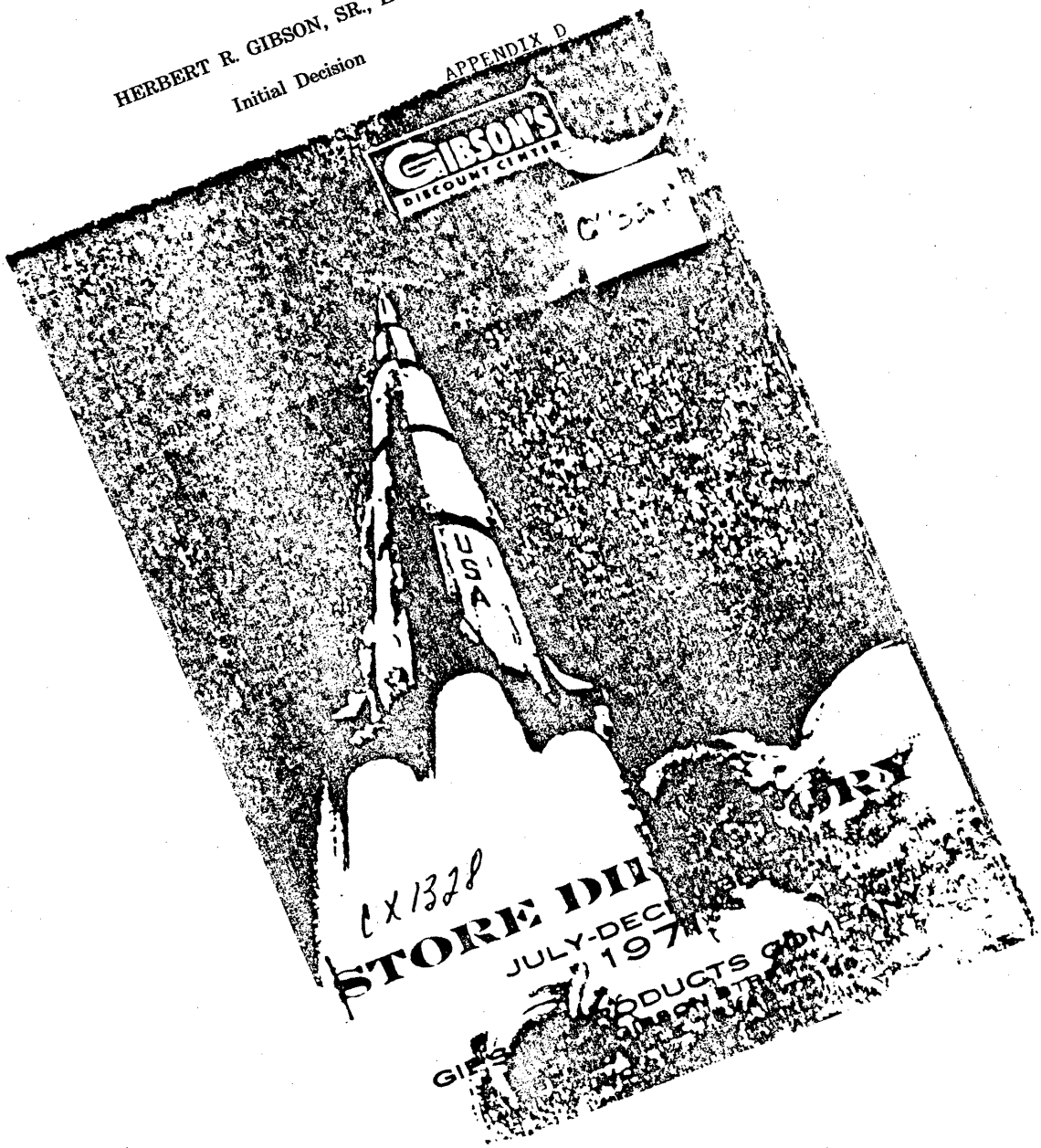
BILL REA
ADVERTISING - TABLOID

LOYD REECE
GIBSON PRINTING CO.

CX 41

APPENDIX D

553



SEAGOVILLE EXECUTIVES

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

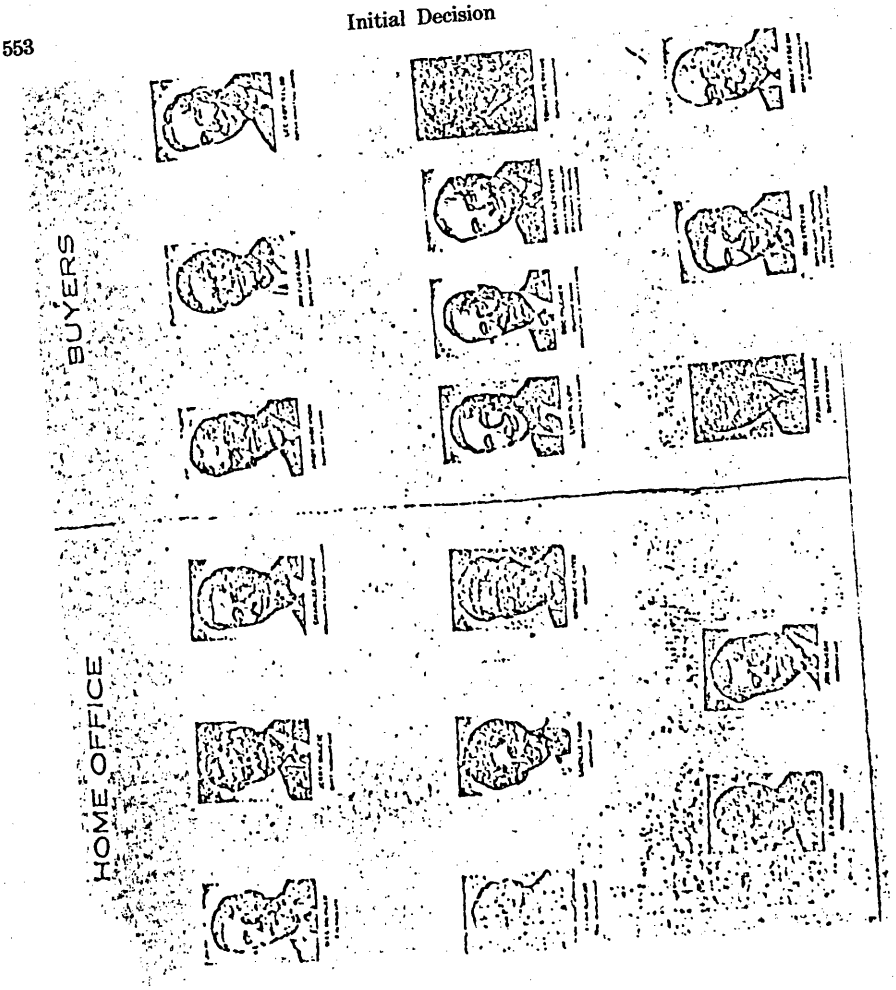
MRS. H. R. GIBSON, SR.
SECRETARY

H. R. GIBSON, JR.
PRESIDENT

GERALD GIBSON
EXECUTIVE VICE PRESIDENT

CX 1328

553



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BILL CADDELL

BOB DAMRON

S W HAMILTON JR

BILL BARNES

MARGIE KAUTZ

S W HUDSON

CHARLIE DAVIS

JIMMY COBB

BILL REA

CX 13

APPENDIX E

Abbreviations used throughout this Initial Decision are as follows:

CX	–	Complaint counsel's exhibits
RX	–	Respondents' exhibit
Tr.	–	Transcript page
SR	–	Herbert R. Gibson, Sr.'s exhibit
JR	–	Herbert R. Gibson, Jr.'s exhibit
CPF	–	Complaint counsel's proposed finding
CRB	–	Complaint counsel's reply brief
RPF SR.	–	Respondents' proposed finding (Herbert R. Gibson, Sr. and Belva Gibson)
RPF JR.	–	Respondents' proposed finding (Herbert R. Gibson, Jr. and all other respondents)
RRB SR.	–	Respondents' reply brief (Herbert R. Gibson, Sr. and Belva Gibson)
RRB JR.	–	Respondents' reply brief (Herbert R. Gibson, Jr. and all other respondents)

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

The complaint in this case charges respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a) (1976), and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(c) (1976), stemming principally from the operation of the "Gibson Trade Show," one part of a network of respondent family enterprises. Individual members of the Gibson family control corporations which own 43 retail discount stores, known as "Gibson Discount Centers"; a family corporation also licenses 614 other stores to operate under the Gibson name.[1] (ID 29) Together, the Gibson-owned and franchised stores combine to buy many of their products from suppliers at a quarterly private fete in Dallas, staged by the Gibson family, and known as the Gibson Trade Show. (ID 60–61)

[2]Count I of the complaint charges respondents with inducing the payment from suppliers of promotional allowances in connection with the Gibson Trade Show, which allowances were not available on a proportionally equal basis to other customers of these suppliers. This allegation, while maintained under Section 5 of the FTC Act, is

[1] The following abbreviations will be used in this opinion.

ID	–	Initial Decision Finding number
ID p.	–	Initial Decision page number
Tr.	–	Transcript page number
CX	–	Complaint Counsel's exhibit number
RAB	–	Appeal brief of Gibson, Sr.
CAB	–	Complaint Counsel's appeal brief

patterned after and draws from Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. Count II alleges that respondents, in violation of Section 5 of the FTC Act, collectively boycotted suppliers who did not grant the promotional allowances charged in Count I. Finally, Count III is a distinct allegation of the payment of illegal brokerage in violation of Section 2(c) of the Clayton Act.

Administrative Law Judge Theodor P. von Brand (the "ALJ") dismissed Count I, issued an order against all respondents except Gibson's, Inc., under Count II, and issued an order only against respondent Herbert R. Gibson, Sr. under Count III. Complaint counsel and respondents both appeal.

Respondents' Businesses

A description of the numerous Gibson corporate entities and the intertwining relationship among them and Gibson family members is set forth at length in the initial decision and will not be repeated here. (ID 1–117)

Briefly, the respondents are Herbert R. Gibson, Sr., ("Gibson, Sr."), individually and doing business as Gibson Products Co. and The Gibson Trade Show; his wife Belva Gibson ("Belva"); two sons, Herbert R. Gibson, Jr. ("Gibson, Jr.") and Gerald Gibson ("Gerald"); and eight corporations, five of which are Gibson family controlled.[2] Of the remaining three corporations, two[3] negotiated consent settlements in 1976, and one, Al Cohen Associates, Inc., charged solely in Count III, is still in the case. [3]

Gibson, Sr. founded the retail discount store chain and, until November 1, 1972, directed the franchising and trade show aspects of the family enterprise, doing business as the Gibson Products Company. (ID 3–4) Two other Gibson-controlled corporations, Gibson Warehouse, Inc., and Ideal Travel Agency, were used by Gibson, Sr. as vehicles to store and resell merchandise and to collect booth and show fees at The Gibson Trade Show. (ID 14–15)

As of November 1, 1972, a reorganization and change in operating control of various aspects of the family business was effected, essentially through a transfer of stock by Gibson, Sr. and his wife to a corporation, Gibson's, Inc., all of whose shares were owned by two of their sons, Herbert R. Gibson, Jr. and Gerald Gibson. This corporation now owns and operates the franchising and retail aspects of the family business. Gibson, Sr. retained the trade show business and, having sold

[2] Gibsons, Inc., Gibson Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Gibson Products Co., Inc.

