

Complaint

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IN THE MATTER OF

JOSEPH A. KAPLAN & SONS, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS.
2 (a), (d) AND (e) OF THE CLAYTON ACT

Docket 7813. Complaint, Mar. 10, 1960—Decision, Nov. 15, 1963

Order requiring a Yonkers, N. Y., manufacturer of shower curtains, shower curtain sets and accessories under the trade name of "Jakson", to cease discriminating in price in various ways in its favored treatment of, among others, some 26 large retail customers which were the stockholders of a corporate wholesaler they organized in 1946—soon after the Commission issued a desist order against their knowingly inducing and receiving discriminations in price through a corporate agency created by them for such purpose, *Associated Merchandising Corp. (AMC) et al.*, Docket 5027, 40 F.T.C. 578—for the purpose of providing special prices to them; respondent's price discriminations including charging differences in cost of as much as 18 percent in favor of AMC stores and regularly favoring the AMC stores with markdown allowances resulting in lower net prices which were not made to AMC's competitors, in violation of Sec. 2(a) of the Clayton Act; negotiating with AMC and other customers on an individual basis in granting advertising allowances on close-out sales while not making such allowances to competing stores, in violation of Sec. 2(d); and accepting the return of merchandise from some of its customers but not all, thus providing those favored with a service not provided others, in violation of Sec. 2(e).

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13) hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Joseph A. Kaplan & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with office and place of business located at 1 Jakson Place, Yonkers, New York.

PAR. 2. Respondent Joseph A. Kaplan & Sons, Inc., is now, and for many years has been, engaged in the business of manufacturing, selling and distributing shower curtains, shower curtain sets and accessories under the trade name "Jakson".

Said products are now and have been manufactured from various materials including rubber, cotton and plastics.

Respondent is one of the leaders in the industry. Its sales of said products amount to approximately \$2,500,000 annually.

PAR. 3. Respondent manufactures its products in Yonkers, New York, from which point the products are shipped to purchasers located in various cities and states of the United States.

Respondent sells said products for use, consumption or resale within the United States, and, when said products are sold, respondent ships or causes the products to be shipped to purchasers thereof located in states other than the state wherein said products are manufactured. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products among and between the various states of the United States and the District of Columbia.

PAR. 4. Respondent, in the course and conduct of its business as aforesaid, is now and for many years has been engaged in active and substantial competition with others engaged in the manufacture, sale and distribution of products of like grade and quality in commerce between and among the various states of the United States and in the District of Columbia.

Many of the purchasers of respondent's products are competitively engaged with each other and with customers of respondent's competitors in the resale of shower curtains and shower curtain sets. Among said purchasers are retailers such as specialty shops, variety and department stores.

PAR. 5. Respondent, in the course and conduct of its business as aforesaid, has been and is now, directly or indirectly, discriminating in price between different purchasers of its products of like grade and quality by selling said products to some purchasers at higher prices than those charged competing purchasers.

PAR. 6. Illustrative of, but not limited to the method or methods by which respondent has discriminated, and is now discriminating in price as referred to in Paragraph Five, and illustrative of, but not limited to the times and trading areas involved in such discriminations is the following:

For many years past, and specifically during the period from 1958 to date, and in many areas including but not limited to Boston, Massachusetts, Stamford, Connecticut and Philadelphia, Pennsylvania, respondent sold and is now selling products of like grade and quality to purchasers who compete with the purchasers receiving the favored prices. The favored purchasers are billed by, and submit

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payments to, respondent through an intermediary corporation owned and controlled by said purchasers. Said intermediary is sometimes hereinafter referred to as the "buying agency".

In return for the price advantages granted said favored purchasers, respondent seeks and obtains, through the buying agency or otherwise, all or substantially all of said purchasers' business in shower curtains and shower curtain sets. In addition, respondent's products are displayed and sold exclusively, or substantially so, in the most advantageous sales space in said purchasers' stores, namely, the housewares departments.

PAR. 7. The effect of such discriminations in price made by respondent, as alleged in Paragraphs Five and Six, may be to substantially lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and its favored purchasers are respectively engaged, or to injure, destroy, or prevent competition with the respondent, its purchasers who receive the benefits of such discriminations, or with customers of either of them.

PAR. 8. The aforesaid acts and practices of respondent constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

COUNT II

PAR. 1. Paragraphs One through Three of COUNT I are hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 2. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution of its products.

PAR. 3. Included among and illustrative of the payments alleged in Paragraph Two of COUNT II, were payments, or credits paid by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services or facilities, including newspaper and magazine advertising, furnished by customers in connection with the offering for sale or sale of respondent's products.

During the time and in the areas as alleged in Paragraph Six, COUNT I, respondent offered to pay and paid, some customers varying percentages of the cost of promotional services or facilities fur-

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nished by such customers in promoting the sale of respondent's products.

The respondent did not offer, or otherwise make such allowances available, or did not make the allowances available in proportionally equal terms to all customers competing in the sale or offering for sale of respondent's products.

PAR. 4. The acts and practices of respondent as alleged above violate subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

COUNT III

PAR. 1. Paragraphs One through Three of COUNT I are hereby adopted and made part of this COUNT as fully as if herein set out verbatim.

PAR. 2. In the course and conduct of its business in commerce, and during the time and in the areas as alleged in Paragraph Six of COUNT I, respondent discriminated in favor of some purchasers against other purchasers of its products bought for resale by contracting to furnish or furnishing, or by contributing to the furnishing of services or facilities connected with the handling, sale or offering for sale of such products so purchased upon terms not accorded to all competing purchasers on proportionally equal terms.

PAR. 3. Included among and illustrative of the services or facilities furnished some customers, as alleged in Paragraph Two of COUNT III, is that of accepting the return for credit of unsold Jakson products.

This service consists of periodically accepting, from some purchasers, the return of unsold merchandise thereby enabling said favored purchasers to maintain and display a more readily saleable, fresh and newly styled stock of respondent's shower curtains and shower curtain sets.

PAR. 4. During the same period of time, respondent sold its products to retailers competing with said favored purchasers and has not furnished or offered to furnish the services or facilities as set forth in Paragraph Three of COUNT III herein, to said nonfavored retailers on proportionally equal terms.

PAR. 5. The acts and practices of respondent as alleged above violate subsection (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Mr. Peter J. Dias, supporting the complaint.

Mr. Gilbert H. Weil, New York, N.Y., for the respondent.

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INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

MAY 21, 1962

The Federal Trade Commission issued its complaint charging Joseph A. Kaplan & Sons, Inc., the respondent herein, with violations of the provisions of subsections (a), (d), and (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13). Respondent, in its answer, denied the violations charged. Pursuant to notice, hearings were held in New York, New York, Philadelphia, Pennsylvania, and Boston, Massachusetts, where extensive testimony was given and many exhibits received in evidence. Proposed findings and briefs have been submitted by the parties, and oral argument held thereon. Upon the record thus constituted, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Joseph A. Kaplan & Sons, Inc., hereinafter sometimes referred to as Kaplan, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with office and place of business located at 1 Jakson Place, Yonkers, New York.

2. Respondent is now, and for many years has been, engaged in the business of manufacturing, selling, and distributing shower curtains, shower curtain sets, and accessories under the trade name "Jakson." Said products are now, and have been, manufactured from various materials, including cotton and plastic. Respondent is one of the leaders in the industry. Its sales of said products amount to approximately \$2,500,000 annually.

Respondent's products, although classified in certain price lines, are identifiable and catalogued by pattern as well. Patterns have a considerable effect upon the sales appeal and the consumer acceptance of the product. These products are considered to have style and fashion attributes.

3. Respondent sells said products for use, consumption, or resale within the United States and ships, or causes the products to be shipped, from Yonkers, New York, its manufacturing point, to purchasers located in other states. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products among and between the various states of the United States and the District of Columbia.

4. Many of the purchasers of respondent's products, referred to above, are competitively engaged with each other in the resale of those products.

5. Among the purchasers to whom sales and shipments of respondent's products were made in 1958 and 1959 were Bloomingdale's in Stamford, Connecticut, Filene's in Boston, Massachusetts, and Strawbridge & Clothier in Philadelphia, Pennsylvania.

6. The three stores referred to in Finding No. 5, above, are three of 26 retail department stores located in various States of the United States which together wholly own a subsidiary corporation known as Associated Merchandising Corporation, hereinafter referred to as AMC, located at 1440 Broadway, New York City. Each of these 26 stores owns one share of Class A voting stock and a certain quantity of Class B non-voting common stock. The voting stock is held by each stockholding store in the name of a nominee. The record is silent as to the amount of Class B non-voting stock each store owns. The brief of the respondent advises, however, that such stock is distributed among the stores on the relative basis of each store's volume of retail sales at the time it first became a shareholder.

7. The shareholding stores of AMC paid for their shareholdings at the time they became shareholders. AMC operates on an expense budget, the monies for which are received from the stores on a service charge formula, which is based on sales made by the stores. While there are 26 stockholding stores, the service charge is computed on the basis of 27 stores, since two of the stores are treated separately for service charge purposes, but as one for stockholding purposes. The service charge is paid by the stores in monthly installments.

8. The directors of AMC are chosen by the Class A stockholders from among the Class A stockholders. Each director of AMC is also an officer or director of the respective stockholding store. The officers of AMC are chosen by the directors of AMC and are in no other way connected with or related to the stockholders of AMC.

9. AMC's principal functions are: researching operating problems found in department stores such as receiving, marketing, display and fixturing, publicity, personnel problems, electronic methods; merchandising services by representatives who constantly scout the market for new and exciting merchandise and communicate their findings to the stores. Occasionally, AMC will buy as an agent at the direct request of a store, but that is not its prime function. AMC does not purchase any merchandise from respondent.

AMC's operating level parallels that of a department store. Thus, there are AMC merchandise representatives who are counterparts to store buyers, and who consult with store buyers to determine their desires and advise the buyers as to sources of supply for desirable merchandise at the most favorable price. This AMC merchandise representative works on a so-called "steering committee," consisting

of himself, store buyers, and, occasionally, a divisional manager from the store as well. This committee assesses and determines what the market seems to be for their items or classifications of merchandise. Since these committees do not have the buyers from all the stores, they pass on the information which they have developed to all the other stockholding stores.

10. In or about 1946, AMC founded a wholly owned subsidiary corporation, the Aimcee Wholesale Corporation, hereinafter referred to as AWC. AWC's offices are located at the same address as the parent corporation, 1440 Broadway, New York City, and AWC also maintains a warehouse located at 469-10th Avenue in the same city. Prior to 1946, respondent dealt directly with AMC, knowing it was owned by certain retail stores, and granted it a quantity discount. In 1946, respondent was told by the housewares buyer of AMC that AMC had formed a wholly-owned subsidiary corporation, AWC, which would function as a wholesaler, reselling to retailers. Respondent, having at that time one customer classified as a jobber, agreed to afford AWC a similar pricing arrangement.

