

Complaint

IN THE MATTER OF

COLONIAL STORES INCORPORATED

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 8768. Complaint, September 20, 1968—Decision, May 7, 1970*

Order requiring a major chain of grocery supermarkets headquartered in East Point, Ga., to cease knowingly inducing or receiving discriminatory promotional payments from suppliers in connection with its special promotions.

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 Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Colonial Stores Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia with its principal office located at 2251 Sylvan Road, East Point, Georgia.

PAR. 2. Respondent is now, and for many years has been, engaged in the operation of a chain of retail grocery stores, selling a great variety of food, grocery, and non-edible household products. There are presently about 438 retail grocery stores composing respondent's chain, which stores are located in the States of Virginia, Georgia, North Carolina, South Carolina, Alabama, Florida, Maryland, Ohio, Kentucky, and Tennessee, and grouped geographically into divisions by respondent and designed as its Atlanta, Columbia, Jacksonville, Raleigh, Norfolk, Columbus, and Cincinnati Divisions.

In the course of its business respondent purchases food, grocery and non-edible household products of many types from a large number of manufacturers, suppliers, and handlers of such products. To create consumer demand and acceptance for the products it sells, and to attract business to its stores, respondent engages in extensive advertising. Respondent's sale of its products are substantial, exceeding \$535,000,000 annually.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaged in commerce, as "commerce" is defined

in the Federal Trade Commission Act. Respondent purchases for resale a great variety of products from a large number of suppliers located throughout the United States. Respondent causes these products, when purchased by it, to be transported from the places of manufacture or purchase to stores or warehouses located in the States of Virginia, Georgia, North Carolina, South Carolina, Alabama, Florida, Maryland, Ohio, Kentucky, and Tennessee for resale to the consuming public. There is now, and for many years has been, a constant current of trade in commerce in these products between and among various States of the United States.

In addition, respondent disseminates advertising in commerce and receives payments in commerce from suppliers for advertising and promotional services and facilities.

PAR. 4. In the course and conduct of its business in commerce, respondent is now and has been in competition with other corporations, persons, firms and partnerships in the purchase, sale and distribution of food, grocery and non-edible household products.

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1962, respondent has knowingly induced and received from some of its suppliers the payment of something of value to or for respondent's benefit as compensation or in consideration for services or facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers when respondent knew or should have known that such payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such supplier's products.

PAR. 6. For example, twice each year respondent conducts a special promotion during which the products of its suppliers are featured in brochures mailed by respondent to a large number of households located in the areas in which respondent operates its retail grocery stores. Also, in connection with these special promotions, respondent provides display and advertising services and facilities to its suppliers in other advertising media and in its retail grocery stores. Respondent's special promotions sometimes have a seasonal theme and sometimes are supported by a theme of games and prizes for customers of respondent's retail grocery stores.

In connection with these special promotions and the advertising and promotion of its suppliers' products, respondent authors or selects the special promotional theme and determines the period of time that the special promotions will run. Respondent also deter-

mines the terms and conditions of the advertising and promotional services and facilities it provides to its suppliers and decides the rate of compensation the suppliers are required to pay to respondent for such service and facilities. Typical of the rates established by respondent for advertising in its brochures in some of its divisions are the following:

Division:	Full page rate
Atlanta	\$2,400
Jacksonville	1,200
Columbia	1,700
Raleigh	2,400
Norfolk	2,300

Respondent directly and indirectly solicits many of its suppliers to participate in these special promotions.

Examples of such special promotions consist of, although they are not limited to, the promotion entitled "Sword in the Stone" held during the first three months of 1964 and the promotion entitled "Red Carpet Sweepstakes" held during the first three months of 1965.

A substantial number of respondent's suppliers participated in respondent's "Sword in the Stone" and "Red Carpet Sweepstakes" promotions and agreed to pay, and did pay, respondent more than \$250,000 as compensation therefor.

PAR. 7. Typical of the suppliers who participated in respondent's "Sword in the Stone" promotion during the first three months of 1964, the products which were promoted, and the amounts which they paid to respondent are the following:

Name of supplier	Products	Amount
Blue Magic Company of North Carolina, Inc., Wilson, N.C.	Starch, rinse and bleach.....	\$6,500.00
Poss Famous Foods, Inc., Athens, Ga.	Hash, stew and canned meat.....	1,700.00
Louisiana State Rice Milling Co., Inc., Abbeville, La.	Packaged rice.....	1,700.00
Gebhardt Mexican Foods, Co., San Antonio, Tex.	Chili, beans and sauces.....	2,200.00
Coca Cola Company, New York, N.Y.	Soft drinks.....	6,557.08
Royal Crown Cola Co., Columbus, Ga.	Soft drinks.....	1,200.00
Gordon Foods, Atlanta, Ga.	Potato chips, crackers and nuts...	4,700.00

PAR. 8. Typical of the suppliers who participated in respondent's "Red Carpet Sweepstakes" promotion during the first three months in 1965, the products which were promoted and the amounts which they paid to respondent are the following:

Name of supplier	Products	Amount
Blue Magic Company of North Carolina, Inc., Wilson, N.C.	Starch, rinse, and bleach.....	\$1,298.00
Louisiana State Rice Milling Co., Inc., Abbeville, La.	Packaged rice.....	1,200.00
Aluminum Company of America, Pittsburgh, Pa.	Aluminum wrapping paper.....	624.00
Coca Cola Company, New York, N.Y.	Soft drinks.....	4,152.13
Gordon Foods, Atlanta, Ga.	Potato chips.....	1,733.00

PAR. 9. Many of respondent's suppliers who participated in respondent's "Sword in the Stone" promotion in 1964 and the "Red Carpet Sweepstakes" promotion in 1965, including specifically those listed herein, did not offer and otherwise make available to all their customers competing with respondent in the sale and distribution of their respective products payments or allowances, or other things of value, for advertising, display, or other promotional services or facilities on terms proportionally equal to those granted respondent.

When respondent induced and received or received said payments or allowances from its suppliers, respondent knew or should have known that it was inducing and receiving, or receiving payments or allowances for advertising, display, or other promotional services or facilities from its suppliers which the suppliers were not offering and otherwise making available on proportionally equal terms to all their other customers who were competing with respondent in the sale and distribution of such suppliers' products.

PAR. 10. The acts and practices of respondent, as herein alleged, are all to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C. 45)

Mr. Ivan W. Smith, Robert E. Freer, Jr., and Lee S. Dewey, supporting the complaint.

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, Atlanta, Ga., by Mr. Ernest P. Rogers, Mr. George B. Haley, Jr., and Mr. G. Kimbrough Taylor, for respondent.

INITIAL DECISION BY ANDREW C. GOODHOPE,
HEARING EXAMINER

OCTOBER 24, 1969

The Federal Trade Commission issued its complaint against respondent September 20, 1968, charging it with violations of Section 5 of the Federal Trade Commission Act. Respondent filed an answer in which it admitted certain allegations in the complaint but denied that it had violated Section 5 of the Federal Trade Commission Act. The complaint alleged that the respondent had engaged in unfair methods of competition and unfair acts and practices in commerce by inducing and receiving discriminatory promotional allowances from some of its suppliers. Thereafter hearings were held in Atlanta, Georgia; Greenville, South Carolina, and Washington, D.C.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence, and the proposed findings of fact, conclusions and briefs filed by counsel for the respondent and counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent, Colonial Stores Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia. Its principal business office is located at 2251 Sylvan Road, East Point, Georgia. (Admitted in Answer.)
2. Respondent, during all times pertaining hereto, has been engaged in the business of operating a chain of retail grocery supermarkets. There are about 430 supermarkets in respondent's chain located in the States of Georgia, Florida, South Carolina, North Carolina, Virginia, Alabama, Maryland, Kentucky and Ohio. Respondent purchases a large variety of food, grocery, and nonedible household products from many suppliers for resale in its supermarkets. Respondent's sales of these products are substantial, ranging from \$480 million in 1964 to more than \$530 million in 1967. (Admitted in Answer; CX 168, 170.)
3. Respondent has six operating divisions, each under a vice president and general manager, who is responsible for about 35 to 95 supermarkets. Division headquarters are located in East Point, Georgia (Atlanta); Jacksonville, Florida; Columbia, South Carolina; Raleigh, North Carolina; Norfolk, Virginia; and Cincinnati, Ohio. During the period 1963 through 1965 there was also a Columbus, Ohio, Division which is now merged with the Cincinnati Division. Each division has its own warehouse. Most buying, advertising and promotional decisions are made at the division level and purchasing, sales, advertising and promotional records are maintained in the division offices. (Admitted in Answer; CX 170; Tr. 122, *et seq.*)
4. Respondent purchases products for sale in its supermarkets from suppliers located throughout the United States. Respondent causes these products to be transported from the State of manufacture or purchase to its warehouses and stores located in the States

of Virginia, Georgia, North Carolina, South Carolina, Alabama, Florida, Maryland, Kentucky and Ohio for resale to the consuming public. There is now, and for many years has been, a constant current of trade in commerce in these products between and among various States of the United States. In addition, respondent disseminates advertising in commerce and receives payments from suppliers in commerce for advertising and promotional services and facilities. (Admitted in Answer; CX 1-7, 170.)

5. In the course and conduct of its business, in commerce, respondent is now, and for many years has been, engaged in competition with other corporations, firms, persons and partnerships in the purchase, sale and distribution of food, grocery and nonedible household products. (Admitted in Answer; CX 170.)

6. To create consumer demand for the products it sells, respondent engages in extensive advertising. One method of advertising employed by respondent is the special event promotion based upon a seasonal theme or upon a theme of games and prizes, during which the products of respondent's suppliers are featured and are promoted by various advertising methods. These include direct mail brochures to consumer households located in those areas where respondent operates its stores; disseminates its newspaper, radio and television advertisements; and shows its in-store displays of the promoted products.

7. Respondent solicits a number of its suppliers to participate in these special promotions. Although the suppliers pay respondent for the services and facilities of advertising their products in these special promotions, it is the respondent who authors and selects the special promotional themes and who sets the periods of time during which the special promotions will run. Respondent also decides the terms and conditions of the advertising and promotional services and decides the rates of compensation the suppliers are to pay for such advertising services and facilities. (Par. Six of Answer; Tr. 205-206.)

8. Complaint counsel introduced evidence showing that respondent had a number of promotions of the general types described above during the years 1964 through 1967 in various of its divisions. Complaint counsel, however, concentrated their proof on a 19-month period from January 1964 through July 1965 and primarily on two of respondent's promotions—the Sword in the Stone promotion and the Red Carpet Sweepstakes promotion which took place during the first quarters of 1964 and 1965, respectively. (Comp. counsel Prop. Find. 16.)

9. The Sword in the Stone promotion began January 4, 1964, and extended 8-to-10 weeks into the first quarter of 1964. It was based upon a Walt Disney movie of the same name, then showing throughout the United States, and was developed into a traffic-building game by Famous Character Promotions, Inc., a professional marketer of supermarket games. The game was sold to respondent by the Famous Character firm on an exclusive basis under the terms of the sales agreement. Respondent entered into an arrangement with Metro Molding Corporation, manufacturer of the "Melmac" plastic dinnerware sold in respondent's stores, to use said dinnerware as a continuity and traffic-building item in this promotion. Respondent regarded Metro Molding as a cosponsor of the promotion. (CX 8-11, 21, 22; Tr. 199-200, 1788-1789.)