[3] Progressive Brokerage, Inc. and Barshell, Inc.

the Gibson Products Company name to Gibson, Jr. (ID 16, 25), he registered the name, "The Gibson Trade Show," on November 1, 1972. (ID 26)

The Gibson Trade Show, upon which much of this case turns, is a private trade show where manufacturers display their products to buyers for Gibson owned and franchised stores. (ID 59–61) The show provides the booth space from which the suppliers' representatives can show their wares and attempt to obtain orders.

Gibson, Sr. employs "merchandise managers" or "trade show buyers" to operate the show. These buyers recruit the participation of manufacturers to sell at the show. (ID 78) Buyers discuss product lines, billing terms and prices with suppliers, negotiating to get the best deal on the products to be shown. Upon the satisfactory conclusion of negotiations, a buyer fills in a "show sheet" with the price and terms for each product. These sheets, which are the exclusive order forms used at the shows (ID 90), are headlined "Ship to Gibson Products Company," followed by blank lines for the address of a particular store. (ID 91) They contain a notation that items are not to be shipped at prices higher than those listed or else a deduction will be taken. (ID 93) The trade show buyers patrol the aisles and [4]booths during the show, talking to suppliers' and retailers' representatives.[4] (ID 85)

Payments made by suppliers, and allegedly illegally induced by respondents, in connection with the trade show included the following, for each year from 1969 through 1972: (1) payment for booth rental, in an amount which was identical for all suppliers; (2) payment for services in connection with booth rental including, but not limited to electrical contractor services and furnishings; (3) payment for provision of personnel to prepare and attend the booth throughout the time The Gibson Trade Show was open; (4) payment for advertising in a Gibson tabloid; (5) special trade show prices on one or more of the suppliers' products offered for sale at The Gibson Trade Show; (6) special billing terms on all sales made at the trade show; and (7) special allowances on sales made at the trade show, calculated from a previously negotiated percentage of all such sales (the so-called "show fee").

The principal family business, from at least 1969 to November 1972,

[4] In addition to the provision of booth space, the trade show provides meeting facilities and other services, including the opportunity for placement of "blanket orders," recommendations sent to Gibson stores to purchase particular items. (ID 89)

Suppliers are also solicited to advertise in Gibson tabloids, which are used by Gibson retailers as newspaper supplements or which are mailed out or posted in stores. (ID 105) Participating stores purchase the finished tabloids from one of the Gibson family corporations; the tabloids are prepared and printed by G&G Advertising, a proprietorship run by Gerald Gibson. (ID 107) Also, Gibson, Sr. at times sends letters to suppliers requesting that they advertise in particular tabloids. (ID 113–115) If an item is to be advertised in a tabloid, there is a sign on its suppliers' booth at The Gibson Trade Show which states "Recommended tab item."

from November, 1972 to the date complaint issued in 1975, and to the present, was the ownership and operation of Gibson retail discount stores and the franchising of those stores. Both before and after the November 1972 transfer, the franchise agreements promised the franchisee the benefit of Gibson volume purchasing and advice on merchandise, but reserved to the franchisor the right to order the discontinuance of an item or service if the quality was disapproved.

Participation in the Gibson Trade Show is a standard vehicle for manufacturers wishing to sell to Gibson retail stores. Few other retailers stage private trade shows, however, and, accordingly, the complaint charges that the myriad payments made to the Gibson enterprises were not matched by similar payments or terms to the suppliers' other customers. **[5]**

No additional facts are pertinent to Count I of the complaint; additional information needed to dispose of Counts II and III is set forth *infra*.

Count I

Count I of the complaint largely tracks the language of the Clayton Act Sections 2(d) and 2(e)[5], as amended, and alleges that the Gibson family and corporate respondents knowingly induced and/or received promotional payments and services in connection with the sale of products to Gibson owned and franchised stores in violation of Section 5 of the FTC Act.[6] The seven types of allegedly illegal allowances are those set forth *supra*. **[6]**

The ALJ found that the variety of fees and special terms given by manufacturers to respondents were not within the purview of Sections

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[5] Section 2(d), 15 U.S.C. 13(d) (1976), 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 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.

Section 2(e), 15 U.S.C. 13(e) (1976), provides:

> That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

[6] Although buyer misconduct is not a violation of Sections 2(d) and 2(e), this omission appears to be only a matter of congressional inadvertence. *See Grand Union Co.* v. *FTC*, 300 F.2d 92, 96 (2d Cir. 1962). Nevertheless, such misconduct is cognizable under Section 5 of the FTC Act. *R. H. Macy & Co.* v. *FTC*, 326 F.2d 445 (2d Cir. 1964).

2(d) and 2(e), because they were in connection with the original sale of a product, rather than in connection with its resale.[7] In his view, the allegations of Count I should have been brought under Section 2(a) for price discrimination. Complaint counsel, relying principally on *Alterman Foods, Inc.*, 82 F.T.C. 298 (1973), *aff'd*, 497 F.2d 993 (5th Cir. 1974), which was distinguished by the ALJ, appeal.[8]

Two features differentiate Sections 2(d) and 2(e) from the provisions of Section 2(a). The first is that the seller must either provide "services or facilities" or make payment in consideration of "services or facilities furnished by or through [the] customer." It has been held that the service or payment at issue must be promotional in nature, such as for advertising. *See P. Lorillard Co.* v. *FTC*, 267 F.2d 439, 443 (3d Cir.), *cert. denied*, 361 U.S. 923 (1959). The second is that the payment made or service rendered must be in connection with the "processing, handling, sale, or offering for sale" of a product by the customer, *i.e.*, it must bear a nexus to the resale or preparation for resale by the retailer. *See Rutledge* v. *Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975). If these conditions can be met, the plaintiff may take advantage of Sections 2(d) and 2(e), which carry an easier standard of proof than does Section 2(a). Under Section 2(a), price discrimination is lawful, unless it may substantially lessen or injure competition and, *inter alia*, it is neither cost-justified, nor undertaken to meet competition. Sections 2(d) and 2(e) require no showing of competitive effect, nor do they allow resort to Section 2(a) statutory defenses, save perhaps the "meeting competition" defense. *See* E. Kintner, A Robinson-Patman Primer 270–72 (2d ed. 1979); *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); *but see Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956). Thus, Sections 2(d) and 2(e) "create a legal premium for the FTC or other plaintiffs to ease their evidentiary burdens." F. Rowe, Price Discrimination Under the Robinson-Patman Act 372 (1964).

The traditional use of Sections 2(d) and 2(e) has been in the realm of cooperative promotional arrangements. *See FTC* v. [7]*Fred Meyer, Inc.*, 390 U.S. 341 (1968). In the classic Section 2(d) and 2(e) case, a manufacturer has compensated a high volume retailer via a discriminatory plan, sometimes in an amount far in excess of that retailer's actual promotional costs, and in so doing has utilized a scheme not realistically available to small retailers. In addition, the manufacturer often rebates a "promotional allowance" to a retailer in an amount tied

[7] The ALJ found that the solicitation of fees for tabloid advertising was within the purview of Section 2(d). (ID p. 184) However, he held that complaint counsel had not sustained their burden of showing contemporaneous sales with respect to the items promoted in the tabloids, ID p. 189, and complaint counsel did not appeal from this holding.

[8] Complaint counsel have appealed from other holdings of the ALJ on this count of the complaint, but in light of our disposition of this threshold question, we do not reach these other issues.

to the number of units resold by the retailer to the public, but not linked to the retailer's actual promotional expenditures. Plainly, such a transaction is in connection with a resale and within the ambit of Sections 2(d) and 2(e). Similarly, making employees available or arranging with a third party to furnish personnel for purposes of performing work for a customer would also come within Sections 2(d) and 2(e). FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 CFR 240.7, example 6 (1980).

Because of the easier threshold of proof carved out for Sections 2(d) and 2(e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed. Accordingly, we will generally find that Sections 2(d) and 2(e) apply to cooperative promotional arrangements. *See* Rowe, *supra* at 381 ("[T]he legal criteria of Sections 2(d) and 2(e), unless confined to the sphere of cooperative promotional arrangements, would cut across and confound the legal requirements of the separate price and brokerage provisions of the Act.")

The legislative history of Sections 2(d) and 2(e) evidences the relatively narrow scope that Congress intended these specific provisions to have. For example, Representative Utterback, Chairman of the Senate-House Conferees, stated that:

> The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. 80 Cong. Rec. 9418 (1936).

And the Senate and House Judiciary Committee Reports also focus on "special allowances in purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally." S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15–16 (1936).

In keeping with this narrow scope courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a). [8]Variations in credit terms have consistently been held to present only a Section 2(a) issue, and courts have refused to allow such claims to be maintained under Sections 2(d) and 2(e). *See, e.g., Robbins Flooring, Inc.* v. *Federal Floors, Inc.*, 445 F. Supp. 4, 8 (E.D. Pa. 1977); *Glowacki* v. *Borden, Inc.*, 420 F. Supp. 348, 353 (N.D. Ill. 1976). Likewise, discriminatory freight allowances have been held to be in connection with delivery on the original sale and as such within Section 2(a) rather than Sections 2(d) or 2(e), *see Chicago Spring Products Co.* v. *United States Steel Corp.*, 371 F.2d 428 (7th Cir.

1966), and other so-called delivery allowances have been held not to be in connection with resale and so to state a Section 2(a) rather than a Section 2(d) claim, *Glowacki*, *supra* at 358–359.

