

sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
FASHION PARK, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d)
OF THE CLAYTON ACT

*Docket C-794. Complaint, July 17, 1964—Decision, July 17, 1964**

Consent order requiring a Rochester, N.Y., distributor of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by granting substantial promotional allowances to certain department stores while not making proportionally equal allowances available to all competitors of said favored customers. The effective date of the order has been postponed until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells

*This order was made effective on Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-32S, et al., Aug. 9, 1965, 68 F.T.C. 393.

and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce 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 and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

The respondent having executed the agreement containing a consent order which agreement contains an admission of all the jurisdictional facts set forth in the complaint to issue herein, and a statement that the signing of the said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as set forth in such complaint, and also contains the waivers and provisions required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fashion Park, Inc. is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 432 Portland Avenue, Rochester 2, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Fashion Park, Inc. a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

MAX FACTOR & COMPANY AND SHULTON, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d)
OF THE CLAYTON ACT

Dockets 7717 and 7721. Complaints, Jan. 5, 1960—Decisions, July 22, 1964

Orders dismissing, without adjudication of the issues and on the determination that entry of a desist order would not serve the public interest, complaints charging cosmetics manufacturers with violating Sec. 2(d) of the Clayton

Act by making discriminatory payments—such as an allowance of \$881 for advertising in 1958 to J. Weingarten Inc., in connection with the sale of its cosmetic products, when they did not make proportionally equal payments available to all Weingarten's competitors.

COMPLAINTS*

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaints, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Max Factor & Company, Docket No. 7717, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1655 North McCadden Place, Hollywood, California.

Respondent, Shulton, Inc., Docket No. 7721, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 697 Route 46, Clifton, New Jersey.

PAR. 2. Respondent, Max Factor & Company, Docket No. 7717, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics to retail chain store organizations, department stores, independent drug stores, grocery stores, syndicate stores, rack jobbers and drug wholesalers. Sales made by respondent are substantial and exceeded \$45,000,000 in the year 1958.

Respondent, Shulton, Inc., Docket No. 7721, is now and has been engaged in the business of manufacturing, selling and distributing toiletry, chemical and pharmaceutical products. It sells its products to retail chain store organizations, independent drug and grocery stores, department stores, and wholesalers throughout the United States, and certain countries in Europe and Latin America. Respondent's total sales are substantial having exceeded \$37,000,000 in the year 1958.

PAR. 3. In the course and conduct of their business, respondents have engaged and are now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondents sell and cause their products to be transported from the respondents' prin-

*The Complaints were consolidated by the Compiler.

principal place of business, to customers located in other States of the United States, and certain countries in Europe and Latin America.

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their 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 respondents, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondents' products.

PAR. 5. For example, during the year 1958 respondent, Max Factor & Company, Docket No. 7717, contracted to pay and did pay to J. Weingarten, Inc., Houston, Texas, \$881 as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

For example, during the year 1958 respondent, Shulton, Inc., Docket No. 7721, contracted to pay and did pay to J. Weingarten, Inc., \$6,000 as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondents, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John H. Brebbia for the Commission, Docket No. 7717.

Mr. Frederick M. Rowe and *Mr. Joseph DuCoeur* of *Kirkland, Ellis, Hodson, Chaffetz & Masters*, Washington, D.C., for respondent, Max Factor & Company, Docket No. 7717.

Mr. Austin H. Forkner for the Commission, Docket No. 7721.

Mr. J. Wallace Adair and *Mr. Richard L. Perry* of *Howrey, Simon, Baker & Murchison*, Washington, D.C., for respondents, Shulton, Inc., Docket No. 7721.

INITIAL DECISION AFTER REMAND BY WALTER R. JOHNSON,
HEARING EXAMINER, DOCKET NO. 7717

MARCH 6, 1964

On January 5, 1960, a complaint was issued wherein the respondent was charged with making discriminatory payments to some of its customers in violation of Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13.) As an example, the complaint recites a payment of \$881 by respondent to J. Weingarten, Inc., Houston, Texas, during 1958.

Respondent's answer denied any violation and affirmatively pleaded that its payments were made in good faith to meet payments on the part of its competitors. Respondent in its answer also questioned the public interest aspects "to single out one transaction of *de minimis* scope for a formal proceeding which aims at a broad order to cease and desist that can severely handicap a respondent in competing with its numerous rivals who are free of such restraints." A motion of J. Weingarten, Inc. to intervene was denied by the hearing examiner.

Prehearing conferences led to a clarification of the issues and permitted voluntary access by complaint counsel to respondent's business files in Hollywood, California. Hearings for the receipt of evidence were held on January 11, 1961 in Shreveport, Louisiana, on January 12 and June 6, 1961 in Houston, Texas, and on June 13, 1961 in Los Angeles, California. The testimony of 18 witnesses was heard and is contained in a transcript of 544 pages: 61 exhibits were received in evidence.

In connection with its defense, respondent made application for subpoenas addressed to eight competitors who participated in the Weingarten promotions. For the reason that the Commission had held in prior cases that the meeting competition defense of subsection (b) was not available in a subsection (d) proceeding, the hearing examiner denied the request of respondent. An interlocutory appeal from the ruling was denied by the Commission, one member dissenting.

Proposed findings were filed by both parties and the hearing examiner heard arguments thereon on September 28, 1961. On October 4, 1961, the hearing examiner issued an initial decision which found that the respondent was guilty as charged and set forth a cease and desist order. On October 23, 1961, the respondent initiated an appeal with the Commission which heard oral arguments thereon on February 28, 1962. On November 2, 1962, the Commission issued an order wherein it recited that the Commission had determined "that respondent should be afforded an opportunity to present a defense under Sec-

tion 2(b) of the amended Clayton Act" and remanded the matter to the hearing examiner "for further proceedings consistent with the Commission's aforesaid determination".¹ It was "*Further ordered*, That the hearing examiner, upon completion of the hearings, shall file with the Commission a new initial decision on the basis of the entire record herein", including findings and conclusions "upon all the material issues of fact, law or discretion" presented.

Prehearing conferences again led to a clarification of issues and resulted in agreed procedures that facilitated the disposition of the hearings on respondent's defense. A detailed stipulation between the parties (RX 29) also simplified the defense hearings and set forth facts which obviated the necessity for calling numerous witnesses in support of respondent's meeting competition defense. The examiner on May 27, 1963 entered an agreed order which, among other things, required each party to file a pre-trial brief containing (1) a summary of the issues of fact and law the party considered to be presented by the case; (2) the names and addresses of each witness the party intended to call at the hearings, together with a statement of the nature of the witness' testimony; and (3) a list of the exhibits the party intended to introduce in evidence. Inasmuch as respondent had the burden of going forward with evidence on its Section 2(b) defense, it filed its pre-trial brief first, and complaint counsel filed an answering brief thereafter.

Hearings for the receipt of respondent's meeting competition defense were held on August 5-7, 1963 in New York City. Respondent's presentation conformed with the outlines of its pre-trial brief in all pertinent respects. Respondent also presented a detailed stipulation concerning the participation of numerous competitors in the promotional events of J. Weingarten, Inc., together with the amounts of their respective participations (RX 29), and presented the testimony of seven officials of competitors as to their participation in the Weingarten events. In all nine witnesses testified and forty-one exhibits were introduced in support of respondent's meeting competition defense. Complaint counsel's rebuttal evidence was received on October 16, 1963 in Washington, D.C. Only one rebuttal witness was called to testify and two other witnesses were excused by complaint counsel after subpoenas were issued by the examiner for their appearance on complaint counsel's motion. On the latter date, the record was closed for the receipt of evidence. The parties filed proposed findings on November 29, 1963

¹ The courts held the "meeting competition" defense available in Section 2(d) proceedings. *Exquisite Form Brassiere, Inc. v. FTC*, 301 F. 2d 499 (D.C. Cir., 1961), cert. denied, 369 U.S. 888 (1962); *Shulton, Inc. v. FTC*, 305 F. 2d 36 (7th Cir., 1962).

and replies thereto on December 11, 1963. The hearing examiner has given full consideration thereto and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

Respondent, Max Factor & Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1655 North McCadden Place, Hollywood, California (Complaint, par. 1; Answer, par. 1). Respondent is now and has been engaged in the business of manufacturing, selling and distributing cosmetics to retail chain store organizations, department stores, independent drug stores, grocery stores, syndicate stores, rack jobbers, and drug wholesalers. Sales made by respondent are substantial and exceeded \$45,000,000 in the year 1958, and \$53,000,000 in 1959 (Complaint, par. 2; Answer, par. 2; CX 1).

In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in California, to customers located in other States of the United States and in the District of Columbia (Complaint, par. 3; Answer, par. 3).

One of respondent's customers, J. Weingarten, Inc. (hereinafter referred to as Weingarten), with its principal office located at Houston, Texas, is engaged in the operation of a chain of retail supermarkets purchasing and reselling a large number of products, including food, drugs, cosmetics and household articles. Weingarten has 60 such supermarkets located in the States of Texas, Louisiana and Tennessee. 47 of the stores are in Texas, 5 in Louisiana, and 8 in Tennessee. For a number of years Weingarten has been having "Anniversary", "Health and Beauty Carnival" and other promotional sales and, in connection with such sales, its suppliers are requested to participate by making payments in return for which they are to receive newspaper advertising and other promotional services (RX 23). The issues in this case are limited to respondent's participation in three promotional sales. In 1958 it paid Weingarten \$885.86 (although \$881.14 was the Commitment figure) in connection with the 57th Anniversary Sale and \$884.40 for the Ninth Annual May Beauty Carnival; and in 1959 it paid \$760.60 in connection with the May Beauty Carnival, as compensation or as allowances for advertising or other services or facilities furnished by or through Weingarten in its offering for sale of products sold to

it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Weingarten in the sale and distribution of products of like grade and quality purchased from respondent. The evidence relating to these matters is detailed in the findings hereinafter set forth.

Before proceeding to discuss the evidence, the observation should be made that the complaint counsel in putting in their case-in-chief were confronted with the situation of using one Max Factor employee and two Weingarten employees as witnesses who were unfriendly and evasive. Mr. James J. Millett, Jr., who has been the respondent's sales representative in the Houston area since August 1953, appeared as a witness on three different occasions, the first time when called by complaint counsel, the second time when he was used by respondent in putting in its defense prior to the remand and the third time when called by the respondent in connection with its meeting competition defense. The testimony given by Mr. Millett is not only evasive but is full of contradictions and in many respects cannot be regarded as credible. The circumstance is illustrated by reciting from page 341 of the transcript when he was called as a witness by complaint counsel:

CROSS EXAMINATION

By Mr. ROWE:

Q. Mr. Millett, very briefly, will you tell us what your responsibilities are as an employee of Max Factor in the Houston area? You are principally a salesperson?

A. Yes, I am a salesman, go out all day long and take orders from people that are our customers.

Q. Do you have any authority with respect to advertising or promotional agreements with Max Factor, with customers in this area?

A. No, I don't.

Then, when called as a witness for the respondent, he had this to say:

By Mr. ROWE:

Q. You have previously testified in this proceeding, Mr. Millett, in the hearings held January 12, 1961?

A. Yes, I did.

Q. Would you state again, sir, the nature of your business on behalf of the Max Factor Company?

A. I am the territorial representative, which includes calling on all of the people that we do business with down here, to write their orders and to handle all the other business that we have with them, which includes calling on the drugstores, department stores, chain stores, building up displays on counters, working with their salespeople, handling our promotions and handling all correspondence pertinent to this territory. (Tr. 359-60.)

184

Initial Decision

In January 1958, Weingarten sent out a letter to its suppliers, soliciting their participation in its *57TH ANNIVERSARY SALE* (CX 20A), which was to be held from February 25 to March 8, 1958. The letter reads in part:

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

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

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

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

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

There was attached to the letter a sheet setting forth a schedule of prices *for the entire promotional program* and the supplier was given the option of selecting one of five categories of participation with the prices varying according to the size of the newspaper advertisement (CX 20B). For example, \$881.14 was specified for the "Entire Service Which Includes Approximately $\frac{1}{8}$ Page" newspaper ads in five Weingarten trade areas. Ninety of Weingarten's suppliers participated in the sale and made contributions totaling \$23,538.37 (CX 6A-D). Mr. Millett received a copy of the letter and discussed with Mr. Bob Framson, Weingarten's cosmetics buyer, Max Factor's participation in the promotion. Such discussion may have taken place prior to the time the letter was sent out (Tr. 843-45). Apparently at that time it was agreed that Max Factor would participate, featuring its product "Creme Puff Combination" (Tr. 404). However, on January 31, 1958 Mr. Millett and the respondent's Sales Manager, Al Rubin, met with Weingarten's Mr. Framson when the 57th Anniversary Sale was discussed, and it was agreed that the products "Sebb" and "Curl Control" would be featured instead of "Creme Puff Combination" (Tr. 818-20). When Mr. Millett was questioned with regard to the extent of Max Factor's participation, he gave the unbelievable answer: "No mention was made of a certain figure that we would pay" (Tr. 849). A written advertising authorization, dated February 19, 1958, was issued by Max Factor at its Hollywood, California office to Weingar-

Initial Decision

66 F.T.C.

ten to run advertising in specified newspapers on a cooperative 75-25% basis during the 57th Anniversary Sale, product Creme Puff Combs, in the total amount of \$881.14, of which Factor's 75% share would be \$660.86 (CX 4). It should be noted that the authorization is for newspaper advertising only, and it would seem that it was issued on the basis of Mr. Millett's first discussion with Weingarten's Mr. Framson with regard to the 57th Anniversary Sale. On March 7, 1958, Weingarten billed Max Factor "For Your Participation in Our 57th Anniversary Sale \$881.14" (CX 7). Payment of the billed amount is shown by a tabulation prepared by Weingarten, which sets forth that on 4-8-58 it received Max Factor's check # 12084 dated 3/25 and on 6-6-58 it received Max Factor's check # 6868 dated 6/4 (CX 9). The newspaper cost to Weingarten for advertising Max Factor & Company and the featured products in connection with the 57th Anniversary Sale totaled \$373.77, but, as the record shows, the newspaper cost was only part of the promotion purchased by Max Factor and did not include Radio, television, bulletins and other items involved in the promotion (CX 10). The specific expense to Weingarten for items other than newspaper costs is not shown by the record.

It is the position of respondent that it had only participated in the promotional sale in the amount of \$660 as set forth in the written authorization (CX 4). In putting in its defense, respondent called Mr. Melcombe, one of its accountants from its Hollywood office, who was the custodian of some of its records, and through him there were offered and received in evidence the two checks which the Weingarten records showed that it had received from respondent in payment of Max Factor's participation in the promotion in question. Check #12084 (RX 20) payable to Weingarten, Inc., dated 3-25-58, is in the amount of \$660.86 and drawn on Max Factor's account in the Security-First National Bank of Los Angeles. Check #6868 (RX 21) payable to Weingarten's, Attention: Mr. Bob Framson, Buyer, dated June 4-58, is in the amount of \$225.00 and drawn on the Max Factor account in the Citizens National Trust & Savings Bank of Los Angeles. Mr. Melcombe testified that his company makes payment to its customers for authorized cooperative advertising from a special checking account kept in the Security-First National Bank of Los Angeles (Tr. 501). The witness also identified a confirmation request which the respondent received from Weingarten with reference to the correctness of the item in the amount of \$220.78 appearing in Weingarten's books as being due from Max Factor as of May 31, 1958. Weingarten asked that the reply to the request be made to the auditing firm of Touche, Niven, Bailey & Smart of Houston, Texas

184

Initial Decision

(RX 19A-B). It should be noted that Mr. Melcombe did not profess to have any personal familiarity with the Weingarten transactions and his lack of knowledge in this respect is revealed by the following questions and answers given by him on cross-examination:

Q. Are you familiar with the J. Weingarten account, Mr. Melcombe?

A. I know they are located in Texas. (Tr. 532.)

* * * * *

Q. Mr. Melcombe, would you take Respondent's Exhibit No. 21 in evidence, please and tell me why Max Factor paid that sum of \$225.00?

A. I haven't got the slightest idea why it was paid.

Q. But you know that it was paid?

A. Yes, sir. I have the canceled check. (Tr 534-5.)

Mr. Millett, called as respondent's witness, identified a copy of a letter dated July 3, 1958 sent to Touche, Niven, Bailey & Smart by Max Factor & Co., authored by Howard A. Lawrence, in reply to the aforementioned confirmation request, which reads in part:

Regarding invoice #27132 dated March 7, 1958 for \$220.28, when this bill was originally submitted it was in the amount of \$881.14 which represented the full cost of advertising and the agreement that we have with this company is that we pay only 75%. On March 25, 1958 we mailed them our check #12084 in the amount of \$660.86 in full payment of this invoice. The balance that you show, \$220.28 is the additional 25% that we do not pay and, therefore, is not a valid claim against our company. (RX 15A-B.)

With reference to the foregoing document, Mr. Millett had this to say:

By Mr. ROWE:

* * * * *

Q. Thank you, Mr. Millett.

I would like to recall in your mind one aspect of the testimony you rendered on the occasion of the previous hearing here held in January, and I invite your attention, if I may, to the transcript at Page 336, and in substance, Mr. Millett, on that portion of the transcript appears your testimony which, in substance, refers to being bothered by a representative of Weingarten as to certain monies being in dispute between Max Factor Company and the Weingarten Company; is that correct?

A. That's correct.

Q. You testified at that time that you were bothered, to use your word, by representatives of Weingarten at that time in that connection.

A. Yes. They kept mentioning would I contact the company to get them to pay the money they said we owed them.

Q. Have you, to your recollection, Mr. Millett, ever received any correspondence or copies of correspondence relating to this situation of dispute between Max Factor and Weingarten?

A. Yes. I received a letter from Howard Lawrence or a copy of a letter. to a firm of accountants.

Q. I show you at this time, Mr. Millett, a document marked Respondent's Exhibit 15-A and -B for identification, this being a letter by Max Factor, or

Initial Decision

66 F.T.C.

a copy of a letter from Max Factor & Company to Touche, Niven, Bailey & Smart, which are accountants in Houston, Texas, dated July 3, 1958, and I ask you whether or not this is a copy of the correspondence which you received.

A. Yes, sir, it is.

Q. And I invite your attention to the third paragraph from the bottom of Page 15-A, and ask you whether the contents of this paragraph refer to the dispute over monies owing, to which you testified in our January hearings in this case.

A. Yes, it does. (Tr. 442-3.)

* * * * *

Q. With respect to Exhibit 15-A and -B, Mr. Millett, to the best of your recollection was this sum outstanding dispute ever paid by Max Factor to Weingarten?

A. I don't know that it was, no. (Tr. 444.)

The portion of page 336 of the transcript to which Mr. Millett's attention was invited referred to testimony given by him when called as a witness by complaint counsel. It reads in part:

By Mr. GOODHOPE:

* * * * *

Q. You participated in the May Beauty Carnival, did you not, 1958?

A. We were on their counters in a competitive position through the May Carnival.

Q. You also participated in making them a payment for that promotion?

A. As far as I know, we didn't make them a payment.

Q. You didn't?

A. I don't know whether we did or didn't. He bothered me to see if I could get the company to pay the money he said was in dispute. I didn't know anything about it.

Q. What was he bothering you about?

A. As I went in to get the orders from him, he would say, "You still owe us some money."

Hearing Examiner JOHNSON: Who is "he"?

The Witness: Mr. Bob Framson.

By Mr. GOODHOPE:

Q. Was that in connection with the Fifty-Seventh Anniversary Sale he was bothering you?

A. He didn't specifically say. As I was leaving, he said once or twice, not on every call, he said, "Would you stop in and see—" whatever that lady's name was—"about this money you owe us?" And she would show me this and that, which didn't make very much sense to me. And as long as I had what I was in there to accomplish, I just let it slide. (Tr. 336-7.)

It seems to be the position of respondent that, because the check #6868 listed on the Weingarten tabulations was in the amount of \$225.00 and not for \$220.28, which was the amount claimed by Weingarten, together with the letter dated July 3, 1958 sent by respondent to Weingarten's auditors, the inference should be drawn that check

#6868 was in payment of some transaction other than the 57th Anniversary Sale as shown by the Weingarten records. There is no direct testimony in the record that the respondent did not make the payments shown by the Weingarten tabulations received in evidence (CX 6A-D; CX 9). If the \$225.00 check was in payment of something other than the 57th Anniversary Sale, the respondent should have produced some one who was familiar with the situation to explain the transaction. This it failed to do. If Max Factor's participation had been limited to newspaper advertising on a 75/25 basis, it would not have paid \$660.86, but it would have paid only \$280.33, which is 75% of \$373.77, the amount expended by Weingarten for Max Factor ads in connection with the promotion sale. Furthermore, if it should be assumed that the respondent's participation totaled only \$660.86, it would not alter the conclusions drawn herein.

On April 3, 1958, Weingarten sent a letter to Mr. Jim Millett announcing its 9TH ANNUAL MAY HEALTH & BEAUTY CARNIVAL to take place during May 5, 1958 through May 31, 1958, stating that his company was among twenty participants in the 1957 Carnival. The letter outlined the details of the promotion, showed the extent of the respondent's participation in the 1957 event, and suggested figures for its participation in the 1958 event (CX 21A-B). A tabulation prepared from Weingarten's records shows that 20 of its cosmetic suppliers participated in the 1958 Carnival event and the amount each contributed, totaling \$17,639.86. It shows that respondent paid \$884.40 (CX 12). In Weingarten's invoices (CX 13 and 14) billing respondent, it lists the latter's participation as follows:

Cash prizes.....	\$300.00
Additional 5% of retail P.M. paid to sales personnel.....	449.40
Newspaper advertising totaling \$180.00 on a "¾ local rate your share"--	135.00
Total	884.40

The Max Factor products featured in the 1958 Carnival event were Natural Wave and Primitive Combination (Tr. 412-416). The respondent does not seem to dispute facts set forth in this paragraph detailing its participation in the 1958 Carnival.