11. In 1946, the Executive Committee of AMC passed the following resolution:

Upon Motion duly made, seconded and unanimously carried, it was

RESOLVED: That the Associated Merchandising Corporation be and hereby is authorized to and does guarantee the payment of any and all obligations of the Aimcee Wholesale Corporation; and it is

FURTHER RESOLVED: That any duly elected officer of the Associated Merchandising Corporation be and hereby is authorized to certify to any person, firm or corporation and to execute any and all papers required to be executed in connection with effecting the guaranty of the payment of any and all obligations of the Aimcee Wholesale Corporation.

This resolution has never been rescinded.

12. Kaplan's price lists contain two columns of prices, one entitled "cost" and the other "retail." The former is Kaplan's price to dealers, and the latter is Kaplan's suggested retail price which is referred to as "list price." Pursuant to negotiations between Kaplan and the AMC buyer, it was agreed that the price to AWC would be "list price" less a discount, except for Aquafaille, for which there was a specially negotiated price. During 1958 and 1959 and up to this time, AWC was and is the only Kaplan account classified as a jobber, all others, except one not relevant here, being retailers.

13. AWC sells not only to stores which are stockholders of AMC, but also to other stores. Of more than 100 stores which are customers of AWC, only 26 are stockholders of AMC. In 1958, however, 98.8 per cent of AWC's sales of Jakson products were made to AMC stores, and, in 1959, 98.6 per cent of such sales. In those two years, AWC sold from .8 to 1 per cent to various units of Fedway Stores.

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Fedway Stores is one of ten divisions of Federated Department Stores, Inc., all the other nine being AMC stockholder stores. Many of the officials of Federated Department Stores, Inc., are directors of AMC. AWC's average sales of Jakson products during both 1958 and 1959 to AMC stockholder stores alone amounted to 98.7 per cent of total sales, and combined with sales to the Fedway Stores, amounted to 99.6 per cent of the AWC's total sales for the two-year period.

14. The officers of AMC and AWC during 1958 and 1959 were as follows:

AMC

Joseph P. Kasper, Pres.
John C. Oram, Vice Pres.
Chas. G. Taylor, Vice Pres.
Lewis B. Sappington, Vice Pres.
Richard G. Tinnerhold,
Sec'y-Treasr.

AWC

Joseph P. Kasper, Pres.
John C. Oram, Vice Pres.
Chas. G. Taylor, Vice Pres.
Norman Tarnoff, Vice Pres.
Richard G. Tinnerhold,
Vice Pres. and Treasr.
Leo A. Nunnink, Sec'y

The officers of AWC, with the exceptions of Tarnoff and Nunnink, were also its directors during the same years. During the same years, Mr. Nunnink was also controller of AMC and AWC.

15. In the conduct of its affairs during 1958 and 1959, AWC employed, among some 200 other personnel, six salesmen who travelled throughout the country calling on AMC stockholder stores as well as other stores. AWC also contracts with AMC for the services of AMC's merchandise representatives (Finding No. 9 above) and AWC pays AMC for such services. These personnel are used for the procurement functions of AWC. One such is Mr. Hodges, AMC's home furnishings division manager, which division is responsible for the purchase of shower curtains.

16. AWC places its own order for Jakson products on its own order form, called Form 500. A typical Form 500 would read as follows:

Aimcee Wholesale Corporation
Shipping Instructions: Shipping instructions on drop shipments
to follow.
To: Joseph A. Kaplan, Yonkers, New York.
Shipping date: 12/1/59.
Cancelled: 2/28/60.
Assorted styles and colors of Koroseal and taffeta shower curtains, drapes and ensembles as detailed on 502 shipping
authorizations or direct store orders..... \$100,000.00
List Price less 50% (except Aquafaille which is \$2.81).
Signed:..... Signed:.....
(Merchandise Representative) (Merchandise Officer)

AWC places its orders with respondent before receiving orders for such merchandise from its customers, although efforts are made by

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AWC to predict their behavior based upon previous business. No store customer of AWC, whether stockholder of AMC or otherwise, was under a direction or instruction by its management or otherwise to purchase respondent's merchandise from AWC.

17. Retail stores customarily select the shower curtain lines which they will handle in particular seasons at the housewares show which is held twice a year. At such times, AWC representatives attempt to sell the merchandise which it has purchased from respondent. AWC customers, however, consider the merchandise of the respondent as well as competitive merchandise from suppliers other than AWC, and make their own decisions of what merchandise they wish to buy. If the decision is to buy Kaplan merchandise, the store will generally place an opening order with AWC and, subsequently, sometimes, fill-in orders. Upon receipt of such orders, AWC issues shipping instructions to respondent against the Forms 500 previously executed. Respondent then drop ships the merchandise to the customer store, AWC never taking physical possession of the goods or warehousing it.

In addition, the AMC stores buy a small quantity of Jakson merchandise directly from Kaplan without going through AWC. Such purchases are usually for special sizes, small amounts, or close-out merchandise.

18. Sales of goods of like grade and quality as those sold to the AMC stores were made by Kaplan to other retailers, at or about the same time, in the trade areas where the AMC stores were located, such retailers being in competition with the AMC stores.

Prices

19. During 1958 and 1959, Kaplan charged retailing purchasers the price contained in the "cost" column of its price list. The price charged AWC was the so-called "list price" less a fixed discount, which resulted in cost differences between AWC and retailers of as much as 18 per cent in favor of AWC. In the case of Aquafaille, the cost difference ranged from 5 to 15 percent in favor of AWC. AWC, in turn, sold such merchandise, except for Aquafaille, to its customer stores at a mark-up of 5 per cent over its cost. The resultant cost to the AMC stores was still as much as 13 per cent below Kaplan's charge to other retailers. When the AMC store bought directly from respondent, its cost was the same as that paid by all retailers, or the "cost column" price.

Competitive Injury

20. The record contains no evidence regarding primary line injury; that is, injury to the competitors of the respondent.

21. Despite the higher price paid by the retailers who purchased direct from Kaplan as compared with AWC or the AMC stores, such unfavored customers trade in shower curtains at a gross margin of approximately 42 per cent, which is at least equal to, if not higher than, the average at which they customarily operate the *department* in which the goods are sold. A Stamford retailer, however, enjoyed only a 4 per cent net profit on total *store* sales in 1958, during which time he paid between 11 and 17 per cent more for respondent's curtains than the competitive AMC store in Stamford did.

22. There is no significant resale price competition at the retail level in respondent's goods. In one area, the merchandise is fair-traded. In the other areas, the suggested retail price or Kaplan's "list" price is generally observed.

23. Although some of respondent's retailer customers find retail sales activities in respondent's goods "not very rugged," there are other retailers who describe that activity as "keen" and "strong." Similarly, some retailers consider themselves competitive with the AMC stores, while others, for various reasons, do not.

24. In Stamford, the AMC store suffered a decrease of almost 9 per cent in sales of respondent's shower curtains from 1958 to 1959. During that time, a competitor, Redmond, enjoyed a 42 per cent increase. These comparisons are on the basis of *net* sales which are defined as gross sales minus mark-down allowances and return merchandise. As will appear later, the AMC store had some return-goods privileges and possible mark-down allowances which were not granted Redmond, making a comparison of net sales difficult.

25. In Philadelphia, where the AMC store and a competitor, Wanamaker, were treated alike except for the difference in cost price, the AMC store's purchases of Kaplan merchandise increased about 20 per cent from 1958 to 1959. While Wanamaker's purchases declined about 26 per cent during the same period.

26. *Net* sales figures for 1960 and several years prior show no appreciable change in the AMC stores' share of the market in Stamford, Philadelphia, or Boston. In Philadelphia and Boston, however, the AMC stores did show a marked increase in their share of the market from 1958 to 1959:

Year	Stamford	Phila- delphia	Boston	Year	Stamford	Phila- delphia	Boston
1951.....		25.3	35.7	1956.....	81.4	18.8	27.1
1952.....		24.2	40.6	1957.....	89.2	17.4	41.1
1953.....		30.6	41.5	1958.....	88.6	13.9	32.8
1954.....	92.5	22.3	38.5	1959.....	88.5	19.5	36.4
1955.....	82.5	20.1	24.5	1960.....	87.5	18.9	35.6

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27. The following table shows the number of Kaplan's nonfavored customers in the same three areas:

Year	Stamford	Phila- delphia	Boston	Year	Stamford	Phila- delphia	Boston
1951.....	-----	14	12	1956.....	2	21	15
1952.....	-----	20	10	1957.....	4	20	12
1953.....	-----	24	11	1958.....	4	19	15
1954.....	3	19	11	1959.....	4	26	16
1955.....	3	19	12	1960.....	3	19	14

28. Despite the lower amounts of price favoritism practiced by the respondent in its sales of Aquafaille as compared with its sales of non-Aquafaille, the AMC stores in the areas studied bought a greater percentage of respondent's Aquafaille than of the non-Aquafaille.

Advertising

29. In order to promote the sale of its products, Kaplan occasionally grants so-called "advertising allowances" to retailers. Respondent employs no printed matter relative to such allowance. Such allowances are granted on three occasions:

a. To assist the retailer in reselling respondent's merchandise in the normal course of dealing in such products, i.e., at regular rather than close-out prices, and where the advertising allowance is not negotiated as part of the price of such merchandise, but is specially negotiated as an allowance *per se*, and is actually intended by respondent as consideration for the retailer's performing the advertising.

Respondent consents to the entry of a cease and desist order with regard to this type of advertising.

b. The great bulk of respondent's "advertising allowance," which actually constitute a part of the price negotiated, in special situations where respondent sells slow-moving merchandise in its own inventory. This monetary allowance, given the purchaser to consummate the sale, is represented as an "advertising allowance." Although respondent has no real interest in whether the money is actually used for advertising, this attitude is not made known to the purchaser who gets the allowance.

c. When retailers are overstocked.

30. During the years 1958 and 1959 and in the course of its business in interstate commerce, respondent made payments or contracted to make payments to or for the benefit of some of its retailer customers in various competitive areas as compensation or in consideration for the three types of advertising referred to in Finding

29, above. AMC stores received such payments for advertising both on goods bought directly from respondent as well as goods acquired through AWC.

