

requirements of this proviso.”
Commissioner MacIntyre dissenting.

IN THE MATTER OF
SUNBEAM CORPORATION

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

Docket 7409. Complaint, May 27, 1959—Decision, Jan. 11, 1965

Order dismissing complaint charging a Chicago, Ill., manufacturer of electric household appliances, electric shavers, electric tools, and lawn mowers and garden equipment with making payments for cooperative advertising to certain retailers who purchased large quantities of its merchandise through its “Local Promotion Advertising Plans,” without making such payments available on proportionally equal terms to competing retailers.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunbeam Corporation 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, Section 13), hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent named herein is Sunbeam Corporation. Respondent is a corporation organized and existing under and by virtue of the laws of the State of Illinois. Respondent’s principal office and place of business is located at 5600 West Roosevelt Road, Chicago 50, Illinois.

PAR. 2. Respondent is one of the major manufacturers, sellers and distributors in the United States of electric household appliances, electric shavers, electric tools, and lawn mower and garden equipment. For 1957 net sales of respondent for all products amounted to \$121,840,449.

PAR. 3. Respondent sells its said products to a large number of customers located throughout the United States for use, consumption, or resale therein.

Respondent's main factory is located in Chicago, Illinois, at which respondent manufactures the products hereinabove enumerated, except that respondent manufactures some of its ladies' electric shavers at San Juan, Puerto Rico, from which State and place respondent ships said products or causes them to be shipped and transported to customers located throughout the United States.

PAR. 4. In the course and conduct of its business respondent is now and for many years past has been shipping its said products from the state, states or places where manufactured, or stored in anticipation of sale and shipment, to purchasers located in other states and in the District of Columbia in a constant current of commerce as "commerce" is defined in the Clayton Act, as amended.

PAR. 5. There are approximately 250,000 retail dealers in the United States selling respondent's products to consumers. These include jewelers, department stores, hardware dealers, electric appliance dealers, mail order houses and chain store concerns.

Respondent has two principal methods of sale and distribution of its said products to retail dealers. By the first of these methods, respondent sells its products to wholesale distributors who resell to retailers. By the second method respondent sells directly to retailers. Respondent's direct sales to retailers are principally to about 81 large retail concerns, including chainstores and mail order houses. For brevity, respondent's direct retail purchasers will hereinafter be referred to as "the 81 retailers."

Notwithstanding the fact that one of respondent's two methods of sale and distribution of its products to retail dealers is through wholesale distributors, respondent, in the administration of its local promotion advertising plans hereinafter to be referred to, and in the carrying out and execution of its policies as expressed therein, deals directly with retail dealers, both with those buying from respondent direct and with those buying from respondent through wholesale distributors. Under the terms, provisions and limitations of its said advertising plans, respondent exercises a direct control

over retail dealers, regardless of the source of purchase, insofar as the advertisement of respondent's products for resale to consumers is concerned. It is, therefore, alleged that all such retailers are customers of respondent within the meaning of Section 2(d) of the Clayton Act, as amended.

PAR. 6. In the course and conduct of its business in commerce, as aforesaid, respondent has paid or contracted for the payment of money, goods, or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the handling, sale, or offering for sale of respondent's said products and respondent has not made or contracted to make such payments, allowances, or considerations available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Respondent has executed, carried out, and put into effect its various discriminatory and disproportional advertising practices in a variety of ways. Included among these are the following practices:

On or about January 1, 1957, respondent promulgated and put into effect four "Local Promotion Advertising Plans" providing for the advertisement and promotion of its products by retail dealers, as follows:

- A. Electric Household Appliance Assortment Plan.
- B. Electric Shaver Plan.
- C. Electric Tool Advertising Plan.
- D. Lawn Mower and Garden Equipment Advertising Plan.

Pursuant to the terms and conditions of these four advertising plans, respondent has provided for the payment of preferred advertising allowances to "the 81 retailers" hereinbefore referred to who buy direct from respondent, and to other retailers who place orders with respondent through wholesale distributors in specified minimum quantities and amounts for direct shipment from respondent's factory to the ordering retailer.

This preferred advertising consists of acceptable local newspaper, radio, television and catalog advertising. Under respondent's "Electric Household Appliance Assortment Plan" the minimum direct shipment order is \$750 worth of respondent's products as specified in said plan. Upon receipt and shipment by respondent of such an order, respondent sets up on its books 12% of the amount of such order "calculated at current suggested dealer cost" as a credit to the account of the ordering retailer which may be used only for approved local newspaper, radio, television or catalog advertisements of re-

spondent's products. Since the sale of many of respondent's products are seasonal, respondent permits the accumulation of such credits until January 31 of the next calendar year. With these accumulated credits, respondent pays to the dealer up to 75% of his advertising costs computed upon the basis of the local open rate which, by reason of discounts, amounts to 100% reimbursement to most advertisers.

In addition to the preferred advertising allowances hereinbefore described paid by respondent on direct shipments, "the 81 retailers" receive an additional 10% from respondent for such advertising which is deducted from the total of respondent's invoices to such customers. This enables "the 81 retailers" to advertise and sell respondent's products at respondent's "current suggested dealer cost" and make a profit. Many dealers who place orders with respondent through wholesale distributors and receive from respondent a 12% allowance "calculated at current suggested dealer cost" for newspaper, radio, television, or catalog advertising, are in competition with "the 81 retailers" in the resale of respondent's products to consumers.

PAR. 7. There are many dealers selling respondent's products who are unable to purchase at one time the amount of respondent's products specified as the minimum order for direct shipment by respondent's "Electric Household Appliance Assortment Plan." These dealers have to order in lesser quantities from respondent's wholesale distributors and take delivery from the stocks on hand in distributors' warehouses. By the terms, provisions and conditions of respondent's said advertising plan, dealers who order and take delivery of respondent's products from a distributor's warehouse cannot earn or receive from respondent any allowances or payments of any kind for newspaper, radio, television, or catalog advertisement of respondent's products.

Many dealers who buy and take delivery of respondent's products from the warehouses of respondent's distributors during the period of a year, buy, in the aggregate, substantial quantities of respondent's products; and if allowed to accumulate credits by respondent for newspaper, radio, television, or catalog advertising, as respondent allows and pays to their favored competitors, could accumulate sufficient credits to place substantial amounts of this type of advertising. Instead, respondent allows these customers a display type of advertising only for their stores which is much less effective than newspaper, radio, television and catalog advertising which respondent allows and pays to its favored customers. In many instances this

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display type of advertising is not even suitable to the needs of a customer.

Many of the respondent's said customers buying from and taking delivery of respondent's said products from the warehouses of respondent's distributors were and are in competition with many of respondent's customers ordering and taking delivery from respondent on the "Direct Shipment" basis, and with "the 81 retailers" as hereinbefore described, in the resale of respondent's products to consumers.

With the exception of differences in the amounts of the minimum orders to qualify for direct shipment, and differences in percentages earned for the preferred advertising allowances paid, all of respondent's said advertising plans, hereinbefore referred to, are identical.

PAR. 8. The acts and practices as hereinabove alleged are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act as amended.

Mr. William H. Smith supporting the complaint.

Mr. David C. Murchison and *Mr. Richard L. Perry*, of *Howrey, Simon, Baker and Murchison*, Washington, D.C., and *Mr. Stephen R. Smith*, Chicago, Ill., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

JUNE 15, 1964

Preliminary Statement

The complaint herein, issued on March 27, 1959, charges respondent with violating Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, by reason of alleged discriminatory payments under an advertising program instituted by respondent on or about April 1, 1957.

The respondent answered and denied the alleged violation. Hearings have been held for the receipt of oral testimony and documentary evidence in support of and in opposition to the allegations of the complaint. Proposed findings of fact, conclusions of law and order have been filed by counsel for the parties and oral argument had thereon. The matter is now before the hearing examiner for initial decision. All proposed findings of fact and conclusions of law not found or concluded herein are denied.

Upon consideration of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent Sunbeam Corporation is a corporation organized and doing business under the laws of the State of Illinois, with its principal place of business located at 5600 West Roosevelt Road, Chicago 5, Illinois. Respondent manufactures electric shavers, electric household appliances, electric tools, lawn mowers and garden equipment. For the year 1957, respondent's net sales for all products amounted to \$121,840,449.

2. Respondent sells its products principally to wholesale distributors. Respondent sells its electric shaver products to about 400 wholesale distributors and its electric household appliance products to approximately 800 wholesale distributors located throughout the United States. Such wholesale distributors resell respondent's said products to retail dealers. For this reason, generally speaking, respondent Sunbeam does not know who the retail dealers in Sunbeam products are. However, for competitive reasons, during the years 1957, 1958 and 1959, respondent sold its electric shavers direct to 81 large retailers located in various cities of the United States, including Baltimore, Maryland.¹ In October 1959, respondent's products were sold by approximately 100,000 retail dealers located throughout the United States. Retail dealers who resell respondent's electric shavers and electric household appliances are department stores, utility companies, appliance dealers, furniture stores, hardware stores, jewelry stores, drug stores, tobacco and liquor stores and catalog or mail-order firms.

3. In the course and conduct of its business respondent is now and for many years has been shipping its said products from the State of Illinois, where manufactured, and, in the case of some of its ladies' electric shavers, from San Juan, Puerto Rico, where some of them are manufactured, to purchasers located in other states and in the District of Columbia, in commerce, as "commerce" is defined in the Clayton Act, as amended.

4. On or about April 1, 1957, respondent promulgated and offered to the trade, through its wholesale distributors, four "LOCAL Promotion Advertising Plans" to be used by retail dealers in advertising and promoting Sunbeam products on a local basis as a tie-in to

¹ CX 44 is a list of the names and addresses of the 81 large retailers, including chain stores and mail-order houses, to whom, for competitive reasons, respondent sold electric shavers "direct" in 1957, 1958 and 1959. For the purposes of this decision, shavers were the only product which respondent sold "direct".

