

Complaint

IN THE MATTER OF

CLAIROL INCORPORATED

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2(d) OF THE CLAYTON ACT*Docket 8647. Complaint, Sept. 15, 1964—Decision, June 24, 1966*

Order requiring a New York City manufacturer of beauty preparations to cease paying discriminatory promotional allowances to competing customers in two channels of trade, beauty salons and regular retailers selling to consumers for home use, in the sale of its hair coloring products, in violation of Section 2(d) of the Clayton Act.

COMPLAINT

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

PARAGRAPH 1. Respondent Clairol Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1290 Avenue of the Americas, New York, New York. Respondent Clairol Incorporated is a wholly owned subsidiary corporation of Bristol-Myers Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 630 Fifth Avenue, New York, New York.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of beauty preparations, principally hair coloring products, hereinafter collectively referred to as beauty products. Respondent is now and has been, at all times referred to herein, one of the largest concerns in the United States in volume of sales of hair coloring products. Respondent sells its beauty products to a large number of customers throughout the United States. Respondent's customers include beauty salons, beauty supply dealers, beauty schools, department stores, drug wholesalers and drug retailers.

PAR. 3. Respondent sells and distributes its beauty products in

commerce by causing said products to be shipped from its manufacturing plant located at Stamford, Connecticut, and to and from a warehouse located at Los Angeles, California, to purchasers thereof located in the several States of the United States and the District of Columbia. There is now and has been, at all times mentioned herein, a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, respondent is now, and has been in substantial competition with other corporations, individuals, partnerships and firms, engaged in the manufacture, sale and distribution of beauty products, many of which are also engaged in commerce between and among the various States of the United States and the District of Columbia.

Many of the purchasers of respondent's products, and customers of said purchasers, are in substantial competition with each other within the trading areas where such purchasers or customers of purchasers are located.

PAR. 5. In the course and conduct of its business in commerce, and particularly since April of 1959, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation for services or facilities furnished by or through such customers in connection with the processing, handling, sale or offering for sale of respondent's products, including incorporation by such customers of said products in beauty or hair care treatments; and such payments for services or facilities have not been made available on proportionally equal terms to all other customers competing with such favored customers, including customers who resell to purchasers who compete with said favored customers.

For instance, respondent has engaged in cooperative advertising programs with certain of its beauty salon customers whereby advertisements have been placed in newspapers, linking said beauty salon customers' names with respondent's products, to the value and benefit of said customers. Payment for these advertisements has been made by respondent to said beauty salon customers, or their agents. Payments in 1960 to one favored beauty salon organization, operating beauty salons in leased space in a substantial number of department stores and ladies' specialty stores located throughout the United States, approximated the amount of the said customer's purchasers for the same calendar year.

In another instance, a retail drug chain located in Cleveland, Ohio, was paid several thousand dollars, approximately, in 1961 and 1962 as a promotional allowance on certain of respondent's products purchased by said retail drug chain, and for demonstrators furnished by and utilized by said retail drug chain in a hair care clinic.

Respondent has not offered to pay, or paid, or otherwise made such allowances available on proportionally equal terms to all customers competing with said favored customers, including customers who resell to purchasers who compete with said favored customers.

PAR. 6. The foregoing alleged payments and allowances made by respondent in the sale of its products are in violation of subsection (d) of Section 2 of the Clayton Act, as amended.

Mr. Ernest G. Barnes, Mr. Thomas P. Athridge, Jr., and Mr. Charles A. Price supporting the complaint.

Mr. Gilbert H. Weil and Mr. J. Richard Edmondson, 60 East 42nd St., New York 17, N.Y. for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

JULY 16, 1965

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I. THE COMPLAINT

1. The complaint herein was issued on September 15, 1964, charging respondent, Clairol Incorporated, with violations of subsection (d) of Section 2 of the Clayton Act as amended, which subsection provides, as follows:

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.

2. In particular the complaint alleges that since April of 1959, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation for services or facilities furnished by or through such customers in connection with the processing, handling, sale, or offering for sale of respondent's products, including incorporation by such customers of said products in beauty or hair care treatments; and such payments for services or facilities have not been made available on proportionally equal terms to all other customers competing with such favored customers, including customers who resell to purchasers who compete with said favored customers.

II. THE ANSWER

3. Respondent, in its answer filed October 22, 1964, admitted making certain payments to certain beauty salon customers toward their cost of advertising certain hair coloring services of their salons, which payments for such advertising have not been made available on proportionally equal terms to all other beauty salon customers who competed in rendering such hair coloring services with the beauty salons that received such payments. Respondent also admitted that such payments were not made on proportionally equal terms to customers of respondent who resold respondent's products to beauty salons who thus competed with the beauty salons that received such payments. (Answer, Para. 2.)

4. Respondent further admitted that certain sums of money were paid, in 1961 and 1962, to a retail drug chain located in Cleveland, Ohio, as promotional allowances on certain of respondent's products purchased by that retail drug chain, and that certain sums of money were also paid to that retail drug chain for demonstrators furnished by and utilized by that retail drug chain in a hair care clinic. Only insofar as the payments for the demonstrators are concerned, respondent admitted that such payments were not offered, paid or otherwise made available on proportionally equal terms to all of respondent's customers competing with the favored retail drug chain, or to respondent's customers who resold to purchasers who competed with that retail drug chain. (Answer, Para. 2.)

5. Respondent, however, denied that any of the acts alleged in the complaint to have been performed by respondent, and which respondent did in fact perform, are, as a matter of law, violations of Section 2 of the Clayton Act, as amended. (Answer, Para. 3.)

III. STIPULATIONS AS TO THE FACTS

6. On April 30, 1965, counsel for both parties signed a stipulation as to the facts incorporating therein 113 attachments or exhibits which, together with the complaint and answer herein, constitute the entire record in this proceeding.

IV. PROPOSED FINDINGS AS TO THE FACTS AND RULINGS THEREON

7. On June 15, 1965, opposing counsel submitted proposed findings as to the facts, proposed conclusions, and briefs in support thereof. In addition, oral argument thereon was heard by the hearing examiner on June 28, 1965. All proposed findings have

been considered by the hearing examiner, and those not incorporated in this initial decision either verbatim or in substance are hereby rejected.

V. RESPONDENT CORPORATION AND ITS PRODUCTS IN GENERAL

8. Respondent herein is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 1290 Avenue of the Americas, New York, New York. It is a wholly-owned subsidiary corporation of Bristol-Myers Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 630 Fifth Avenue, New York, New York. (Complaint, Para. 1; Answer, Para. 1.)

9. Respondent is now, and has been, engaged in the manufacture, sale, and distribution of beauty preparations, principally hair coloring products. At all times referred to herein, it has been one of the largest concerns in the United States in volume of sales of hair coloring products. (Complaint, Para. 2; Answer, Para. 1.) Its product line as of the time the complaint herein issued, consisted almost entirely of hair care products, principally hair coloring products and items used in connection with the application of said hair coloring products. Respondent at one time marketed a mascara product which was discontinued in 1960, and, during 1964, a shaving aid preparation, Ultra Smooth, was introduced. During or about March 1965, respondent introduced a line of cosmetic products for uses other than the care or coloring of hair. (Stipulation, Para. 3.)

10. Respondent's sales are substantial, exceeding twenty (20) million dollars in 1964. (Stipulation, Para. 2.) Respondent sells its beauty products to a large number of customers throughout the United States, including independent beauty salons, beauty salon chains, beauty supply dealers, beauty schools, department stores, drug wholesalers, rack jobbers, drug retailers and other retailers. (Complaint, Para. 2; Answer, Para. 1; Stipulation, Para. 1.)

VI. COMMERCE

11. Respondent sells and distributes its beauty products in commerce by shipping them from its manufacturing plant located at Stamford, Connecticut, and to and from a warehouse located at Los Angeles, California, to purchasers thereof located in the several States of the United States and the District of Columbia.

There is now and has been, at all times mentioned herein, a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended. 38 Stat. 730 (1914); 15 U.S.C. § 12 (1965). (Complaint, Para. 3; Answer, Para. 1.)

12. In the course and conduct of its business in commerce as aforesaid and as hereinafter referred to, respondent is now, and has been in substantial competition with other corporations, individuals, partnerships and firms engaged in the manufacture, sale and distribution of beauty products, many of which are also engaged in commerce between and among the various States of the United States and the District of Columbia. Many of the purchasers of respondent's products, and customers of said purchasers, are in substantial competition with each other within the trading areas where such purchasers or customers of purchasers are located. (Complaint, Para. 4; Answer, Para. 1.)

VII. RESPONDENT'S SALE DISTRIBUTIONAL ORGANIZATION—ITS POLICIES AND PRODUCTS

13. During the period 1960 through 1964, respondent sold, and it now sells, its products in interstate commerce to independent beauty salons, beauty salon chains and beauty supply dealers; hereafter sometimes collectively referred to as the beauty trade. Respondent's products purchased by the beauty trade are ultimately incorporated into hair care treatments rendered to customers of beauty salons on the premises of such beauty salons. (Stipulation, Para. 1A.) During this same period respondent also sold, and it now sells, its products in interstate commerce to drug wholesalers, rack jobbers, department stores, drug retailers, and to other retailers; hereinafter sometimes collectively referred to as the drug trade. Respondent's products purchased by the drug trade are primarily purchased for ultimate resale to consumers for hair care treatments in the home. (Stipulation, Para. 1B.)

14. Respondent's sales and distributional organization and policies, with respect to the products involved in the discriminations alleged in the complaint, are divided into two distinct and separate divisions. One division is concerned with the beauty trade and its channels of distribution which lead to the purchase of respondent's products by beauty salons for incorporation into hair care or hair coloring treatments. The other division is concerned with the drug trade and its channels of distribution which lead to

the purchase of said products by consumers for self-application in the home. (Stipulation, Para. 17A.)

15. Respondent is, however, an integrated corporation. Both the beauty and drug trade "divisions" report to the corporate president who is the chief executive officer. Until December 31, 1964, the corporate executive vice-president was the principal operating officer responsible for advertising and sale of all products in respondent's beauty trade and drug trade divisions. (Stipulation, Para. 17B1; Attachments 99-100.)

16. With the exception of the aforementioned corporate officers who have primary responsibility for the advertising, sale and distribution of respondent's products, the sales organizations for the beauty trade and the drug trade are generally operated as separate and distinct divisions of respondent. (Stipulation, Para. 17B2-3.) Respondent's prices for its products sold to the beauty trade are different from those for the same products sold to the drug trade; such prices in each customer category being determined in accordance with the traditional and competitive pricing practice distinctive to each particular field. (Stipulation, Para. 17C.) Respondent's sales, merchandising and promotional methods, strategy, and programs, including cooperative promotional activities, differ as between the beauty trade and the drug trade field.

17. From 1960 through 1964, respondent sold almost all of its different product items to both the beauty trade and the drug trade. As of 1964, the products sold only to the beauty trade were: Blue Lightening Powder Bleach; Salon Formula Regular oil shampoo tint; Remov-Zit; Sylk; and Clairfill. Products sold only to the drug trade, introduced during the year 1964, were: Ultra Smooth, and Miss Clairol hair Spray. (Stipulation, Para. 4A.)