31. During the same period of time and in the same competitive areas referred to in Finding 30, above, respondent failed to make, offer, or otherwise make available payments to or for the benefit of some other retailer customers as compensation or in consideration for advertising services to be furnished by or through such other customers competing in the distribution of respondent's products.

a. In the case of advertising allowances granted by respondent to retailers in the normal course of business at regular prices, the record discloses varying payments, or no payments whatever, to competing retailers in the same competitive areas for advertising services on goods of identical grade, quality, and pattern.

b. In the case of "advertising allowances" granted by respondent to move its own slow-moving inventory, the record discloses that such allowances were negotiated with some of the retail customers. In Philadelphia, the AMC store received an advertising allowance for advertising two patterns in September 1958 which had last been sold to a competing purchaser in February and May of that same year. Two other patterns which were advertised by the AMC store in October 1959 had last been sold to a competing purchaser in February and September 1958. In both Stamford and Philadelphia, however, the allowance granted the AMC stores on purchases of certain patterns of curtains was not offered or made available to competing retailers who had at the same time purchased respondent's curtains bearing the same list price and made of the same material as the one on which the AMC store received an allowance, *but with a different pattern*. Thus the AMC store was able to advertise and sell a certain Jakson curtain (*e.g., Fishnets*) at "\$3.99, former price \$6.95," during the same time that a competitive retailer in that area was buying a differently patterned curtain of the respondent, made of the same material and with the same suggested retail price of \$6.95, but getting no advertising allowance from respondent.

c. In the case of advertising allowances paid by respondent to help move a retailer's slow-moving stock, respondent admits granting such allowances without specifying time or place, and avers additionally that such allowances were given to all retailer customers without distinction. Respondent expects its customers to ask for advertising allowances and its salesmen consult with the retail customers to expedite their sale of slow-moving stock. Several retailer customers in the Stamford, Boston, and Philadelphia areas

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testified, however, that no advertising allowances were made known to them by respondent. Respondent did not contradict such testimony.

Markdown Allowances

32. In addition to the differences in prices charged by respondent, referred to in Finding 19, above, respondent also paid the AMC stores markdown allowances during 1958 and 1959, both on goods bought directly from respondent and on goods acquired through AWC. When a store wished to move a particular pattern by lowering its sales price and the supplier paid the store a sum of money to do so, such transaction was called a markdown allowance. These allowances were generally granted prior to the introduction of respondent's new line in order to aid the customer in clearing out his slow-moving stock. The amount granted was negotiated between Kaplan and the customer, and resulted in a substantial reduction in cost to the retailer. Thus, Filene's, finding themselves over-stocked with a Kaplan pattern costing them \$4.95 and marked to sell for \$9.90, reduced the price to \$5.95 and received a markdown allowance of \$1.60 from the respondent, making its net cost for that pattern \$3.35. Competitive stores in Boston were charging \$6 for the same pattern by respondent. Similarly, another pattern priced to sell at \$7.95 cost Filene's \$3.98. When Filene's reduced the price to \$4.95, it received a markdown allowance of \$1.20, making its net cost \$2.78. During the same time, competitors were paying the respondent \$4.50 for the same pattern.

33. Although it was to respondent's advantage to clear out slow-moving stock in the hands of all of its customers, it did not grant or offer markdown allowances to all its customers. Such markdown allowances facilitate the clearing out of troublesome merchandise and are an aid to the respondent and the respondent's customers as well. Although respondent was interested in having its customers clear the slow-moving stock, the fact that a markdown allowance could be negotiated was not made known by the respondent to all its customers.

Returns

34. It is respondent's policy, as stated on its invoice, that:

Perfect merchandise is not returnable and will not be accepted unless authorized by us.

Respondent disseminates no other printed matter relative to the circumstances under which it will accept the return of merchandise

which is not defective. During 1958 and 1959, respondent accepted the return of merchandise from some of its customers, including the AMC stores, in order to expedite their clearance of excess stock. If the goods had been bought by the AMC store directly from Kaplan, the credit was given the store; if it had been acquired through AWC, the credit was given AWC. During the same period, respondent failed to inform competitors of such favored customers of the availability of this privilege. Thus, although Kaplan accepted return merchandise from Bloomingdale's in Stamford, a competitor in that area, when inquiring about a "program" of returns, was not informed of any such benefit nor was he told of the possibility of any returns under any circumstances. In Boston, Filene's and Jordan Marsh were allowed return credits. A competitor testified that returns could help him, but such benefits had not been made known to him by the respondent.

35. The return privilege accorded by the respondent, although negotiated on an individual basis by pattern, is allowed by respondent not merely on the basis of pattern, but on the basis of the particular store's difficulty in selling the item. Thus, one store's slow-moving item, eligible for return privileges, could be a good seller at a competitive store and would not be eligible at the latter for any return privileges. The converse is also true. It is, thus, immaterial whether the respondent allowed return privileges on a particular pattern. Rather, it is the practice of the respondent to allow some of its customers returns on slow-moving items regardless of patterns. This service or facility is not made available or known to all of respondent's customers.

DISCUSSION

The complaint in this proceeding charges the respondent with violations of the Clayton Act and in particular with violations of subsections (a), (d), and (e) of Section 2 of that Act.

The Purchase Issue

With respect to subsection (a), the complaint alleges that the respondent has discriminated in price between different purchasers of its products of like grade and quality by selling said products to some purchasers at higher prices than those charged competing purchasers. Counsel supporting the complaint contends that the AMC stores are direct purchasers from or customers of Kaplan not only on their purchases direct from Kaplan, but even on the

purchases they make of Kaplan's products through AWC. In essence, urges the Commission counsel, AWC is merely a buying front for a group of retailers and respondent's sales to AWC are, in effect, sales to the retailer stockholders of the parent corporation.

In opposition thereto, respondent points to the separate corporate status of AWC and the apparent autonomous operations of that corporation. Like an ordinary wholesaler, AWC places its own orders on its own order forms with the respondent at prices which were negotiated between it and the respondent. These orders, however, argues the Commission counsel, were not firm orders inasmuch as they called for an aggregate dollar amount of merchandise for future delivery, without specification of patterns, sizes, colors, materials and other information necessary to performance. *Nebraska Aircraft Corporation v. Varney, et al*, 282 Fed. 608 (8th Cir. 1922). The weight of legal authority, however, appears to support the respondent's position that an agreement giving the buyer an election to select the goods specified in the contract of sale from a general grouping is sufficiently definite and mutual as to obligations to be enforced. *Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc.*, 29 F. 2d 3 (2d Cir. 1928); 105 A.L.R. 1100 (1936).

If, of course, AWC's order with Kaplan on its Form 500 was not a binding contract unless and until shipments were authorized at the request of the retail stockholding stores involved, it would be easier to find that the real purchaser in such situations was the store rather than AWC. Assuming, nevertheless, without deciding, that the Form 500 constituted a binding contract in accordance with the weight of authority above, I reach the same result.

Respondent argues that it cannot be held to have violated subsection 2(a) of the Act unless it charged discriminatory prices to competing purchasers and, although it charged a lower price to AWC, there was no violation since AWC did not compete with the retail stores that were being charged a higher price. Respondent cites the indirect purchaser cases such as *American News Co. v. F.T.C.*, 300 F. 2d 104 (2d Cir. 1962), citing *K. S. Corp. v. Chemstrand Corp.*, 198 F. Supp. 310 (D.C.S.D.N.Y. 1961), *Kraft Phenix Cheese Corp.* 25 F.T.C. 537 (1937), *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953), and *Dentists Supply Co. of New York*, 37 F.T.C. 345 (1940), which absolved the discriminating supplier where there was no control by such supplier over the price at which the customer bought from an intermediary wholesaler. Here it is undisputed that Kaplan exercised no control over the prices charged by AWC.

It also cites the parent-subsidary cases such as *National Lead Co. v. F.T.C.* 227 F. 2d 825 (7th Cir. 1955) where the court held that a parent corporation could not be held for the illegal acts of a wholly owned subsidiary corporation without evidence of such complete control of this subsidiary by the parent as to render the former a mere tool of the latter. Here respondent argues that the separate operations of AWC and AMC negates any inference of control by AMC over AWC.

I find it unnecessary to pass upon these arguments of respondent. Assuming, *arguendo*, that the indirect purchaser cases and the parent-subsidary cases indicate no culpability on respondent's part, I feel that the position taken by the Commission and the courts in the so-called "automotive parts" cases is controlling.¹ In these cases, jobbing members of a buying organization ordered merchandise from the manufacturer, who then shipped direct to the jobbing members. The buying organization was invoiced by the manufacturer and paid it. The jobber members of the buying organization were in turn billed by the buying organization at the exact price charged by the manufacturer. The manufacturer allowed the buying organization discounts based on the aggregate volume of purchases and such rebates were distributed by the buying organization to the jobber members in proportion to their individual purchases.

The operation in these automotive parts cases was an obviously transparent performance. The buying organization was a mere conduit or bookkeeping device. Here the relationships are much more sophisticated and complex. The price offered by the respondent to AWC was not conditioned upon volume of purchases; the orders came from AWC and not from the member stores; AWC sold to the stores at a profit; these profits have never been distributed outside the AWC corporation. Nevertheless, the philosophy underlying the automotive parts cases controls. As the court held in *K. S. Corp. v. Chemstrand Corp.*, *supra*, "each case must be decided on its own facts." It must be noted that the respondent originally dealt directly with AMC, allowing it a volume discount. This arrangement was discontinued in 1946 when AMC formed a wholly-

¹ *Standard Motor Products v. Federal Trade Commission*, 265 F. 2d 674 (2d Cir. 1959), *cert. den.*, 361 U.S. 826 (1959); *P. Sorensen Mfg. Co. v. Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957); *P. & D. Mfg. Co., Inc. v. Federal Trade Commission*, 245 F. 2d 281 (7th Cir. 1957), *cert. den.*, 355 U.S. 884 (1957); *C. E. Niehoff & Co. v. Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957), *mod'f'd*, 355 U.S. 411 (1958), *rehearing denied*, 355 U.S. 968 (1958); *E. Edelman & Co. v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), *cert. den.*, 355 U.S. 941 (1958); *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956), *cert. den.*, 353 U.S. 938 (1957); *Moog Industries v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958), *rehearing denied*, 356 U.S. 905 (1958).

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owned subsidiary, AWC. It was an AMC representative, however, who negotiated the best price possible on behalf of AWC and secured a wholesale price for it. Furthermore, it was AMC which undertook to underwrite and guarantee the financial obligations of AWC. AWC undertook no warehousing or handling operations as might be expected of a wholesaler. AWC has not been called upon to pay for merchandise it has ordered from Kaplan which it found it did not need. The record contains only an expression of an attitude that Kaplan did expect AWC to carry out its commitments.