10. The promotion began in each division by the mailing of a brochure advertising the feature game and the supplier's products. The entire promotional program also included instore displays, newspaper ads and radio and television features. The mailer differed by divisions, depending upon the brand of trading stamps used in the area and upon the participating suppliers. Each brochure had about 14 full pages—each page had approximately 8 by 5 inches of four color advertising space—which respondent sold to its suppliers. Respondent mailed 2,799,400 of the Sword in the Stone brochures to households located throughout trading areas in which its stores were located. Another 92,100 were distributed by respondent through its stores to customers presumably missed by the mailing. Some participating suppliers did not buy advertisements in the mailers, but utilized other plans involving varying amounts of instore displays, and newspaper, radio and television advertisements (CX 12-17, 19, 21-22; Tr. 176-178).

11. In selecting the areas to be covered by its Sword in the Stone mailers, respondent made an effort to cover and enlarge the trading areas in which its supermarkets were located. In cities such as Atlanta, Georgia, and Charlotte, North Carolina, where respondent had many stores, the entire trading areas were covered but no effort was made to isolate neighborhoods where its stores were located. The same was true for areas, such as Gainesville, Georgia, which were not large enough to subdivide into separate mailing districts. Regardless of how the areas for the mailing were selected, respondent's purpose was to reach as many families as possible throughout its trading areas. (CX 21-22; Tr. 176-78, 1778.)

12. For full-page advertisements in the Sword in the Stone mailers, respondent charged and received from the participating

suppliers \$2400 in the Atlanta Division, \$1200 in the Jacksonville Division, \$1700 in the Columbia Division and \$2400 in the Raleigh Division. Rates for half-page ads were approximately half of that for full pages. In addition, advertising suppliers furnished respondent with suitable product identification, color art and copy for reproduction in the mailers or paid respondent for the cost of preparation. For this reason, the amounts paid by the suppliers for mailer ads sometimes varied. (CX 18.)

13. The Red Carpet Sweepstakes promotion was substantially the same in concept, purpose and execution as the Sword in the Stone promotion. It began about February 1, 1965, and continued 12 weeks until April 24, 1965. The theme of the Red Carpet promotion, however, was not the exclusive product of a professional super-market game promoter as was Sword in the Stone. Red Carpet has been a merchandising theme that respondent has used for many years in its various divisions to promote and advertise its products to the public. The Sweepstakes portion of the promotion consisted of the drawing of prizes used in the promotion as a traffic-builder.

The direct mail brochures used in the Red Carpet Sweepstakes were substantially the same as those used in the Sword in the Stone. Each division's brochure had about 14 full pages, approximately 8 by 5 inches, of four color advertising space which were sold to suppliers. Distribution to consumer households was about the same as in Sword in the Stone. (CX 123, 123A, 303, 125-30, 143; Tr. 184, *et seq.*, 201, *et seq.*)

14. Suppliers who purchased advertisements in the Red Carpet Sweepstakes mailers also received in-store displays and broad distribution in newspaper ads. For full-page advertisements in the Red Carpet Sweepstakes mailers, respondent charged the participating suppliers and received from them about \$1750 in the Atlanta Division, about \$1200 in the Jacksonville Division, about \$1200 in the Columbia Division and about \$1455 in the Raleigh Division. As in the Sword in the Stone promotion, a half-page ad in the Red Carpet mailer cost about half of the rate for a full-page ad. (CX 132, 134, 144, 303; Tr. 201, *et seq.*)

15. Complaint counsel during the course of the hearings and in their proposed findings have urged that in presenting their evidence they were proceeding in this matter under a three-fold theory of illegality. In their 15th proposed finding complaint counsel set forth their theories as follows:

In capsule, complaint counsel urge that the charges of the complaint have been sustained upon three basic theories of proof:

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a. That, because of the large number of suppliers participating in respondent's special promotions; because of respondent's general methods of inducing the suppliers to participate; because of respondent's failure to safeguard against discrimination; because of the central features of respondent's promotions including the fact that respondent selected the times, rates, themes, places, and all other features of the promotions; and because of the vast trading areas where respondent operates and the extremely large numbers of respondent's competitors in these trading areas, for all of these reasons, it was not possible in any practical sense that *all* of said suppliers made proportionally available to *all* of their customers' competing in *all* of respondent's trading areas the promotional benefits paid to respondent. This, complaint counsel urge, is a finding supported by the evidence *without* the need to prove which suppliers of which products discriminated against which of respondent's competitors.

b. That even if *all* of respondent's suppliers participating in *all* of respondent's special promotions made proportionally available to *all* of their competing customers the promotional benefits paid to respondent, and, even if this had been done contemporaneously with respondent's promotions (all of which complaint counsel contend is impossible), then in a qualitative sense, respondent has received unlawful discriminatory promotional benefits as alleged in the complaint because when respondent seized for itself the power to determine the terms, conditions, proportional rates of payment, times, places, themes, for respondent *and* respondent's competitors, then, by definition, respondent has selected circumstances most favorable to it, and not its competitors. In effect, complaint counsel contend that, granted quantitative proportionally equal treatment of competitors by respondent's suppliers, respondent has been favored in qualitative discrimination by its methods.

c. That, because of respondent's general methods and the demonstrated examples of specific supplier payments proved to be discriminatory, the complaint has been sustained in the traditional manner of the following: (Citing previous Commission and Court cases.)

16. The hearing examiner rejects the first two of complaint counsel's theories of proof. The allegations in the complaint, particularly in Paragraph Five, are in the charging language that has customarily been used in these types of cases by the Commission. Consequently, the hearing examiner and counsel in support of the complaint have been limited by the allegations in the Commission's complaint. In the Commission's opinion in its order vacating the initial decision and remanding the matter to the hearing examiner in *J. Weingarten, Inc.*, 62 F.T.C. 1521, 1524 (1963), it specifically spelled out the basic factual elements of a Section 5 violation by a buyer as follows:

1. The solicitation and receipt by respondent in commerce of payments for promotional services in connection with the resale of a supplier's product.

2. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.

3. The payments received by respondent were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms.

4. That respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionally equal terms. 62 FTC at 1524-1525.

It is the examiner's opinion that these factual elements must be established by reliable, probative and substantial evidence. They cannot be concluded simply from an examination of respondent's promotional plan and the manner in which it was put into effect without more. In effect, it appears to the examiner that complaint counsel are urging that all promotions originating with a buyer-retailer and involving the payment by such buyer-retailer's suppliers of any moneys or other consideration must be considered per se illegal. If one were to adopt this theory, the appropriate remedy would be the outlawing of all buyer-retailer type promotions involving supplier participation. The law in this area has not reached this point as yet and cannot be so extended—certainly not in this matter. Counsel in support of the complaint originally relied upon two suppliers of respondent as suppliers who, they asserted, had discriminated in favor of respondent during its promotions in 1964 and 1965. When the evidence was all in, it was apparent that the record would not support a finding that respondent had received discriminatory payments from the J. D. Jewell Company or The Murray Biscuit Company. Consequently, complaint counsel requested no findings based upon the payments made to respondent by these two companies. If the examiner were to adopt either of the first two theories proposed by complaint counsel, he would have had to find a violation of Section 5 in situations where the record did not establish that respondent had received discriminatory payments. Consequently, the examiner's decision is limited to complaint counsel's third theory as is required by the complaint and the Commission's decision in *J. Weingarten, Inc.*, (*supra*).

Participating Suppliers

17. The complaint identified eight suppliers as having discriminated in favor of respondent by making payments to respondent in its various promotions. During the prehearing conferences, complaint counsel identified three additional suppliers. During the hearings, evidence was presented pertaining to all eleven of these suppliers. Complaint counsel in their proposed findings have abandoned two of these suppliers as being examples of suppliers who made discriminatory payments to the respondent. In addition, complaint counsel

have limited their proof principally to those suppliers who participated in respondent's Sword in the Stone promotion and Red Carpet Sweepstakes promotion. Proof in the record was also limited to approximately a 19-month period from January 1964 to July 1965.

18. A tabulation setting forth the promotions named, the division of respondent in which a particular supplier participated in such promotion, and the amount of money paid to respondent by the nine suppliers upon whom complaint counsel rely is as follows:

Supplier	Promotion	Division	Amount paid	CX
Blue Magic Co.	Sword in Stone	Atlanta	\$2,400.00	25
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Raleigh	2,400.00	16, 18
	Thanksgiving 1964	Raleigh	1,104.00	150
	Thanksgiving 1964	Norfolk	650.00	151
	Red Carpet	Columbia	1,208.00	144
	Red Carpet	Raleigh	1,455.00	126, 303
	July 4, 1965	Raleigh	1,104.00	154
	July 4, 1965	Norfolk	650.00	153
	July 4, 1965	Norfolk	650.00	153
Gordon Foods	Sword in Stone	Atlanta	2,400.00	25
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Jacksonville	600.00	50
	Sword in Stone	Norfolk	2,300.00	15, 18
	Red Carpet	Atlanta	1,733.00	132
	July 4, 1965	Atlanta	1,200.00	158
	July 4, 1965	Columbia	770.00	161
Trade Winds Co.	Sword in Stone	Atlanta	2,400.00	25
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Jacksonville	1,200.00	50
	Sword in Stone	Raleigh	2,400.00	16, 18
Aluminum Co. of America	Thanksgiving 1964	Columbia	924.00	191
	Red Carpet	Columbia	624.00	144
	July 4, 1965	Atlanta	650.00	158
	July 4, 1965	Norfolk	612.48	153
	July 4, 1965	Raleigh	506.90	154
	July 4, 1965	Raleigh	506.90	154
Coca-Cola Co., New York, N.Y.	Sword in Stone	Atlanta	2,400.00	25
	Sword in Stone	Columbia	1,757.08	61
	Sword in Stone	Raleigh	2,400.00	16, 18
	Thanksgiving 1964	Columbia	1,540.00	147
	Thanksgiving 1964	Raleigh	1,104.00	150
	Red Carpet	Atlanta	1,750.00	132
	Red Carpet	Columbia	1,208.00	144
	Red Carpet	Raleigh	1,455.00	126, 303
	Red Carpet	Jacksonville	1,194.13	134
	July 4, 1965	Atlanta	1,109.70	158
	July 4, 1965	Columbia	770.00	161
	July 4, 1965	Norfolk	1,000.00	153
	July 4, 1965	Raleigh	1,104.00	154
	July 4, 1965	Raleigh	1,104.00	154
Poss' Famous Foods Inc.	Sword in Stone	Columbia	1,700.00	61
	Thanksgiving 1964	Columbia	1,540.00	147
	Thanksgiving 1964	Jacksonville	306.50	149
	Thanksgiving 1964	Jacksonville	306.50	149
Gebhardt's Mexican Foods Co.	Sword in Stone	Columbia	1,700.00	61
La. State Rice Milling Co.	Sword in Stone	Columbia	1,700.00	61
	Thanksgiving 1964	Raleigh	592.00	150
	Red Carpet	Columbia	1,200.00	144
Royal Crown Cola Co., Columbus, Ga.	Sword in Stone	Jacksonville	1,200.00	50
	Sword in Stone	Raleigh	2,400.00	16, 18
	Thanksgiving 1964	Norfolk	510.48	151
	Red Carpet	Norfolk	1,000.00	627
	July 4, 1965	Raleigh	1,104.00	154

Blue Magic Co.

