

It is further ordered, That the 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.

IN THE MATTER OF

J. WEINGARTEN, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 7714. Complaint, Jan. 5, 1960—Decision, Aug. 13, 1963

Order dismissing "solely for the purpose of complying with the * * * order of the District Court" requiring the Commission to issue a final order disposing of the case by August 13—"without prejudice to the right of the

Commission to reopen the matter * * * if the * * * order of the District Court becomes ineffective as a matter of law"—complaint charging a grocery supermarket chain with 45 outlets in Texas, Louisiana and Tennessee, with knowingly inducing or receiving discriminatory advertising allowances from suppliers.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that J. Weingarten, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of Section 5 of said Act (15 U.S.C.A. Sec. 45), 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 as follows:

PARAGRAPH 1. Respondent J. Weingarten, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its principal office and place of business located at 600 Lockwood Drive, in the city of Houston, State of Texas.

PAR. 2. Respondent is now, and for many years has been, engaged in the operation of a large chain of retail grocery stores reselling all types of grocery, cosmetic, and other products to the consuming public. Respondent purchases all of said products, including all types of canned foods, fresh vegetables, all types of meats, canned and fresh, dairy products of all kinds and numerous other food items, household articles and clothing, which it resells, from a large number of manufacturers, processors and handlers of such products. The forty-five retail grocery stores presently composing respondent's chain are all located in the States of Texas, Louisiana and Tennessee. The total sales made by respondent from these stores are substantial and exceeded \$120,000,000 for the fiscal year ending June 28, 1959. Respondent advertises the products which it sells to create consumer demand and acceptance therefor throughout the states where its stores are located.

PAR. 3. Respondent, in the course and conduct of its business, has engaged and is now engaging in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent for many years has been purchasing the products which it sells in its various chain stores from a large number of suppliers located throughout the United States and respondent causes these products when purchased by it to be transported from the place of manufacture and purchase

*The District Court's order was reversed by the Court of Appeals for the Fifth Circuit on Sept. 14, 1964 [7 S.&D. 1000].

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without the States of Texas, Louisiana and Tennessee to stores or warehouses located within the States of Texas, Louisiana and Tennessee for resale to the consuming public. There is now, and has been for many years, a constant current of trade in commerce in said products between and among the various states of the United States.

PAR. 4. In the course and conduct of its business, as herein described, respondent has been for many years in competition in the sale and distribution of food and grocery products in commerce between and among the States of Texas, Louisiana and Tennessee with other corporations, persons, firms and partnerships.

PAR. 5. In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

PAR. 6. For example, the respondent addressed letters to a large number of its suppliers early in 1958 as follows:

Weingarten's is on the move! Your products are now getting greater distribution through more units, serving more people than at any time in our history.

We are highlighting this progress with our great annual event this year * * * the 57TH ANNIVERSARY SALE. Thirty-nine great big units are taking part, and we are sure that you will want to avail yourself of the opportunity to participate.

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

Many of our suppliers have asked us concerning this event, and we are, therefore, extending to you an opportunity to participate.

The attached sheet shows the prices of participation in the entire promotional program with the difference in prices being due to the different size ads in the various cities which will be included in a newspaper section.

Please mail the attached card indicating your intentions, and we would appreciate it if it would reach us no later than February 3rd, so we may formulate our plans accordingly.

Respondent enclosed a chart containing the following information and indicating that the amount of newspaper advertising which each supplier was purportedly to receive varied depending upon the amount paid by the supplier and the area chosen:

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	Section in Houston area with distribution in Houston, Freeport, Baytown, Texas City	Section in three Sabine area newspapers, including Beaumont, Orange, Port Arthur	Section in Bryan and Galveston	Section in Lake Charles American Press	Section in Shreveport Times-Journal	Total amount in all areas
1/4 page, including entire service.....	215.00	111.05	87.50	56.05	106.01	546.83
1/8 page, including entire service.....	352.35	170.00	141.00	91.15	173.02	881.14
1/4 page, including entire service.....	559.50	318.00	223.00	145.30	279.04	1,448.40
1/2 page, including entire service.....	870.95	608.50	344.00	226.60	438.08	2,343.72
Full page, including entire service.....	1,409.15	1,115.80	555.00	367.20	759.06	3,995.90

A 5% discount is included and already deducted for participation on all sections where our stores are located.

The payment in each case to be made by the supplier was set by the respondent and varied from \$56 to \$3,995. Ninety of respondent's suppliers entered into the arrangements above described with respondent, and as a result agreed to and did pay the respondent a total of \$23,538.

PAR. 7. Typical of the suppliers, the products which they supply and the amounts which they paid the respondent are the following:

Name of Supplier	Location	Product	Amount paid
Max Factor & Co.....	Hollywood, Calif.	Cosmetics.....	\$881.14
Nestle-LeMur Co.....	New York, N.Y.	do.....	881.14
Lanolin Plus, Inc.....	Newark, N.J.	do.....	881.14
Yakima Fruit & Cold Storage Co.....	Yakima, Wash.	Fruit.....	150.00
Shreveport Macaroni Manufacturing Co.....	Shreveport, La.	Macaroni.....	108.00
Ipswich Hosiery Co.....	Manchester, N.H.	Hosiery.....	285.00
Vanity Fair Paper Mills, Inc.....	New Orleans, La.	Paper products....	215.00

PAR. 8. Many of respondent's suppliers, including those listed above, did not offer or otherwise make available similar compensation or things of value or allowance for advertising or other service or facility on proportionally equal terms to those granted the respondent to all other of their customers which were competing with respondent in the sale and distribution of the same supplier's products. Respondent knew or should have known that it was inducing or receiving a payment or allowance for advertising or other service or facility from its suppliers which its suppliers were not offering or otherwise making available on proportionally equal terms to other of such supplier's customers who were competing with respondent in the sale and distribution of such supplier's products.