Perhaps the most important single fact in the relationship existing between these parties is the actual business done by AWC in shower curtains. Of its total sales in 1958 and 1959, 98.7 per cent were to the AMC stores. If we include the Fedway Stores as AMC stores by reason of their close affiliation, we find that 99.6 per cent of AWC sales were made to such purchasers. In any event, less than 1.3 per cent of AWC sales were made to purchasers other than the stores which owned AWC. In that connection, it should be noted that the stores owned equal shares of the AMC voting stock; the stores' officers or directors were chosen as directors of AMC, who in turn selected the officers of AMC. These AMC directors would also, presumably, select the directors of AWC. The AWC directors were also its officers and, by a curious coincidence, these same individuals were the officers of AMC, chosen by the directors of AMC. The conclusion is inescapable that AMC created AWC *for the purpose* of buying for AMC stores. To assure this result, identity of control was provided both in the corporate structure as well as in the operations where the corporate officers were similar and the buyers used were from both corporate organizations. To assure favorable results, an AMC representative who had been dealing with the respondent secured the wholesale price for AWC—a most anomalous situation if AMC and AWC were as truly separate as claimed. One seldom finds a buyer importuning a supplier to give an intermediary wholesaler a low price unless the buyer has some reason to be quite sure that such low price will inure to his, the buyer's benefit. In *Mennen Company v. F.T.C.*, 288 Fed. 774 (2d Cir. 1923) *cert. den.* 262 US 759 (1923), retailers in the same line of trade organized themselves into a corporation. The court found:

The persons who constitute these mutual or cooperative concerns are buying for themselves to sell to other consumers and not to other "jobbers" or to other "retailers." The nature of the transaction here involved is not threatened by the fact that they make their purchases through the agency of their corporation. For some purposes a corporation is distinct from the members who compose it. But that distinction is a fiction of the law and the courts disregard the fiction whenever the fiction is urged to an intent or purpose which is not within its

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reason and policy. And in such a case as this the fiction can not be invoked. The important fact is that the members of the corporation are all retailers who buy for themselves to sell to the ultimate consumer.

It is obvious to me that AWC is buying for the AMC stores and not for the other retailers. Certainly other retailers would be interested in buying from AWC and thus save some 15 per cent in costs if AWC were willing to do business with them. AWC, however, grants this boon, at least in about 99 per cent of its sales, only to its owner stores. Despite the trimming, therefore, the situation is like that of the automotive parts cases and the lower price obtained by AWC from the respondent in the form of an instant price reduction, rather than a deferred price reduction based upon volume of business, inures to the benefit of the AMC stores, first, in the form of lower costs, and second, in profit sharing, presently or eventually, by reason of their ownership of the buying organization.

This is not to say, however, that the buying stores have no right to own stock in a wholesale corporation. Rather, it is the nature of the wholesaling function which controls. Where the sole *raison d'être* of the wholesaling corporation lies in the benefits it can confer upon its own retailer stockholders to whom it makes all, or practically all, of its sales, it can be no longer be called a true wholesaler but becomes a mere dummy or front for such retailer stores. Such is the characteristic that may be applied to AWC in this instance. This characteristic is also the feature which distinguishes this case from the parent-subsidary cases (e.g., *National Lead, supra*) and the indirect purchaser cases (e.g., *American News Co., supra*) cited by the respondent. In all those cases the subsidiary or intermediary was not created and doing business solely for the benefit of the parent or supplier but was, apparently, in business for all desirable trade.

Kaplan, having dealt with the AMC retailer stores and having been informed of the corporate relationship existing between the proposed wholesaler, AWC, and its former retailer customers, the AMC stores, and knowing to whom AWC was selling, cannot be heard to plead ignorance of the true state of affairs.

The Injury Issue

It is conceded that primary line competitive injury need not be considered in the absence of evidence to that effect in the record.

As to secondary line competitive injury, respondent concedes that AWC and AWC's customers pay less for respondent's merchandise than do their competitors. It points out, however, that 2(a) of the

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Act requires proof of the likelihood of competitive injury between the two sets of retailers. Respondent further concedes that the decision in *F.T.C. v. Morton Salt*, 334 U.S. 37 (1948) permits an inference of competitive injury from a record of price discrimination between competing purchasers. This prima facie presumption is described by the Court as follows:

We think that the language of the Act and the legislative history * * * show that Congress meant by using the words "discrimination in price" in Section 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitor's. * * * It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by the evidence.

To refute this prima facie presumption of competitive injury due to price discrimination, respondent argues:

1. That the price differentials are not converted into competitive resale pricing;
2. That the price differences do not subsidize discernible, additional competitive vigor, but rather that competition in the resale of respondent's brand of shower curtains is a stable and routine matter;
3. That the margin of profit realized by the retailers who pay the higher price is unusually high, and more than adequate to support their successful and healthy trade in the commodities involved;
4. That the share of market of the retailers purchasing at the lower prices has not increased;
5. That the progress of the business of the retailers who buy at the lower prices has not been any better than their competitors';
6. That there has been no decrease in the number or proportion of the "unfavored" retailers in the market place.

These arguments in rebuttal have been given careful consideration. As to the lack of competitive resale pricing, it is true that the retail price of respondent's products are generally observed, voluntarily or otherwise, but proof merely that the favored purchaser has not used his price advantage to cut resale prices is not controlling. *E. Edelmann & Co. v. F.T.C.*, 239 F. 2d 152 (7th Cir. 1956).

Price competition is but one form of competition. Additional service to customers, additional salesmen to call on them carrying a larger or more varied

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stock, branch houses * * * all aid respondent's customers to stay in business and to prosper. The institution or expansion of these competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased. *In the Matter of Namsco, Inc.*, Docket No. 5711, 49 F.T.C. 1161 (1953).

As to "discernible additional competitive vigor," it would be hard to make much of this fact in view of the insignificance of the shower curtain business in an average department or specialty store. Nevertheless, it must be indisputable that the price advantages enjoyed by the AMC stores must inure to their benefit in AMC merchandising services or otherwise. As to respondent's theory of stable and routine competition, it cannot be accepted as a fact in the light of some of the contradictory descriptions given by retailers.

As to the unusually high margin of profit, it should be noted that the high margin of profit is a departmental margin only. It is common knowledge that store-wide margins in retail selling do not begin to approach 42 per cent. In fact, the record shows that one of the nonfavored customers had only a 4 per cent store-wide profit. For him and others like him, a price discrimination of as much as 18 per cent must hurt in direct proportion to the sales volume of the commodity so affected.

As to the share of market of the favored customers, it is true that in the decade of the 1950's the net sales of the AMC stores indicate no appreciable change in their share of the market. On the other hand, however, they did increase their market share from 1958 to 1959 in Philadelphia and Boston. Moreover, the respondent's use of net sales figures for these comparisons fails to give an accurate picture since such figures exclude markdown allowances and return merchandise.

As to the progress of business, at least in Philadelphia, Wanamaker's a nonfavored customer, was treated the same as Strawbridge & Clothier, the favored customer, except as to price. There, where competitive comparisons are apparently appropriate, Wanamaker's purchases declined 26 percent compared with Strawbridge & Clothier's increase of about 20 per cent from 1958 to 1959.

Finally, respondent points to its sales of Aquafaille and the fact that the favored customers bought more Aquafaille than non-Aquafaille, although the price advantage they enjoyed on the former was less than on the non-Aquafaille. The differences, however, were not very great. In the case of Aquafaille, price discrimination ranged from 5 to 15 per cent. In the case of non-Aquafaille, the price differences ran as high as 18 per cent. Consumer preference for one as against another type of shower curtain might very well account

for a store's purchase of an item, even at a slightly less advantageous price.

In sum, the prima facie case of competitive injury, predicated upon mere price discrimination alone, has not been rebutted by these various contentions of the respondent.

The Markdown Allowance Issue

The markdown allowance given by respondent to some of its customers has been defined in Finding 32 above. Respondent argues that the allowance is not a service or facility but only money, rendering the transaction outside the scope of Section 2(e) of the Act. Moreover, argues the respondent, these allowances are not an element of the price agreed upon for the sale of any commodity, but an individual gratuity to expedite the retailer's sale of his slow-moving stock.

The complaint makes no specific mention of markdown allowances, citing only price discrimination, discriminatory payments for services, and discriminatory services. A discriminatory program of markdown allowances might well be considered within the contemplation of Section 2(d) of the Act as a payment for services rendered by the customer, the services being the customer's offering of such merchandise for resale at a reduced price. More properly, however, it would appear that such practices are covered by Section 2(a) of the Act prohibiting direct or indirect price discriminations. The markdown allowance has the effect of reducing the buyer's cost and giving such buyer a price advantage over competitors receiving no such allowance. Whether or not the allowance is negotiated at the time of sale, the effect is the same. To make the coverage under 2(a) conditional upon being negotiated at the time of sale is not required by the language of that Section and would only encourage avoidance of the Act. Thus, a seller could charge all customers the same sale price and, having made the sale, give markdown allowances to some. The purposes of the Act should not and cannot be frustrated in that manner.

Respondent contends, however, that if the markdown allowance is within the coverage of Section 2(a), it is expressly excluded therefrom by the last proviso of that Section which permits "price changes * * * in response to changing conditions affecting the market for or the marketability of the goods concerned." This affirmative defense, however, is obviously intended for the seller who must make prompt disposal of his merchandise and who may find it necessary, therefore, to sell to different purchasers at different prices. It has nothing to do with the marketability of the goods in the hands of the

buyers. Nor is the exemption applicable to mere changes in market demand in the regular course of business, as here. See Cyrus Austin, *Price Discrimination*, p. 80 (1959).

The Advertising Allowances

As noted in Finding 29, above, respondent consents to the entry of a cease and desist order with respect to advertising allowances made by it to assist the retailer in reselling merchandise in the normal course of dealing in such products. It opposes, however, a cease and desist order with respect to the two other types of advertising allowances involved, those granted to sell respondent's close-out merchandise in its own inventory and those granted a retailer to help move excess stock in the retailer's inventory.

As to respondent's close-out merchandise, respondent argues that the allowance granted is merely a bookkeeping transaction, the respondent being interested only in the net realization. As a component in the respondent's formula for determining its price, the allowance should be governed by 2(a), according to the respondent, rather than as a payment for services under 2(d). If so, applying the affirmative defense of sales in discontinuance of business in the goods concerned contained in 2(a) would absolve the respondent.

I cannot agree. There are many elements of cost which enter into any formula for determining a sales price by a seller. There may be no basis for segregating any one of them, such as advertising, and treating such segment separately, except where the seller, by his own behavior, so treats it. This is the case here. Kaplan negotiated a sales price for its close-out merchandise and deducted therefrom an advertising allowance separately stated. Having done so, the allowance came within Section 2(d) of the Act and had to be made available to all customers. The respondent's intent becomes immaterial. *P. Lorillard Co. v. F.T.C.*, 267 F. 2d 439 (3rd Cir. 1959) *cert. den.* 361 U.S. 923 (1959); *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831 (7th Cir. 1958), *cert. den.*, *sub nom. General Foods Corp. v. State Wholesale Grocers*, 358 U.S. 947 (1959).