19. The Blue Magic Company of North Carolina, now owned by the Roman Cleanser Company of Detroit, Michigan, manufactures a line of washday products, principally bleaches, sold under the

"Easy Monday" label throughout the respondent's trading area. The general manager of Blue Magic during 1964 and 1965, John Bulla, appeared and testified that during 1964 and 1965 Blue Magic had a cooperative advertising program under which it made available to each of its customers, including respondent, for promotional purposes, either in money or free goods, an amount equal to approximately 3 percent of the customer's purchases of Blue Magic products (Tr. 1695; CX 623, 626, 626 A & B). It was the policy of Blue Magic to make these payments to customers who cooperated with it and advertised its products; but some customers, such as wholesalers, who did not advertise, received free goods and off-invoice case allowances, since this was the only way that Blue Magic could promote its products with purchasers who did not advertise (Tr. 1704-06). Blue Magic had this 3 percent policy for many years and Mr. Bulla felt that the availability of the payments was general knowledge with Blue Magic customers (Tr. 1698). Blue Magic sold its products principally through brokers and depended upon them to offer the contracts and make copies of the contracts, which the brokers had in their possession, available to customers (Tr. 1695-1703). A number of such contracts, including respondent's are in evidence, (RX 301, 303-11). Mr. Bulla testified that over a period of years, respondent's payments were within 3 percent of its total purchases, and that if payments to respondent in one year exceeded 3 percent, an adjustment would be made in later years. Mr. Bulla also testified that in determining whether payments to respondent were within the 3 percent limitation he considered total annual sales to respondent, rather than sales to a particular division (Tr. 1711-13).

20. During the year 1964, Blue Magic paid respondent \$6,500 for participation in respondent's Sword in the Stone promotion in the Atlanta, Columbia, and Raleigh Divisions, and \$1,754 for respondent's 1964 Thanksgiving promotion. Blue Magic in 1965 paid respondent \$2,663 for participation in respondent's Red Carpet Sweepstakes promotion in the Columbia and Raleigh Divisions, and \$1,754 for participation in respondent's July 4 promotion in the Raleigh and Norfolk Divisions.

21. During the period November 1, 1963, through October 31, 1964, Blue Magic sold respondent \$263,087.99 worth of its products. During this period of time the respondent received payments from Blue Magic of \$6,500 for the Sword in the Stone promotion. Respondent actually would have been entitled to \$7,892.54 under Blue Magic's 3 percent cooperative advertising arrangement. While there are no figures for respondent's purchases after this period, and since re-

spondent's largest payment was early in 1964, it would appear that the later payments made to respondent by Blue Magic would be within Blue Magic's 3 percent cooperative advertisement program. (See Comp. Counsel Prop. Find. 124, Legal Argument.)

22. The alleged nonfavored customers of respondent either received offers of payments from Blue Magic (Tr. 1455) or were given price reductions or other things of value, such as printed private labels furnished at Blue Magic's cost (Tr. 1706-09), or purchased Blue Magic's products only sporadically (Tr. 1334). The record requires a finding that Blue Magic did offer to competitors of respondent something of value on a proportionally equal basis either in the form of cooperative advertising payments, which were refused or which the customer was unable to use because he chose not to advertise, or in the form of off-invoice pricing in an attempt to promote its products (Tr. 1331, 1455; RX 301-14).

23. Since the payments made to the respondent appear to be within Blue Magic's 3 percent cooperative advertising program, and the record contains no evidence that they were not, the respondent cannot be found to have induced or received discriminatory promotional payments in violation of Section 5 of the Federal Trade Commission Act, since it was operating within a well-known Blue Magic cooperative advertising contract that it had every right to believe Blue Magic was offering to or making available to all of its customers competing with respondent. In fact Blue Magic's cooperative merchandising agreement specifically stated that it was being offered to all of its customers (CX 301-11).

Gordon Foods

24. Gordon Foods, a division of Sunshine Biscuit Company, manufactures potato chips and related snack items, such as peanut butter sandwiches and bakery items, and sells them from its plants located in Raleigh, North Carolina, and Atlanta, Georgia. These products are sold primarily by Gordon's route salesmen to individual grocery stores and other retail accounts on a store-door delivery basis. In some areas Gordon sells through distributors in the same fashion and also sells direct to vending machine accounts (Tr. 1050-56). Gordon sells its potato chips to respondent on a store-door delivery basis and bills each division headquarters weekly. During 1964-1965, Gordon Foods participated in the following promotions with the respondent in the Colonial divisions listed:

Sword in the Stone.....	Atlanta.....	\$2,400	CX 329	CX 25
	Columbia.....	1,700	CX 330	CX 61
	Jacksonville.....	600	CX 346	CX 50
	Norfolk.....	2,300	CX 331	CX 15 and 18
Red Carpet.....	Atlanta.....	1,733	CX 334	CX 132
July 4, 1965.....	Atlanta.....	1,200	CX 337	CX 158
	Columbia.....	770	CX 340	CX 161

Complaint counsel, while listing the above payments in their proposed findings, apparently rely for establishing a violation of Section 2(d) of the amended Clayton Act only on the payments made by Gordon to respondent's Columbia and Atlanta Divisions during the 1964 Sword in the Stone promotion (Comp. Counsel Prop. Find. 112).

25. The only witness from Gordon Foods who appeared and testified was David Ross, the comptroller of the Atlanta, Georgia, Division of Gordon Foods during the year 1964. He was assistant general manager of this Division of Gordon Foods at the time he testified. His testimony consisted primarily of the identification of a large number of exhibits. He also testified that during 1964 Gordon Foods had in effect a cooperative advertising agreement pursuant to which Gordon's customers could earn payments of up to 2 percent of their purchases from Gordon in 1963 by performing various types of promotional activities in connection with the sale of Gordon products (CX 325; Tr. 1071, 1108). Similarly, in 1965 customers were entitled to earn 1½ percent of their 1964 purchases from Gordon in return for performing various promotional services in connection with the sale of Gordon products (Tr. 1071, 1108). In 1964 the contract was a written contract (CX 325), but the 1965 contract was an oral contract; however, the performance requirements did not change (Tr. 1071). Mr. Ross testified that Gordon Foods' zone and sales managers were instructed to offer these cooperative advertising arrangements to all of Gordon's customers (Tr. 1074-75).

26. Mr. Ross also testified that respondent's Sword in the Stone promotion was an acceptable form of advertising under Gordon's contracts. He stated that the payments made to respondent by Gordon during 1964 and 1965 were charged against the amounts to which respondent was entitled under Gordon's promotional contracts and that the total payments to respondent in 1964 and 1965 were within the percentage of its purchases of Gordon's products for the preceding year as provided by Gordon's cooperative contract with respondent (Tr. 1107-08; CX 325, 357). The only conclusion that the record permits is that the payments made to respondent by

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Gordon Foods were pursuant to its regular cooperative advertising agreements in effect during the years 1964 and 1965.

27. Commission exhibits 359, 359 A and B are a tabulation prepared by Gordon Foods showing payments made by Gordon during the year 1964 to a substantial number of its customers for advertising pursuant to Gordon's cooperative advertising agreements. Only a few of the agreements were produced pursuant to the subpoena at the time of the hearing since all of the 1964 records had been destroyed except those previously requested and received by a Commission investigator (Tr. 1101-03).

28. Complaint counsel contend that a number of wholesalers, wholesaler-cooperatives, and retailers were not paid any money by Gordon Foods in amounts similar to those payments made to respondent. In fact, a number of such customers did receive payments or offers of payments (Tr. 1335, 1613, 1624; CX 359, 359 A & B). While Jack Maziar, the representative of Associated Grocers Coop., Inc., of Georgia, testified that to his knowledge the Gordon contract was not offered to his company (Tr. 506), Commission Exhibits 527 and 359 show that Associated Grocers did receive cooperative advertising payments from Gordon in 1964 (Tr. 504-05). All of the alleged nonfavored retailer-competitors of respondent in the Atlanta area were members of and purchased from Associated Grocers so they should have received some benefits from these advertising allowances. Commission exhibit 359 also shows that a number of other competitors of respondent received promotional payments from Gordon. For example, Bi-Lo, Inc., a chain-store retailer in Greenville, South Carolina, handled Gordon products in competition with respondent. While the witness from Bi-Lo did not recall whether Gordon made an offer of money to Bi-Lo in 1964 (Tr. 1613), he did state that it was entirely possible that this happened in 1964 and 1965 (Tr. 1624). Moreover, Commission exhibit 359 shows that cooperative advertising payments were made to Bi-Lo in 1964. On the basis of the present record, therefor, the examiner finds that Gordon's regular cooperative advertising agreement was, at least, available to all of respondent's competitors.

29. In any event, the respondent cannot be charged with inducing or receiving discriminatory payments in violation of Section 5 of the Federal Trade Commission Act since, as found above, the payments which it did receive were within the terms of the cooperative advertising agreement that Gordon had with respondent and others. The agreement stated, among other things, "This merchandising agreement is available on proportionally equal terms to all cus-

tomers." (CX 333, 334.) The examiner does not believe that a buyer can be found to have violated Section 5 of the Federal Trade Commission Act when he accepts moneys under a supplier's regular cooperative advertising agreement unless the agreement itself, on its face, is obviously discriminatory or the buyer has some affirmative knowledge that the agreement is not being offered to competitors.

Trade Winds

30. The Trade Winds Company is a frozen foods processing firm specializing in seafood. One of its products is breaded frozen shrimp that it sells throughout the United States under the trade names "Trade Winds" and "Pan Redi." The shrimp is supplied from packing plants located in Brownsville, Texas, and Thunderbolt, Georgia.

31. During 1964, Trade Winds had a promotional advertising program under which it granted to its customers a 1 percent advertising allowance on all purchases of Trade Winds frozen seafood products. Proof of advertising was required and payment was made on a quarterly basis (CX 517, 518, 523, 524). In addition, Trade Winds, from time to time during the first quarter of 1964, granted various allowances off the invoice prices on various of its products. Both respondent and other customers in respondent's trading areas were granted these off-case promotional allowances. (See, for example, CX 521 C & D and CX 522 A-E.)

32. Respondent during its Sword in the Stone promotion in the first quarter of 1964, solicited and received a total of \$7,700 for promotion of the Trade Winds breaded fantail shrimp: \$2,400 in the Atlanta Division, \$2,400 in the Raleigh Division, \$1,700 in the Columbia Division, and \$1,200 in the Jacksonville Division (CX 513-16). The record makes it clear that these payments for advertising in respondent's Sword in the Stone promotion are in addition to the Trade Winds regular cooperative promotional programs (CX 513-20).

33. In the Atlanta trading area during the Sword in the Stone promotion, respondent had three competitors who carried the Trade Winds shrimp: The Newman Thrifty Lady Market (Tr. 1118), Morris Red Dot Supermarket (Tr. 1136), and Matthews Supermarket, Inc. (Tr. 1158). All of these retailers purchased their Trade Winds shrimp through Associated Grocers Coop., Inc., and received no offers of promotional payments directly from Trade Winds or any of its representatives. They may have benefited from whatever pay-

ments or discounts were granted to their immediate supplier. However, the only allowances offered or received by the Associated Grocers Coop. during the first quarter of 1964 were the 1 percent advertising contract (Tr. 512-15) and the promotional off-invoice allowances that, as found above, were given to Associated Grocers Coop, and the respondent.

34. Consequently, the examiner finds that the payment of \$2,400 made to respondent for participation in respondent's Sword in the Stone promotion in the Atlanta Division was discriminatory since like or similar payments were not offered to competitors of respondent either directly or through their source of supply in the Atlanta area.