18. Respondent's products which were and are sold to the beauty trade and to the drug trade have identical chemical formulas, with the exception of shampoos, which are sold to the beauty trade in a more concentrated form than when sold to the drug trade. (Stipulation, Para. 4B.) Many of respondent's products, including some of respondent's largest selling products, sold to both the beauty trade and the drug trade, are packaged in identical packaged sizes, and, in some instances, in identical packages. (*Ibid.*)

19. Respondent's principal selling product, Miss Clairol Hair Color Bath (Regular and Creme Formula) was, prior to July of 1963, sold to the beauty trade and to the drug trade in identical

packaging. Subsequent to July of 1963, Miss Clairol Hair Color Bath has been sold to the drug trade in individual two (2) ounce bottles (see Attachments 6A, 6B) packaged one dozen (12) bottles to a unit pack, and to the beauty trade in individual two (2) ounce bottles (see Attachment 7B) packaged six (6) bottles to a carton, a so-called "six-pack" (see Attachment 7A). (Stipulation, Para. 4C 1.) The two (2) ounce bottle and the contents thereof are identical for both the beauty trade package and the drug trade package. (Stipulation, Para. 4B.) Both the box in which the two (2) ounce Miss Clairol product intended for the drug trade is contained and the carton in which the six (6) two (2) ounce bottles intended for the beauty trade is contained carry warnings against use prior to application of a preliminary "patch" test for skin irritation which is recommended by respondent. (Attachments 6A and 7A.) Labels placed on each two (2) ounce bottle intended for the drug trade and on each two (2) ounce bottle intended for the beauty trade identify the particular shade of Miss Clairol. (Attachments 6B and 7B.) A direction leaflet packaged in the six (6) bottle carton intended for the beauty trade sets forth the details of the preliminary patch or skin test for hypersensitivity recommended by respondent. (Attachment 7C.) Similarly, each container box of two (2) ounce Miss Clairol intended for the drug trade contains a set of directions for use and application of the product. (Attachments 6C, 103A, 103H.) These drug trade instruction leaflets for both Miss Clairol Regular and Creme Formula contain detailed instructions concerning the patch or skin hypersensitivity test, the preparation of the hair coloring mixture, and the variants in application procedure depending upon whether the hair has or has not been previously colored. (*Ibid.*) These leaflets also contain a detailed "color selector" chart informing the reader as to the proper Miss Clairol color which should be used to achieve the desired result. (*Ibid.*)

20. The primary difference in packaging Miss Clairol Hair Color Bath (Regular or Creme Formula), subsequent to July 1963, is that *each* two (2) ounce bottle intended for the drug trade is packaged with a complete instruction leaflet, whereas the "six-pack" beauty trade package contains only one leaflet with each unit of six (6) two (2) ounce bottles, and that leaflet sets forth only the skin hypersensitivity test. (Stipulation, Para. 4C 1; compare Attachments 6C, 103A, 103H, with Attachment 7C.)

21. Respondent's products Silver Drops, Red Fashion Colors, Salon Formula Creme Toner, Applicators, Born Blonde, Kind-

ness, Creme After Rinse Packettes, Instant Whip Lady Clairol, Lady Clairol Whipped Creme, and Lady Clairol Lightening Boosters are packaged in identical packages for both the beauty trade and the drug trade. (Stipulation, Paras. 4C 2, 4C 5, 4C 6.)

22. Other of respondent's products, while of identical chemical formulas (Stipulation, Para. 4B.), are packaged in different size containers, depending upon whether sold to the beauty trade or to the drug trade.

23. Whether hair coloring treatments incorporating respondent's products are administered at home or in a beauty salon, the chemical changes which respondent's products undergo when applied to the hair are identical. It is the molecular alteration of the original color molecules or "intermediates" that, when mixed with a dilute hydrogen peroxide solution or "developer," impart color to the hair by becoming embedded within the hair shaft whenever and wherever applied. (Stipulation, Para. 18.)

VIII. "PUSH MONEY" PAYMENTS (DRUG TRADE)

24. Respondent now sells, and during the three-year period 1961-1963, sold its products to Gray Drug Stores, Inc., a large retail drug chain located in Cleveland, Ohio, operating approximately 150 retail drug outlets, many of which are located in and surrounding the Cleveland, Ohio, trading area. Respondent commenced certain "push money" payments to Gray Drug Stores, Inc., in October of 1959, and continued such "push money" payments through 1962. "Push money" payments are payments which are made to sales people for selling a particular product. (Stipulation, Para. 12B; Attachments 86-88.) During the period 1961-1962, respondent made the following "push money" payments to Gray Drug Stores, Inc.:

<i>Period</i>	<i>Year</i>	<i>Amount</i>
First Quarter	1961	\$354.63
Second Quarter	1961	401.26
Third Quarter	1961	604.38
Fourth Quarter	1961	886.14
First Quarter	1962	551.27
Second Quarter	1962	417.92
Third Quarter	1962	597.45
Fourth Quarter	1962	439.03

(Stipulation, Para. 12B.)

The payments made by respondent during the year 1961 were equivalent to ten per cent of the retail price of respondent's product Pure White Creme Developer, and five per cent of the retail price of respondent's shampoo products. (Attachment 86.) The payments made by respondent during the year 1962 were equivalent only to ten per cent of the retail price of respondent's Pure White Creme Developer. All of these payments were made as push money payments. All such push money payments were discontinued at the end of 1962. (Stipulation, Para. 12B.)

25. During the three-year period 1961-1963, respondent contemporaneously sold Pure White Creme Developer and shampoo products to other retailers, including department stores, located in the Cleveland, Ohio, trading area which were, and are, in substantial competition with Gray Drug Stores, Inc., in the resale of such products to consumers. (Stipulation, Paras. 1B, 12C.) Respondent did not pay, and has never paid, offered to pay, or otherwise made available on proportionally equal terms, or on any terms, to competing retailers any equivalent or substantially equivalent promotional payment, or push money payment, on such products, or on any of respondent's products. (Stipulation, Para. 12C.)

26. During the three-year period 1961-1963, respondent contemporaneously sold Pure White Creme Developer and shampoo products to the drug wholesalers and to rack jobbers located in the Cleveland, Ohio, trading area. Those wholesalers and jobbers resold said products to retailers, including department stores, located in the Cleveland, Ohio, trading area. The retailers were and are in substantial competition with Gray Drug Stores, Inc., in the resale of respondent's products to consumers. (Stipulation, Paras. 1B, 12D.) During said three-year period, 1961-1963, respondent did not pay, and has never paid, offered to pay, or otherwise made available on proportionally equal terms, or on any terms, to the wholesalers and rack jobbers, located in the Cleveland, Ohio, trading area purchasing respondent's Pure White Creme Developer and shampoo products, any promotional payments, or push money payments. Also, during the aforesaid period, respondent did not pay, and has never paid, offered to pay, or otherwise made available on proportionally equal terms, or on any terms, any equivalent or substantially equivalent promotional payment, or push money payment, to retailers purchasing respondent's Pure White Creme Developer and shampoo products from such wholesalers or rack jobbers. (Stipulation, Para. 12E.)

IX. "DEMONSTRATOR" PAYMENTS (DRUG TRADE)

27. During the two-year period 1961-1962, respondent made payments to Gray Drug Stores, Inc., Cleveland, Ohio, as follows:

<i>Year</i>	<i>Amount</i>
1961	\$1,500
1962	1,500

Those payments were made to cover the cost of demonstrators used by Gray Drug Stores, Inc., in hair care clinics. (Stipulation, Para. 13.) During this period 1961-1962, payments for demonstrators were not offered, paid, or otherwise made available by respondent on proportionally equal terms to all other of respondent's customers competing with Gray Drug Stores, Inc., in the distribution of respondent's products, or to respondent's customers who resold to purchasers who compete with Gray Drug Stores, Inc. (Complaint, Para. 5; Answer, Para. 2.) The customers of respondent and purchasers from customers of respondent who compete with Gray Drug Stores, Inc., and to whom such payments for demonstrators were not paid, offered, or otherwise made available on proportionally equal terms by respondent, included department stores, drug and other retailers, and wholesalers and rack jobbers who resell respondent's products to consumers, or whose customers resell respondent's products to consumers. (Stipulation, Para. 1B; 12A; 12C; 12D; 12E; Attachment 85.)

X. DIRECT-PURCHASING RETAILER PROMOTIONAL ALLOWANCES (DRUG TRADE)

28. Commencing on or about May 1, 1964, respondent made available to all of its direct-purchasing retailer drug trade customers in the Baltimore, and Washington, D.C., trading areas, such as department stores and chain drug stores, a promotional allowance equivalent to five per cent of each such customer's total purchases of respondent's products. (Stipulation, Para. 14.) Commencing on or about August 1, 1964, such allowance was also made available by respondent to its direct-purchasing retailer customers in the Philadelphia trading area. Stipulation, Para. 15.) The terms and conditions of such allowances are set forth in written agreements entered into by respondent and its direct-purchasing retailer drug trade customers in the aforesaid trading areas who have elected to qualify for such allowances by agreeing to perform certain promotional services and facilities in connec-

tion with the resale of respondent's products to consumers. (Attachments 89-90, 92; Stipulation, Paras. 14A, 15A.) Payment of this promotional allowance is made each four month calendar period, upon proof of performance submitted by each such retailer customer.

29. In the Baltimore, Philadelphia, and Washington, D.C. trading areas, respondent has sold and now sells its products to drug wholesalers and rack jobbers, which products are identical to the products respondent contemporaneously sold and now sells to those direct-purchasing retailer drug trade customers to whom respondent has agreed to pay and now pays promotional allowances as described in the preceding paragraph. The unfavored wholesalers and rack jobbers resell respondent's products to department stores, drug stores, and to other retailers who were, and are, in substantial competition in the resale and distribution of respondent's products with the direct-purchasing retailer customers receiving promotional allowances from respondent pursuant to the written agreements, as aforesaid. (Stipulation, Para. 14C, 15B.) Respondent has not paid, offered to pay, or otherwise made available to its wholesaler and rack jobber customers in the Baltimore, Philadelphia, and Washington, D.C. trading areas, the five per cent promotional allowance paid to direct-purchasing drug trade customers in said trading areas, nor has any proportionally equal promotional plan or payment been offered, or otherwise made available, to such wholesaler and rack jobber customers. Furthermore, respondent has not paid, offered to pay, or otherwise made available to the retailers purchasing respondent's products through wholesalers and rack jobbers the five per cent promotional allowance paid to direct-purchasing retailer drug trade customers in the areas cited, who compete with the retailers purchasing respondent's products through wholesalers and rack jobbers in the resale of respondent's products to consumers, nor has any proportionally equal promotional plan or payment been offered, or otherwise made available, by respondent to such retailers purchasing respondent's products through said wholesalers and rack jobbers. (Stipulation, Para. 14D, 14C, 15B, 1B.)