Sunbeam's national advertising of its Sunbeam products.² These plans were designated by Sunbeam as its "Electric Shaver Plan" (CX 2), "Electric Household Appliance Assortment Plan" (CX 3), "Lawn Mower and Garden Equipment Plan" (CX 4), and its "Electric Tool Advertising Plan" (CX 5), sometimes hereinafter referred to as LPAP plan or plans. At the initial hearing held in this proceeding, copies of each of the plans were received in evidence without objection. However, the only evidence in the record concerning the latter two plans was that the Lawn Mower and Garden Equipment Advertising Plan (CX 4) was rescinded and abandoned in March 1958, and the Electric Tool Advertising Plan (CX 5) was abandoned in September 1957, more than one year prior to the issuance of the complaint herein. (Tr. 35) No evidence was offered by counsel supporting the complaint that respondent ever made any payments for advertising promotion pursuant to these two plans. Therefore, only respondent's alleged discriminatory practices in the administration of its Electric Shaver Plan (CX 2) and the Electric Household Appliance Assortment Plan (CX 3) remain to be considered in this initial decision.

5. The provisions of the four advertising plans as originally issued to Sunbeam's wholesale distributors on April 1, 1957, were similar in most respects, except for the products covered and the minimum purchase requirements for reimbursement for newspaper, radio, television or catalog advertising under the plans. Each plan provided for a choice by the retail dealer of six separate forms of local promotional advertising, to wit: newspaper advertising, radio advertising, television advertising, or catalog advertising on the one hand, and point-of-purchase banners and displays or direct mailing pieces on the other. (CX 2 and 3; Ploner, Tr. 519; Mendler, Tr. 950; Bohmbach, Tr. 1007-08, 1017-20; Scott, Tr. 1296-97; Dodge, Tr. 1559; Mee, Tr. 1806-07.)

6. For example, the Electric Shaver Plan (CX 2) provided for the setting up of credits on Sunbeam's books for newspaper, radio, television, or catalog advertising to any dealer who placed an order for a minimum of \$440 worth of Sunbeam men's or women's Shave-masters with an authorized Sunbeam wholesale distributor of his choice for shipment at one time direct from the Sunbeam factory to a single shipping address of the dealer. The credit set up on respond-

²The four plans were issued simultaneously by Sunbeam to each of its wholesale distributors, who, in turn offered the plans to each of its retail dealer customers. Indeed, each retail dealer who testified at the hearings stated that he was familiar with the plans (CX 2 and 3), and that they had been made known and offered to him by a wholesale distributor.

ent's books equaled 14 percent of such order, calculated at current "suggested dealer cost" which appear in respondent's price lists and invoices in evidence (CX 19, 20, 21, 22).³ Such credits could be accumulated over a period extending to January 31 of the next calendar year. To those dealers who did not wish to order from wholesale distributors in the \$440 minimum quantity amount specified for direct shipment at one time from the Sunbeam factory and did not wish to use newspaper, radio, television, or catalog advertising, the Shaver Plan (CX 2) provided, as an alternative, a proportionate reimbursement credit of 14 percent of each purchase of Sunbeam shavers from a wholesale distributor, which credit could be used to obtain the "point-of-purchase" display or direct mail advertising promotion material listed in Appendix B of the Shaver Plan (CX 2G). This material consisted of Catalog Pages, Circulars, Displays, Banners, and/or Post Cards and was usually delivered to the dealer by the wholesale distributor at the time of delivery of the shavers, based upon 14 percent of the amount of the purchase calculated at "suggested dealer cost". Thus, under each type of alternative advertising promotion, newspaper, broadcast, or catalog advertising, and the display or direct mail advertising promotion material, the reimbursement credit was at a uniform rate of 14 percent. Credits for display material on purchases of less than the \$440 minimum specified for so-called "direct" shipments could be accumulated for a period extending to January 31 of the next calendar year. However, the Electric Shaver Plan (CX 2) was in effect for only one year. It was permanently abandoned in April, 1958, when respondent discontinued so-called Fair Trade. (Tr. 533; 1989; 952-53; 1066-67; 1131.)

7. The other plan remaining to be considered is respondent's Small Electric Appliance Plan (CX 3). This plan was offered simultaneously with the Shaver Plan and was similar to the Shaver Plan. The Small Electric Appliance Plan (CX 3) covered Sunbeam Mixmasters, Toasters, Cookers and Deep Freezers, Electric Blankets, Electric Sheets, Electric Irons, Waffle Bakers and Grills, Coffeemakers, Fry-

³ "Suggested dealer cost" is the same as the suggested "wholesale selling price" and the "suggested resale net price" which appear in Sunbeam's price lists. "Suggested dealer cost" was an accounting figure used to compute the amount of the allowance owing to the dealer. It was necessary to use "suggested dealer cost" for the purpose of calculating the allowance to each dealer because Sunbeam did not know the actual price which the dealer paid to his distributor for the merchandise. Based on the number of units purchased by the dealer and the "suggested dealer cost" as shown by the price lists, it was a simple matter for the wholesale distributor to calculate the amount of the credit owing to the dealer under LPAP. (Bohmbach, Tr. 1958-62; Lee, Tr. 1116; 1121-23; Ploner, Tr. 1925-34.) The terms "distributor cost" and "suggested resale net price" as used in the shaver price lists (CX 21 and 22) are the equivalents of "distributor net price" and "wholesale selling price", as used in the appliance price lists (CX 19 and 20).

pans, Egg Cookers, Baby Bottle Warmers, Saucepans and Hair Dryers.⁴ The Appliance Plan (CX 3) provided in substance that, when a dealer placed an order for \$750⁵ or more worth of any of the Sunbeam appliances listed above with a wholesale distributor of his choice for shipment at one time, freight prepaid by Sunbeam from its factory in Chicago to a single shipping address of dealer, Sunbeam would set up an advertising allowance credit on its books equal to 12 percent of such order (reduced in 1958 to 10 percent), calculated at current "suggested dealer cost", such credit or credits to be cumulative during the year until January 31 of the following year, to be used according to the terms of the plan to reimburse the dealer for newspaper, radio, television, or catalog advertising. For dealers who did not wish to use newspaper, radio, television, or catalog advertising and did not choose to purchase as much as \$750 worth of respondent's small appliances in one order and take advantage of the quantity direct shipment provision of the Appliance Plan (CX 3) so as to obtain a reimbursement credit for newspaper, broadcast or catalog advertising, the Appliance Plan (CX 3) offered an alternate proportionate advertising credit at the same percentage, 12 percent (reduced in 1958 to 10 percent), of the amount of the purchase of Sunbeam small appliances from a wholesale distributor, calculated at "suggested dealer cost", to be used as a credit toward the purchase of "point-of-purchase" display or "direct" mail promotion advertising material listed in Appendix B of the Appliance Plan (CX 3). Thus, under the Appliance Plan, as under the Shaver Plan, reimbursement for each type of promotional assistance was at a uniform rate of 12 percent (reduced in 1958 to 10 percent).

8. The Small Electric Appliance Plan was amended in April 1958, when respondent abandoned so-called "Fair Trade", and all references to "Fair Trade" were deleted. The reimbursement credit of 12 percent was reduced to 10 percent. Also, the provision in the plan for the accumulation of credits for the point-of-purchase display and direct mail advertising promotion material listed in Appendix B of

⁴ The word "Shavemaster" was included in the first issuance of the Small Electric Appliance Plan (CX 3) through inadvertence but, along with Hair Dryers, was eliminated from the plan in April, 1958, when respondent abandoned Fair Trade. (Tr. 32) No credits earned under the appliance plan were used for the reimbursement of advertising and promotion of shavers and no credits earned under the shaver plan were used for the reimbursement of advertising and promotion of appliances. (Bohmbach, Tr. 1065-66; Lee, Tr. 1129-30, 1132; Ploner, Tr. 1998-99.)

⁵ The \$440 and \$750 minimums specified under the Shaver and Appliance Plans for "direct" shipment and reimbursement credits for newspaper, broadcast or catalog advertising did not represent the actual cost to dealers. These figures were based upon "suggested dealer cost" which was an accounting figure used to calculate the amount of credit to which the dealer was entitled under each of the plans.

the plan beyond January 31, 1958, was deleted, since there would be no real purpose in continuing this provision in effect. This was so for the following reasons: When the LPAP plans were put into effect in April 1957, they were made effective as of January 1, 1957, so that those dealers who had made purchases of Sunbeam products from their wholesale distributors during the period intervening between January 1, 1957, and April 1, 1957, when the plans were formally announced and presented to the trade, and had not received the Appendix B material, could then obtain it under the plans. On purchases of Sunbeam products by dealers from their wholesale distributors after April 1957, the wholesale distributor ordinarily delivered the Appendix B material to the dealer along with the merchandise, upon the basis of the 14 percent of the order on electric shavers and 12 percent on the small electric appliances. Therefore, since the Appendix B material was delivered to the dealer by the wholesale distributor along with the merchandise, there was no good purpose in continuing the accumulation of credit provision in effect. The Small Electric Appliance Plan (CX 3) was republished effective January 2, 1959, and remained in effect until April 1960, when it was discontinued and abandoned and has not since been resumed. (Tr. 656)

9. The complaint alleges, among other things, that the Electric Shaver Plan (CX 2) and the Small Electric Appliance Plan (CX 3), previously described, authorized the payment of "preferred advertising allowances" to the 81 large retailers who bought electric shavers direct from respondent and to the other retail dealers who purchased Sunbeam shavers or small appliances from wholesale distributors "in specified minimum quantities and amounts for direct shipment from respondent's factory to the ordering retailer" and that "this preferred advertising consists of acceptable local newspaper, radio, television, and catalog advertising;" that there were "many dealers who were unable to purchase at one time the amount of respondent's products specified as the minimum order for direct shipment;" and that said dealers were offered "a display type of advertising only for their stores which is much less effective than newspaper, radio, television and catalog advertising which respondent allows and pays to its favored customers. In many instances, this display type of advertising is not even suitable to the needs of a customer (the dealer)."

10. On first impression, and more especially to one inexperienced in retail selling and promotion, it would seem that "newspaper, radio, television" and, to a lesser extent, "catalog" advertising would be superior to, and, therefore, "preferred" to a "display type of adver-

tising only" for use in stores. It would also seem to follow that this "display" type of advertising would be "less effective" than newspaper, radio, television and catalog advertising. However, after hearing the testimony of all the witnesses, the hearing examiner finds that the overwhelming weight of the testimony is to the contrary. The record affirmatively shows that newspaper, radio, television, and catalog advertising was unsuitable for the overwhelming majority of dealers who purchased and sold electric shavers and small electric appliances during 1957, 1958, and 1959, the years in question, and further, that the point-of-purchase display and direct mail advertising promotion material offered in Appendix B of the Shaver Plan (CX 2) and the Small Electric Appliance Plan (CX 3), respectively, as an alternative to newspaper, broadcast and catalog advertising to those dealers who purchased in smaller quantities than the \$440 and \$750 minimums specified in the plans were, for most dealers, far more "effective" and suitable methods of advertising and promotion than newspaper, radio, television, and catalog advertising.