35. Respondent urges that the payments for participation in the Sword in the Stone promotion should be considered as payments under the Trade Winds 1 percent promotional allowance, since there is no direct evidence that they were not. In the examiner's opinion the record is amply clear on this point. Respondent not only received the benefit of the Trade Winds regular cooperative advertising allowances, as well as all Trade Winds off-invoice discounts—as did a number of its competitors—but respondent also received substantial additional payment (\$2,400 in the Atlanta Division alone) over and above the regular allowances and discounts. There can be no other sensible explanation for these additional payments other than that they were discriminatory payments made to respondent by Trade Winds (CX 513-20).

36. Complaint counsel urge that there are additional retailers in Florence, South Carolina, who purchased through wholesalers and who were also discriminated against. This may be the case, but the evidence in the record is so vague and general that the examiner is unable to base any finding on it. These customers in Florence purchased their frozen shrimp products from wholesalers, representatives of which were not called to testify. Nor did any representative of the Trade Winds Company who had any knowledge of the Trade Winds promotional program during 1964 appear and testify. In addition, there is no documentary evidence upon which to base such a finding as there was in the Trade Winds dealings with respondent and its competitors in the Atlanta area.

37. As found above, the payment made to respondent by Trade Winds was discriminatory and in violation of Section 2(d) of the amended Clayton Act. It is further clear that respondent should have known, or at least had good reason to believe that the payment was discriminatory. Respondent was receiving payments from Trade

Winds under its regular cooperative advertising agreement and also receiving the benefit of the Trade Winds promotional discounts off the invoice price on Trade Winds products. These payments and discounts by Trade Winds were not large and for respondent to request and to take the comparatively large payments that it did, in the examiner's opinion, placed upon the respondent the duty of making certain that Trade Winds was offering similar payments to respondent's competitors. This the respondent failed to do; consequently, it must be charged with having knowledge that the payments it received from Trade Winds were in violation of Section 2(d) of the amended Clayton Act.

Alcoa

38. The Aluminum Company of America sold its product, household aluminum foil (Alcoa Wrap), to the respondent and a number of respondent's competitors during the years 1964 and 1965. Alcoa participated in respondent's promotions during Thanksgiving of 1964, the Red Carpet Sweepstakes in the first quarter of 1965, respondent's July 4, 1965, promotion, and the President's Sale during Thanksgiving of 1965. The only division in which Alcoa participated in these promotions was in the respondent's Columbia Division (Tr. 886-87).

39. Prior to January 1962 Alcoa had a cooperative advertising program under which it paid 3 percent of sales of Alcoa Wrap quarterly for the promotion of this product. Shortly after the entry of the Commission's order to cease and desist violations of Section 2(d) of the amended Clayton Act, *Aluminum Co. of America*, 59 F.T.C. 1058 (1961), Alcoa changed its practice and granted a 3 percent quarterly payment to its Alcoa Wrap customers, as an automatic price refund, with no advertising performance required. Since Alcoa did not advise its customers of this change, some continued to perform advertising services, and Alcoa hoped that the 3 percent payment would be used for that purpose. This practice continued during the years 1964 and 1965 with respondent regularly receiving payments from Alcoa under this 3 percent arrangement. Also Alcoa from time to time made price cuts to stimulate sales. These price cuts were programmed into Alcoa's computer and all customers in a trading area received such reductions. Alcoa's employees were not authorized to offer or to pay promotional allowances. (CX 171-88; Tr. 900-04, 911, 964.)

40. Alcoa was represented in respondent's Columbia Division by a broker, Emory L. Williamson. In the Fall of 1964, this broker

agreed to participate in respondent's Thanksgiving promotion (Tr. 292). The broker was not authorized by Alcoa to commit it to participate in this promotion or any others to which he committed his principal. Alcoa refused to pay the amount to respondent and Mr. Williamson advised respondent's Columbia Division that he was going to have to pay the Columbia Division in sample merchandise which he received (Tr. 293). Alcoa's own representative in the area, Robert V. Gill, also agreed to Alcoa's participation in Colonial Stores promotions without contacting the Alcoa management. However, he stated that the participation by Alcoa was not intended to commit Alcoa to making special payments but that the Alcoa price reductions were to cover the participation in Colonial's promotions. For example, during the 1964 Thanksgiving promotions, Alcoa had a national program offering one case of Alcoa Wrap free, with the purchase of five cases; and during Colonial's Red Carpet promotion early in 1965, Alcoa was offering 50 cents per case allowance off-invoice; and during respondent's July 4, 1965, promotion, Alcoa had a national offer of free merchandise in relation to the purchase of two items. These discounts and allowances were to cover Alcoa's participation. (Affidavit of Robert V. Gill, CX 239, 239 A & B.)

41. These transactions between Alcoa and respondent are the subject of a large number of exhibits and testimony in the record (CX 189-236; testimony of Alcoa representative James A. Anderson, Tr. 885, *et seq.*; testimony of Charles A. Porter, former senior buyer of Colonial's Columbia (Central) Division, in particular Tr. 292 *et seq.*). The problems created by Alcoa's participation in respondent's various promotions, commencing in 1964, continued until August of 1967, at which time Alcoa wrote off \$927.15, an amount due it from Colonial Stores, as an uncollectible item. Complaint counsel urge that this amount must be considered to have been an advertising allowance paid by Alcoa to Colonial Stores that was not offered or paid to Colonial's competitors during this period of time. Complaint counsel also assert that Alcoa paid respondent \$624 in sample merchandise for participation in respondent's Red Carpet Sweepstakes in 1964.

42. There can be no doubt but that there was an indebtedness of at least \$616 that respondent never repaid Alcoa. This debt, whatever its amount, arose as a result of respondent's several deductions of the amount of its invoices to Alcoa for various promotional services from its remittances to Alcoa when such invoices became past due (CX 191, 194, 197, 202; Tr. 907-20). It is clear that Alcoa did not intend

for any payments to be made by it to respondent in addition to its regular promotional programs offered to all of its competing customers. The affidavit of the Alcoa sales representative, Mr. Gill (CX 239), and the testimony of Charles A. Porter, respondent's Columbia Division buyer, and a study of the various invoices, letters, checks, etc., passing between the accounting departments of Alcoa and Colonial, leave the examiner with no explanation of the situation other than that it was a complete mutual misunderstanding. Mr. Gill intended Alcoa's participation to come out of Alcoa's regular promotional moneys or free goods and Mr. Porter expected either money or free goods and was not advised until after the promotions were completed that Alcoa's broker, Mr. Williamson, did not have authority to commit Alcoa to participate in the promotions (Tr. 296). When the records reached the respondent's accounting department, and the amounts which respondent expected were not paid, the accounting department simply deducted these amounts from its next payment due Alcoa and Alcoa's accounting department thereafter attempted to recover the amount of these deductions. Alcoa was successful, at least once, in collecting \$1,580.15 on March 30, 1966 (CX 215), less \$311.15 deducted because of a merchandise shortage (CX 222). Consequently, Alcoa did recover some of the money that respondent had deducted to cover participation by Alcoa in respondent's various promotions. After several years of correspondence and attempts by the Alcoa representative to straighten the matter out, Alcoa simply wrote off the amount of \$927.15 as an uncollectible debt since it would cost more to collect this amount than it was worth (CX 234-36; Tr. 957).

43. It is the examiner's conclusion after examining all of the documents involved and the testimony of the persons involved in these transactions that Alcoa did not violate Section 2(d) of the amended Clayton Act. Alcoa clearly refused to honor the commitments that its broker and representative had made and attempted to recover all of the unauthorized deductions taken by respondent; and it was partially successful in this attempt. Since the record does not contain evidence that Alcoa violated Section 2(d), respondent cannot be charged with having induced or received payments in violation of Section 2(d).

Coca-Cola

44. The respondent received payments during its 1964 Sword in the Stone promotion for the advertising of Coca-Cola in three of its divisions, and during its 1965 Red Carpet Sweepstakes in four of its

divisions. The complaint charges and complaint counsel argue that these discriminatory payments were made by Coca-Cola Company of New York, New York, and that the Coca-Cola Company of New York did not make available similar promotional allowances to all of its customers competing with respondent. The subject of the relationship between Coca-Cola of New York and its various bottlers in the Southeast, and the transactions between the bottlers and respondent, and respondent's competitors was the subject of extensive testimony and numerous exhibits and lengthy proposed findings (Tr. 643-814).

45. The Coca-Cola Company of New York manufactures Coca-Cola syrup in its plants in Baltimore, Maryland, and Atlanta, Georgia, and sells the syrup to licensed bottlers located throughout the United States. The Coca-Cola Company of New York has extensive advertising programs promoting Coca-Cola products. These promotions are sponsored by the Coca-Cola Company of New York itself and do not involve the bottlers in any way. The operations of the bottlers are controlled by a Bottler's Bottle Contract between Coca-Cola of New York and each bottler (CX 266). The bottler purchases the syrup, adds water and CO₂, and sells the resulting mixture in bottles and cans in the trading area set forth in the particular Bottler's Bottle Contract. There is no question with regard to the existence of competition between respondent and other purchasers of Coca-Cola in respondent's trading areas since Coca-Cola is sold in practically every imaginable retail outlet (Tr. 659-60, 764).

46. The Coca-Cola Company of New York has a Bottler Sales Development Department, which employs field representatives, whose function is to promote the sales of Coca-Cola. Among other things, the field representatives make surveys and audits; call on large manufacturing companies and military accounts; and generally promote the sale of Coca-Cola to customers, including the respondent (Tr. 735-36). One of the purposes for calling on the respondent was that respondent's stores in its various divisions were supplied by a number of Coca-Cola bottlers and, in fact, the stores in some divisions were supplied by two or more bottlers. The Coca-Cola national sales representatives acted more or less as coordinators for the various bottlers with accounts such as Colonial, which are called inter-bottler accounts.

47. The promotion of Coca-Cola in the Sword in the Stone and Red Carpet Sweepstakes and other promotions was arranged between respondent and representatives of Coca-Cola's Bottler Sales Development Department. After respondent had contacted the field representatives, they, in turn, contacted the bottlers involved in respond-

ent's divisions to see if they wished to participate in respondent's promotions. The decision regarding participation was made by each bottler and the payment for the participation in the promotion came from funds that belonged to and could only be spent by each bottler. These Coca-Cola representatives had no authority to commit the bottlers to such promotions (Tr. 688, 750). The field representatives of the Coca-Cola Company did, however, assist the bottlers in arranging for them to participate in respondent's promotions. In fact, in some instances they even signed respondent's contracts on behalf of the bottlers and handled the money for the bottlers after the bottlers had decided to go along with the promotions and make the payments to respondent (Tr. 722, 779). The record contains no evidence whatever that there was any threat to or coercion of the bottlers by Coca-Cola Company to participate, and it is clear that all of the funds involved in the payments to respondent came from the bottlers' funds. The actual payments made by the various bottlers were based upon the number of respondent's stores that a particular bottler had within his territory. The amount that the bottler actually paid was approximately \$30 per Colonial store.

48. The record is clear that there were no sales made to any of respondent's divisions or stores by the Coca-Cola Company itself. All sales were made by the various Coca-Cola bottlers. The record is also clear that the Coca-Cola Company made no payments to the respondent for these promotions since all payments involved came directly from bottlers' funds. The theory of complaint counsel that the Coca-Cola Company itself, rather than the individual bottlers, violated Section 2(d) of the Clayton Act, as amended, is based upon the activities of the Coca-Cola Bottler Sales Development Department field representatives in assisting the various bottlers to participate in respondent's promotions. This contention must be rejected by the hearing examiner. There is no evidence that the bottlers were under the direct control of the Coca-Cola Company so that their identity as independent businesses can be disregarded and the Coca-Cola Company charged with responsibility for their actions. The only control that the record demonstrates that the Coca-Cola Company exercises over its bottlers is by the Bottler's Bottle Contract. The mere fact that Coca-Cola representatives assisted the bottlers in participating in respondent's promotions does not warrant a finding that the Coca-Cola Company itself is responsible for the bottlers' actions.