XI. ALLOWANCES FOR NEWSPAPER ADVERTISING (BEAUTY TRADE)

30. During the period 1960 through 1964, respondent made substantial payments for newspaper advertising to some but not all of its beauty salon customers who contemporaneously purchased products of like grade and quality from respondent. The

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payments that were made by respondent to its beauty salon customers were not made, offered, or otherwise made available, on proportionally equal terms to all such customers. (Stipulation, Para. 5.) The purchases of some of respondent's beauty salon customers, and the payments or allowances received by such customers for newspaper advertising during 1962 and 1963 are substantially in excess of figures set forth below:

1962		Name and Address	1963	
Purchases	and Allowances		Purchases	and Allowances
\$ 8,000	\$ 2,000	Abraham & Strauss Brooklyn, New York	\$ 9,000	\$ 2,500
10,000	800	Charles of the Ritz New York, New York	15,000	6,000
6,000	2,000	Michael Kazan New York, New York	8,000	2,000
15,000	5,000	Maxim Kunin New York, New York	20,000	5,000
4,000	1,500	Martin's Brooklyn, New York	5,000	1,000
100,000	10,000	The Glemby Co., Inc. (Salon Service, Inc.) New York, New York	100,000	100,000
200,000	200,000	Seligman & Latz, Inc. New York, New York	200,000	200,000

(Stipulation, Para. 5A)

XII. SPECIAL "LINE" OR "CO-OP" ALLOWANCES (BEAUTY TRADE)

31. In addition to the payments or allowances set forth above, respondent made a payment of \$18,000 each year for the four years from 1961 through 1964 to Seligman & Latz, Inc., as a special "line" or "co-op" payment for newspaper advertisements placed by Seligman & Latz, Inc., which did not feature respondent's products, but which did include a small "line" in the advertisements which mentioned respondent's products by name. (See attachments 39-41.) No other customers were paid, offered, or in fact received such payments or allowances from respondent, although contemporaneously purchasing from respondent products of like grade and quality as those purchased from respondent by Seligman & Latz, Inc. (Stipulation, Para. 5C.)

XIII. COMPETITION BETWEEN FAVORED AND NONFAVORED BEAUTY SALONS PURCHASING FROM RESPONDENT

32. In many trading areas during the five-year period from 1960 to 1964, beauty salons purchasing products from respondent

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and receiving payments for newspaper advertising from respondent, as aforesaid, were and are in substantial competition with other beauty salons who were contemporaneously purchased identical products from respondent, but not receiving any advertising allowances or payments from respondent and who were not, in fact, offered such advertising payments or allowances by respondent on proportionally equal terms, or on any terms. Also, in many trading areas, beauty salons that were and are in substantial competition with each other and which did receive advertising payments or allowances from respondent, did not receive, and were not in fact offered, such payments or allowances by respondent on proportionally equal terms to those referred to above, although they contemporaneously purchased identical products from respondent. Beauty salon customers of respondent receiving such payments or allowances and beauty salon customers of respondent not receiving such payments or allowances, or not receiving such payments or allowances on proportionally equal terms, were and are in substantial competition with each other in their handling of products purchased from respondent. (Stipulation, Para. 7.)

XIV. COMPETITION BETWEEN FAVORED BEAUTY SALON CUSTOMERS
PURCHASING FROM RESPONDENT AND BEAUTY SALONS PURCHASING
FROM BEAUTY SUPPLY DEALERS

33. The most substantial part of respondent's total sales to the beauty trade during the period 1960 through 1964 was to beauty supply dealers who purchased respondent's products contemporaneously with purchases of identical products by those beauty salons who purchased directly from respondent. These beauty supply dealers resell respondent's products to almost all beauty salons in the United States, and such beauty salons would thereby be purchasing respondent's products contemporaneously with purchases of identical products by beauty salons purchasing directly from respondent. During the period 1960 through 1964, many of the beauty salons purchasing respondent's products from beauty supply dealers were and are in substantial competition with beauty salons purchasing identical products directly from respondent. Furthermore, many of the beauty salons purchasing respondent's products from beauty supply dealers were and are in substantial competition with beauty salons purchasing identical products directly from respondent and receiving advertising

payments or allowances from respondent. Beauty salons purchasing respondent's products from beauty supply dealers were and are in substantial competition in their handling of respondent's products with beauty salons purchasing identical products directly from respondent and receiving such payments or allowances, as aforesaid. (Stipulation, Para. 9A.) Respondent does not, and has never, paid, offered to pay, or otherwise made available to beauty supply dealers any payments or allowances for newspaper advertising. Furthermore, respondent does not, and has never, paid, offered to pay, or otherwise made available, on terms proportionally equal to those referred to hereinbefore, any payments or allowances for newspaper advertising to beauty salons purchasing respondent's products from said beauty supply dealers. (Stipulation, Para. 9B.)

XV. BEAUTY SALONS AND THEIR FEES

34. Respondent's products purchased by beauty salons, including the beauty salons purchasing respondent's products from beauty supply dealers, are purchased for incorporation into hair care treatments administered by beauty operators, or beauticians, to customers of said beauty salons. Said hair care treatments are provided on the premises of such beauty salons. The bills rendered by the beauty salons to their customers specify a unitary charge for the hair care treatments rendered, without itemizing charges for the separate product and labor components; but such charges are ordinarily intended by the beauty salons to cover their costs for all such components, as well as some portion of their total operational costs and some amount of profit. (Stipulation, Para. 11.)

XVI. BEAUTY SALON PERSONNEL

35. Respondent's products which are distributed through the beauty trade are applied to the hair of consumers on the premises of beauty salons by employees who are either beauticians or hair colorists. Beauticians are ordinarily trained in a beauty school or with the equivalent of a beauty school education in a vocational high school. The fifty States of the United States, the District of Columbia and Puerto Rico, have minimum requirements ranging from 1,000 to 2,500 hours in beauty schools, or two years in a vocational high school, to become eligible for a license to practice as

a beautician. Several of the states permit apprenticeship training rather than in-school training, requiring the same or a greater number of hours of training. Little formal education is required to become a licensed beauty operator or beautician. An eighth grade education complies with the requirements established by many of the states, some states requiring no formal education whatsoever. (Stipulation, Paras. 21B, 21C; Attachment No. 106.)

36. Only 50 to 100 hours of the above-described schooling of operators is devoted to hair coloring, the major emphasis being placed on hair styling. Much of the hair coloring instruction involves the practical application of hair coloring on live models. (Stipulation, Para. 21C.) While beauticians who then intend to specialize in hair coloring may attend further classes offered by leading manufacturers of hair coloring products, for a period of two weeks, or two months at the rate of one day or evening a week, upon the completion of which they will receive a specialization certificate from the manufacturer, there is no requirement that beauticians using respondent's products have any such special training. (Stipulation, Para. 21D.) A beauty salon may have one or two such "specialists" to advise as to hair coloring in the salon. Larger salons may employ more. (Stipulation, Para. 21E.)

XVII. BEAUTY SALONS AND HAIR COLORING

37. Customers of beauty salons often specify the brand of hair coloring product that is used on their hair in the beauty salon. While beauticians may suggest a particular shade for the customers, many customers also specify the color or shade they desire. (Stipulation, Para. 21E.)

38. Charges by beauty salons for treatments incorporating various of respondent's products are as low as \$3.50 and as high as \$50. While the cost of respondent's products to be applied is not, as a general rule, the determinative factor in the amount charged by the beauty salon, such charges may be varied to cover additional product costs and services where the customers have long hair, or desire a color that requires blending of two or more of the standard coloring mixtures, particularly in the case of the lower-priced treatments. (Stipulation, Para. 19A.) Hair coloring treatments intended to produce highly specialized or stylized effects may cost customers considerably more than the lower-priced treatments. (Stipulation, Para. 19A.)

39. The procedures and mechanics of applying respondent's products are the same whether they are applied by beauticians or

colorists in beauty salons, or by consumers at home. (Attachments 101A-I, 6C, 103A-H, 104.) While hair colorists have a dexterity and skill in applying hair care products (Stipulation, Para. 21B.), respondent's products, whether applied by colorists in salons or by consumers themselves, have the overriding characteristic, as respondent itself insists, of ease and simplicity of use. (Attachments 6C, 102, 103A-H, 107-113.)

40. Special color effects and stylings, such as "Picture Framing," "Tortoise Shelling," "Winging," "Jewel Toning," require extra effort and time to tint the various parts or strands of the hair different colors, and some judgment to achieve a harmonious result. The manner in which the customer's hair is currently being styled may also be a consideration. (Stipulation, Para 21E.) In tinting various parts or strands of the hair, however, application techniques in getting the color on the hair do not vary. (Attachments 101A-H.)

41. Although many of respondents's products used in beauty salons are applied by colorists, some of respondent's products are applied in beauty salons by beauticians who are not skilled colorists. Respondent's shampoos, conditioners, rinses ("Come Alive Gray"), and semipermanent colorings ("Loving Care," "Silk & Silver," and "Sparkling Color"), do require very little skill and experience. (Stipulation, Para. 21F.) These products which require little skill and experience for application are some of the products concerned in advertising by beauty salon chains for which respondent has made payments not offered, accorded, or made available to competing beauty salons or not offered, accorded, or made available to said competing beauty salons on proportionally equal terms. (Attachments 10-38; Stipulation, Para. 19A.)

XVIII. FAVORED BEAUTY SALONS' ADVERTISING OF RESPONDENT'S PRODUCTS

42. Attachments to the stipulation of facts, numbers 10 through 38, are representative samples of the newspaper advertisements for which payments or allowances were made by respondent to favored beauty salons. These attachments vividly demonstrate that the particular Clairol product or products involved are always featured prominently in such advertisements. Said advertisements indicate that the Clairol product or products being advertised are of equal importance in the advertisement to the concomitant application or treatment with the product, or collat-

eral services advertised with the hair coloring, such as a shampoo and set. The gravamen of said representative advertisements is not at all that consumers should get a hair coloring application or treatment, but that they should get a "Clairol" product application or treatment. (Attachments 10-38.)

43. For instance, Attachment 10 advises consumers "no matter what the natural color of your hair, let us WASH AWAY CREEPING GRAY with CLAIROL LOVING CARE now in ELEVEN glowing shades, ranging from the sheer delicacy of PALE SHINING BLONDE TO NEW, YOUNG 'NATURAL BLACK' and all this week . . . to introduce you to Loving Care"; less prominently featured in the advertisement is the fact that the price of the Loving Care application includes a free shampoo and set. The primary purpose of this advertisement is clearly to introduce consumers to respondent's product Loving Care. Similarly, Attachment 14 advises: "YOUR HAIR SHOULD BE HANDLED WITH TENDER LOVING CARE by CLAIROL"; the free shampoo and set are less prominently featured. It is respondent's product as a product, rather than its application, that is the dominant part of said Loving Care advertisements, occupying the greater space and given the most prominent treatment.

44. Attachment 12 is also illustrative; the pitch of the advertisement is to the product rather than the application:

Color me young with wonderful CLAIROL LOVING CARE . . . Light a bright and fantastic glow in your hair naturally with tender . . . "Loving Care"! Gently brighten away greying years . . . let your true color shine with the subtle help of Miss Clairol's fountain of youth. There's a shade deftly created to light the sleekest coif or the swirliest bob with a new and lovely brilliance. Let us take away the dingy cloud of grey with Loving Care. Clairol Loving Care with shampoo and set only \$5 . . . for this week only.