On March 17, 1959, Weingarten sent a letter to Mr. C. R. Ruston, Max Factor & Co., Hollywood, California, announcing its 10TH ANNUAL MAY HEALTH & BEAUTY CARNIVAL to be held from May 4, 1959 through May 30, 1959 and invited respondent's participation (CX 27A-B). In reply thereto, Mr. Ruston, on March 24, 1959, wrote to Weingarten wherein he said:

Initial Decision

66 F.T.C.

We are asking our Sales Representative in your area, Jim Millett, to contact you personally and discuss this promotion, as in going over past correspondence regarding this same subject for 1958 there seemed to be some misunderstanding regarding cash prizes and by Jim discussing this subject thoroughly with you this year we will not have the same misunderstanding.

The matter of the 5% and advertising will be no problem, but in order to avoid confusion this entire matter will be covered with you at the time of Jim's contact. (CX 28.)

A memorandum signed by Jim Millett and penned at the buyer's desk at Weingarten on April 14, 1959 reads:

MAX FACTOR & Co.

We agree to participate in J. Weingarten's May Carnival by paying a 5% extra PM during the month of May on MFH sales.

We will furnish merchandise prizes of \$300.00 at cost. Regular Stock merchandise, of your own choice. (CX 16.)

When called as a witness by complaint counsel, he testified on cross-examination with reference to the document as follows:

By Mr. ROWE:

Q. You say you did not make any copies of this document. Did you inform anyone at the company in Hollywood, your superiors, that such a document had been filled out by you?

A. No, I did not.

Q. Can you tell us why you did not?

A. Well, as I said, I don't have the authority to O.K. arrangements of that nature with an account that size or any other size, and I just preferred that they didn't know about it.

Q. Do you know, Mr. Millett, as a fact, whether or not this particular memorandum which you wrote up was ever fulfilled in any form, whether the arrangements there specified were ever fulfilled by the company.

A. I really don't know. (Tr. 343-44.)

When called as respondent's witness, he testified on cross-examination as follows:

By Mr. BREBBIA:

Q. What was the reason for Mr. Framson making you sign this memo that Mr. Rowe just mentioned, pertaining to the 1959 Carnival?

A. He wanted to know definitely would Max Factor be participating or not participating in this Carnival, and he had to know right then and he wanted to make sure that we were, and I told him that I had to find out from the office before I could commit the company, and that was good enough, and so I had to sign this little bulletin.

Q. In other words, you committed the company without the company's permission?

A. That's right.

Q. You testified earlier you didn't have the authority to commit the company.

A. That's right. I subsequently got my commitment approved by the office.

Hearing Examiner JOHNSON: You say you did get it approved, is that correct?

The WITNESS: Yes, sir. I phoned them later and told them what had occurred. (Tr. 871-72.)

A tabulation prepared from Weingarten's records shows that 20 of its cosmetic suppliers participated in the 1959 Carnival and the amount each contributed, totaling \$20,791.45. It shows that respondent paid \$760.60 (CX 17). In Weingarten's invoice (CX 18) billing respondent, it lists the latter's participation as follows:

Cash prizes.....	\$300. 00
Additional 5% of retail PM paid personnel.....	460. 60
Total	760. 60

The products featured in the displays in Weingarten stores were Hypnotique Fragrance and Hi-Society Lipstick. In reference to the 1959 Carnival, the figures shown by the Weingarten records are not disputed by the respondent.

Weingarten carried a complete line of Max Factor products which it purchased directly from the respondent (Tr. 206). Mr. Millett testified, where newspaper advertising was authorized by his company, it was "always made in relation to particular products of the company", and these products were agreed upon by the parties (Tr. 394). Mr. Alfred Firestein, of Hollywood, California, Executive Vice President of the respondent company, testified that:

Every ad for a Max Factor product will carry the Max Factor name. The Max Factor is what we are selling basically. It is the reputation and integrity, the fine quality products that meet the needs of the consumer at a price that is reasonable for the average consumer. (Tr. 772-73.)

In the newspaper ads devoted to respondent in the promotions heretofore discussed, the name Max Factor was prominently set forth, as well as the featured products. In the three promotional events involved herein, the participants were favored with special displays in each of the Weingarten stores. The displays devoted to Max Factor were not devoted to the featured products alone, but to its entire line (Tr. 799). With respect to the special push money (PM), as well as the regular push money, paid by the respondent to Weingarten, the sales clerks were paid the proper percentage of the total of all Max Factor products that they sold during the Carnivals in 1958 and 1959, and had no relation to any particular product (Tr. 857). The "cash prizes", monies paid in connection with said Carnivals by the respondent to Weingarten, were used to make awards to the latter's personnel for displays, percentage of increase over assigned sales quotas and the like which pertain to Max Factor's entire line of products (CX 21A-B). It is therefore found that the promotional payments made by the

respondent to Weingarten, as hereinbefore related, were in connection with the sale by the respondent to Weingarten of all of its products.

To establish that other customers of respondent in the trade areas of Shreveport, Louisiana, and Houston, Texas, competed with Weingarten in the sale and distribution of respondent's products and that such competing customers were not offered payments, such as were paid to Weingarten, on proportionally equal terms, complaint counsel presented the testimony of thirteen witnesses representing twelve retailers and one wholesaler. Three of the retailers had stores in Shreveport, eight had stores in Houston, and one had stores in both cities.

There was evidence that during 1958 and 1959 a Shreveport wholesaler purchased respondent's full line of products and resold them to retailers who were in direct competition with Weingarten, and that the respondent never offered or made available to the wholesaler any advertising or promotional allowances (Tr. 70-87). The Hearing Examiner will disregard this evidence, although he is familiar with the decision of the Commission in *Fred Meyer, Inc.*, Docket No. 7492 (March 29, 1963), now pending on appeal in the U.S. Court of Appeals (Ninth Circuit), for the reason that he does not consider it necessary to involve such an issue in this proceeding.

Each of the retail dealers who testified was appointed a Max Factor dealer by the execution of a written franchise agreement. Under the terms of the agreement, respondent agreed to supply the retailer's normal requirements for Max Factor products and to pay, under specified conditions, advertising and promotional allowances. The retailer agreed to sell Max Factor products, to maintain adequate inventories, to use his best efforts in featuring and promoting the sale of Max Factor products, and to furnish respondent regular and special promotional services (CX 3). The record contains copies of the franchise agreements, which contain the details of three different promotional allowance plans available to the retailer. The franchise agreements also set forth that the respondent would make available on request of the retailer, when authorized by Factor, on a share and share basis, allowances for advertising in newspapers of paid circulation, or radio or television. It would serve no purpose to recite the details of the promotional allowances, including newspaper advertising allowances, available under the franchise agreements in that the respondent cancelled and superseded all such provisions and initiated a new plan effective January 1, 1958. On December 1, 1957, respondent wrote to all of its retailers as follows:

To enable you to achieve a much greater Max Factor volume and profit, we are pleased to announce that we will merge our Cosmetic Division and our Pharma-

184

Initial Decision

ceutical and Specialty Division on January 1, 1958. This means that starting January 1st, all Max Factor products may be combined for discount, promotional allowance and prepaid freight. You will now enjoy 10% greater profit by the direct purchase of products formerly distributed through our Pharmaceutical and Specialty Division and it will be easier and more profitable for you to do an even greater volume on the entire Max Factor line.

Our discounts for all Max Factor products will be retail list price less $33\frac{1}{3}\%$, less 10% allowance for display and free flow of merchandise less 2% cash discount 10 days EOM. All Max Factor products will be shipped to you on a freight prepaid basis providing the net amount of the order before cash discount equals \$75.00 or more.

In addition, we will allow you an extra $8\frac{1}{3}\%$ allowance from the net invoiced amount for payment of P.M.'s providing such incentive compensation is paid to your sales personnel and if you provide us with feature display in your cosmetic department and extra push and extra effort in promoting the sale of Max Factor products in accordance with the attached application. If you will sign and return this application in the self-addressed envelope enclosed, we will process it immediately. The schedule of discounts and allowance outlined here supercedes any earlier agreements and franchises which are to be considered as cancelled January 1, 1958.

We have planned the most dramatic advertising campaign in our history to start off 1958. In addition to strong network TV programming, we will have spot TV, magazines and local newspapers. We feel this is the start of what will be the greatest year in our history and we most sincerely hope that you will participate with us and share in this greatly increased volume.

The provisions of the plan remained in effect during the years of 1958 and 1959. During that period, each retailer called as a witness, and Weingarten, received the $33\frac{1}{3}\%$ trade discount and the 10% allowance for display and free flow of merchandise, the mathematical equivalent of 40%. Respondent invoiced its retailers at the retail list price of the products purchased, less the two discounts or 40%, which would give the amount the retailer was to pay. Each retailer witness, who paid P.M.'s to his salespeople, and Weingarten received the $8\frac{1}{3}\%$ incentive compensation allowance from the net invoice amount (5% of retail list price) (Tr. 421-22, 490-91; CX 38). Each retailer witness, during the period involved, purchased Max Factor products directly from the respondent (Tr. 89, 92, 107, 210, 218, 220, 234, 248, 260, 269, 280, 291, 300, 309), and in the resale of the products was in competition with Weingarten (Tr. 93, 114, 115, 215, 220, 236, 250, 263, 275, 281, 293, 301, 325). Eleven of the retailers, outside of the usual 10% allowance for display and $8\frac{1}{3}\%$ P.M.'s (in the instances where paid) were not offered by the respondent, nor did they receive from the respondent, during the years 1958 or 1959, any advertising or other promotional allowance. The situation was the same with the twelfth retailer, except that it had received newspaper allowances during both years on a 75/25 basis (Tr. 307-326).

There is no evidence in the record to refute the testimony of the Shreveport dealers that, other than the regular and usual 10% and 8 $\frac{1}{3}$ % allowances, the respondent did not offer, make available or pay to them any promotional allowances. Respondent called as a witness Mr. Fred W. Hansen who was, at the time involved, its Southern Sales Manager with his headquarters at Atlanta, Georgia, and his territory included the Shreveport area. The testimony given by him does not contradict the facts as hereinbefore found. Mr. Hansen acted in a supervisory capacity, and it does not appear that he had personal contact with the Shreveport dealers. Respondent's salesman, who dealt with such accounts, was not called as a witness.

With reference to the accounts in the Houston area, there is the testimony of Mr. Millett, respondent's sales representative in that area. When called as a witness by complaint counsel on January 12, 1961, Mr. Millett, after evasively going over the circumstances surrounding the payments made by his company for its participation in the Weingarten Anniversary and Carnival Sales in 1958 and 1959, gave the following answers to questions put to him:

Q. Did you make a similar offer to all the other customers in the area?

A. There was no offer made by me at all.

Q. You agreed to make a payment. Do you agree, or did you agree to make a similar payment to all the other customers?

A. I was under pressure to meet the competition of the other lines he showed me were in there.

Q. Did you make the same offer to the other customers?

Mr. ROWE: Object. He hasn't stated he made any offer.

Hearing Examiner JOHNSON: He may answer.

By Mr. GOODHOPE:

Q. Did you agree to make any such payment to any other customers in the area?

A. No, I did not. (Tr. 334-35.)

* * * * *

Q. Did you make a similar offer to all the rest of all your competitors of Weingarten in the area about the same time you agreed to make this payment to Weingarten?

A. No. I said I didn't offer to make it. I was sort of forced into making it to maintain my position in his stores.

Q. And you didn't make a similar offer to any of your other customers in that area?

A. No, I did not. (Tr. 337.)

The respondent would disregard what has been recited and rely on portions of Mr. Millett's testimony given by him when called as a witness by respondent on June 6, 1961. At that time he explained how the retail accounts he serviced looked to him as to advertising and

promotional allowances, saying: "I am the person they see from Max Factor and only person—the printed document (franchise agreement) is nice but it gets lost in the files and more or less when they want something clarified, they wait until I come there and discuss it with me" (Tr. 389). Mr. Millett said he periodically called on his retail accounts and discussed with them the promotional and advertising allowances that respondent had available, and that "we discuss with each account on a periodic basis the fact that we do have cooperative advertising, that we are also doing other forms of promotion that they are engaged in" (Tr. 389, 393, 394, 460). On cross-examination, the following exchanges took place:

Q. In the absence of a request, do you offer cooperative advertising to your retailers?

A. My primary job is to sell merchandise, and in the line of selling it, we discuss any way we can to sell more of it. To say I went in and offered it to every account I call on, that would not be true. But we discuss it with everybody. (Tr. 459.)

* * * * *

Q. My question is: You were not offering to the other retailers the same you gave to Weingarten, is that correct?

A. That's correct. We didn't offer to Weingarten or to anybody else. (Tr. 471.)

There is no credible evidence in the record to refute the testimony of the Houston dealers that, other than the regular and usual 10% and 8½% allowances (except in one instance, previously mentioned, where a dealer received advertising allowances), the respondent did not offer, make available or pay to them any promotional allowances.

That Weingarten received preferential treatment is indicated by respondent's witness, Executive Vice President, Mr. Alfred Firestein, who, on direct examination, testified:

Q. Can you tell us whether cosmetic suppliers, including Max Factor and Company, compete for the business of particular retail accounts?

A. Yes, sir. Certain retail accounts which by reason of their aggressiveness, their prestige, their location, their traffic flow, a number of reasons, have specialized in selling of cosmetics and toiletries, have made quite an effort to sell cosmetics and toiletries, and we as well as all of our competition try to cultivate those accounts who are actively engaged in promoting the sale of cosmetics and toiletries. (Tr. 773-74.)

* * * * *

A. When you have a particularly aggressive retailer within an area who, because of his prestige and the nature of his business, is going to have a promotion in which all of our competitors or many of our competitors are going to participate, it would be incumbent upon us probably to go along and participate in that promotion with our competitors, so that we would not lose position within the store during this period and we would not lose the favor of the sales girls,

Initial Decision

66 F.T.C.

and we would also not be quite conspicuous to the consumer by our absence by something that would be receiving a great deal of publicity.

Q. Do you know, sir, whether in the years 1958 and 1959 the J. Weingarten Company of Houston, Texas, was such a retailer from your company's standpoint?

A. Yes. (Tr. 780-81.)

On cross-examination he testified:

Q. I asked the question because you indicated the necessity in certain instances of entering promotions where your competitors are involved.

A. Yes.

Q. And I asked you whether the logical corollary to that answer of yours would be if you would participate if competition required it regardless of the plan.

Mr. ROWE: Objection. That isn't a corollary.

Hearing Examiner JOHNSON: He may answer it.

A. It is possible that under extreme competitive pressure, yes, we would go along with the promotion. (Tr. 788.)

In respondent's proposed findings, it is said:

37. Therefore, with respect to the availability of respondent's promotional allowances, the record shows that each independent retailer who was called to testify in this proceeding was party signatory to a franchise agreement; that he received written and oral notification of modifications of the agreement from time to time; that he was periodically apprised by respondent's sales representatives as to the availability of the allowances under Max Factor's program; and, finally, that he in fact received the 10% promotional and 8½% incentive allowance available under the Max Factor program. * * *

38. Staff counsel's only evidence to controvert this showing is the testimony of twelve "competitor" witnesses, in response to leading questions whether or not the witness had been "offered" allowances by respondent's representatives or employees in 1958 and 1959. Precisely what staff counsel intended to elicit by his question is not entirely clear, since Section 2(d) speaks in terms of "availability" of promotional payments. * * *

In the initial decision of *HMH Publishing Co., Inc.*, Docket No. 8516, dated February 5, 1963 (adopted by the Commission on March 28, 1963), this hearing examiner had the following to say about the term "available":

The respondent considers the provision prohibiting respondent from making a payment which is not "affirmatively offered and otherwise made available" to competing customers as being unusual and unique and it goes on to state that such a requirement goes far beyond the terms of Section 2(d) which direct only that the payments be "made available" to competing customers.

The Commission has held in a number of cases that a customer must be informed of an allowance before it can be deemed to be available. In *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89, 95 (1954), in rejecting respondents' contention that the Hearing Examiner erred in concluding in effect that the Act requires that sellers must inform customers as to the terms under which they may receive compensation for services or otherwise offer such credits

when they have been made available to sellers competing with such customers, the Commission stated:

Although the word "available" rather than "offered" appears in the relevant subsection of the Act, the statute contemplates that customers competing in the resale of a seller's merchandise be afforded equal opportunity to share in payments for promotional services in the event the seller elects in the first instance to provide it to one of their competitors. A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not "available" to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated.

In *Henry Rosenfeld, Inc., et al.*, 52 F.T.C. 1535, 1548 (1956), the Commission said:

The respondents' advertising allowances have not been granted by them on proportionally equal terms to their competing customers; and there is clear record showing that their failure to inform all accounts as to the terms under which allowances were being accorded has deprived those so disfavored of equal competitive opportunities in reselling the dresses. It follows, therefore, that respondents' promotional allowances were unavailable, as a matter of law, among competing customers. Under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals. *In the Matter of Kay Windsor Frocks, Inc., et al.*, Docket No. 5735.

In *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050, 1059, 1060 (1957), it is said:

The Commission's interpretation of the word "available" used in Section 2(d) as requiring an offer has been clearly expressed in the matters of *Kay Windsor Frocks, Inc., et al.*, Docket No. 5735, and *Henry Rosenfeld, Inc., et al.*, Docket No. 6212. It is that, under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals.

It is further stated:

Once a seller determines upon a plan of advertising allowances, the plan must be affirmatively made known to every customer. Whether or not a customer participates therein is a decision for the customer. The customer obviously must know the specific terms of a plan before he can determine whether he is interested in participating. In this respect the seller's offering of a plan serves a worthwhile purpose.

In the initial decision in *Exquisite Form Brassiere, Inc.*, Docket No. 6966, adopted by the Commission on October 31, 1960, it is said:

It is settled law, and indeed respondent's counsel concedes, that the term "available" as used in § 2(d) means that the payment must be offered, and the terms made known, to all competing customers.

Initial Decision

66 F.T.C.

The foregoing pronouncements interpreting the statutory term "available" leave no doubt that an affirmative offering to each and every competing customer must be made by the seller once the latter decides to grant advertising allowances to any. It should be apparent that respondent's objections to the use of the words "affirmatively offered" are groundless, in that it does not involve any obligation on the respondent which is not imposed by the statute as construed by the Commission.

Respondent's "de minimis" Defense

With respect to the respondent's "de minimis" defense, pleaded in its answer, the Hearing Examiner does not regard the payments made by the respondent as negligible or inconsequential, and therefore finds that there is no merit to such defense.

Respondent's Meeting Competition Defense

In addition to the respondent, a number of companies, engaged in the business of manufacturing, selling and distributing cosmetics and toiletries to retail chain store organizations, department stores and independent drug stores, participated in the three special promotional events of Weingarten which are the subject of this controversy. The amounts paid by such companies to Weingarten in connection with the promotions were as follows:

57TH ANNIVERSARY SALE—1958

Lanolin Plus, Inc.	\$881.14
Nestle-Lemur	881.14
Shulton, Inc.	881.14
Bourjois, Inc.	881.14
Helene Curtis Industries, Inc.	326.03
Rapidol Distributing Corp.	352.35

(CX 5, CX 6A-D.)

BEAUTY CARNIVAL—1958

Beaute Vues Corp.	900.50
Bourjois, Inc.	1,054.03
Barbara Gould Diversified Associates	616.20
Dorothy Gray, Ltd.	737.70
Dorothy Perkins Co.	506.00
David, Redfield & Johnstone, Inc. (Blensol)	489.70
Houbigant Sales Corp.	153.81
Lambert-Hudnut Pharmaceutical	991.13
Lanolin Plus, Inc.	1,093.50
Lenel Perfumes	747.10
Lenthric, Inc.	462.80

184

Initial Decision

Paragon Distributing Corp.....	\$576. 00
Revlon Products, Inc.....	998. 00
Richard Hudnut Sales, Inc.....	1, 252. 10
Tussy Cosmetiques.....	1, 592. 55
Shulton, Inc.....	1, 721. 80

(CX 12, RX 29.)

BEAUTY CARNIVAL—1959

Alberto-Culver Co.....	929. 75
Beaute Vues Corp.....	943. 70
Bourjois, Inc.....	1, 140. 15
Barbara Gould Dana Perfumes Corp.....	1, 008. 80
Dorothy Perkins Co.....	997. 10
Fletcher, Richards, Culkins & Holden (Blensol).....	504. 00
Dorothy Gray, Ltd.....	1, 076. 90
Hazel Bishop, Inc.....	489. 90
Houbigant Sales Corp.....	214. 50
Helena Rubinstein, Inc.....	1, 620. 20
Paragon Distributing Corp.....	690. 00
Revlon, Inc.....	1, 248. 30
Richard Hudnut Sales, Inc.....	1, 382. 40
Tussy Cosmetiques.....	1, 828. 50
Shulton, Inc.....	2, 047. 40

(CX 17, RX 29.)