Furthermore, courts have recognized that the purpose of Sections 2(d) and 2(e) is to strengthen Section 2(a) by prohibiting outright hard-to-detect, disguised discrimination in the form of promotional allowances, thus forcing most discrimination into the open area of price allowances or discounts, where it can be measured and adjudicated under Section 2(a). *FTC* v. *Simplicity Pattern Co., Inc.*, 360 U.S. 55, 68 (1959). In light of this salutary, but narrow, statutory purpose, the courts have, albeit not unanimously, resisted expanding the "scope of Sections 2(d) and 2(e) beyond the limited area of applicability intended by Congress," *Cecil Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F. Supp. 819, 850 (M.D. Tenn. 1974); and *see generally Skinner* v. *United States Steel Corp.*, 223 F.2d 762 (5th Cir. 1956); *New Amsterdam Cheese Corp.* v. *Kraftco Corp.*, 363 F. Supp. 135 (S.D.N.Y. 1973); *David R. McGeorge Car Co., Inc.* v. *Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

There is some authority, however, for expanding the scope of Section 2(e). *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), cited by complaint counsel, held that preferential differences in the timeliness of delivery were within the purview of Section 2(e) because consistently faster deliveries would ultimately promote and facilitate resale. The very limited acceptance of this decision, *see Glowacki* v. *Borden*, *supra* at 356; *Harlem River Consumers Cooperative, Inc.* v. *Associated Grocers of Harlem, Inc.*, 371 F. Supp. 701, 710 (S.D.N.Y.), *aff'd*, 493 F.2d 1352 (2d Cir. 1974) (dicta); *Palmer News, Inc.* v. *ARA Services, Inc.*, 476 F. Supp. 1176, 1183 (D. Kan. 1979) (dicta), is outweighed by the strenuous criticism of its expansive view, *see* Rowe, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. [9]98, 108–09 (1972); *Cecil Corley Motor Co., Inc.*, *supra* at 851–852, and other courts have either rejected, *id.*; *Buchanan* v. *Yamaha International Corp.*, 1977–1 Trade Cas. (CCH) ¶61,245 at 70,728–29 (D. Ore. 1976), or distinguished the decision, *David R. McGeorge Car Co.*, *supra* at 55; *Purdy Mobile Homes, Inc.* v. *Champion Home Builders Co.*, 594 F.2d 1313, 1317–18 (9th Cir. 1979). Indeed, it is not entirely clear whether the Seventh Circuit continues to hold firmly to its *Centex-Winston* decision. *See Kirby* v. *P. R. Mallory & Co., Inc.*, 489 F.2d 904, 910 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); *Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, [1980] 5 Trade Reg. Rep. (CCH) ¶63,229 at 78,126–27 (7th Cir. March 17, 1980); *but cf. Glowacki*, *supra* at 356. In *Kirby*, which dealt with advertising allowances, the court reaffirmed the accepted distinction between

payments and services in connection with the original sale, which are challengeable only under Section 2(a), and those with a connection to the resale, which are cognizable under Sections 2(d) or 2(e). The court then concluded:

> In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price discrimination in the supplier-customer sale and drafted §§ 2(d) and 2(e) to apply exclusively to promotional discriminations like those alleged in this case. 489 F.2d at 910–11.

Whatever vitality remains in the *Centex-Winston* decision, it does not contravene the general standards which we bring to bear upon the facts of this case.

Against this legal background, we approach our earlier decision in *Alterman Foods, Inc., supra*. Unlike the ALJ, we are unable to discern a principled basis upon which to distinguish that case from the one at bar. In a factual setting quite similar to the instant case, *Alterman* held that discriminatory payments to a private trade show were, in fact, unlawful promotional allowances under Sections 2(d) and 2(e) of the Clayton Act. In finding that the Alterman food show had induced suppliers to violate Sections 2(d) and 2(e), the Commission relied upon two kinds of benefits which had accrued to the Alterman retail operation. These benefits were described as "[d]irect in the sense that profits from booth rentals enhanced the financial position of the respondent, and indirect in the sense that the suppliers' booths, displays and demonstrations at the food show were intended to aid in and promote the product's resale to the consuming public." 82 F.T.C. at 343. **[10]**

After careful reexamination of our decision in *Alterman*, we conclude that its reasoning is flawed and, henceforth, we decline to follow it. Specifically, we do not judge the "benefits" recited in *Alterman*, which are relied upon by complaint counsel, to be sufficiently related to the promotional allowance and resale requirements of Sections 2(d) and 2(e) to trigger application of those provisions. Undoubtedly, the products purchased by Gibson retail buyers from manufacturers at the trade show were intended for resale to the ultimate consumer. But this fact standing alone is insufficient to transform what is plainly the original sale into one that is in connection with resale. To the extent that Gibson entities received booth rentals and Gibson buyers received price concessions not available to competing customers, an action may lie under Section 2(a). But to focus on the translation of these "direct benefits" down to the next level of competition, *i.e.*, to rely on the fact that these concessions generally enhanced the overall financial strength of the company,

enabling Gibson retailers to undercut competitors on subsequent resales, is to misapply the statute.[9] "Benefits" of this sort are inherent in any transaction in which goods are ultimately destined for resale, and to accept the *Alterman* holding would mean opening up Sections 2(d) and 2(e) to practices that Congress intended to be challenged solely under Section 2(a).[10] **[11]**

As to the "indirect benefits" identified in *Alterman*, we believe they play a role too incidental in the overall transaction here to warrant application of Sections 2(d) and 2(e). In general, marketing assistance, if discriminatorily granted, does run afoul of Sections 2(d) and 2(e). But in the present case, it is clear that the principal function of the trade show was to funnel a high volume of products from manufacturers to participating retailers at a discount price, and not to provide promotional assistance. While various suppliers may have laid out their merchandise and demonstrated their products as complaint counsel contend (CAB 22), and while suppliers may even have discussed selling techniques with would-be buyers, plainly the suppliers' principal purpose in engaging in these acts was to induce retail store buyers to make the original purchases, not to provide marketing or promotional assistance to them.[11] Moreover, no real showing has been made that retailers received "services or facilities" furnished or underwritten by suppliers beyond completion of the original sale. We do not mean to suggest that trade shows are free of the constraints of Sections 2(d) and 2(e) insofar as they facilitate promotion upon resale, but rather we will look realistically at transactions as a whole before deciding to apply Sections 2(d) and 2(e), the narrower statutory provisions, instead of Section 2(a). In this case, the sundry fees paid by suppliers at the trade show were, at bottom, little more than reductions in price necessary to induce Gibson retailers to make the original purchase of the products.

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[9] Of course, an examination of such direct benefits *ab initio* may be necessary to determine whether there has been discrimination among competing customers. *See* Kintner, *supra* at 254. But even if we assume for purposes of this discussion that all seven categories of alleged discriminatory payments, including the show fees, inured somehow to the benefit of the Gibson retailers, that does not automatically bring such payments within the purview of Sections 2(d) or 2(e). Although it is not entirely clear, it appears that the Commission in *Alterman* analyzed the direct benefits in terms of both the discrimination and resale issues.

[10] Our holding is not inconsistent with *R. H. Macy & Co.* v. *FTC*, 326 F.2d 445 (2d Cir. 1964), in which Macy's solicited vendors to contribute $1,000 apiece to help defray advertising and promotional costs of its 100th anniversary celebration. While complaint counsel would read *Macy* as proscribing the receipt of payments as "general revenue," in fact the court specifically found that Macy's used the contributions for advertising purposes:

> Macy's used the payments for institutional advertising and promotions to get more people into its stores to buy the goods of all its vendors. The payments by the contributing vendors were thus in consideration for services or facilities furnished by Macy's in connection with the offering for sale of the vendor's goods. *Id.* at 450.

[11] In *Elizabeth Arden, Inc.* v. *FTC*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); and *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962), for example, manufacturers' employees were utilized to demonstrate product use to customers at retail outlets. The marketing assistance in the instant case, by contrast, was no more than a tangential element of the transaction.

We believe this result comports most closely with the intent of Congress and the meaning of the statute. Accordingly, Count I, which rests on too expansive an interpretation of the jurisdictional requisites of Sections 2(d) and 2(e) of the Clayton Act, is dismissed.

Count II

Few manufacturers could resist the subtle persuasion of Herbert R. Gibson, Sr. to participate in the Gibson Trade Show. And, indeed, as Gibson, Sr. would point out, matters had been arranged so that the Gibson Trade Show was a very important vehicle for selling to Gibson retail stores. The trade show afforded suppliers a unique opportunity to exhibit their wares to a multitude of Gibson retail stores [12]at once. On occasion, however, Gibson, Sr. and would-be trade show participants, such as the Toastmaster Division of McGraw Edison Company, would have a disagreement over the sundry fees to be paid by the exhibitor.

Toastmaster had participated in Gibson trade shows from 1966 to 1970, but in 1970 was unable to agree with Gibson buyers on terms for its future participation. (ID 379, 384–386) On January 22, 1971, a letter was sent out to "All Stores" by two buyers from the Gibson Products Company, Tommy Perkins and Bobby Regeon, concerning Toastmaster. (CX 104) It read:

> The above company will not sell us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or authorize this line, and suggest that you discontinue the same.
>
> Please give this your attention, and we appreciate your continued co-operation.

Similar letters, signed by Tommy Perkins, were sent out on March 11, 1971 and March 30, 1971 concerning Tucker Manufacturing Co. and Jeannette Glass Co., respectively. (CX 303, CX 136) There was evidence as well of other direct and indirect communications to Gibson-owned and franchised stores suggesting they not purchase from designated suppliers.

Toastmaster sales to Gibson-owned and franchised stores, which had amounted to $953,656 in 1970, plummetted to $296,778 in 1971. (ID 390) Tucker and Jeannette sales also fell sharply following the Perkins letters. (ID 398–99, 408)

Despite efforts by Toastmaster representatives to sell directly to individual Gibson franchised stores, sales remained depressed for two additional years. In 1974, Toastmaster met Gibson, Sr.'s terms for participation in the trade show, and its sales to Gibson stores went up. (ID 392)

The ALJ found that the Gibson family respondents and the Gibson corporate respondents, in combination with some or all of the Gibson family owned stores and Gibson franchised stores, had maintained an illegal boycott of suppliers who would not grant the special allowances demanded on sales during or incident to the trade show. He found that respondents had induced Gibson franchised stores to stop buying from specified suppliers in order to coerce those suppliers into paying increased show fees to Gibson, Sr. for participation in the trade show. All Gibson family [13]respondents were placed under order, as they were officers and directors of Gibson Products Company (ID p. 9), the name under which the trade show operated until November 1, 1972.[12] The order also binds all Gibson corporate respondents, save Gibson's, Inc., which was not in existence when the boycott began. Inclusion of these respondents was premised on the ALJ's finding of mutual interdependence and integrated operation among all Gibson corporate and family respondents.

Respondents appeal, contending that the evidence is insufficient to sustain a finding that there was a boycott. Respondents argue that there is no evidence that specific retailers ceased buying Toastmaster products because of the January 22, 1971 letter; that it was improper for the ALJ to find a drop in Toastmaster sales from 1970 to 1971; and, finally, that it was improper for the ALJ to infer a boycott from the drop in sales. Complaint counsel appeal from the ALJ's refusal to include Gibson's, Inc. in the order. For the reasons discussed below, we agree with complaint counsel.