Respondent also contends that since the record fails to show discriminatory advertising allowances on close-out merchandise of the same pattern and at the same time, there has been no prohibited discrimination. The record does, however, admittedly disclose that respondent granted advertising allowances on certain patterns of close-out merchandise to some of its customers, but failed to grant such allowances to other customers purchasing different patterns but bearing the same suggested retail price. Although Section 2(d) does

not contain the language of "like grade and quality" found in Section 2(a), it would appear that such limitation should be read into 2(d). Cyrus Austin, *supra*, page 128. Pattern is an important consideration in the sale of shower curtains, a commodity which is considered to have style and fashion attributes. In such case, a seller's choice of a pattern in its excess stock for close-out sale and advertising allowances should not require him to offer his whole price line on similar terms. Otherwise, Kaplan, finding Pattern X in its \$7.95 price line slow moving, would be obliged to offer promotion allowances, if at all, on all its \$7.95 curtains. This would be an intolerable hindrance to sales. *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket No. 6212, 52 F.T.C. 1535 (1956); *Atalanta Trading Corp. v. F.T.C.*, 258 F. 2d 365 (2d Cir. 1958).

In the *Atalanta* case, the promotional allowance given by the seller to a customer on certain items of its meat products was not offered to any other customer. There were no other sales at the same time and of the same item to competing purchasers. The Court held there was no discrimination. The failure to make the allowance must be to a purchaser. The fact that there may have been potential purchasers was considered immaterial because the Act imposes no duty to sell all potential customers. All the Act requires of a seller is that he give equal treatment to those he chooses to sell.

Here Kaplan did not sell the particular close-out, slow-moving pattern on which an advertising allowance was granted except to the single purchaser. There being no other purchaser of that item, but only potential purchasers, the *Atalanta* case requires a finding of no discrimination.

Had there been other purchasers of that close-out item who received no advertising allowance, then respondent's failure to inform such purchaser of the advertising allowance would have violated the Act and its expectation that the buyer would ask for the allowance no defense. *Chestnut Farms Chevy Chase Dairy*, Docket No. 6465, 53 F.T.C. 1050 (1957); *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (March 21, 1962) [60 F.T.C. 568]; *Liggett & Myers Tobacco Co., Inc.*, Docket No. 6642 (Sept. 9, 1959) [56 F.T.C. 221]; *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89 (1954).

As to advertising allowances to help the retailer move his own excess stock, respondent contends that it has not been shown that it actually paid such an advertising allowance. Mr. Kaplan, a corporate officer, testified, however, that the respondent did grant such allowances although no specific instance was mentioned. There is nothing in the record to indicate that the respondent denied such allowances to some customers while granting them to others.

Here, however, there is no difficulty respecting discrimination as in the case of advertising allowances on Kaplan's close-out merchandise. The allowance given by Kaplan to move a retailer's stock, as distinguished from Kaplan's own stock, is made because the *retailer* has a slow-moving item which he wants to move. The allowance is made for a retailer's slow-moving item regardless of patterns. Indeed some patterns, slow-moving in some stores, are good sellers in other stores and would not qualify for an advertising allowance in such stores. The record makes it obvious that retailers often and normally experience slow-moving items. If so, respondent's failure to deny an advertising allowance to such retailers is no defense. Rather, it is its failure to inform all competing customers that an advertising allowance was available on their own slow-moving items that violates the Act.

The Return Merchandise Issue

Respondent concedes that it has accepted the return of merchandise from some of its customers, but not from all. Respondent argues, however, that it has not violated the Act in this respect because such credits are not services or facilities connected with the handling, sale, or offering for sale of such commodities; that dealers prefer not to qualify for the return payment, for it represents a loss of money to them in failing to get the full retail price; that nondiscriminatory return payments are in respondent's own best interests; that only the "unconscionably incompetent" buyers will fail to ask for return credits if they want them, and respondent has not refused such requests; that the record fails to show that return payments on a specific pattern were granted to any customer and denied another competing customer seeking to return the same pattern.

These arguments are not persuasive. Payments for return merchandise are properly within the coverage of Section 2(e) of the Act. The Commission, in the Matter of *Appleton-Century-Crofts, Inc.*, 47 *F.T.C.* 1371 (1951), held such payments to be so covered. Although the return payment privilege was part of the purchase transaction in that case, I see no distinction. Section 2(e) of the Act prohibits discriminatory furnishing of services or facilities connected with the processing, handling, sale, or offering for sale of the commodity. The clearance of excess stock in the hands of the retailer is an obvious aid both to that retailer and to the respondent. The return service provided by the respondent in this case is obviously connected with the processing and handling of that commodity, even if it is in the cessation of handling of the commodity. Cer-

tainly, a retailer can hardly undertake the return of merchandise without some handling. In this respect, *Secatore's Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665 (D.C. Mass 1959), and *Skinner v. U.S. Steel Corporation*, 233 F. 2d 762 (5th Cir 1956), are distinguishable in that the services or facilities involved, viz., credits and wage assignments, were not necessarily involved with the handling or sale of the merchandise.

The fact that dealers may not prefer to qualify for return payments and that nondiscriminatory payments would be in the respondent's own best interest is beside the point. The issue is whether there was discrimination in fact, regardless of intent and injury.

As to the alleged custom in the trade of requesting return payments, the Commission's position in the *Matter of Chestnut Farms Chevy Chase Dairy*, and other cases cited, *supra*, is pertinent both here and in the case of advertising allowances discussed above.

Similarly, as to pattern: Although the record fails to show that any customer was denied return privileges on a particular pattern for which return privileges were granted by the respondent to competing buyers, return privileges were not granted by the respondent simply on the basis of pattern. Rather, they were granted because a particular item was slow moving with a particular retailer, regardless of pattern. The discrimination, however, was in failing to grant such privileges to some sellers similarly "stuck" whether or not with the same pattern. Some of respondent's customers were not informed of this privilege although in competition with others who were given that privilege.

The Scope of the Order

I have concluded, above, that violations of Section 2(d) have been proven with respect to advertising allowances in the normal course of business as well as for a retailer's slow-moving stock, but not for Kaplan's close-out merchandise. Respondent contends that the cease and desist order is properly limited to the specific practice found violative of the Act.

This proposal is not satisfactory. The order herein regarding discriminatory payments for services is limited to advertising and promotional services. Simply because respondent has elected to segment its program of advertising allowances for the sake of its brief herein, is insufficient justification for further circumscribing the cease and desist order relative to advertising allowances. By its own admission, respondent has engaged in discriminatory payments or a buyer's specific services, viz., advertising. There is no precedent within or without the Commission for making that the basis for an order

further limited to the specific type of advertising done. *In the Matter of Shulton, Inc.*, Docket No. 7721 (July 25, 1961) [59 F.T.C. 106]. Even the *Swanee Paper* case, 291 F. 2d 833 (2d Cir., 1961), cited by the respondent, fails to support its position. That case does not require an order to be coterminous with the facts found which is the respondent's position. On the contrary, it simply requires "there must be some relation between the facts found and the breadth of the order." A program of advertising allowances, either in the normal course of business or to expedite the sale of slow-moving stock, cannot be said to be so unrelated in its segments as to require dissection and individual treatment in a cease and desist order.

Respondent also urges that if a cease and desist order is entered regarding price discriminations, it be limited to the type of violation found or, specifically, that it prohibit the respondent from discriminating in price through the medium of an intermediary person. Here, too, the argument is made that since the use of the intermediary person (AWC) was the only instance of price violations, the order must be limited to that type and not cover price discriminations committed without the use of an intermediary. This proposition seems patently absurd. In effect, respondent would have the order prohibit price discrimination done indirectly, leaving the respondent free to do the same directly.

Finally, Commission counsel proposes that the order prohibit all discriminatory furnishing of services not merely the acceptance of return merchandise. Respondent opposes this proposed order, urging that it be limited to the acceptance of return merchandise only and not cover other services. The record contains nothing whatever with respect to any possible violations of the Act by the respondent under Section 2(e) except the acceptance of return merchandise. An authority notes:

*** [T]he cooperative-merchandising service involved *** under Section 2(e) *** is usually a service furnished by the manufacturer to a retailer ***. This service *** has a broad range and includes: providing a demonstrator *** making a sales promotion discount or payment; allowing a cash discount; offering free goods; providing special containers or labels; allowing mail or telephone orders at a discount; permitting an f.o.b. purchase at a less price; allowing a rebate for the non-return of unsalable merchandise ***. [These are] simply indicative of it ***. Charles Wesley Dunn, CHH Robinson Patman Act Symposium, New York State Bar Association. January 23, 1946.

In accordance with the decision of the Commission in *Quaker Oats Company*, Docket No. 8119, April 25, 1962 [60 F.T.C. 798], the order herein is limited to the acceptance of return merchandise, the type of service involved, rather than covering the myriad services possible in

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a merchandising relationship. Similarly, in the case of discriminatory payments for services under 2(d), the order is limited to advertising and promotional services but without further fragmentization into the various facets and techniques of advertising payments possible. In the case of discriminatory pricing under 2(a), the order covers competing purchasers but is not limited to the particular device of discrimination which has been or may be employed by the respondent, to wit, an intermediary person. Unlike the *Vanity Fair Paper Mills* decision, *supra*, where an order covering payments for all services was approved, the order herein is limited to the type of service involved, an advertising allowance in one instance and the acceptance of return merchandise in the other. In the *Vanity Fair* case, the Commission's opinion emphasizes the respondent's policy to consider the customer's request, which could take many forms. In this case, there is no intimation of respondent's interest in services other than those covered by the order. As the Commission stated in the *Quaker Oats* decision:

There is no reason to believe as in *Vanity Fair Paper Mills, Inc.*, *supra*, in which a broader order issued, that future activities might concern other than advertising, promotional or display services or facilities.

In this case there is no reason to believe that future activities might concern other than discriminatory pricing, including markdown allowances, advertising, and the acceptance of return merchandise.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the respondent.
2. This proceeding is in the public interest.
3. Respondent is engaged in commerce.
4. Respondent in the course of such commerce discriminates in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or to injure, destroy, or prevent competition with any person who knowingly receives the benefit of any such discrimination or with its customers.
5. The respondent's program of markdown allowances is an element of price within the meaning of Section 2(a) of the Act.
6. Respondent pays advertising allowances for the benefit of a customer in the course of such commerce in consideration for the service or facility of advertising furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of products sold by the respondent, without making such payment available to all competing customers.

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7. Respondent discriminates in favor of some purchasers against other purchasers of a commodity by furnishing some purchasers the service or facility of accepting return merchandise for credit, such service or facility being connected with the processing, handling, sale, or offering for sale of such commodity.

ORDER

It is ordered, That respondent Joseph A. Kaplan & Sons, Inc., a corporation, its officers, employees, assignees, and representatives, directly or through any corporate or other device, in or in connection with the sale of shower curtains, shower curtain sets, shower curtain accessories, and related products in commerce, as commerce is defined in the Clayton Act, as amended, forthwith cease and desist from:

1. Discriminating, directly or indirectly, in the price of said products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

2. Paying or contracting to pay, or granting or contracting to grant, or allowing, directly or indirectly, anything of value, including checks and credits, to or for the benefit of a customer as compensation or in consideration of any advertising or promotional services or facilities furnished by or through said customer in connection with the sale or offering for sale of respondent's products, unless such payments, credits, grants or allowances are available on proportionally equal terms to all other customers competing in the distribution of said products.