PAR. 9. The acts and practices of respondent, as hereinbefore alleged, of inducing and receiving special payments or allowances

from its suppliers which were not made available by such suppliers on proportionally equal terms to respondent's competitors are all to the prejudice and injury of competitors of respondent and of the public; have the tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of food, grocery, cosmetic and clothing products and have the tendency to obstruct and restrain, and have obstructed and restrained, commerce in such merchandise and constitute unfair methods of competition in commerce and unfair practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. The amounts of money solicited and received by the respondent from each of its suppliers were paid by such suppliers for advertising to be done by respondent in promoting each such supplier's products during respondent's anniversary sales and Texas Products and Louisiana Products sales in the year 1958 and the years prior thereto. However, it has been the regular and continuous practice of respondent not to use the entire amounts of money received from its suppliers to advertise such suppliers' products during such sales but to divert substantial amounts of such payments to its own use.

For example, during the year 1958, respondent solicited its suppliers and ninety of them paid respondent substantial amounts of money totalling \$23,538 for advertising which respondent was to do on such suppliers' products during its anniversary sale beginning February 24, 1958, and lasting one week. However, respondent did not expend the entire amount of money received from each of its suppliers as an advertising allowance in advertising each such supplier's products during such sale, but diverted substantial amounts of such payments from its suppliers to its own use.

PAR. 11. The aforesaid acts and practices of respondent as herein alleged of inducing and receiving advertising allowances from its suppliers and not expending the entire amount of money received from each such supplier as an advertising allowance in actual advertising of such suppliers' products and of diverting substantial amounts of such money to its own use are all to the prejudice and injury of such suppliers and of competitors of respondent and the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of and in violation of Section 5 of the Federal Trade Commission Act.

Mr. Ernest Oakland for the Commission.

Fulbright, Crooker, Freeman, Bates & Jaworski, by *Mr. Austin C. Wilson*, *Houston, Texas*;

Howrey, Simon, Baker & Murchison, *Washington, D.C.*, by *Mr. Edward F. Howrey*, *Mr. Harold F. Baker*, and *Mr. A. Duncan Whitaker* for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

The Commission's complaint in this matter, issued on January 5, 1960, charges the respondent with violations of Section 5 of the Federal Trade Commission Act in two particulars, the gist of which are:

- (1) Knowingly induced or received promotional allowances from suppliers, and that it knew or should have known that such allowances were violative of Section 2(d) of the Clayton Act, as amended; and
- (2) Not expending the money received from its suppliers for advertising, but diverting substantial amounts thereof to its own use.

The respondent filed its answer, hearings were held at which evidence was received in support of and in opposition to the complaint, proposed findings were submitted and arguments heard. The proposed findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

The respondent challenges the jurisdiction of the Commission.

First, it asserts that it is a live poultry dealer within the meaning of Section 218b of Title 7, U.S.C., and, therefore, subject to the exclusive jurisdiction of the Secretary of Agriculture under the provisions of Section 227 of Title 7, U.S.C., as amended.

Second, it is the position of the respondent that the Commission does not have jurisdiction under Section 5 of the Federal Trade Commission Act to bring this action.

The jurisdictional questions were first raised by the respondent by its motions to dismiss the complaint, which motions were denied by the Hearing Examiner. The respondent filed an interlocutory appeal from such ruling which was denied by the Commission. It is found that the Federal Trade Commission has jurisdiction over the acts and practices of respondent as alleged in the complaint, and the complaint alleges a cause of action under Section 5 of the Federal Trade Commission Act.

Respondent, J. Weingarten, Inc., is a corporation organized under the laws of the State of Texas, and its principal office and place of business is located at 600 Lockwood Drive, Houston, Texas. Respondent is now and for many years has been engaged in the operation of a large chain of retail supermarkets purchasing and reselling all types of food products, drugs, cosmetics, household articles, and clothing.

The respondent's business can be traced back to the year 1901 when Harris Weingarten, a native of Poland, together with his 17-year-old son, opened a small grocery store in Houston, Texas, on \$300 capital. The senior's dry goods business had failed and the money came from

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Mama Weingarten's pinch money savings. Harris got up at 4:30 a.m. to make the rounds of the produce markets and Joe would have the store ready for opening at 6:00 a.m. During the slack hours of the day, Joe visited the homes in the area, going from door to door soliciting orders for the store. First, his brother, Sol, then later about 1914, his youngest brother, Abe, and his sister, Anne, joined their father and brother as partners. That was the start of a business that was to grow to one of the nation's most thriving and progressive super-market enterprises. In 1914, the business was incorporated. In 1920, a second store and a bakery were opened and the company began advertising in local newspapers. From time to time other stores were added. In 1939, it had 13 stores, and during that year the sales totaled \$12,098,282. In 1942, it opened its first store outside of the city of Houston, and in 1954 its first store outside of Texas. As of July 2, 1960, the company operated sixty stores, forty-six in Texas, seven in Louisiana, and seven in Tennessee and employed approximately 5,000 persons. The sales for the fiscal year ended July 2, 1960 amounted to \$137,275,368.