49. As far as the independent Coca-Cola bottlers are concerned, the record will not support a finding that the payments they made to

respondent or that the sale of Coca-Cola products by any individual bottler was made to respondent "in commerce" as is required for a violation by any of them of Section 2(d) of the amended Clayton Act. Complaint counsel themselves do not claim that any of the bottlers crossed State boundaries in selling bottled Coca-Cola. The fact that a bottler, which was located in a State other than the State in which the headquarters of a particular division of respondent was located, made its payments to this division across a State line is not sufficient to bring the entire transaction into commerce since the sales of the products and the promotional payments to respondent were based solely upon respondent's stores within the particular bottler's State and no shipment of Coca-Cola across State boundaries was made by any of the Coca-Cola bottlers.

50. The record does not establish with clarity that the payments made by the independent Coca-Cola bottlers were discriminatory. The payments as found above amounted to approximately \$30 per store in return for which Coca-Cola was advertised in respondent's mailers, described above, and other in-store promotions. None of the independent Coca-Cola bottlers testified as to what their promotional offers or payments to their customers were; but the record is clear that these bottlers offered a substantial number of promotional activities, services and equipment, without charge, to their customers (Tr. 783-84, 719-20). Among other things, these bottlers furnished outside signs, racks for the Coca-Cola products and clocks to be used in retail outlets. Chain stores, including respondent, do not use outside signs or other services or equipment offered by the bottlers (Tr. 719, 783). The alleged nonfavored customers, who were competitors of respondent and who testified regarding Coca-Cola, admitted that they had either been offered or had actually received some of the promotional material offered by the bottlers, or in some cases, case allowances for display-type promotions (Tr. 1205-10, 1226-27, 1285-87, 1320-21). Some of this equipment is quite expensive (Tr. 784). The examiner is unable to find upon the present record that the payments made to the respondent can be said to be discriminatory. For example, the Greenville, South Carolina, bottler paid respondent \$113.36 in connection with the Sword in the Stone promotion or \$28.34 for each of respondent's four stores located in this bottler's territory (CX 290-291). When considered on a per store basis, these payments are indeed small compared to the promotional aids the bottlers made available to customers competing with respondent. The record does not support a finding of discrimination by the bottlers since it fails to provide evidence by which a comparison of propor-

tionality between the payments made to respondent and the services and facilities made available to respondent's competitors.

Royal Crown

51. The respondent promoted Royal Crown Cola during the years 1964 and 1965 in some of its divisions. The Royal Crown Cola Company, located in Columbus, Georgia, manufactures a concentrate which it sells to a large number of franchise distributors throughout the United States. This concentrate is combined with carbonated water, bottled and sold to the public as Royal Crown Cola. In addition, the Royal Crown Cola Company itself produces this soft drink, which it cans and sells to its franchise distributors throughout the United States. In a few instances and for a temporary period of time, Royal Crown Cola Company has owned and operated franchise bottlers in various cities, none of which is pertinent to this proceeding (Tr. 532, 540-46, 557, 569).

52. Royal Crown Cola is sold through virtually every type of retail outlet in the United States, and there is no question but that the respondent is in competition with thousands of such retail outlets in the resale of both the canned and bottled soft drink (Tr. 531, 557).

53. While complaint counsel cite other payments received by respondent for the promotion of Royal Crown Cola, they base their charge that respondent induced a violation of Section 2(d) of the Clayton Act, as amended, upon the payments received by respondent in 1964 for promoting Royal Crown in the Sword in the Stone promotion. (Comp. Counsel Prop. Find. 98.) The amounts paid were \$1,200 to respondent's Jacksonville, Florida, Division and \$2,400 to respondent's Raleigh, North Carolina, Division. The products promoted during the Sword in the Stone promotion are Royal Crown Cola in both the bottles and cans (CX 16, p. 22).

54. The examiner rejects complaint counsel's contention that the Royal Crown Cola Company of Columbus, Georgia, violated Section 2(d) of the Clayton Act, as amended, as a result of the payments received by respondent to promote Royal Crown Cola products. The only testimony in the record pertaining to Royal Crown Cola, other than from retailers, is by two Royal Crown representatives, William I. Adams (Tr. 526, *et seq.*) and Lawrence Purvis (Tr. 554, *et seq.*). Their testimony is that the Royal Crown Cola Company of Columbus, Georgia, sold no products to respondent that were advertised or promoted in connection with the Sword in the Stone promotion nor made any payment to respondent in connection with such promotion

(Tr 550-51, 581-84). The evidence is undisputed that the individual bottler prepares the bottled Royal Crown Cola from the concentrate and sells it to its customers, including the respondent (Tr. 532-33). Royal Crown Cola in cans is purchased by the bottler from Royal Crown Cola Company of Columbus, Georgia, and the bottler rather than the Royal Crown Cola Company sells the canned beverage to retailers such as respondent. As with Coca-Cola the bottlers are independent businesses and the only control that the Royal Crown Cola Company exercises is pursuant to the franchise with the bottlers and consists principally of quality control over the product sold by the bottlers.

55. The payments made by the various bottlers to respondent cannot be attributed to the Royal Crown Cola Company of Columbus, Georgia. The funds from which such payments were made were derived one-half from the Royal Crown Cola Company (based upon a particular bottler's purchases of concentrate) and one-half from the bottlers. The only evidence in the record is that the Royal Crown Cola Company had no control whatever over these funds. The funds were only expended at the request of or with the approval of the individual bottlers (Tr. 537-39, 580-81). The contract for the promotion in respondent's Raleigh, North Carolina, Division was signed by the Royal Crown representative, Mr. Purvis, but it is clear he signed only on behalf of the bottlers after the bottlers themselves had determined that they wanted to participate in the respondent's promotion (Tr. 567-68, 580; CX 507). The fact that the Royal Crown Cola Company may have issued a check for the amount of the participation in respondent's promotions is only a bookkeeping function since the charges are thereafter made against each bottler's own funds, based upon the number of respondent's stores each bottler supplies with Royal Crown Cola.

56. There is no evidence in the record upon which to base a finding that any of the sales made by any Royal Crown bottlers were made in the course of commerce within the meaning of Section 2(d) of the Clayton Act, as amended.

57. The evidence in the record is also too vague and insubstantial upon which to base a finding that the payments made to respondent by the bottlers were not made available on proportionally equal terms to respondent's competitors. Complaint counsel rely upon the testimony of Sol Janow, former vice president of Daylight Grocery Co., a 7-store supermarket chain in Jacksonville, Florida (Tr. 1195, *et seq.*). This witness' testimony was vague and not based upon a review of any records. The witness did not even have control of the Daylight

records at the time he testified (Tr. 1207). However, he did testify that his stores from time to time received display racks from its local bottler, but he was unable to state what promotions were available during the first quarter of 1964 from Royal Crown bottlers. He did recall that there had been off-case promotional allowances granted to him for the promotion of Royal Crown Cola in the past (Tr. 1208). The other retailer who testified was the purchasing manager of the Atlanta Division of the Great Atlantic & Pacific Tea Company (Tr. 1213, *et seq.*). This witness only testified that a record search which he made in 1966 showed no written contracts with Royal Crown during the first quarter of 1964. However, this witness was not with the A & P Jacksonville Division during 1964 so he had no knowledge as to what offers might have been made to A & P during that time (Tr. 1213). No finding can be based upon this testimony.

58. Complaint counsel cite the Commission decision in *Royal Crown Cola Co.*, 63 F.T.C. 1950 (1963), as authority for the proposition "that the Commission has already found Royal Crown to have violated the law under circumstances similar to those which exist in this case." (Comp. Counsel Prop. Find. 99, Legal Argument.) In that proceeding the Commission held that Royal Crown Cola Company of Columbus, Georgia, had violated Section 2(d) of the amended Clayton Act. The basis for the finding of illegality was the fact that sales were made in commerce by the Royal Crown Cola Company through its wholly owned and operated bottling plant located in Columbus, Georgia. On appeal to the Commission the finding that payments made by the Royal Crown Cola local franchised bottlers could be attributed to Royal Crown was rejected when the Commission struck a conclusion of the hearing examiner to the effect that the order against Royal Crown Cola Company was applicable to sales of Royal Crown Cola to retailers by respondent's local franchised bottlers. The decision in that case is authority for the proposition that the Royal Crown Cola Company cannot be held responsible for violation of Section 2(d) of the amended Clayton Act by the Royal Crown Cola local franchised bottlers.

Poss' Famous Foods

59. Poss' Famous Foods of Athens, Georgia, manufactured a line of canned meat items of the barbecue variety in 1964 in its plant in Athens, Georgia, and did business in the nine Southeastern States (Tr. 612-15). Poss' products consist primarily of Southern Hash, Brunswick Stew, Pork with Barbecue Sauce and Hot Dog Chili

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Sauce sold in various sizes (CX 506 A). Poss' sells its products direct to retail store organizations having a central warehouse and to grocery wholesalers by means of brokers whom it employs (Tr. 615-17).

60. During 1964, Poss' sold its 24-ounce Brunswick Stew to respondent and paid respondent \$1,700 for a 1-page ad in respondent's *Sword in the Stone* mailer in the Columbia Division and for featuring Poss' products in its stores during the first 10 weeks of 1964. Poss' also paid respondent \$1,576 during the fourth quarter of 1964 for participation in respondent's Thanksgiving promotion. However, complaint counsel apparently did not rely upon this payment as being discriminatory (Comp. Counsel Prop. Find. 125-30).

61. The general manager of Poss', Charles S. Mangleburg, testified that during 1964 Poss' normal way of promoting its product was to grant to any of its customers a promotional allowance in the form of free goods in return for whatever advertising or promotional activity it was able to obtain. In addition, Poss' had promotional arrangements with customers in which it granted money to them on a bill-back basis, such as was done with respondent's Columbia Division and other customers (Tr. 617-21). Mr. Mangleburg also testified that Poss' salesmen were instructed to offer the trade, generally, any promotional arrangement that was entered into with any customer at any time (Tr. 630-32). Commission exhibits 504 and 505 are tabulations showing sales and promotion advertising allowances paid by Poss' to a select number of customers within respondent's Columbia Division during the year 1964. These tabulations show that Poss' gave it customers either free merchandise as promotional allowances, received billbacks from customers for promotional allowances, or paid some other consideration to a substantial number of its customers during 1964. For example, these tabulations showing that the Winn-Dixie Stores located in Greenville, South Carolina, and that are in competition with respondent's Columbia Division stores received substantial payments, even greater than those received by respondent during 1964, for promoting Poss' products in the Winn-Dixie stores. The payments made to Winn-Dixie were for the purchase of trading stamps to be given away by Winn-Dixie in connection with the sale of Poss' products (CX 504). In addition, Poss' purchased ads in wholesalers' weekly order books and paid for cooperative advertising signs. Mr. Mangleburg further testified that at the time he approved the payment to respondent for the *Sword in the Stone* promotion, he believed that the promotion would generate more sales than actually resulted (Tr. 637-39).