Group boycotts generally are *per se* violations of the antitrust laws. "[C]ertain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . . [G]roup boycotts are of this character." *United States* v. *General Motors Corp.*, 384 U.S. 127, 146 (1966).[13]

[14]The rule of *per se* illegality has been applied to three types of group boycotts: (1) horizontal combinations of traders at one level of distribution, the purpose of which is to exclude direct competitors from the market; (2) vertical combinations of traders at different marketing

[12] Belva Gibson appeals from her inclusion in the boycott finding and order, claiming she did not actively participate in the boycott. In light of the fact that Belva Gibson was an officer and director of all of the Gibson corporate respondents, except for Gibsons, Inc., we find that she was properly included in the order.

[13] We are not unaware of decisions applying the rule of reason to conduct that was alleged to be a "boycott," *see, e.g., Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). But the considerable differences between the conduct in those cases and conduct traditionally proscribed under a *per se* standard suggests that there may be no real inconsistency in approach. *See* Sullivan, Handbook of the Law of Antitrust 256–59 (1977). In any event, the facts of the instant case fall well within existing *per se* decisional law, and hence we have no occasion to explore the precise dividing line between *per se* illegal boycotts and arrangements that should be examined under the rule of reason. *See generally St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 542–43 (1978).

levels, the purpose of which is to exclude competitors of some members of the combination; and (3) combinations "designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors." *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). *See also United States* v. *General Motors Corp., supra; Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119, 127 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

The conduct at issue here plainly falls within the third category noted above. The boycott victims all refused to pay or increase the percentage paid to Gibson, Sr. as a show fee for participation in the Gibson Trade Show. In order to induce these firms to pay the demanded amount, Gibson Products Co. requested Gibson-owned and franchised stores to stop buying their products, thus denying them access to the Gibson market. This action manifests both exclusionary and coercive conduct, thereby exhibiting rather clear anticompetitive effects. And respondents' utilization of their status as franchisor to Gibson stores for the purpose of coercing firms to participate in the trade shows at a price they were unwilling or unable to pay admits of no redeeming virtue.

Respondents' appeal, premised almost exclusively on factual grounds, is unpersuasive. The letters to Gibson stores were plainly invitations to boycott.[14] On their face, these letters went significantly further than the communications in *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600 (1914), the circulation of which was held to be a violation of Section 1 of the Sherman Act. The *Eastern States* letters contained no request to refrain from dealing, but merely set out the names and addresses of wholesalers who also sold at retail. The Supreme Court found, in light of the record in that case, that the circulation of such information had the "natural effect of causing [15]such retailers to withhold their patronage from the concern listed." 234 U.S. at 609. And the letters in this case contained the very suggestion of incitement and mutual action that was found lacking in the case relied upon by respondents, *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 112 (2d Cir. 1975).

Neither does the fact that there was no express mutual agreement to boycott vitiate the finding of a collective refusal to deal. *See Eastern*

[14] The ALJ found that respondents' testimony that the letter regarding Toastmaster was sent out only to those stores which had already complained about Toastmaster products was not credible, and we agree. The record compels the finding that "All Stores" meant just that, and that the letter was received, or intended to be received, by all stores operating under the Gibson name, both franchised and family-owned.

States, supra at 608–609. It is sufficient that knowing concerted action was contemplated and invited, the stores adhered to the request.[15] *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939); *FTC* v. *Cement Institute*, 333 U.S. 683, 716 n.17 (1948). All stores which received the letter are chargeable with knowledge that concerted action was at least contemplated, *see Interstate Circuit, supra* at 222, and it is evident from sales data and corroborative testimony that a very substantial number of stores did participate in the scheme.

Respondents attack the chart which displays sales data, CX 117A–D, contending that it is impermissible to infer a "precipitous drop" in Toastmaster sales to Gibson stores from that chart. Supposedly, it is not clear on the face of the document which figure represents total sales for a particular year.

Each of the four documents in this exhibit contains two charts. The first is labeled "Monthly Dollars," the second "Cumulative Dollars." On both charts each row is labeled with a month and each of the first eleven columns is labeled with a product. The twelfth column is labeled "other appliances" and the last column is labeled "total." It is clear that each figure in the "Total" column of the Monthly Dollars chart represents the dollar value of all products sold that month. It is equally clear that each figure in the "Total" column of the Cumulative Dollars chart represents the cumulative total of all products sold in the preceeding months. Consequently, the last figure in the "Total" column of the chart represents the sale of all products through December, or the total for that year. Respondents have advanced no alternative interpretation of this figure, and indeed, the chart will support none. We thus find respondents' argument in this respect to be utterly without merit. **[16]**

Respondents, citing the general rule against admissibility of hearsay, also object to reliance on testimony and memoranda by Toastmaster representatives who recalled being told by Gibson franchisees that, essentially, they were under boycott. (*See* Tr. 3464–66, CX 106A) Hearsay evidence is admissible, however, in FTC adjudicative proceedings, provided that it meets the standard set out in our Rules of Practice Section 3.43(b), *viz.*, that it be "relevant, material, and reliable." *Resort Car Rental System, Inc.* v. *FTC*, 518 F.2d 962, 963 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975). In this case, the proffered evidence is consistent with and corroborative of other facts in the record. While we would attach less weight to hearsay evidence

[15] The fact that the letters were sent out on Gibson Products Company stationery, the name under which Gibson, Sr. granted the stores their franchises, itself suggests the presence of considerable inducement to the franchisees to comply. Roy Love, a franchisee in Oklahoma City, clearly had this in mind when he told Toastmaster's representative, after receiving his copy of the letter, that "if he wanted to keep his sign out in front of his store, saying 'Gibson's,' he had to go by what Seagoville [Gibson management] ordered or told him to do." (Tr. 3466)

standing alone, under the circumstances presented here we see no reason to exclude it or ignore it.

Respondents' final argument is that even if Toastmaster sales to Gibson stores did drop, the decline was more likely attributable to factors other than the boycott, *viz.*, dissatisfaction with Toastmaster products, an asserted preference by Toastmaster's sales representative to sell to distributors instead of directly to retailers, and Toastmaster's lack of access to Gibson retailers because of its non-participation in the Gibson Trade Show.[16]

We agree that an inference of conspiracy should not be drawn where other inferences are equally plausible, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 280 (1968), but respondents clearly fail to make this showing.

Although respondents offered testimony on complaints received about Toastmaster's shipping policies at Christmas time (Tr. 6639), there was no evidence that any store stopped buying Toastmaster goods due to these problems, nor did the witnesses themselves suggest that this was the case. Furthermore, respondents' claim that dissatisfaction with Toastmaster's warranty program contributed to the decline in sales is supported only by the testimony of one witness, who stated that such dissatisfaction caused him to discontinue selling the Toastmaster line sometime in the mid-1960's. (Tr. 7893–94) No evidence is offered that this caused any store to discontinue buying Toastmaster goods in 1970–1971. The additional claim that Toastmaster's failure to live up to its commitments caused the decline is supported only by testimony from the witness who claimed he stopped buying this line of goods during a period [17]of time when he was not working for any Gibson discount store but for another store altogether (Tr. 7938–39). All of this evidence fails to establish that any Gibson store stopped buying Toastmaster products in the relevant period for any of the suggested reasons.

The second explanation offered, that Toastmaster's representative preferred selling to distributors, and that he did not want to increase his sales to Gibson stores (Tr. 3507–08), also fails to find support in the record. No evidence was offered to establish a decision on that representative's part to stop selling to Gibson stores. Nor could it be inferred that because he did not wish to increase sales that he, therefore, wished to decrease them. By contrast, his own testimony indicates that he continued to try to sell to individual Gibson stores, even after the January 22, 1971 letter. (Tr. 3464–65)

[16] Respondents Gibson, Jr. and Gerald also contend that retail stores in which they were financially interested did not participate in the boycott. These respondents have offered little evidence to rebut complaint counsel's *prima facie* case in this respect, however. In any event, since responsibility for sending the boycott invitations may be attributed to these respondents, the question of their stores' acceptance of their invitations is essentially immaterial.

The last alternative explanation, which cites Toastmaster's non-participation in the trade show as the cause of its decline in sales, is rather ironic, since it was Toastmaster's refusal to accept Gibson, Sr.'s demand for increased trade show participation fees which led to its being blacklisted in the first place. Even if we were to dignify this argument by full consideration of it, however, we would have to conclude that it is not adequately supported by the record. Respondents proffered no direct evidence of the impact, in the absence of a boycott, that non-participation in the trade show would have on a firm's ability to sell directly to individual Gibson stores. Without any indication of the magnitude of this impact, we cannot infer that non-participation in the trade show alone could have caused such a sharp drop in Toastmaster sales in 1971.

Respondents have failed to establish the existence of legitimate business reasons on the part of Gibson retailers, wholly distinct from their receipt of the boycott letter, which would account for the sharp drop in Toastmaster sales. *Cf., DuPont Glore Forgan, Inc.* v. *American Telephone & Telegraph Co.*, 437 F. Supp. 1104, 1126 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978). Neither are we persuaded that this drop in Toastmaster sales was "mere chance." *Interstate Circuit, supra* at 223. Respondents' actions and their consequences cannot be explained by alternate inferences that can be drawn from the record, and in light of the specific invitation to boycott and the subsequent evidence as to the effects of the invitation, we find that respondents have violated Section 5 of the FTC Act by engaging in an unfair method of competition, *viz.*, a group boycott.[17] We find further that, despite a modest rebound in Toastmaster sales to individual Gibson stores in 1972 and 1973, this boycott plainly continued until at least 1974 when Toastmaster capitulated to the demands of Gibson, Sr.'s representatives [18]for higher fees for participation in the Gibson Trade Show. (ID 392) We note also that respondents have offered no evidence to show that the boycott was discontinued prior to 1974.

The ALJ, finding that the individual and corporate Gibson respondents comprised a single entity, issued an order on this count of the complaint binding all of them, save Gibson's, Inc. Without necessarily agreeing that there was complete unanimity of interest among all respondents under the pre-November 1, 1972 organizational structure of the Gibson family business, we conclude that the ALJ was correct in placing all such respondents under order.

First, substantial commonality of interest was demonstrated, espe-

[17] Indeed, under these circumstances an invitation to boycott, irrespective of its actual effects, might violate Section 5 if the soliciting party has a reasonable expectation that the invitation will be accepted and acted upon.

cially in the pre-November 1, 1972, environment. The ALJ found that all individual respondents, including Gibson, Jr. and Gerald, were officers of Gibson Products Company, the franchisor corporation, with authority broad enough to include knowledge and approval of the dissemination of the boycott letters. Inclusion of the corporate respondents was correctly premised on the ALJ's finding of their mutual interdependence and on the interdependence among the corporate and individual respondents collectively. It is not necessary for this purpose to determine, as the ALJ did, that all respondents were part of a single enterprise in the pre-November 1, 1972 period.