Respondent, in the course and conduct of its business, has engaged and is now engaging in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent for many years has been purchasing the products which it sells in its various chainstores from a large number of suppliers located throughout the United States and respondent causes these products when purchased by it to be transported from the place of manufacture and purchase without the States of Texas, Louisiana and Tennessee to stores or warehouses located within the States of Texas, Louisiana and Tennessee for resale to the consuming public. There is now, and has been for many years, a constant current of trade in commerce in said products between and among the various States of the United States.

In the course and conduct of its business, as herein described, respondent has been for many years in competition in the sale and distribution of the named products in commerce between and among the States of Texas, Louisiana and Tennessee with other corporations, persons, firms and partnerships.

In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such

suppliers competing with respondent in the sale and distribution of such suppliers' products.

The respondent has regularly been an extensive user of all forms of advertising media—newspapers, television, radio, circulars and others. In a speech delivered before the 1954 Annual Meeting of the National Association of Food Chains, an official of Weingarten's had this to say, in part:

According to statistics gained from a recent NAFC clinic, the advertising expenses of the average chain operation today run anywhere from one-half of one per cent to one per cent of sales, after deducting all types of creditable cooperative monies. Where the industry as a whole makes about one per cent to 1.3 per cent of sales after taxes, we can well realize the importance of attempting to hold down advertising costs, while still doing an outstanding job in telling the public about ourselves, our merchandise, and, of course, our prices.

In our organization, we manage to get approximately a little over half of all our advertising dollars expended returned to us in the form of charges to vendors. As you may well imagine, keeping up this rate of return and bettering it, if possible, is a prime responsibility of our advertising people. It is only through the cooperation of our many fine suppliers who show a willingness and desire to work with us and the others in the food industry in our area that we are able to continue our tremendous advertising outlay and still maintain an average net after taxes at the end of the year.

The respondent has in effect standard cooperative advertising agreements with many of its suppliers, which are offered by such suppliers, and such contracts usually contain statements that their benefits are available on proportionately equal terms to the suppliers' other customers. However, this case is concerned about payments made as the result of respondent's solicitation of its suppliers to participate in special promotions. For many years respondent has conducted so-called "Anniversary" and "Texas Products" sales. Since 1954 when respondent established stores in Louisiana, it has held "Louisiana Products" sales. Most all, if not all, of respondent's suppliers are solicited and requested to participate in such sales. Respondent also conducts special promotions in connection with particular divisions of its stores, such as the Drug, and Home Center Departments to which the suppliers of such departments are solicited to participate.

In addition, respondent sponsored radio and television programs to which suppliers were called upon and did make payments, but it would serve no purpose to go into the facts relating thereto. The Hearing Examiner in general will confine himself to the promotional sales during the years 1958 and 1959.

During 1958 respondent conducted its 57th Anniversary Sale (57th AS), 20th Texas & Louisiana Products Sale (20th TLPS), Twelfth Home Center Birthday Sale (12th HCBS), 9th Annual May Health & Beauty Carnival (9th AMHBC), Home Center—Million Dollar Sale

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(HCMDS) and in 1959 its 58th Anniversary Sale (58th AS), 21st Texas & Louisiana Products Sale (21st TLPS), 13th Home Center Birthday Sale (13th HCBS), 10th Annual May Health & Beauty Carnival (10th AMHBC), and Home Center—Million Dollar Sale (HCMDS).

The approximate number of suppliers who were solicited and the number who participated in the said promotions, together with the total amount contributed by them to respondent is summarized as follows:

Promotion	Approximate Number solicited	Participated	Amount
<i>1958</i>			
57th AS.....	350	90	\$23,538.37
20th TLPS.....	325	40	15,744.52
12th HCBS.....	170	71	7,955.10
9th AMHBC.....	37	21	17,939.88
HCMDS.....	(¹)		(?)
<i>1959</i>			
58th AS.....	300	75	21,974.90
21st TLPS.....	275	45	12,271.93
13th HCBS.....	250	42	3,600.00
10th AMHBC.....	37	21	20,791.45
HCMDS.....	(?)	50	3,300.00

¹ Figures incomplete.

Respondent also solicited and received payments from suppliers in return for spot announcement of suppliers' products in the course of one or more of respondent's television and radio programs. In 1959, respondent received \$5,555.84 from 11 of its suppliers in connection with radio programs and \$75,916.45 from 51 of its suppliers in connection with television programs.

Starting the latter part of 1958 and abandoned at the end of 1959, respondent experimented with an in-store closed-circuit television advertising setup known as "Sell-A-Vision". Eighteen television receiving sets were placed throughout one of respondent's stores over which slides were shown and sales messages flashed. In 1959, respondent solicited and received \$4,415.05 from 33 suppliers for their participation in Sell-A-Vision.