62. Based upon the record, the examiner finds that the payments that respondent solicited and received from Poss' are discriminatory payments since Poss' failed to offer or to make like or similar payments available to a number of respondent's competitors selling Poss 24-ounce Brunswick Stew. While, as found above, Poss' had various methods of promoting its products, the payment made to respondent for the Sword in the Stone promotion is so greatly disproportionate when compared to the amounts offered to or granted to respondent's competitors and is so great when compared to respondent's own purchases from Poss' that respondent had every reason to know or to believe that it was receiving discriminatory payments. For example, Poss' payment to respondent for the Sword in the Stone promotion, \$1,700, amounted to 45 percent of the respondent's Columbia Division purchases of 24-ounce Brunswick Stew during the first three months of 1964. Competitors who received the free goods deals only received, at best, about 9 percent of their purchases (CX 495-503).

63. A number of respondent's competitors testified that they were not offered any promotional payments similar to those received by respondent. Duckworth Foods of Greenville, South Carolina, purchased Poss' 24-ounce Brunswick Stew during the first quarter of 1964 and received no cooperative advertising offers from Poss' or its supplier (Tr. 1351-52). Duckworth's supplier, the Associated Grocers of South Carolina, received \$39 per quarter from Poss' for an ad in its weekly order book and some free goods but no offer of money such as respondent received (CX 503-05; Tr. 632-33, 1374-75). Bi-Lo, Inc., a chain grocery store with headquarters in Greenville, South Carolina, purchased Poss' Brunswick Stew from Poss' and received no offers from Poss' during 1964 (Tr. 1615). Kash & Karry, Inc., a retailer in Greenville, South Carolina, in competition with respondent, received a promotional allowance in the form of services of Poss' demonstrator. Poss' valued these services at \$381 for the first quarter of 1964 or about 51¼ percent of this retailer's purchases from Poss'. Consequently, this retailer-competitor of respondent was discriminated against when the services it received are compared to the amount paid to respondent (CX 495, 505).

64. It is found that the payments made by Poss' to respondent were solicited and were received by respondent who knew or should have known that such payments were discriminatory since Poss' could not possibly have been offering like or similar payments to competitors of respondent.

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Gebhardt's

65. During the first quarter of 1964 Gebhardt's Mexican Foods Company of San Antonio, Texas, a Division of Beatrice Foods Company, paid respondent \$1,700 for the promotion of its Mexican food line in respondent's Sword in the Stone promotion. In return for the \$1,700, Gebhardt's received a full-page ad in the Sword in the Stone mailer used in respondent's Columbia, South Carolina, Division. In addition, ten of the Gebhardt's basic Mexican food products were given prominent display in all of respondent's Columbia Division stores with a warehouse backup on each of the products promoted. Five of the products featured in the display were selected by Gebhardt's and the remaining five by respondent (CX 542). There is some confusion as to the exact amount received by respondent since the original payment was to be \$2,000. Respondent actually received only \$1,700, plus some advertising mats supplied by Gebhardt's. The basis for the payment was that Gebhardt's would pay \$50 per store in the Columbia Division (40 stores) for the ad and the store displays. However, respondent received something less than this amount per store (Tr. 470-84).

66. The general sales manager of Gebhardt's, Robert B. Bonner, appeared and testified (Tr. 454, *et seq.*) concerning Gebhardt's payment to the respondent and identified certain exhibits pertaining to the promotion. Gebhardt's sold its products in the Columbia, South Carolina, Division through a broker who contacted all possible accounts, including respondent, in the area in attempting to sell Gebhardt's products. No representative of this broker was called to testify so the only evidence in the record pertaining to the arrangement between Gebhardt's and respondent is that of the Gebhardt's representative, Mr. Bonner.

67. The hearing examiner is unable to conclude, based upon the testimony of this witness and the exhibits in the record, that Gebhardt's violated Section 2(d) of the amended Clayton Act in making its payment to respondent's Columbia Division. Prior to January of 1964, the Columbia Division of respondent had not carried Gebhardt's line of Mexican food products and the promotional arrangement between Gebhardt's and respondent's Columbia Division presented an opportunity for Gebhardt's to place ten of its basic Mexican food line items in forty of respondent's stores (Tr. 483-84). Mr. Bonner testified that at the time it entered into its arrangement with respondent he had instructed his broker to make the same type of promotional allowance available to all other competing

customers in the Columbia, South Carolina, Division. In fact the record establishes that a similar offer of \$40 per store was made by Gebhardt's broker to a competitor of respondent, Winn-Dixie, in the amount of \$40 per store in August 1963, which was refused (Tr. 482-83; CX 308, 308 A).

68. The only substantial, credible evidence in the record with regard to Gebhardt's promotional offers and in particular its attempt to get its basic Mexican food line placed in retail outlets, is the above cited testimony of Gebhardt's representative, Mr. Bonner. The only conclusion that can be drawn from this testimony and the exhibits is that Gebhardt's had instructed its broker to make like or similar payments to those made respondent available to all of respondent's competitors. In addition, the payments made by Gebhardt's are in the nature of introductory offers to obtain substantial coverage of its entire line in the stores located in respondent's Columbia, South Carolina, Division. As a consequence, the payment made by Gebhardt's is not a payment within the purview of Section 2(d) of the amended Clayton Act since it is a payment intended to facilitate the original sale of the products involved and does not constitute the rendering of a service or facility by the purchaser, *New England Confectionery Co.*, 46 F.T.C. 1041, 1059.

69. The record, in addition, fails to establish that there were competitors of respondent who were carrying the same or substantially the same products for resale in competition with the respondent. The respondent was paid for advertising and promoting substantially all of Gebhardt's Mexican food line consisting of ten items (Tr. 480-82). An examination of the invoices and testimony of competitors establishes that they purchased only one or two Gebhardt's products (CX 314-21). Further, Mr. Bonner testified that these products, Chili Pepper and Hot Dog Sauce, are basically not a part of Gebhardt's Mexican food line. Consequently, the record does not contain substantial evidence that competitors of respondent were purchasing the same products for which respondent received payment.

Louisiana State Rice Milling Company, Inc.

70. The Louisiana State Rice Milling Co., Inc., of Abbeville, Louisiana, is a marketer of table rice under the trade names "Mahatma" and "Watermaid." Louisiana State Rice sold to respondent's Atlanta, Jacksonville, Raleigh and Columbia Divisions during 1964 and 1965 and regarded each division as a separate account for sales and promotional purposes. During the respondent's Sword in

the Stone and Red Carpet promotions in the first quarters of 1964 and 1965, Louisiana State Rice participated in these promotions in respondent's Columbia Division and purchased full-page ads in respondent's mailers used in connection with these promotions. Louisiana State Rice paid respondent's Columbia Division \$1,700 for the Sword in the Stone promotion and \$1,200 for the Red Carpet promotion.

71. During 1964 and 1965, Louisiana State Rice had in effect a regular cooperative advertising agreement that it offered to all of its customers, including respondent, pursuant to which Louisiana State Rice paid the customers who took advantage of the contract, promotional allowances based upon their purchases. Also, during this period Louisiana State Rice made additional payments over and above its regular cooperative advertising agreements. As found above, Louisiana State Rice made two payments to respondent's Columbia Division during 1964 and 1965 that were over and above the regular contract (Tr. 395, 407-08; CX 399-402).

72. Commission exhibits 541 and 541 A are tabulations showing Louisiana State Rice customers and showing purchases of rice and promotional payments made to such customers during 1964 and 1965. Complaint counsel urge that these exhibits, in conjunction with the testimony of the Louisiana State Rice representative, Charles R. Godchaux, establish that the payments to respondent's Columbia and Raleigh Divisions were discriminatory (Tr. 381, *et seq.*). It is clear from Mr. Godchaux's testimony that the records he produced (CX 541, 541 A) were records of actual payments only, since there was no record of offers of payments that were not accepted by Louisiana State Rice customers (Tr. 425-27, 445-47). He was interrogated by complaint counsel only as to actual payments and not as to offers that might have been made. Considerable doubt, moreover, is cast upon CX 541 and 541 A since other records show that payments were made to some customers listed on these exhibits as having received payments; namely, Associated Grocers Mutual of Carolinas, Inc., and Harris-Teeter Supermarket, Charlotte, North Carolina (CX 414, 415; RX 216-19). Respondent's exhibits 212 thru 215 also demonstrate that Winn-Dixie of Greenville, South Carolina, was receiving promotional allowances in addition to those it received under Louisiana State Rice's regular advertising contract during 1964 and 1965. Complaint counsel state in their Proposed Finding No. 52 that they are not offering Winn-Dixie of South Carolina or Harris-Teeter Supermarket, Inc., of Charlotte, North Carolina, as examples of nonfavored customers of Louisiana State Rice. Never-

theless, the fact that substantial payments were made to these customers for promotional purposes, which are not reflected upon CX 541 and 541 A, casts considerable doubt upon these exhibits. The A & P company Division of Charlotte, North Carolina, also purchased Louisiana State Rice products, and Commission exhibits 541 and 541 A show that no payments were made to A & P during 1964 and 1965. The examiner, however, is unable to find that no offers were made to this A & P Division based upon Louisiana State Rice representative's testimony, discussed above, and no representative of the A & P company of Charlotte, North Carolina, was called to testify to establish this point.

73. The wholesaler customers of Louisiana State Rice who did appear and testify likewise did not give the examiner a basis for concluding that they were discriminated against by Louisiana State Rice. The testimony of Neal P. Ponder, general manager of Associated Grocers of South Carolina, is so vague that no finding can be based upon it (Tr. 1365, *et seq.*). Mr. Ponder testified solely from memory as to what contracts his organization had with Louisiana State Rice and what payments his company received from Louisiana State Rice. He had not searched his files for the years 1964 and 1965 nor had anyone else made such a search (Tr. 1385-86). Mr. Ponder testified that his organization had no advertising agreement with Louisiana State Rice. However, CX 541 shows that Louisiana State Rice's Contract No. 489 was in effect with Associated Grocers during 1964 and 1965 (Tr. 1373-85). Herbert B. Drake, president of Smith-Drake Company, a wholesale grocer, testified that he had no regular cooperative advertising contract with Louisiana State Rice and received no payments or offers of payments from Louisiana State Rice (Tr. 1484-1485). Consequently, it appears that Louisiana State Rice may have discriminated against this wholesaler. However, Mr. Drake did testify that he may have received free goods or case allowances from Louisiana State Rice but he could not be sure unless he reviewed his invoices for the period of time involved (Tr. 1493). Only a few of his invoices were in evidence (CX 417, 417 A-D) or available at the hearing, and apparently no file search of his records had been made before he testified.

74. Louis Hite, president of Massey-Hite Company, a wholesaler located at Florence, South Carolina, testified that he did not recall receiving any offers of payments over and above Louisiana State Rice's regular cooperative advertising payments that his company received during 1964 and 1965. He also testified that it was possible for offers to be made to his company's advertising manager without

his knowledge (Tr. 1460), but he would know of any offer that was accepted. He made it clear that the Massey-Hite Company did not accept all the cooperative advertising offered to it, only those which were worthwhile to the company (Tr. 1460-61), and that his advertising manager did have authority to refuse offers of cooperative advertising from suppliers (Tr. 1468). Consequently, the record is inconclusive as to whether this customer of Louisiana State Rice was actually discriminated against since it regularly received promotional payments under Louisiana State Rice's regular contract. The record fails to show whether additional payments were offered by Louisiana State Rice. Edgar C. Amos of the R. P. Turner Company, another wholesaler, testified that his company had no cooperative advertising contract with Louisiana State Rice (Tr. 1545-61). The record, however, establishes that Louisiana State Rice had had a regular cooperative advertising arrangement with the R. P. Turner Company since 1962 (RX 341; CX 541 A). Again, this witness had not checked the records of the R. P. Turner Company in preparing to testify (Tr. 1554); although records for the years 1964 and 1965 were available. Consequently, no conclusive finding can be based upon the testimony of this witness.