Second, respondents' operations are sufficiently integrated that an order embracing all of them is necessary to insure the effectiveness of the relief we have directed. Some fencing in to prevent circumvention of Commission orders is appropriate and lawful, *see Sunshine Art Studios, Inc.* v. *FTC*, 481 F.2d 1171 (1st Cir. 1973); *Delaware Watch Co., Inc.* v. *FTC*, 332 F.2d 745 (2d Cir. 1964), and where, as here, it has been shown that respondents' operations are closely integrated, it is probably indispensable.[18]

[19]Complaint counsel appeal from the failure to include Gibson's, Inc., the principal post-November 1, 1972, corporate entity, in the boycott provisions of the order. The ALJ reasoned that since Gibson's, Inc., did not exist at the time of the boycott, it should not be covered. (ID p. 210) We disagree.

The evidence indicates and we have found that the boycott of Toastmaster continued until at least 1974, and indeed, complaint counsel contend that Jeannette is still being boycotted. (RAB 31) Since institutional management of the Toastmaster boycott, at least in the post-November 1, 1972, period, was in the hands of Gibson's, Inc., which became the franchisor corporation, or of its officials, we find that that corporation participated substantially in the conspiracy, and is chargeable as a member thereof.

Indeed, even if the boycott had not continued after November 1,

[18] Respondents object also to the entry of an order against the lot of them precisely because they are so closely interwoven, on the ground that corporations cannot conspire with their own subsidiaries, affiliates, or officers. *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346 (N.D. Cal. 1974), *modified*, 401 F. Supp. 1374 (N.D. Cal. 1975), *modified*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). It is contended, for example, that Gibson, Sr. and his wife could not have conspired with the corporate respondents because they owned a controlling interest in each. Without discussing the permutations of who amongst the Gibson corporate and family respondents could be held to have conspired with whom, we simply note that concerted action between related corporations which has the purpose or effect of unreasonably restraining the trade of unrelated third parties is highly suspect under the intra-enterprise conspiracy doctrine. *See, e.g.*, American Bar Association, Antitrust Law Developments 33 (1975), and cases cited therein. Moreover, we have made appropriate provision in Part I of the Final Order for those circumstances in which some of the respondents collectively own retail stores.

We have no occasion here to examine the outer reaches of intra-firm conspiracy doctrine in any event, principally because the conspiracy we have found relates mainly to the agreement between the respondents (and each of them) and the Gibson franchised stores to boycott designated suppliers' product lines. Also, of course, the corporate respondents were all held because their interdependence required doing so in order to insure the effectiveness of the relief ordered, and "bathtub conspiracy" doctrine does not address this question at all.

1972, it would still be necessary and proper to include Gibson's, Inc. in the order. Where a business found guilty of unfair trade practices is continued by a subsequently formed corporation, both businesses may be subject to the cease and desist order, *P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261 (6th Cir.)., *cert. denied*, 400 U.S. 926 (1970). The determination to include the newly formed company hinges on various factors which include whether both companies engaged in the same business, the capability of the new company to resume the unfair practices, and whether there is substantial identity of ownership between the old company and the new, *id.* at 272. Prior to November 1, 1972, the franchising business and the Gibson trade show were operated by Gibson, Sr. under the aegis of the Gibson Products Co. Gibson, Jr. and Gerald Gibson were president and executive vice president of that company. Currently, Gibson, Sr. operates the trade show and Gibson, Jr. and Gerald carry on the franchising business through Gibson's, Inc. Clearly the same parties found to have engaged in the boycott are still in control of the same businesses which were involved in the boycott. In light of the integrated nature of the business operations prior to November 1, 1972, the fact that the Gibson Trade Show continued to be oriented to Gibson stores, and the existing family relationship, the division of labor represented by the franchising business being taken over by the newly formed Gibson's, Inc. does not justify excluding that corporation from the order. Thus, the order will run to this corporation as well. **[20]**

COUNT III

Complaint counsel challenge under Section 2(c) of the Clayton Act[19] the receipt of commissions by Gibson, Sr., from two brokers representing Ray-O-Vac Company, Barshell, Inc., and Al Cohen Associates, Inc. The statute bans payments of brokerage or allowances in lieu thereof by one party in a transaction to the other and by either party to the other's agent. Complaint counsel tried the Count III charges on the theory that Gibson, Sr. acted in these transactions as a principal or buyer, not on the theory that he acted as intermediary or agent of other respondents or nonrespondent franchisees.

The ALJ found that Gibson, Sr. (but none of the other Gibson family

[19] Section 2(c), 15 U.S.C. 13(c) (1976), provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

respondents) had violated Section 2(c) by splitting brokerage fees with Barshell.[20] (ID p. 198) At least one such payment by Barshell to Gibson, Sr. of a part of its commissions from Ray-O-Vac was made in September, 1972, while Gibson, Sr. was owner and operator of various Gibson retail stores, and, thus, while he was clearly a "buyer." As a consequence, an order was entered against Gibson, Sr. [21]

With respect to the charge of splitting commissions with Al Cohen Associates, the ALJ found that while substantial payments to Gibson, Sr. had been made by Al Cohen in 1974 and 1975, Gibson, Sr. was not a "buyer" at the time, because he no longer had an ownership interest in any retail operation. The law judge, therefore, found that Section 2(c) had not been violated and dismissed the complaint against Al Cohen Associates. (ID p. 198)

Both sides appeal, and we will consider each of the issues raised *seriatum*.

First, Gibson, Sr., relying on *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186 (1974), contends that the "in commerce" requirement of Section 2(c) has not been met. (RAB 19–22) We disagree.

The question answered in the negative by the Supreme Court in *Copp* was "whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation 'in commerce' within the meaning of each of these sections [§ 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, and §§ 3 and 7 of the Clayton Act] and whether such sales are 'in commerce' and 'in the course of such commerce' within the meaning of §§ 2(a) and 3 respectively." *Id.* at 188. There was no argument in *Copp* that sales were, in fact, made in interstate commerce or were otherwise directly involved in national markets. Rather, Copp argued only that the "in commerce" requirement was satisfied because the asphaltic concrete was used in construction of interstate highways. *Id.* at 198.

By contrast, the brokerage payments made in this case were allowances upon all Ray-O-Vac sales to Gibson retail stores, both family-owned and franchised, in a 20-state area. (ID p. 194) Thus, not only could one find an "ample nexus to interstate commerce in the whole transaction," *Shreveport Macaroni Manufacturing Co.* v. *FTC*, 321 F.2d 404, 409 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964), as the ALJ did, but the underlying sales were, in fact, directly in interstate commerce, making this a straightforward case.

[20] Gibson, Sr. argues that the specific violation found by the ALJ was not alleged in the complaint. (RAB 8) We find, however, that respondent had ample notice of what complaint counsel intended to prove, that he had adequate opportunity to defend against the charges, and that he, in fact, took advantage of this opportunity. *See, inter alia*, Complaint Counsel's Answer to Motions to Exclude Evidence, and Respondent's Reply to Answer to Motions to Exclude Evidence, each filed December 2, 1977.

Respondent's other threshold argument is that a showing of discrimination is a necessary prerequisite to a finding of a Section 2(c) violation. (RAB 22–25) Once again, we disagree.

The proscription of Section 2(c) is absolute in prohibiting the payment of brokerage to the other party to a transaction or to that party's agent, "except for services [22]rendered." The legislative history[21] and the case law support this understanding. Such doubt as exists in this area was created by dicta in the decision of the Supreme Court in *FTC* v. *Broch & Co.*, 363 U.S. 166 (1960).[22] While *Broch* may have generated some confusion, *see* Rowe *supra* at 344–345, the weight of authority is that a showing of discrimination in the payment of "dummy brokerage" is not a generic statutory requirement.

In *Broch* an independent broker agreed to lower his commission in order to give a purchaser a lower price. The issue was whether the lower price that the buyer obtained was an allowance in lieu of brokerage in violation of Section 2(c). The Supreme Court found a violation, reasoning that this situation was analogous to a broker splitting part of his commission with the buyer. The Court was concerned, however, that brokers be able to change their prices without every consequent saving to a buyer being judged an "allowance in lieu of brokerage." Thus, the Court wrote, "[t]his is not to say that every reduction in price coupled with a reduction in brokerage, automatically compels the conclusion that an allowance in lieu of brokerage has been granted." 363 U.S. at 175. The Court went on to explain that "[a] price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers." *Id.* at 176. The Court's language that "whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case," *id.*, cannot fairly be read to require a showing of discrimination as a prerequisite to finding any Section 2(c) violation. [23]

Read as a whole, *Broch* represents an effort by the Court to plug a possible statutory loophole through use of the "allowance in lieu of brokerage" provision. Because of difficulties peculiar to transactions of

[21] The Conference Report states:

> [T]his subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.

H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936).

[22] Respondent's argument is not based on a specific holding in *Broch*, but only upon the Court's occasional references, in the context of the facts of that case, to "discriminatory" brokerage.

the type considered in *Broch*, it was necessary to use the notion of discrimination as an element in establishing whether a price reduction was an allowance in lieu of brokerage.

The instant case is quite different, however. Here it is alleged that the seller made payments to a broker who, in fact, was under the control of the buyer and who passed on most of his commissions to that buyer.[23] *Broch* reviews the legislative history of Section 2(c), finding:

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. 363 U.S. at 169.

Thus, the type of transaction we consider here is precisely that which it was the major legislative purpose to curtail. While respondent quotes at great length from such cases as *Shreveport Macaroni Manufacturing Co.* v. *FTC, supra; Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra;* and *Rohrer* v. *Sears, Roebuck & Co.*, 1975–1 Trade Cas. ¶60,352 (E.D. Mich. 1975), for the proposition that Section 2(c) is directed at discrimination, none of these cases is factually apposite and none demonstrates that, in general, discrimination is a necessary element of a Section 2(c) violation.

As a matter of statutory construction of Section 2 as a whole, subsection 2(c), like subsections 2(d) and 2(e), necessarily makes certain business practices, other than price discrimination, unlawful, as it is designed to eliminate hidden preferences by forcing them "into the open" for measurement and adjudication under the more forgiving price discrimination provisions. *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959).[24] Moreover, subsections 2(d) and 2(e) on their face require a showing of discrimination, while subsection 2(c) does not, thus manifesting an explicit congressional determination not to require discrimination as a precondition to finding illegal [24]dummy brokerage. Given the purpose and structure of the Act and the illogic of addressing the problem of dummy brokerage in terms of discrimination, a general requirement that discrimination be shown cannot and should not be read into Section 2(c).