11. Counsel supporting the complaint selected four metropolitan market areas from which to call witnesses in support of the allegations of the complaint: Milwaukee, Wisconsin; Richmond, Virginia; Washington, D.C.; and Baltimore, Maryland. Counsel supporting the complaint called twelve witnesses, two of these being employees of the Federal Trade Commission and one, Mr. E. K. Ploner, a vice president of respondent. The remaining witnesses called by counsel supporting the complaint were two employees of Graybar Electric Company, a wholesale distributor, two retailers in Milwaukee, four employees of three retail concerns in Richmond, and an employee of Richmond Newspapers, Inc., Richmond, Virginia. Complaint counsel did not call any witnesses from the Washington, D.C., or Baltimore market areas although he had originally stated that these areas constituted two of the four market areas in which he proposed to offer evidence in support of the allegations of the complaint. The testimony of the witnesses offered by complaint counsel do not support the allegations of the complaint.

12. One of the witnesses called by complaint counsel at the hearing held in Milwaukee on October 14, 1959, was Mr. Art Anderson, a retail jewelry dealer doing business in a room on the second floor of an office building located at 125 West Wells Street, Milwaukee, Wisconsin. (Tr. 241) Mr. Anderson testified that, in 1957, he sold Sunbeam electric shavers and small appliances which he had purchased from three wholesale distributors in Milwaukee (Tr. 242); that he purchased approximately \$1800 worth of Sunbeam shavers and appli-

ances from Edward M. Wells and Son, Inc., approximately \$4500 worth from H. P. Johnson Company, and approximately \$300 worth from Standard Electric and Supply Company. Each of these amounts were totals purchased from each wholesaler and most of his purchases of Sunbeam products from the wholesale distributors were in small amounts but that on one occasion he received an advertising allowance on an order of 24, 36, or 48 electric shavers and frying pans which he had purchased from one of the three wholesale distributors named above and drop-shipped to him from the Sunbeam factory. (Tr. 243-44) Although not positive, he believed that he advertised Sunbeam shavers and frying pans in the *Brookfield News* and the *Elm Grove Leaves*, weekly newspapers published in two Milwaukee suburbs during 1957, 1958, and 1959. (Tr. 262, 287) He stated that he would obtain copies of the advertisements and send them to complaint counsel. (Tr. 263, 287-88) If Mr. Anderson ever transmitted such advertisements to complaint counsel, they were not produced nor offered at any subsequent hearing held in this proceeding. On the other hand, during the presentment of respondent's defense at a subsequent hearing, respondent offered affirmative evidence to show that Mr. Anderson did not advertise any Sunbeam shavers or small electric appliances in the *Elm Grove Leaves* and *Brookfield News* in either of the years 1957, 1958, or 1959, as Mr. Anderson had testified. Mr. Edward K. Ploner, Vice President of Sunbeam, testified that, on August 24, 1961, he visited the office of the publisher of the *Elm Grove Leaves* and the *Brookfield News*, where he examined each issue of these papers for the years 1957 through 1959 and ascertained that there were no advertisements in these newspapers of Sunbeam products by Mr. Anderson. The only advertisement placed by Mr. Anderson in these newspapers was a small signature advertisement, identical to RX 4 and 5, which appeared in every consecutive issue for the period January 8, 1957 through April 16, 1959. The only products mentioned in these advertisements were diamonds, watches and rings. (Tr. 1152-1153) Mr. Anderson's testimony that he had received advertising allowances from Sunbeam on shavers and appliances which he had purchased in quantities of 24, 36, or 48 from wholesale distributors was also discredited by the testimony of Mr. Ploner who testified that he checked the records of Sunbeam Corporation and these records did not disclose any direct shipment of Sunbeam products to Mr. Anderson in 1957, 1958, or 1959, and that Mr. Anderson had not requested reimbursement from Sunbeam for any advertising. (Tr. 1155) Also, none of the exhibits offered in evidence by complaint counsel purporting to show the total orders, allowances and payments

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to all dealers in Milwaukee who had received direct shipments under LPAP during the years 1957-1959 list the name of Mr. Anderson or his business. On the whole, Mr. Anderson's testimony added nothing of material substance to support the allegations of the complaint. In published advertising pieces (RX 1 and 2), Mr. Anderson represented himself as a "wholesale" jeweler but admitted he was not. (Tr. 288) In several instances, Mr. Anderson was evasive in his testimony on cross-examination. Apparently, he withheld information from representatives of the Federal Trade Commission regarding a contempt order entered against him in the Circuit Court of Waukesha County, Wisconsin. (RX 6) On cross examination he was asked whether he had informed counsel supporting the complaint of the contempt order:

Q. Did you tell Mr. Smith today, two weeks ago, or at any time?

A. (No response).

Q. Answer the question.

A. No (Tr. 267-268).

Mr. Anderson could not even remember if he had previously discussed the subject matter of this proceeding with representatives of the Commission. (Tr. 265-266) From a preponderance of the evidence, it is found that Mr. Anderson did not ever advertise nor claim or receive reimbursement from respondent for advertising Sunbeam shavers or appliances in any newspaper under respondent's LPAP Plans.

13. The next witness called by complaint counsel was Mr. Howard M. Steller, President of Steller's, Incorporated, retail jewelers in Milwaukee. Steller's operated a jewelry store at 2740 North Teutonia Street in Milwaukee and, in October 1956, opened a second store in the Capital Court Shopping Center in Milwaukee. (Tr. 289-299; 1752-1778) Prior to 1956, Mr. Steller promoted the sale of Sunbeam shavers and small appliances by newspaper advertising three times each year, in May and June, for graduation, brides, Mother's and Father's Day, and anniversaries, another promotion on lay-away, which came in September and October, and the third, for Christmas. Steller's paid for this advertising and did not receive reimbursement from Sunbeam. This was prior to the offering of the LPAP Plans in April 1957. However, in 1956, the discount and department stores in Milwaukee began cutting prices on electric shavers and appliances to the point where Steller's was not making any profit on their sale. Therefore, during 1957, 1958 and 1959, the years involved in this proceeding, Steller's only handled electric shavers and small appliances as an accommodation to customers and did not advertise them in

newspapers. His only newspaper advertising in 1957, 1958, and 1959 was on jewelry and diamonds. Mr. Steller was familiar with respondent's LPAP Plans, CX 2 and 3, and the \$440 and \$750 minimum purchase requirements on shavers and appliances would not have prevented him from participating in the plans if he had wanted to because, if he had run a newspaper advertisement promotion of Sunbeam shavers or appliances, he would have first purchased a supply of Sunbeam shavers and appliances in quantities in excess of the \$440 and \$750 minimums specified in the plans in order to back up the newspaper advertising. The third witness called by complaint counsel at the hearing in Milwaukee was Mr. Frank Russo, a salesman for Graybar Electric Company, a wholesale distributor of electric supplies, including Sunbeam electric shavers and appliances, in Milwaukee, Wisconsin. Mr. Russo testified that he was familiar with Sunbeam's shaver and small electric appliance plans (CX 2 and 3) and gave estimates of yearly purchases by certain retail dealers in Milwaukee of Sunbeam shavers and appliances, accessories, etc., from Graybar and stated that, in his opinion, these named dealers were in competition with certain department stores in Milwaukee in the sale of Sunbeam shavers and appliances.

14. At the hearing held in Richmond, Virginia, on January 28, 1960, complaint counsel called representatives of three retail dealers in Richmond who had received reimbursement from respondent for newspaper advertising promotion of Sunbeam shavers and appliances under respondent's LPAP plans (CX 2 and 3). These dealers were Sears, Roebuck & Co., Standard Drug Company and Thalhimer Brothers, a department store in Richmond. Complaint counsel also called a representative of Richmond Newspapers, Incorporated, owner of two Richmond newspapers, the *Times Dispatch* and *News Leader*, who identified CX 38, 39, and 40 as rates for advertising in the two newspapers effective during the years involved in this proceeding, and CX 41, 42, and 43 as being photostatic copies of newspaper advertisements run by Sears on April 17, 1958, by People's Drug Stores on April 10, 1958, and April 17, 1958, respectively. Counsel also called a representative of Graybar Electric Company, a wholesale distributor in Richmond.

15. Mr. Ernest P. Duke, Advertising Display Manager for Sears, Roebuck & Co., in Richmond, called as a witness by complaint counsel, testified that he used six of the point-of-purchase display material items listed in Appendix B of respondent's appliance plan (CX 3) in the promotion of Sunbeam appliances listed in the advertisement by Sears in the Richmond *News Leader* of April 17, 1958 (CX 41). The

Appendix B point-of-purchase items which Mr. Duke used in the Sears store display were the Hand Mixer Display, Coffeemaster Display, Waffle Baker Display, Ironmaster Display, Toaster Display and the Cooker and Fryer Display. (Tr. 332) However, there is no evidence in the record to show that these Appendix B display materials were received by Sears on the same purchase on which it purportedly received reimbursement for the newspaper advertisement above referred to (CX 41). These point-of-purchase items utilized by Mr. Duke were already in the possession of Sears at the time the newspaper advertisement referred to above appeared. These six Appendix B displays were already on hand in the drawer of a display table which Mr. Duke removed therefrom to set up the display of Sunbeam appliances. (Tr. 332-333) Prior to the publication of the newspaper advertisement (CX 41) on April 17, 1958, Sears had made purchases of Sunbeam appliances from local wholesale distributors. (Tr. 335) It may well be that the six Appendix B display items which Mr. Duke used had been received by Sears in reimbursement credits on purchases of Sunbeam appliances from wholesale distributors prior to April 1958, under the LPAP Plan. Under the plans, a dealer could receive reimbursement in the form of Appendix B display material from his wholesale distributor on purchases of less than the \$440 and \$750 minimums specified under the LPAP Plan and, on purchases in amounts approximating or exceeding the specified \$440 and \$750 minimums, receive reimbursement for newspaper, broadcast or catalog advertising. However, the evidence shows and it is found, that under the plans, the dealer did not and could not receive both the Appendix B promotion material and also reimbursement for newspaper, broadcast or catalog advertising on the same purchase. Nor could a dealer receive reimbursement in the form of Appendix B display or direct mail advertising material which he was not entitled to and had not earned under the plans. In other words, the Appendix B material was not distributed indiscriminately; only to those who had earned and requested it under the plans. (Ploner, Tr. 40-41; Siegel, Tr. 1403-04; Moldenhauer, Tr. 1453-55; Russo, Tr. 1488-89; Pitt, Tr. 1543; Dodge, Tr. 1564; Weingroff, Tr. 1666; Mitchell, Tr. 1699; Manning, Tr. 351.) So, from this evidence it is found that Sears, Roebuck & Co., advertised Sunbeam small appliances under respondent's LPAP Plan in 1958 and that the \$750 minimum specified in the Appliance Plan (CX 3) was not beyond its reach. It is further found that, prior to April 17, 1958, the date of the advertisement of Sunbeam small appliances by Sears, Roebuck & Co., in the *Richmond News Leader* (CX 41) referred to above, Sears had previously made purchases of Sun-

beam small appliances from Richmond wholesale distributors on which Sears was eligible to receive credits toward point-of-purchase display or direct mail material listed under Appendix B of respondent's Appliance Plan (CX 3).