45. Representative advertisements by beauty salon chains of respondent's other products, for which advertisements respondent has made payments to favored customers, establish that such products are also advertised with emphasis on the product itself. For instance, respondent's product, Miss Clairol, has in representative advertisements by said beauty salon chains been advertised to consumers as:

1. . . . Your head start on fashion
GLORIOUS MISS CLAIROL
COLOR FOR NEW
HAIR BEAUTY

Coming in clear and bright . . . dazzling Miss Clairol. The color

miracle that brightens your hair, the beautiful way to color grey, give hair a youthful glow, a fabulous new look. (Attachment 20)

2. *ONE TOUCH OF COLOR FROM MISS CLAIROL*
A SPECIAL MID-SUMMER PRICE FOR A FAMOUS MISS CLAIROL HAIR COLOR BATH. A MISS CLAIROL TOUCH UP BRINGS A NEW AND LOVELY LOOK TO YOUR HAIR, COVERS DRABNESS FROM GREY OR TOO MUCH SUN. IF YOU'VE THOUGHT OF TRYING A COLOR, THIS IS THE TIME. ONE-COLOR SPECIAL \$6.50.
(Attachment 17.)

46. Respondent's hair color lotions, in representative advertisements by beauty salon chains, are advertised as:

... NEW CLAIROL HAIR COLOR LOTIONS
... FOR EVERY WOMAN WHO EVER DREAMED OF HAVING
LOVELY HAIR COLOR

Not permanent tints—these exciting Hair Color Lotions penetrate just enough to shine naturally, beautifully and last through a month of shampoos. If you hate that gray, let us wash it away with CLAIROL LOVING CARE! If you ever wished your gray hair would gleam like purest silver, we'll bring out all its lovely potential with CLAIROL SILK & SILVER. If mousey (non-gray) hair has you in the doldrums, we'll give it an exciting color "pick-me-up" with CLAIROL SPARKLING COLOR. Even if you've never tried hair coloring, try it now! You'll love it. HAIR COLOR LOTION TREATMENTS, 3.50
(Attachment 21.)

47. It is clear that respondent's products constitute the greatest attraction in the advertisements and that the primary purpose of said advertisements is to sell consumers on the availability of respondent's products at the beauty salons.

XIX. RESPONDENT'S GENERAL ADVERTISING TO CONSUMERS

48. Respondent does substantial advertising of its products in national magazines such as Ladies Home Journal, McCall's, and Good Housekeeping, magazines directed primarily to women. Respondent also advertises in other magazines of general public circulation, such as Life. (Stipulation, Para. 16.) The advertising of respondent's products through national magazines is designed to stimulate drug trade sales of its products by "preselling" women on hair coloring which will be purchased through the drug trade as well as influence the choice of products selected by patrons in beauty salons. (Stipulation, Para. 20; Attachment 102, p. 5; Stipulation, Para 21E(4); Attachments 93A-B, 96A-B.) Indeed, the market for respondent's products is so extensive that according to respondent consumers purchasing respondent's products through the drug trade do so 10-12 times per year, spend an average of

\$40 per year on hair coloring products alone, and are ready and willing to buy a host of related items. (Attachment 102, p. 5.)

49. Respondent's product, "Condition," is advertised in national magazines as "easy and quick to use," and available at beauty salons and cosmetic counters. (Exhibit 93A-B.) Respondent's product, "Born Blonde," is similarly advertised as "surprisingly easy to use," neither containing nor requiring peroxide, "just poured on," also "[T]here's no sectioning, and the color 'takes' quickly." (Exhibit 95.) "Lady Clairol" is advertised as "a breeze," "[s]o quick and easy." (Exhibit 94.) "Come Alive Gray" is advertised as "Clairol's New Miracle Rinse," "[t]akes just minutes to rinse in glowing gray color," and is available "[a]t cosmetic counters and beauty salons." (Attachment 96A-B.) The advertising slogan for Loving Care is: "Hate That Gray? Wash It Away!" Consumers are advised that the product comes in ten shades and that they need only choose the tone most like their own. (Attachment 97A-E.) "Miss Clairol Hair Color Bath" is advertised as "Quick and Easy," and "[t]akes only minutes." Consumers are encouraged by "the fresh, young, even color you get *every time* with Miss Clairol." (Attachment 98A-E.)

XX. APPLICATION OF RESPONDENT'S PRODUCTS BY CONSUMERS

50. Products packaged by respondent to be distributed through the drug trade for home application contain instructions setting forth the procedures to be followed in such applications.

51. For instance, the leaflet packaged with Clairol Creme Toner (Salon Formula Oil Shampoo Tint) has the preliminary patch or skin test for hypersensitivity recommended by respondent, a Color Strand test to predetermine the final color which will result, a check list of "Do's and Don't's" to be followed prior to application, mixing directions, detailed instructions for first application and for retouch applications, both for lighter and darker shades. In addition, respondent's leaflet contains a Color Selector and Lightening Guide for the purpose of harmonizing the necessary lightening of the hair with the Creme Toner color selected. Respondent's other preparations have similar accompanying instructions.

XXI. BEAUTY TRADE—DISCRIMINATION BETWEEN FAVORED AND NON-FAVORED COMPETING BEAUTY SALONS

52. We must now determine whether respondent's acts in granting advertising allowances to some of its direct-purchasing

beauty salon customers during the period of 1960 to 1964, while not making such advertising allowances available on proportionally equal terms to competing beauty salon customers constitutes a violation of Section 2(d) of the Clayton Act.

53. Counsel for the respondent contends that although respondent's favored and nonfavored beauty salons operating in the same geographical and market area are in general competition with each other, they do not compete with each other in the distribution of respondent's products. This rather surprising result occurs, according to respondent, because the hair dye preparations which the competing beauty salons have purchased from respondent are "... used up and decharacterized by the salon as a necessary part of the personal service salons perform. . . ." Respondent further contends that such products having been "used up and decharacterized by the beauty salon" are not sold by the beauty salon to its customers but rather a hair dyeing service is sold. Respondent contends that "respondent's products cease to exist in the hands of the salon, and become incapable of being further redistributed." Relying upon such contentions, respondent avers that "The *sine qua non* of a Section 2(d) violation is missing."

54. To the contrary, counsel supporting the complaint contends that the advertising allowances furnished by respondent to its favored beauty salon customers were furnished "... in connection with the processing, handling, sale, or offering for sale . . ." of such products and that the favored and nonfavored customers have been "... competing in the distribution . . ." of such products with the clear result that respondent has violated Section 2(d) of the Clayton Act as alleged.

55. A reexamination of Section 2(d) of the Clayton Act reveals that in order to constitute a violation of that Act, the advertising services furnished to respondent's favored customers must have been furnished "... in connection with the processing, handling, sale, or offering for sale" of respondent's products. It is important to observe that the statutory words "processing, handling, sale, or offering for sale" are stated disjunctively with the logical effect that the statute covers any factual situation embraced in the meaning of any one of the four concepts or meanings included therein. We find that none of the words—processing, handling, sale, or offering for sale—are defined by the Clayton Act itself, and, with the sole exception of "processing" defined by the Supreme Court in the context of Section 2(e) of the Clayton Act in *Corn Products Refining Company v. Federal Trade Commission*,

324 U.S. 726, 744 (1945), none of those words in the context of Section 2(d) of the Clayton Act has ever been expressly defined by the Commission or the courts.

56. In interpreting such statutory words we are aided by two guiding principles. First, the words employed in the statute should be read in "... their normal and customary meaning," *Schwegman Bros. v. Calvert Corporation*, 341 U.S. 384, 388 (1951). Second, in interpreting a statute such as the Clayton Act, a result should be sought which is compatible with the legislative history, economic realities and fundamental purpose of that law, *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505, 516, 518 (1963).

57. "Processing," as defined in the *Corn Products* case, "... is a mode of treatment of materials to be transformed or reduced to a different state or thing," *supra*. This definition very clearly resembles the definition of "process" in Black's Law Dictionary and Webster's Dictionary.

58. "Handling" is defined in Black's Law Dictionary (4th edition, 1951) as meaning "... to control, direct, to deal with, to act upon, to perform some function with regard to or to have passed through one's hands, to buy and sell or to deal or trade in" Webster's New international Dictionary (3rd edition, 1963) defines "handling" as "1. b. process by which something is handled especially in a commercial transaction, (The problem was not the sale but the handling of the merchandise.)"

59. "Sale," or "offering for sale," is defined in the Uniform Sales Act in Section 1 (2) as "... an agreement whereby the seller transfers property and goods to the buyer for a consideration called the price." Many similar authoritative definitions might be cited.

60. From what we believe to be the "normal and customary meaning" of the word "sale," a sale is a transaction which contains the following elements: a. competent parties; b. mutual assent; c. property in which title is transferred; and d. consideration, generally in the form of money paid.

61. The facts in our present case meet all the requirements of a sale. There are competent parties, mutual consent, money is paid, and title to property in the form of hair dye or similar preparation is transferred from a beauty salon to a customer. Although a unitary fee is paid for the application of the hair dye, and although the larger part of that fee is for the service rendered, nev-

ertheless a part of the fee is unquestionably paid in consideration of the material or dye furnished. That part of the fee constitutes consideration for the sale of respondent's hair dye preparation.

62. The mere fact that the products in question have been, as respondent contends, "decharacterized" in the process of their application by the beauty salon technician, does not change the simple truth that a part of the fee paid by the customer was paid for respondent's product. For example, in *Frontier Asthma Co., Inc.*, 43 F.T.C. 117, 127 (1946), the Commission summarily rejected an argument by physicians that they were engaged only in the practice of medicine and had nothing to do with the sale of certain asthma preparations. Similarly, in *Sidney J. Mueller t/a Mueller Hair Experts*, 49, F.T.C. 586, 594 (1952), *aff'd*, 262 F. 2d 443, 447-448 (5th Cir. 1958), the Commission and the Court of Appeals for the Fifth Circuit rejected respondent's argument that he was only engaged in rendering a service of treatments for baldness, and was not engaged in the sale of any cosmetics or the other preparations used in administering such treatments.

63. We are convinced that respondent's favored beauty salon customers do in fact as well as in law sell respondent's products to their customers in the course of administering various hair care and coloring treatments, and that respondent's acts of discrimination between its beauty salon customers constitute violations of Section 2(d) of the Clayton Act, as amended.

XXII. BEAUTY TRADE—DISCRIMINATION BETWEEN NONFAVORED
WHOLESALE CUSTOMERS WHOSE NONFAVORED BEAUTY SALON CUSTOMERS
COMPETE WITH FAVORED BEAUTY SALON CUSTOMERS

64. As one of the alleged beauty trade discriminations, we must next determine whether respondent's acts in granting advertising allowances to some direct-purchasing beauty salons while failing to make such allowances available to wholesalers whose beauty salon customers compete with the favored beauty salons, in the sale of respondent's products, constitute a violation of Section 2(d) of the Clayton Act.

65. Since we have determined in the preceding section of this opinion that beauty salons in the same market area not only compete with each other in general, but compete with each other in the sale of respondent's products, we need here only determine whether respondent's favored beauty salon customers and its unfavored wholesale customers doing business in the same market area are "competing in the distribution" of respondent's products within the meaning of Section 2(d) of the Clayton Act.