Complaint counsel cites *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), for the

[23] The ALJ found that "Gibson, Sr.'s review of Ray-O-Vac's commission statements to Miller, ostensibly a seller's broker, to determine how much brokerage he should receive, demonstrates respondent's control of the latter." (ID 197)

[24] The Court in *FTC* v. *Simplicity Pattern Co.* noted expressly that each of subsections (c), (d), and (e) makes certain practices other than price discrimination unlawful. 360 U.S. at 65.

proposition that *Broch* is not to be understood to require generically a showing of discrimination, and we find the discussion in that case convincing. In *Rangen* it was concluded that Section 2(c) applies to payment of commercial bribery and that discrimination is not a necessary element of a Section 2(c) violation.

The Court explained that:

> discrimination was used in Broch to determine if the price arrangement was an "in lieu" of brokerage transaction; and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage. 351 F.2d at 858.

Respondent cites no decisions other than *Broch*-type cases involving allowances in lieu of brokerage in which a Section 2(c) case was dismissed for failure to show discrimination. We, therefore, conclude that Section 2(c) means, in essence, what it says, and that complaint counsel need not demonstrate, as respondent would require, that dummy brokerage has been paid to others, with favored customers receiving larger payments. Accordingly, the threshold requirements to utilize Section 2(c) have been satisfied in this case.

Respondent next raises certain factual objections to a finding of a Section 2(c) violation. Gibson, Sr. contends that the check that was issued to him on September 23, 1972 (CX 192), which was found by the ALJ to be evidence of the illegal brokerage, was, in fact, an unrelated 3% commission or show fee due Gibson, Sr. for sales by the Gibson Trade Show of merchandise belonging to Barshell. (RAB 13) There is a conflict in the testimony on this point between Barshell's proprietor, Mr. James Miller, and Mr. Lynn Low, a trade show buyer for Gibson, Sr. We resolve the conflict as the ALJ did, by crediting Mr. Miller's testimony.

Mr. Miller testified, in essence, that Gibson, Sr. would review his "commission statements" (which indicated total sales by Ray-O-Vac through Barshell to Gibson stores) and assess a corresponding charge as his brokerage fee upon Mr. Miller's commission. (Tr. 3132–34) Mr. Miller identified the check in question, CX 192, as his payment to Gibson, Sr., for this purpose. Mr. Low contended that CX 192 was Barshell's check in payment for the Gibson Trade Show's sales of Barshell's health and beauty aids. (Tr. 7523–24) There is evidence, however, [25]that Mr. Miller sold health and beauty aids, not through Barshell, but through his other corporation, Progressive Brokerage. (Tr. 3136–37) In fact, Mr. Miller testified that Barshell was formed specifically to be a housewares distributor, "[a]nd that's why I chose to move it [Ray-O-Vac] into that company [Barshell], as opposed to our beauty aids rep." (Tr. 3145) Had the payments been for the purpose

described by Mr. Low, therefore, the check presumably would have been made out to Progressive Brokerage, rather than to Barshell. Moreover, Mr. Miller's testimony is consistent with evidence of Gibson, Sr.'s course of dealing, and is specifically consistent with the ALJ's finding that Gibson, Sr. had an agreement with Mr. Miller's successor as agent for Ray-O-Vac to do precisely the same thing. (ID 425–29)

Gibson, Sr. next contends that he was not a buyer in September, 1972, and, thus, cannot be liable under complaint counsel's theory of violation. (RAB 17–19) This argument is without merit. We agree with the ALJ that at least in the context of his personal ownership and operation of individual retail stores, as well as in his role as head of Gibson Products Company, Gibson, Sr. was plainly a buyer.

Respondent relies heavily on *Nuarc Co.* v. *FTC*, 316 F.2d 576 (7th Cir. 1963), where it was held that under certain circumstances mere ownership may not suffice to make one a buyer within the meaning of the Act, but *Nuarc* is factually inapposite. In that case the Commission was required to try to establish a link between two corporations to show a pass-through of benefits from one to another. The instant case is substantially different. Purchases from Ray-O-Vac by at least the Gibson, Sr.-owned retail operations can be attributed to the actions of Gibson, Sr. personally. No pass-through of benefits need be demonstrated. Gibson, Sr. is covered by the statutory provision because, as the buyer in the transaction, he or his agent received brokerage payments from the other party to the transaction or from his agent.

Finally, respondent argues that assuming CX 192 represents a brokerage check and assuming that he was a buyer at the time, he has met the statutory exception for "services rendered." (RAB 28–30) It is unclear whether this exception applies as between buyer and seller, although *Broch, supra* at 173–74, suggests that it may.[25] However, even assuming that buyers may avail themselves of it, respondent has not come forward with adequate evidence to substantiate this claim. [26]

Respondent has made no effort in concrete terms to establish the value of the services he rendered in relation to the brokerage payments he received. It is not contested that respondent's services in inducing the purchase of Ray-O-Vac products by Gibson stores were in the nature of brokerage or were "selling type" services within the exception in Section 2(c). But, even assuming this exception is available to buyers, respondent's burden is considerably greater and

[25] "There is no evidence that the buyer rendered any services to the seller or to the respondent [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances," *FTC* v. *Broch & Co., supra* at 173; *but, cf., Southgate Brokerage Co., Inc.* v. *FTC*, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945).

more specific than he contends, and by doing little more than articulating his claim to the exception, he has failed to meet that burden.

Alternatively, several cases suggest the availability in these circumstances of a "functional discount" justification. *See Central Retailer-Owned Grocers, Inc.* v. *FTC*, 319 F.2d 410 (7th Cir. 1963); *Empire Rayon Yarn Co., Inc.* v. *American Viscose Corp.*, 364 F.2d 491 (2d Cir. 1966) (en banc), *cert. denied*, 385 U.S. 1002 (1967); and *Hruby Distributing Co.*, 61 F.T.C. 1437 (1962). Specifically, respondent would have to demonstrate that he performed a valuable service entitling him to a functional discount, the size of which would correspond to the distribution costs the seller saved as a result. *See Central Retailer*, *supra* at 414; *Empire Rayon*, *supra* at 492.

The analysis that would be undertaken to ascertain whether respondent had proffered an adequate functional discount justification would closely approximate that undertaken to evaluate the "services rendered" by him. The two concepts share a marked similarity, although the focus of each differs slightly, in that the first examines the overall value of respondent's services, while the second fixes upon the savings to the supplier as a consequence of respondent's performance of certain functions the supplier otherwise would have undertaken itself. Arguably, the "services rendered" exception is broad enough to encompass any justification which might be offered under the functional discount rubric, but the ALJ considered them separately and, for purposes of review, we do likewise.

The ALJ concluded, correctly, that there was no showing here that respondent performed any functions that might have entitled him to a discount of a measurable size. For example, it was not shown that Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. Nor was there evidence that Ray-O-Vac was even aware of his activities. As the ALJ noted, this militates strongly against any finding that the split brokerage constituted a functional discount for distributional services. Respondent's appeal, therefore, is denied.

Complaint counsel's appeal is premised exclusively upon the theory that all of the Gibson respondents constituted a "single economic enterprise," both before and after November 1, 1972. Under this scenario, all respondents should be found liable and placed under order as a consequence of the Barshell transaction, and Al Cohen Associates should be held as a consequence of the transactions in which it was involved, for if [27]all respondents comprised a single enterprise, then Gibson, Sr. must have been a buyer even in 1974 and 1975, when he no longer owned any Gibson retail stores.

To a large extent, we need not address the merits of complaint counsel's appeal. Leaving aside the "single economic enterprise" contention, there is no doubt that before November 1, 1972, all Gibson businesses were at least closely knit. (See discussion *supra* at pp. 18–19). The Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson-owned retail stores were operated were completely interdependent and under the control of the same few individuals in the Gibson family. For purposes of relief, in this environment, there is ample justification to bind all Gibson corporate respondents, except dissolved corporations, and all Gibson family respondents in order to insure that the order we issue today is not circumvented.[26] *Sunshine Art Studios, Inc.* v. *FTC*, *supra*; *Delaware Watch Co., Inc.* v. *FTC*, *supra*.

We are aware that this disposition means that no order will issue against Al Cohen Associates, for we do not address whether a "single economic enterprise" existed after November 1, 1972. In view of the fact that we are binding all of the individual Gibson respondents, however, we do not find this to be a significant omission.

Remedy

A broad order is warranted against all respondents charged in connection with Count II. A substantial question is presented, however, with respect to paragraph 5 of the ALJ's order, which directs respondents to cease and desist from "utilizing franchising or licensing agreements containing (a) provisions whereunder respondents undertake to give merchandising advice to the licensees or franchisees and (b) provisions whereunder respondents retain the right of quality control over the products sold and services rendered by such licensees or franchisees." [28]

The ALJ found that virtually the only occasions upon which these provisions had been exercised had been to further group boycotts of the type we condemn today. He concluded that, "[i]n view of respondents' insistence that those provisions in the agreement have not been exercised, the imposition of such a provision in the order deprives them of no valuable right." (ID p. 211)

We are troubled by this provision, because merchandising advice and quality control clauses in franchise agreements are hardly novel, and they frequently offer legitimate protection to the franchisor's trade-

[26] The ALJ found that the liability of respondents H. R. Gibson, Jr. and Gerald Gibson for Section 2(c) violations could not be established, because complaint counsel failed convincingly to tie them to the receipt of illegal brokerage. (ID pp. 202–03) While we do not reverse this determination, neither does this result preclude, for fencing-in purposes, placing Gerald Gibson and Gibson, Jr. under order.

name without also serving an anticompetitive purpose. It may indeed be the case that respondent's illegal conduct has been perpetrated under the guise of these clauses, but the remedy may be to restrain the conduct, not the clauses. We are satisfied that an order addressed to conduct, especially as it affects price or concerns suppliers vis-a-vis the trade show, will be adequate to insure that the underlying purpose of the order is not circumvented. We have modified the order to substitute for paragraph 5 of the ALJ's order a more narrow provision focusing on the content of communications from respondents to franchisees. It should, accordingly, be very difficult for respondents to utilize the merchandising advice and quality control clauses they retain in an anticompetitive manner without thereby violating another provision of the order.

Respondents' additional objections to paragraphs 3 and 4 of the ALJ's order are denied, as these provisions constitute reasonable fencing-in related directly to the conduct held to be illegal in this case. *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 388 (1959); *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946). Essentially, these provisions prevent respondents from blocking supplier sales to franchisees, either at respondents' whim or, more specifically, because the supplier has not met respondents' terms for participation in the trade show. Thus, these provisions operate to frustrate nascent group boycotts by preventing respondents from interfering with supplier-franchisee transactions under specified circumstances.