16. The next witness called by counsel supporting the complaint was Mr. L. K. Manning, District Plant Sales Manager for Graybar Electric Company, Richmond, Virginia, a wholesale distributor of electrical products. During 1957, 1958, and 1959 Graybar sold and distributed Sunbeam shavers and appliances to approximately 100 retail dealer customers in Richmond. Mr. Manning was familiar with respondent's Shaver Plan (CX 2) and Appliance Plan (CX 3). Graybar had several customers in Richmond who placed orders with it for Sunbeam shavers and appliances and took delivery on a direct shipment basis from the Sunbeam factory, thus entitling these retail dealers to receive reimbursement from respondent for newspaper, broadcast or catalog advertising of Sunbeam shavers or appliances under respondent's LPAP Plans. These dealers included Thalhimers Dept. Store, Cowardin Jewelry, Sears, Roebuck & Co., Lowe's Jewelry and Standard Drug Company. However, the majority of Graybar's retail customers did not buy on a drop-shipment basis but bought from Graybar in quantities less than the \$440 and \$750 minimums specified in the plans. In fact, according to Mr. Manning, none of Graybar's retail dealer customers bought exclusively on a drop-shipment basis. As an example, counsel supporting the complaint inquired if Thalhimers bought Sunbeam shavers and appliances from Graybar both ways, that is, orders equaling or exceeding the \$440 and \$750 minimums specified for drop-shipment and reimbursement for newspaper, broadcast, and catalog advertising and orders in amounts less than the above minimums, where the dealer would take delivery of the Sunbeam shavers or appliances direct from Graybar's Richmond warehouse and thus be entitled to receive the point-of-purchase display or direct mail promotion material listed in Appendix B of the plans, and Mr. Manning replied Thalhimers bought both ways. Mr. Manning testified that Thalhimers bought 50 percent on a drop-shipment basis and 50 percent on a fill-in basis from the warehouse stocks of Graybar in Richmond. Commission counsel pressed Mr. Manning to find out if, on a purchase by Thalhimers from Graybar on the drop-shipment basis under the plans, Thalhimers was entitled to receive reimbursement for newspaper advertising and also to receive the point-of-purchase material listed in Appendix B on the same drop-shipment purchase. In other words, could Thalhimers receive the Appendix B material on a drop-shipment purchase and also

receive reimbursement for newspaper advertising. Mr. Manning made it clear that Graybar did not give Thalhimer any Appendix B material on a drop-shipment purchase. Under the terms of the plans and the instructions by Sunbeam in its letter to all of its wholesale distributors embodied in CX 24, Thalhimer's was not entitled to receive any Appendix B material on a drop-shipment purchase which approximated the \$440 and \$750 minimums, where Thalhimer's was entitled to receive reimbursement for newspaper, broadcast, or catalog advertising.

17. Both inside and outside Graybar salesmen were given copies of respondent's LPAP Plans, CX 2 and 3, at the time of their issuance in April 1957, and their salesmen offered both plans to their customers. There are approximately 150 to 175 electric appliance retailers in Richmond and of this number, only approximately 12 to 15 promote the sale of appliances by newspaper advertising. The great majority of dealers promote their sale through point-of-purchase material. (Tr. 367-368) There are various types and classifications of retail dealers who may sell electric appliances, such as department, drug, hardware, furniture, variety, gift, grocery, and appliance stores. Some of the large volume stores, like department stores, use promotion advertising in newspapers and some radio and television advertising. Some stores use direct mail. The vast majority prefer and use point-of-purchase advertising promotion material. Mr. Manning did not know of any type of advertising at the retail level not covered by Sunbeams' plans. (Tr. 369) A retailer who intends to promote the sale of shavers or appliances by newspaper advertising must first purchase and have on hand at least \$440 worth of shavers or \$750 worth of appliances before running the newspaper advertising. (Tr. 383) He must have the shavers or appliances on hand to "back-up" the newspaper advertising. Newspaper advertising is relatively expensive and it must be regular and repetitive in order to be effective. Therefore, most retail dealers prefer point-of-purchase advertising. (Tr. 370-371) Mr. Manning also testified that Sunbeam's LPAP Plans are "the greatest contributor toward retail stores advertising programs of any lines that we handle * * *." (Tr. 380-381) For a retailer to buy just one each of Sunbeam's small appliances from Graybar would aggregate a cost of more than \$1,000. (Tr. 371)

18. Mr. Gilbert Rosenthal, Merchandise Manager for Standard Drug Company, a retail drug chain with headquarters in Richmond, Virginia, was the next witness called by counsel supporting the complaint. (Tr. 386-404) Standard operates 13 retail drug stores in Virginia and the District of Columbia. Mr. Rosenthal was familiar with

respondent's Shaver and Appliance Plans (CX 2 and 3). In the fall of the year, Standard advertises shavers and appliances in newspapers including the *Times Dispatch* and *News Leader* in Richmond and the *Washington Post* and *Star* in Washington, D.C. November and December is the best selling season for shavers and appliances according to Mr. Rosenthal. Standard purchases most of its Sunbeam shavers and appliances from local wholesale distributors in Richmond, including Graybar Electric Company, and also Norfolk Distributing Co., in Norfolk, Virginia. Standard buys shavers direct from Sunbeam at the wholesale distributor's price. Before running a newspaper advertisement of Sunbeam shavers or appliances, Standard would purchase several thousand dollars worth of these products from a local wholesale distributor to be delivered on a drop-shipment basis. Seven hundred fifty dollars worth would be the very minimum purchase before running a newspaper advertisement for the three stores in Richmond. On drop-shipments under the LPAP Plans, Standard places the order with the local wholesale distributor of its choice and the distributor transmits the order to Sunbeam in Chicago. Sunbeam then ships the merchandise to the Standard warehouse in Richmond. The wholesale distributor then bills Standard for the merchandise. The price which Standard pays the wholesale distributor for the merchandise is determined or set by the distributor. There are about 10 or 12 retail dealers in Richmond who advertise Sunbeam shavers and appliances in newspapers. The remainder of the Richmond dealers use point-of-purchase or direct mail advertising. Standard uses very little point-of-purchase display material in its stores and never has used or requested any of the Appendix B display material from Sunbeam or any wholesale distributor.

19. Mr. Milton Kirtley, Divisional Merchandising Manager of Home Furnishings at Thalhimer's, a department store in Richmond, was the next witness called by complaint counsel. Mr. Kirtley was not familiar with respondent's Appliance Plan (CX 3) although he testified that Thalhimer's sold Sunbeam shavers and appliances. Mr. Kirtley testified that he did not buy merchandise for Thalhimer's and, for this reason, he was excused. Mr. Herbert Lebar, Houseware Buyer for Thalhimer's, was then called by complaint counsel. (Tr. 410-424) At the time of the hearing, January 28, 1960, Mr. Lebar had held his then position with Thalhimer's since June 1959. Mr. Lebar's predecessor, Mr. Frank Carpen, was then operating a retail store in Newport News, Virginia. Mr. Lebar was not familiar with respondent's Shaver and Appliance Plans (CX 2 and 3). Since Mr. Lebar began with Thalhimer's in June 1959, Thalhimer has handled

Sunbeam products which he characterized as "traffic" appliances, irons, toasters, frypans, etc. Shavers are not carried in Mr. Lebar's department of the store. Thalhimer buys Sunbeam appliances from local wholesale distributors, such as Graybar Electric Co., and Goldberg-Tiller, both on fill-in orders of less than \$750 and also on orders of \$750 or more on a drop-shipment basis, varying, depending on the time of year. They buy on a drop-shipment basis before running a newspaper advertising promotion of Sunbeam appliances. Mr. Lebar testified that Thalhimer's was "in competition with every other appliance dealer who sells Sunbeam in the city of Richmond." Since Mr. Lebar has been with Thalhimer, they have not used any of the point-of-purchase promotional materials listed in Appendix B of CX 3G, except a frypan display that was "there" before he came to the store and was "still there". On purchases of Sunbeam appliances by Lebar on behalf of Thalhimer from the wholesale distributor, the price is determined by the distributor and Lebar, both on fill-in purchases and those for drop-shipment. Before running a newspaper advertisement of Sunbeam appliances, a minimum of \$750 worth of Sunbeam appliances is ordered so as to have the merchandise on hand to "back-up" the advertisement. Thalhimer has its own art and display department and, for this reason, uses very little of the sales promotion display material offered by manufacturers, including Sunbeam.