3. Discriminating directly or indirectly among competing purchasers of its products by contracting to furnish, furnishing, or contributing to the furnishing of the service or facility of accepting the return of its unsold products to any purchaser of said products bought for resale, with or without processing, unless such service or facility is accorded on proportionally equal terms to all purchasers competing in the resale of said products.

OPINION OF THE COMMISSION

NOVEMBER 15, 1963

By DIXON, *Commissioner*:

This matter is before the Commission upon exceptions respectively taken by counsel supporting the complaint and respondent to the

hearing examiner's initial decision holding respondent in violation of subsections (a), (d), and (e) of Section 2 of the Clayton Act, as amended. The examiner, in his initial decision, included an order against respondent to cease and desist the practices he found to be unlawful.

Complaint counsel has two exceptions to the initial decision. The first is that the order provision relating to the Section 2(e) violation found is limited to the specific method employed by the respondent; the second is that the examiner failed to find a Section 2(d) violation in connection with advertising allowances granted to promote the sale of slow-moving products in respondent's own inventory. Respondent's exceptions, as its counsel states in its brief, cover virtually the entire initial decision. Principal objections seem to go to the scope of the order and to the examiner's findings and conclusions: (a) to the effect that certain retailers buying through an intermediary were purchasers from the respondent; (b) that the price discriminations found would likely injure competition; (c) that respondent had violated Section 2(d) in connection with advertising allowances applicable to slow-moving styles and (d) that its acceptance of returned merchandise from certain purchasers constituted services and facilities within the meaning of Section 2(e) and that respondent had violated this subsection with respect to such returns. It should be noted that respondent does not contest the order to cease and desist covering the Section 2(d) violation insofar as it relates to normal advertising allowances given to promote its merchandise at regular prices.

Joseph A. Kaplan & Sons, Inc., respondent, is a New York corporation with offices located at 1 Jakson Place, Yonkers, New York. It is engaged in the manufacture, sale and distribution of shower curtains, shower curtain sets, and accessories, under the trade name "Jakson." Respondent, one of the industry leaders, sells products in the amount of about \$2,500,000 annually. These products are sold in interstate commerce.

Respondent's customers, during the time covered by this proceeding (1958 and 1959), were all retailers, specifically department stores and specialty stores, except one, disregarding for the moment purchases made by or through Aimcee Wholesale Corporation (hereafter referred to as AWC), which transactions are at the center of the instant litigation. The single exception (other than AWC) was the Crane Company, an organization engaged in the distribution of plumbing supplies.

The complaint in Count I charges that respondent discriminated in price in violation of Section 2(a) by selling products of like grade and quality to some purchasers at higher prices than the prices charged competing purchasers and that the favored purchasers were billed by, and submitted payment to, respondent through an intermediary corporation owned and controlled by such favored purchasers.

The basic facts in this case so far as they concern the distribution of respondent's goods to certain retailers through AWC and the different prices charged different purchasers are not in dispute. Twenty-six retail department stores located in various states of the United States together wholly own a corporation known as Associated Merchandising Corporation (hereinafter referred to as AMC), with offices at 1440 Broadway, New York City. Each store owns one share of Class A voting stock and an undisclosed quantity of Class B nonvoting stock. The directors of AMC are chosen by the Class A stockholders from among the Class A stockholders. Among these store owners are Bloomingdale Bros., Stamford, Connecticut; Wm. Filene's Sons Co., Boston, Massachusetts; and Strawbridge & Clothier, Philadelphia, Pennsylvania. For convenience, the twenty-six AMC stockholder stores will hereafter be referred to as the "AMC stores."

AMC and its stockholder stores were the named respondents in the matter of *Associated Merchandising Corp., et al.*, Docket No. 5027, decided by the Commission May 8, 1945 (40 F.T.C. 578). The Commission, in that matter, issued an order requiring those respondents to cease and desist knowingly inducing or receiving discriminations in price. The findings there were in part as follows:

Respondent, A.M.C., was created, and is now being maintained and operated, by respondent members as an instrument, method, agency, and means whereby said respondent members are enabled to act collectively to obtain special allowances and discounts on their purchases of goods, wares, and merchandise for resale in their respective stores. (40 F.T.C. 590.)

The record discloses that AMC, as such, now functions as a service organization for its stockholder stores, providing aid in such things as research and merchandising. In about 1946, soon after the aforesaid action by the Commission in Docket No. 5027, AMC formed a wholly owned subsidiary corporation called Aimcee Wholesale Corporation (AWC), already referred to above. AWC occupies the same administrative offices as those of the parent corporation and maintains a warehouse at a different location in New York City.

The officers of the AMC and AWC during 1958 and 1959 were:

AMC	AWC
Joseph P. Kasper, Pres.	Joseph P. Kasper, Pres.
John C. Oram, Vice Pres.	John C. Oram, Vice Pres.
Charles G. Taylor, Vice Pres.	Charles G. Taylor, Vice Pres.
Lewis B. Sappington, Vice Pres.	Norman Tarnoff, Vice Pres.
Richard G. Tinnerholm, Sec'y-Treasr.	Richard G. Tinnerholm, Vice Pres. and Treasr. Leo A. Nunnink, Sec'y

During these same years the officers of AWC, with the exceptions of Tarnoff and Nunnink, were also its directors.

In 1946, the Executive Committee of AMC passed a resolution, still in effect, providing that AMC guarantees the payment of any and all obligations of AWC.

AWC contracts with AMC and pays for the services of AMC's merchandising representatives. Such personnel are used in the procurement functions of AWC. One of these representatives so used was Mr. Hodges, AMC's manager of the home furnishings division, the division responsible for the purchase of shower curtains.

AWC sells merchandise to stores other than the AMC stores, but the record does not disclose the volume of such outside sales except as to respondent's products. Virtually no sales were made of respondent's products to non-AMC stores. In 1958, 98.8 percent of the Jakson products distributed through AWC were sent to AMC stores; in 1959, 98.6 percent. In these years up to 1 percent of the goods billed through AWC were sold to Fedway stores, one of the ten divisions of Federated Department Stores, Inc., the other nine being AMC stores. Many officials of Federated Department Stores, Inc., are directors of AMC. Combined with sales to Fedway stores, AWC's average distribution of Jakson products in 1958 and 1959 to AMC stores amounted to 99.6 percent of AWC's total distribution for that period.

AWC placed orders to respondent on its own order forms (called Form 500) at the prices negotiated between it and respondent. In a typical purchase AWC would order "Assorted styles and colors of Koroseal and taffeta shower curtains, drapes and ensembles as detailed on 502 shipping authorizations or direct store orders," and would advise: "Shipping instructions on drop shipments to follow."

Such general orders would be placed before AWC received specific orders from the AMC stores, but efforts were made to estimate closely the needs of these stores.

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Retail stores customarily select shower curtain lines they will handle for the coming season at the housewares show held twice a year. AMC stores may place orders for Jakson curtains through AWC or purchase from other suppliers. If they choose Jakson merchandise, the stores will place opening orders with AWC and sometimes later fill-in orders. Upon receipt of such orders, AWC issues shipping instructions to respondent against its Form 500 orders. Respondent then drop ships the goods to the AMC store. AWC never warehouses or takes physical possession of the goods. AMC stores buy some merchandise directly from respondent, usually consisting of special items like close-out merchandise.

Prior to 1946, which also was before the Commission issued its cease and desist order in Docket No. 5027 against AMC and stockholder stores, respondent sold to AMC and granted it a quantity discount. In 1946, respondent was advised by the AMC housewares buyer, Mr. John Lyons, that AWC had been formed and that a wholesaler's discount for the new organization was being sought. Respondent agreed to give to AWC discounts on the same special terms then being accorded to the Crane Company.

From all of the circumstances, we conclude that the real purchasers and customers for respondent's shower curtains in the AWC transactions were the AMC stores. The entire ownership and control of AWC was, indirectly through AMC, in the hands of the AMC stores. The benefits in connection with the lower prices received through AWC flowed directly to the AMC stores. While AWC, so far as respondent's products were concerned, was technically a wholesale purchaser, in reality the goods were purchased by the individual stores.

It is contended by respondent that AWC was a distinct corporate entity operating as a wholesaler. However, the purpose or effect of purchasing respondent's products through AWC was clearly to provide special prices to the retailers owning the corporation. The corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute. *Corn Products Refining Company v. Benson*, 232 F. 2d 554, 565 (2d Cir. 1956); *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774, 782 (2d Cir. 1923), *cert. denied*, 262 U.S. 759.

The respondent knew, or was chargeable with the knowledge, that the special prices it accorded to AWC inured directly to the benefit of the AMC retailers and that it was in effect dealing with such retailers as its purchasers and customers. The facts leave no question on this score. Respondent knew that AWC had been formed by

AMC and it also knew that AMC was owned and operated by a group of retailers, as the testimony of respondent's president, Harold M. Kaplan, indicates.

Moreover, while Mr. Kaplan denied the AMC stores were respondent's customers on regular merchandise, respondent's actions towards these stores denote a buyer-seller relationship. Respondent treated the AMC stores as its customers, as shown by the regular contacts. Its salesmen called periodically on all AMC stores, looked over stocks, tried anticipating merchandising problems, and recommended measures, such as advertising campaigns to keep products moving. Respondent's representatives worked closely with the AMC stores on the questions of advertising allowances, markdown allowances, return of goods and other merchandising problems.

To illustrate, on markdown allowances, respondent's representative would work out the whole arrangement with the retail store. The representative in such case had to know the size of the stock, the nature of the market and the terms of sale and resale before he could intelligently recommend a markdown allowance. These allowances were given after mutual agreement between the store and respondent that the retail price was too high and that lower prices were necessary to move the goods. The close working relationship between respondent and AMC stores is pointed up by various documents relating to the receipt of advertising allowances and other benefits which show specific authorization by respondent for payments to stores for particular promotions. Respondent, from such contacts, was bound to know and did know the relationship between the AMC stores and AWC and the terms and conditions under which the goods were received by the AMC stores.

There is also evidence that respondent influenced, at least to some extent, the terms upon which the AMC stores bought. The testimony of Mr. Kaplan brings out that the price to be paid by the AMC store, in certain circumstances, is in part established by respondent. He testified that in the case of AMC stores, the credit for markdowns, advertising allowances and such like went to the AWC organization but he stated, "I think there is inducement, because I think that it is a transfer, and I think that the store does get proper credit." Respondent, in short, refunded a portion of the price which it knew went back to the particular store to permit that store to resell at a new lower price. The court, in *American News Company, et al. v. Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962), *cert. denied*, 83 Sup. Ct. 44 (1962), held that if a manufacturer deals with a retailer through the intermediary of whole-

salers, dealers or jobbers, the retailer may nevertheless be a "customer" or "purchaser" of the manufacturer if the latter deals directly with the retailer and controls the terms upon which he buys.