The record shows that the respondent collected \$40,339.73 from 26 of its grocery suppliers, and \$20,313.57 from 17 drug suppliers in the year 1958; \$29,684.36 from 20 grocery suppliers, and \$28,935.74 from 17 drug suppliers in the year 1959 on regular advertising contracts.

To induce participation, it was the practice of the respondent to write letters to its supplier weeks prior to the date of the sale. There would be enclosed with the solicitation letter a reply card for the use of the supplier to indicate the extent of his participation. When a supplier was not heard from, the respondent would follow

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up with a reminder message in the form of a letter and telegram. In addition, respondent's buyer and officials would contact a supplier directly to invite participation. A typical solicitation letter used in connection with "Anniversary" and "Product" sales reads.

Weingarten's is on the move! Your products are now getting greater distribution through more units, serving more people than at any time in our history.

We are highlighting this progress with our great annual event this year * * * the 57TH ANNIVERSARY SALE. Thirty-nine great big units are taking part, and we are sure that you will want to avail yourself of the opportunity to participate.

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

Many of our suppliers have asked us concerning this event, and we are, therefore, extending to you an opportunity to participate.

The attached sheet shows the prices of participation in the entire promotional program with the difference in prices being due to the different size ads in the various cities which will be included in a newspaper section.

Please mail the attached card indicating your intentions, and we would appreciate it if it would reach us no later than February 3rd, so we may formulate our plans accordingly.

Thanks very much in advance for your consideration.

Most sincerely,
(Sgd.) Jesse Siegel,
JESSE SIEGEL,
Director of Advertising.

A reminder letter reads:

Gentlemen:

JUST A REMINDER

* * * That we have not heard from you regarding your participation in our forthcoming 57TH ANNIVERSARY SALE.

TIME IS GROWING SHORT:

* * * Will you please contact our buyers or the writer not later than February 3rd, advising us of your commitment.

Sincerely,
(Sgd.) Jesse Siegel,
JESSE SIEGEL,
Director of Advertising.

A reminder telegram reads:

(HOLD FOR DELIVERY UNTIL 2/9/59)

(29 BOOKS ATTACHED)

FEB. 8, 1959.

DEADLINE FOR 58TH ANNIVERSARY SALE ONLY 48 HOURS AWAY.
APPRECIATE HEARING FROM YOU IMMEDIATELY ABOUT YOUR PARTICIPATION.

E. L. JACKSON,
J. WEINGARTEN INC.,
HOUSTON, TEXAS.

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Among the many suppliers who were solicited and who made payments to respondent are: Max Factor & Company, Yakima Fruit & Cold Storage Company, Shreveport Macaroni Manufacturing Company, Inc., Vanity Fair Paper Mills, Inc., Shulton, Inc., Ipswich Hosiery Company, The Nestle-Lemur Company, and Lanolin Plus, Inc.

Max Factor & Company of Hollywood, California, participated in the 57th Anniversary Sale with a payment of \$881.14, the 9th Annual May Health and Beauty Carnival with a payment of \$884.40, and 10th Annual May Health and Beauty Carnival in the amount of \$760.60. During 1958, respondent received additional payments of \$2,024.31 under the terms of a regular cooperative advertising contract with Max Factor. Yakima Fruit & Cold Storage Company of Yakima, Washington, participated in the 54th and 57th Anniversary Sales in the amount of \$192.50 and \$150, respectively. Shreveport Macaroni Manufacturing Company, Inc., of Shreveport, Louisiana, participated in the 57th and 58th Anniversary Sales and 20th and 21st Louisiana Products Sales, making payments of \$106.01, \$106.01, \$106.01, and \$107.51, respectively. Vanity Fair Paper Mills, Inc., with its principal office located at New York, N.Y., participated in the 57th and 58th Anniversary Sales at the 20th and 21st Texas/Louisiana Products Sales, making payments of \$215, \$227, \$215, and \$235.24, respectively. Further, respondent received \$541 in 1958 and \$509.76 in 1959 under its regular cooperative advertising contract with Vanity Fair. Shulton, Inc., of Clifton, New Jersey, participated in the 57th and 58th Anniversary Sales to the extent of \$881.14 and \$1,054, and in the 9th and 10th Beauty Carnivals with payments of \$1,761.30 and \$2,047, respectively. Shulton also paid respondent \$1,332.25 during 1958 and \$1,648.18 during 1959 pursuant to a regular cooperative advertising contract. Ipswich Hosiery Company of Manchester, New Hampshire, participated in the 57th Anniversary, the 12th and 13th Home Center Sales in the amounts of \$285, \$250, and \$300, respectively. The Nestle-Lemur Company of New York, N.Y., participated in the 57th and 58th Anniversary Sales in the amounts of \$881.14 and \$347.38, respectively. Nestle-Lemur also paid respondent \$151 in connection with the Sell-A-Vision promotion. Lanolin Plus, Inc., of Newark, N.J., participated in the 57th and 58th Anniversary, 21st Texas Products, and the 9th Beauty Carnival Sales, paying \$881.14, \$652.59, \$1,292.83, and \$1,093.50, respectively.