20. The next witness called by counsel supporting the complaint was Mr. Edward K. Ploner, a Vice-President of Sunbeam Corporation, at a hearing held in Chicago, Illinois, on October 17, 1961. Complaint counsel had previously called Mr. Ploner as a witness at the first hearing held in this proceeding in Chicago on October 12, 1959. At the hearing on October 17, 1961, Mr. Ploner was used by complaint counsel, to a large degree, to identify certain documents, including advertising requisitions and certain documents prepared by respondent at the request of complaint counsel, such as CX 46. This exhibit purports to show the accrued credits earned under the LPAP Plan by Smith Williams Jewelry Company, Richmond, Virginia, on purchases of appliances in 1957 and shavers in 1958, including the amounts paid in reimbursement for newspaper advertising, and the name of the newspaper which carried the advertising. The product categories or classifications covered by CX 46 and similar ones, such as CX 48, 77, 79, and 81, are listed therein as "Shaver" and "Appliance". On cross examination, Mr. Ploner explained that, under the category of "Shaver", there are four Sunbeam products: two of them being "Men's Shavers", each basically different from each other, different as to the type of mechanism and blades, different in shape,

configuration, and color, but all classified as shavers. Then there are two types of "Ladies' Shavers". A lady's shaver differs from a man's shaver in construction, mechanism, and appearance. The purpose is different. With respect to the word "Appliance", that term includes all of the small appliances manufactured by respondent and listed in CX 3, such as Sunbeam Mixmaster, Toasters, Cookers and Deep Fryers, Waffle Bakers and Grills, Coffeemakers, Frypans, Electric Irons, etc. Each of these items has a different use. So, on CX 46 and similar exhibits, the newspaper advertisement referred to in the exhibit does not show the actual product advertised, but only refers to it as "Shaver" or "Appliance". Mr. Ploner testified that Smith Williams Jewelry Company was not a customer of Sunbeam Corporation and that CX 46 and other similar exhibits are not official records of Sunbeam Corporation kept in the regular course of business but were prepared by employees of respondent in the manner and form requested by counsel supporting the complaint in response to a Subpoena Duces Tecum.

21. The next witness was Mr. Seth MacDonald, a Senior Accountant with the Federal Trade Commission, called by complaint counsel to identify and explain some written tabulations in the form of exhibits which Mr. MacDonald had prepared by copying from some of respondent's records made available to Mr. MacDonald and complaint counsel under a Subpoena Duces Tecum. CX 56 is an example of one of the tabulations which Mr. MacDonald stated that he had prepared in his own handwriting, with the following heading at the top of the page of the exhibit: "Sunbeam Corp. Advertising Reimbursements to Lee's Appliance & Furniture Co., Richmond, Va." This exhibit purports to list the numbers of five checks totaling \$213.04 paid by Sunbeam Corp. in 1957 and 1958 as reimbursement to Lee's Appliance & Furniture Co. for newspaper advertisements of "shaver" in the Richmond *Times Dispatch* and *News Leader* and \$1,273.66 paid in 1957 and 1958 for advertisements of "app." in these newspapers. The exhibits prepared by Mr. MacDonald do not identify the Sunbeam products advertised in the newspaper for which Sunbeam is supposed to have issued checks to various payee dealers as reimbursements for such advertising other than as "shaver" or "app.", whether the shavers advertised were men's or ladies' the exhibits do not disclose. In the case of "app.", the exhibits prepared by Mr. MacDonald do not identify the appliance, whether it was a Mixmaster, Toaster, Iron, or any of the other eight or ten types of "appliances" manufactured by Sunbeam. On cross-examination, several errors were

disclosed in the tabulations contained in the exhibits prepared by Mr. MacDonald.

22. Following Mr. MacDonald, complaint counsel re-recalled Mr. Ploner to identify certain additional exhibits, including CX 314 A-G, which purports to be a list of dealers in various cities who purchased Sunbeam shavers and/or appliances direct from respondent. This list was compiled by respondent in the manner and form as that specified in response to a Subpoena Duces Tecum issued at the behest of complaint counsel. This exhibit lists Sears, Roebuck & Co., Chicago, Illinois, as being a direct purchaser of shavers and appliances in 1958 and 1959. Mr. Ploner also identified other exhibits, including CX 316, an invoice dated September 26, 1958, from respondent to Graybar Electric Co., Richmond, Va., for Electric Irons drop-shipped to Sears, Roebuck & Co., in Richmond under respondent's Appliance Plan (CX 3), and CX 317, an order from Graybar on which the invoice was based. Complaint counsel offered and there were received in evidence, over respondent's objection, several additional exhibits, CX 318 through CX 324, purporting to show drop-shipments of shavers and appliances from respondent to Sears, Roebuck & Co., under respondent's LPAP Plans on orders placed by Sears with Graybar Electric Co., Inc., and Goldberg-Tiller Corp., Richmond wholesale distributors. Complaint counsel offered these exhibits with the stated purpose to show that respondent, under its LPAP Plans, did not treat its "direct" customer dealers, such as Sears, Roebuck, any differently from those dealers who purchased from wholesale distributors, insofar as advertising treatment was concerned. An examination of these invoice exhibits shows that CX 316, CX 319, CX 320, CX 321, and CX 322 each represented drop-shipments to Sears, Roebuck & Co., during the months of September and October 1958, after respondent discontinued selling appliances direct to Sears in July 1958. (Tr. 28, 77, 185, 689) CX 323 and CX 324 are dated December 1957, and purport to represent drop-shipments of shavers purchased from Goldberg-Tiller Corp., a Richmond wholesale distributor. Even CX 314G does not list Sears, Roebuck & Co., as a direct customer of respondent for shavers in 1957. So, upon the basis of the evidence, it is found that respondent was not selling Sears, Roebuck & Co., electric shavers on a direct basis in 1957, and that respondent discontinued sales of electric appliances to Sears, Roebuck & Co., on a direct basis on or about July 1958.

23. Upon concluding the examination of Mr. Ploner at the hearing in Chicago on October 18, 1961, complaint counsel announced that,

since respondent was not willing to admit "competition"⁶ between dealers in Sunbeam shavers and appliances in the four market areas, as required by Section 2(d) of the Clayton Act, it would be necessary to hold hearings in Milwaukee, Wisconsin; Washington, D.C.; Baltimore, Maryland; and Richmond, Virginia. This was despite the fact that, upon complaint counsel's request, hearings had already been held in Milwaukee and Richmond where complaint counsel had an opportunity to adduce testimony on this facet of his affirmative case. The competition between dealers referred to by complaint counsel was that competition, if any, between those dealers who purchase from Sunbeam Corporation on a direct basis and those dealers who purchase Sunbeam products from wholesale distributors. Of course, respondent takes the position that those dealers who do not purchase from respondent on a direct basis, but purchase Sunbeam products from wholesale distributors, are not customers of respondent. Respondent takes the position that it does not even know who many of these dealers are (those who purchase Sunbeam products solely from wholesale distributors), and, respondent could not admit competition with respect to dealers wholly unknown to it. Respondent counsel stated that they would have to know who the dealers were, the product involved, and the time period involved.

24. At the next session of the hearing held in this proceeding in Washington, D.C., on July 23, 1963, complaint counsel called Mrs. Agnes Simpson, a statistical clerk with the Federal Trade Commission, for the evident purpose of proving the existence of competition between dealers in Milwaukee, Richmond, Baltimore, and Washington who bought direct from respondent and dealers in the same cities who bought from wholesale distributors. This proof of "competition" was sought to be established through certain exhibits produced and identified by Mrs. Simpson. The principal exhibits which Mrs. Simpson prepared and sponsored for the purpose of showing "competition" were CX 325, CX 326, CX 327, and CX 329, maps of the cities of Richmond, Virginia; Milwaukee, Wisconsin; Baltimore, Maryland; and Washington, D.C., respectively. Mrs. Simpson testified that, on each of these maps, she had spotted the approximate location of the dealers in the four cities whose names were shown on other exhibits which had been received in evidence at previous hearings. For example, CX 45, designated as an Advertising Requisition previously

⁶ Of course, there is testimony in the record by certain dealers that they considered themselves to be in general competition with all other dealers located in the same city, selling Sunbeam products, but this type of testimony has been held to be insufficient to establish "competition" within the contemplation of Section 2(d) of the Clayton Act.

received in evidence, directs the shipment of 250 Hair Dryer Circulars under Appendix B of respondent's LPAP (Appliance Plan CX 3) Plan to Smith Williams Jewelers, 731 E. Main A, Richmond, Virginia. Mrs. Simpson stated that, on CX 325, the Map of the city of Richmond, with stated marks and symbols, she indicated the approximate location of Smith Williams Jewelers from the address shown on CX 45. From CX 47, another Advertising Requisition, she obtained the name and address of N. F. Jacobs Sons, 815 E. Broad Street, Richmond, and indicated the approximate location of this dealer's store on the map of Richmond, CX 325. She then went on to CX 49, which lists Cowardin Jewelry, 1707 E. Main Street, Richmond, Virginia, as another dealer who had obtained Appendix B Material in the form of circulars, and indicated with symbols the approximate location of this dealer on the Richmond Map. (CX 325) She followed the same procedure by indicating the approximate locations on the maps of Milwaukee (CX 326), Baltimore (CX 327) and Washington (CX 329), the names and addresses of those dealers listed on the face of exhibits in the record. In cases where the address of the dealer was not shown on the exhibit, Mrs. Simpson consulted the telephone directory of the appropriate city and selected an address for that dealer from that directory. The city maps used by Mrs. Simpson, CX 325, 326, 327, and 329 did not purport to be maps of Richmond, Milwaukee, Baltimore, and Washington during 1957, 1958 or 1959, the years involved in this proceeding. The locations of the dealers which Mrs. Simpson purported to show on the city maps were only approximations, at best, and, on cross-examination, many wide errors were brought out in these approximations. Mrs. Simpson testified that she did not have personal knowledge that the maps which she prepared and sponsored accurately reflected store locations during the relevant years. As stated above, the purpose of these maps was to show the geographic proximity of store locations from which an inference of competition could be drawn. Mrs. Simpson stated that she did not have personal knowledge of what products may have been stocked and resold by any of the stores shown on the maps. (Tr. 707-848)

25. At the conclusion of the cross-examination of Mrs. Simpson, complaint counsel rested his affirmative case. Counsel for respondent then moved to (1) dismiss the complaint on the ground that counsel for the complaint had failed to prove that allegedly favored and disfavored dealers were engaged in competition at or about the same time in the distribution of products of like grade and quality; (2) to dismiss the charge in Paragraph Six of the complaint to the effect

that respondent had granted an "additional 10%" allowance to "81 retailers" for advertising purposes, for the reason that, during the course of testimony at hearings in support of the Commission's case-in-chief, complaint counsel agreed that this charge should be disregarded because he had "misinterpreted" respondent's billing system, and (3) that the charge in Paragraph Six of the complaint with respect to respondent's Lawn Mower and Garden Equipment Assortment Plan (CX 4) and its Electric Tool Assortment Plan (CX 5) be dismissed for failure of proof. By order dated October 15, 1963, this hearing examiner denied respondent's motion to dismiss the complaint by reason of the Commission's views that, on a motion to dismiss made at the close of the Commission's case-in-chief, all evidence adduced in support of the case-in-chief should be viewed in the light most favorable to the complaint. The hearing examiner stated that action with respect to points (2) and (3) of respondent's motion would be taken in his initial decision to be issued after the closing of the record.