66. The word "distribution" as used in Section 2(d) is a relatively simple word which Webster's New International Dictionary (2nd edition) defines as "1. act of distributing; apportionment among several or many; . . . 8. econ. a. physical conveyance of commodities from producers to consumers; . . ." We believe that the word distribution was clearly intended in Section 2(d) of the Act to include all the channels of commerce by which products travel from a manufacturer to the ultimate consumer. The Commission's recent decision in *Fred Meyer, Inc.*, 1963 Trade Reg. Rep., ¶ 16,368 at 21,214-21,216 (F.T.C. Dkt. 7492, March 29, 1963) [63 F.T.C. 1, 42, 43], and the district court's opinion in *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230, 236 (D.C.N.J. 1956), supports such a practical and realistic construction of Section 2(d) of the Clayton Act. In the *Meyer* case, the Commission stated that:

. . . we see nothing in the words of that provision [Clayton Act §2(d), as amended] to support the proposition that wholesalers whose retailer-customers compete with direct-buying "chains" are not entitled to a fair share of the promotional allowances received by the latter. As noted, Section 2(d) declares that such allowances are unlawful unless they are made available, on proportionally equal terms, to "all other customers competing in the distribution of such products." These wholesalers, like respondents themselves, buy directly from the discriminating suppliers and are, therefore, unquestionably "customers" of those discriminators. And we think that, insofar as those wholesalers resell to retailers who, in turn, resell to consumers in competition with respondents, the wholesalers are competing with respondents in the "distribution" of the goods in question. It is true, of course, that only the retailer-customers of these two wholesalers compete with respondents in the direct resale of the goods to consumers. But the statute speaks of competition in the "distribution" of the products, not merely of competition in their "resale". These wholesalers, through their numerous retailer-customers, are seeking exactly the same consumer dollars that respondents are after. Every time an independent retailer loses a sale to respondents, the wholesaler who supplied that independent retailer suffers a loss of volume by just that much. And if all of the independent retailers in Portland should close their doors, these wholesalers would necessarily be finished in that market. *Id.* at 21,215.

67. Respondent's counsel contends, however, that the holding of the Court of Appeals for the Ninth Circuit in the *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F. 2d 694, 702 (1964), and the conceptual essence of the Supreme Court's determination in the *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505 (1963), rejects the theory of the Commission in its *Meyer* decision. It is our opinion, however, that the facts in the two cases cited are to different from the present case to jus-

tify respondent's contention. Moreover, the logic in the Commission's statement and the obvious economic harm which the Commission's decision seeks to prevent, commends it to us as the correct interpretation of Section 2(d) of the Clayton Act. Accordingly, we conclude that the discrimination between the nonfavored wholesaler whose beauty salon customers compete with favored beauty salons constitute a violation of Section 2(d) of the Clayton Act.

XXIII. DRUG TRADE—"PUSH MONEY" AND "DEMONSTRATOR"
DISCRIMINATIONS

68. As we have seen from the findings as to the facts herein, respondent during the years 1961 and 1962 expended approximately \$4,250 to the Gray Drug Stores, Inc. of Cleveland, Ohio, for the payment of "push money" in connection with the sale of respondent's Pure White Creme Developer and its shampoo products without making such payments available on proportionally equal terms to its other customers who, contemporaneously with Gray, purchased such products from respondent and who compete with Gray in the distribution of such products including those drug trade wholesale customers of respondent who sold respondent's products to purchasers who directly compete with Gray in the retail sale of such products.

69. In view of our conclusions in sections XXI and XXII, it seems only necessary here to point out that it is well settled that "push money" payments accorded to a favored customer as hereinabove described constitutes a violation of Section 2(d) of the Clayton Act. In *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1053-1054 (1960, *aff'd but modified on other grounds*, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962), the statement was made, as follows:

The record discloses in this connection [push money] that respondent transmitted a check to Rosenbaum's, of Plainfield, New Jersey, by letter dated July 19, 1957, advising that "This check represents the prize monies due your Sales Personnel for the Exquisite Form P.M. Contest that was run in your store for the period of 4/15 thru 6/8/7." Since this payment was granted by respondent to or, at least, "for the benefit of" a customer for promotional services furnished respondent, it clearly comes within the scope of Section 2(d). The record also reveals that this payment was not made available on proportionally equal terms to other customers of respondent in the Plainfield, New Jersey, area. This showing is sufficient to sustain the charge in the complaint that respondent violated Section 2(d) of the amended Clayton Act.

70. In addition to the push money payments, the record also shows that during 1961 and 1962 respondent paid \$1,500 to the Gray Drug Stores, Inc., to finance the cost of demonstrators employed by Gray in hair care clinics without making such payments available on proportionally equal terms to its other customers who compete with Gray in the distribution of respondent's products including those drug trade wholesale customers of respondent who sold respondent's products to purchasers who directly compete with Gray in the retail sale of such products.

71. It is firmly established that a seller who makes discriminatory payments as compensation to a customer for demonstrator services provided by the customer in connection with the sale or offering for sale of the seller's products, and who does not make such payments available on proportionally equal terms to its other customers who, contemporaneously with the favored customer, purchase the seller's products of like grade and quality and who compete with the favored customer in the distribution of such products, violates Section 2(d) of the Clayton Act, as amended. See *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F. 2d 988, 990 (8th Cir. 1945), *cert. denied*, 326 U.S. 773 (1945); *Elizabeth Arden, Inc. v. F.T.C.*, 39 F.T.C. 288, 298—302 (1944), *aff'd*, 156 F. 2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); *Exquisite Form Brassiere, Inc. v. F.T.C.*, 57 F.T.C. 1036, 1054 (1960), *aff'd but modified on other grounds*, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

XXIV. DRUG TRADE—PROMOTIONAL SERVICES

72. As we have previously observed, the respondent, commencing in the year 1964, entered into formal sales promotional agreements with certain selected chain drug stores and department stores in the market areas of Baltimore, Philadelphia, and Washington, D.C. Under those agreements, respondent has paid substantial sums of money for promotional services performed by those customers in connection with the sale of respondent's products. All the other drug retailers in the areas cited purchased their requirements of respondent's products from wholesalers and jobbers that purchased from respondent. Respondent has not made its promotional allowances available on proportionally equal terms, or on any terms, to either the wholesalers or to their customers who do business in the market areas described and who compete with respondent's favored customers in the distribution of respondent's products of like grade and quality.

73. Under the authority cited in section XXII, and for similar reasons there stated, we must conclude that the respondent's acts in granting the promotional allowances as above described constitute a violation of Section 2(d) of the Clayton Act.

XXV. SCOPE OF THE ORDER

74. Respondent's counsel contends that if the two major promotional allowance programs in issue herein are not adjudged to be violations of the Clayton Act, that the Commission should not subject respondent to a cease and desist order based merely on the violations involving "push money" payments and "demonstrator" payments made to the Gray Drug Stores, Inc., in 1961 and 1962. Counsel contends further that when respondent recognized that such payments were unlawful, it voluntarily discontinued them prior to the issuance of the complaint herein. In addition, respondent's counsel also contends that if any order to cease and desist is issued against the respondent, it should be fashioned to the type of conduct found to be unlawful.

75. In considering the scope of the Commission's order, it should be remembered that the respondent has been found in this proceeding to have violated Section 2(d) of the Clayton Act in four different ways: through discriminatory payments for demonstrators; through discriminatory payments of push money; through discriminatory payments for promotional allowances; and through discriminatory payments for newspaper advertisements. It must also be remembered that respondent is one of the largest concerns in the United States in volume of sales of hair coloring products. Respondent's favored, direct-purchasing customers are all large, independent beauty salons or very large beauty salon chains. Two of these favored customers each operated more than 300 beauty salons. The payments granted to these favored beauty chain customers are extremely substantial. The advertising which respondent's allowances finance clearly benefited the favored customer in his entire business, and enabled them to shift a large part of their advertising cost to the respondent. On the other hand, the nonfavored customer who can not secure such allowances consist of small independent beauty salons who must expend their own monies in order to secure such advertising.

76. Under all of the facts and circumstances herein found to exist, we believe that the public interest requires that the Commission should issue a cease and desist order prohibiting future vi-

ulations of Section 2(d) through disproportional payments of any nature whatsoever.

XXVI. THE ORDER

It is ordered, That respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying, or contracting for the payment of promotional or advertising allowances, or anything of value, to or for the benefit of any customer 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 respondent's products, including the incorporation of said products in beauty or hair care treatments, unless such compensation or consideration is offered, or otherwise made available, on proportionally equal terms to all other customers competing in the distribution of respondent's products, including all other customers who resell respondent's products to purchasers who compete in the distribution of said products with those customers receiving such compensation or consideration, or who compete in the incorporation of said products in beauty or hair care treatments with those customers receiving such compensation or consideration.

OPINION OF THE COMMISSION

JUNE 24, 1966

BY MACINTYRE, *Commissioner*:

Clairol Incorporated, a wholly owned subsidiary of the Bristol Myers Company and a leading distributor in the United States of hair coloring products, is charged with violating Section 2(d) of the Clayton Act, as amended, in connection with the sale of its hair coloring preparations. The hearing examiner found that respondent had violated the Act in its sales of these products both to the beauty trade and to the drug trade. The proceeding is now before us on Clairol's appeal from the initial decision.

Because of commendable cooperation between counsel and the hearing examiner, the record before us is confined to the facts

stipulated by the parties and a number of documents attached to the stipulation. As a result, this proceeding, which might well have turned into a "big" case, is characterized by a concise record and the resolution of Clairol's appeal does not hinge on a debate about the facts documented by the record, but, rather, the legal conclusions which may properly be drawn therefrom, namely, whether the respondent's promotional payments are within the remedial scope of the statute.

The three questions presented to the Commission on Clairol's appeal are the following:

1. Are beauty salons, when in the course of rendering hair coloring services to their patrons they utilize respondent's products, engaged "in the distribution of" such articles within the meaning of Section 2(d) of the Robinson-Patman Act?

2. Must the supplier who accords promotional allowances to his retail customers make them available on proportionally equal terms to wholesalers who resell to retailers that compete with the supplier's retailer customers?

3. Is the scope of the order proposed in the initial decision too broad?

Of the issues raised by respondent's appeal, the first, presenting the question of whether beauty salons are engaged in the distribution of products within the meaning of Section 2(d) of the Robinson-Patman Act, is a question of first impression. We will turn first to this novel and interesting issue, which is obviously of considerable importance to the beauty trade and its suppliers.