AWC was technically the customer but the real purchasers and customers were the stores. Except for the mechanics of ordering and billing, respondent dealt with AMC stores exactly the same way as if AWC were out of the picture. From all the circumstances we conclude that the individual AMC stores were the purchasers and customers for the purposes of the Robinson-Patman Act. Cf. *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958).

Discrimination in Prices

In 1958 and 1959, respondent charged retailers the prices contained in the "cost" column of its price lists (Commission Exhibits 2 through 5 and subparts). AWC was billed at the so-called "list price," less a discount of 50 percent resulting in cost differences between AWC (AMC stores) and other retailers of as much as about 18 percent in favor of AMC stores. In the case of Aquafaille curtains, the cost difference was 5 and 15 percent in favor of AMC stores. AWC billed the AMC stores at list prices less a discount of 47½ percent, or, to put it another way, at a markup of about 5 percent over its costs.

Examples of the price differences charged between favored AMC stores and nonfavored retail stores in the same markets are as follows: Filenè's, AMC store in Boston, Massachusetts, bought the Zephyr pattern set on September 22, 1959, for \$2.95 a set, while Walpole Bros., in the same city, on August 24, 1959, paid \$3.60 a set. The unfavored store was charged 18 plus percent more than the favored. Bloomingdale's, AMC store in Stamford, Connecticut, paid in January, April and May 1958, for Windswept pattern, \$4.95 a set, whereas Redmond's, in the same city, paid \$6 per set, or a 17 plus percent difference in the same period.

Competitive Injury

The basis for determining the likelihood of competitive injury in secondary line cases, as set forth in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948), and followed in a series of subsequent court and Commission cases, *e.g.*, *Moog Industries, Inc. v. Federal Trade Commission* 238 F. 2d 43 (8th Cir. 1956); *Whit-*

aker Cable Corp. v. Federal Trade Commission, 239 F. 2d 253 (7th Cir. 1956); *Mueller Co. v. Federal Trade Commission*, 323 F. 2d 44, 46 (7th Cir. 1963), points to a finding of adverse competitive effect in this proceeding. In *Morton Salt*, the court found that “* * * competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay,” (334 U.S. at 46-47), and that “* * * there is a ‘reasonable possibility’ that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.” (334 U.S. at 50.) The United States Court of Appeals for the Seventh Circuit, in its recent decision in *Mueller Co.*, *supra*, said:

There is evidence that the profit margin for a wholesaler in the business is “very, very low” and an additional 10% margin “extremely important”; that a retailer seeing one competitor’s lower price on one item will think “you are out of line” on other items and this has a harmful effect on the regular jobbers; that a regular jobber changed to a different seller to get a discount equalling the competition of stocking jobbers; and that some of petitioner’s jobbers wrote complaining of the discount to stocking jobbers. Moreover, there is apparent from the difference in discounts themselves a “reasonable possibility” that the regular jobbers would be adversely affected by petitioner’s discounting practice.

We think there is a substantial evidentiary basis to support the finding that the effect of discrimination in discounts “may be substantially to injure competition.” * * *. [Citing cases.]

Here some of the retailers in the markets covered described the competition as keen—one competitor called it “very rough and very extreme”; a purchaser testified that he “cannot be five cents off” what competitors charge; and various retailers testified that cash discounts were important. For some the cash discount was a very large part of their profit. In one instance, a nonfavored retailer competing with an AMC store in Philadelphia, Pennsylvania, testified, “Well, it’s [cash discount] important because it adds to it. Department stores traditionally work on a very, very slim margin and the cash discount that we get when we pay our bills on time is a large part of that.” Another witness, Raymond Cohen of Redmond’s, Stamford, Connecticut, a specialty store selling soft goods, home furnishings and other such products, testified that Redmond’s net profit was 4 percent in 1959 and that if the store did not receive the 2 percent cash discount its net profit would be reduced by about 1 percent. In the circumstances, price differences of 18 percent and even as little as 5 percent are substantial. Respondent’s sales to the AMC stores in the years here covered were in excess of one-half

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million dollars annually. Thus, the total of the discounts received by the favored customers would come to substantial amounts. In view of the continuous large differences in prices here shown between the favored and nonfavored purchasers, the latter, over a period of time would surely lose the competitive contest in the sale of respondent's goods.¹ We conclude that the effect of the price discriminations here shown "may be substantially to injure competition" within the meaning of Section 2 of the Clayton Act, as amended.

The probable competitive effects may, of course, be determined by considering only respondent's shower curtain product. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock, and there is no possible way effectively to protect the retailer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store. *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37, 49 (1948).

Respondent's exceptions on the Section 2(a) charge are rejected, but we do not agree with all of the examiner's comments in connection with this and other matters in the "Discussion" portion of the initial decision. Accordingly, that part of the initial decision will be stricken by the accompanying order.

Markdown Allowances

Respondent, in the years 1958 and 1959, granted so-called markdown allowances to AMC stores on goods purchased directly from respondent, as well as on the goods these stores acquired through AWC. Other retailers not in the AMC group also received markdown allowances. The terms of such allowances were negotiated between respondent and the retailer. These allowances were granted mainly prior to the introduction of a new line to aid the customer in clearing up slow-moving stock. Since they were on an individual store basis, some stores received the allowances while other pur-

¹ We do not attach any particular significance to the data in the record showing market shares for the years 1951-1960 for the AMC stores in the three markets analyzed. Respondent contends in effect that the data fails to record any consistent loss of sales by unfavored customers. The court, in *Whitaker Cable Corp. v. Federal Trade Commission*, *supra*, observed: " * * * it is rather tenuous to argue that because particular purchasers did not lose sales notwithstanding the disparate prices charged by petitioner, there can be no finding of probable injury to competition." (239 F. 2d at 255.) Moreover, as the examiner has found, the AMC stores in Philadelphia and Boston did show a marked increase in their share of the market from 1958 to 1959.

chasers competing in the sale of respondent's goods of the same grade and quality did not. The effect was that the favored purchasers ultimately paid lower net prices. The AMC stores appear to have been regularly favored in this connection. Witnesses representing competing stores, usually small decorator shops but included some larger stores, testified that they had not received and did not even know about the markdown allowances.

The following is an example of this type of price discrimination: On February 13, 1958, John H. Pray, a store in Boston, bought Lace Stripe pattern curtains for \$6 a set, while at the same time, Filene's, AMC store in Boston, received this item through AWC at \$9.90 less 50 percent, or \$4.95 per set. There was, however, a 5 percent additional charge to the AMC store by AWC. Filene's marked this item down in August 1958 from \$9.90 to \$5.90 and received a markdown allowance of 40 percent of the difference, or \$1.60 per set. This brought Filene's ultimate price down to \$3.35 as compared with the \$6 paid by John H. Pray of Boston. The price paid by Pray was about 45 percent more than the new net price paid by the AMC store.

Where, as here, the larger stores received preferential terms which were in effect lower net prices on particular patterns purposefully granted to lower the retail prices, and where at or about the same time smaller competing retailers buying goods of the same grade and quality paid the regular, higher prices, we conclude that the resulting different prices are price discriminations within the meaning of Section 2(a). For the same reasons referred to above under "Competitive Injury" we conclude that the effect of these price discriminations in the form of markdown allowances likewise "may be to substantially injure competition."

Respondent argues that since the purpose of the mark-down allowances was to spark the sale of slow-moving goods, such come within the changing conditions of marketability provision of Section 2(a). This defense is not available here because there has been no showing of "changing conditions affecting the market for or the marketability of the goods concerned." Even if it is assumed that the mere fact that the goods are slow-moving is a changing condition of marketability, respondent has not adequately demonstrated that this was a characteristic of the goods upon which the allowances were granted. For instance, there has been no attempt to show a comparison in the volume of sales between normal goods and the allegedly slow-moving goods. There has been no real justification under the proviso. Moreover, we are not at all convinced that the mere slow movement of

goods in the circumstances shown would constitute a changing condition of market or marketability within the meaning of the pertinent proviso in the Act. We believe that there must be shown a pronounced and serious deterioration or alteration in the market conditions. Nothing like that has been demonstrated here. *Cf. Moore v. Mead Service Co.*, 190 F. 2d 540 (10th Cir. 1951); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d 356, 369 (9th Cir. 1955). We therefore reject respondent's argument on this defense.

Advertising Allowances

The hearing examiner found in substance that respondent violated Section 2(d) of the Robinson-Patman Act in granting advertising allowances to some customers, which allowances were not made available to competing customers on proportionally equal terms. He differentiated between (a) advertising allowances granted in the normal course of business at regular prices, (b) advertising allowances granted by respondent to move its own slow-moving inventory and (c) advertising allowances to help the retailer sell the retailer's slow-moving stock. He found respondent in violation as to (a) and (c) but not as to (b).

Complaint counsel has excepted to the examiner's determination as to (b) above; respondent apparently appeals primarily from the scope of the order. The examiner ruled that the respondent consented to the entry of the cease and desist order with respect to advertising allowances made in the regular course of dealing in respondent's products and the respondent, in its brief, states that it does not contest the issuance of such an order. The examiner found that respondent granted discriminatory advertising allowances on goods purchased directly from respondent, as well as on respondent's goods purchased through AWC, which finding is not opposed by respondent. Respondent therefore apparently agrees that at least for the purpose of Section 2(d) the AMC stores are its "customers." The issue on advertising allowances is not whether a Section 2(d) order should be entered, since this is conceded; it is how broadly the order will be construed to cover different types of advertising allowances.

In connection with category (c), above, that is, advertising allowances to the retailer on the retailer's stock, we have only certain testimony to indicate that such allowances were granted, and this testimony alone does not show any discrimination in the availability thereof. Complaint counsel seems to have recognized a possible

deficiency in the record on this point and fails to mention any evidence supporting contentions of a violation. The hearing examiner based his conclusion on evidence showing a failure to inform competing customers of its availability. It is true that some retailers from Stamford, Connecticut, Boston, Massachusetts, and Philadelphia, Pennsylvania, testified that the availability of advertising allowances was not made known to them. This, however, falls short of adequate proof of any violation, since there is nothing to indicate that allowances of the kind here considered were granted in these three particular localities. We believe the evidence is insufficient to support a finding that respondent discriminated among competitors as to advertising allowances given on a retailer's own stock and we reject the examiner's holding to such effect.

The hearing examiner found that the respondent had made a third category of advertising allowance, which was that granted by respondent to move its own slow-moving inventory. This has been referred to as a close-out sale.² Mr. Kaplan defined this type of allowance in part as follows:

* * * One important group is our closeout sale. This is a very large proportion of the total advertising that we cooperate with the store on. But a close-out sale is a negotiation. It is merchandise that is sitting in our inventory that is not moving as well as we would like to. We want to be through with that pattern. We offer the pattern on a bargaining basis to a particular buyer * * *. (Tr. 431.)