26. Defense hearings were held in Chicago, Illinois, on November 25, 26, and 27, 1963, and Washington, D.C., on January 27, 28, 29, 30, 31, and February 1, 1964. The respondent called twenty-one witnesses. Five were present or former officers and employees of Sunbeam Corporation at the time of the preparation, issuance and operation of the LPAP Plans during the years 1957, 1958, and 1959. The respondent also called six dealer witnesses, four distributor witnesses, four executives of trade associations familiar with the advertising and promotion of shavers and small appliances by retail dealers, and two of the leading authorities on advertising and marketing in the United States, Dr. James Scott, Professor of Advertising, Graduate School of Business Administration, University of Michigan, and Mr. William W. Mee, President, Point-of-Purchase Advertising Institute, New York, New York. The testimony of each witness will not be reviewed in detail. References to some of the testimony will be referred to where appropriate.

27. The record shows conclusively, and it is found, that newspaper, broadcast, and catalog advertising were unsuitable for 90 to 95 percent of the dealers who sold Sunbeam electric shavers and small appliances. Every dealer who made purchases of shavers and small appliances in quantities below the minimums specified in respondent's LPAP Plans who appeared at hearings testified that newspaper, broadcast, and catalog advertising were, for them, unsuitable forms of advertising and promotion. Although the theory of the complaint and the theory on which complaint counsel presented his case-in-chief

was that the \$440 and \$750 minimums specified in the plans prevented some dealers from using newspaper, broadcast, or catalog advertising and forced them to use the Appendix B advertising material which the complaint alleged was "less effective" and "not even suitable" to their needs, not one dealer testified that he was prevented from using newspaper or broadcast advertising by reason of the \$440 and \$750 minimums specified in the plans. The testimony of both dealers and distributors was that those dealers who used newspaper, broadcast, or catalog advertising customarily purchased at least \$500 to \$2,000 worth of shavers and appliances, respectively, before running an advertisement in the newspaper. This was necessary so as to "back-up" the advertisement. For those dealers who did not choose to use newspaper, broadcast or catalog advertising, and those dealers constituted 90 to 95 percent of the dealers who sold Sunbeam shavers and small appliances, respondent's LPAP Plans did not prescribe any purchase minimums for those dealers to be entitled to receive the Appendix B point-of-purchase or direct mail advertising material. Messrs. Mitchell and Moldenhauer, dealers in Baltimore, Maryland, and Milwaukee, Wisconsin, respectively, each of whom had purchased in much greater quantities than the minimums specified in the two plans for newspaper, broadcast, or catalog advertising, testified that newspaper, broadcast, and catalog advertising were unsuitable for their promotional needs. Since complaint counsel laid so much stress on this theory to establish the violation of Section 2(d) as alleged in the complaint, it is significant that complaint counsel has not requested a specific finding of fact on this allegation of the complaint. It may be that counsel agrees with the hearing examiner that the evidence does not establish the allegations of the complaint in these respects.

28. Since the closing of the testimony, complaint counsel has abandoned the theory of the Section 2(d) violation alleged in the complaint to the effect that "newspaper" advertising is "preferred" advertising, and that "point-of-purchase" advertising is much less "effective" than newspaper advertising. Complaint counsel now requests the hearing examiner to find that newspaper, radio, and television advertising are wholly ineffective and "functionally unavailable to 95 percent of dealers". In his proposed findings of fact, complaint counsel has proposed a new and different theory from that alleged in the complaint on which he proposes that it be found that respondent's LPAP Plans violated Section 2(d) of the Act. Complaint counsel now contends that the point-of-purchase Appendix B display or direct mail advertising offered as an alternative to newspaper, broadcast, or catalog advertising in respondent's plans was not a reason-

able and genuine alternative to those dealers who did not choose to use newspaper, radio, television or catalog advertising. His reasons for this contention are (1) that the Appendix B point-of-purchase advertising material was suitable for dealers who also advertise in newspapers, on radio, or television, and (2) the record shows that some dealers did use the Appendix B material in addition to newspaper advertising. In other words, counsel urges that, since the alternative Appendix B materials were suitable for and were actually used by some dealers who, on occasion, also used newspaper advertising, this dual use prevented the Appendix B material from being an alternative to newspaper, radio, television or catalog advertising.

29. In support of this contention, complaint counsel quotes from the decision of the Commission in *Exquisite Form Brassiere, Inc.*,⁷ Docket 6966, issued January 20, 1964, as follows:

Exquisite's additional contention that it's furnishing of display materials constituted a reasonable alternative was also correctly rejected, since these materials were offered and could be obtained by any customer irrespective of his participation in cooperative advertising.

The undisputed facts of record in the present case with respect to the availability of the Appendix B advertising promotion material under respondent's plans were quite different from the facts in the *Exquisite Brassiere* case. In the present case, under respondent's plans, the Appendix B material *could not be obtained by any dealer irrespective of his participation in respondent's LPAP Plans* (italics mine). Under respondent's plans, the Appendix B advertising materials were an alternative to those dealers who did not choose to use newspaper, radio, television, or catalog advertising and could only be obtained by the dealer on the basis of purchases and to the extent that credits had actually been earned. The Appendix B materials were not distributed to all dealers indiscriminately, but only on earned credits on purchases from wholesalers under the plans. Under respondent's plans, the dealer did not receive both reimbursement credits for newspaper advertising and also credits toward Appendix B materials on the same purchase. This is made clear by the evidence of record. In the *Exquisite* case, the distribution of the display material was not based solely on credits earned on purchases by the dealer on a proportionate basis under the advertising plans, but was given and distributed indiscriminately to any and all customers, irrespective of their participation in an advertising plan.

⁷ The amended complaint charged Exquisite with violating subsections (d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act.

30. Of course, it is also undisputed in the present record that some dealers received reimbursement for newspaper advertising on some purchases from a wholesale distributor on a drop-shipment basis under respondent's plans, and, on a fill-in purchase from the same or a different wholesale distributor, received the Appendix B display material. This dual use by a dealer of two of the alternatives under respondent's plans, each alternative form of advertising being earned by the dealer under the plans on separate purchases, does not render respondent's plans any less alternative. The fact that some dealers used both alternative forms offered in the plans indicates that these dealers considered both newspaper and the Appendix B advertising materials useful and valuable to them. This was one of the stated purposes of the plans, to make available to all types of dealers, large and small, a variety of alternative forms of advertising. Some dealers used newspaper advertising on a seasonal basis under respondent's plans. At other times of the year, under respondent's plans, these dealers did not choose to run newspaper advertisements and made purchases from their wholesale distributor in amounts less than \$440 and \$750 minimums specified for reimbursement for newspaper advertising and received their choice of the Appendix B advertising material (Bohmbach, Tr. 1033-34; Ploner, Tr. 1959) which they used in their stores. Try as he did, complaint counsel was not able to show in this record that any dealer received both a reimbursement for newspaper advertising and also the Appendix B material on the same purchase under respondent's plans. This is one of the significant provisions in respondent's plans that made the Appendix B advertising materials an alternative to newspaper, broadcast, or catalog advertising; the dealer had the choice of the Appendix B materials or the alternative newspaper, broadcast, or catalog advertising—but he could not have both the Appendix B materials and also reimbursement for newspaper, broadcast, or catalog advertising on the same purchase.

31. Complaint counsel now urges that the Appendix B advertising material offered in respondent's plans is not a genuine alternative for dealers who do not choose to use newspaper, broadcast, or catalog advertising for still another reason. Complaint counsel contends that respondent's furnishing of services or facilities to customers in the form of Appendix B material does not constitute an alternative to payments for services or facilities to be provided by competing customers. As authority for this position, complaint counsel, on Page 13 of his proposed findings of fact, quotes from the initial

decision of the hearing examiner in the *Exquisite* case, Docket 6966, dated January 27, 1960, filed on January 28, 1960, wherein it is stated:

* * * Section 2(d)⁸ encompasses paying for services furnished by a customer, whereas Section 2(e) encompasses services furnished by the seller to the customer, which would include the furnishing of store dispensers and display material. Section 2(d) expressly provides that such payments for services furnished by a customer are illegal, unless *such payment* is available on proportionally equal terms to all other customers competing. This means what it says: an alternative must be the payment for services furnished and not the furnishing of services by the seller to the customers. Such payment, not something else, must be available on proportionally equal terms.

In his citation to this initial decision, complaint counsel states that this initial decision of the hearing examiner was "Adopted as the decision of the Commission, October 31, 1960; Remanded on other grounds, 301 F. 2d 499 (C.A.D.C. 1961)." This statement is misleading. While it is technically correct to say that the Commission in its order stated that the initial decision of the hearing examiner was "Adopted as the decision of the Commission," nevertheless, the Commission, in its opinion by Secrest, Commissioner, declined to adopt the statements of the hearing examiner quoted above from his initial decision. After agreeing with the hearing examiner that *Exquisite's* advertising plans were not offered or made known to some customers competing with others who received payments under the plan, and, for this reason in violation of Section 2(d), the opinion stated:

* * * Consequently, we do not reach the question of whether the various plans could be legitimate components of a comprehensive plan or whether the terms of one plan were or could be proportionally equal to those of another.

32. The Commission's decision in the *Exquisite* case was taken by that respondent to the United States Court of Appeals for the District of Columbia for review. Since the Commission, in its decision, had expressly stated that it did not consider it necessary to reach the question passed upon by the hearing examiner in his initial decision to the effect that "an alternative must be the payment for services furnished and not the furnishing of services by the seller to the customers," this question was not involved in the review by the Court of Appeals. One of the questions which were involved was

⁸Section 2(d) provides: "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

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whether the so-called Subsection (b) defense was available against the charge under Subsection (d). The Commission had held it was not available. The Court of Appeals stated, among other things:

The economic evil sought to be outlawed by it is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as discrimination is practiced * * *. It is impossible to believe it meant to treat one process of discrimination one way and to treat in another way another process equally effective as discrimination * * *. The Commission makes the flat statement in its brief here that Subsection (d) does not proscribe discriminations in services or facilities. We are wholly unable to agree with that view.