Respondent, at the hearings on its meeting competition defense, called officers or employees of some of its competitors, who testified regarding the participation of their own companies in one or more of the three Weingarten sales events. Specifically with respect to the 57th Anniversary Sale, testimony was adduced from Charles T. Bigelman, treasurer of Bourjois, Inc., a full line cosmetic and toiletry supplier which competes with respondent in the sale of such products to J. Weingarten, Inc.; and Allen D. Choka, chief counsel of Helene Curtis Industries, Inc., a hair, toiletry and fragrance product supplier which also competes with respondent (Tr. 689-98, 752-63). Specifically with respect to the May Health and Beauty Carnivals in 1958 and 1959, testimony was adduced from James M. Boohecker, General Manager of Dorothy Gray, Ltd., a full line cosmetic and toiletry supplier which competes with respondent for the custom of Weingarten; William P. Schliemann, marketing services manager of Tussy Cosmetics, a division of Lehn & Fink Products Corp. which markets a full line of cosmetic and toiletry products in competition with respondent; and Herbert T. Georgi, vice president of Houparco, Inc., parent of Houbigant, Inc. and Cheramy Co. which manufacture fragrance products that are sold in competition with respondent (Tr. 702-43). In addition, Victor Silberfeld, executive assistant to the vice president for ad-

vertising and sales of Helena Rubinstein, Inc., a full line cosmetic and toiletry supplier which competes with respondent, testified specifically with respect to participation in the May 1959 Health and Beauty Carnival, and Bernard Nemtzow, counsel and general secretary of Warner-Lambert Pharmaceutical Co. which, through one of its divisions, sells various products in competition with respondent, specifically testified with respect to participation in the 1958 May Health and Beauty Carnival (Tr. 663-83, 744-51). Respondent also presented the testimony of Alfred Firestein, Executive Vice President and formerly Director of Marketing of Max Factor & Co., and of James Millett, Max Factor sales representative in the Houston, Texas area. Both witnesses testified as to the background and circumstances surrounding respondent's participation in each of the controverted sales events of Weingarten (Tr. 765-875). Complaint counsel called only one witness in rebuttal, Robert H. Tetley, regional sales manager for Dorothy Gray, Ltd., although he had previously subpoenaed two other witnesses, George Barbat, a sales representative for Tussy Cosmetics, and Robert Framson, cosmetic and toiletry buyer for J. Weingarten, Inc. (Tr. 887, 890-925; Motion for Submission of Rebuttal Evidence, August 16, 1963).

As the testimony of industry witnesses makes clear, adequate shelf space, proper display and aggressive personal selling at the retail level—the final link between the manufacturer and the ultimate consumer—are essential to sales success in the highly competitive cosmetics industry (Tr. 723-24, 773-77). Consequently, suppliers' sales representatives are continually alert to preserve and improve their line's shelf space, position and display, and must constantly maintain good relations with retailers' sales personnel to build and maintain their enthusiasm for the supplier's products (Tr. 785, 805, 864). As an incentive to the salesgirls, respondent and other cosmetic suppliers provide funds for the payment of PM's (push money) or incentive compensation. These payments are made to the girls in the form of commissions based on each girl's sales of each supplier's products, typically 5% of their retail price or its equivalent (Tr. 495-96, 668, 709, 737, 777-78). In view of her small regular salary, it is only natural that a salesgirl's motivations to emphasize the sales of a particular supplier's products will be affected by the amount of such incentive compensation she receives (Tr. 724, 777-78, 864). During special sales events such as the Weingarten Anniversary Sales and Beauty Carnivals, promotional efforts at the retail level are greatly increased. Eye-catching mass displays (e.g., RX 40A-F, 41A-J) supplement normal shelf space arrangement (Tr. 668, 736, 804, 806-8). Salesgirls step up

their demonstration and sales activity to stimulate the sales of the products of suppliers participating in the event through the payment of extra PM's and prize money (or merchandise) for the girls (Tr. 669, 707-8, 721-22, 736-37, 778, 833-34). The increased promotional activity at such special sales events has important short and long range effects on a participating supplier's sales. Not only are the immediate sales of the featured products sharply increased, but new users may be attracted, both to the featured products and the manufacturer's entire line (Tr. 356, 411). In addition, the extra PM's and prize money create a favorable attitude in the salesgirls which continues long after the event (Tr. 723-24, 834-35). Conversely, a non-participating supplier may expect enduring adverse effects. His products may be shunted to unfavorable locations or even taken off display entirely to make room for participating suppliers' products (Tr. 826, 833, 838-40). In such a case, it is difficult to regain the former shelf and display position, which has taken years to build up (Tr. 776, 834-35, 839-40). Moreover, because the salesgirls naturally concentrate their efforts during special events in the lines paying them increased compensation, it is "ridiculous" for a manufacturer not to match the special incentives offered by his competitors (Tr. 671). And in view of the "mental gymnastics" required for a salesgirl to switch loyalties and push the products of suppliers who have not assisted her in the past, failure to participate in special events may also have a longer range adverse effect on the salesgirls' attitude toward non-participating manufacturers and hence on the essential personal sales push to the ultimate consumer (Tr. 778-79, 835).

As to the participation by respondent's customers in the Weingarten 57th Anniversary Sale, respondent's representative, Mr. Millett, testified that he "certainly had no reason to believe they were unlawful. They had had anniversary sales in the past, and I had seen ads and I certainly didn't—nobody ever raised any question about them being legal or illegal to me" (Tr. 827). With reference to competitors' participation in the 1958 Carnival, the same witness testified that he "had no reason to believe that anything was unlawful. There had been these carnivals ever since I had been in the territory, and nobody ever raised any question" (Tr. 835). As for the participation of respondent's competitors in the Weingarten 1959 Carnival, the witness testified that he "certainly didn't have any reason to believe they were unlawful" for the reason "They had been as many other anniversary and carnival type sales, and nobody ever raised any question of whether they were illegal to me" (Tr. 840-41). The seven competitors' witnesses called

by the respondent testified with reference to the lawfulness of their participation in the Weingarten promotions.

Mr. Silberfeld identified a document (RX 33) which reflected Helena Rubinstein's advertising and promotional allowance plan, which was in effect in the year 1959 and available to all retailers in the Houston trade area at the time (Tr. 665). He said that Helena Rubinstein's participation in the Weingarten 1959 promotional event was within the framework of the company's policy (Tr. 670). The witness said that "the Helena Rubinstein program as reflected on Respondent's Exhibit 33 was * * * submitted to the Federal Trade Commission as part of a notice of compliance by Helena Rubinstein" (Tr. 671-72). Official notice was taken that there is a cease and desist order issued in the matter of *Helena Rubinstein*, Docket No. 6441, of the Federal Trade Commission (Tr. 673-74). He also said that, subsequent to the participation of Helena Rubinstein in the Weingarten 1959 Beauty Carnival, such participation was never questioned by the Commission (Tr. 675). The witness stated that Helena Rubinstein's participation in the Weingarten 1959 Carnival "was in accordance with the advertising and promotional policy, Exhibit 33 * * * which was made available to all retail customers in the trade area in which Weingarten was a customer of Helena Rubinstein" (Tr. 685-86).

Mr. Bigelman, after identifying the Bourjois Advertising and Promotion Agreement with Weingarten, which was in effect in the year 1958 (RX 54, Tr. 692), testified that he had no personal knowledge of the transactions between his company and Weingarten in 1958 (Tr. 693), and he was unable to say whether or not Bourjois' participation in the 1957 Anniversary Sale fell within the company's policy (Tr. 696). He testified further that the files of the company show Bourjois was contacted by the Federal Trade Commission with reference to its participation in the Weingarten Anniversary Sale, but he was unable to say whether there was any subsequent inquiry by the Commission with respect thereto (Tr. 696-97).

Mr. Georgi testified that the advertising and promotional programs of Houbigant, as reflected in Respondent's Exhibits 46A through E, and 47A and B, were in effect during the years 1958 and 1959, and were available to all retail customers of the company (Tr. 704-5). He said that Houbigant's participations in the 1958 and 1959 Weingarten May Carnivals were "definitely" within the framework of the Company's programs. He also said, as far as he knew, the participations were never questioned by the Federal Trade Commission (Tr. 710).

Dorothy Gray's General Manager Boohecker identified a docu-

ment, "Statement of Marketing Policy" (RX 39A-D), setting forth the company's promotional program which was in effect in 1958 and 1959 and available to Dorothy Gray's retail accounts in the Houston, Texas trading area (Tr. 719). It was his testimony that Dorothy Gray's participation with Weingarten in the May, 1958 and 1959 promotions was within the framework of the company's marketing policy (Tr. 722). On cross-examination, when asked for the "prime reason for agreeing to participating in specifically these two promotions" (Tr. 732), Mr. Boohecker answered: "Because it fitted perfectly with Dorothy Gray's merchandising plans in general." The witness also said, on direct, that, to his knowledge, Dorothy Gray's participation in the May, 1958 and 1959 Weingarten Carnivals was never questioned by the Commission (Tr. 724).

Mr. Schliemann identified a "Tussy Cosmetic, Statement of Marketing Policy" (RX 37A-D), which was in effect in 1958 and 1959 and available to Tussy's retail customers in the Houston area in those years (Tr. 735). The witness said that the participation in the May, 1958 and May, 1959 Weingarten Carnivals was within the framework of the Tussy marketing policy and, to the best of his knowledge, such participation was never questioned by the Commission (Tr. 737-38).

Mr. Nemtzwow identified the "Lambert-Hudnut, General Promotion Agreement" (RX 50), which was in force during 1958 and available to retail customers in the Houston, Texas area. He testified that, to his knowledge, the company's participations in the Weingarten promotions were never questioned by the Federal Trade Commission (Tr. 748).

Mr. Choka, of Helene Curtis Company, identified a "Special Cooperative Advertising Promotion Agreement" (RX 59), which was used during 1958 for promotions that were run by his company, and he stated that Helene Curtis' participation in the Weingarten 57th Anniversary Sale in the amount of \$320.05 was "within the over-all framework of its promotional program." The witness testified that his company received a letter from the Federal Trade Commission, dated March 20, 1959, stating that an investigation was being conducted to determine whether Weingarten or its suppliers have engaged in acts which are in violation of the Federal Trade Commission Act or the Clayton Act, and requested considerable detailed information with respect to Helene Curtis' participation in Weingarten's promotion sales during 1958 (RX 61A-D, Tr. 756). By letters, dated April 27, 1959 (RX 62A-C), and June 5, 1959 (RX 63), Helene Curtis made an explanation with respect to its participation in the Weingarten event (Tr. 756-57). Thereafter, Helene Curtis did not hear from the

Initial Decision

66 F.T.C.

Commission on this subject. One of the details set forth in the first reply letter read:

(d) Our salesman was told that other firms were cooperating with Weingarten and felt that we would be prejudiced if we did not participate. We communicated with our salesman on September 23, 1958 after learning about his commitment. He was a new salesman not familiar with our practices and we advised him these required him to submit the matter to the Home Office for approval. The amount paid to J. Weingarten, Inc. for the advertising in question was not in excess of the amount they would have been entitled to receive under our regular sales promotion allowance, which is offered to all customers of the same class. (RX 62B.)

The witness on direct examination expressed the opinion, as counsel for the company, that Helene Curtis acted lawfully in this matter. On cross-examination, Mr. Choka testified that the salesman who made the arrangements with Weingarten was reprimanded for two reasons: One, that the participation did not fall within the company's plan; and, two, all promotions were to be approved by the home office.

Mr. Millett consistently testified that respondent's participation in the Weingarten promotions in every instance was for the purpose of meeting competition in order to protect Max Factor's competitive position with Weingarten in self defense (Tr. 841, 860-61). He also testified that he was without "any authority with respect to advertising or promotional agreements with Max Factor, with customers in this area" (Tr. 341). He stated further that newspaper advertising is approved in Hollywood and "Max Factor's participation on incentive payments or other promotional payments" is "approved by the people directly above me, the Sales Department" (Tr. 342). With reference to the memorandum (CX 16), hereinbefore referred to, where he committed the respondent to participate in the 1959 Carnival, he had this to say: "Well, as I said, I don't have the authority to O.K. arrangements of that nature with an account that size or any other size" (Tr. 343). The situation with reference to Mr. Millett's authority is well illustrated when he testified:

Q. Would you ever participate in a promotion in which your major competitors did not?

A. Possibly we would, yes.

Q. And if you did, what would the reason be?

A. The decision to participate in promotions and special events is in the hands of the sales manager. The theory behind it would be, if it fitted in with our plans, if it seemed to be important at the time, whatever the reason was that it just seemed we wanted to participate in this promotion with this particular account, we might.

Q. What would be your prime reason in participating aside from competition?

A. Aside from competition, it hasn't occurred in my territory, but the sales manager, as I say, has the final say-so over these approvals or disapprovals, and what all of the circumstances would be, I can't imagine, but I'm sure it could happen.

Q. Did you have any authority to make arrangements in these promotions for the company?

A. I didn't have authority to commit the company; no. (Tr. 849-50.)

There is a want of any evidence in the record that the person, who authorized respondent's participation in the Weingarten promotions, based his decision to participate on the competitive situation.

The only evidence in the record with reference to prior knowledge of the acts of respondent's competitors which it purports to be meeting is the testimony of Mr. Millett.

With respect to the respondent's participation in the 57th Anniversary Sale, Mr. Millett said that on January 13, 1958 he and Al Rubin, his sales manager, called upon Bob Framson, Weingarten's cosmetic buyer (Tr. 818-19). As to what took place at that time, Mr. Millett had this to say:

Q. Would you tell us, Mr. Millett, prior to and at the time the decision was made as you have testified to on January 31, 1958 for Max Factor to participate by advertising Sebb and Curl Control, whether you knew of other companies or competitors participating also?

A. Yes.

Q. Would you tell us how you know that or knew that? (Tr. 821.)

* * * * *

The WITNESS: Well, in our discussions when these particular events were brought up, he mentioned, or he told us that Helene Curtis and Bourjois, Lanolin Plus, and other similar companies to this, will be competing in this Anniversary event, particularly since we wanted to feature these type of commodity products, Curl Control and Sebb, we felt that it would be highly to our disadvantage if we weren't also being featured, because these companies were heavily involved in commodity-type products, and so, with this background, we decided to participate in this Anniversary event, and feature these type of products. (Tr. 822.)

* * * * *

Hearing Examiner JOHNSON: Did he tell the extent in which these competitors were going to compete in this event?

The WITNESS: Not exactly what they were going to do, but from my experience, the way he told us—

Hearing Examiner JOHNSON: I am just asking you what he told you.

The WITNESS: They would make mass displays of these competitive products, that's what he said, and I have seen mass displays in these type of stores, so I knew roughly what he was talking about.

Hearing Examiner JOHNSON: But he did not tell you specifically in what manner they were going to produce it?

The WITNESS: No, except that it was going to be advertising.

Hearing Examiner JOHNSON: I am asking if he said anything specific.

Initial Decision

66 F.T.C.

The WITNESS: No; he said these competing companies would be participating in this Anniversary event, and I presume—

Hearing Examiner JOHNSON: Not what you presume. What did he tell you?

The WITNESS: He didn't say specifically what size or anything that they were going to take.

Hearing Examiner JOHNSON: Are there any details about it?

The WITNESS: No; he said that they were going to be in it. (Tr. 823-24.)

According to Mr. Millett, Max Factor's decision to participate in the 1958 Carnival was tentatively made on March 23, 1958 when he and Mr. Rubin called on Mr. Framson at Weingarten's (Tr. 827-29). With reference to the meeting, the witness said:

Well, in our discussions, he [Mr. Framson] said that the Carnival was coming up and that our major competitors Dorothy Gray, Tussy, and Revlon and DuBarry were going to be participating in it, and that he would like very much to line up our participating right then and there, and that was about it. We agreed tentatively to participate, and that he said that Mr. Rubin said that I would be back in a few weeks to line up the details. At that time we also took these orders for the products that we had mutually agreed upon to feature during the forthcoming event. (Tr. 829.)

Mr. Millett testified that his company's decision to participate in the 1959 Carnival was made on April 14, 1959 when he called on Mr. Framson who "told me again that our major competitors were going to be—in fact—had already signed up to participate, including Revlon, Dorothy Gray, Tussy, DuBarry" (Tr. 835-36). It was during this meeting that Mr. Millett wrote and signed the memo (CX 16), which has been mentioned before, to the effect that Max Factor would participate to the extent of an extra five percent P.M. and \$300 worth of prizes (Tr. 836). However, the decision to participate in the 1959 Carnival appears to have been made on March 24, 1959 by Mr. C. R. Ruston, who was at the time the respondent's Sales Manager located at Hollywood. On March 17, 1959, Weingarten wrote a letter to Mr. Ruston soliciting the respondent's participation in the 1959 Carnival and suggesting prizes in the amount of \$300.00, an additional 5% P.M. on reported retail sales and newspaper advertising of \$200.00 (CX 27A-B). Mr. Ruston, by letter dated March 24, 1959 (CX 28) in responding to the solicitation, said:

We are asking our Sales Representative in your area, Jim Millett, to contact you personally and discuss this promotion, as in going over past correspondence regarding this same subject for 1958 there seemed to be some misunderstanding regarding cash prizes and by Jim discussing this subject thoroughly with you this year we will not have the same misunderstanding.

The matter of the 5% and advertising will be no problem, but in order to avoid confusion this entire matter will be covered with you at the time of Jim's contact.

184

Initial Decision

Mr. Millett said that he received the letter and was asked by Mr. Ruston on that day to contact Weingarten for that purpose (Tr. 837-38). With respect to this situation, Mr. Millett on cross-examination testified:

The company and I were in virtual agreement on this prior to my committing them, but this was something I had to do to get this sewed up at this time. Mr. Ruston's letter to me, which I have a copy, to Weingarten's, virtually laid out the way we would operate, but he wanted more information as to the exact details of it, and I normally would have reported in to him that evening and told him the details, and then we could have come back another day and tied the whole thing up, but in this instance he had to know right then. (Tr. 873-74.)

On further cross-examination, he had this to say:

By Mr. BREBBIA:

Q. Mr. Millett, you have testified that in each one of these three Weingarten promotions that we have been discussing here today, that Mr. Framson, the drug buyer, informed you of certain competitors who would be participating in these promotions, and I believe you stated that he did not give you any further details of the promotions or participations of these individuals.

Mr. ROWE: I object, Your Honor. I don't believe that's an accurate characterization of the record as to what Mr. Framson did.

Hearing Examiner JOHNSON: He may answer the question.

A. Any further details of their participation, like, for instance, in the anniversary sale that these competitors would be involved in, the advertising in all of these cities, he would tell me that.

Q. How much, for instance, they would participate, in what amount?

A. Dollars and cents wise?

Q. Yes.

A. No; he didn't mention that.

Q. He didn't?

A. No.

Q. Did you attempt to elicit from Mr. Framson any further details of the participation aside from the information that you have testified to today that he gave you?

A. No; I didn't. (Tr. 841-42.)

Mr. Millett admitted that he did not even know the amount of his company's participation in the 57th Anniversary Sale (Tr. 846-48):

By Mr. BREBBIA:

Q. Did you participate in this promotion, the 57th Anniversary Sale under one of the form of the participation which is listed in Commission's Exhibit 20-B and C?

A. We agreed in the 57th Anniversary Sale to participate and to run so much advertising, whatever number of instances were involved, and at that time it was decided upon how much advertising would be run, and as far as I know, it was under our regular plan.

Q. Was the amount determined by this literature, Commission's Exhibit—

* * * * *

Initial Decision

66 F.T.C.

Q. —Commission's Exhibit 20-B or C, which lists amounts of participation in the 57th Annual Sale?

A. I wouldn't know that. The only thing I know, these things are paid from Hollywood, and the only thing I can say is what happened the day we were there.

Q. What was mentioned regarding your participation in the sale?

A. That we would feature Curl Control and Sebb, and that we would run some advertising in all of the cities that they had stores in.

Q. Did you determine at that time what the amount of the advertising was?

A. No; this was—as far as I know, we didn't know. Nothing was said to me, except that we would run advertising under a certain size ad in each of these cities. (Tr. 846-48.)

Subsequently, on re-direct, respondent's counsel tried to develop through Mr. Millett that a recipient of Weingarten's solicitation letters in connection with the Beauty Carnivals in 1958 and 1959 (CX 21A-B, CX 27A-B) would know the type and general basis of the participation of another company which was participating (Tr. 864-65):

Q. Would the recipient of such a circular know the type and general basis of the participation of another company which was participating?

A. Yes; he would.

Hearing Examiner JOHNSON: How would he know that?

The WITNESS: The extra five percent PM—

Hearing Examiner JOHNSON: The question is, how do you know that? Do you remember the question?

The WITNESS: How would I know that this was more or less a standard set of participation?

Hearing Examiner JOHNSON: How do you know it, the extent of their participation? You have indicated contradictory testimony. You said you didn't know the extent of their participation.

The WITNESS: I knew to the extent that they, the girls, got ten percent of the PMs on all of the lines that did participate in the Carnivals.

Hearing Examiner JOHNSON: How do you know that?

The WITNESS: By talking to the girls.

Hearing Examiner JOHNSON: After the promotion?

The WITNESS: No; during the promotion. (Tr. 865.)

On re-cross-examination, Mr. Millett responded:

By Mr. BREBBIA:

Q. Did you ever have occasion to specifically discuss CX-21-A, that's the solicitation letter dated April, 1958, in April or when you made the visit to him regarding your participation in the sale?

A. I don't believe so; not specifically.

Q. How about CX-27-A, which is the solicitation—

* * * * *

Q. — for your participation in the 1959 Annual Health and Beauty Carnival?

A. Yes; I believe I discussed it with Mr. Framson on this one.

Q. Did you have any discussion with Mr. Framson under this solicitation letter that your competitors would make?

A. As to any specific sum of money, no.

Hearing Examiner JOHNSON: Or any specific percentage?