In view of the examiner's careful and detailed findings on the subject, only a general outline of the circumstances involved in respondent's sales to the beauty trade is necessary as an introduction to the consideration of whether these advertising payments come within the scope of the statute. As the examiner found, in the period 1960 through 1964 respondent made substantial payments for newspaper advertising to some, but not all, of its beauty salon customers who contemporaneously purchased products of like grade and quality from the respondent. These payments for cooperative advertising, as the record discloses, were substantial, ranging in the years 1962 to 1963 from eight hundred to two hundred thousand dollars in the case of certain beauty salon chains. The magnitude of such discounts in relation to

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the purchases made in the case of certain of these customers in this period is set forth in the margin.¹

The examiner found that certain beauty salon customers of Clairol who received such payments or allowances and other beauty salon customers, purchasing from the respondent, to whom such payments were not offered on proportionally equal terms, were and are in substantial competition with each other in the handling of products purchased from respondent. Clairol contends strenuously, however, that beauty salons neither resell Clairol's hair coloring products nor distribute such products within the meaning of Section 2(d) of the Clayton Act, as amended. Basic to Clairol's position is the contention that hair coloring products utilized by the beauty salons in treatments of their customers are for the salon's own use and not for resale as such. Respondent's counsel contends that beauty salons use the product themselves in the course of hair coloring treatments and therefore cannot be in competition with each other in the distribution of such commodities.² It is further Clairol's position that what the customer buys is not the hair coloring product but, rather, a hair dyeing service. In short, it is respondent's contention that Clairol's hair coloring products cease to exist in the hands of the salon and therefore become incapable of being further redistributed. Clairol does concede, however, that beauty salons do compete in the sale of hair coloring services.

The findings in the initial decision show that respondent's products distributed through beauty salons are applied to the hair of consumers on the premises of the salons by employees who are

1

1962		Name and Address	1963	
Purchases and Allowances			Purchases and Allowances	
\$ 8,000	\$ 2,000	Abraham & Strauss Brooklyn, New York	\$ 9,000	\$ 2,500
10,000	800	Charles of the Ritz New York, New York	15,000	6,000
6,000	2,000	Michael Kazan New York, New York	8,000	2,000
15,000	5,000	Maxim Kunin New York, New York	20,000	5,000
4,000	1,500	Martin's Brooklyn, New York	5,000	1,000
100,000	10,000	The Glemby Co., Inc. (Salon Service, Inc.) New York, New York	100,000	100,000
•				
200,000	200,000	Seligman & Latz, Inc. New York, New York	200,000	200,000
(Stipulation, para. 5A.)				

(Stipulation, para. 5A.)

² See pp. 4 and 5 of the oral argument.

either beauticians or hair colorists.³ The examiner further finds that customers of beauty salons often specify the brand of hair coloring product which is used on their hair and that while a beautician may suggest a particular shade for the customer, many customers also specify the color or shade they desire.

The charges for the treatments incorporating hair coloring by a beauty salon, which are unitary charges for services and hair coloring products, may vary from \$3.50 to a high of \$50. The cost of respondent's products to be applied is not, as a general rule, the determinative factor in the amount charged by the salon but such charges may be varied to cover additional product costs and services in those cases where the customer has particular hair problems or desires more elaborate services.

The procedures for applying respondent's products, as the examiner found, are the same whether applied at home or by the beautician or colorist in the salon. The examiner further found that respondent's products, whether applied by the colorist in the salon or by consumers themselves, have the overriding characteristic, as respondent itself insists, of ease and simplicity of use. The record further shows, as the examiner found, that although many of respondent's products used in beauty salons are applied by colorists, some of respondent's products are applied in beauty salons by beauticians who do not have special skills as colorists. Certain of respondent's products requiring little skill and experience for their application, according to the examiner's finding, are among the products included in the advertising by beauty salon chains for which respondent has made the payments challenged in this proceeding.

The foregoing, then, is the setting in which respondent's products are distributed to consumers in the beauty salons. The determination which must be made is whether such distribution is within the scope of that term as it is set forth in Section 2(d) of the Clayton Act, as amended. That decision cannot be made solely on the basis of the procedures followed in the salons. Also pertinent to such a determination is the relationship of the beauty salon customers to Clairol, the nature of the advertising for which cooperative payments were made and, finally, the objectives which both Clairol and the cooperating beauty salons hope to achieve through such advertising.

Scrutiny of certain of the cooperative advertising under consid-

³ The qualifications for beauticians and hair colorists are set forth in Findings 35 and 36 of the initial decision.

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eration in this proceeding makes it clear that it was designed to sell Clairol hair coloring products. Representative of cooperative advertising by Clairol's beauty salon customers, and for which respondent made payments, is the following, run by Abraham & Strauss of New York City, which states in pertinent part:

- . . . your head start on fashion
 GLORIOUS MISS CLAIROL
 COLOR FOR NEW
 HAIR BEAUTY
 Coming in clear and bright . . . dazzling Miss Clairol. The color miracle that brightens your hair, the beautiful way to color grey, give hair a youthful glow, a fabulous new look. (Attachment 20.)

Another representative advertisement makes the following appeal:

ONE TOUCH OF COLOR FROM MISS CLAIROL
 A SPECIAL MID-SUMMER PRICE FOR A FAMOUS MISS CLAIROL HAIR COLOR BATH. A MISS CLAIROL TOUCH UP BRINGS A NEW AND LOVELY LOOK TO YOUR HAIR, COVERS DRABNESS FROM GREY OR TOO MUCH SUN. IF YOU'VE THOUGHT OF TRYING A COLOR, THIS IS THE TIME. ONE-COLOR SPECIAL \$6.50. (Attachment 17.)

Clearly, it is the purpose of these advertisements to sell Clairol to the prospective consumer. As the examiner aptly stated, the pitch of such advertisements is directed to the product rather than to the application.⁴

The correspondence between Clairol and certain of its beauty salon customers further supports the finding that the purpose of the advertising is to enable the particular beauty salon to sell Clairol products. The correspondence makes it clear that this is the understanding of both the cooperating beauty salons and Clairol. For example, by letter of October 23, 1962, the advertising and publicity director of Charles of the Ritz, writing to Clairol, states:

⁴ Certain advertisements do make a reference to the skill and artistry of the salon's hair colorist. For example, a cooperative advertising with Charles of the Ritz states in pertinent part:

"CLAIROL MAKES BLONDES TO ORDER"

. . . aided and abetted by our Mr. Gerald. Be your own blend of blonde . . . or almost any other hair color in the spectrum . . . with a custom blend shade of Miss Clairol. Mr. Gerald, master hair colorist, will lovingly create a very particular shade to suit your personality or change it! For a most exciting fashion marriage of Clairol hair color and Charles of the Ritz styling. You must meet Mr. Gerald. Consultations are complimentary" (Attachment 34.)

Here the advertisement does recognize the expertise of the hair stylist, but equally prominent is the appeal to the customer to go to the salon and ask for Clairol. In other words, while the advertisement does give recognition to the skill and artistry of the hair colorist, the advertisement is expressly concerned with selling respondent's product to the consumer.

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How astray the best laid plans do get, for it was last Spring that I most sincerely intended to meet with you and discuss a cooperative advertising program.

Now I really mean it, particularly in the light of the fact that we have employed a most marvelous hair colorist in our Chicago salon. . . . and we feel *he can make many new friends for both Clairol and ourselves given some advertising exposure.* (Emphasis supplied.)

Here, clearly, the salon recognizes it is the purpose of the advertisements to sell Clairol cooperatively by a joint appeal to the desirability of the product and the virtues of the particular hair styling colorist.

This is also documented by correspondence from Clairol to certain beauty salon customers, indicating that in the particular case the amount of cooperative advertising money to be paid was to be determined on the basis of the amount of the product purchased.⁵ In some cases it was based on a percentage of annual sales. If Clairol advises its customers that advertising monies to be made available are a function of the purchases made by the customers on an annual or some other basis, it is clear Clairol did not intend to merely get general advertising exposure but that it expected the particular salon receiving advertising monies to sell respondent's hair coloring preparations to its customers in the course of hair coloring treatments. In short, it is clear Clairol intended that beauty salon operators, aided by these advertisements, sell or distribute its hair coloring products to the consumer.

This is further documented by the fact that respondent insists that Clairol's message be prominently featured in any cooperative advertising. For example, one beauty salon customer was advised by Clairol:

As I told you we require the Clairol name appear prominently in the caption and that we will want to see a proof of the ad prior to insertion (Attachment 66.)

The conclusion that the advertisements are designed to induce customers to ask for, and pay for, Clairol products in the salons must also be drawn from the copy requirements for Clairol advertising. For example, respondent insists that the name Clairol must appear in the headline of every ad, that it must be carried in a size and weight of type at least equal to the rest of the headline and that Clairol ads must feature a salon service with a Clairol product and that it must be clearly an ad which sells the service incorporating respondent's product, explaining what it is, and of-

⁵ For example, see Attachment 65 and Attachment 70.

fering promise of beauty results. Mere mention of the Clairol service is not sufficient.⁶ If a permanent wave special is included in the advertisement, respondent required that it must be a subordinate offer and occupy no more than 25 percent of the Clairol ad space and, further, that prices for Clairol services offered in the advertisements are not to be made to appear at a price disadvantage as compared to other services listed in the ad. Thus, the price of the permanent wave special may not be lower than that for a Clairol coloring service listed.⁷

On the basis of these facts, the determination must be made whether Clairol's payments for the newspaper advertising of the type outlined above come within the scope of Section 2(d) of the Clayton Act, as amended. Essentially, Section 2(d) provides that it shall be unlawful for a seller to make payments in consideration for services or facilities furnished by or through a customer in connection with the processing, handling, sale or offering for sale of any products sold by the vendor unless such payments or consideration are made available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.⁸ Clearly, the cooperative advertising under consideration here is a service or facility furnished in connection with the processing, handling, sale or offering for sale of Clairol's products. The question remaining is: Do the favored and nonfavored beauty salons compete in the distribution of these products and commodities?

There is no precedent directly in point. Counsel for both sides, however, have been diligent in searching for decisions which may have a bearing on the problem under other sections of the Robin-

⁶ An exception is made in the case of advertisements announcing the opening of a beauty salon but even here, while more weight may be given to the event involved, at least 50 percent of the ad should be about hair coloring and Clairol should be in the headline.

⁷ The stipulation in the copy requirements to the effect that cooperative advertisements are to be scheduled only to promote Clairol products used professionally in the salon but "not to promote Clairol products for resale to the consumer" does not vitiate the finding on the basis of Clairol's copy requirements as a whole that the advertisements are designed to induce consumers to purchase hair preparations included in the salon's beauty treatments. Clairol's labeling of the beauty salon's handling of the product as a "use" as distinguished from a "resale" to consumers cannot be permitted to obscure the realities of the situation apparent from the record as a whole.

⁸ The requirements of Section 2(d) as set forth in the text of the statute are the following:

"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."

son-Patman Act and the Federal Trade Commission Act—cases dealing with seller's liability for product defects, the Fair Labor Standards Act, and even the narcotics statutes. A review of the cases cited by both sides compels the conclusion that, with the exception of the Supreme Court decision in *Corn Products v. Federal Trade Commission*, 324 U.S. 726 (1945), none of the precedents relied on by either side has sufficient bearing on the problem with which we are confronted here to be decisive. Precedents dealing with statutes covering problems not within the scope of the legislation under consideration in the particular case must be interpreted with caution. As the Supreme Court held:

Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. . . . *Federal Trade Commission v. Bunte Brothers*, 312 U.S. 349, 353 (1941).