Thus, the Court, noting that "the thrust of the Robinson-Patman Act is against discrimination", considered all Subsections of the Act together, each Subsection as component parts of the whole. The Court held that the Subsection (b) defense was available against the Subsection (d) charge. This hearing examiner is of the opinion, and it is found, that the Appendix B advertising promotion material offered in respondent's LPAP Plans was a reasonable alternative to those dealers who did not choose to use newspaper, radio, television or catalog advertising.

33. The provision in Subsection 2(d) that payments or allowances must be made available on proportionally equal terms "to all other customers competing in the distribution of such products or commodities" means only customers who compete in the resale or distribution of products "of like grade and quality." *Atlanta Trading Corp. v. FTC.*, 258 F. 2d 365-70. Although alleged in the complaint, there is no evidence in the record that dealers who purchased Sunbeam shavers and appliances exclusively from wholesale distributors were customers of respondent. Under the evidence, the only dealer customers of respondent were the 81 large dealers who purchased shavers direct from respondent. Under the theory of the complaint, these 81 large dealers were the favored customers, and those dealers who purchased exclusively from wholesale distributors in amounts less than the \$440 and \$750 minimums specified in the LPAP Plans were the disfavored dealers. Counsel for respondent contends that the evidence of record does not establish that competition exists "in the distribution of such products or commodities" because the evidence does not show that (1) the allegedly favored and disfavored dealers were located in reasonably close geographic proximity to one another; (2) that they were engaged in the resale or distribution of goods "of like grade and quality"; and (3) the purchase and resale of such goods were not shown to have occurred "at or about the same time."

34. Counsel supporting the complaint has attempted to show only the first of the above factors, "geographic proximity." This was through the testimony of Mrs. Simpson and the exhibit maps of Richmond, Milwaukee, Baltimore, and Washington prepared by her. In *J. Weingarten, Inc.*, Docket No. 7714, evidence to the effect that the stores of allegedly disfavored customers were "located in sufficiently close proximity to Weingarten stores that competition between them is a certainty" was held to be insufficient under Section 2(d). The Commission held that complaint counsel must show:

* * * that the stores shown to compete with (the favored customer) were actually stocking and selling an allegedly discriminating supplier's goods at approximately the same time when (the favored customer) induced and received the promotional allowances.

In that case the Commission rejected as insufficient the testimony of the manager of two drug stores in Houston that he purchased the products of Max Factor & Co., and Shulton, Inc., two of Weingarten's suppliers. The Commission said:

The only specific product identified in the testimony as purchased from the two suppliers is Shulton's "Desert Flower Creme Deodorant". This, then, is the only product which we know that both Weingarten and the witness purchased and resold in 1958 and 1959. We have no idea how extensive the witnesses' purchases of this item were; whether it was stocked in both stores; and whether it was stocked and resold at or during the time when the respondent was soliciting and receiving an allegedly discriminatory allowance from Shulton * * *. The wholesaler testimony adduced in the record is defective in another respect in that it fails to identify the particular stores serviced which are in competition with Weingarten or, in the instance where stores are shown to compete, there is no showing that these stores handled and sold items similar in grade and quality to those purchased by Weingarten from suppliers who granted it an allegedly discriminatory promotional allowance * * *. Antitrust cases and, in particular, Robinson-Patman cases, require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made.

General statements by dealers that they consider themselves to be in competition with all other dealers in the same city are not sufficient. *International Milling Co.*, Docket No. 7136. The evidence of record is undisputed that respondent's electric shavers were not of like grade and quality nor were respondent's appliances of like grade and quality. There were at least two different types of men's shavers and two different types of ladies' shavers. There were eight or ten different types of appliances. Complaint counsel stated that he could not "break the thing down product by product. I would be as

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aged as Methusela on that basis" (Tr. 702). Upon the basis of the evidence, it is found that complaint counsel has not established that competition exists "in the distribution of such products or commodities" as required by Section 2(d) and the cases decided thereunder.

35. One of the cases relied upon by both complaint counsel and counsel for respondent is *Lever Brothers Company*, 50 F.T.C. 494 (1953), commonly referred to as one of the soap cases. Lever Brothers offered two advertising promotion plans. Under the first plan, Lever offered payments for services based upon the number of cases of each product purchased by the customer during the contract period. The amount paid, which varied according to the product and with the type of advertising, ranged from 12½ cents to 20 cents per case for newspaper advertising and from 8 to 9 cents per case for handbill or radio advertising. Customers who did not use the first plan were entitled, under the second plan, to payments of 6 cents per case if they furnished a feature sale supported by in-store display. Customers using the second plan had the option of promoting their sales through newspaper, radio, or handbill advertising and receiving payment therefor, at the per case rates specified in the first plan. In that case (*Lever Brothers*), counsel supporting the complaint argued, as he does in the present case, that advertising allowances "were not available" to all of *Lever Brothers'* customers, because they were not suitable for, or usable by, certain customers. The Commission held that, although some customers failed to earn payments for newspaper advertising because their volume of purchases of *Lever* products did not warrant such payments, the plan offered alternative forms of participation which were effective and suitable, and, therefore, available as a practical matter, to customers who did not participate in the plans' newspaper advertising alternative. In his initial decision, the hearing examiner found that:

No witness has appeared in this proceeding who testified that he wished to participate in the advertising allowances but could not do so because of the expense. Furthermore, any customer, who for any reason does not wish to advertise, can avail himself of the promotional allowances at the rates provided by using handbills, radio or television or by conducting feature sales with display only (510).

The Commission adopted this decision and said:

In other words, the newspaper advertising allowances is a part of the comprehensive plan of payment for promotional services offered by respondents to their several hundred thousand customers throughout the country. The conditions under which these customers operate, of course, vary. Although it appears that the use of advertising by means of newspaper, handbills, or

store displays is general throughout the country, we will assume that among these many customers will be found some who do not find newspaper advertising practical. There is no proof, however, that either handbills or store displays are not reasonably practical for all (50 F.T.C. at 510).

36. In the Commission's Guides For Advertising Allowances and Other Merchandising Payments and Services For Compliance With Section 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, adopted May 19, 1960, the following example is given by the Commission as a guide "to businessmen who want to avoid violating the laws against giving or receiving improper promotional allowances, including advertising or special services, for promoting products":

Example: The seller's plan provides for furnishing demonstrators to large department store customers. He must provide usable alternatives to his customers who run other types of stores and compete with these customers but cannot use demonstrators. The alternatives might be services of equivalent value that the competing customers could use, or payments of like value for advertising or displays furnished by the customers.

The above example suggested by the Commission as a guide to businessmen indicates that the Commission considers that both "payments" and "services" may be used and considered as reasonable "alternatives" in an advertising plan or plans.

37. The advertising plan involved in *Atlantic Products Corporation, et al.*, Docket No. 8513, opinion of the Commission, dated December 13, 1963, was quite different from the plans here under consideration. In that case, Atlantic was charged with violating Section 2(d) by failing to make advertising and promotional allowances available to all competing customers on proportionally equal terms. The complaint was directed against that provision of respondent's five percent advertising allowance on "regular line" luggage, whereby minimum purchases of \$1500 over specified six-month periods were required in order for the customer to qualify for the allowance. The evidence disclosed that the \$1500 minimum purchase requirement had the effect of excluding from 85 to 90 percent of Atlantic's customers from any participation in the plan. The Commission held that the inclusion of a minimum-purchase requirement in an advertising allowance plan, while not *per se* a violation of 2(d), had the effect of rendering Atlantic's plan illegal because 85 to 90 percent of Atlantic's customers did not purchase in sufficient amounts to qualify for the allowance and because it was not demonstrated that a lower minimum, under which many more customers could qualify, would be impractical or burdensome for the seller.

Unlike the Atlantic plan, Sunbeam's LPAP Plans offered an alternative to those dealers who did not choose to buy in the \$440 and \$750 minimums specified in respondent's plans for newspaper, radio, television, or catalog advertising. For these dealers, respondent's plans offered the Appendix B display or direct mail advertising material with no minimum-purchase requirement. Sunbeam's LPAP Plans provided a comprehensive choice of qualitatively equivalent forms of advertising and promotion which were suitable to the needs of all types of dealers, large or small. Under respondent's LPAP Plans, and unlike those in Atlantic, no purchase minimums of any kind were required of 90 to 95 per cent of the dealers who purchased in small quantities and preferred to use the Appendix B display or direct mail advertising offered as an alternative to newspaper, broadcast, or catalog advertising.

38. There is no evidence in this record of a dealer to whom proportional and qualitatively equivalent promotional allowances were not available in theory and in practice under respondent's plans. There is no evidence that any dealer preferred one of the alternatives in respondent's plans but found it beyond his reach. What are the standards to be used in assessing the requirements of Section 2(d) with respect to an advertising plan? The Commission stated in its decision in *Lever Brothers*,⁹ *supra*, that the intent of Congress in passing Section 2(d) was to eliminate discrimination in the payments for services and facilities rendered, particularly in the advertising field. In passing on the legality of payments for services and facilities rendered under Section 2(d) and whether a promotional plan conformed to the express Congressional intent, the Commission stated that: "It must be honest in its purpose and fair and reasonable in its application." One of the most recent expressions of opinion by the Commission as to that type of advertising program which will meet the tests of Section 2(d) is stated by the Commission in its latest decision in the *Exquisite Form Brassiere*¹⁰ case, issued on January 20, 1964, as follows:

* * * we emphasize that the manufacturer engaging in advertising must do so through a comprehensive, nondiscriminatory program containing reasonable alternatives for those small retailers unable to participate in cooperative newspaper advertising. Such a program must not favor the large retailer and should provide for the small retailer some sort of financial aid in methods of advertising economically available to him. Further, the plan, with its alternatives, must be uniformly offered in its entirety to all competing retail customers.

⁹ *Lever Brothers Co.*, Docket No. 5585, 50 F.T.C. at 512.

¹⁰ *Exquisite Form Brassiere, Inc.*, Docket No. 6966, January 20, 1964.