The WITNESS: He told me that they paid an extra five percent, all of them that participated, extra push money, but, of course, it would vary from the sales, how much they actually paid. In other words, if one line sold \$5,000 and another line sold \$3,000, the line that sold \$5,000, they would have to pay more money.

By Mr. BREBBIA:

Q. How about prize money?

A. This was usually a fixed amount; it didn't fluctuate with the amount of sales.

Q. When you originally testified today, you testified that the only details that Mr. Framson discussed with you was the participation of particular competitors of yours, is that correct?

Mr. ROWE: Counsel, I don't recall that specific testimony.

Hearing Examiner JOHNSON: Let him answer the question.

A. Again, the question was—

Q. You did not at the time of your original testimony on the subject of your visit with Mr. Framson regarding the 1959 May Health Beauty Carnival, indicate that he discussed with you the fact that the competitors whom he named were going to pay a ten percent additional PM.

Mr. ROWE: There is no ten percent; it is five percent.

A. They paid an additional five percent. If he didn't suggest it, he didn't say it in so many words. We both knew this was exactly what we were talking about, this is the basis of participating, that is, paying the extra five percent PM recorded on our line in that month.

Hearing Examiner JOHNSON: It isn't so much what you knew. What was said?

The WITNESS: He certainly would have told me what the participations for the other lines were as well as ours.

By Mr. BREBBIA:

Q. You are saying he would have. The question is did he.

A. Yes; he did. (Tr. 867-70.)

There are the following expressions of the Commission with reference to the necessity of showing prior knowledge on the part of the discriminator of the acts of the competitor which he purports to be meeting to sustain a meeting competition defense:

In *Forster Mfg. Co., Inc., et al.*, Docket No. 7207 (March 18, 1963), the Commission said:

Respondents contend that the four discriminatory sales made to Armour in 1956 were all "preceded" by sales at even lower prices by competitors. But here again, as in their discriminations in favor of MCA and Hantover, there was no showing that, when respondents granted these special prices to Armour, they had any knowledge of the prices being charged Armour by their competitors. In the absence of such knowledge, it is impossible to find that respondents' discriminatory sales were made "in good faith to meet an equally low price of a competitor." (p. 28.)

* * * * *

Initial Decision

63 F.T.C.

It is important, therefore, that the seller relying on Section 2(b) ascertain in advance not only the price he purports to be meeting, but the identity of the competitor who is allegedly offering it. (p. 36.)

In *Exquisite Form Brassiere, Inc.*, Docket No. 6966, the Commission, in its opinion issued on January 20, 1964, said:

An essential element in the establishment of a meeting competition defense is that of "good faith." Implicit within the element of good faith is evidence that the respondent was genuinely responding to some particular action on the part of a competitor. Patently, an awareness of the competitor's allowance prior to the attempt to meet it is an integral aspect of a showing of good faith responsiveness. Examination of the legislative history of this section lends strong support of the requirement of actual awareness of the acts purportedly met. There it was stated:

This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices *until his competitor has first offered* lower prices, * * * In other words, the proviso permits the seller to meet the price *actually previously offered* by a local competitor. * * * H.R. Rep. 2287, 74th Cong., 2d Sess., p. 16. (Emphasis supplied.) (p. 6.)

* * * * *

In a case where a proponent of the Section 2(b) defense wholly fails to show any prior knowledge of the acts of his competitor which he purports to be meeting, we conclude that the element of good faith is lacking. The meeting competition defense does not sanction the fortuitous meeting of competition which occurs when the manufacturer discriminates and then in hindsight points to the previously unknown fact that another was granting similar allowances at the same time. The absence of even a scintilla of evidence showing that the proponent of the defense was in some manner aware of its competitors' acts, which it was supposedly meeting, clearly precludes a finding of the good faith responsiveness required by this defense. (p. 7.)

CONCLUSION

It is concluded and found that the payments made by the respondent to J. Weingarten, Inc. in 1958 and 1959 for participation in each of the three Weingarten promotional events in violation of Section 2(d), as hereinbefore found, were not made in good faith to meet the payments of competitors as authorized by Section 2(b) of the amended Clayton Act.

ORDERED

It is ordered. That respondent, Max Factor & Company, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of cosmetics, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other retail customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of cosmetics, unless such payment is made available on proportionally equal terms to all other retail customers competing in the distribution or resale of such products.

INITIAL DECISION AFTER REMAND BY WALTER R. JOHNSON,
HEARING EXAMINER, DOCKET NO. 7721

JANUARY 7, 1964

On January 5, 1960, the Commission issued a complaint wherein the respondent is charged with having made discriminatory payments to some of its customers in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Subsequent thereto, the respondent filed a number of pleadings including answers to the complaint. During the course of the proceedings, the Hearing Examiner denied the request of respondent to adduce evidence that the payments were made in good faith to meet competition pursuant to the provisions of subsection 2(b) of the Robinson-Patman Act, the Hearing Examiner basing his ruling on the Commission's holdings in prior cases that such defense was not available in a Subsection (d) proceeding.

In the last answer of the respondent, filed on September 14, 1960, it elected not to contest the allegations of fact set forth in the complaint, admitted all material allegations of fact set forth in the complaint, and waived a hearing as to the facts so alleged. In such answer, the respondent reserved the right to submit proposed findings of fact and conclusions of law and such other rights as it may have in the premises. On January 5, 1961, the Hearing Examiner filed an initial decision which found that the respondent was guilty of the violation as charged in the complaint, and set forth a cease and desist order. The respondent appealed to the Commission. On July 25, 1961, the Commission denied the appeal and by a three to two vote refused to permit the respondent to present a Section 2(b) defense. Thereafter, respondent filed a petition for review with the United States Court of Appeals for the Seventh Circuit. The Court, on May 10, 1962, set aside the Commission's order to cease and desist and dismissed the complaint without prejudice. The Court in its opinion recited that it was in agreement with the decision of the United States Court of Appeals

for the District of Columbia Circuit, dated November 22, 1961, in *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499, ruling that the Section 2(b) defense was available in cases arising under Section 2(d) of the Robinson-Patman Act. On July 12, 1962, the Court set aside the portion of the order directing that the complaint be dismissed and provided that the cause "be remanded to the Commission with directions to afford the petitioner an opportunity to present a defense under Section 2(b) of the statute to the charges that petitioner has violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act" (305 F. 2d 36).

In compliance with the Court's order, the Commission, on October 16, 1962, reopened the proceeding and remanded the case to the Hearing Examiner "for such further proceedings as are necessary to comply fully with the opinions and judgments of the Court and for the receipt of such rebuttal evidence as counsel supporting the complaint may offer." Thereafter, the Hearing Examiner convened a prehearing conference which was held on May 9, 1963. The Hearing Examiner's "Pre-Hearing Order", filed May 10, 1963, which recited the results of the conference and agreed to by the parties, directed respondent to submit its trial brief on or before July 8, and allowed complaint counsel until August 9 to submit his trial brief. Respondent's trial brief was filed on July 8, 1963, and complaint counsel, having received an extension of time, filed his trial brief on August 16, 1963. Respondent's answer to complaint counsel's trial brief was filed on August 26, 1963.

By agreement of the parties, the Hearing Examiner's "Pre-Hearing Order" of May 10, 1963 allowed respondent one week beginning August 26 for the presentation of its defensive case, and complaint counsel one week beginning September 9 for presentation of rebuttal. The rebuttal hearings, however, were subsequently rescheduled at the request of complaint counsel to begin on October 8, 1963. Hearings for the defense were held on four days during the week of August 26, 1963 in New York City and Houston, Texas, and respondent rested its case on August 30 (Tr. 785). Rebuttal hearings were held on four days during the week of October 7 in New York City and Houston, Texas, and complaint counsel rested his case on October 11. The Hearing Examiner, on that day, declared the case closed for the reception of evidence (Tr. 1394).

The parties filed proposed findings on November 26, 1963 and replies thereto on December 6, 1963. The Hearing Examiner has given full consideration thereto and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected.

Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

Respondent, Shulton, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 697 Route 46, Clifton, New Jersey.

Respondent is now and has been engaged in the business of manufacturing, selling and distributing toiletry, chemical and pharmaceutical products. It sells its products to retail chain store organizations, independent drug and grocery stores, department stores, and wholesalers throughout the United States, and certain countries in Europe and Latin America. Respondent's total sales are substantial having exceeded \$37,000,000 in the year 1958.

In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in New Jersey, to customers located in other States of the United States, and certain countries in Europe and Latin America.

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 made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

For example, during the year 1958 respondent contracted to pay and did pay to J. Weingarten, Inc., \$6,000 as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

(Complaint; Answer September 14, 1960.)

The parties are in agreement that the issue presented is whether respondent's payments to J. Weingarten, Inc. in 1958 were made in good faith to meet the payments of one or more competitors who par-

ticipated in the three promotional events involved in this case (RPF 61, CCR 1-2).¹

Respondent called ten witnesses who testified in this case, three of whom were with or had been with Shulton, Inc., six were representatives of cosmetics and toiletries companies, and one who was an employee of J. Weingarten, Inc. They were: Richard N. Parks, Vice-President of Sales of Shulton; Jack W. Wilson, Administrative Assistant to the National Sales Manager of Shulton; Robert E. Lee, Sales Representative of Shulton for South Texas from 1954 to 1960; Allen D. Choka, General Counsel of Helene Curtis Industries; Charles T. Bigelman, Treasurer of Bourjois, Inc.; Ralph DePadua, Assistant Treasurer of Houbigant, Inc.; William Warren Lee, Assistant Controller of Warner-Lambert Pharmaceutical Company; James M. Boohecker, General Manager of Dorothy Gray, Ltd.; William P. Schleimann, Marketing Service Manager of Lehn & Fink Products Corporation, Tussy Division, and Robert S. Framson, Buyer of Cosmetics and Toiletries of J. Weingarten, Inc.

Complaint counsel, in his rebuttal case, called fourteen witnesses. In addition to Messrs. Wilson, Robert E. Lee, Choka, Bigelman, William Warren Lee, Boohecker, Schleimann, and Framson who are heretofore listed, he called William H. Walling, a former employee of Bourjois, Inc.; Herbert T. Georgi, Vice-President of Houparco Company; Robert H. Tetley, Sales Representative of Dorothy Gray, Ltd.; George W. Barbate, Territorial Manager of Tussy; Joseph T. Finkelstein, Department Head of Non-foods of J. Weingarten, Inc.; and Edward W. Underwood, Accountant for the Federal Trade Commission, Bureau of Restraint of Trade.

Description of Respondent's Business

Shulton, Inc. sells and distributes various and unrelated products through three distinct and separate divisions. These are: (1) the Domestic Toiletries Division which is engaged in the manufacture, sale and distribution of cosmetics and toiletries; (2) the Chemicals Division, which is engaged in manufacturing fine chemicals such as flavorings; and (3) the Home Products Division, which sells and distributes products in the household chemical specialty field such as insecticides, cleaners, air fresheners and pharmaceuticals (Parks, Tr. 362-64). Each of the foregoing divisions has its own separate management, sales force, and methods of promotion and advertising (Parks,

¹ "RPF" herein refers to respondent's proposed findings; "RR" to respondent's reply to complaint counsel's proposed findings; "CCPF" to complaint counsel's proposed findings; and "CCR" to complaint counsel's reply to respondent's proposed findings.

Tr. 362-64). The acts and practices involved in this case relate only to the sale and promotion of cosmetics and toiletries by the Domestic Toiletries Division. No question is raised with respect to Shulton's practices in connection with its other divisions. References herein to Shulton's products are limited to cosmetic and toiletry products except as otherwise specifically noted.

Shulton sells cosmetics and toiletries to retail chain stores, department stores, independent drug and grocery stores, and wholesalers in most of the states of the United States. The products it sold in 1958 are described in its product catalogs and are identified by such trade names as Old Spice, Desert Flower, Friendship Garden, and Thylox (Parks, Tr. 409; RX 1 and 2). Comparable competitive products are described in the following catalogs, price lists, and reports: Helene Curtis (RX 3, 6); Lenthéric (RX 4, 5); Houbigant (RX 18, 19), Tussy (RX 25, 118); Dorothy Gray (RX 22, 24, 128); Warner-Lambert (Hudnut) (RX 28, 29). In terms of physical characteristics and uses, Shulton's products are classified in accordance with the following lines which correspond with the method of product classification employed throughout the industry (Parks, Tr. 390-91; Boohecker, Tr. 231-303; Framson, Tr. 513-14).

(a) *Fragrance line*. This line includes dusting powders, cologne, bubble bath, soap, sachet, and gift sets (RX 33 A-B; Wilson, Tr. 208-10).

(b) *Utility line*. This line includes deodorants (Parks, Tr. 391).

(c) *Treatment line*. This line includes hand lotions, cleansing creams, moisturizers, and skin fresheners (RX 1, 2, 33A-B; Wilson, Tr. 208-10).

(d) *Men's line*. This line includes shaving cream, after shave lotions, men's cologne, pre-shave lotions, men's hair grooming products powders, and gift sets (RX 1, 2, 33A-B; Wilson, Tr. 211).

(e) *Hair care line*. This line includes shampoos, and hair grooms for women (Parks, Tr. 391, 409; Boohecker, Tr. 231, 303).

Nature of Competition in the Cosmetics and Toiletries Industry

In the course and conduct of its business, Shulton is in substantial competition with other manufacturers of cosmetics and toiletries. This record shows that each line of Shulton's products competes with similar lines of other cosmetic and toiletry companies and that each category of products within each Shulton product line, such as colognes, is of like grade and quality and is the same commodity as the colognes of other companies. Each of these product categories is manufactured from the same basic raw materials and serves the same end use (Parks,

Tr. 392; Wilson, Tr. 208-9, 211, 214-15, 405-6). For example, deodorants are used as a cover-up or antiperspirant and are equally competitive whether sold in the form of cream, stick, or roll-on (Parks, Tr. 395). It is customary for customers to switch back and forth in their purchases between the deodorants of one cosmetic and toiletry company and deodorants of a competitor and to switch back and forth between cream deodorants and stick deodorants (Parks, Tr. 395, 398-99; Framson, Tr. 521). They are the same commodity (Parks, Tr. 392-96, 398-408).

The undisputed evidence shows that products manufactured and sold by the following cosmetic and toiletry companies are directly competitive with products manufactured and sold by Shulton: Helene Curtis (including King's Men and Lenthéric) (Choka, Tr. 78, 81, 109-10; RX 33); Dorothy Gray (Boohecker, Tr. 231, 236; RX 22, 24, 33); Tussy (Schleimann, Tr. 333; RX 25, 33); Bourjois (Barbara Gould) (Parks, Tr. 405; RX 13 H-K, 14, 15, 16, 33, 44); Warner-Lambert (Hudnut-DuBarry) (Parks, Tr. 372, 398-99; RX 33 F); Houbigant Sales Corp. (Cheramy) (Parks, Tr. 417; RX 18, 19, 33); Max Factor and Co. (Parks, Tr. 421; RX 33 L); Dorothy Perkins (Parks, Tr. 416; RX 33 M); Revlon (Parks, Tr. 421; RX 33 N); Helena Rubinstein, Inc. (RX 33 P); Lenel (Parks, Tr. 418; RX 33 Q); Dana Perfumes Corp. (RX 33 R); Parfums Corday, Inc. (RX 33 S); Lanolin Plus (Parks, Tr. 417; RX 33 T); Nestle-Lemur Co. (RX 33 U).

Companies in the cosmetics and toiletries industry engage in various forms of promotional activity. Many of them have national advertising programs, including television and national magazines, designed to promote good will and to promote the image of the company and its products (Parks, Tr. 390; Framson, Tr. 521; Boohecker, Tr. 241-43). Because cosmetic and toiletry products are "impulse items", displays and other promotional efforts are the most important competitive factors in obtaining shelf space and selling these products (Parks, Tr. 396-98, 425; Framson, Tr. 514-16; R. Lee, Tr. 679, 762-63). The customer's choice between competing brands is easily influenced by such things as packaging, display, and the payment of P.M.'s to sales personnel (Parks, Tr. 398, 410-12, 427-28; Framson, Tr. 517-19; R. Lee, Tr. 681). As Mr. Parks, Vice-President of Sales for Shulton, testified:

* * * it has been conclusively proven through controlled tests that they [cosmetics and toiletries] are impulse items, and to the extent that they are displayed, in traffic locations, sales respond immediately. People go out with

184

Initial Decision

products that had no intention * * * of buying when they went into the store (Parks, Tr. 396).

* * * * *

It has been proven time and time again in controlled tests that customers are easily switched from one brand of commodity to another, and the one they see is the one most likely to be picked up (Parks, Tr. 398).

At another point in his testimony regarding impulse buying, Mr. Parks commented:

Well, it is a well-known fact backed up by experience and surveys and studies, that women are very fickle in their attachment to a fragrance. Most women have several fragrances that she will use alternately, and is very prone to try a new fragrance.

There is very little customer loyalty, so that a final decision at the counter, she may end up buying something entirely different from what she had in mind. She might have had one brand in mind, and gone to another. Maybe she has no brand in mind, and going by a display is intrigued into buying something (Parks, Tr. 411; emphasis added).

It is important in promoting sales to stimulate the interest of sales clerks by training programs and the payment of P.M.'s because the sales clerks are in contact with the ultimate consumers and have the ability to switch customers from one product to another (Boohecker, Tr. 237-38). As Mr. Boohecker testified:

Q. Suppose one of the items does not have a PM on it? Would she promote the item with the PM?

A. My answer would be yes.

Q. Have you found this to be your experience throughout your many years in this industry?

A. Your question is have I found that to be my experience? My observation has been this: if a consumer asks for an item—we will say cleansing cream—there is a PM on one cleansing cream and no PM on a second cleansing cream and the prices are about the same, that girl, logically, would attempt to sell the one that carried the PM (Boohecker, Tr. 238-39; see also Tr. 241).

Mr. Parks summed up the importance of paying P.M.'s and creating good will with the sales clerks as follows:

She controls what they call the last three feet of movement of your product, the most important—

Q. Would you explain that?

A. The most important three feet of movement in your product is between the retail clerk and the customer. We can ship it thousands of miles and control all those activities, but it is no good if it doesn't go across that counter, and she is the last person you have any contact with to help influence the sale (Parks, Tr. 428).

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Initial Decision

66 F.T.C.

Q. And would you tell us whether or not the salesgirls, if they are skilled, have the ability to switch customers from one product to another?

A. They certainly do (Parks, Tr. 430).

Mr. Parks listed the payment of P.M.'s by the supplier as the "number one" motivation in influencing the sales girls "to switch customers to your products" from a competitor's product (Parks, Tr. 430).

Since cosmetic and toiletry products are primarily "impulse" items where the purchase decision is made at the point of sale, the efforts of the sales girls, the amount of shelf space and display space, and the location of such space in the cosmetic and toiletry department of the retail outlet determines to a great extent the volume of movement of a cosmetic company's product through such outlets. This is true whether competitors are advertising a particular product, a product category, or a line of products because when one cosmetic and toiletry competitor gains favored promotional effort, display and shelf space, it necessarily does so at the expense of another product or product line which is also displayed within the limited cosmetic and toiletry section of the retail outlet. As Mr. Parks testified, "the battle of advertising and promotion and salesmanship have pretty much resolved itself down to a battle for space" (Parks, Tr. 410, 429; R. Lee, Tr. 679; Framson, Tr. 513-16). Thus the larger the number of cosmetic and toiletry companies vying for competitive locations in the cosmetics and toiletries section of a retail outlet, the greater the vigor and degree of competition for the available space.

It is customary in the cosmetics and toiletries industry for companies to estimate annual sales to their customers (including Weingarten) at the beginning of the year and to budget the promotional and advertising allowances available under their programs to customers on an annual basis (Parks, Tr. 465-66; Schleimann, Tr. 335; R. Lee, Tr. 682; Tetley, Tr. 1188-89). These promotional and advertising programs included regular P.M. incentives, extra P.M.'s for special promotions, cash prize monies and cooperative advertising allowances (Parks, Tr. 389; Boohecker, Tr. 244-45; Framson, Tr. 517-19, 557, 559, 573). This record shows that many customers decline the promotional allowances made available to them by cosmetics and toiletries companies. Some decide not to make sufficient space available in order to promote every manufacturer's product, while others are not promotionally minded and refuse to take promotional allowances offered by any supplier (Parks, Tr. 384-388). Weingarten has also declined to accept many promotional payments which have been offered by its suppliers (Framson, Tr. 592-93; Boohecker, Tr. 277).

Most cosmetics and toiletries companies, including competitors of

184

Initial Decision

Shulton, offered their customers a regular 5% P.M. (Framson, Tr. 539-46, 557, 559, 618, 619; R. Lee, Tr. 715-16, 737, 742-43, 775; Choka, Tr. 105; Bigelman, Tr. 131; Boohecker, Tr. 244-45, 258-59, Tetley, Tr. 1195; W. Lee, Tr. 173; Schleimann, Tr. 335; Tr. Parks, 389, 434). During Weingarten's May Health and Beauty Carnival and its 1958 Christmas Sale this was increased to 10% by the payment of an additional 5% P.M. (Choka, Tr. 83, 103; Schleimann, Tr. 337; Boohecker, Tr. 245-47, 259-60, 1169-70; Georgi, Tr. 1035; W. Lee, Tr. 173-74; CX 24, 30 A, 128; RX 47, 48, 49 A-B, 90, 91, 92, 93, 97, 98). Unlike most competitors, Shulton did not offer a regular 5% P.M. on a continuing basis (Framson, Tr. 540-46, 552; R. Lee, Tr. 701). During Weingarten's May and Christmas promotions, therefore, Shulton, to be competitive, paid a full 10% P.M. Shulton's P.M. during these promotions thus equalled the 10% P.M.'s (5% plus and additional 5%) which were being paid by its competitors (R. Lee, Tr. 715).