Ten witnesses from nine companies competing with the respondent testified with regard to the allowances, if any, received from the eight suppliers heretofore specifically named and their testimony established that the said suppliers did not offer or otherwise make available

payments or allowances for advertising or other services or facilities, on terms proportionately equal to those granted by them to respondent to all others of their customers who were competing with respondent in the sale and distribution of their products.¹

The chief issue with reference to the first charge in the complaint in this case, is whether respondent knew or should have known that it was receiving unlawful allowances from some of its suppliers. A similar issue was involved in three recent cases before the Federal Trade Commission, which serve as a guiding post in disposing of the controversy here. The cases are *American News Company* (Docket 7396), *The Grand Union Company* (Docket 6973), and *Giant Food, Inc.* (Docket 6459) where the Commission rejected arguments similar to those advanced by respondent in this proceeding.

In *Grand Union*, the Hearing Examiner in the initial decision said:

* * * The facts must be interpreted in the light of the fact that respondent was not a mere passive recipient of normal advertising allowances, but was an instigator and co-originator of the sign project and, as such, must have been aware that it involved a specially "tailored", negotiated program which it would be very difficult to make generally available on a proportionally equal basis to its competitors. *Atalanta Training Corp.*, Docket No. 6464, December 20, 1956.

The Commission adopted the initial decision and said in part:

Respondent also argues that there is no evidence that it knew or should have known that such payments by its suppliers were not made available to its competitors on proportionally equal terms. The record shows, first of all, that payments made to respondent by certain of its suppliers had not been proportionalized. The record also shows that respondent was not a passive recipient of these discriminatory payments but that it had, in fact, solicited them. Respondent, and not the suppliers, originated the plan under which the payments were made and in most instances respondent approached the supplier with the plan * * *.

¹ On January 5, 1960, the date the complaint was issued herein, the Commission initiated proceedings, charging violation of subsection (d) of Section 2 of the Clayton Act, as amended, against eight of the suppliers involved in this matter, to wit: *Max Factor & Company* (Docket 7717), *Yakima Fruit & Cold Storage Company* (Docket 7718), *Shreveport Macaroni Manufacturing Company, Inc.* (Docket 7719), *Vanity Fair Paper Mills, Inc.* (Docket 7720), *Shulton, Inc.* (Docket 7721), *Ipswich Hosiery Company* (Docket 7715), *The Nestle-Lemur Company* (Docket 7716), and *Lanolin Plus, Inc.* (Docket 7722). All of the mentioned cases were assigned to this Hearing Examiner. The first five named contested the charges after which the Hearing Examiner issued initial decisions finding violations of the complaint. With the exception of the *Yakima* case, where the Commission adopted the Hearing Examiner's initial decision, appeals have been taken to the Commission. In the *Shulton*, *Shreveport*, and *Vanity Fair* cases, the appeals have been denied and the Commission has adopted the initial decisions of the Hearing Examiner. In the *Shulton* case, a petition to review the order has been filed in the U.S. Court of Appeals (7th Cir.), where it remains pending. The *Max Factor* appeal has not been disposed of by the Commission. By a consent agreement, a cease and desist order has been issued against *Ipswich Hosiery Company*. The charges of the complaints in respect to *Nestle-Lemur* and *Lanolin Plus* remain pending.

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* * * It also knew that certain of its suppliers had promotional allowance programs which were available to their customers. Respondent also knew that, in general, the arrangements for participation in the sign program were not negotiated as part of such announced advertising allowance programs. It also knew that, with one exception, the arrangement was a specially tailored or negotiated deal outside of the supplier's generally announced program. The record also shows that in some instances respondent received from the supplier an allowance under the supplier's generally announced advertising program in addition to the benefits which it received from the sign deal. We think that these circumstances should have at least "provoked inquiry in the mind of a prudent businessman," *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 66 (1952), and that respondent should have inquired whether the participating suppliers were proportionalizing the payments made under the sign arrangement.

On affirming the decision of the Commission, the U.S. Court of Appeals (2d Cir., February 7, 1962) said:

Of course there are unique problems in the application of § 5 of the Federal Trade Commission Act to the buyer who engages in a transaction outlawed by § 2(d) of the Clayton Act. Section 2(d) does not outlaw all payments by sellers for services or facilities rendered by their customers; it declares unlawful only those which are not offered on a proportional basis to all customers. Unlike the seller, the buyer has no control over those payments—he cannot insure that they are "proportionalized." It may be difficult even to find out whether the seller is making proportionally equal allowances available. The data are often in seller's files; and even if information is publicly available, it may be difficult to make the subtle assessments necessary to determine "proportionality." It would be a harsh burden to hold that any buyer who induces or receives a payment later found to be disproportionate has engaged thereby in unfair competition. The Commission in this case has correctly limited the complaint to "knowing receipt or inducement" of disproportionate payments; and the record supports its finding that Grand Union knew, or in the exercise of reasonable care should have known, that the payments received had not been made proportionally available to its customers. Cf. *Automatic Canteen Co. of America v. F.T.C.*, *supra*, 346 U.S. 61.

In *American News Company* in the opinion of the Commission, it is said:

A buyer who induces a seller to depart from his customary pattern of allowances and grant a promotional payment two or three times greater than previously paid does so at his peril unless possessed of particular knowledge that the seller has granted like concessions to others similarly situated.