We turn first to the Fifth Circuit's decision in *Sidney J. Mueller v. United States*, 262 F. 2d 443 (5th Cir. 1958), ruling on a district court action for violation of a Commission order prohibiting deceptive claims for baldness cures. In that precedent, both sides apparently find some support for their position. Respondent relies on this case to support its position that beauty care treatments involve solely the sale of a service. Complaint counsel, on the other hand, cites the case for the proposition that although a service is performed by the salon as part of the overall transaction with the customer, this does not preclude a finding that respondent's products were sold in the course of being incorporated into hair care treatments. In fact, the *Mueller* case does not lay down any hard and fast rules on whether products dispensed in connection with hair care treatments are to be regarded as simply part of the service or whether they are also to be regarded as sold to the consumer receiving the treatment. Ruling on defendant's claim of immunity under the Federal Trade Commission Act on the ground that he advertised treatments and not products, the court held:

. . . Here, however, we do not have to draw any fine distinction between the sale of a service and the sale of a product along with a service. In this case the advertisements show that Mueller represented the chief thing he had to offer was the miraculous effect produced by his cosmetic preparations. The sale of the office treatment was a transaction where an appreciable part of the consideration for the service was a payment for the material. . . . (262 F. 2d, *supra* at 448.)

Clearly, the court does not purport to definitively spell out criteria for determining whether a transaction is to be considered a sale under the Federal Trade Commission Act or any other stat-

ute. The decision does stand for the proposition that the determination of whether a transaction constitutes a sale of a product must be decided on the basis of all the surrounding circumstances in the particular proceeding, and it is on the basis of the facts in this case that the question of the coverage of Section 2(d) must be decided here.

Respondent also relies on a number of products liability cases to sustain its position that beauty salons do not sell hair coloring preparations when they are distributed to customers in the course of beauty treatments. These cases, involving issues quite different from those involved here—such as privity, implied warranty, and a balancing of risks between vendor and vendee—are of no assistance in determining whether the transactions under consideration in this case meet the criteria of Section 2(d) of the Robinson-Patman Act, as amended.⁹

Similarly, respondent's citation of dicta in various cases under the Fair Labor Standards Act that beauty parlors and barber shops are service establishments under the terms of that statute, does not afford persuasive support for respondent's position in this case. None of these cases throw light on the issue of what criteria govern the determination of whether a particular transaction is to be considered a sale or the performance of the distributive function.¹⁰

⁹ The rationale in these cases involving claims for injuries arising out of the use of hair coloring preparations or blood transfusions have no application here. For example, in *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E. 2d 792 (1954), the decision that a hospital does not give its patients an implied warranty for blood was evidently to a considerable degree governed by the court's aversion to holding a hospital as an insurer. Consequently, the holding that a blood transfusion is not to be construed as a sale has little pertinence here. This is particularly the case where the decision turns on express recognition of the fact that the art of healing calls for a balancing of risks and that absent negligence, liability should not be imposed upon institutions seeking to assist or save patients. Nor can we be governed by a decision of the Court of Common Pleas of Connecticut, in *Epstein v. Giannatasio*, 25 Conn. Sup. 109, 197 A. 2d 342 (1963), which relied on *Perlmutter* to some extent, holding that a beauty treatment was not the sale of a product within the terms of the Uniform Commercial Code as adopted by the State of Connecticut. The third products liability case cited by respondent, and which also involved Clairol, did not involve a suit against a beauty salon, the court merely ruling in that proceeding that wholesalers or distributors of hair preparation products could be held on the basis of implied warranty and that privity of contract in the ordinary sense was not necessary to establish liability in such cases. *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d. 413 (Sup. Ct. Kan. 1954).

¹⁰ This is evident simply from an examination of the factual issues facing the courts in these cases. For example, in one case the court decided that the services of a building engineer and similar employers were vital to the production of the goods of tenants in a building and therefore such employees came within the scope of the Fair Labor Standards Act and that the business of leasing a building was not a service establishment exempt from the requirements of the Act. *Fleming v. Kirshbaum Co.*, 124 F. 2d 567 (3d Cir. 1941), *aff'd, sub nom., Kirshbaum Co. v. Walling*, 316 U.S. 517 (1942). Similarly, in *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40 (W.D. Tenn. 1940), another case relied on by respondent, the court held a night watchman was engaged in production of goods for

Finally, we turn to the cases under the Robinson-Patman Act cited in this appeal.¹¹ The case most directly in point is the Supreme Court's decision in *Corn Products Refining Co. v. Federal Trade Commission*, 324, U.S. 726 (1945), ruling on a similar issue under Section 2(e), which has been recognized as the companion provision to Section 2(d) of the statute.¹² That decision, ruling squarely on the question of whether processing in connection with the handling of a product precludes the finding under Section 2(e) of a resale of that product, is decisive here.

The facts in the *Corn Products* case parallel in many respects the factual situation in this proceeding. In this connection, Corn Products was charged with violating Section 2(e) by advertising expenditures made for the Curtiss Candy Company in order to promote the sale of dextrose or corn sugar for use in candy manufacture. For this purpose, Corn Products, in the years 1936 to 1939, advertised Curtiss candy as "rich in dextrose." At the same time, Curtiss, in its own advertising, described its candy as being rich in dextrose and also made statements to that effect on its labels. The Court held, in connection with the advertising for which Corn Products paid, that the Commission could properly

commerce within the meaning of the Fair Labor Standards Act of 1938 and that a cement and gravel company was not a service or retail establishment within the meaning of the Act. In the third case cited by respondent, *Stucker v. Roselle*, 37 F. Supp. 864 (W.D. Ky. 1941), the court held a hat cleaning business to be a service establishment coming within an exception to the Act.

¹¹ Respondent places considerable reliance on *General Shale Products Corporation v. Struck Construction Co.*, 132 F. 2d 425 (6th Cir. 1942), cert. denied, 318 U.S. 780 (1943), which involved a treble damage action under Section 2(a) of the Robinson-Patman Act. In that suit, a building materials manufacturer alleged unlawful price discrimination in the sale of brick to a municipal agency as well as a conspiracy to discriminate by a contractor and a brick manufacturer. In the course of the construction job, the contractor was to supply the necessary brick at a specified price. Respondent contends the holding of the court in *General Shale* that there was no sale of brick but, rather, that the facts disclosed a service agreement and not an arrangement for the transfer of chattels or sale of personal property, is dispositive here. That case, however, is not decisive in our consideration of the issue of whether beauty parlors distribute Clairol's beauty preparations within the meaning of Section 2(d). The circumstances surrounding the transactions alleged unlawful here and the facts of *General Shale* are obviously distinguishable. *General Shale* simply did not deal with the problem of determining whether there was a resale or distribution by the customer to third parties. The court had before it one transaction and not a course of dealing, as in this case, indicating that both seller and purchaser looked upon the latter as part of the former's system of distribution. As a result, the court's decision has no bearing on the weight to be given the advertising arrangements here in effect, which indicate that it was the parties' intent to view the critical transactions involving the beauty salons and the consumers as a sale. This evidence indicating that Clairol viewed the beauty salons as part of its chain of distribution we view as crucial.

¹² In this connection, respondent has brought to our attention the comment that both provisions are: "reciprocal bans of coextensive scope irrespective of minor textual variations." (See Rowe, *Price Discrimination Under The Robinson-Patman Act*, p. 390 (1962).) And, as the Report of the Attorney General's National Committee To Study the Antitrust Laws (1955) has stated, at page 189, minor discrepancies in the twin provisions were ironed out by the courts in order to resolve the two subsections into a harmonious whole.

infer that it "contemplated the offering for sale of the candy by Curtiss."

Among other contentions, Corn Products argued that the advertising arrangement was not forbidden because it was not made with Curtiss Candy Company as a purchaser of a commodity bought for resale with or without processing within the meaning of the statute. It was the contention of Corn Products that, although Curtiss purchased dextrose from it, the processing and combination with other ingredients resulted in candy, an entirely new commodity, which the candy manufacturers then sold. On that basis Corn Products argued there could be no resale of dextrose within the meaning of Section 2(e).

The Court held that in view of the purpose of the statute to prevent the enumerated discriminations attending the sale of a commodity for resale, the precise nature or extent of the processing before resale is immaterial, stating:

. . . The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased and resold. (324 U.S., *supra* at 744.)

In short, the Supreme Court, looking to the intent of the parties evidenced by the advertisements and the purpose of the statute to assure equality to a vendor's customers, held that Curtiss was a purchaser for resale within the contemplation of Section 2(e). Since Curtiss was a purchaser for resale, it is obvious that the Court must have found that, in fact, under these circumstances the candy manufacturer had resold dextrose even though after processing it had assumed an entirely different form. Clearly, the Court, in construing the factual prerequisite for a finding of "resale" under Section 2(e), refused to frustrate the purpose of the statute, which is to prevent discriminations attending the sale of a commodity by an overly technical definition of that term.

Under the analogous facts here, the Commission, too, must find a resale, as did the examiner.¹³ First, the cooperative advertising, as noted above, was meant to sell Clairol's hair coloring products to the customer. The fact that the product was processed or de-characterized is, under the holding of the Supreme Court in *Corn Products*, immaterial to the question of whether, in fact, a resale

¹³ Although we find that the transactions here are a "resale" under the holding of *Corn Products* and therefore satisfy the requirements of the term "distribution" in Section 2(d), this, of course, does not mean that for Section 2(d) to apply there must necessarily be a "resale" in all cases. We merely hold here that once the Commission finds that a transaction may be equated with a resale, it necessarily satisfied the requirement of distribution under Section 2(d).

occurred. The production of candy is analogous to the hair coloring service performed in the beauty salons purchasing Clairol's hair coloring products. Under the logic of respondent's argument, however, the Supreme Court, in *Corn Products*, should therefore have ruled there had been no resale of dextrose since that ingredient became lost in Curtiss' manufacture of candy. The Supreme Court, of course, expressly refused to adopt that rationale in *Corn Products*. In order to construe the two companion provisions, Sections 2(d) and 2(e), in conformity to each other, the Commission, too, will avoid frustrating the purpose of the Act by a hyper-technical definition of the Term "sale" but, rather, will, as the Supreme Court in *Corn Products*, look to all the surrounding circumstances and the purpose of the statute to determine whether a resale has taken place. Applying that test, the challenged advertising payments are necessarily within the scope of Section 2(d).

Respondent seeks to distinguish the facts of this proceeding from those in *Corn Products* on the ground that the beauty salons who are Clairol's customers did not resell respondent's hair coloring preparations even as components. In this connection, respondent argues that the distribution of the products sold to the beauty salons comes to rest within the salons "when they open the bottles, pour out the contents, mix, blend, alter and chemically decharacterize them. [And that] Respondent's products cease to exist while still in the hands of the salon and become incapable of being further redistributed."¹⁴ Relying heavily on the fact that the products had become "decharacterized," respondent argues there can be no redistribution and therefore the *Corn Products* doctrine cannot apply.¹⁵

Respondent's contention cannot be reconciled with the holding of the Court in *Corn Products*, which, as noted above, held precisely that the processing of a product, whether it results in little or much alteration in the nature of a product, does not preclude a finding that the product has subsequently been redistributed or resold. Further, respondent's argument is simply not consonant with the realities of the situation as documented by this record. It would have the commission segmentize the transaction between Clairol and its beauty salon customers into two distinct phases: the first, sale of the preparation to the beauty salon brought to a

¹⁴ Respondent's appeal brief, p. 10.