There is nothing peculiar about the type of promotions conducted by Weingarten. Such promotions are conducted by other stores throughout the country and are sometimes referred to as "concentration drives" (Boohecker, Tr. 243). Indeed, in the cosmetics and toiletries industry, it is a common practice for suppliers to offer additional P.M.'s at certain times of the year, such as the graduation—Mother's Day—Father's Day period and at Christmas (RPF 10, 18, 25, 27, 29, 33, 39). Thus, Mr. Parks testified:

Q. And what about extra P.M.'s. were they made available, generally throughout the industry in 1958?

A. Yes, sir (Parks, Tr. 389).

Similarly, Mr. Choka of Helene Curtis (Lentheric-King's Men) testified regarding the extra 5% P.M.:

Q. Do your files show any other companies who received the 5 percent P.M. who might be competitors of Weingarten?

A. Yes, sir.

Q. How many have you got, about?

A. In checking this over, I would guess there were perhaps 25 or 30 in the Houston area which was the area I was looking at (Choka, Tr. 101-2).

*The Advertising and Promotional Plans Offered by Shulton's
Competitors to Their Customers in 1958*

On the basis of all of the evidence offered in this case, it must be concluded that the advertising and promotional plans of Shulton's competitors which participated in Weingarten's three 1958 promotional events which have been challenged by complaint counsel were lawful. The evidence demonstrates that such plans were offered to all customers

Initial Decision

66 F.T.C.

on proportionally equal terms, and that the payments to Weingarten by Shulton's competitors were within the allowances provided by such plans (Boohecker, Tr. 243-45, 252, 253-56, 262; Schleimann, Tr. 335, 337, 469; Choka, Tr. 84-85, 97, 101-2, 105; W. Lee, Tr. 157, 168; Bigelman, Tr. 125-26, 139; Parks, Tr. 372-73; R. Lee, Tr. 706-7, 722-23; Framson, Tr. 558; RX 11, 12, 17, 32, 34, 35, 117).

Bourjois, Inc.—Barbara Gould

In compliance with a Federal Trade Commission Order to Cease and Desist, the "Advertising and Promotion Agreements" of Bourjois, Inc. and Barbara Gould were submitted to the Federal Trade Commission's Division of Compliance, and were marked "received and filed" ² on May 23, 1957 (RX 17 A-L).³ Although these programs, which were in effect in 1958, were investigated by the Commission in 1959, no action was taken challenging the promotional and advertising payments to Weingarten (Bigelman, Tr. 124-26). Under its program, Bourjois offered 13 $\frac{1}{3}$ % of annual net purchases to all of its customers for cooperative advertising and other promotional services, including P.M.'s, and 5% for cooperative advertising (Bigelman, Tr. 122, 131, 140).

The Bourjois and Barbara Gould plans authorize the payment to sales personnel of a regular 5% commission on sales and further state that any funds available under the plans may be used for the payment of salaries or commissions (RX 17 G-J).⁴ It is permissible, under the plans, to offer a customer a 10% P.M. for particular promotions so long as all P.M.'s paid come within the 8 $\frac{1}{3}$ % limitation based on the whole year's purchase (Bigelman, Tr. 122-23).

Mr. Bigelman testified that payments made by Bourjois (Barbara Gould) in connection with Weingarten's 57th Anniversary Sale, the Ninth May Health and Beauty Carnival, and the 1958 Christmas Sale were all within the framework of the Bourjois and Barbara Gould "Advertising and Promotion Agreements" (Bigelman, Tr. 139). In 1958, Weingarten's purchases from Barbara Gould amounted to \$3,758.00 and its purchases from Bourjois amounted to \$15,504.00 (Bigelman, Tr. 130-31, 140). The total amount of promotional monies

² It was stipulated that the handwritten notations at the bottom of the Federal Trade Commission compliance reports for Bourjois, Revlon, Helena Rubinstein and Hudnut Sales Co., Inc. were made by the Commission's Compliance Division, and are authentic notations used by the Commission's staff in connection with those matters (Tr. 899).

³ *Bourjois, Inc.*, Dkt. No. 6635.

⁴ Following the provisions authorizing payments for cooperative advertising and a regular 5% P.M., the plans provide: "3. Funds available under this agreement can also be used for the payment of a demonstrator's salary and commission" (RX 17 H, J).

budgeted for the Weingarten account in 1958, thus came to \$3,945.68 (Bigelman, Tr. 123, 937).⁵ Bourjois and Barbara Gould's payments to Weingarten during that year, however, amounted to only \$3,760.02 (Bigelman, Tr. 124, 937).

Dorothy Gray

Dorothy Gray's "Statement of Marketing Policy", which makes promotional allowances available to each customer, was in effect in 1958 (RX 27 A-D). These allowances are estimated on the basis of the dollar value of all merchandise (both staple and promotional) purchased during the preceding year, adjusted in accordance with purchases during the current calendar year (Boohecker, Tr. 242-43, 258, 262, 309; RX 27 C). The 8% and 7% allowances authorized by the plan may be used for the payment of double P.M.'s or for prize money at particular times in the year (Boohecker, Tr. 243; RX 27 E).

Dorothy Gray's sales force has considerable flexibility in administering the funds available under its marketing policy (Boohecker, Tr. 278-79). Thus, Mr. Boohecker, Vice-President of Lehn & Fink Products Corp. and General Manager of Dorothy Gray, testified:

Q. Then is it a fact that your program makes possible a wide variety of alternative, depending upon the needs of each of your customers?

A. Yes, sir (Boohecker, Tr. 323).

In addition to the foregoing 8% and 7% allowances, which are available for demonstrators, P.M.'s or prize money, Dorothy Gray also offers a 5% cooperative advertising allowance on staple merchandise (RX 27 D).

Like most companies in the cosmetics and toiletries industry, Dorothy Gray's program is geared to a uniform percentage of merchandise purchased by each customer during the current calendar year (Boohecker, Tr. 309). Because Dorothy Gray is a "semi-franchised" set-up having restricted distribution and therefore relatively few customers in any area, it has experienced no difficulty in proportionalizing its offers of promotional and cooperative advertising assistance among all of its customers (Boohecker, Tr. 236-37).

In 1958, Dorothy Gray's payments to Weingarten in connection with the May Health and Beauty Carnival and the 1958 Christmas Sale were made pursuant to its marketing policy (Boohecker, Tr. 243-57, 266-67, 322-24; Tetley, Tr. 1195, 1297; RX 82, 92). Dorothy Gray also authorized the payment of funds for cooperative advertising un-

⁵Thirteen and one-third percent of \$15,504.00 equals \$2,066.68 (Bourjois), and 50% of \$3,758.00 equals \$1,879.00 (Barbara Gould), for a total of \$3,945.68.

Initial Decision

66 F.T.C.

der its plan for the 1958 May Health and Beauty Carnival, but Weingarten did not elect to accept this authorized cooperative advertising (Boohecker, Tr. 247, 270-75, 277; RX 49 A-B, 57).

Dorothy Gray's marketing policy was investigated by the Federal Trade Commission on several occasions, but no action challenging its payments under its policy was taken as a result of that investigation (Boohecker, Tr. 253-56; RX 117).

Helene Curtis Industries

Helene Curtis' advertising and promotional policy was described as follows by Mr. R. K. Ryerson, General Sales Manager:

Approximately bi-monthly we make available to all our retail customers promotional allowances on a proportionately equal basis. Cooperative advertising is one form of promotional which qualifies for our regular promotional allowance. Since not all customers can conform to a single program of promotion, we permit these funds to be expended for various forms of promotion to suit individual circumstances (RX 12 B).

Promotional payments by Helene Curtis Industries (Lentheric-King's Men) are made under the "Special Cooperative Advertising Promotion Agreement" employed by that company which provides $8\frac{1}{3}\%$ of purchases for promotional allowances and 5% for cooperative advertising. This program permits payments for extra P.M.'s and cash prizes to customers provided the total expenditure does not exceed $13\frac{1}{3}\%$ of annual purchases (Choka, Tr. 97, 101-2, 105; RX 9, 10, 89). The availability of promotional allowances offered by Helene Curtis is brought to the attention of all customers by the company's salesmen. In addition, announcements are made in trade bulletins and trade journals (Choka, Tr. 98; RX 12 C). Helene Curtis participated in Weingarten's 57th Anniversary Sale, Ninth May Health and Beauty Carnival, and the 1958 Christmas Sale (Choka, Tr. 106; CX 14; RX 9, 89). Participation in these events involved the payment of additional 5% P.M.'s (Choka, Tr. 81-83, 97, 103-4). These allowances were within the framework of Helene Curtis' cooperative advertising and promotional policies and were offered to all customers, including competitors of Weingarten, on proportionally equal terms (Choka, Tr. 83, 88, 100, 101-2, 103-4, 105).

Mr. Choka, General Counsel of Helene Curtis, testified that in his opinion and based on his examination of company records, payments by Helene Curtis to Weingarten in 1958 were lawful (Choka, Tr. 87-88, 96-97, 100, 112, 1093-94). Furthermore, although the Commission investigated Helene Curtis' promotional and advertising payments

to Weingarten in 1958, no action challenging these payments was taken (Choka, Tr. 85; RX 11 A-D, 12 A-C).

Helena Rubenstein

Official notice was taken of the Order to Cease and Desist and the Report of Compliance which was submitted by Helena Rubenstein, Inc. to the Federal Trade Commission and marked "received and filed" on September 13, 1956 (Tr. 49).⁶ Helena Rubenstein's program offers seven "Sales and Service Allowance Plans." Plan No. 1 offers 1% of net purchases for each foot of display space provided by the customer, with a minimum of 3% and a maximum of 15%, and a 3% allowance for companies employing a full-time cosmetician. Plan No. 2 offers an allowance of 15% to customers employing a full-time cosmetician who provide a minimum of eight feet of display space or, alternatively, an 18% allowance if two or more cosmeticians are employed and if a minimum of 12 feet of display space is provided. Plan No. 3 offers a 10% allowance to customers who provide part time services of a cosmetician and furnish a minimum of 5 feet of display space. Plans No. 4 and No. 5 offer stated percentages of net purchases to customers who provide counter wall shelves in accordance with schedules set forth in the plans. Plan No. 6 offers stated percentages of net purchases for customers who provide window displays. Plan No. 7 is an "inventory control program" which offers allowances of 2% to 7% depending on the amount of display space furnished as well as an additional 3% of net purchases to be used as a cosmetician's sales allowance.

In addition to the foregoing allowances for promotional services, Helena Rubenstein's plan offers to pay the actual cost of newspaper, television, and radio advertising at the customer's lowest contract rate.

Houbigant Sales Corporation

Houbigant participated in the Ninth May Health and Beauty Carnival and the 1958 Christmas Sale (Georgi, Tr. 1029; Framson, Tr. 1302, 1304; RX 88, 97, 104, 127; CX 178, 179, 180). During the May Health and Beauty Carnival Houbigant paid Weingarten an additional 5% P.M. and furnished merchandise for prizes (CX 178, 179, 180). During the 1958 Christmas Sale it paid an extra 5% P.M. and made payments for cooperative advertising (RX 88, 89, 104).

⁶ Helena Rubenstein, Dkt. No. 6441.

Hudnut Sales Company

Hudnut Sales Company, a sales Division of Warner-Lambert Pharmaceutical Co., distributed the Hudnut, DuBarry and Sportsman lines (W. Lee, Tr. 154). Hudnut's cooperative advertising and promotional program, which was in effect in 1958 and available to all customers, was furnished to the Federal Trade Commission's Division of Compliance and marked "received and filed" on June 26, 1956 (RX 32 A-T).⁷

Hudnut's cooperative advertising plan offers an allowance of 7½% based on net purchases during each calendar year (RX 31 A-B). The plan states that charges are accepted up to the full cost of advertising (RX 31 A, 32 E). Mr. William W. Lee of Warner-Lambert, testified that Hudnut's cooperative advertising payments to Weingarten in 1958 were made pursuant to the arrangements shown in RX 31 A-B (W. Lee, Tr. 157).

Hudnut's "Alternate Promotion Plan", number one (RX 32 M-O), offers a promotional allowance "equal to 5% of retail (approximately 8% of the net)" for sales clerks' incentives. The allowance is payable on all lines combined, *i.e.*, DuBarry, Sportsman, and Hudnut (RX 32 M). "Alternate Promotional Plan", number two (RX 32 P-R), offers a similar basic 8% allowance as well as an additional 3% allowance to customers who provide six feet of display space. "Alternate Promotional Plan" number three (RX 32 S-T) offers a 10% demonstrator allowance to customers who provide permanent counter, shelf, and case display space.

Hudnut was one of the companies which offered a regular 5% P.M. to Weingarten in 1958 (W. Lee, Tr. 161). In addition, Hudnut offered its customers, including Weingarten, additional 5% P.M.'s at various times. Mr. Lee explained his company's policy in paying additional 5% P.M.'s as follows:

The sales department is authorized to grant an additional 5 percent, to offer an additional 5 percent, to customers at specific times of the year, like Christmas and sometimes in May (W. Lee, Tr. 161).

The payment of additional 5% P.M.'s to customers on such special occasions is a regular policy of the company and additional 5% P.M.'s are made available to all customers (W. Lee, Tr. 161). Hudnut's sales force was instructed to inform all customers of the availability of additional 5% P.M.'s when they became available, by means of the Richard Hudnut Almanac (W. Lee, Tr. 162-63).

⁷ Hudnut Sales Co., Inc., Dkt. No. 6440.

Hudnut participated in Weingarten's May Health and Beauty Carnival and in the 1958 Christmas Sale (RX 47, 53, 80, 90). Total promotional payments to J. Weingarten, Inc. in 1958 were \$3,356.95, which is equal to 8% of cumulative net purchases by Weingarten of \$41,961.86 during that year, and is less than the total promotional payments which were available under Hudnut's promotional allowance plan (CX 248 A, F).

Revlon

Official notice was taken of the cease and desist order and the report of compliance filed by Revlon with the Commission on April 2, 1957 and marked "received and filed" on April 2, 1957, together with related documents (Tr. 49).⁸ Revlon's advertising and promotional program was originally promulgated on February 7, 1952 (see memorandum from Carl Mitson, February 7, 1952). The allowances authorized by Revlon's 1952 program were supplemented by additional allowances described in the memorandum from Andrew A. Lynn, dated December 15, 1956 (see letter from James T. Welch to Federal Trade Commission, January 16, 1957).

As originally promulgated, Revlon's program provided for eight different types of promotional assistance to its customers, including demonstrator allowances, P.M.'s and cooperative advertising. Allowances and services described in the program were interchangeable and different combinations thereof could be worked out to the mutual benefit of the customer and Revlon (see memorandum from Carl Mitson, February 7, 1952, p. 1).

As originally promulgated in 1952, Revlon's plan authorized a demonstrator allowance up to 10% of net purchases and cooperative advertising on a 50-50 basis. As supplemented by the memorandum of December 15, 1956, Revlon authorized its customers to choose between advertising reimbursed on a 100% basis up to 4% of net purchases, or, alternatively, on a 50-50 basis (see memorandum from Andrew A. Lynn, December 15, 1956, p. 1). Additional P.M.'s up to 10 $\frac{1}{3}$ % of purchases (8 $\frac{1}{3}$ % plus an additional 2% for customers employing ten or more cosmeticians) were also authorized by the memorandum of December 15, 1956.

Tussy

The "Statement of Marketing Policy" of Tussy Cosmetics, originally promulgated in 1952, offered a 12% allowance for "demonstration services" which was based on the net dollar value of all merchandise

⁸ *Revlon, Inc.* Dkt. No. 6519.

purchased by the customer during the calendar year (RX 26 A-C; Schleimann, Tr. 334). Tussy also offered an allowance up to 5% of the customer's purchases of staple merchandise for cooperative advertising (RX 26 C). In addition, the plan provided that when special promotions are conducted in a given area, all customers in the area may be offered an allowance for display and advertising in an amount equivalent to a uniform percentage of the promotional merchandise purchased. The percentage of such special allowances was not stated in the program (RX 26 C).

Mr. Schleimann, Marketing Services Manager for Tussy, testified that in the Houston area in 1958, Tussy offered all customers a basic promotional allowance of 8% of net purchases plus another 7% when additional services were performed (Schleimann, Tr. 334-36). The additional 7% was available for such things as prize money, circulating demonstrators, and for the payment of additional 5% P.M.'s (Schleimann, Tr. 336). An additional 10% promotional allowance was also available on promotional merchandise (Schleimann, Tr. 335). Tussy's package of promotional allowances in the Houston area thus consisted of a basic 8%, an additional 7% for additional services, and an extra 10% on promotional merchandise.

In addition to the foregoing promotional allowances, an allowance of 5% was available for cooperative advertising (Schleimann, Tr. 334). Tussy generally paid for cooperative advertising on a 50-50 basis, but, depending upon the availability of funds accrued under its policy, it could allow payment on a two-thirds or a 100% basis. Reimbursement on an increased basis, of course, was available to all customers (Schleimann, Tr. 336-37, 339).

Shulton's Promotional and Advertising Program

Mr. Parks, as Vice-President in Charge of Sales, had principal responsibility for Shulton's sales and promotional program. As part of his duties, he kept himself informed of the general promotional and advertising programs of competitors by contacts with competitors at conventions, personal calls on customers, attending sales meetings and receiving reports from Shulton's sales force, and by reading trade publications such as the Drug "Pink Sheet" (Parks, Tr. 366-69). The knowledge thus gained about competitive programs was used as a basis of determining sales policy and was disseminated to Shulton's sales force at meetings throughout the year (Parks, Tr. 366).

Following an investigation of the promotional and advertising programs of Shulton and all of its major competitors, the Commission promulgated its Trade Practice Conference Rules for the Cosmetic and Toilet Preparations Industry (4 CCH Trade Reg. Rep. ¶ 41,221;

Parks, Tr. 372-74). Shortly thereafter, in 1952, Shulton developed its "Federal Trade Commission Program" for administering promotional and cooperative advertising funds (Parks, Tr. 373-76; CX 68 E-Q; RX 130). This program, as originally designed, permitted its sales representatives to offer an allowance of 6% of purchases for promotional services and 5% for cooperative advertising. The total allowance provided under the program was 8½% by Shulton and 2½% by the customer (Parks, Tr. 378; CX 68 D). Shulton's program was based essentially upon participation in selected retailer promotions (Parks, Tr. 412-13), and contemplated the spending of promotional money:

* * * when our goods naturally sell over [the customer's] counter in the greatest volume—such as Christmas, Father's Day, Mother's Day, or in conjunction with our special price or general line or item promotions—(CX 68 E).

Shortly after promulgation of its "Federal Trade Commission Program" in 1952, Shulton discovered that the program's budgetary limits were inadequate to permit its sales representatives "to meet this competition" (Parks, Tr. 378). Promotional allowances available under the program therefore were increased by 5%, making a total of 8⅓% of purchases for promotional allowances and 5% of purchases for cooperative advertising allowances, or a maximum allowance of 13⅓% of purchases for competitive promotions (Parks, Tr. 378-79; RX 130). After Shulton had established its promotional and advertising program, the Commission again investigated Shulton and other cosmetics and toiletries companies in 1953 to determine whether the Trade Practice Conference Rules were in fact being carried out by the industry (Parks, Tr. 379-80). No action was taken as a result of that investigation (Parks, Tr. 381).

The basic operating policies of Shulton's promotional and advertising program are formulated by top management "on the basis of our own judgment supplemented by regional managers, competitive knowledge, and so on. Then we indoctrinate our sales people as to the policies and they in turn indoctrinate the salesmen, and it is the local salesman's responsibility to handle the account within the scope of our policies".⁹ Testifying regarding the information which he had available to keep abreast of competitive conditions, Mr. Lee stated:

Well, the first and primary source of information was our Shulton management. At our sales meetings we would discuss our plans and they would make known to us as much information as they had on competitive companies' plans and programs.

⁹ In the course of his duties as Sales Manager, Mr. Parks was aware that the Federal Trade Commission had investigated and issued complaints and orders against certain of Shulton's competitors in 1955 and 1956. He kept Shulton's salesmen informed on these matters at sales meetings where the sales force discussed the promotional plans of Shulton and its competitors (Parks, Tr. 381-82).

In addition to that, of course, there were trade papers, we regularly obtained information from buyers, we were in a position where exchanging information was to our mutual benefit. We got a great deal of information on procedures and conditions in the industry from the sales girls in the cosmetic departments of the stores that we called on as a regular part of our duty, and we also had rather close association with the other representatives, * * * (R. Lee, Tr. 678-79).

Thus in order to be competitive, Shulton's promotional policies and those of its competitors were made known to its sales force.

Sales Representatives Were Authorized To Arrange the Terms of Participation in the Weingarten Promotions

Mr. Lee,¹⁰ local sales representative for Shulton, and the local sales representatives for competing cosmetics and toiletries companies were authorized to enter into agreements on behalf of their companies to participate in promotional events conducted by Weingarten in 1958. Although it was customary to confirm in writing the promotional arrangements which had been agreed to between the local sales representatives and Mr. Framson, the Weingarten cosmetics buyer, in practice it was very unusual for any company to modify an arrangement which have previously been worked out by its sales representative with Mr. Framson (Framson, Tr. 554-55, 1324, 1368, 1369, 1379; R. Lee, Tr. 718-19, 732, 733-34, 758, 767; Parks, Tr. 436, 460, 465; Bigelman, Tr. 925; Boohecker, Tr. 232, 258, 280; Choka, Tr. 1098; Georgi, Tr. 1032; Schleimann, Tr. 993, 998; Tetley, Tr. 1186).