75. The advertising manager of Community Cash Stores, Spartanburg, South Carolina, Herbert T. Littlejohn, who purchased direct from Louisiana State Rice, testified that he did not recall ever receiving an offer from Louisiana State Rice for promotion of its products in excess of the regular promotional contract, which payments were regularly received during 1964 and 1965. He also testified that Community Cash Stores maintained no records of unaccepted advertising and promotion offers, and he did not remember everything that was offered but was not accepted in 1964 and 1965 (Tr. 1325). He also testified that offers were made to the Community Cash buyer that he would not know about (Tr. 1332). His testimony must be evaluated in the light of respondent's exhibit no. 300 which shows that Louisiana State Rice had made a special display promotion payment available to Community Cash in 1963 that was cancelled in March 1964. Henry Veach, executive vice president of Bi-Lo, Inc., testified that he did not recall Bi-Lo receiving any payments or offers beyond the regular contract with Louisiana State Rice (Tr. 1624). However, such a payment was made in March of 1965 (Tr. 413; CX 416). Mr. Veach also testified that Bi-Lo does not retain copies of its invoices to manufacturers showing promotional and advertising payments. Consequently, it would be difficult

to establish any offers or payments made during 1964 and 1965 to this customer (Tr. 1617-25).

76. The evidence in the record is so vague and contradictory that the examiner finds that there is no reliable evidence upon which to base a finding that respondent has knowingly induced or has received a discriminatory advertising allowance from the Louisiana State Rice Milling Company, Inc.

77. In summary, therefore, it is found that the record establishes that respondent induced and received payments as advertising allowances from two of its suppliers, in commerce, that respondent knew or should have known were not being offered or otherwise made available on proportionally equal terms to all other of such suppliers' customers who were competing with respondent in the sale and distribution of such suppliers' products; namely, Poss' Famous Foods, Inc., and Trade Winds Company.

78. Respondent argues that a large number of suppliers participated in its various promotions and that only a few were named in the complaint or were made the subject of evidence during the trial; that the payments made by these suppliers were directly chargeable against their regular cooperative advertising arrangements; that the payments were made by the suppliers on their own terms and conditions and in many instances respondent was required not only to provide the advertising and in-store displays, but also to purchase a minimum quantity of products within a specified period of time, thus indicating to respondent, and justifying it in believing, that all such suppliers were making their payments within the framework of the suppliers' regular cooperative advertising programs. As found above, this argument of respondent does have a foundation in fact, as far as respondent's dealings with nine of the eleven suppliers are concerned. In the two instances in which respondent has been found to have induced and to have received discriminatory payments, this argument must be disregarded because it simply does not apply. The payments made by Poss' Famous Foods and Trade Winds Company were over and above the amounts provided for in their regular cooperative advertising agreements and these suppliers did not require the purchase of any additional products by respondent. The payments to respondent were in fact so disproportionate to each supplier's regular cooperative advertising payments, and to the quantity of such supplier's products purchased by respondent, that no explanation is possible other than that they were discriminatory payments and that the respondent should have known that it

would have been impossible for these suppliers to have offered like or similar payments to all of respondent's competitors.

79. Competitors of respondent, large and small, operating in the same trading areas as respondent's stores, had a multitude of similar types of promotions and plans that were, at least in part, paid for by such competitors' suppliers (Tr. 218-20, 319, 1817-26, 1853). Respondent argues that it well knew of this situation and consequently it was justified in inducing and receiving the payments which it did. While it is true that the record contains evidence of a large number of such programs in effect during 1964 and 1965 by respondent's retailer-competitors, this does not justify the respondent's acceptance of the discriminatory payments made to it. Since the record contains no evidence as to the amounts paid toward the other promotions conducted by respondent's competitors, the respondent cannot justify its actions by simply saying that competitors were doing the same things. The legal obligation placed upon respondent was to be certain that its promotions were run in a lawful manner. Speculation that respondent's competitors may have been acting unlawfully or that respondent's suppliers may have been making payments toward respondent's competitors' promotions does not justify the respondent in assuming that all of its suppliers' payments to it were not discriminatory.

80. Respondent had a form contract (Form 6254) that was signed by virtually all of the suppliers from whom it received payments in connection with its promotions. Poss' Famous Foods and Trade Winds Company had signed such forms. This form contract contained the following statement: "It is understood that this same agreement is made available by the Vendor on a proportionally equal basis to all dealers in the competitive area who purchase products as herein specified." (See, for example, CX 48). This language was inserted in Form 6254 by respondent upon the advice of its attorneys (RX 1-5 A). This agreement, as far as the record shows, was signed by each supplier freely, and no supplier testified that any information was given to the respondent to the effect that such statement was not true. Representatives of the respondent who testified all stated that they knew of nothing more that they could have done in dealing with the various suppliers to assure themselves that the payments made by the suppliers were legal.

81. The Sword in the Stone promotion commenced in all of respondent's divisions involved in this proceeding on or about January 4, 1964, and ended on March 7, 1964, (CX 62). Since respondent had purchased this promotion on short notice, it felt impelled to put the

promotion into effect in its various divisions without delay; so that instead of mailing out its usual promotional letter, it contacted by telephone or by personal call all those suppliers who, it thought, might be interested in the promotion and who might do the best job (CX 60). All of the suppliers who had agreed to participate in the promotion had made this agreement prior to the promotion so that their ads would be placed in the mailers that were to go out early in January (CX 55-58). Consequently, those suppliers who had bought ads in respondent's Sword in the Stone mailers, including Poss' Famous Foods and the Trade Winds Company, had agreed to participate in this promotion as early as January 4, 1964. Poss' Form 6254 was dated February 11, (CX 61) and Trade Winds Company, January 31, 1964, (CX 25). Both of these companies have been found to have made discriminatory payments to respondent for the Sword in the Stone promotion. The fact that Poss' and Trade Winds signed the Form 6254 long after they had committed themselves to pay respondent for this promotion can only mean that the Form 6254, as used in the Sword in the Stone promotion, is a meaningless, self-serving declaration obtained by the respondent and worthy of no weight. The respondent failed to follow the advice of its attorneys by not obtaining suppliers' signatures on its Form 6254 at the proper time—when the original agreements were made. The forms should also have been signed by a person from each supplier that the respondent knew was in a position of authority to make such a commitment, rather than merely some salesman or broker's representative. For example, had this been done, the whole episode between respondent and Aluminum Company of America, discussed above, would not have occurred.

CONCLUSIONS

1. In the course and conduct of its business, in commerce, respondent induced and received from its suppliers' payments, allowances, or other things of value for its benefit, as compensation for or in consideration of its advertising and promotional services and facilities in connection with its offering for sale or sale of the products sold to it by such suppliers.

2. The suppliers did not offer or otherwise make available to all of their customers who competed with respondent's payments, allowances, or other things of value for advertising and promotional services or facilities in connection with the offering for sale or sale of

their products on terms proportionally equal to those granted to respondent.

3. Respondent knew or should have known that the payments, allowances, or other things of value it received, were not offered or otherwise made available by the suppliers on proportionally equal terms to all of their other customers who competed with the respondent in the offering for sale or sale of such suppliers' products.

4. The acts and practices of respondent, as hereinbefore found, are all to the prejudice of the public, and constitute unfair methods of competition, in commerce and unfair acts and practices in commerce, within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondent Colonial Stores Incorporated, a corporation, and its officers, representatives, agents, and employees, directly or indirectly, through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent do forthwith cease and desist from:

Inducing and receiving payments, allowances, or anything of value from any supplier as compensation for or in consideration of advertising and promotional services or facilities furnished by or through respondent in connection with the sale or offering for sale of such supplier's products, when respondent knows or should know that such payments, allowances, or other things of value are not being offered or otherwise made available by such supplier, on proportionally equal terms to all of such supplier's other customers, including retailer-customers that do not purchase directly from such supplier, who compete with respondent in the offering for sale or sale of such supplier's products.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

OPINION OF THE COMMISSION

MAY 7, 1970

I

The complaint in this proceeding, issued September 20, 1968, charged that respondent had violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition and

unfair acts and practices in commerce by inducing and receiving discriminatory promotional allowances from some of its suppliers. Respondent filed an answer denying the allegations.

After full evidentiary hearings, the examiner issued an initial decision on October 24, 1969, in which he found that respondent had induced and received payments as advertising allowances from two of its suppliers, in commerce—allowances that respondent knew or should have known were not being offered or otherwise made available on proportionally equal terms to all other of such suppliers' customers who were competing with respondent in the sale and distribution of such suppliers' products. The examiner found that complaint counsel had not carried their burden of proof as to seven other suppliers alleged to have discriminated in favor of respondent by making payments to respondent in its various promotions.¹

The case is now before the Commission on the cross-appeals of respondent and complaint counsel.

Respondent contends: (a) that there is insufficient evidence to support the examiner's conclusion that the payments from the discriminating suppliers, The Trade Winds Company and Poss' Famous Foods, were not offered on proportionally equal terms to its competitors; (b) that even assuming the payments were discriminatory, respondent neither knew nor should have known that such payments were discriminatory; and (c) that, even if the payments were discriminatory and respondent should have realized it, respondent nevertheless made sufficient inquiry of Trade Winds and Poss to satisfy its duty of inquiry as to the possible discriminatory nature of the allowances and therefore respondent should not be held for its conduct. Complaint counsel contend that the examiner erred in holding that there was insufficient evidence to determine that respondent had induced discriminatory payments from seven additional suppliers. Complaint counsel also contend that the evidence supported a broader order than that issued by the examiner with his initial decision.²

¹ Complaint counsel identified two additional suppliers as having made discriminatory payments to respondent but, in their proposed findings, did not pursue the charges as to these suppliers. The proof presented by complaint counsel was limited principally to suppliers who engaged in respondent's "Sword in the Stone" and "Red Carpet Sweepstakes" promotions and to the period from January 1964 to July 1965.

² Before the examiner and on appeal, complaint counsel have argued alternative theories of law under which it would not be necessary to establish that respondent had received discriminatory payments in order to establish that respondent had violated Section 5 by inducing discriminatory payments. The examiner rejected these theories, and we agree that decision of this case requires no extension of the established principle that a showing of receipt of discriminatory payments is a necessary element of proof in a Section 5 "inducement case" (I.D. 561-63). See *American News Co. v. Federal Trade Commission*, 300 F.2d 104, 111 (2d Cir. 1962), cert. denied, 371 U.S. 824; *J. Weingarten, Inc.*, 62 F.T.C. 1521, 1530 (1963).

II

The facts are adequately set forth in the initial decision; and the examiner's findings, to the extent they are consistent with this opinion, are hereby adopted as those of the Commission.

Respondent, a Virginia corporation with its principal business office in East Point, Georgia, operates a chain of retail grocery supermarkets, located mainly in the southern part of the country. Respondent engages in extensive advertising and promotion to create demand for the products it sells. It solicits a number of its suppliers to participate in its special promotions. Respondent selects the theme of such promotions, sets the periods of time during which the special promotions will run, decides the terms and conditions of the advertising and promotional services, and decides the rates of compensation the suppliers are to pay for such services and facilities.