In affirming the decision of the Commission, the U.S. Court of Appeals (2d Cir., February 7, 1962) had this to say:

The test of whether a buyer has knowledge that payments he induces and receives are illegal was laid down for cases brought under § 2(f) by the Supreme Court in *Automatic Canteen Co. of America v. F.T.C.*, 346 U.S. 61. By analogy this test is applicable in these § 5 proceedings. See *Grand Union Co. v. F.T.C.*, *supra*. Although knowledge must be proved, it need not be by direct evidence; circumstantial evidence, permitting the inference that peti-

tioners knew, or in the exercise of normal care would have known, of the disproportionality of the payments is sufficient.

The Court further said:

Petitioners contend that the order places undue burdens on them by forbidding inducement and receipt of payments when they know, or *should know*, that proportional payments are not "*affirmatively offered* or otherwise made available" to their competitors. They attack specifically the provisions we have italicized. There is nothing in the Supreme Court's opinion in *Automatic Canteen Co. of America v. F.T.C.*, *supra*, 346 U.S. 61, which precludes the imposition of a duty of reasonable inquiry upon a buyer. Indeed, that opinion stated that the Commission might find knowledge under § 2(f) that payments induced and received were not cost-justified (the issue there) *if it showed two things*: first, that the buyer knew of a price differential, and second, that one familiar with the trade should know that such a differential could not be cost-justified. *Automatic Canteen Co. of America v. F.T.C.*, *supra*, 346 U.S. 61, 81. Nor can there be any objection to including the term "*affirmatively offered*." Petitioners seem to feel that this provision makes the order more onerous and imposes a requirement on sellers not called for by § 2(d). Whatever may be the merits of petitioners' contention that § 2(d) imposes no duty of affirmative offering on sellers, inclusion of this provision cannot prejudice the buyer. As the order now reads, this clause does not change what sellers must do, but simply defines the obligation of the buyer to learn whether payments are "*proportionalized*." If he is apprised of sufficient information about payments which he induces and receives to create a duty of further inquiry, the buyer, under this order, must see first if the payments are affirmatively offered to his competitors on a proportionally equal basis; if not, the order indicates he may have a further duty to see whether they are "*otherwise made available*."

Many of respondent's suppliers offer to their customers regular cooperative advertising programs. Payments under such contracts are generally based upon and related to the quantities of purchases. Respondent was aware that the regular cooperative advertising contracts which it and its competitors maintained with suppliers were designed to be offered generally to the trade. For example, many of the suppliers' contracts with respondent, in an obvious effort to comply with the requirements of the Robinson-Patman Act, include passages such as these:

The allowance(s) provided in this contract is available on proportionally equal terms to all competing customers of the Company who purchased the product(s) listed.

This same precise agreement is offered to all customers of O-Cedar on a proportionally equal basis, in the same trading area * * *

This agreement is available on proportionally equal terms to all competing customers of Lustre-Creme products.

The payments which respondent induced and received, the subject of this controversy, were outside of any regular advertising contract it had with its suppliers, and the requests for such payments were unrelated to any amount of merchandise purchased from a supplier.

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The situation was such that a supplier, even if he wanted to make similar payments to the competitors of respondent, would find it most difficult, if at all possible, to determine what payments would be proportionally equal to those made to the respondent. The situation is indicated by excerpts from letters received by the respondent from suppliers who were solicited and refused to make the payments requested:

We receive a great number of requests to participate in special events, and some years ago we decided upon a policy of nonparticipation in all special requests in order to make sure that we did not discriminate.

Since our company cannot accept each of the many offers to participate in customer promotions throughout the country, nor only some of the offers without showing discrimination, it has been our policy to decline participation in all of these promotions.

By letters received by respondent from participating suppliers, it was informed or put upon notice that the payments which it solicited were not being offered to competing customers on proportionally equal terms. For example:

Maybe you have heard us mention before that the cost of our Century cast iron cookware contains no cushion for cooperative advertising, special promotion discounts, etc. * * *.

Nevertheless, Mr. Stabile, you people have done a wonderful job with our Century line of cast iron cookware to our mutual benefit, so a special request is being processed so that a credit memorandum for \$100 will be issued to your account.

The following year, respondent solicited the same supplier again, receiving this response:

Maybe old Walter Todd has told you before that our prices on Century cast iron cookware just do not include any cushion for advertising allowance, full freight allowance, special discounts, etc., which makes us helpless to offer any rebate for those things.

But, the very excellent job you have done for both of us tells me in no uncertain terms that this Million Dollar Sale you are planning for the Christmas season will be quite successful. So, we are glad to arrange for an exception so that we might participate with you folks.

A credit memo in the amount of \$100 will be issued right away.

Another supplier said:

We have your letter requesting that we might allow you \$100.00 for your Anniversary Sale and although we do not have a standard set-up for this sort of thing, we try to do it on a personal basis with our good accounts such as you, that have had such a good record with us.

We are happy to advise that we will allow this \$100.00 credit for this particular use.

Many of the suppliers advised respondent of the preferential nature of the payments being requested, but respondent persisted in soliciting the same suppliers. A typical situation is where Gold Seal Co. informed respondent in October 1958 that it had a "firm policy" preventing its participation in the 20th Texas Products Sale. Solicited shortly thereafter for the 58th Anniversary Sale, Gold Seal refused again, stating:

Our Company has a very firm policy of not tying in with any of these special sales because we receive so many requests each and every week for co-operation.