Shulton's confirmation of its participation in the May Health and Beauty Carnival in 1958 is probably typical of the procedure followed by the sales representatives. Mr. Lee called on Mr. Framson and arranged for Shulton's participation on April 8 (R. Lee, Tr. 698; RX 122). That evening Lee wrote a letter in longhand addressed to Weingarten, confirming this participation; he attached a short memorandum to his branch manager's secretary in Dallas and requested that the letter be typed and forwarded to Weingarten (RX 123). On April 11th a typewritten letter in almost the identical form as that prepared by Mr. Lee on April 9th was forwarded to Weingarten by the Shulton branch manager confirming Shulton's participation in the May Health and Beauty Carnival (CX 18 A).

The confirmation letters in the record typically refer to arrangements which had previously been agreed to by the sales representative and Weingarten, for example:

* * * [our representative] has completed an arrangement with you * * * (CX 18 A);

¹⁰ Mr. Lee left Shulton in 1960 to take a position with Pitney-Bowes Company (R. Lee, Tr. 676-77).

184

Initial Decision

This will merely serve as written confirmation of our telephone conversation * * * (CX 29 C);

* * * [our representative] has arranged with you for an extra 5% commission * * * (CX 30 A);

This will confirm the arrangement made with [our local representative] for an extra 5% PM * * * (RX 81);

This will merely serve as confirmation for your records * * * (RX 82);

We wish to confirm the P.M. arrangement set up with your good firm by our territory representative, * * * (RX 87).

From all of the evidence in this record, it is concluded that sales representatives were authorized by cosmetics and toiletries companies to arrange for participation in Weingarten's promotions in 1958.

*The Weingarten Promotions**In General*

J. Weingarten, Inc. of Houston, Texas, was one of the first retail grocery chains in the United States to include a cosmetics and toiletries department in a supermarket (Framson, Tr. 512). By 1958, Weingarten was engaged in the sale of cosmetics and toiletries of more than twenty competing suppliers (Framson, Tr. 519; R. Lee, Tr. 680). Weingarten was actively promoting and displaying these products in the high-traffic cosmetics departments of its outlets by the use of several promotional events throughout the year (Framson, Tr. 512-16, 521-22). During these promotional events, special efforts and special display space was provided for those cosmetics and toiletries suppliers that participated in the events (Framson, Tr. 518, 527, 537-38, 581; R. Lee, Tr. 695; RX 67-69).

Weingarten's cosmetics and toiletries departments are comparable to such departments in many department stores and large drug stores. The cosmetics and toiletries which are displayed and sold in these departments are classified in accordance with the following general categories: fragrance, make-up and treatment, hair-care, and men's line. Deodorants (and certain other utility products) are sometimes classified in more than one of the foregoing general categories. Cosmetics and toiletries are allocated a definite but limited space within the drug and cosmetics departments of Weingarten's retail outlets where they are displayed according to line. For example, the fragrance line of all suppliers is supplied in one section; and categories of products, such as lipsticks, are displayed together. As Mr. Framson explained, "If a customer wanted to purchase a lipstick she had free access to all lipsticks that were available in one place" (Framson, Tr. 513-14).

The testimony of Mr. Framson demonstrates the importance of promotional and advertising allowances in developing shelf and display space for suppliers in Weingarten outlets. As Mr. Framson characterized it, the suppliers are "screaming for it" because "the more shelf space designated for an item, the more it helped the impulse buyer" (Framson, Tr. 514). Explaining the impulse buyer, Mr. Framson commented: "Lady customers are supposed to be tremendous impulse customers, according to the records, and if you devote more space to certain items, chances are, * * * that the sales are greatly enhanced on the particular items, if they are given the greater shelf space" (Framson, Tr. 515).

That there are advantages to having front display space or attractive display space, as opposed to being in the rear of a display or not being displayed prominently in a Weingarten outlet, was stipulated by counsel. It was also stipulated by counsel that front display space would be a substantial factor in causing a product to move more rapidly than products in less prominently displayed areas (Framson, Tr. 515-16).

Mr. Framson noted that sales girls are "extremely important" in determining which products are going to move in the cosmetics and toiletries department of Weingarten's outlets. Items on which the sales girls are paid promotional allowances (P.M.'s) are promoted and pushed in preference to items on which the girls do not receive promotional allowances (Framson, Tr. 517-18). Similarly, cash prizes "definitely" increase the incentive of the sales girls to sell and promote the particular product on which the prize money is offered (Framson, Tr. 518).

It was stipulated by counsel that Weingarten has found that the housewife purchasing cosmetics and toiletries switches back and forth between the products of different suppliers (Tr. 520). As Mr. Framson stated, "Promotional advertising, national advertising, co-op advertising by the local companies, enhanced displays, improved displays, point of sale displays, plus suggestions by the cosmetic clerk," are the principal reasons why housewives switch back and forth between the products of suppliers. Thus, the promotional allowances and cooperative advertising allowances of the various suppliers which agreed to participate in Weingarten's promotions in 1958 would have increased the sale of their products at the expense of Shulton, had Shulton failed to meet that competition (Framson, Tr. 521).

In 1958 Weingarten conducted six promotional events: The Store Manager's Sale, the Harvest Sale, the Texas Products Sale, the 57th Anniversary Sale, the Ninth May Health and Beauty Carnival and

the Christmas Sale (Framson, Tr. 522). To be competitive, Shulton participated in three of these events: the 57th Anniversary Sale, the Ninth May Health and Beauty Carnival, and the Christmas Sale (Framson, Tr. 534-35; R. Lee, Tr. 682, 685-89, 698, 714-15).¹¹

The specific products sold to Weingarten in 1958 by Shulton and other cosmetics and toiletries suppliers are set forth in a tabulation of Weingarten's invoices (RX 33 A-U).¹² This tabulation was prepared by Mr. Wilson of Shulton. Mr. Underwood, an accountant assigned to this matter by the Commission, agreed that it accurately reflects the product information contained on the invoices (RX 33; Wilson, Tr. 207, 211, 214-18; Underwood, Tr. 1052-53, 1116-17). Competitive products were grouped in the tabulation depending on whether they were of like grade and quality (Parks, Tr. 406-8; Wilson, Tr. 215). An examination of this tabulation and the testimony of the witnesses shows that the Shulton products and product lines were directly competitive with the products and product lines of its competitors purchased, displayed and sold by Weingarten throughout 1958.

Shulton's decision to participate in these events was made on an individual basis in each case; it did not offer Weingarten a regular P.M. (Framson, Tr. 540-46; R. Lee, Tr. 701). Payments made by Shulton in connection with these three events were as follows:

Sales event	Services rendered by Weingarten	Amount	Citation
1. 57th Anniversary Sale.....	Newspaper advertising and other services.....	\$881.14	RX 43
2. The 9th Health and Beauty Carnival.....	Cash Prizes.....	400.00	RX 56
	10% P.M.	798.30	RX 56
	Co-op Advertising	563.25	RX 52 A-B
3. 1958 Christmas Sale.....	10% P.M.	2,611.90	RX 56
	Co-op Advertising	759.00	RX 103; Tr. 656-50
Total.....		\$6,013.59	

¹¹ In meeting the promotional payments of its competitors in these three events, Shulton kept within the maximum allowances of 13½% available under its plan. Maximum payments allowable on sales of \$46,217 to Weingarten would have been \$6,160.73 (CX 52).

As buyer for Weingarten's drug department in 1958, Mr. Robert Framson was in charge of contacting sales representatives of cosmetics and toiletries suppliers (Framson, Tr. 510-11, 1347; Finkelstein, Tr. 1372). Mr. Framson was also in charge of working out the ar-

¹² Shulton did not participate in the Texas Products Sale because competition did not require it (R. Lee, Tr. 728-30, 770).

¹³ The invoice dates are shown on RX 33. Mr. Framson testified that the turnover of cosmetic and toiletry products at Weingarten was three to four times per year. The record shows that a considerable part of the merchandise invoices in a third quarter was sold by Weingarten during the fourth quarter (Framson, Tr. 576, 1357).

rangements with sales representatives for the three promotions involved in this case (Framson, Tr. 1352-53). Mr. Finkelstein, manager of the cosmetics department, was concerned with the promotions involved in this case only in a supervisory capacity and did not handle direct contacts with the sales representatives himself (Framson, Tr. 598, 1347, 1348; Finkelstein, Tr. 1366, 1368). In this supervisory role, Mr. Finkelstein, in connection with the May Health and Beauty Carnival signed letters which were sent to the suppliers and received replies from them which merely confirmed arrangements that had previously been worked out between Mr. Framson and the sales representatives (Finkelstein, Tr. 1368, 1375-76). All contacts with the sales representatives, including follow-ups on letters received by Mr. Finkelstein were part of Mr. Framson's responsibilities (Finkelstein Tr. 1371).

THE WEINGARTEN 57TH ANNIVERSARY SALE

Weingarten began planning its 57th Anniversary Sale, which was to be held from February 24th to March 8, 1958, in December 1957 (Framson, Tr. 526-29; RX 38 A). As planned by Weingarten this Anniversary Sale "increased the traffic flow of consumers through" Weingarten's retail outlets and "boosted the sales of displayed products" through the use of extensive advertising and promotion. In consideration of their participation the suppliers were offered cooperative advertising in newspapers and preferential displays in the Weingarten outlets for a particular product (Framson, Tr. 528-31; RX 38 A-B).

Mr. Framson began discussing participation in this Anniversary Sale with suppliers in December 1957. One of the first cosmetic and toiletry companies to agree upon the terms of participation in this event was Bourjois, Inc. These arrangements were made in the latter part of December, 1957 (Framson, Tr. 529, 659; Walling, Tr. 943, 947-48). At that time Bourjois was coming out with a promotion on its deodorant at the special price of two for \$1.00, and Mr. Framson and Mr. Walling, salesman for Bourjois, agreed in December, 1957 that this item would be featured in the 57th Anniversary Sale (Framson, Tr. 529-30; Walling, Tr. 948; RX 44).¹³ Bourjois agreed to participate in the 57th Anniversary Sale in accordance with the Weingarten rate sheet at a cost of \$881.14 (Framson, Tr. 530, RX 37,

¹³ Tussy regularly conducts an annual one-half price sale in April of each year (Framson, Tr. 531-32). When Mr. Lee spoke to Mr. Framson on January 15, 1958, Mr. Lee was told that Bourjois was trying to "beat the gun" by coming out with its deodorant special earlier in the year (R. Lee, Tr. 744).

44),¹⁴ and Mr. Framson placed an order for 3,600 of the special priced deodorants with Mr. Walling (Framson, Tr. 659, 1300; RX 121).¹⁵

Later on January 15, 1958, Mr. Framson discussed the 57th Anniversary Sale with Mr. Lee of Shulton and informed Mr. Lee that other companies were participating in the Anniversary Sale¹⁶ (Framson, Tr. 533), and particularly mentioned the "Bourjois deodorant promotion" (Framson, Tr. 534). He told Mr. Lee that Bourjois which had come out with a two for \$1.00 deodorant had agreed to participate in the 57th Anniversary Sale and to purchase one-eighth page of cooperative advertising in all territories (Framson, Tr. 533, 616; R. Lee, Tr. 682-84, 766; see RX 121). At that time Shulton was also introducing a special two for one sale on its deodorant (R. Lee, Tr. 683-86; Framson, Tr. 533). When Lee learned that Bourjois had agreed to participate in the Anniversary Sale with its two for one deodorant promotion, the following described conversation ensued:

Q. Did he tell you whether or not Evening in Paris had committed themselves to participate in his sale—

A. Yes, sir.

Q. — by making promotional and co-op payments?

A. Yes, sir.

Q. What did he tell you about that?

A. Well, I asked Bob what the level of their participation would be, because our basic agreement with Weingarten was based on—the promotional allowance was based on periodic promotion, so it was of the utmost importance to me to know what the other people were doing at this time. And Bob was always cooperative, and he told me what Bourjois was doing. And they were participating on a chain-wide level. And I thought it was very important, particularly because of the fact that deodorants is a big, a growing business, and it was important to us at this time, and I felt that it was of the utmost importance that we not let Bourjois steal our thunder in this case, that we had to meet—it was imperative that we meet this condition.

Q. Did you agree on January 15 to meet this participation by Bourjois?

A. Yes, sir, we did.

Q. And did you participate in a greater or lesser amount than Bourjois?

A. In the same amount, the one-eighth page level (Tr. 686-87).

¹⁴ In addition to newspaper advertising, participating companies received other services in consideration for their payment of \$881.14 (Framson, Tr. 656-57). For example, the payment of \$881.14 entitled participating suppliers to one-eighth of a page of newspaper advertising in approximately 15 newspapers, mass displays in each of the Weingarten stores, radio and television advertising, and point of sale displays, including special effects and art work (R. Lee, Tr. 688).

¹⁵ Mr. Framson refreshed his recollection as to the date of the arrangement by reference to a purchase order to Bourjois for its deodorant at the special price (Framson, Tr. 661).

¹⁶ Participants in the 57th Anniversary Sale were: Lanolin Plus, Inc., The Nestle-LeMur Company, Bourjois, Inc., Barbara Gould, Max Factor & Co., Helene Curtis, Rapidol Distribution Co., Dowd, Redfield & Johnstone, and Shulton, Inc. (Framson, Tr. 525).

Mr. Lee's purpose in agreeing to participate in the 57th Anniversary Sale was solely to enable Shulton to retain its sales position in Weingarten's stores. When he agreed to participate, Mr. Lee considered deodorants to be a large and growing business and it was important to him "that we not let Bourjois steal our thunder in this case, that we had to meet—it was imperative that we meet this condition" (R. Lee, Tr. 686–87). Mr. Lee testified further:

Q. If you had not met this advertising promotion by Bourjois at this time of the anniversary sale, can you tell us whether or not Shulton would have lost sales position and volume of sales in the Weingarten * * * stores?

A. Absolutely. Our loss would have been substantial in point of immediate sales volume. It would have been serious in loss of position. We would lose the interest of the sales girls, which was always an important item, and when you lose position like that, *it is even a greater struggle to attempt to regain it*, so it is an important thing all around (R. Lee, Tr. 688–89; see also Tr. 729).¹⁷

Mr. Lee had no reason to believe that the participation in the 57th Anniversary Sale by Bourjois, or any other competitor, was discriminatory or unlawful (R. Lee, Tr. 689). Thus, Mr. Lee testified that he did not know that "Bourjois was doing anything but what was right" (R. Lee, Tr. 691). When the Hearing Examiner asked whether Mr. Lee had given any thought to the legality of Shulton competitors' participation in the Anniversary Sale, Mr. Lee testified:

The WITNESS: Well, we are talking about five years ago. Your Honor, and it may be hard to say, but I would just say this, we were aware of the fact generally that there had been some FTC Commission citations, or I don't know what you call them, some activity in that field. Again, because of the close nature of this cosmetic field, information like this went around the trade quickly. I have no information—as a matter of fact, several years ago there had been—Bourjois was one of the companies that had been involved, as I understand this thing.

Hearing Examiner JOHNSON: Prior to 1958?

The WITNESS: Yes, sir, and because of the fact that the FTC had proceeded against them somehow, I would say that in this sale they are bending over backwards to do what was expected of them by the FTC.

Q. This was your assumption, anyway?

A. Yes (R. Lee, Tr. 690).

Q. In your calls on any of these [other] accounts, can you recall of any instance where you became aware or had reason to believe that they were discriminating in their promotion allowances or cooperative advertising?

¹⁷ When he met with Mr. Lee on January 15, 1958, Mr. Framson placed an order for 3,600 pieces of Shulton's deodorant product, which was equal to his order for 3,600 pieces which he had previously placed with Bourjois (Framson, Tr. 659, R. Lee, Tr. 688). (Emphasis in quotation added.)

A. I had no indication that Bourjois was doing anything but what was right (R. Lee, Tr. 691).

Upon consideration of all of the evidence in this case it must be concluded that Mr. Lee's purpose in agreeing, on behalf of Shulton, to participate in the 57th Anniversary Sale was to meet an individual competitive situation in good faith in order to avoid a loss of substantial sales.

Weingarten's 1958 May Health and Beauty Carnival

Weingarten's May Health and Beauty Carnival, which was conducted during the period May 5 through May 31, was inaugurated to coincide with special springtime events such as Mother's Day and school graduations (Framson, Tr. 537; *e.g.*, RX 54). The 1958 May Health and Beauty Carnival was a full line promotion and was similar to carnivals conducted by Weingarten in prior years which had involved cash prizes, cooperative advertising and extra P.M.'s (Framson, Tr. 550-52, 581, 702). Planning for the 1958 May Beauty Carnival began the latter part of January 1958. At that time Weingarten reviewed the results of the Carnival of the previous year and discussed possible participation in the 1958 Carnival with various sales representatives (Framson, Tr. 550-51, 553, 561, 567). By the latter part of March, Mr. Framson's plans for the 1958 Carnival had been completed and, with one or two exceptions sales representatives of the participating companies had indicated that their companies were going to participate (Framson, Tr. 553, 561).

Mr. Framson described the promotional and display effort in the Weingarten stores during the May Beauty Carnival as "truly magnanimous" (Tr. 538).¹⁸ Asked whether or not suppliers who participated in the 1958 May Beauty Carnival enjoyed greater sales and movement of their products than those suppliers who for one reason or another did not participate, Mr. Framson explained that they "did" because they had "greater exposure, advertising, increased interest on the clerk's part" (Framson, Tr. 550). In describing the May Beauty Carnival, Mr. Lee testified that "This was one of the most outstanding cosmetic promotions in this area, and perhaps even in the country. It greatly increased traffic. There was a great increase in sales * * *" (R. Lee, Tr. 694).

In preparation for this May Beauty Carnival, Weingarten rearranged its set-ups and displays in the cosmetic section of its outlets.

¹⁸ The displays are graphically depicted by the photographs showing proof of performance which were furnished to the suppliers (RX 65 A-79 B).

Initial Decision

66 F.T.C.

Previous shelf arrangements and displays were done away with. "Some lines had to come down" (R. Lee, Tr. 695). After the displays and promotional materials were set up for the May Beauty Carnival "the companies that were participating in the promotion, of course, got the front space, the major space and those companies that did not participate were relegated to lesser important positions. In some cases under or behind the counter" (R. Lee, Tr. 695-96).

The sales girls eagerly accepted and participated in the May Beauty Carnival because "Of course, it meant money in their pockets, they were getting benefit from the merchandise that they sold," and therefore they pushed the products on which there were extra P.M.'s. Since cosmetics are "such impulse items, it is relatively easy to sway customers, and so if a sales girl had a stake in it, they can exert a tremendous influence on the sale of any item that they choose to push" (R. Lee, Tr. 697).

Mr. Lee testified that he called on Mr. Framson on April 8, 1958 (confirmed by Field Representatives Daily Call Report on that date; RX 122) and that Mr. Framson advised him that certain of Shulton's competitors had already agreed to participate in the May Beauty Carnival by paying a 10% P.M., cash prizes at the level of about \$400, and co-op advertising (R. Lee, Tr. 698-700; Framson, Tr. 554, 555, 562).¹⁹

Dorothy Gray, for example, had discussed the 1958 Health and Beauty Carnival with Mr. Framson as early as February 12, 1958 (Tetley, Tr. 1190-91). Mr. Framson testified that Mr. Corriden of Dorothy Gray agreed to participate during the meeting between Framson and Corriden March 17, 1958 (Framson, Tr. 1354; as to the date of this meeting, see CX 212 A). Mr. Lee testified:

Q. Did he indicate whether or not any of your competitors had agreed to participate in the May Beauty Carnival?

A. Yes, he did. From both Bob and from the representatives themselves, we were all enthusiastic about this sale. It was an important event.

Q. What did he tell you with regard to your competitor's participation when you visited him on April 8?

A. Yes, April 8th. Well, he told me that most of the companies were participating on the ten per cent PM and on the prize level at about \$400, and because as always these promotions were important events, it was important to me and important to Shulton that we be in there among those lines that were represented during this important promotion.

Q. Did he tell you whether or not most of your competitors or many of your competitors were participating in an advertising co-op in connection with the May Beauty Carnival?

¹⁹ The following companies participated in the May Beauty Carnival: Tussy, Lanolin Plus, Beante-Vues, Blensol, Diversified, Lenel, Paragon, Warner-Lambert, Dorothy Perkins, Bourjois-Barbara Gould, Helene Curtis (Lentheric, King's Men), Revlon, Corday, Shulton, Dorothy Gray, Houbigant, Max Factor, Gillette, and Johnson & Johnson (Framson, Tr. 565-66).

A. Yes, sir, he did.

Q. What did you decide at that time, if anything, to do about it?

A. We agreed to participate on this average level, and so we agreed.

Q. What do you mean "on the average level"?

A. I figured \$400 in prizes.

Q. What about the ten per cent PM?

A. We agreed to the ten per cent. In our case again, this was meeting the ten per cent. We did not have the continuing PM (R. Lee, Tr. 700-01; see also Framson, Tr. 1350-51).