The payments from Trade Winds Company and Poss' Famous Foods which the examiner found to be discriminatory and induced by respondent occurred in connection with respondent's "Sword in the Stone" promotional program, run during the first quarter of 1964. This promotion, which was based upon a Walt Disney motion picture of that title showing throughout the United States at that time, was developed as a supermarket game by Famous Character Promotions, Inc. The promotion was initiated in respondent's various divisions by mailing of a brochure advertising the game and the suppliers' products. The promotional program included in-store displays, newspaper advertisements, and radio and television features. Respondent sold space in the brochures, which varied from division to division, to its suppliers. Respondent mailed 2,799,400 Sword in the Stone brochures to households in the trading areas where its stores were located. An additional 94,100 brochures were distributed by respondent through its stores to customers. Some participating suppliers did not buy advertisements in the mailers but utilized other plans involving varying amounts of in-store displays and newspaper, radio, and television advertising.

The Trade Winds Company is a frozen foods processing firm specializing in sea foods. It sells breaded frozen shrimp throughout the United States under the trade names "Trade Winds" and "Pan Redi." During 1964, Trade Winds granted, under its promotional advertising program, a 1 percent advertising allowance on all purchases of Trade Winds frozen seafood products. Trade Winds required proof of advertising and made payment on a quarterly basis. In addition, Trade Winds frequently granted off-case promotional allowances from the invoice price on certain products.

In the first quarter of 1964, during the Sword in the Stone promotion, respondent received from Trade Winds, in addition to payments under Trade Winds' regular cooperative promotional program, a total of \$7,700 for promotion of Trade Winds breaded fantail shrimp; \$2,400 of this sum was received in the Atlanta division of Colonial Stores (CX 513-520).

Respondent had three competitors who carried the Trade Winds shrimp in the Atlanta trading area during the time of the Sword in the Stone promotion (Tr. 1118, 1136, 1158). None of these competitors, each of whom purchased Trade Winds shrimp through Associated Grocers Coop., Inc., received any offers of promotional payments directly from Trade Winds or any of its representatives. The only allowances offered or received by Associated Grocers Coop. during the first quarter of 1964 were the 1 percent advertising contract and the promotional off-invoice allowances described above (Tr. 512-515). The examiner found that the payment of \$2,400 to respondent for participation in the respondent's Sword in the Stone promotion in the Atlanta division therefore was discriminatory (I.D. 569-71). We agree.

Respondent argues that there is no direct evidence that the \$2,400 payment made to respondent for participation in the Sword in the Stone program in the Atlanta division was discriminatory; it contends that complaint counsel did not present direct evidence that this sum was not for payment of the 1 percent allowance and thus failed to carry their burden of proof.

We cannot accept respondent's argument. There is evidence in the record that Trade Winds was billed \$181.25 for cooperative advertising under Trade Winds' regular quarterly promotional program (CX 520). For the \$2,400 as well as the \$181.25 payment from Trade Winds to fall within the 1 percent quarterly allowance, respondent's Atlanta division would have had to make purchases of more than a quarter of a million dollars of Trade Winds' products during the first quarter of 1964. However, respondent's sales invoices reflecting first quarter purchases from Trade Winds (CX 522 a-e) total only \$33,553.80.³ Moreover, Trade Winds' sales invoices to respondent reveal that none of respondent's divisions made any weekly purchase in

³ Respondent contends that no evidence was adduced to prove that this sum represented all the purchases made from Trade Winds during the quarter, but these figures were from the invoices produced by respondent upon request by Commission counsel for invoices showing first quarter purchases from Trade Winds. Respondent has not asserted that its records are incomplete or that it did not comply fully with Commission counsel's request. The \$181.25 payment is less than the \$335 to which respondent was entitled under the 1 percent allowance; this is not surprising since, as noted above, Trade Winds required proof of performance as a prerequisite to payment of the allowance (Tr. 513).

excess of \$8,000 (CX 522 a-m). Although complaint counsel did not present the "airtight" case preferable in matters of this nature, we agree with the examiner that the proof they presented was sufficient to support the allegations of the complaint as to this supplier. At a minimum, complaint counsel's proof placed upon respondent the duty of coming forward with some evidence to the contrary, evidence which respondent did not present.

The other supplier which the examiner found to have been induced by respondent to make discriminatory payments was Poss' Famous Foods of Athens, Georgia. This company manufactured a line of canned barbecue meat items in its Athens plant, including Southern Hash, Brunswick Stew, Pork with Barbecue Sauce, and Hot Dog Chili Sauce. Poss sells its products in the Southeastern United States directly to retailers with central warehouses and to wholesalers through brokers.

Poss sold its 24-ounce size of Brunswick Stew to respondent throughout 1964. It paid respondent \$1,700 for a one-page advertisement in respondent's *Sword in the Stone* mailer in the Columbia, South Carolina, division and for featuring of Poss' products in respondent's stores during the first 10 weeks of that year.

The general manager of Poss testified that, during 1964, the company's normal way of promoting its products was to grant to its customers a promotional allowance in the form of free goods in return for advertising or other promotional activity carried out for it. Poss also had promotional arrangements with customers, under which it granted money to them on a bill-back basis (Tr. 617-21). Poss' general manager further testified that its salesmen were instructed to offer the trade, generally, any promotional arrangement that was entered into with any customer at any time (Tr. 630-32).

Although Poss had various methods of promoting its products, the payments which the record shows were made to respondent were so grossly disproportionate to the amounts granted to respondent's competitors and were so large in comparison with respondent's purchases from Poss that it is reasonable to infer that respondent knew or should have known it was receiving discriminatory payments. Poss' payment to respondent for the "*Sword in the Stone*" promotion in respondent's Columbia, South Carolina, division, totaled \$1,700. This amounted to 45 percent of respondent's purchases in that division of 24-ounce Brunswick Stew during the first three months of 1964. Respondent's competitors received no more than 9 percent of their purchases, under Poss' various promotional arrangements (CX 495-503).

Representatives of several of respondent's competitors who purchased Poss' 24-ounce Brunswick Stew testified that they were not offered any promotional payments similar to those received by respondent. Duckworth Foods of Greenville, South Carolina, received no cooperative advertising offers from Poss or its suppliers during the first quarter of 1964 (Tr. 1351-52). Duckworth's suppliers, Associated Grocers of South Carolina, received \$39 per quarter from Poss for an advertisement in its weekly order book and also received some free goods; however, Associated received no offer of money such as that received by respondent (CX 503-505; Tr. 632-33, 1374-75). Bi-Lo, Inc., a grocery chain headquartered in Greenville, South Carolina, received no offers from Poss during 1964 (Tr. 1615). Kash & Karry, Inc., a retailer located in Greenville, South Carolina, received promotional allowances in the form of services of Poss' demonstrator. These demonstrator services were valued by Poss at \$381 for the first quarter of 1964, which was approximately 5 $\frac{1}{4}$ percent of Kash & Karry's purchases from Poss, significantly lower than the percentage granted to respondent (CX 495, 505).

In view of these facts, we accept the examiner's finding that "the payments made by Poss to respondent were solicited and were received by respondent who knew or should have known that such payments were discriminatory since Poss could not possibly have been offering like or similar payments to competitors of respondent" (I.D. 581).

III

Respondent argues that even if it had reason to believe that the special promotional payments it solicited and received were discriminatory, and we have so found, it nonetheless should not be held to have violated the law because it fulfilled any duty of inquiry imposed upon it. This argument is based entirely upon the printed statements on respondent's promotional contract Form 6254, which was signed by virtually all suppliers who granted promotional allowances to respondent. The statement asserted that the "same agreement is made available by the Vendor on a proportionally equal basis to all dealers in the competitive area who purchase products herein satisfied" (*e.g.*, CX 48).

The examiner described the statement of availability appearing on respondent's printed forms as a "meaningless self-serving declaration obtained by the respondent and worthy of no weight" (I.D. 589.) The examiner noted that execution of these forms by the suppliers occurred subsequent to agreement by the suppliers to participate in respondent's Sword in the Stone promotion. The

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Sword in the Stone promotion was initiated in all of respondent's divisions on or about January 4, 1964 (CX 62). All suppliers who agreed to participate in the promotion had been contacted by respondent by telephone or personal visits by its representatives, and had agreed to participate in the program prior to the promotion so that their advertisements would be placed in the mailers to be distributed in early January.⁴ As a result, suppliers such as Poss and Trade Winds who purchased advertisements in the Sword in the Stone mailers had agreed to participate in the promotion about January 4, 1964, when the promotion began. However, the signed forms which respondent asserts satisfied its duty of inquiry were not obtained until some time later. The Trade Winds form was dated January 31, 1964 (CX 25), and Poss' form was dated February 11, 1964 (CX 61).⁵

In these circumstances, we agree with the examiner that the *ex post facto* signature of respondent's forms did not satisfy respondent's duty of inquiry, and did not negate its inducement and receipt of discriminatory allowances from Trade Winds and Poss' Famous Foods.

As the Supreme Court noted in *Automatic Canteen Company v. Federal Trade Commission*, 346 U.S. 61, n.80 (1953), the weight which may properly be given to such statements will vary according to the factual circumstances surrounding their execution. Likewise, we need not now determine the question how, under other circumstances, a buyer's inquiry may properly be carried out. See *Giant Food, Inc. v. Federal Trade Commission*, 307 F. 2d 184, 187 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

In sum, we uphold the examiner's findings that respondent violated Section 5 of the Federal Trade Commission Act by inducing and receiving discriminatory payments from The Trade Winds Company and from Poss' Famous Foods. Respondent's appeal, to the extent that it seeks to reverse these findings, is rejected.

IV

Inasmuch as we have determined that the examiner correctly found that respondent violated the law, as alleged in the complaint, no useful purpose would be served by reviewing complaint counsel's

⁴ Respondent did not mail out its usual promotional letter because it had purchased this promotion on short notice and thus desired to proceed with it as quickly as possible.

⁵ The examiner noted that respondent's practice was to have its form signed by a salesman or broker's representative rather than by a person it had determined had the authority to make such a commitment (I.D. 589).

appeal of the dismissal of the charges concerning additional suppliers alleged to have been induced into making discriminatory payments to respondent. At most, review and reversal of the examiner's findings which are challenged by complaint counsel would only serve as additional grounds for an order no different from that supported by the findings of violation which we have already upheld. Accordingly, without passing on the merits of the issues raised, the appeal of complaint counsel is dismissed.

V

The examiner's order has been modified so that it will serve as an effective injunction against resumption of the practices shown by this record which we have found to be unlawful. The order entered in the instant case is not to be regarded as a general model or precedent for orders in other cases involving different circumstances and needs.

Commissioner MacIntyre concurs in the result.

FINAL ORDER

This matter has been submitted to the Commission on the cross-appeals of complaint counsel and respondent from the initial decision of the hearing examiner filed on October 24, 1969. The Commission has rendered its decision denying the appeals of respondent and of complaint counsel, and adopting the findings of the hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

It is ordered, That respondent Colonial Stores, Incorporated, a corporation, and its officers, representatives, agents, and employees, directly or indirectly, through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent, do forthwith cease and desist from:

Inducing and receiving promotional allowances or payments from any supplier as compensation for or in consideration of advertising and promotional services, furnished by or through respondent in connection with special promotions originating with or sponsored by respondent, and involving the sale or

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offering for sale of such supplier's products, where respondent solicits such promotional allowances and payments and knows or should know that such promotional allowances or payments are not being offered or otherwise made available by such supplier on proportionally equal terms to all of such supplier's other customers, including retail customers who do not purchase directly from such supplier, who compete with respondent in the offering for sale or sale of such supplier's products.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner MacIntyre concurs in the result.

IN THE MATTER OF

UNIVERSE CHEMICALS, INC., ET AL.

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