All other objections raised to the order provisions relating to Count II have been considered and are denied.

Gibson, Sr. contends that the order provisions resulting from Count III violations are also overbroad, in that they are not limited to transactions in which he is a buyer, but include those in which he acts as agent or intermediary for a buyer. We see no infirmity in this extension; rather we view it as permissible fencing-in related directly to the conduct held to be illegal herein.

Such fencing-in is particularly appropriate in light of the interrelationship among respondents. At least since November 1, 1972, there has been an enhanced potential for [29]Gibson, Sr. to act as agent or intermediary for retail stores owned by other members of the Gibson family. Indeed, he owns no stores outright at this time, meaning that, leaving aside the possibility of treating all respondents as a "single enterprise," an order limited to Gibson, Sr. as a buyer might have little practical effect. Finally, it is not true, as Gibson, Sr. suggests, that the ALJ's finding that no liability attached to the Al Cohen transaction constituted a vindication for Gibson, Sr. in those circumstances where

he was not a buyer, but merely an agent. The issue of Gibson, Sr.'s agency was not joined, for complaint counsel elected to try the case solely on the theory that Gibson, Sr. was a buyer. The ALJ's finding, therefore, does not bear on this question of order coverage.

All other objections raised to the order provisions relating to Count III have been considered and are denied.

Finally, respondents contend generally that no order should be issued, because the evidence is old and the practices found to be unlawful are isolated instances of misconduct. We do not agree. Respondents cannot and do not contend that the law violations were inadvertent or that these practices were voluntarily abandoned, even after issuance of the complaint. Given the nature and structure of their business operation, which remains essentially unchanged, and given the absence of any evidence of abandonment, we find that an order is necessary to combat a cognizable danger of recurrence of the violations.

To promote clarity, we have made numerous stylistic and grammatical changes to the order entered by the ALJ.

FINAL ORDER

This matter having been heard by the Commission upon the appeals of complaint counsel and respondents from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1–214, as amended, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

I.

It is ordered, That respondents Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, individually and/or as officers of corporate respondents; and corporate respondents Gibson's, Inc., Gibson's Discount Center, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, [2]Inc. and Gibson Products Co., Inc., their

successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the operation of a trade show, the operation or franchising of any retailing business, or the operation of any business related to retailing in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Combining, agreeing, engaging in an understanding, or conspiring with any of said other respondents, or any other person, partnership or corporation, to eliminate or boycott any supplier in order to prevent or hinder the supplier's sales to or business dealings with any of the respondents or any other person, partnership, or corporation; provided that nothing herein shall prevent respondents from acting collectively to further legitimate business decisionmaking with respect to businesses, including retail stores, which said respondents own collectively.

2. Coercing or intimidating any supplier in any manner to prevent such supplier from competing for the sale of any products to any retailer or any other person, partnership or corporation.

3. Representing directly or indirectly or implying to any supplier that the supplier may not compete for the sale of any products to any other person, partnership or corporation.

4. Taking any individual action to eliminate a supplier or to prevent or hinder the supplier's sales to or business dealings with any other person, partnership or corporation because such supplier does not appear in shows conducted by the Gibson Trade Show.

5. Recommending, suggesting or advising any retailer or any other person, partnership or corporation not to deal with a supplier because such supplier does not appear in shows conducted by the Gibson Trade Show, or because such supplier is unwilling to meet the price, delivery, or billing terms demanded by respondent[s] or by any retailer or any other person, partnership or corporation.

II.

It is further ordered, That Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, [3]Jr., Gerald Gibson, Gibson Products Co., Inc., Gibson's Inc., Gibson's Discount Centers, Inc., their successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the purchase of merchandise, in commerce, as

"commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Receiving or accepting, directly or indirectly, as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer, from any seller or seller's broker anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."

2. Assuming control of or influencing any seller or seller's broker to induce such seller or seller's broker to pay to respondent[s] anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."

III.

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

IV.

It is further ordered, That Count III of the complaint be, and it hereby is, dismissed as to respondents Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Al Cohen Associates, Inc.

V.

It is further ordered, That, for a period of 10 years from the date of service of this order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and of each affiliation with a new business or [4]employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VI.

It is further ordered, That respondents shall notify the Commission

at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Complaint

IN THE MATTER OF

COMMERCIAL LIGHTING PRODUCTS, INC.

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

Docket C-3018. Complaint, May 6, 1980—Decision, May 6, 1980

This consent order requires, among other things, an Englewood, N.J. seller of light bulbs and other products to cease shipping or billing for unordered merchandise; soliciting orders from unauthorized persons; shipping goods that vary in quantity or price from that ordered; offering discounts or sending collection letters to induce payment for unordered merchandise; and transferring alleged delinquent accounts to debt collection agencies, after being informed that the merchandise had not been ordered. The firm is further prohibited from shipping merchandise pursuant to any unsigned purchase order. Should such a form be received, the company must mail to the "Lighting Buyer" of the business an acknowledgment card containing prescribed information and a toll-free number to call should problems arise. Additionally, the order requires that the firm develop and provide relevant personnel with an approved statement of operating principles and practices, and maintain a surveillance program designed to detect those who fail to conform.

Appearances

For the Commission: *G. Martin Shepherd.*

For the respondent: *Paul G. Pennoyer, Chadbourne, Parke, Whiteside & Wolfe*, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Commercial Lighting Products, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act and the provisions of 39 U.S.C. 3009, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Commercial Lighting Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 East Palisade Ave., Suite 220, Englewood, New Jersey. Respondent is not a non-profit corporation or a charity.

PAR. 2. Respondent is now and for some time has been engaged in offering for sale, selling and distributing light bulbs and other

products by soliciting orders by telephone and by personal contacts, shipping said products by mail and by common carriers to persons, business establishments, schools, educational and religious institutions and other entities (hereafter referred to as "persons" in this complaint), located in various States of the United States, under its corporate name and also through its division named AAA Lighting Products, Inc. Respondent therefore maintains and has maintained a substantial trade in said light bulbs and other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act as amended.

PAR. 3. In the course and conduct of its business, respondent is now and for some time has been engaged in the following acts or practices:

(a) Distributing or causing to be distributed, light bulbs and other products to persons who have not requested or consented to the shipment of such products and, in connection with such shipments, failing to disclose to such persons that they may treat such products as gifts and that they have the right to retain, use, discard, or dispose of such products in any manner as they see fit without any obligation.

(b) Mailing or causing to be mailed, bills and collection letters to recipients of light bulbs and other products who did not request or consent to the shipment of such products.

The acts and practices set forth above were and are unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent is now and for some time has represented, contrary to fact, that:

(a) Persons who do not pay for light bulbs or other products will have their alleged delinquent accounts referred to an attorney, debt collection company, credit bureau, or credit reporting agency.

(b) Respondent will adversely affect the credit rating of persons with alleged delinquent accounts.

(c) Failure to accept delivery of respondent's products will result in the persons being liable for storage charges or other charges assessed by common carriers attempting to deliver such products.

Such acts or practices were and are deceptive.

PAR. 5. Respondent's representatives have contacted janitors, custodians, maintenance personnel and other persons in various business establishments and institutions and represented themselves, contrary to facts, as being friends or acquaintances of such persons or as salesmen who have supplied said business establishments and institu-

tions with products in the past or represented that they contacted such persons for the purpose of offering them free gifts, and, in a significant number of instances, have not attempted to determine whether such persons were authorized to order products in the amount of the orders solicited. Such acts and practices have been, and are, deceptive.

PAR. 6. Respondent has induced and attempted to induce persons employed by various business establishments and institutions to consent to the shipment of light bulbs or other products by falsely representing that said persons would receive a small number of light bulbs or other products on approval or that such persons would receive only an amount sufficient to cover the shipment of free gifts that would be sent to such persons, or that such persons would receive only a small number of light bulbs or other products to insure that they would not exhaust their existing supply of light bulbs or other products before deciding to order additional products from respondent, when in fact persons who agreed to accept allegedly small quantities of light bulbs or other products received, in a significant number of instances, large quantities of light bulbs or other products for which they or their business establishments or institutions were subsequently billed substantial amounts of money whether or not they agreed to accept or retain said products. Such acts and practices have been, and are, unfair or deceptive.

PAR. 7. Respondent has, in a significant number of instances, sent light bulbs or other products in quantities substantially larger than quantities ordered or at prices substantially higher than prices quoted to the persons who ordered said products. Such acts and practices have been, and are, unfair and deceptive acts and practices.

PAR. 8. Respondent's "verifiers" and other employees have telephoned business establishments and institutions that allegedly ordered light bulbs or other products to allegedly confirm orders that were in fact never made and respondent has, in a significant number of instances, not made good faith efforts to resolve complaints from business establishments and institutions that have complained that they did not order merchandise allegedly ordered or that they received unordered merchandise or overshipments from respondent or shipments of bulbs or other products from respondent at prices higher than previously quoted. Instead, respondent has misrepresented, in a significant number of instances, that shipments complained about were shipped according to bona fide orders or that said orders were verified before shipment or that the complainants would have to resolve their disputes with respondent's salesmen who respondent alleged were independent contractors for whose actions respondent is

not responsible or respondent has offered discounts to induce persons to accept, retain, or pay for the products. Such acts and practices have been, and are, unfair or deceptive acts and practices.

PAR. 9. Respondent has, as aforesaid, used unfair or deceptive acts and practices to induce business establishments and institutions to accept or retain unordered merchandise and merchandise priced higher than represented at the time it was ordered and to pay to respondent substantial sums of money for said merchandise. Respondent has received said sums of money and has failed to refund or offer to refund said money. The use by respondent of said acts and practices and the continued retention of said sums of money are unfair or deceptive acts and practices.

PAR. 10. Respondent, which has been in substantial competition in commerce with corporations, firms and individuals engaged in the sale of light bulbs and other products, has used, as aforesaid, unfair and deceptive acts and practices to induce persons, business establishments and institutions to retain or accept and pay for said products.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, have been and are all to the prejudice and injury of the public and are in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act or the provisions of 39 U.S.C. 3009.

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and Section 3009 of the Postal Reorganization Act (39 U.S.C. 3009); 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 respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said 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, 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 Commercial Lighting Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 East Palisade Ave., in the City of Englewood, State of New Jersey.

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

As used in this order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting directly or indirectly and by any manner or means.