39. This hearing examiner is of the opinion that respondent's LPAP Plans contain reasonable alternatives for those small dealers who may not be able to or do not choose to participate in newspaper, broadcast, or catalog advertising. Respondent's plans, with their alternatives, were offered in their entirety to all dealers in Sunbeam shavers and appliances,¹¹ did not favor the large dealer and provided the small dealer an alternative form of promotional advertising which was useful and suitable to his needs. In sum, this hearing examiner is of the opinion that respondent's LPAP Plans meet the tests outlined by the Commission in the *Lever* and *Exquisite* cases for compliance with Section 2(d).

40. Respondent's counsel requests that the complaint should be dismissed because:

1. The allegations of the complaint have not been established by the evidence;
2. The Shaver Plan was abandoned on April 7, 1958, more than one year prior to the issuance of the complaint herein, and will not be resumed; and
3. The Appliance Plan was abandoned in April 1960, and, under the decision of the Commission in *Bearings, Inc., et al.*, Docket No. 7134, January 22, 1964, the evidence with respect to all plans has become stale and no useful purpose would be served in making an adjudication on such a cold record.

After carefully considering the entire record, the hearing examiner is of the opinion that the allegations of the complaint have not been established and that the complaint should be dismissed. Accordingly,

ORDER

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

OPINION OF THE COMMISSION

By Elman, *Commissioner*:

The complaint, issued on February 13, 1959, charges respondent with violation of Section 2(d) of the Clayton Act, as amended. Respondent is alleged to have made payments for cooperative advertising to certain retailers who purchased its merchandise in large quantities, without making such payments available on proportionally equal terms to competing retailers. After full evidentiary hear-

¹¹ The Electric Tool (CX 4) and Lawn Mower (CX 5) Plans were offered simultaneously with the Shaver (CX 2) and Appliance (CX 3) Plans.

ings, the hearing examiner filed an initial decision dismissing the complaint.

At issue in this case is the legality of certain "Local Promotion Advertising Plans" established by respondent early in 1957. There were four such plans, but evidence was presented only as to two, involving small appliances and electric shavers. Since they are basically similar, a description of the electric-shaver plan will provide an adequate basis for understanding the operation of both.

Respondent distributed its shavers directly to some 81 large retailers, and indirectly (through appliance and drug wholesalers) to thousands of smaller retailers. Under respondent's plan, which was offered uniformly to all competing retailers, any retailer, whether he bought directly or through a wholesaler, who made a single purchase for shavers in the amount of \$440 or more earned a credit on respondent's books equal to 14% of the "suggested dealer cost" (i.e., estimated wholesale price) of the merchandise. Such credits, which could be accumulated and used at any time prior to January 31 of the year following the one in which they were earned, would entitle the retailer to be reimbursed by respondent for local newspaper, radio, television, or catalog advertising of respondent's shavers.

Any retailer who ordered less than \$440 worth of shavers did not earn such a credit, but was offered his choice from a wide variety of point-of-sale display material and direct-mail advertising material, including catalog pages, circulars, in-store displays, banners, and postcards. Respondent assigned a price to each item of promotional material equal to its own direct cost in producing it, and the retailer was permitted to select so much of this material as he wished within the 14% limit. The purchaser of an order larger than \$440 could choose to receive these promotional materials instead of the cooperative advertising credit, but he could select only one or the other.

The hearing examiner, purporting to apply standards laid down in *J. Weingarten, Inc.*, F.T.C. Docket 7714 (decided March 25, 1963) [62 F.T.C. 1521], resolved certain threshold issues in favor of respondent. These issues are basically two: proof of competition between favored and disfavored customers, and whether the disfavored customers were customers of respondent.

1. Section 2(d) requires that a seller who pays any of his customers for services in connection with the resale of his products or commodities make such payments available on proportionally equal terms, not to all of his other customers, but only to those customers "competing in the distribution of such products or commodities"

with the favored customers. This limitation on the requirement of proportionalization has been interpreted to mean, for example, that a seller is not, "without any time limitation whatsoever * * *, irrevocably committed upon making the first sale to hold open the same promotional allowance to all other prospective purchasers or to refuse to deal with them." *Atalanta Trading Corp. v. F.T.C.*, 258 F. 2d 365, 372 (2d Cir. 1958). Nor is he obliged to "give advertising allowances on all his products if he elects to accord them on one or more articles." *Id.*, at 369. And he need not make such allowances available except to competitors of the favored customers.

In the present case, respondent established a plan under which its customers received payments for promoting a particular line of products, electric shavers. This line consists of only two articles, men's and women's Shavemasters, of which the latter accounts for a relatively small volume of sales. Complaint counsel showed, further, that some customers received payments under the plan while it was in effect and that some of the favored and disfavored customers were located in the same local trade area. At this point, we think, the burden shifted to respondent of producing evidence that such customers were not, in fact, competing in the distribution of articles covered by the plan; and that burden was not met here. Such a distribution between complaint counsel and respondent of the burden of coming forward with evidence in a Section 2(d) case is required in the interest of fairness and of effective statutory enforcement.

2. Section 2(d) is not violated unless the disfavored customers are customers of the supplier charged with violating the statute (see, e.g., *American News Co. v. F.T.C.*, 300 F. 2d 104, 109 (2d Cir. 1962)); and here the allegedly disfavored customers actually purchased from intermediate distributors, not—as the allegedly favored customers did—directly from respondent.

In limiting the prohibitions of Section 2(a) of the Clayton Act to price discrimination between purchasers from the seller charged with violating the statute, Congress recognized that the grant of a discriminatory price by the seller's customer to *his* customer is not properly chargeable to the original seller, unless, of course, the intermediary is a sham or dummy, so that the original seller is, in practical effect, the grantor of the discrimination. See, e.g., *Champion Spark Plug Co.*, 50 F.T.C. 30. Similarly, the grant of a discriminatory allowance by a wholesaler to some of his retailer customers does not make the wholesaler's supplier liable under Section 2(d).

In the present case, however, respondent itself, not its wholesalers, granted the advertising and promotional allowances in question, and granted them directly to the allegedly disfavored retailers. Even though the latter purchased respondent's merchandise from wholesalers, the wholesalers played no significant part in the transactions alleged to violate Section 2(d). As the direct and intended recipients of payments by respondent for the promotion of respondent's goods under a plan devised and implemented by respondent, these retailers were, we think, "customers" of respondent within the meaning of the statute. Any other construction would defeat the plain intent of Congress in enacting Section 2(d)—to prevent sellers from discriminating between competing resellers in the granting of advertising and other promotional allowances.

The main issue in this case is whether respondent's plan for granting advertising and promotional payments to its customers, as described earlier, satisfies the requirement of Section 2(d) that such payments be "available on proportionally equal terms" to competing customers. Like other provisions of the price discrimination law, this requirement "does not place an impossible burden upon sellers." *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759. Mathematically exact proportionality is not required, and a plan is lawful so long as it is "honest in its purpose and fair and reasonable in its application." *Lever Brothers Co.*, 50 F.T.C. 494, 512. Cf. *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 61, n. 6. The thrust of the statute is prevention of discrimination by sellers in granting advertising or other promotional payments to their customers, especially discrimination favoring large buyers over small. See *F.T.C. v. Simplicity Pattern Co.*, *supra*, at 69; H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936). A common method of such discrimination is to restrict payments to large-volume or other selected accounts, thereby excluding, arbitrarily and unjustifiably, some customers from enjoyment of the benefits of the seller's advertising or promotional payments. See, e.g., *Atlantic Products Corp.*, F.T.C. Docket 8513 (decided December 13, 1963) [63 F.T.C. 2237].

The theory underlying the complaint in the present case was that the minimum-purchases requirement for receiving cooperative advertising credits from respondent (\$440 in the electric-shaver plan) unlawfully denied some of the respondent's customers the benefits of the cooperative advertising assistance provided by respondent to competing customers. The evidence, however, is to the contrary, as complaint counsel has tacitly conceded in abandoning the original theory of the complaint on this appeal. The record shows that if any

retailer of respondent's products desired to engage in newspaper, television, or radio advertising, the \$440 minimum would not be a practical obstacle, since he would have to stock at least that amount of merchandise to satisfy the demand that the advertisement would be expected to generate. As the Commission has observed, "the inclusion of a minimum-purchases requirement in an advertising allowance plan is not *per se* a violation of 2(d)". *Atlantic Products Corp.*, *supra*, p. 2 [63 F.T.C. 2237]. Clearly, on the particular facts of record here, respondent's minimum-purchases requirement, which was not shown to exclude any customer who might have wished to participate in cooperative advertising, was not discriminatory and hence not unlawful.

During the trial of this case before the hearing examiner, complaint counsel injected another theory of Section 2(d) liability, which he concedes (Appeal Brief, pp. 6, 31) was not in the contemplation of the Commission when it decided to issue the complaint. The theory is that cooperative advertising is not usable by many of respondent's customers, whether or not any minimum-purchases requirement is imposed, and that respondent has failed to afford such customers alternative forms of promotional assistance of equal value, thereby violating the proportionalization requirement of the statute. Since the examiner found, we think correctly, that the point-of-sale and other promotional materials made available by respondent to retailers in lieu of cooperative advertising credits were equivalent in value to such credits, complaint counsel's theory has no merit as applied to the facts of this case.

Complaint counsel further contends that, in view of the unique effectiveness of newspaper advertising as a method of sales promotion, no provision for alternative forms of promotional assistance to retailers who cannot or do not desire to utilize cooperative advertising in their business can satisfy the requirements of Section 2(d). The argument is far-reaching in its implications; if accepted, the consequence would be that no cooperative advertising plan would pass muster under the statute since inevitably there will be some retailers whose nature or scale of operation precludes their participation in cooperative advertising. Such retailers will prefer other kinds of promotional activity and benefits. Cooperative advertising, where conducted under a fair, reasonable, and non-discriminatory plan, has been recognized as a means whereby the competitive ability of small business is enhanced since the supplier undertakes to assume advertising costs which many retailers could not defray unaided. To hold every such plan inherently discriminatory and unlawful merely

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because not every retailer can or wants to take advantage of the plan would destroy cooperative advertising and thereby seriously harm the very class, small independent retailers, which Section 2(d) was enacted to protect.

In view of our disposition of the issues raised by complaint counsel's appeal, we are setting aside the initial decision of the hearing examiner and dismissing the complaint.

Commissioner MacIntyre concurred in the result.

FINAL ORDER

Upon consideration of the appeal of complaint counsel from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That the initial decision be, and it hereby is, set aside, and that the complaint against respondent be, and it hereby is, dismissed.

Commissioner MacIntyre concurring in the result.