The term "close-out" as used in the testimony suggests the elimination or discontinuance of an item or pattern from the stock. The testimony indicates that certain advertisements on which allowances were made, such as the advertisements identified as Commission Exhibits 41 and 43, concern merchandise purchased by the AMC store directly from the respondent. These advertisements apparently relate to special promotional merchandise, since that was all that AMC stores purchased directly from respondents. It is not at all clear from the record, however, that any of the goods on which advertising allowances were accorded were in fact discontinued items. The documents tell us very little. Strawbridge & Clothier,

² We concur in the examiner's disposition of respondent's argument that the allowances it granted on close-out merchandise was in effect a part of the price and should be governed by Section 2(a), at page 1329 of the initial decision, where he states:

"I cannot agree. There are many elements of cost which enter into any formula for determining a sales price by a seller. There may be no basis for segregating any one of them, such as advertising, and treating such segment separately, except where the seller, by his own behavior, so treats it. This is the case here. Kaplan negotiated a sales price for its close-out merchandise and deducted therefrom an advertising allowance separately stated. Having done so, the allowance came within Section 2(d) of the Act and had to be made available to all customers."

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in its invoice to respondent for respondent's share of the advertisement appearing in the record as Commission Exhibit 41, merely described the transaction as follows: "To advertising 'Shower Curtains' in the Sunday-Inquirer . . . Sept. 14— Your share as per agreement . . . \$200.00" (Commission Exhibit 36A). In other words, there is little, if anything, in the record to show that the allowances received for the advertisements, such as those represented by Commission Exhibits 41 and 43, are in a particular category relating to so-called close-out merchandise and thus different from respondent's regular advertising allowances. Nevertheless, because of the question raised, we believe it appropriate to proceed and consider the matter as though it were clearly shown that respondent had such a special category.

The hearing examiner decided the question on "close-out" advertising allowances on the basis that no other customer competing with the favored customer had purchased the same particular "close-out slow-moving pattern," citing *Atalanta Trading Corporation v. Federal Trade Commission*, 258 F. 2d 365 (2d Cir. 1958), as his legal authority. He is wrong in this determination. In the first place, goods of like grade and quality, in fact identical goods, were sold to competitors of the favored customer, although there was a time difference in the sales. As an example, the Americana pattern which was advertised by Strawbridge & Clothier of Philadelphia, Pennsylvania, on September 14, 1958 (Commission Exhibit 41), had been sold to a competing purchaser on February 28, 1958, and May 28, 1958. (Commission Exhibit 12.) If it is assumed that respondent sold the pattern about the same time it was advertised, there is a time difference here of a number of months between the transactions, but we do not believe that such a fact is fatal to a finding of sales of the same item to competing customers. This matter is clearly distinguishable from the *Atalanta* case on the point because here, unlike *Atalanta*, there is a showing of continuous sales of regularly promoted items. In *Atalanta* there were only isolated sales.

Secondly, the close-out allowance question was incorrectly decided by the examiner because goods of "like grade and quality" were sold to or handled by competitors of the favored retailers at the same time. In one instance, Strawbridge & Clothier of Philadelphia, Pennsylvania, an AMC store, advertised certain of respondent's curtains in the *Philadelphia Inquirer* on September 14, 1958, for which it received an allowance from respondent. (See Commission Exhibits 36A, B; 41.) At or about the same time, Gimbel's,

Philadelphia, Pennsylvania, purchased and marketed respondent's products, some of which were apparently the same in everything except pattern. The Strawbridge & Clothier ad, for example, mentioned "Barbary," a Koroseal curtain priced "Reg. 4.95, 2.99 ea." Gimbel's purchased "Bouffant" on August 26 and September 11, 1958, which product was also a Koroseal curtain, and it carried a suggested retail price of \$4.95. Gimbel's was not advised of the availability of any advertising allowance (nor were such allowances in any sense available) on the Bouffant pattern or similar curtains. While such goods differed as to pattern, the difference, in the circumstances, is not enough to distinguish the products. We 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*.

What respondent has done is to segregate a particular pattern in its line of shower curtains and decide that one purchaser out of a number of purchasers in a particular territory will receive an allowance for advertising on the particular pattern. The competitors, although they are handling goods of like grade and quality, receive nothing. The availability of the particular pattern and the advertising allowance on such pattern is not known to them. The withholding of an opportunity to buy the special pattern was in effect a withholding of an opportunity to share in the allowance. The customers involved are generally competing in the sale of respondent's whole line of goods, and it would be completely contrary to the purpose of Section 2(d), aimed at equality of opportunity for competing merchants, who acquire products for resale, if some are so denied a chance to participate.

We do not think that the principles involved, however, go so far as to require in this case that an advertising allowance on a specific item, though it be distinguished from a line by no more than a style or pattern difference, need be given on the whole line in all circumstances. If, for instance, it is shown that a particular item is to be discontinued and the manufacturer desires to grant an allowance on this item alone so that he can quickly clear his warehouse of the merchandise, as respondent claims it was seeking to do here, it may do so providing all customers competing in handling respondent's line in the affected market are given an equal opportunity to purchase this specific item and to share in the allowance.³

³ This has nothing to do with a seller's qualified right to refuse to deal with a potential purchaser. Here we are considering a situation in which competing purchasers handling respondent's line are purchasers of goods of "like grade and quality."

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In other words, the availability of the advertising allowance would depend upon the availability of the specifically promoted item or pattern itself. Here there has been no showing by respondent, as to the particular patterns on which payments were made, that competitors of the favored customers had an opportunity to buy the goods and receive a share of such payments. Cf. *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (7th Cir. 1958). In fact, the record affirmatively shows that respondent treated customers on an individual basis in the granting of advertising allowances on the close-out sales and that such allowances were not available to customers competing with the favored customers in the sale of respondent's goods. We therefore overrule the hearing examiner in his holding on this question and find and conclude as to the close-out advertising allowances that respondent has violated Section 2(d) of the Robinson-Patman Act.

Return of Merchandise

The examiner found that respondent conceded that it had accepted the return of merchandise from some of its customers, but not all. Moreover, the record clearly shows this to be the case. In Stamford, Connecticut, Bloomingdale's returned merchandise; but Redmond's was not offered the opportunity. Nor did respondent agree to grant such privilege when that customer specifically requested it. In Boston, Filene's and Jordan Marsh were privileged to return good merchandise, but respondent did not make the same service available to competitors Howell Brothers and Walpole Brothers. The benefits which the favored customers received were aptly described in the words of one of the customers, as follows:

Well, the shower curtain business is one that depends upon running it with clean, liquid stock. It is to our advantage to be injecting new styles, fresh styles, into that stock repeatedly. In this manner we are able to stimulate customer business. If our stocks become bogged down with undesirable sellers or with sellers that are—that our customers tell us they don't desire or demand, it is this that would affect our shower curtain business greatly. (Tr. 996-7.)

Respondent does not contest the finding and holding as to the difference in treatment in regard to returns of merchandise. It argues, however, that the returns are not within the meaning of Section 2(e) because they are not connected with the "processing, handling, sale or offering for sale" of such merchandise. We believe the argument is without merit. In the examples mentioned above, the competing retailers buy the respondent's merchandise

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regularly. This merchandise is bought for resale. It will obviously help the favored purchaser to move the merchandise which he has purchased from the respondent if he can return slow-moving patterns. Thus, the service provided is connected not only with the handling of the product returned, but also with the "handling, sale, or offering for sale" of the entire line of respondent's products. This we think is a service within the meaning of Section 2(e). See *Appleton-Century-Crofts, Inc.*, 47 F.T.C. 1371 (1951). Respondent has violated this subsection of the Clayton Act, as amended, since it did not accord such service to all purchasers on proportionally equal terms.

Form and Scope of Order

Respondent objects to the form of paragraph 1 of the order contained in the initial decision. It contends that words such as "charged to any other purchaser" renders that paragraph ambiguous, uncertain and vague. It questions whether this means prices charged by respondent or by persons other than respondent. We see no difficulty in light of the holding herein, which makes plain that the favored purchasers in this case include AMC stores buying through the AWC organization. Thus, in this instance, the prices charged are those charged the AMC store through AWC. Whatever the arrangement is between AWC and its owners, the AMC stores, this is no concern of the respondent. All benefits of the lower prices go to the AMC stores. Also, respondent need not proceed at its peril under the order, since, as the court observed in *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962), the Commission's offices are open for discussion of any problems which may arise under the order. We therefore reject respondent's request for modification of paragraph 1 thereof.

Complaint counsel contends that paragraph 3 of the order is too narrowly written and we agree. We have found that respondent has violated Sections 2(a), (d) and (e) of the Clayton Act, as amended, and to have violated these subsections in a variety of ways. The violations shown herein cover a long period of time and tend to show favored treatment towards certain large retail customers. In the circumstances, we believe that an order broad enough to prevent future violations through variations in the methods engaged in is fully justified. Commission orders are not designed to punish for past transgressions but are designed as a means for preventing illegal practices in the future. *Nivest Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 343 (7th Cir.

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Final Order

1960), *cert. denied*, 364 U.S. 883; *cf. Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962). Paragraph 3, therefore, will be modified to cover discriminatory furnishing of services and facilities beyond that of accepting the return of unsold products by changing the pertinent phrase to read: "the service of accepting the return of its unsold products or any other service or facility connected with the handling, sale or offering for sale of said products."

The exceptions of complaint counsel are sustained and the respondent's exceptions are sustained to the extent above indicated and otherwise rejected. The initial decision will be modified in accordance with the views expressed in this opinion and as modified will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioners Elman and Higginbotham concur in the result.

FINAL ORDER

NOVEMBER 15, 1963

This matter having come on to be heard upon the exceptions of counsel supporting the complaint and of the respondent to the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to the exceptions respectively taken; and

The Commission, for the reasons stated in the accompanying opinion, having sustained the exceptions of complaint counsel and sustained in part and rejected in part the exceptions of respondent and having further directed that the initial decision be modified in accordance with the views therein expressed and as so modified adopted as the decision of the Commission:

It is ordered, That the portion of the initial decision under and including the heading "Discussion" be, and it hereby is, stricken.

It is further ordered, That paragraph 3 of the order contained in the initial decision be, and it hereby is, modified to read as follows:

3. Discriminating, directly or indirectly, among competing purchasers of its products by contracting to furnish, furnishing, or contributing to the furnishing of, to any of respondent's customers the service of accepting the return of its unsold products or any other service or facility connected with the handling, sale or offering for sale of said products, unless such service or facility is made available on proportionally equal terms to all customers competing with such favored customers in the sale of said products.

Complaint

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It is further ordered, That the initial decision, as so modified and as supplemented by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, Joseph A. Kaplan & Sons, Inc., 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 the order to