Undaunted, respondent made another effort in connection with its 21st Texas Products Sale.

In January of 1958, respondent was forwarded a letter written by National Oats Company's vice president to its broker, explaining its refusal to participate in the 57th Anniversary Sale:

Perhaps by next year the legal status of such activities will be settled, and then we can decide whether we should or should not participate. This type of activity is still under active investigation by the authorities in Washington, however, and so at least for the time being you will just have to give Nathan Finkelstein our regrets, at the same time explaining why.

Respondent nevertheless solicited National Oats a few months later for the 20th Texas Products Sale, and was once again forwarded a letter between the same parties. It stated in part:

In view of the Federal Trade Commission's investigation, which to our knowledge has not been dropped as yet, we still question the wisdom of going into any of the Weingarten promotions.

* * * * *

With all this in mind we ask that you explain our position to Nathan Finkelstein. We would probably risk going into their next Anniversary Sale if you felt it absolutely necessary, though because of the Federal Trade Commission's attitude toward Weingarten's activities we would prefer not to.

Respondent apparently "felt it absolutely necessary": it solicited National Oats twice in the year following the receipt of the second letter.

The respondent seems to take the position that notwithstanding all the facts it knew, which suggested probable illegality, it should be permitted to ignore them and rely instead upon a presumption that its suppliers, in making the payments, were acting within the law. In support of its position, respondent relies heavily upon *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1952). The decision therein does not support this contention. The Supreme Court, in discussing the point, stated that "trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution." The respondent was apprised of suffi-

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cient information about payments which it induced and received to impose on it a duty of making reasonable inquiry if the payments were affirmatively offered or otherwise made available to its competitors on a proportionally equal basis. This it failed to do.

The acts and practices of respondent, as hereinbefore found, of inducing and receiving special payments or allowances from its suppliers which were not made available by such suppliers on proportionally equal terms to respondent's competitors are all to the prejudice and injury of competitors of respondent and of the public; have the tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of food, grocery, cosmetic and clothing products and have the tendency to obstruct and restrain, and have obstructed and restrained, commerce in such merchandise and constitute unfair methods of competition in commerce and unfair practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Consideration will now be given to the second charge of the complaint which reads:

PARAGRAPH TEN: The amounts of money solicited and received by the respondent from each of its suppliers were paid by such suppliers for advertising to be done by respondent in promoting each supplier's products during respondent's anniversary sales and Texas Products and Louisiana Products sales in the year 1958 and the years prior thereto. However, it has been the regular and continuous practice of respondent not to use the entire amounts of money received from its suppliers to advertise such supplier's products during such sales but to divert substantial amounts of such payments to its own use.

The respondent in its proposed findings takes the position that the allegations contained in paragraph 10 of the complaint should not be construed as stating a separate and distinct cause of action, but should be construed as merely supplementary to the major charge of the complaint contained in paragraph 9. There is no merit to the contention, and it is inconsistent with the position taken by the respondent all through the hearings. At a prehearing conference herein, counsel for respondent made this statement:

Let me say first, this proceeding is in many respects the same type of proceeding as I understand is presently at the Examiner's decision level in the Giant Food Stores matter.

Basically, the Commission has two complaints. One, they complain that we knowingly induced or received special allowances or payments or services from suppliers that the suppliers did not make proportionately available to other people in the business and, secondly, that we received monies over and above what we spent for the benefit of the particular suppliers. That is in substance the essence of the complaint.

In the Giant case (Docket 6459) referred to by counsel, the Hearing Examiner and the Commission construed the complaint, which is similar to the complaint herein, as stating two separate and distinct charges.

It seems to be the contention of counsel supporting the complaint that respondent was required to expend in newspaper advertising the entire amount received from a participating supplier in advertising such supplier's products. The record herein establishes that participation in respondent's sales was requested and received upon an express agreement that the services to be performed by respondent consisted of an entire promotional service including, but not limited to, newspaper advertising. A typical solicitation letter sent to a supplier, heretofore quoted, requested the payment for an entire promotional program. To repeat a portion of the letter:

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

* * * * *

The attached sheet shows the prices of participation in the entire promotional program * * *.

The attached sheet referred to in the above letter shows the varying costs of participation in the sale depending upon the geographical area where newspaper advertising is to be given and the size of such advertisements. The sheet states that these costs are for the "Entire Service Which Includes" approximately so much of page of advertising.

Attached to such a letter was a reply card for the convenience of those suppliers desiring to participate, which reads in part:

We will be happy to participate in Weingarten's forthcoming ANNIVERSARY SALE. Please count on us for this overall promotion including
Page in * * *

In view of the concise, direct and wholly unambiguous language contained in these solicitation materials, it must be concluded that each supplier was informed and did in fact understand that its payments were to be used to defray the costs of an entire promotional program, not merely the cost of the newspaper lineage, or the cost of any other single type of promotion.

Respondent's vice president in charge of sales described in detail the services and benefits received by a participating supplier:

A. Well, he receives the benefits of the entire sale which encompasses newspaper advertising, radio, display at store levels, supervision of the prod-

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ucts, in-store promotion that entail in making a sale, institutional advantage of being with the sale and the institutional copy we may use in connection with the sale, proper regard to his distribution of merchandise, and display of merchandise. That basically is it.