The allowances authorized by Mr. Lee for Shulton's participation in the May Health and Beauty Carnival did not exceed the percentages (where made on a percentage basis) or the dollar amounts (where made on a dollar amount basis) which Mr. Framson told Mr. Lee represented the levels of participation by Shulton's competitors. Thus, Shulton agreed to participate "on the average level", which, because Shulton did not pay a regular 5% P.M., meant that it would pay a full 10% P.M. for the duration of the event together with a \$400.00 cash prize and cooperative advertising (R. Lee, Tr. 700-1; Framson, Tr. 562-63). The following companies, among others, had participated in the 10% P.M., cash prize, and cooperative advertising for the 1958 May Beauty Carnival: Tussy (RX 48, 54; CX 37), Dorothy Gray²⁰ (RX 49 A-B, 57); Hudnut (RX 50 A-B, 53); Bourjois-Barbara Gould (RX 55; CX 32); and Lanolin Plus (RX 59; CX 38).

Mr. Lee's purpose in agreeing to participate in the May Health and Beauty Carnival was to enable Shulton to retain its sales position and to avoid being placed at a serious competitive disadvantage. Thus, Mr. Lee testified:

Q. Why did you decide to participate in the 1958 May Beauty Carnival?

A. Because of the fact that this was a very important promotion and we would be at a serious promotional disadvantage if we did not participate.

Q. In your opinion, if you had not participated in the 1958 May Health and Beauty Contest, would it have any effect on the volume of movement of your merchandise through the Weingarten store at that time?

A. Yes, sir. This May Health and Beauty Carnival encompassed several promotional areas for Shulton and for the cosmetic industry. There was the Easter, Mother's Day, graduation cycle there, and to pass up a promotional effort such as this, tied up in that time, would have cost us, and I just couldn't afford to suffer that loss. (R. Lee, Tr. 701-02).

When he agreed to participate, Mr. Lee had no reason to believe that payments by competing suppliers of cosmetics and toiletries were unlawful (R. Lee, Tr. 705, 706-7). He testified:

Q. Did you have any idea that the competitors which Mr. Framson told you were competing in participating in this contest, were participating contrary to their own promotional and advertising policies?

²⁰ Dorothy Gray did not participate in the cooperative advertising because Weingarten declined to accept it (Boohecker, Tr. 247, 270-75, 277; RX 49 A-B, 57).

A. No. At least to the contrary, based on that, what was mentioned earlier about the FTC hearing that we knew about, I kind of felt that the competition was clean at this time (R. Lee, Tr. 707).

Upon consideration of all the evidence in this case, it must be concluded that Shulton, in making available promotional advertising allowances to Weingarten for its 1958 May Health and Beauty Carnival, was meeting an individual competitive situation in good faith to avoid the loss of substantial sales.

Weingarten's 1958 Christmas Sale

For a number of years prior to 1958, Weingarten had conducted special promotions during the Christmas period (Framson, Tr. 569-70). These promotions, in prior years, had consisted of the payment by suppliers of an additional 5% P.M. and cooperative advertising (Framson, Tr. 570). In 1958 Weingarten's Christmas Sale took place during the period November 28 through December 24, 1958 (e.g., RX 90).

For approximately 20 years, suppliers of cosmetics and toiletries had conducted cosmetics shows at the Rice Hotel in Houston, Texas, generally held during the month of August (Framson, Tr. 568-69; R. Lee, Tr. 707). Since the Christmas season was the most important season of the year for the movement of cosmetic products, these shows permitted the sales representatives to show their Christmas lines and take orders for fall and Christmas promotions with deliveries beginning September 15 (Framson, Tr. 569, 575-76; R. Lee, Tr. 711-12). Although Mr. Framson began planning for Weingarten's 1958 Christmas Sale in July, 1958, no orders were placed and no terms for participation were agreed to until the 1958 Cosmetics Show, which was opened officially on Sunday, August 10, and ran through Thursday, August 14, 1958 (Framson, Tr. 571, 574-75; R. Lee, Tr. 707-08). A few days prior to the official opening of the Show, sales representatives of the major cosmetics companies arranged for a pre-showing at which buyers from the more important accounts were invited to attend (R. Lee, Tr. 708-11, 714; Framson, Tr. 571-72; RX 124). Mr. Framson attended the pre-showing prior to the official opening, where he examined the lines, the packaging of the goods, obtained price lists and catalogs, and discussed the suppliers' advertising programs as well as Weingarten's own plans for the Christmas season (Framson, Tr. 571-73).

Mr. Framson placed orders with most of the sales representatives of Weingarten cosmetics and toiletry suppliers during the Cosmetics Show and they agreed at that time to participate in Weingarten's

Christmas promotion (Framson, Tr. 574-75). When Mr. Framson talked to Mr. Lee at the Show, they discussed Weingarten's Christmas program and Mr. Framson informed Mr. Lee that other cosmetics and toiletry companies had already agreed to participate in Weingarten's Christmas Sale (Framson, Tr. 576-77; R. Lee, Tr. 718). For example, on July 23, 1958, Mr. Tetley, salesman for Dorothy Gray, made a note to obtain confirmation of an additional 5% P.M. for the period November 25 to December 24, 1958 (Tetley, Tr. 1194-95; RX 129).²¹ Mr. Lee, however, did not make any arrangement for participation in Weingarten's 1958 Christmas Sale until August 15, 1958, which was after the Cosmetics Show had closed (Framson, Tr. 577-78; R. Lee, Tr. 714; RX 125). In this connection, Mr. Lee testified:

Q. In connection with securing this order, will you tell us what, if any, discussion you had regarding Weingarten's Christmas promotion?

A. Well, Bob informed me that the promotional efforts would take the form of the ten per cent PM on the line and on the gift set sales and in our case, of course, this meant agreeing on a period during which we would, in effect, *meet competition and pay a comparable ten per cent promotion*, and we also discussed the cooperative advertising, and because of the fact that we were making, again, another one of our periodic promotional efforts, I asked him what the promotional efforts of our competition would be and he said in the neighborhood of five hundred to a thousand dollars.

Q. On what?

A. On the cooperative advertising.

* * * * *

Q. Did he inform you that competitors had agreed to pay him co-op advertising and a ten per cent PM at that time?

A. Yes, sir.

Q. Were most of the competitors, in fact, paying an extra five, rather than straight ten?

A. Yes, sir.

Q. But to meet that would Shulton have to pay a ten per cent promotion?

A. Yes, sir, for the period of the sale. (R. Lee, Tr. 715-16. See also 717-18, 681; Framson, Tr. 577-78; emphasis added.)

Under the circumstances, Mr. Lee agreed at the meeting on August 15 to participate in the Weingarten Christmas Sale "on the level of the competition" (R. Lee, Tr. 716) and that Shulton would pay a 10% P.M. and furnish cooperative advertising (R. Lee, Tr. 714-15; Framson, Tr. 577-78).²² The allowances thus authorized by Mr. Lee for

²¹ Weingarten's purchase order for Bourjois, Inc., dated August 14, 1958 contains a notation that Bourjois was to participate in the 1958 Christmas Sale with "Five percent extra PM, November 24 through December 25" (Framson, Tr. 661). The same notation was found in the Bourjois file (CX 128).

²² The following companies participated in the 1958 Christmas Sale: Tussy, Houbigant, Warner-Lambert, Helena Rubinstein, Lenel, Max Factor, Bourjois, Dana, Revlon, Shulton, Dorothy Gray, Corday, Helene Curtis (Lentheric and King's Men), Gillette (Framson, Tr. 574-75; RX 80, 81, 83, 88, 90, 91, 93, 97, 99, 100, 101 A, 104).

Shulton's participation in the Weingarten 1958 Christmas Sale did not exceed the percentages (where made on a percentage basis) or the dollar amount (where made on a dollar amount basis) which represented the levels of participation by Shulton's competitors.

Mr. Lee's purpose in agreeing to participate in the 1958 Christmas Sale was to prevent substantial injury to Shulton's sales position in the Weingarten stores. Thus, he testified:

Q. Will you tell us whether or not it was desirable for you to participate in this promotion in order to meet the competition of these competitors who had agreed to it?

A. Yes, sir. Not only desirable, it was an absolute necessity. (R. Lee, Tr. 717.)

Otherwise, Shulton would have lost considerable volume of business and its sales to Weingarten for the Christmas season would have been substantially reduced (R. Lee, Tr. 718).

As Mr. Lee's testimony shows, when he agreed to participate in the Christmas Sale, he had no reason to believe that payments by competing suppliers were unlawful (R. Lee, Tr. 722-23, 736):

Q. Mr. Lee, at the time of your decision, your conference with Framson when you agreed to participate in Weingarten's 1958 sale, Christmas sale, did you have any reason to believe that the participation of your competitors that had previously agreed to participate in this sale was discriminatory or in any way unlawful?

* * * * *

A. No, sir. I had no reason to believe that they were discriminatory in any way.

* * * * *

Q. Had anyone, competitors, customers, accounts, or anyone in Shulton, ever suggested to you that the participation in the Weingarten sales at Christmas was in any way discriminatory as against other accounts?

A. No, sir (R. Lee, Tr. 722-23).

Upon consideration of all the evidence in this case, it must be concluded that Shulton, in making available a promotional and advertising allowance to Weingarten for its 1958 Christmas Sale, was meeting an individual competitive situation in good faith to avoid the loss of substantial sales.

Questions of Law

The Commission in *J. A. Folger & Company*, Docket No. 8094, page 5 (November 14, 1962)²³ had this to say:

The Commission's views as to a respondent's burden in proving its defense under Section 2(b) are expressed in the following recent Commission decisions: *Tri-Valley Packing Association*, Docket No. 7225 and Docket No. 7496 (May 10, 1962); *American Oil Company*, Docket No. 8183 (June 27, 1962).

²³ 1-11-63 Petition to review filed by Folger with 5th CCA.

In *Tri-Valley Packing Association, supra*, page 7,²⁴ the Commission stated:

In order to establish this defense, respondent has the affirmative duty of proving that it reduced its prices to certain customers in good faith to meet the equally low price of a competitor. The Supreme Court in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951), clearly indicated that the lower price which may be met by a seller under the proviso must be a "lawful" price. Certain it is, therefore, that as part of the good faith requirement of this defense, respondent must at least show the existence of circumstances which would lead a reasonable person to believe that the lower prices it was meeting were lawful prices.

Commissioner Elman, dissenting in *Tri-Valley*, said in part:

Where a seller in an active market meets the lower prices of other sellers and invokes the meeting-competition-in-good-faith defense allowed by Section 2(b), considerations of elementary fairness, effective administration of the statute, and the realities of a competitive market preclude imposition on him of a heavier burden than showing that he had no reason to suppose that the competitive lower prices he was meeting were unlawful. The law should not be construed as forcing a seller to compete at his peril. A "sales manager who is trying to compete * * * is not, of course, required to become a detective or a judge." A businessman who must operate in the pressures of the marketplace cannot be expected to conduct a survey into his competitor's costs or to prophesy whether the competitor's lower price will later be held unlawful. Accordingly, if the statute is not to be made an impediment to free and fair price competition, the lower price met by a seller in good faith in a competitive situation should be deemed to be lawful if the seller shows that he neither knew nor had reason to believe that it was unlawful, and if no counter-showing is made of facts known to the seller which would indicate to a reasonable and prudent business man that the lower price was probably unlawful.

In *American Oil Company, supra*, page 10,²⁵ the Commission stated:

And in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951), the court stated that the interpretation put on the proviso in the *Staley* case is "that the lower price which lawfully may be met by the seller must be a lawful price". We have not construed the proviso, however, as placing on respondent the burden of proving the legality of the price it was meeting although the Supreme Court has indicated that the person claiming the defense has this burden. 340 U.S., at 249, n. 14. And we need not decide at this time whether proof of the illegality of a competitor's price in itself is sufficient to rebut a claim of meeting competition. We are of the opinion, however, that a seller who meets a competitor's lower price which he knows or has reason to believe is illegal has failed to meet the good faith requirement of the defense. *Standard Oil Co. v. Brown*, 238 F. 2d 54 (5th Cir. 1956). Since the seller claiming this defense has the affirmative duty of establishing each element thereof, including good faith, we think it incumbent upon him to show, at least, the existence of facts which would lead a

²⁴ 7-13-62 Petition to review filed by Tri-Valley with 9th CCA.

²⁵ Order of Commission set aside with directions to dismiss complaint by 7th CCA 11-19-63.

Initial Decision

66 F.T.C.

reasonable and prudent person to believe that the price he was meeting was lawful.

Commissioner Elman, dissenting in *American Oil*, said:

The majority opinion also raises substantial questions concerning application of the meeting competition in good faith defense. For example, in its discussion of the lawfulness of the lower competitive prices met by American, the Commission seems again to have overlooked that the controlling inquiry is the seller's subjective good faith. A seller's burden of establishing good faith is satisfied by showing that he had no reason to believe the lower price met was unlawful. He should not be required, as the Commission states (opinion, p. 10), to go further and show positive facts, known to him when he met the competitive lower price, "which would lead a reasonable and prudent person to believe that the price he was meeting was lawful." See my dissent in *Tri-Valley Packing Association*, Dockets 7225 and 7496, May 10, 1962.

While the difference between these evidentiary burdens may seem slight, the evidence on which the Commission relies to show that respondent was not acting in good faith illustrates how important the difference actually is.

In *Standard Oil Company v. Brown*, referred to in the majority opinion in the *American Oil* case, the Court said, at page 58:

Appellee here contends that there is a burden on the seller to prove that the competing price was lawful. There is certainly no authority for this in either the Supreme Court or later Court of Appeals opinions in the case referred to at such great length. The most, it seems to us, that could be made out of the use by the Supreme Court of the word "lawful" is that if the seller discriminates in price to meet prices that he knows to be illegal or that are of such a nature as are inherently illegal, as was the basing point pricing system in the *Staley* case, *supra*, there is a failure to prove the "good faith" requirement in § 2(b). There is nowhere a suggestion that the seller must carry the burden of proving the actual legality of the sales of its competitors in order to come within the protection of the proviso.

In an appended note, the Court stated further:

Not only is there no precedent for requiring such proof, but it is apparent that such a requirement would practically destroy the value of the proviso, for the legality *vel non* of the competitor's prices depends on many facts, including what it might be doing to meet low prices of its competitors. The inquiry into these collateral issues would be endless.

It is apparent that questions of law are presented in this proceeding which have not been resolved by the courts but, applying the test in keeping with the interpretation of the law as laid down by the majority of the Commission, it is the opinion of the hearing examiner that the respondent has shown positive facts, known to it at the time it met the competitive payments, which would lead a reasonable and prudent person to believe that the payments it was meeting were lawful.

184

Opinion

CONCLUSION

It is the conclusion of the Hearing Examiner that the payments made by the respondent to J. Weingarten, Inc. in 1958, as alleged in the complaint, were made in good faith to meet the payments of competitors as authorized by Section 2(b) of the amended Clayton Act.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION*

JULY 22, 1964

BY ELMAN, COMMISSIONER:

The complaints in these closely related cases were issued on January 5, 1960, and charged respondents (cosmetics manufacturers) with having violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, in granting allowances for advertising and promotional services to J. Weingarten, Inc., a large supermarket chain, in 1958 and 1959. At issue is respondents' participation in several promotional events sponsored by Weingarten: the 57th Anniversary Sale and Ninth Annual May Beauty Carnival in 1958, the 1958 Christmas Sale (No. 7721 only), and the Tenth Annual May Beauty Carnival in 1959 (No. 7717 only). After extended proceedings, the hearing examiner issued his initial decisions after remand, entering a cease-and-desist order in No. 7717, but accepting respondent's good-faith meeting of competition defense and dismissing the complaint in No. 7721. These matters are before the Commission on cross-appeals of complaint counsel and respondent in No. 7717 and on complaint counsel's appeal in No. 7721.

These cases present a factual pattern that has recurred frequently in the Commission's administration of Section 2(d). The pattern is this: A large or chain retailer will sponsor a special promotional event, for example, an anniversary sale. It will solicit the participation of competing suppliers, often sending a large number of these suppliers identical contracts which provide that the supplier shall grant the retailer special advertising and promotional allowances in connection with the event. A supplier thus solicited may face a difficult choice. He may be very reluctant, for many reasons, to accede to the buyer's request for favored treatment. But he may also be aware that if competing suppliers participate in the promotional event and he does not,

*In the following related cases of Max Factor & Company, Docket No. 7717 and Shulton, Inc., Docket No. 7721.

it will put him at a serious competitive disadvantage. For, as the records of the present cases show, failure to participate in a large retailer's special promotional events may cost a supplier dearly in the fight for retail shelf space and salespersons' goodwill and loyalty, extremely important competitive factors.

The Commission's experience in this type of case has demonstrated that the "enforcement policy best calculated to achieve the ends contemplated by Congress" (*Moog Industries v. F.T.C.*, 355 U.S. 411, 413) is one based on Section 5 of the Federal Trade Commission Act and directed primarily at large buyers who, knowing or having reason to know that such concessions to them are discriminatory and not fairly available on comparable terms to competing buyers, induce suppliers to grant payments or allowances in connection with special promotional events.

The Supreme Court has held that conduct which "runs counter to the public policy declared in the Sherman and Clayton Acts" violates Section 5 of the Federal Trade Commission Act.¹ The Robinson-Patman Act was passed "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 168. Unfair conduct by the buyer, not the seller, was the primary evil at which the Act was aimed. In the words of its principal draftsman, "buying power is the source of the evil. The seller is merely an innocent victim compelled usually in self-defense to grant the concessions demanded." (Quoted in *Grand Union Co.*, 57 F.T.C. 382, 420.) One way in which such power may be unfairly exercised is by the buyer's demanding and receiving discriminatory advertising and promotional allowances: "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services. * * * Such an allowance becomes unjust when * * * the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936).

In view of the basic Congressional policy embodied in the Robinson-Patman Act, particularly in Section 2(d), the courts have recog-

¹ *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457, 463. See also *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U.S. 392; *Grand Union Co. v. F.T.C.*, 300 F. 2d 92 (2d Cir. 1962).

nized that the Commission may declare to be an unfair method of competition, forbidden by Section 5 of the Federal Trade Commission Act, the practice whereby powerful buyers knowingly induce their suppliers to grant them discriminatory advertising and promotional allowances that do not meet the proportionality requirements of Section 2(d).² That principle has been applied by the Commission in factual situations essentially indistinguishable from that of the present cases.³

Accordingly, the Commission, in the exercise of its administrative responsibility to determine what enforcement policy, in the circumstances, is "best calculated to achieve the ends contemplated by Congress", has decided to dismiss the complaints in the present cases. The respondents are only two among a very large number of suppliers who participated in Weingarten's special promotional events during the period in question. The entry of cease-and-desist orders against these particular respondents, therefore, would not be an equitable and fully effective method of eliminating the discriminatory practices in which respondents engaged, along with many others, and would not be in the public interest.

Our disposition of these cases makes it unnecessary to adjudicate any of the issues raised in the appeals, including the question whether respondents have sustained the burden of establishing the good-faith meeting of competition defense.⁴

Commissioner MacIntyre, without concurring in the result, states that he does agree that an *appropriate* proceeding under Section 5 of the Federal Trade Commission Act is a better means for challenging practices of this type.

² *Grand Union Co. v. F.T.C.*, *supra*; *Giant Food, Inc. v. F.T.C.* 307 F. 2d 184 (D.C. Cir. 1962); *American News Co. v. F.T.C.*, 300 F. 2d 104 (2d Cir. 1962); *R. H. Macy & Co. v. F.T.C.*, 326 F. 2d 445 (2d Cir. 1964); *Fred Meyer, Inc.*, F.T.C. Docket 7492 (decided July 9, 1963) [63 F.T.C. 1]. In an action against a buyer under Section 5, the buyer could not, of course, defend on the ground that his unlawful conduct was justified by similar conduct on the part of one or more of his competitors. As has been held many times, the fact that an unfair method of competition is widespread in an industry is not a defense on the merits to an action brought against a single competitor, although it should be considered by the Commission in exercising administrative discretion as to how most effectively to stop the practice. *Moog Industries*, *supra*, at 413.

³ See, e.g., *Giant Food, Inc.*, *supra*; *R. H. Macy & Co.*, *supra*.

⁴ Even assuming that the respondents had a good-faith meeting of competition defense on the facts of the present cases (a question we neither reach nor decide), it would not necessarily follow that there could be no unlawful inducement by the buyer under Section 5. In the special situation where the buyer, by inducing nonproportionatized allowances from a group of suppliers, has himself created the conditions under which they may be able to establish a Section 2(b) defense, it would be anomalous and destructive of the statutory policy to hold that the buyer was also sheltered by the defense. The general language of the *Automatic Canteen* decision (*Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 71) cannot be read as answering this particular question, which was not even remotely presented by the facts before the Court in that case.

FINAL ORDERS*

These matters have been heard on appeal (by complaint counsel and respondent in No. 7717, and by complaint counsel in No. 7721) from initial decisions of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission, without adjudicating any of the issues raised by these appeals, has determined that the public interest would not be served by entry of cease-and-desist orders in these proceedings and that the complaints in these matters should be dismissed. Accordingly,

It is ordered, That the initial decisions be, and they hereby are, vacated and set aside.

It is further ordered, That the complaints against respondents be, and they hereby are, dismissed.

Commissioner MacIntyre not concurring in the result.

IN THE MATTER OF

CHESEBROUGH-PONDS, INC.**

ORDERS, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)
OF THE CLAYTON ACT

Dockets 8491-8500, 8502-8508. Complaints, June 13, 1962—Decisions, July 27, 1964

Orders setting aside initial decisions—respondents having ceased making the alleged discriminatory payments—and opinion setting forth declaratory findings defining the requirements of the law as a binding guide for future conduct in cases in which complaints charged 17 manufacturers of drugs, cosmetics and sundries with violating Sec. 2(d) of the Clayton Act by making payments for advertising in customer-owned publications including (1) wholesalers' catalogs distributed to retailer customers for use in ordering merchandise, and (2) catalogs distributed by wholesalers to retailers for dissemination to the buying public.