¹⁵ If the Supreme Court properly held that candy embodying the ingredient dextrose was a resale of the dextrose, certainly then logic compels us to hold that here, where the ingredients of the hair coloring preparations are far more apparent to the customers, there is, *a fortiori*, a resale of Clairol's products.

termination by pouring the product out of its bottle and whatever chemical changes then take place at that time; and, the second, a completely distinct phase, beginning with service to the customer once the processing of the product has begun. This abstruse argument simply cannot be reconciled with the holding of *Corn Products*. Further, it is completely at variance with the actual intent of the parties, as noted above, which obviously contemplated a movement of hair preparations from respondent through the beauty salon to the heads of the consumers, generated by the cooperative advertisements directed to consumers, which are the subject of this proceeding.

Finally, respondent contends that the explicit inclusion of the phrase "use and consumption" in Section 2(a), which prohibits price discriminations to different purchasers where such commodities are "sold for use, consumption or resale", governs the outcome of this issue. For the reasons stated above, we have found that the hair preparations in question were not sold to beauty salons by Clairol merely for use or consumption; rather, they were sold for resale or distribution. The mere inclusion of those terms in Section 2(a), of course, cannot be determinative of whether the customer distributes within the meaning of Section 2(d) without reference to the facts of the particular case. It might be noted, moreover, that the inclusion of these terms in Section 2(a) compels the conclusion that an overly technical rule for deciding what transactions come within the category of resale or distribution under Sections 2(d) and 2(e) would clearly negate an important objective of these two sections, which is to prevent evasion of Section 2(a) by hidden or indirect price discriminations. Sections 2(c), 2(d) and 2(e) were drafted as unqualified prohibitions of a number of discriminatory practices without certain of the defenses applicable under Section 2(a) simply to give sellers an incentive to confine discriminations to price differentials coming within that section of the Act. See *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55 (1959). Accepting respondent's argument that the question of distribution or resale under Section 2(d) and 2(e) is to be governed by a concept such as de-characterization would give a very restricted meaning to the terms "resale" or "distribution" under those sections. In effect, sellers would be afforded a haven from the proscription of Section 2(a) by virtue of such an unrealistic appraisal of such transactions. Congress intended precisely the opposite, namely, that sellers should be encouraged to keep their discriminations out in the

open where they can be readily appraised under Section 2(a). The result urged by respondents would nullify the legislative scheme envisaged by Congress. Simply by changing the label of the transaction and relying on an overly simplified construction of the statute, the Act could be readily evaded.

The remaining issue on appeal relating to the coverage of the Act is whether a failure to make available promotional payments to wholesalers whose customers compete with direct purchasers receiving such payments is actionable under Section 2(d). A decision on this issue is not decisive on the question of whether an order should issue. Actionable discriminations between customers purchasing directly from Clairol are documented on this record, both with respect to cooperative advertising payments to beauty salons and to payments for push money and demonstrators to Gray Drug Stores in Cleveland, Ohio.¹⁶ Nevertheless, an expression of the Commission's views on this subject is required in the light of two recent decisions by the Ninth Circuit, namely, *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F. 2d 351 (9th Cir. 1966), and *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F. 2d 694 (1964). We recognize that the decision of the Ninth Circuit in those cases sustains the position of respondent on this point and, if upheld, will prevent further action by the Commission under Section 2(d) to ensure equality of treatment with respect to promotional payments for a wholesaler and his customers who compete with direct buying retailers receiving such payments. The Commission nevertheless believes that in view of the importance of this issue it should adhere to the position originally taken in its decision in *Fred Meyer, Inc.*, Docket No. 7492 (1963), *modified*, 359 F. 2d 351 (9th Cir. 1966) [63 F.T.C. 1]. There we held that the statute is applicable to actual competitors without limitation by differences in the functional levels at which they operate. This construction of the statute, we believe, is in accordance with the language of the Act, is necessary to effectuate the Congressional purpose in enacting it, and is supported by the decision in *Krug v. International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D.N.J. 1956). In this connection, we note again that Section 2(d) speaks of competition

¹⁶ It is only in the case of the promotional payments amounting to 5% of the purchases made available to Clairol's direct purchasing chain drug store customers in the Baltimore, Washington and Philadelphia areas but not made available to wholesalers whose customers compete with such favored customers where a ruling granting respondent's appeal and reversing the hearing examiner on this point would preclude the imposition of a cease and desist order. The initial decision fully covers this promotion as well as the payments to Gray Drug Stores and there is no need to again go over that ground in this opinion.

in the distribution of products and not merely of their resale. A narrower construction of the statute would inevitably lead to inequitable discrimination and place in peril the entire structure of independent food merchandising, including the traditional wholesaler and his numerous small retailer customers who would be placed completely outside the pale of the Act insofar as their competition with direct buying chains is concerned. As we noted heretofore, in *Fred Meyer*, it would conflict with economic reality to apply the prohibitions of Section 2(d) to direct buying retailers only and to ignore the fact that wholesalers compete in redistribution with integrated chains and that customers of such wholesalers compete with direct buying chains on the retail level. It would be a strange result where, as a practical matter, in this case and in other cases the protection of the statute would be applicable only to the chains but denied their smaller competitors. In view of the importance of the issue, the Commission has requested the Solicitor General to file a petition for certiorari in the Supreme Court on this point in *Fred Meyer*. In the meantime, we will adhere to our earlier ruling on this issue announced in that case.*

In addition to its contention that the statute does not apply to the discriminations documented in the record, Clairol asks the Commission, as a matter of discretion, to dismiss that phase of the proceeding relating to payments of push money and for demonstrations to Gray Drug Stores of Cleveland on the basis of discontinuance. We have reviewed the record on this point and are unable to conclude that the unlawful practices have been surely stopped or that a dismissal is warranted because of unusual circumstances. As respondent itself admits, it was aware of the Commission's investigation prior to terminating these payments. The fact that the Gray situation was not brought to respondent's attention in connection with this investigation and that respondent was unaware of the Commission's knowledge of the Gray allowances until it received the complaint herein is immaterial. Respondent was well aware of the statutory areas involved in the investigation. As a result, the Commission, rather than accepting Clairol's contention that such discontinuance had been entirely spontaneous, would be equally justified in inferring that the abandonment was timed to anticipate the Commission proceeding in this matter. No justification has been shown for a dismissal of the

* Commissioner Elman did not concur in the request to the Solicitor General asking him to file a petition for a writ of certiorari for the Commission in *Fred Meyer*.

proceeding as far as the Gray payments are concerned on that basis. See *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

The question remaining is whether the order should be modified. Respondent would have the order limited specifically to the violations of law documented by the record as well as to the trade channel in which it occurred. In this case, it appears that the public interest can be safeguarded and resumption of these practices and like practices adequately prohibited by provisions directed specifically against discriminatory payments to customers in the particular channels of trade involved in this proceeding, namely, beauty salons and retailers selling Clairol's preparations to the consumer for home use. There is some justification for limiting the order in this fashion in the case of the discriminatory promotional payments to beauty salons and in application of the requirement in *Fred Meyer* that payments be made available to wholesalers whose customers compete with direct buying retailers. The application of the Act to situations of this nature is not of such long standing as other discriminations hitherto prohibited under Section 2(d). Further, since the record on the basis of this stipulation necessarily gives us an insight only into Clairol's merchandising of hair care preparations, the application of this order will be limited to those products.

In this connection, the cease and desist order will specifically prohibit discriminatory promotional payments to customers engaged in the resale of respondent's hair care products to consumers for home use as compensation or consideration for services or facilities furnished in connection with the processing, handling, sale or offering for sale of respondent's products. The services furnished by Clairol's retailer customers selling respondent's products to consumers for home use, for which discriminatory payments were made, were not so novel so as to justify limiting the prohibition's scope to services of sales employees or demonstrators, or promotional services rendered within the store. The order will specifically prohibit in this connection, as respondent suggests, by an additional paragraph, payments for promotional services to such direct buying retailers unless such payments are available on proportionally equal terms to all other customers of respondent reselling such products to persons competing in the distribution of such merchandise with those of respondent's retailer customers to whom promotional payments have been made.

The order will be specifically directed against discriminations

in respondent's payments for cooperative advertising to Clairol's beauty salon customers. The order will expressly prohibit payments for advertising services in connection with hair care products distributed by beauty salon customers to consumers in the course of hair care treatments unless such payments are made available on proportionally equal terms to all other customers of respondent competing in the distribution of hair care products in the course of such treatments. An additional paragraph, in accordance with respondent's suggestion, will expressly prohibit payments of this nature unless they are also available on proportionally equal terms to all other customers who resell such products of respondent to persons competing with those customers to whom such payments were made.

Accordingly, respondent's appeal is denied except to the extent set forth herein and the initial decision of the hearing examiner, as modified and supplemented by this opinion, is adopted as the decision of the Commission. An appropriate order will issue.

Commissioner Elman dissented.

FINAL ORDER

This matter is before the Commission on respondent's appeal from the initial decision of the hearing examiner and upon briefs and oral argument in support of such appeal and in opposition thereto. The Commission has determined, for the reasons stated in the accompanying opinion, that respondent's appeal should be denied except to the extent noted therein, that the order of the hearing examiner should be modified, and that the initial decision, as modified and supplemented by the accompanying opinion, shall be adopted as the decision of the Commission. Accordingly,

It is ordered, That the order entered by the hearing examiner in his initial decision filed July 16, 1965, shall be modified to read as follows:

It is ordered, That respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale or distribution of its products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith:

1. (a) Cease and desist from paying or contracting to pay anything of value to or for the benefit of any retailer customer engaged in the resale of respondent's hair care products to home use consumers as compensa-

Order

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tion or consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of respondent's products unless such payment or consideration is available on proportionally equal terms to all other retailer customers of respondent competing with the favored retailer customer in the distribution of such products to the consumer for home use.

(b) Cease and desist from making or contracting to make any such payment to or for the benefit of any such retailer customer unless such payment is available on proportionally equal terms to all other customers of respondent who resell such products of respondent to retailers who compete with the favored retailer customer in the resale of respondent's hair care products to consumers for home use.

2. (a) Cease and desist from paying or contracting to pay anything of value to or for the benefit of any customer engaged in rendering hair care services, in the course of which such customer uses respondent's hair care products, for advertising services furnished by or through such customer in the promotion of such products unless such payment or consideration is available on proportionally equal terms to all beauty salon customers of respondent competing with the favored customer in the rendering of hair care services and the use of respondent's hair care products.

(b) Cease and desist from making or contracting to make any such payment to or for the benefit of any such customer unless such payment is available on proportionally equal terms to all other customers of respondent who resell such products of respondent to beauty salons who compete with the favored customer in the rendering of hair care services and the use of respondent's hair care products.

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

It is further ordered, That respondent, Clairol Incorporated, a corporation, shall, within sixty (60) days after service upon it of

NATIONAL ALUMINUM CO.

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Complaint

this order, file with the Commission, a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Elman dissenting.