Q. Anything else?

A. Oh, there are probably other items, too.

Q. What are the other items?

A. All the different facets of the personnel of the company by-products of their job, the buyers and the supervisors might do in a store in connection with the sale, the working of the people, the training of the people and how to work on his particular product, working with warehouse functions to see that the product is well distributed; the by-products of the supervisory people.

In the opinion of the Commission in the Giant case, it is stated:

Although Section 2(d) of the amended Clayton Act does not authorize payments for services grossly in excess of their cost or value, neither does it prohibit a seller from compensating his buyers for any type of service provided its other standards are met, including a reasonable relationship between the payments and the services being rendered. Cf. *Lever Brothers Company*, 50 F.T.C. 491, 511-12 (1953).

The record herein does not establish that payments received by the respondent were in excess of the value of the services rendered by it. Evidence was submitted with reference to the 54th Anniversary, the 57th Anniversary, and 20th Texas Products Sales, and in each instance the respondent's direct newspaper, radio and television advertising costs, alone, were considerably more than the amounts paid by the participating suppliers. The total cost of newspaper advertising for the 54th Anniversary Sale was \$44,260, and for television and radio \$3,523, whereas total receipts from suppliers amounted to \$39,539.28. The cost of newspaper advertising for the 57th Anniversary Sale was \$40,391.42, and for television and radio \$3,978.80, whereas receipts from suppliers were \$23,538.37. The cost for newspaper advertising was \$33,736.12, and television and radio was \$9,720.32 for the 20th Texas Products Sale, whereas the receipts from suppliers were \$15,744.52. Respondent's special sales are programmed three months in advance and entail much work by various company personnel, including the advertising department, in advance of the actual period of the sale. The respondent offered tabulations based upon its records, which appear to be reliable and on the conservative side, showing the expenses of the advertising department attributable to the 54th Anniversary, 57th Anniversary, and 20th Texas Products Sales were, respectively, \$6,123, \$8,025 and \$8,055. There were other obvious expenses directly attributable to the conduct of the sales, but no attempt was made to determine the precise cost to respondent, since the total expenditures by respondent for the newspaper, radio and television advertising and for the services of its advertising depart-

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ment directly attributable to the sales greatly exceeded the payments from participating suppliers.

ORDER

For the reasons hereinbefore stated,

It is ordered, That J. Weingarten, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing, receiving or contracting for the receipt of anything of value from any supplier as compensation or in consideration for services or facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondent knows or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent in the sale and distribution of such supplier's products.

It is further ordered, That the allegations contained in paragraphs 10 and 11 of the complaint be, and they hereby are, dismissed.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

This proceeding was commenced by the issuance of a complaint on January 5, 1960, charging that the respondent retail grocery corporation had violated Section 5 of the Federal Trade Commission Act by knowingly inducing or receiving discriminatory promotional allowances from its suppliers. Adjudicative hearings were held before a hearing examiner who, on May 3, 1962, entered an initial decision finding the allegations of the complaint to have been substantially proven and ordering respondent to cease and desist from prescribed activities.

Respondent appealed to the Commission, pleading that the findings and conclusion of the examiner were not supported by reliable, probative and substantial evidence and that the initial decision does not comply with the requirements of Section 8(b) of the Administrative

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Procedure Act in that it fails to make factual findings to support its general conclusions. The matter was considered by the Commission on the briefs of the parties and on oral argument heard October 23, 1962. On March 25, 1963, the Commission issued an order vacating the initial decision and remanding the matter to the hearing examiner for the expeditious reception of additional evidence. Two of the four Commissioners participating in the decision of the appeal announced their reasons for the remand in an opinion accompanying the order [62 F.T.C. 1521].

On April 29, 1963, respondent filed a complaint against the Commission in the United States District Court for the Eastern District of Texas, Beaumont Division,* seeking a declaratory judgement and injunctive relief barring the Commission from any further action in the instant proceeding other than dismissal and, on May 10, 1963, filed an amendment to the complaint seeking, after final hearing, an order in the nature of a writ of mandamus requiring dismissal of the administrative complaint. On July 11, 1963, the District Court entered an Order, together with Findings of Fact and Conclusions of Law, requiring *inter alia* as follows:

“a. Defendants, their agents, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined from remanding the case of J. Weingarten, Inc., FTC Docket No. 7714, to said Hearing Examiner or other hearing officer or from holding any hearings or other proceedings or from taking any further action of any kind, directly or indirectly, under and by virtue of said order and opinion of remand.

“b. Within ninety (90) days from May 15, 1963, defendant Federal Trade Commission and defendants Dixon, Anderson, Elman, MacIntyre and Higginbotham make and issue a final order, disposing of said case before the Federal Trade Commission.”

On July 16, 1963, the District Court denied the Commission's motion for a stay pending appeal. On July 24, 1963, a notice of appeal was filed in the District Court. On or about July 26, 1963, motions for a stay of the District Court order pending appeal and for expedition of the appeal in the United States Court of Appeals for the Fifth Circuit were filed. The Court has not rendered a decision on these motions.

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SAVOY WATCH CO., INC., ET AL.

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Under the circumstances, and solely for the purpose of complying