*In the following related cases of Max Factor & Company, Docket No. 7717 and Shulton, Inc., Docket No. 7721.

**And the following related cases: Union Carbide Corporation, Docket No. 8492; Becton, Dickinson & Company, Docket No. 8493; Warner-Lambert Pharmaceutical Company, Docket No. 8494; Julius Schmid, Inc., Docket No. 8495; The Mennen Company, Docket No. 8496; Eversharp, Inc., Docket No. 8497; Sterling Drug, Inc., Docket No. 8498; Corn Products Company, Docket No. 8499; White Laboratories, Inc., Docket No. 8500; Chemway Corporation, Docket No. 8502; The d-Con Company, Inc., Docket No. 8503; Hazel Bishop, Inc., Docket No. 8504; Philip Morris, Incorporated, Docket No. 8505; Lehn & Fink Products Corporation, Docket No. 8506; B. T. Babbitt, Inc., Docket No. 8507; Youngs Rubber Corporation, Docket No. 8508.

The Complaints and Final Orders in these cases were consolidated by the compiler.

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The Complaints and Final Orders in these cases were consolidated by the compiler.

COMPLAINTS

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaints, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Chesebrough-Pond's, Inc., Docket No. 8491, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 485 Lexington Avenue, New York, New York.

Respondent Union Carbide Corporation, Docket No. 8492, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 30 East 42nd Street, New York, New York.

Respondent Becton, Dickinson & Company, Docket No. 8493, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Rutherford, New Jersey.

Respondent Warner-Lambert Pharmaceutical Company, Docket No. 8494, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Morris Plains, New Jersey.

Respondent Julius Schmid, Inc., Docket No. 8495, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 423-439 West 55th Street, New York, New York.

Respondent The Mennen Company, Docket No. 8496, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Hanover Avenue, Morristown, New Jersey.

Respondent Eversharp, Inc., Docket No. 8497, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 350 Fifth Avenue, New York, New York.

Respondent Sterling Drug, Inc., Docket No. 8498, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1450 Broadway, New York, New York.

Respondent Corn Products Company, Docket No. 8499, is a corpo-

ration organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 717 Fifth Avenue, New York, New York.

Respondent White Laboratories, Inc., Docket No. 8500, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Kenilworth, New Jersey.

Respondent Chemway Corporation, Docket No. 8502, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Fairfield Road, Wayne, New Jersey.

Respondent The d-Con Company, Inc., Docket No. 8503, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1450 Broadway, New York, New York.

Respondent Hazel Bishop, Inc., Docket No. 8504, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 445 Park Avenue, New York, New York.

Respondent Philip Morris Incorporated, Docket No. 8505, is a corporation organized, existing and doing business under the laws of the State of Virginia with its office and principal place of business located at 100 Park Avenue, New York, New York.

Respondent Lehn & Fink Products Corporation, Docket No. 8506, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 445 Park Avenue, New York, New York.

Respondent B. T. Babbitt, Inc., Docket No. 8507, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 625 Madison Avenue, New York, New York.

Respondent Youngs Rubber Corporation, Docket No. 8508, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 145 Hudson Street, New York, New York.

PAR. 2. Respondent Chesebrough-Pond's, Inc., Docket No. 8491, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics, toiletries, drugs and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$66,000,000 in the year 1959.

Respondent Union Carbide Corporation, Docket No. 8492, through

its division, Union Carbide Consumer Products Company, formerly National Carbon Company, is now and has been engaged in the business of manufacturing, selling and distributing dry cell batteries, flashlights and related battery and flashlight products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$1,200,000,000 in the year 1959.

Respondent Becton, Dickinson & Company, Docket No. 8493, is now and has been engaged in the business of manufacturing, selling and distributing medical thermometers, syringes, needles, household gloves and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$26,000,000 in the year 1959.

Respondent Warner-Lambert Pharmaceutical Company, Docket No. 8494, through its divisions and subsidiaries, is now and has been engaged in the business of manufacturing, selling and distributing cold remedies, anodynes, toothpastes, antiseptics and related products. It sells these products to wholesalers of drugs and sundries throughout the United States. Respondent's total sales are substantial, having exceeded \$190,000,000 in the year 1959.

Respondent Julius Schmid, Inc., Docket No. 8495, is now and has been engaged in the business of manufacturing, selling and distributing prophylactic rubber products, gynecological products, and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's sales were approximately \$8,000,000 in the year 1959.

Respondent The Mennen Company, Docket No. 8496, is now and has been engaged in the business of manufacturing, selling and distributing toilet articles which include men's deodorants, shaving lathers, lotions, talcs, baby powders, baby oils, foot powder and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$20,000,000 in the year 1959.

Respondent Eversharp, Inc., Docket No. 8497, through its division Schick Safety Razor Company, is now and has been engaged in the business of manufacturing, selling and distributing razors, razor blades and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$18,000,000 in the year 1959.

Respondent Sterling Drug, Inc., Docket No. 8498, through its division Glenbrook Laboratories, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics, toilet-

Complaints

66 F.T.C.

ries, proprietary drugs, sundries and related products. It sells its products to wholesalers of drugs and sundries located throughout the United States. Respondent's total sales are substantial, having exceeded \$200,000,000 in the year 1959.

Respondent Corn Products Company, Docket No. 8499, through its division Best Foods, is now and has been engaged in the business of manufacturing, selling and distributing shoe dressings, household dyes, color removing agents and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$500,000,000 in the year 1959.

Respondent White Laboratories, Inc., Docket No. 8500, is now and has been engaged in the business of manufacturing, selling and distributing drugs, pharmaceuticals and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$15,000,000 in the year 1959.

Respondent Chemway Corporation, Docket No. 8502, through its divisions Dunbar Laboratories and Household Products, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics, toiletries, insecticides, proprietary drugs and related products. It sells its products to wholesalers of drugs and sundries throughout the United States. Respondent's total sales are substantial, having exceeded \$7,000,000 in the year 1959.

Respondent The d-Con Company, Inc., Docket No. 8503, is now and has been engaged in the business of manufacturing, selling and distributing rodenticides, insecticides, cleansing and deodorizing agents, lighter fluids, shoe dressings and related products. It sells its products to drugs and sundries wholesalers located throughout the United States. Respondent's total sales are substantial having exceeded \$4,000,000 in the year 1959.

Respondent Hazel Bishop, Inc., Docket No. 8504, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics and related products. It sells these products to wholesalers of drugs and sundries throughout the United States. Respondent's total sales are substantial, having exceeded \$8,000,000 in the year 1959.

Respondent, Philip Morris Incorporated, Docket 8505, through its division American Safety Razor Company, is now and has been engaged in the business of manufacturing, selling and distributing razors, razor blades and related products. It sells its products to its customers located in all of the States of the United States and the

District of Columbia. Respondent's total sales are substantial, having exceeded \$500,000,000 in the year 1960.

Respondent, Philip Morris Incorporated, Docket No. 8505, on May 3, 1960, purchased all of the assets and business of A.S.R. Products Company, a corporation organized under the laws of the State of Virginia with its office and principal place of business located at 308 Madison Avenue, New York, New York. Prior to said acquisition A.S.R. Products Company was engaged in the business of manufacturing, selling and distributing among other things, razors, razor blades and allied products. It sold its products to drug and sundries wholesalers located throughout the United States. Sales by A.S.R. Products Company were substantial having exceeded \$32,000,000 in the year 1959. [Paragraph Three in separate complaint.]

Since Philip Morris Incorporated acquired A.S.R. Products Company on May 3, 1960, Philip Morris Incorporated has carried on the business of A.S.R. Products Company as a Division of Philip Morris Incorporated, and has changed the name of the Division from A.S.R. Products Company to American Safety Razor Company. [Paragraph Four in separate complaint.]

Respondent Lehn & Fink Products Corporation, Docket No. 8506, is now and has been engaged in the business of manufacturing, selling and distributing disinfectants, deodorants, skin creams, hair rinses, bath preparations, feminine hygiene products and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$32,000,000 in the year 1959.

Respondent B. T. Babbitt, Inc., Docket No. 8507, through its divisions and subsidiaries, is now and has been engaged in the business of manufacturing, selling and distributing household cleansing products, hair creams, sprays, shampoos and related products. It sells its products to wholesalers and retailers throughout the United States. Respondent's total sales are substantial having exceeded \$23,000,000 in the year 1959.

Respondent Youngs Rubber Corporation, Docket No. 8508, is now and has been engaged in the business of manufacturing, selling and distributing prophylactic rubber products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$6,000,000 in the year 1959.

PAR. 3. In the course and conduct of their business, respondents have engaged and are now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondents sell and

cause their products to be transported from the respondents' principal place of business, to customers located in other States of the United States. [Paragraph Five in separate complaint, *In the Matter of Philip Morris, Inc.*, Docket 8505.]

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their 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 respondents, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondents' products. [Paragraph Six in separate complaint, *In the Matter of Philip Morris Inc.*, Docket No. 8505.]

PAR. 5. For example, during the year 1959 respondent Chesebrough-Pond's, Inc., Docket No. 8491, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$1,774 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Union Carbide Corporation, Docket No. 8492, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$3,208.73 as compensation or as an allowance for advertising and at least \$1,500 as compensation or in consideration for special merchandising services or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Becton, Dickinson & Company, Docket No. 8493, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$1,468 as compensation or as an allowance for advertising and at least \$2,250 as compensation or in consideration for special merchandising services or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its

offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Warner-Lambert Pharmaceutical Company, Docket No. 8494, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$6,483 as compensation or as an allowance for advertising services and at least \$1,500 as compensation or in consideration for special merchandising services, or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Julius Schmid, Inc., Docket No. 8495, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$3,852 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent The Mennen Company, Docket No. 8496, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$2,100 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Eversharp, Inc., Docket No. 8497, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$18,800 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of

products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Sterling Drug, Inc., Docket No. 8498, contracted to pay and did pay to Druggists' Service Company, Inc., a membership service corporation composed of wholesale druggists, at least \$4,069 as compensation or as an allowance for advertising or other services or facilities furnished by or through Druggists' Service Company, Inc. or its members in connection with the offering for sale or sale of products sold to such wholesale members by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with the wholesale members of Druggists' Service Company, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Corn Products Company, Docket No. 8499, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$2,400 as compensation or as an allowance for advertising and at least \$1,000 as compensation or in consideration for special merchandising services or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent White Laboratories, Inc., Docket No. 8500, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$3,758 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Chemway Corporation, Docket No. 8502, contracted to pay, and did pay, to McKesson & Robbins, Inc. at least \$1,388.10 as compensation or as an allowance for advertising or other services or facilities furnished by or through

McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent The d-Con Company, Inc., Docket No. 8503, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$4,761.78 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Hazel Bishop, Inc., Docket No. 8504, contracted to pay, and did pay, to McKesson & Robbins, Inc. at least \$2,100 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1961 respondent Philip Morris Incorporated, Docket No. 8505, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$1,376 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Prior to respondent's acquisition of A.S.R. Products Company the latter corporation, during the year 1959, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$3,500 as compensation or as an allowance for advertising, and at least \$1,500 as compensation or in consideration for special merchandising services or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by A.S.R. Products Company. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing

with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent. [Paragraph Seven in separate complaint, *In the Matter of Philip Morris Inc.*, Docket No. 8505.]

For example, during the year 1959 respondent Lehn & Fink Products Corporation, Docket No. 8506, contracted to pay and did pay to Druggists' Service Company, Inc., a membership service corporation composed of wholesale druggists, at least \$690 as compensation or as an allowance for advertising or other services or facilities furnished by or through Druggists' Service Company, Inc. or its members in connection with its offering for sale or sale of products sold to such wholesale members by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with the wholesale members of Druggists' Service Company, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent B. T. Babbitt, Inc., Docket No. 8507, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$1,400 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Youngs Rubber Corporation, Docket No. 8508, contracted to pay and did pay to McKesson & Robbins, Inc. at least \$3,852 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

PAR. 6. The acts and practices of respondents, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.* [Paragraph Eight in separate complaint, *In the Matter of Philip Morris Inc.*, Docket No. 8505.]

**In the Matter of Philip Morris Incorporated*, Docket No. 8505, the acts and practices of respondent, as alleged, are a continuation of the acts and practices of A.S.R. Products Company prior to its acquisition by respondent.

OPINION OF THE COMMISSION*

The posture of all seventeen of these cases is substantially similar. The complaints, issued on June 13, 1962, charge the respondents violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, by making discriminatory promotional payments to certain customers. Each of the complaints sets out as an example of the allegedly unlawful payments a specified amount paid to either McKesson & Robbins (hereinafter McKesson) or Druggist's Service Council, Inc. (hereinafter DSC). After hearings the examiners found and concluded that the law had been violated in several respects and their initial decisions contain orders directing the respondent to cease and desist from the activities found unlawful.

With the exception of the *Mennen* case (Docket 8496), in which the Commission *sua sponte* stayed the effective date of the initial decision, and *Lehn & Fink Products Corp.* (Docket 8506), where only respondent appealed, the cases are before us for consideration of the cross-appeals of respondents and complaint counsel. The appealed cases were fully briefed by both sides and argued before the Commission.

The unusual similarity of these matters extends through a common factor which the Commission deems most persuasive—each of the respondents discontinued the payments which the hearing examiners held were unlawful either before or immediately upon receipt of the first official notice that the Commission intended to issue a complaint. Moreover, respondents and their counsel have given assurances that the payments will not be resumed unless and until the Commission holds them to be lawful.

Each of the respondents pleads that because of their voluntary discontinuance of the challenged payments an order to cease and desist is unnecessary since its object has already been accomplished. In weighing pleas of abandonment or discontinuance, the Commission considers a wealth of factors, but in the final analysis the decision must be based upon a conviction that the practice has been surely stopped and will not be resumed in the future. *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 330-331 (7th Cir. 1934). In these cases the Commission in the exercise of its discretion has concluded that the pub-

*In the following related cases: Chesebrough-Ponds, Inc., Docket No. 8491; Union Carbide Corporation, Docket No. 8492; Becton, Dickinson & Company, Docket No. 8493; Warner-Lambert Pharmaceutical Company, Docket No. 8494; Julius Schmid, Inc., Docket No. 8495; The Mennen Company, Docket No. 8496; Eversharp, Inc., Docket No. 8497; Sterling Drug, Inc., Docket No. 8498; Corn Products Company, Docket No. 8499; White Laboratories, Inc., Docket No. 8500; Chemway Corporation, Docket No. 8502; The d-Con Company, Inc., Docket No. 8503; Hazel Bishop, Inc., Docket No. 8504; Philip Morris, Incorporated, Docket No. 8505; Lehn & Fink Products Corporation, Docket No. 8506; B. T. Babbitt, Inc., Docket No. 8507; Youngs Rubber Corporation, Docket No. 8508.

lic interest will best be served by terminating this expensive litigation at this stage with acceptance of the respondents' assurances that the practices found unlawful by the hearing examiners will not be resumed.

At oral argument several counsel expressed the thought that whatever the Commission's final ruling, it should state its position with respect to the various types of payments which the records show were made by the respondents. Counsel argued that respondents are honestly interested in full compliance with the law, but feel in need of guidance with respect to promotional payments made to customers. In view of our disposal of these matters without orders to cease and desist, such a declaratory statement is an absolute necessity, for respondents must be informed as to our understanding of the law and the activities which we feel respondents are bound to refrain from in the future.

These cases are primarily concerned with respondents' payments for advertising in customer-owned publications. The publications are of two types. The first type consists of buying guides or catalogs published by or for wholesalers, which they distribute to their retailer customers to be used by the retailers in ordering merchandise from the wholesaler. McKesson's "Profitunities" and DSC's "Buying Guide" are examples of these types of customer-owned or controlled publications. The second type of publication is a catalog prepared by or for wholesalers which they distribute to retailers for dissemination to the buying public. Examples of these consumer-directed catalogs were the "Gift Books" distributed by both McKesson and DSC. The hearing examiners concluded that discriminatory payments (*i.e.*, not made available to competing customers on proportionally equal terms) to customers for advertisements in such customer-owned publications were unlawful, and the Commission has decided that this legal conclusion is entirely correct. Many of the respondents argued that DSC members and McKesson received no "discriminatory benefit" from their retailer-directed catalogs ("Buying Guide" and "Profitunities") since retailers could and on occasion did utilize the publications in making purchases from other wholesalers. As a factual matter, we are not convinced that McKesson and DSC received no special benefit from their publications. The fact that some retailers occasionally ignored the invitation to buy from the wholesaler-publisher whose name appeared on the catalog is a not entirely unforeseen risk assumed by any advertiser of products available from alternate sources.

Several respondents carry the argument one step farther pleading that since retailers are motivated by the catalog advertisements to purchase from both publisher-wholesalers and their competitors, the respondent suppliers receive the primary benefit from the advertise-

ments and hence the law is not violated. The rule espoused is "If the primary benefit is received by the supplier, rather than by the customer, then there is no violation." As we see it, all promotional payments made by suppliers to their reselling customers are intended to benefit both supplier and customers. To require the Commission to measure which of the parties received the preponderance of the benefit is unrealistic in the extreme, for objective measurement of such a factor is all but impossible. Pursuit of such will-of-the-wisps would effectively stultify enforcement of the Act against this type of discriminatory payment.

While the evidence adduced in these proceedings dealt only with discriminations between the respondents' wholesale customers, the thrust of the proceedings is against a discriminatory practice without regard to the resale competitive level affected. As we said in our opinion dealing with a substantially similar practice in the toy industry, "* * * the distinctive feature in this case is the mode of advertising, not the class of customer by whom that advertising facility was provided. There is no basis, either in logic or in the record, for supposing that an offer by, say, a retail customer, or group of retail customers, to furnish respondents with space in an advertising catalog would have been turned down on the ground that it came from retailers rather than from jobbers * * *." *Transogram Company, Inc.*, Docket No. 7978, September 19, 1962, p. 12 of Opinion [61 F.T.C. 629, 702]. It is our understanding from the assurances found in the records and given at oral argument that the respondents have ceased making discriminatory payments for advertising in all customer-owned publications and our action herein is based in large extent upon this understanding. Any questions which may arise concerning future conduct should be referred to the Commission for an advisory opinion pursuant to § 1.51-1.54 of the General Procedures (August 1963).

In addition to the payments made for advertising in customer-owned publications, all but two of the respondents made payments to DSC for various consulting services and for exhibit space rental at the DSC annual trade show. Six respondents made payments to McKesson for its consulting and advisory services. The hearing examiners found these payments did not violate 2(d) for there was no showing that they fitted the statutory definition of payments "* * * for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of * * *" respondents' products. The facts adduced in these proceedings afford no basis for disturbing the examiners' findings. However, these customer programs will be more fully examined and probed in the matters now in

trial in which McKesson and DSC are charged with having violated Section 5 of the Federal Trade Commission Act by inducing discriminatory payments.¹ The record of those proceedings in which the customers rendering the services are fully represented should prove a more adequate basis for a decision on the legality of these payments.

During 1959 and 1960, DSC had in operation a point-of-retail-sale promotional plan which it termed "Monthly Promotional Service." Six of the respondents made payments to DSC for participation in this program. Under the program DSC prepared seasonal promotional kits (e.g., "Springtime Specials", "Back to School Specials", etc.) consisting of banners, posters and similar in-store promotional material. The products of suppliers contributing to the program were featured in the promotional material. DSC member wholesalers sold the kits to retail druggists at a total charge of \$10 or \$15 per year. The program proved unsuccessful, was abandoned, and, according to the DSC president, will not be revived. The hearing examiners felt that the payments for this promotion violated the Act and we agree, but here again we can discern no need for a formal order to cease and desist. The practice was short lived, was discontinued for business reasons two years before the complaint issued, and its sponsor has no plans to revive it. Moreover, the pending proceeding against DSC is a more appropriate vehicle to probe the true nature of this program and the chances of its resumption.

Section 5(d) of the Administrative Procedure Act authorizes agencies, including the Commission, "* * *" in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." The Commission's action in these cases is an exercise of this authorized discretion. Although we are not issuing an injunctive order, we have found that certain practices are unlawful, relying upon respondent's advance assurances that these declaratory findings will be looked upon by them as a binding guide to future conduct. A cease and desist order is not always, and in all circumstances, the most appropriate and effective disposition of a proceeding where the primary need is to define and declare the requirements of the law. As the Supreme Court has held, *Moog Industries v. F.T.C.*, 355 U.S. 411, the Commission must exercise its administrative discretion in determining the kind of remedial action which will best meet the needs of the situation and serve the public interest.

¹ *McKesson & Robbins, Inc.*, Docket No. 8510; *Druggists' Service Council, Inc., et al.*, Docket No. 8511.

To make sure that there is no misunderstanding on either side as to the import of this decision and its expected and intended effects upon the respondents' conduct, we shall direct each of them to inform the Commission within thirty days of the manner and form of their observance of Section 2(d) as herein interpreted.

FINAL ORDER*

These matters having come on to be heard upon the cross-appeals of respondents and complaint counsel from the hearing examiners' initial decisions; and

The Commission having concluded for the reasons stated in the accompanying opinion that the public interest does not require the entry of orders to cease and desist and that the initial decisions containing such an order should be set aside:

It is ordered, That the initial decisions be, and they hereby are, set aside.

It is further ordered, That respondents shall, within thirty (30) days after service of this order upon them, file with the Commission a report describing the manner and form of their compliance with the requirements of Section 2(d) of the Clayton Act, as amended, as interpreted in the accompanying opinion.