The provisions of this order are applicable to the acts and practices of Respondent, Commercial Lighting Products, Inc., a corporation, through its agents, representatives and employees and its successors and assigns which are in the lighting business, or through any successor corporation, assign, subsidiary, division, franchisee or other device in connection with the advertising, offering for sale, sale or distribution of light bulbs or other Products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

For purposes of this order the following definitions shall be applicable:

"Person" shall mean a recipient of Products from the Respondent or the recipient of any telephonic, written or other type of communication from Respondent in connection with the advertising, offering for sale or sale of Products, as defined. *Provided, however*, that Person shall not mean a natural person, business establishment or institution which does not purchase said Products for consumption (*i.e.*, independent jobbers or wholesalers).

"Respondent" shall mean Commercial Lighting Products, Inc. through its agents, representatives, employees and its successors and assigns, which are in the lighting business, or through any successor corporation, subsidiary, division, franchisee or other device. It shall not include Respondent's Canadian subsidiary or any other foreign subsid-

iary, division or franchisee, if they do not sell substantial amounts of Products to Persons in the United States. In addition, Respondent shall not mean any unrelated wholesalers, jobbers or persons not affiliated with Respondent, nor shall any part of this order be construed to include the acts or practices of such persons. *Provided further,* that Respondent shall not mean a successor to, or assign of, Commercial Lighting Products, Inc. into which Commercial Lighting Products, Inc. is liquidated pursuant to Section 332 of the Internal Revenue Code, where such successor or assign in good faith receives distributions in complete liquidation of Commercial Lighting Products, Inc. and such successor or assign no longer carries on the business of Commercial Lighting Products, Inc. in any way.

"Products" shall mean light bulbs, fluorescent tubes or any lighting equipment or any other merchandise currently sold by Commercial Lighting Products, Inc. or sold by Commercial Lighting Products, Inc. in the future.

"Shipping" shall mean sending, or causing to be sent, any Products by mail or by any carrier or by any means.

I

It is ordered, That Respondent cease and desist from:

1. Shipping Products or causing Products to be shipped, without the expressed request or consent of a Person.
2. Mailing, or causing to be mailed, a bill to a Person for Products which have been shipped without the prior expressed request or consent of the Person.
3. Soliciting an order for Products from any Person without first making a good faith effort to determine whether such Person is authorized to order said Products in the dollar amount of said order.
4. Shipping Products to a Person in larger quantities than ordered or at prices greater than prices quoted at the time of the order.
5. Offering discounts to induce Persons who allege that they received unordered Products from Respondent to accept, retain, or pay for said Products until after a bona fide effort has been made to ascertain whether or not the Products were unordered.
6. Shipping, or causing to be shipped, a collection letter to a Person to whom Products have been shipped without the prior expressed request or consent of such Person.
7. Transferring, or causing to be transferred, to a debt collection company, credit bureau or any credit reporting agency, the alleged delinquent account of a Person who has informed Respondent that the

Products involved were not ordered, until after a bona fide effort has been made to ascertain whether or not the Products were unordered.

Provided, however, that Respondent may act in accordance with the exceptions set forth in the Postal Reorganization Act, 39 U.S.C. 3009, as amended or modified.

Provided further, however, that for purposes of this order, no Products shall be deemed to have been shipped without the prior expressed request or consent of a Person if the procedures outlined below in Parts III and IV of this order have been complied with and the acts enjoined in Part II of this order have not been committed in connection with the shipping of such Products.

II

It is further ordered, That Respondent cease and desist from representing that:

1. The individual contacting a Person being solicited is a friend or acquaintance or has been referred by another individual in the business or institution of the Person solicited or that Respondent has supplied light bulbs or other Products to such Person or such Person's business establishment or institution in the past unless such is the fact.

2. Any Person from whom an order for Products is solicited is being contacted for the purpose of offering him a free gift unless such is the fact.

3. The quantity or price of Products that will be shipped by Respondent in connection with soliciting any Person's consent to receive said Products is less than the quantity or the price of the Products that will be shipped. However, Respondent shall not be deemed to have violated this subsection if it shows that such quantity or price variance was the result of a clerical error.

4. Respondent will send or has sent a notice of an alleged delinquent account to a debt collection company, credit bureau, credit reporting agency, attorney or other individual or entity unless such is the fact.

III

It is further ordered, That:

1. Respondent shall not mail or otherwise ship Products pursuant to any order which does not include on the order form, in addition to any other information, the following information in legible form: (a) the name of the individual who ordered the Products; (b) the job title

of the individual who ordered the Products; (c) the quantity of each item ordered; (d) the unit price of each item and the total price of the order; (e) the date said individual ordered the Products; (f) whether the order was taken on the telephone or in person; (g) whether the individual placing the order signed the order; (h) whether the individual placing the order has received a copy of the order; (i) the name of the salesman or other individual who wrote the order; and (j) whether the individual who ordered the Products states that he has ordered any such Products from Respondent in the past.

2. Respondent will utilize an "Acknowledgment" form which will be addressed to the attention of "Lighting Buyer" of the Person in question, which will contain the information required by items (a) through (j) of Part III, paragraph 1 above, and a notice that if there is any problem with the order, the Person may call Respondent on a free "800" telephone number listed conspicuously on the Acknowledgment. The Acknowledgment will be sent by first class mail to the Person. Respondent will not ship Products to the Person within ten days after mailing of the Acknowledgment. (A representative copy of the Acknowledgment form is attached hereto as Appendix A.)

3. Respondent shall not ship Products to any Person who informs Respondent, before said Products are shipped, that the merchandise allegedly ordered was not ordered.

Provided, however, that the provisions of paragraphs 1–3 above shall not apply where Respondent has received a signed order from a Person on the Person's purchase order or similar form.

4. Respondent shall retain for a period of two (2) years each written communication of the type referred to in Part III, paragraph 2 of this order and each letter sent by Respondent in response to any communication of the type referred to in Part III, paragraph 3 of this order, as well as all other written complaints alleging receipt of unordered merchandise, and shall make said communications and letters available to the Commission's staff for inspection and copying upon request.

IV

It is further ordered, That:

1. Respondent adopt a Statement of Operating Principles and Practices ("Statement") as set forth in Appendix B, and deliver a copy of this Statement to each of its employees, salesmen, agents, solicitors, problem solvers, collectors, customer service personnel and all other individuals who communicate with Persons in connection with the

offering to sell or the terms of sale of Respondent's Products to Persons, the requesting of payment, or the handling of complaints that Products shipped were allegedly unordered.

2. Respondent provide each individual described in Part IV, paragraph 1 of this order with a form to be signed and returned to Respondent, clearly stating his intention to be bound by and to conform his business practices thereto during the period said individual is so engaged and for a period of two (2) years thereafter, and make said forms available to the Commission's staff for inspection and copying upon request.

3. Respondent will not use or engage or will terminate the use or engagement of any such individual described in Part IV, paragraph 1 of this order who does not sign said Statement.

4. Respondent discontinue dealing with or terminate the use or engagement of any individual described in Part IV, paragraph 1 of this order who continues on his own any act or practice prohibited by this order.

5. Respondent shall forthwith distribute a copy of this order to each of its divisions or subsidiary corporations that is involved in the offering for sale, sale or distribution of Products to Persons.

6. Respondent institute a program of continuing surveillance satisfactory to the Commission designed to reveal whether the individuals described in Part IV, paragraph 1 of this order are conforming to the requirements of this order as incorporated in the Statement.

V

It is further ordered, That:

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

2. 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.

APPENDIX A

[letterhead
with return address]

ACKNOWLEDGMENT OF ORDER

TO: Lighting Buyer

_____

_____

Items Ordered	Quantity	Unit Price	Total

Total Price of Order _____

Order placed by _____
Title of individual who placed order _____
Date of order _____
Order was placed (circle one): In Person By Telephone
Did individual placing the order sign it? Yes No
Did individual placing the order receive a copy of it? Yes No
Name of salesperson or other person who wrote the order

_____

Did the individual who placed the order state that she/he had ever ordered any such products from Commercial Lighting Products, Inc., AAA Lighting or Pennstar in the past?

_____

IMPORTANT: IF THERE IS ANY PROBLEM WITH THIS ORDER, YOU MAY CALL US TOLL FREE AT 800-xxx-xxxx.

APPENDIX B

COMMERCIAL LIGHTING PRODUCTS, INC.

STATEMENT OF OPERATING PRINCIPLES AND PRACTICES

As an employee of Commercial Lighting Products, Inc. ("CLP") you should know the Principles and Practices upon which CLP operates and expects its employees to operate.

The success of CLP is based on customer good will and belief in CLP's products. Unfair and unethical sales practices undercut this success, and will not be tolerated by CLP.

Specifically, the following acts or practices are both unethical and unlawful, and will not be tolerated by CLP:

1. The sending of products without the expressed request or consent of the customer.
2. Sending a bill to a customer for products that have been shipped without the prior expressed request or consent of the customer.
3. Soliciting an order for products from any potential customer without first making

a good faith effort to determine whether such person is authorized to order products in the dollar amount of the order.

4. Sending products to a customer in larger quantities than ordered or at prices greater than prices quoted at the time of the order.

5. Offering discounts to induce customers who say they received unordered products from CLP to accept, retain, or pay for the products, until after a bona fide effort to ascertain whether or not the products were unordered.

6. Sending a collection letter to a customer for products which have been shipped without the prior expressed request or consent of the customer.

7. Transferring in any way to a debt collection company, credit bureau or any credit reporting agency, a delinquent account of a customer who has informed CLP that the products involved were not ordered until after a bona fide effort to ascertain whether or not the products were unordered.

8. Telling a potential customer that the individual contacting the customer is a friend or acquaintance or has been referred by another individual in the business or institution of that potential customer, or stating that CLP has supplied light bulbs or other products to the potential customer or the potential customer's business establishment or institution in the past unless such is the fact.

9. Telling a potential customer that he or she is being contacted for the purpose of offering him or her a free gift unless such is the fact.

10. Telling any potential customer the quantity or price of products that will be shipped by CLP is less than the quantity or the price of the products that will be shipped.

11. Telling any customer that CLP will send or has sent a notice of an alleged delinquent account to a debt collection company, credit bureau, credit reporting agency, attorney or other person or entity unless such is the fact.

In addition, CLP requires that an order shall not be mailed or shipped unless the order is legibly written on a properly completed CLP order form, or CLP receives a signed order on the customer's purchase order or similar form.

Furthermore, those CLP procedures which make it obligatory that CLP not ship products to a customer until 10 days after the mailing of the CLP "Acknowledgment" form, must be strictly adhered to. It is CLP's policy to keep these Acknowledgment forms.

Finally, it is also CLP's policy to keep all correspondence between CLP and persons who say they received unordered merchandise from CLP. If you engage in any such correspondence or have custody of any such correspondence, you must not destroy it unless CLP gives you authority to do so in writing.

These procedures and practices are required by CLP and are mandatory. You will be discharged if you do not adhere to them.

I will be bound by this Statement of Operating Principles and Practices and will act accordingly.

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Date: