

Complaint

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mission a report in writing setting forth, in detail, the manner and form in which he has complied with the order to cease and desist contained herein.

IN THE MATTER OF
ALTERMAN FOODS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT AND THE CLAYTON ACT, SEC. 7

Docket 8844. Complaint, May 26, 1971—Decision, Feb. 12, 1973.

Order requiring an Atlanta, Georgia, wholesaler and retailer of groceries and household products, among other things to cease inducing and receiving discriminatory promotional allowances and services from its suppliers.

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. Alterman Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office located at 933 Lee Street, S.W., Atlanta, Georgia.

PAR. 2. Respondent is now and for many years has been engaged in the business of selling groceries and household products to the public at retail, and wholesale to retail grocers and institutional customers. Respondent, through its wholly-owned subsidiary corporations, operates a chain of retail grocery stores under the name Big Apple Super Markets, selling a great variety of food, grocery and non-edible household products. There are presently seventy retail grocery stores composing respondent's chain, which stores are located in the States of Georgia and Alabama. Respondent, through its wholesale division, sells to approximately three hundred seventy-five independent grocers who are members of its voluntary cooperative organization using the name ABC

Food Stores. Respondent's institutional division sells to such concerns as restaurants, hospitals and clubs.

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. Respondent's sales of its products are substantial, exceeding \$133,000,000 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 its stores or warehouses located in the States of Georgia and Alabama for resale to the consuming public.

Respondent resells the products it purchases to retail grocers located in Alabama and Georgia and causes these products to be transported from its warehouse in Atlanta, Georgia, to stores located in Georgia and Alabama.

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 1956, respondent has knowingly induced and received, or 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. 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, including retail customers who do not purchase directly from such suppliers, who compete with respondent in the sale and distribution of such supplier's products.

PAR. 6. For example, each year during April or May, respondent

holds a food show at which products of its suppliers are displayed. For the past several years, shows were held on May 22, 1966; April 23, 1967; May 19, 1968; and May 24, 1969.

The food shows conducted by respondent are attended by Big Apple Super Market employees, ABC Food Store members and their employees and customers of the institutional division.

Respondent solicits most, if not all, of its suppliers to pay it for renting a booth at the food show. The amount which respondent charged for a booth at the 1966 and 1967 shows was \$350. In 1968 and 1969, the cost to a supplier for a booth at the food show was \$375.

Participating suppliers are encouraged to advertise in respondent's food show catalogs. At the food show, suppliers are also encouraged to solicit orders from retail grocers who purchase the suppliers' products from respondent.

A substantial number of respondent's suppliers participated in the food shows. Respondent received from participating suppliers in excess of \$100,000 each year for its 1966, 1967, 1968 and 1969 food shows.

In addition to the special payments received for its annual food shows, respondent has also knowingly induced and received, or received, other discriminatory promotional payments and allowances in the regular course of its business during the years in question.

PAR. 7. In the course and conduct of its business in commerce, and particularly since 1956, respondent has knowingly induced and received, or received, from some of its suppliers the furnishing of services or facilities connected with respondent's offering for sale, or resale, of such products so purchased when respondent knew or should have known that such services or facilities were not made available by such suppliers on proportionally equal terms to all other customers, including retailer customers who do not purchase directly from such suppliers, who compete with respondent in the resale and distribution of such suppliers' products.

PAR. 8. For example, during respondent's annual food shows, agents, employees or representatives of suppliers performed valuable services such as staffing the booths rented by suppliers from respondent and demonstrating the suppliers' products therein. In addition to the furnishing of such valuable manpower, other services performed by some of the suppliers which

aided respondent in the resale of the suppliers' products included the donation of door prizes, free samples and free orders given away at the show.

PAR. 9. Typical of the suppliers who participated in, and paid for a booth at, respondent's food shows at least once during the years 1966 through 1969 were the following:

Sweet Sue Kitchens, Inc., Athens, Alabama.	Interstate Bakeries Corporation, Birmingham, Alabama.
Martha White, Inc., Nashville, Tennessee.	Bernardin, Inc., Evansville, Indiana.
S. T. Jerrell Company, Birmingham, Alabama.	Airkem, Inc., Carlstadt, New Jersey.

PAR. 10. Many of respondent's suppliers who participated in respondent's food shows for the years 1966, 1967, 1968 and 1969 did not offer and otherwise make available to all their customers competing with respondent in the sale and distribution of their respective products payments, allowances, services, 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, allowances or services from its suppliers, respondent knew or should have known that it was inducing and receiving, or receiving payments, allowances, 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, including retailer customers who do not purchase directly from such suppliers, who were competing with respondent in the sale and distribution of such suppliers' products.

PAR. 11. 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., Section 45).

Mr. Lee S. Dewey and Mr. John H. Bedford supporting the complaint.

Arnall, Golden & Gregory, Atlanta, Georgia, by Mr. Cleburne E. Gregory, Jr., and Mr. Allen I. Hirsch for respondent.

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INITIAL DECISION BY THEODOR P. VON BRAND, HEARING EXAMINER
APRIL 17, 1972

PRELIMINARY STATEMENT

On May 26, 1971, the Federal Trade Commission issued its complaint against Alterman Foods, Inc. (Alterman), charging it with having violated Section 5 of the Federal Trade Commission Act. In essence the complaint alleges that Alterman violated the law by knowingly inducing and receiving, or receiving, from some of its suppliers discriminatory advertising or promotional payments not made available on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such products. In addition, the complaint alleges essentially that Alterman violated the law by inducing and receiving, or receiving, from some of its suppliers the discriminatory furnishing of services or facilities in connection with respondent's offering for sale or resale of such products when it knew or should have known that such services or facilities were not made available on proportionally equal terms to its competitors. In short, the complaint alleges as a practical matter that respondent violated the Federal Trade Commission Act by inducing certain of its suppliers to violate Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

Primarily, the charges of illegality and the evidence developed in the record pertain to the participation by certain of Alterman's suppliers in respondent's food shows in the period 1966-1969 involving payments of booth rentals and services such as staffing of the exhibit booths during the show.

A prehearing conference was held on August 19 and 20, 1971. Hearings for the presentation of testimony and other evidence by both sides were held in Atlanta, Georgia, commencing on January 4, 1972, and concluding on January 20, 1972, when the record was closed.

This matter is now 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

I. The Respondent and its Business

A. A General Survey

1. Alterman Foods, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office located at 933 Lee Street, S.W., Atlanta, Georgia. (Admitted in Answer.)

2. Respondent at all times pertaining hereto has been engaged in the business of selling groceries and household products to the public at retail and to retail grocers and institutional customers at wholesale. Presently, there are 74 retail grocery stores composing respondent's chain. These stores are located in the States of Georgia, Alabama, and Tennessee. Alterman through its wholesale division sells to approximately 375 independent grocers who are members of its voluntary cooperative organization using the name A.B.C. Food Stores. Respondent's institutional division sells to such concerns as restaurants, hospitals, clubs, hotels, and various governmental institutions. (Admitted in Answer; Findings 6-15 [pp. 304-08 herein] *infra*.)

3. Respondent has purchased for resale a great variety of products from a large number of suppliers located throughout the United States. Respondent has caused these products, when purchased by it, to be transported from the places of manufacture or purchase to its stores in the States of Georgia and Alabama and to its warehouse in Georgia for resale to the consuming public.

Respondent has resold the products it purchased to retail grocers located in Alabama and Georgia and has caused these products to be transported from its warehouse in Atlanta, Georgia, to stores located in Georgia and Alabama.

¹ References to the record are made in parentheses, and certain abbreviations are used as follows:

CPF—Proposed Findings of counsel supporting the complaint.

RPF—Proposed Findings of counsel for respondent.

CX—Commission Exhibit

RX—Respondent Exhibit

Tr.—Transcript page.

References to the proposed findings of counsel are to page numbers, preceded by one of the abbreviations listed above. References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, M. Alterman 197.

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In addition, respondent has disseminated advertisements in commerce and has received payments in commerce from suppliers for advertising and promotional services and facilities. (Admitted in Answer.)

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. (Admitted in Answer.)

5. According to Alterman's Annual Report for 1967, respondent has experienced steady growth and progress since its beginning (CX 13-E). This is reflected by Alterman's sales figures in the record showing a steady growth in sales from \$45,839,962 in 1959 to \$127,574,803 in 1967 (CX 215-H). At the time complaint issued respondent's sales exceeded \$133 million annually. (Admitted in Answer.)

The record documents the following breakdown of Alterman's transactions with respect to its Big Apple stores, its institutional division, and the A.B.C. stores:

	1966	1967	1968	1969
Big Apple Stores	\$63,453,065	\$67,471,124	\$71,672,612	\$74,317,577
Institutional Division	89,735	67,654	63,814	57,994
A.B.C. Stores	12,590,733	13,994,801	15,066,617	15,207,040
Total Sales	\$76,133,533	\$81,533,579	\$86,799,043	\$89,582,611

(RX 36)

B. Alterman's Wholesale Operation

6. The Alterman wholesale division sells to independent merchants—the A.B.C. Food Stores, a voluntary cooperative. This program began in 1955 (D. Alterman 32-34).

According to Alterman's 1966 Annual Report, the wholesale division selling to the A.B.C. stores added substantially to the overall profit picture and at that time was growing at an annual rate of 8 to 9 percent (CX 12-F). The 1967 Annual Report states that the A.B.C. wholesale division for that period "experienced an especially good year," its sales increasing "in the same dynamic manner which has characterized this division since its inception." (CX 13-E) This expansion continued in the fiscal year ending April 26, 1969, with sales "at an all time high." (CX 216-F)

7. Under the contract between Alterman and the A.B.C. stores, respondent agrees, among other things, to sell to the members of its voluntary group certain items at wholesale cost, to furnish

other merchandise at the lowest operational and competitive costs, to furnish a weekly bulletin pertaining to such information as price or special promotions, to secure for the retail members additional discounts, to aid the retailer in store planning, supervision, and advertising, and to issue rebate checks every 6 months based on the members cooperation and the volume of purchases. The A.B.C. stores in consideration for such services agree to concentrate as nearly as possible all their purchases through the A.B.C. warehouse, to buy a minimum order of \$500 a week, to pay dues and service charges, and to make payment for merchandise under the conditions specified. (RX 8).

8. At the time Alterman formed the voluntary group, A.B.C. stores, "there were no wholesale grocers per se in the city of Atlanta" and there still are no firms that perform this type of service, with the exception of Associated Grocers Co-op, Inc. (A.G.), a retailer-owned cooperative (D. Alterman 32). In the period 1966-69 only A.G. and Alterman's A.B.C. group could have provided a complete wholesale line to independent retailers (Nash 605; Wicks 807; Gantt 934).

9. Alterman, in connection with the operation of its voluntary group, performs the function of a wholesaler.

C. The Retail Operation

10. Retail store operations are the principal duty of Max Alterman, a vice-president of respondent, which operates its retail stores under the names of Big Apple, K-Mart, Food Town, and Food Giant (M. Alterman 191-92).

There were 63 Big Apple stores in 1966; 65, in 1967; 66, in 1968; and 67, in 1969 (RX 1-E). Most of the Big Apple stores are separately incorporated and are operated as separate corporations (C. H. Sheperd 311). They are wholly-owned subsidiaries of respondent, Alterman Foods, Inc. (D. Alterman 38, 100). Two Big Apple stores were incorporated as part of respondent Alterman Foods, Inc., and this was the case in the period 1966-69 (C. H. Sheperd 311; RX 1-A). The subsidiary Big Apple corporations file independent tax returns and give dividends when profits permit (C. H. Sheperd 312).

The K-Mart, Food Giant, and Food Town stores are discount operations (M. Alterman 192; C. H. Sheperd 338). In the case of the twelve K-Mart stores, Alterman owns the food section, and in most instances it leases the space from K-Mart (M. Alterman 192). The record shows further that six or seven of the

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Food Giant supermarkets operated by respondent are a part of Alterman Foods (C. H. Sheperd 338).

11. In a review of Alterman's operations, respondent's 1967 Annual Report described its retail business as follows:

*Your company is presently operating sixty-five modern, congenial, and efficient retail outlets in Georgia and Alabama. Each Big Apple offers appealing selections of fresh meat and produce, frozen foods, dairy, dry groceries, and non-food items. Our stores pride themselves on offering to the consumer a selection of more than 12,000 items, a supply ample to satisfy the desires of the most discriminating shopper. In addition, Big Apple stores give trading stamps. Your company also operates five K-Mart Food stores in greater Atlanta * * * * (emphasis supplied) (CX 13-G).*

According to the same report respondent's wholesale division supplies the A.B.C. stores "from the same warehouse that serves our own Big Apple and K-Mart units" (*ibid*).

This report further discloses:

We opened two new Big Apple stores and one K-Mart Food discount unit. In addition, several older, existing Big Apple stores were remodeled and enlarged, thereby enabling those units to more completely satisfy the demands of our most persuasive critic: the consumer. Two small, outdated units were closed, leaving a total of 63 stores in operation at year's end. Seven stores are planned for the coming fiscal year, five Big Apples and two K-Mart Food stores. Two of these units have already been opened since our year's end, and, judging from the overwhelming response of our customers, it appears that these units will swiftly find an important place in the Alterman Foods organization. (emphasis supplied) (CX 13-E)

12. According to Alterman's 1966 Annual Report respondent's "retail chain continues to expand at an annual rate of twelve to fourteen per cent." The same document indicates that respondent Alterman was responsible for the promotional and merchandising techniques employed in connection with its retail chain's operations. In this connection the report stated:

* * * All of the retail stores, with the exception of three K-Mart Grocery, give trading stamps. The Company has the S&H trading stamps franchise in the greater Atlanta area and certain other locations. King Korn trading stamps are given outside the S&H franchise area. While trading stamps have exceptional promotional value, management has not hesitated to use other promotional items, such as games of cash give-away and extensive, radio, T.V. and newspaper advertising to promote sales. (CX 12-F)

Alterman's annual reports for 1968 and 1969 similarly demonstrate a continuing expansion of respondent's retail chain operation (CX 215, 216).

13. Alterman has a standard contract with its subsidiary corporations operating supermarkets (RX 2-A-C). The agreement is signed in behalf of respondent by Isadore Alterman, chairman of respondent's board and "Read and Accepted" on behalf of the subsidiary corporation by Sam P. Alterman who is also a senior official of the respondent (CX 12-B, CX 13-B). The agreement provides that nothing therein shall constitute a partnership, joint venture, or agency between the parties but shall merely be deemed a management agreement (RX 2-C).

Alterman under the agreement is at its own cost to purchase for, sell, ship, and deliver to the subsidiary all merchandise required in the operation of its business except such merchandise as milk, bread, or meal that may be purchased locally. The contract further provides that respondent shall be under a similar obligation with respect to items such as store fixtures. In addition respondent is to provide remodeling or repair services with respect to the business premises of its subsidiaries at its net cost to them as well as the purchase of various types of business insurance for each subsidiary at cost.

Alterman under the terms of the agreement also agreed to place at the subsidiaries disposal and at Alterman's expense its own executive and administrative staffs "for guidance and counsel" as well as to furnish each subsidiary with "direct and indirect executive supervision and management service." Alterman further undertakes to furnish its retail subsidiaries with the services of a district supervisor to supervise the subsidiaries store managers and "integrate the operation of your store or stores as part of the 'Big Apple Super Markets' chain," check and supervise the subsidiaries inventories, and advise and assist in all merchandising and management problems (RX 2-A, B).

The contract further provides that Alterman will furnish the subsidiaries at respondent's expense with the services of its advertising department in planning, preparing, and executing consumer advertising programs. The agreement also obligates respondent at its own expense to furnish and maintain the subsidiaries accounting records.

Under the heading "Miscellaneous Facilities" the agreement obligates Alterman to provide warehousing and warehousing services as well as central office facilities of various kinds.

The subsidiaries under the terms of the agreement are required to repay the cost of merchandise, trade fixtures and equipment, remodeling and construction and in addition, among other

things, to pay an amount equal to $2\frac{1}{2}$ percent of the subsidiaries gross sales for the furnishing of the services previously enumerated and to pay all the expenses of the stores except as specifically provided otherwise (RX 2-B, C).

14. Alterman's real estate subsidiary, the Altmo Realty Company, according to respondent's 1966 Annual Report, at that time owned various shopping centers that contained fourteen Big Apple stores (CX 12-H).

15. On the basis of the record as a whole, it is evident that respondent Alterman Foods, Inc., functions as a chain retailer in the operation of its Big Apple, Food Giant, and K-Mart stores, notwithstanding the fact that most of the Big Apple stores are wholly-owned subsidiaries. In any event, even in the case of the Big Apple stores two of these units were not separately incorporated in the relevant period. (Findings 10-14, *supra*)

II. The Food Show

16. The Alterman food show has been in existence since 1956. This is an annual event which runs approximately the same time each year in the period March through May. (D. Alterman 38-39) David Alterman, a senior vice-president in charge of respondent's wholesale division, is primarily responsible for the food show, which is under the jurisdiction of Alterman's wholesale division (D. Alterman 109; M. Alterman 205-06).

Generally, Alterman begins work on its food show in the preceding December with a kickoff meeting attended by Alterman officials, Mrs. Craft, director of the food show, and respondent's buyers to discuss the policies and procedures to be followed (D. Alterman 59, 121-22; M. Alterman 196). At these meetings there was no discussion as to whether Alterman's buyers should make inquiry of suppliers as to whether proportionately equal payments have been made available to respondent's competitors as a result of the suppliers participation in the food show (Craft 726; M. Alterman 196-97; G. Alterman 230). No Alterman official has mentioned that this should be done (Craft 726), and David Alterman, respondent's official in charge of the food show, has never advised Alterman's buyers to make such an inquiry (D. Alterman 47).

17. All of Alterman's suppliers are automatically invited by written invitation to participate in the food shows (D. Alterman 39-40; M. Alterman 197-98; CX 211-A). The invitations to par-

ticipate as a co-sponsor are drafted by David Alterman (D. Alterman 103). In pertinent part, the invitation to suppliers for the 1969 show stated:

* * * If you have not participated in the past, perhaps the fact that more than 120,000 cases of merchandise were sold at the show would influence your decision. (CX 211-A)

According to the attached brochure, the primary purpose of the show is "to expose suppliers' products to our own Big Apple employees, operators of our ABC co-op group, and institutional buyers" (CX 211-B). The brochure reinforces this point with the statement that "The ultimate goal of a sponsor in a show of this type is to sell as many products to as many buyers as possible." (CX 211-C)²

18. The Alterman show is put on for the institutional, independent and supermarket buyers, and it is attended by the A.B.C. Food Store members, their families, and their friends (D. Alterman 103, 67; M. Alterman 209); by Big Apple store managers, comanagers, employees, and their families (M. Alterman 209); and by the customers of the respondent's institutional division (D. Alterman 67). Personnel from respondent's K-Mart and Food Giant supermarkets also attend (M. Alterman 213). The suppliers are given tickets and may invite whomever they wish (D. Alterman 67).

19. At the food show only A.B.C. store members and institutional customers were entitled to buy the items displayed and sold at the booths (D. Alterman 77). Only the A.B.C. stores that placed orders were eligible to receive the free orders and rebates at the food show (D. Alterman 106-07; Stipulation attached to CX 221-A—H). Similarly, the prizes offered by suppliers at the show were available only to the A.B.C. members placing orders (Stipulation attached to CX 221-A—H).

In those instances when an A.B.C. store makes a purchase at the show the order is put in a container from which the drawing for free merchandise is made. After the drawing, the other orders are then turned over by the supplier to the Alterman employees who, in turn, fill the orders for the individual A.B.C. stores which made the purchases (D. Alterman 75-76).

In the case of rebates or display allowances given on the orders purchased at the show, these are passed on to the A.B.C. stores

² Essentially the invitations to suppliers for the period 1966-1969 appear substantially the same (Cf. CX 9-A—L (1968) and CX 1-M (1966), CX 5-D (1967).) (D. Alterman 42)

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and not retained by Alterman (D. Alterman 107). In fact all display allowances or rebates are passed on to the A.B.C. stores by respondent. The entitlement to such allowances is recorded electronically, and every 6 months Alterman sends each A.B.C. member so entitled a check (D. Alterman 101-02).

20. Respondent gave away approximately 12,000—15,000 tickets for the 1967 and 1968 shows (D. Alterman 67),³ and Alterman's food show coordinator estimated that approximately 10,000 to 12,000 people attended this event in 1968 and 1969 (Craft 728).

The consuming public as such is not invited to respondent's food show and that event is not advertised to the public (Craft 756; D. Alterman 103-04). It is a wholesale promotion directed to the personnel of respondent's chain stores, the A.B.C. stores, and Alterman's institutional customers (Findings 17-19, *supra*), and it is not a promotion directed to the consumer (May 865-66;⁴ Bergman 514; Brown 591, 593). The food show is therefore not a service or facility furnished by respondent in connection

³ Mrs. Craft, the food show coordinator, estimated that approximately 25,000 tickets were distributed for the 1968 show (Tr. 731). There is no documentary evidence in the record on the basis of which this conflict could be resolved.

⁴ Although numerous guests attend the food show, this event is not directed to them as consumers, as a wholesaler witness testified:

Q. Let me ask you—Food Shows, speaking of Food Shows in general, would you being experienced in the business and having been in the business for 21 years, would you consider a Food Show a promotion to the retail stores or would you consider it as an event for the consumer public?

A. For the retail stores.

* * * * *

Q. Right, so it wouldn't be a promotion to the public, out on the streets coming in?

A. No.

* * * * *

Q. My question is, any time you have 10 to 15 thousand, for example, potential consumers for an event and they can see your product on the consumer level, would this be of value to the product?

A. If a consumer, yes, but I can't answer that the way I think it needs to be answered. The only way a consumer is going to see the product is when it is exposed to the public and a Food Show is not for the Consumer.

Q. That is definitely a retail sales function as you mentioned, but are people who are at a Food Show, are they potential consumers of the product themselves?

A. The people at the food show are the retailers. They are buying the merchandise to put on their shelves to get to the consumer, yes.

Q. Yes, and are these individuals potential consumers in that they might buy the product themselves, is this correct?

A. For their own personal use?

Q. For their own personal use.

A. No, I don't think so. (May 864-66)

with Alterman's offering for sale or resale at retail to the consumer of the products featured at this event.

21. The record as a whole compels the finding that as far as Alterman's retail operation is concerned, the food show and the suppliers' services furnished in connection therewith were in the nature of a sales presentation to respondent's chain store personnel. The promotion, as it pertains to Alterman's retail operation, therefore, was designed to facilitate the original sale by the supplier to respondent rather than the latter's offering for sale or resale of the products featured (Findings 17-20, *supra*).

22. The supplier's cost of participation was a rental of \$350 for a booth in the 1966 and 1967 shows that rose to \$375 in 1968 and 1969 (D. Alterman 66, 107). However, a supplier could rent less than a full booth (D. Alterman 66).

Alterman realized the following amounts as gross income from booth rentals in the years in question \$106,400 (1966), \$110,950 (1967), \$112,875 (1968), and \$117,000 (1969) (CX 223).

Taking into consideration only direct expenditures for such items as rent, food, entertainment, etc., and excluding indirect costs which may also be allocable to the food show program, Alterman realized the following profits from booth rentals at this promotion: \$85,360 (1966), \$88,510 (1967), \$85,152 (1968), and \$89,195 (1969) (CX 223, CX 14-B—H, CX 217-A—D, CX 218-A—D).

No firm finding can be made as to the nature and extent of the indirect costs properly allocable to the Alterman food show. The testimony of respondent's controller on the point was inconclusive. In any event, on the basis of his testimony, taking the position most favorable to respondent, the food show profit from booth rentals would be at a minimum an average figure of \$25,000 to \$30,000 (C. H. Sheperd 324).

III. Respondent's Competitors

23. Associated Grocers Co-op, Inc., is a retailer-owned cooperative which performs the functions of buying for and selling to its members who are independent retail grocers. It also advertises collectively and gives its members managerial assistance and guidance (Maziar 943). The purpose of this organization is to facilitate competition by its members in this day of chain stores and large corporations (Maziar 961). Its membership is diversified, ranging from convenience stores to supermarkets. The

majority of the members however are one-store operations (Maziar 945).

In order to join A.G., an independent grocer pays a \$50 entrance fee and purchases capital stock in the amount of \$4,000. In 1966, a service fee of \$5 a week also went into effect (Maziar 944-45). A.G. retains a certain percentage of the profits, and the balance is returned to the members on the basis of their purchases. Some of the retained profits are used for income tax payments and the remainder is put into the cooperative's surplus which would be distributed to the members in the case of dissolution (Maziar 962). Even where A.G. retains the profits, they are still considered the assets of the individual stockholder-members (Maziar 963).

In the case of the following suppliers; namely, Cumberland, Airwick, Riviana, Sweet Sue, and Bernardin, their advertising and promotional offers were made directly to A.G. headquarters rather than to the individual members (Maziar 946-47).

A.G. headquarters is the "customer" of the suppliers under consideration here that competes with Alterman at the retail level, except in those instances when the cooperative's members buy direct. In the case of "store door" sales direct to the A.G. members, they are the customers that compete with respondent at retail. (See Guide for advertising allowances and other merchandising payments and services, 16 C.F.R. Section 240.3(b) (1971), Example 2.)

A.G. was not created as a wholesaler to drum up wholesale business. It was organized because the member retailers needed to buy as a group (Maziar 965). Although A.G. does have a cash and carry wholesale operation that will sell to nonmembers of the cooperative, this has only a limited stock and it is not in competition with Alterman (Maziar 974-75).⁵ Moreover, the competition between A.G. and Alterman for securing membership of independent grocers in respondent's voluntary A.B.C. group or the cooperative is marginal (Maziar 949).⁶ Even to the extent that such competition exists, it is not equivalent to demonstrat-

⁵ Jack Maziar, general manager and secretary of A.G. testified:

Q. Would you say your cash and carry section competes with Alterman wholesale?

A. I wouldn't think so. (Tr. 974-75)

Nor does the record show whether A.G.'s cash and carry operation sold the products of those suppliers under consideration here.

⁶ In this connection, Mr. Maziar testified:

Q. All right, sir. Is there competition between A.G. and Alterman for membership of independent grocers?

A. To some degree, not too much. (Tr. 949)

ing competition in the resale of the products under consideration here at the wholesale level.

24. A&P, a retail grocery chain, competes with other chains in the Atlanta area, including Big Apple and A.G. (Jones 920).

25. May & Company of Georgia, Inc. (May & Co.), a non-food wholesaler, also known in the grocery trade as a rack jobber, competed with Alterman in resale of the products of the Cumberland Manufacturing Company to the A.B.C. stores (May 831, 847, 862; J. Sheperd 771).

IV. Participating Supplier

Complaint counsel rely on respondent's transactions with seven suppliers in the period 1966-69 to establish the allegations of the complaint. The facts of record pertinent thereto are set forth below.

A. *Airwick*

26. Airwick Industries, Inc. (Airwick), of Carlstadt, New Jersey, is a manufacturer of chemical specialties for the consumer trade such as air fresheners. In 1969, this manufacturer sold its products in the Atlanta area through a food broker, Clanton Sales, Inc., to Alterman, A&P, and A.G. (Vogt 538-40; CX 35).

27. Airwick has two regular promotions a year in the spring and in the fall, usually at 50 cents a case, and this policy was in effect in 1969 (Vogt 542, 546-48; CX 31, 32, 33).

For the first quarter of 1969, Airwick offered a 50 cent a case allowance on Airwick Liquid 5½ oz. and 8¼ oz.; 75 cents a case on "On Guard" 6½ oz.; \$1.50 a case on "On Guard" 12 oz.; and 50 cents a case on Airwick Spray 7½ oz. According to the terms of the offer, such allowances could be deducted from the invoice or set up for a bill-back. "Acceptable trade performance" for such allowances could take the form of newspaper advertising, feature pricing, offshelf display, shelf talker, store survey, or store distribution (CX 31).

The fall promotion dated August 15, 1969, pertained to Airwick Natural Spray and Liquid. No performance was required to receive this allowance, although it was hoped that the customers would furnish performance on a voluntary basis. The reason for making performance voluntary was that Airwick did not feel it had the capability to check on performance as required by FTC rulings (CXs 32, 33).

In addition, there was an opening or introductory offer on Airwick Solid 12/5 oz. of \$1.50 a case offered in the Atlanta area in 1969 (Vogt 549-51; CX 34) and payments thereunder were made to A&P, A.G., and Alterman (Vogt 551; CX 35-A-B). Under the terms of the offer Airwick offered the customer \$1.50 a case for a 60-day period from the date of his first invoice (Vogt 552). This introductory offer was a price reduction and no performance was required (Vogt 570).

With the exception of the introductory allowance, the first quarter and the fall promotion in 1969 were the only promotional offers made to A&P and A.G. These offers were available to all customers, including Alterman (Vogt 548, 552-53).

28. Over and above the foregoing programs, Airwick which had participated in the three or four years preceding 1969 also participated in Alterman's food show in that year paying \$187.50 for half a booth. The products displayed at this show were liquid, aerosol, and solid Airwick (Vogt 553, 562-63; CX 22, CX 35-A-B; Swanson 472).

Airwick's 1969 food show booth was set up, manned, and dismantled by personnel of Airwick's broker (Swanson 470-71).

Airwick as a result of such participation and payment for the food show made no attempt to make proportionately equal offers available to Alterman's competitors (Swanson 472; Vogt 553). Airwick has a policy of not participating in food shows and does not usually take part in such events (Vogt 562). However, on occasion brokers urge Airwick to enter food shows even when the supplier has made it clear that it does not want to participate. Such a situation occurred in 1969 when Airwick was approached by its broker on this subject (*ibid*).

29. Alterman competed in the sale of Airwick products with A&P and A.G. at the retail level (Maziar 953; Jones 920; CX 35).

In the case of respondent's retail operation, the food show and the related services constituted essentially a sales presentation of the products of Airwick to the personnel of its chain stores designed to facilitate Alterman's own purchases from the supplier (Findings 17-21, *supra*).

The food show, which was a wholesale promotion, was not a service or facility furnished by Alterman in connection with its offering for sale or resale of Airwick's products at the retail level. Similarly, the services of the supplier in manning the booth

were not a service or facility furnished in connection with respondent's sale or offering for sale at the retail level to the consumer (Findings 17-20, *supra*). Since the discriminatory food show payment and related services were not in connection with the offering for sale or resale at retail, which is the functional level of distribution involved here, the discrimination is not cognizable under the allegations of the complaint.

B. *Bernardin, Inc.*

30. Bernardin Inc. (Bernardin) of Evansville, Indiana, manufactures home canning caps and lids for home preservation jars which it sells to the grocery trade (Bergman 494-95). In 1969, Bernardin made all its sales through brokers who were also responsible for communicating promotional offers to the customers of this supplier (Bergman 496).

In 1969, Bernardin made sales in the Atlanta area to Alterman, A.G., and A&P's Atlanta Division in the second and third quarters of that year (CX 77).

31. Alterman's total gross purchases from Bernardin for 1969 were in the amount of \$12,104.80. On such gross purchases, it received from Bernardin \$370 in the form of a standard merchandising allowance, \$605.24 in the form of a 5 percent trade discount, and \$556.48 as a 5 percent bill-back on net purchases. In addition, the respondent received a \$375 payment for rental of a full booth at its 1969 Food Show which was 3.1 percent of its gross purchases for the year (CX 77).

A&P's total gross purchases from Bernardin after returns⁷ were \$12,373.52. On those purchases it received, after making allowance for returns, \$381.70 for Bernardin's standard merchandising allowance and a trade discount in the amount of \$866.16 after returns, which was 7 percent of gross purchases. Unlike Alterman, A&P did not receive a bill-back allowance (CX 77).

In 1969, the purchases of A.G. from Bernardin totaled \$9,585.58 after returns. After making allowance for returns it received a standard merchandising allowance of \$288.75 in that year as well as trade discount of \$479.28 which was 5 percent of gross purchases. It did not receive a bill-back of 5 percent on net purchases (CX 77).

The trade discount granted to all three customers—5 percent in the case of Alterman and A.G. and 7 percent in the case of

⁷ In the amount of \$1,883.92.

A&P is not granted for services performed and is a price discount or reduction (Bergman 517). Similarly, the 5 percent bill-back granted to Alterman by Bernardin was not reimbursement for performance furnished but was a price discount to meet competition (*ibid*).

The standard merchandising allowance received by all three customers was offered to the trade by Bernardin's price list of January 17, 1969, and was available to all customers. The "merchandising allowance is a per case allowance which is passed on to all customers with no proof of performance required." (Bergman 500; CX 69-C) According to Bernardin's sales manager, "When they [the customers] purchase it it goes to the retailer and by their putting it on the shelf we consider this as merchandising the product." (Bergman 500) The allowance in question since no performance was required or requested has the characteristics of a price reduction rather than that of a reimbursement for services furnished by the customer.

In view of the foregoing and in view of Mr. Bergman's testimony that no offers other than those appearing on its price list (CX 69 C and D) were made to A.G. and A&P in 1969 (Tr. 502-03), the record supports the inference that Bernardin made no promotional offers other than price reductions to these customers in the year in question.

32. Accordingly, in 1969, the only promotional payment, as opposed to price reductions made and offered by Bernardin in the case of the three customers in question, was the food show payment of \$375 to respondent.

Bernardin, as a result of participating in the 1969 Food Show did not make proportionately equal offers to competitors of Alterman (Bergman 513; Swanson 472). While Bernardin would have considered participating in other shows of this nature, this willingness was not affirmatively announced to the trade (Bergman 513-14).

33. Alterman competed in the sale of Bernardin products with A&P and A.G. at the retail level (Maziar 953; Jones 920; CX 77).

In the case of respondent's retail operation, the food show and the related services constituted essentially a sales presentation of the products of Bernardin to the personnel of its chain stores designed to facilitate Alterman's own purchases from the supplier (Findings 17-21 *supra*).

The food show, which was a wholesale promotion, was not a

service or facility furnished by Alterman in connection with its offering for sale or resale of Bernardin's products at the retail level. Similarly, the supplier's services furnished in connection with manning the booth were not services furnished in connection with respondent's sale or offering for sale of Bernardin products at the retail level to the consumer (Findings 17-20 *supra*). Since the discriminatory food show payment and the related services furnished by the supplier were not in connection with the offering for sale or resale at the retail level which is the functional level of distribution involved here, the discrimination is not cognizable under the allegations of the complaint.

C. *Sweet Sue Kitchens, Inc.*

34. Sweet Sue Kitchens, Inc. (Sweet Sue), of Athens, Alabama, is a manufacturer of canned chicken and other meat products that in 1968 sold its products in the Atlanta area exclusively through its broker, Foods Unlimited, Incorporated (Shepard 153, 155). Among Sweet Sue's customers in the Atlanta area in 1968 were the A&P's Atlanta Division, A.G., and respondent (CX 64-A—B).

35. In 1968, the promotional offers of Sweet Sue consisted of a program of introductory allowances dated January 2, 1968 at 50 cents or 25 cents a case for certain products for one order only (CX 59);⁸ a 50 cents off-invoice allowance for barbeque chicken for all orders taken effective May 6, 1968 through June 21, 1968 (CX 60); and the fall program for products promoted during the promotional period of deliveries from September 15, 1968 and delivered by November 11, 1968 (CX 62-63; H. Shepard 155-59). These promotions, according to the supplier's sales manager, were offered to all the trade in 1968 and no other offers were made to A&P and A.G. (H. Shepard 159).

The record shows that in 1968, Alterman purchased 4,013 cases from Sweet Sue for \$37,488.45. On these purchases respondent received from Sweet Sue promotional payments in the form of bill-backs amounting to \$1,504.50 on purchases of 3,009 cases of Sweet Sue products for promotional services at a rate of 50 cents a case. This allowance on Alterman's purchases in the first three quarters of the year constituted 4.01 percent

⁸ The record is not entirely clear as to whether such introductory offers were promotional payments or price reductions. As Sweet Sue's sales manager testified this apparently depends on how the customer uses it (Tr. 165-66).

of respondent's purchases for the entire year from Sweet Sue (CX 65).

In the second quarter of 1968, Alterman received a bill-back allowance of \$500 on purchases of 1,000 cases of Sweet Sue's products constituting 5.53 percent of respondent's purchases in that quarter. In addition, respondent received in the second quarter a payment of \$375 for rental of a booth at Alterman's 1968 Food Show. Combined, Alterman's food show payment and the bill-back allowance comprised 9.67 percent of respondent's purchases in this quarter (CX 65).

Under respondent's bill-back arrangement with Sweet Sue, Alterman was to receive 50 cents a case on all items purchased during a quarter, in return for an undertaking to advertise the supplier's products once in a quarter (H. Shepard 160). The agreement had its inception in 1966 at a meeting between Sweet Sue and Alterman officials and was put into effect with respondent's first order thereafter (H. Shepard 161-62).

A&P in 1968 purchased 3,426 cases of the Sweet Sue products for a total dollar amount of \$17,404.65. The only allowance received by A&P in that year was \$256.25 in the first quarter in the form of an off-invoice allowance amounting to 5.44 percent of A&P's purchases for that quarter or 1.47 percent of the chain's purchases for the year (CX 65).

Sweet Sue's sales manager testified that A&P was recompensed at a rate of 25 cents a case as opposed to Alterman's 50 cents a case because respondent was buying in larger packs (H. Shepard 174; Mallon 449-50).⁹

A.G. purchased 6,053 cases of the Sweet Sue products in 1968 for a total dollar amount of \$31,031.05. This customer for the year in question received promotional allowances in the amount of \$444.35 in the form of off-invoice allowances and bill-backs or 1.43 percent of A.G.'s total purchases for the year. The comparable percentages for the allowances received by this customer in the first, second, and fourth quarters were 4.73 percent, 1.36 percent, and 1.01 percent, respectively (CX 65).

36. Sweet Sue's payments to Alterman under the bill-back arrangement of 50 cents a case, unrestricted by the time and product limitations inherent in the offers to all the trade in 1968, were discriminatory.

⁹ The record shows that Alterman was buying cases of 24/24 oz. chicken and dumplings while A&P was purchasing the 12/24 oz. pack (CX 65-A-B).

Standing alone, the documentary evidence might justify the finding that Alterman knew or should have known that it was receiving promotional payments more favorable than those made available generally to the trade.

The testimony of Sweet Sue's sales manager and broker on a number of points is however to some extent confusing. Testifying as to the inception of the bill-back arrangement with Alterman, Sweet Sue's sales manager stated:

This would be in '66, maybe late '66. We gave him [George Alterman] an offer, which at that time we were trying to get set up on a regular basis of establishing the same thing to everybody, and it was 50 cents a case allowance. (Tr. 161)¹⁰

This statement is contradicted by his subsequent testimony that the arrangement was in fact a special program with Alterman as distinguished from the introductory allowances generally available since their inception in late 1966 or early 1967 (Tr. 187). In any event, the evidence does not establish with certainty that the initiation of this policy preceded or was contemporaneous with the original offer of the bill-back arrangement to Alterman in 1966. Neither date is fixed with precision in the record.

While the evidence might be construed in a number of ways, these ambiguities preclude a confident finding that respondent at the time of such negotiations knew or should have known that it was receiving discriminatory payments under the bill-back arrangement. Moreover, in this case, the record does not show that respondent either initiated the promotion in question or set the terms of the offer.

The testimony of Sweet Sue's sales manager makes it clear that promotional allowances of 50 cents a case by it were not unusual. Moreover, the allowances received by A&P and A.G. in the first quarter of 1968 as a percentage of purchases under the regular Sweet Sue promotional offers were close to that received by respondent under the bill-back arrangement (CX 65).¹¹ Under the circumstances, the amounts received by respondent in

¹⁰ Again speaking of the original offer to respondent, this witness subsequently testified that the offer had been given to everyone in the trade and that the 50 cents a case did not vary from what was offered to the trade generally (Tr. 170-71). Almost immediately thereafter, the witness testified that the 50 cents a case introductory allowance under CX 59 was not available to the trade on a continuing basis (*ibid*). Whether this qualification relates to the witness' testimony on the original bill-back offer to respondent is open to question. The import of this statement is therefore unclear.

¹¹ The applicable percentages in that quarter are Alterman, 5.46 percent; A&P, 5.44 percent; and A. G., 4.73 percent (CX 65).

and of themselves were not of such magnitude as to raise the inference that Alterman knew or should have known that the allowances it was receiving were not available to its competitors.

After the first quarter of 1968, A&P and A.G. received no allowances or sharply reduced allowances from Sweet Sue (CX 65). In the second quarter Sweet Sue began requiring performance as a prerequisite to receiving allowances (H. Shepard 174). According to Sweet Sue's sales manager, A&P's failure to advertise or display the Sweet Sue products was the reason for its failure to receive promotional payments subsequent to the first quarter; and had it performed, such allowances would have been available in the same way (Tr. 172). This was apparently confirmed by the testimony of the Sweet Sue broker whose statement on this point also applied to A.G. (Tr. 455). It was also the testimony of this witness whose recollection on other points was vague that he "would assume that the allowances are rather consistent throughout the year" (Tr. 455). In the light of the record as a whole, the disparity in allowances paid to A&P, A.G., and Alterman after the first quarter of 1968 does not in and of itself support a finding that respondent knew or should have known that the payments in question were discriminatory.

37. In addition to the payment of \$375 in the case of the 1968 Food Show, Sweet Sue through its broker furnished services in connection therewith by setting up, manning, and dismantling its booth (Mallon 441, 442).

Sweet Sue did not as a result of its participation in the 1968 Food Show affirmatively make proportionally equal offers available to respondent's competitors (H. Shepard 166).

38. Alterman competed in the sale of Sweet Sue products with A&P and A.G. at the retail level (Maziar 953; Jones 920; CX 65).

In the case of respondent's retail operation, the food show and the related services constituted essentially a sales presentation of the products of Sweet Sue to the personnel of its chain stores designed to facilitate Alterman's own purchases from the supplier (Findings 17-21, *supra*).

The food show, which was a wholesale promotion, was not a service or facility furnished by Alterman in connection with its offering for sale or resale of Sweet Sue products at the retail level. Similarly, the supplier's services in setting up, manning, and dismantling the booth were not services furnished in connection with respondent's sale or offering for sale of Sweet Sue

products at the retail level to the consumer (Findings 17-20, *supra*). Since the discriminatory food show payment and related services were not in connection with the offering for sale or resale at the retail level, which is the functional level of distribution involved here, the discrimination is not cognizable under the allegations of the complaint.

D. Riviana Foods, Inc.

39. Riviana Foods, Inc. (Riviana) of Abbeville, Louisiana, is a processor of rice products which sell under the trade names of Water Maid, Mahatma, Chinese Mahatma (bulk rice), and Carolina Instant Rice. Riviana sold its products in the Atlanta market in 1967. Among its customers in that year were A.G., A&P's Atlanta division, and Alterman (Godchaux 631-32; CX 204).

40. Alterman on total purchases in 1967 amounting to \$32,773.65 received \$3,000 in the form of bill-back allowances at the rate of \$750 a quarter, free merchandise in the amount of \$444 and \$367.50 in the form of off-invoice allowances for a promotion of Carolina Instant Rice in the Atlanta market (CX 204; Godchaux 667). In the second quarter, in addition to other benefits, Alterman received \$350 worth of free goods as payment for rental of a booth at respondent's 1967 Food Show (Godchaux 643).

The arrangement whereunder Alterman received \$750 a quarter was negotiated in the mid to late 1950's with George Alterman (Godchaux 646-47). It apparently continued without interruption to the period relevant to this proceeding. This arrangement was reviewed once a year and the necessity for Riviana to meet competitive offers was brought up each time by Alterman officials (Godchaux 650).

A&P's Atlanta division in 1967 received no promotional allowances from Riviana and was offered none in that year by that supplier, with the possible exception of the Carolina Instant Rice promotion (CX 204; Godchaux 651). At one time Riviana had offered the same promotional or advertising program to A&P that this supplier had with A.G., but A&P turned it down (Godchaux 666). According to Riviana's sales manager, this was the reason for not continually reoffering it. The witness also stated that A&P knew that the program was available (*ibid*). The record however does not demonstrate that the witness was knowledgeable about A&P's state of mind on this point in 1967.

A.G. in each of the four quarters of 1967 received promotional

allowances in the form of bill-backs for a total of \$1,521.46 for the entire year on purchases of \$135,677.53 (CX 204). These payments were made on the basis of a cooperative advertising agreement between A.G. and Riviana negotiated in 1955 and still in effect in 1967 (CX 205). A.G., which had not purchased Carolina Instant Rice in 1967 (Tr. 667), received no off-invoice allowances for the test marketing of that product in the Atlanta area in that period, nor did it receive free goods from Riviana in that year (CX 204).

The A.G. contract for cooperative advertising and sales promotions executed on September 6, 1955, was limited to consumer oriented promotions and required promotional performance at least twice quarterly (CX 205). An event such as the food show, essentially a wholesale promotion, was not within the scope of the agreement or available under this offer. Moreover, Riviana's agreement with A.G. on its face did not apply to promotions limited to one occasion.

Riviana did not attempt, as a result of its participation in the 1967 Food Show, to make proportionately equal promotional offers available to Alterman's competitors nor did it announce to the grocery trade that it would participate in the shows of others (Godchaux 652).

41. Alterman competed in the sale of Riviana products with A&P and A.G. at the retail level (Maziar 953; Jones 920; CX 201-203, *in camera*).

In the case of respondent's retail operation, the food show and the related services constituted essentially a sales presentation of the products of Riviana to the personnel of its chain stores designed to facilitate Alterman's own purchases from the supplier (Findings 17-21, *supra*).

The food show, which was a wholesale promotion, was not a service or facility furnished by Alterman in connection with its offering for sale or resale of Riviana's products at the retail level. Similarly, Riviana's services, furnished in connection therewith in manning the booth, were not services furnished in connection with respondent's sale or offering for sale of Riviana products at retail to the consumer (Findings 17-20, *supra*). Since the discriminatory food show payment and related services were not in connection with the offering for sale or resale at the retail level, which is the functional level of distribution involved here, the discrimination is not cognizable under the allegations of the complaint.

E. Cumberland Manufacturing Company

42. The Cumberland Manufacturing Company (Cumberland) of Nashville, Tennessee, is a manufacturer of a general wet and dry drug line including such items as alcohol, mineral oil, Epsom salts, iodine, mercurochrome, merthiolate, turpentine and items of a similar nature (J. Sheperd 758-59). In 1968, Cumberland sold its products to Atlanta area customers including Alterman, May & Co., and Associated Grocers (J. Sheperd 760; CX 184-A thru CX 187-Z-3) through its broker the Bruce Brown Company.

May & Co., a non-food wholesaler, is what is known in the grocery trade as a rack jobber. In addition to selling the merchandise, it performs such functions as putting products on shelves and rotating the merchandise. (J. Sheperd 771; May 831-32) May & Co. sold Cumberland products to approximately 300 members of A.G., and it competed with Alterman in the sale of Cumberland products to the A.B.C. stores (May 847, 854, 862).

The A.G. headquarters purchased Cumberland products direct through this supplier's broker in 1968 (CX 185-A thru 185-Z-3).

43. In 1968, Cumberland participated in Alterman's food show reimbursing respondent in the amount of \$187.50 for the rental of half a booth (CX 180; J. Sheperd 766). This supplier had participated in the Alterman food show for possibly 2 or 3 years before that (Tr. 766). Cumberland discontinued its participation in the food show in 1969 when the Federal Trade Commission investigation of respondent came to its attention (Tr. 767). Although Cumberland permitted Bruce Brown Company, its broker, to display Cumberland products at the show, it refused to pay for such participation in that year (Tr. 771-72) and the broker was responsible for paying \$187.50 for the rental of half a booth (Brown 582, 584).

Cumberland donated a free order for a drawing to be held at the 1968 Food Show, and its broker set up, manned, and dismantled the booth in both the 1968 and 1969 Food Shows (CX 221-C; Brown 581-82).

Cumberland, which has sold its products in the Atlanta area for at least 20 years, has never made a promotional or advertising offer to the grocery trade (J. Sheperd 766; See also Brown 584; May 836). Cumberland does not make such offers because its product line is characterized by a low margin of profit (J. Sheperd 766). Cumberland did not affirmatively make proportionately equal promotional offers available to Alterman's competi-

tors as a result of its food show participation in 1968 (J. Sheperd 766-67).

44. Alterman competed in the sale of Cumberland products with A.G. at the retail level and with May & Co. at the wholesale level of distribution in selling to the A.B.C. Food Stores, respondent's voluntary group (Maziar 953; CX 184-A—Z-3; Finding 25, *supra*).

45. Cumberland's food show payment in 1968 and its broker's payment in 1969 were payments for a service or facility furnished by Alterman in connection with its offering for sale or resale of Cumberland's products at the wholesale level to the A.B.C. stores of its voluntary group. Such payments were not made available on proportionally equal terms to May & Co., by Cumberland or its broker. Similarly, the services furnished by Cumberland and its broker in setting up, manning, and dismantling the food show booths were services furnished in connection with respondent's offering for sale or resale of Cumberland products at the wholesale level not made available on proportionally equal terms to May & Co.

Alterman knew or should have known on the basis of its trade experience that Cumberland had made no promotional offers in the Atlanta area for many years and that Cumberland had no promotional plan on the basis of which the payments in question could be proportionalized. Further, Alterman initiated the promotion and fixed the rate of compensation for the services to be furnished. As a result, Alterman possessed sufficient information to put upon it the duty of making inquiry as to whether such payments and related services were made available to its competitors on proportionally equal terms. Alterman instituted no such inquiry in connection with its food show promotion. Failing to take such steps, Alterman is chargeable with at least constructive knowledge of the discriminatory nature of the Cumberland food show payment and that of its broker as well as of the discriminatory nature of the services furnished in connection therewith.

46. In the case of respondent's retail operation, the food show and the related services constituted essentially a sales presentation of the products of Cumberland to the personnel of its chain stores designed to facilitate Alterman's own purchases from the supplier (Findings 17-21, *supra*).

The Cumberland food show payment and that of its broker

as well as the services furnished in connection therewith discriminated between Alterman and A.G. which competed with respondent at the retail level. However, the food show which was a wholesale promotion was not a service or facility furnished by Alterman in connection with respondent's sale or resale of Cumberland products at retail. Similarly, the services furnished by this supplier and broker in connection therewith, such as manning the display, were not services furnished in connection with respondent's sale or offering for sale of Cumberland products to the consumer (Findings 17-20, *supra*). The discrimination between Alterman and A.G., another retailer, is therefore not cognizable under the allegations of the complaint.

F. *Interstate Brands Corporation*

47. The Interstate Brands Corporation (Dolly Madison) through its Dolly Madison cake plant in Birmingham, Alabama, sold a line of sweet goods in the Atlanta, Georgia, market in the period 1966-69, including layer cakes, snack cakes, sweet rolls and doughnuts (Hayes 402-04).

Dolly Madison products in the Atlanta market are sold by door-to-door delivery, that is, the merchandise is delivered and sold to the individual grocery store as opposed to a warehouse (Hayes 404-05). In the case of chain stores, it is possible that the chain's central headquarters would be billed. Sales to independent stores, however, are primarily cash transactions. The members of A.G. purchased independently and did not buy Dolly Madison products through the headquarters of the cooperative (Hayes 404-05; Maziar 947).

Alterman's purchases of Dolly Madison products were approximately \$104,000 a year (Grobe 268).

48. In the period 1966-69, Dolly Madison made no promotional or advertising program offers to its customers in the Atlanta, Georgia, market (Hayes 407). Wholesale bakers or sweet goods producers did not advertise cooperatively in the area during the years in question. Such suppliers cannot afford to advertise cooperatively because the product involved is an impulse item with a very low margin of profit (Hayes 409). Alterman's buyer who handled Interstate Bakeries knew this supplier had never offered promotional or advertising allowances (Grobe 264-65).

Dolly Madison did run a promotion in the form of a price reduction in the fall of 1968 that offered four units of a snack cake item for the price of three—the Snoopy Election Special.

This promotion was offered to all customers including Alterman (Hayes 407-09). It was not contemporaneous with the Alterman food show in the second quarter of that year.

49. Dolly Madison participated in the Alterman food show in each of the years in the period 1966-69, most of its line being displayed at the promotions in question. In fact, this supplier has participated in the food show for a total of 10 years. Its payments for booth rental in 1966-67 were \$350 and rose to \$375 in 1968 and 1969 (Hayes 419, 424; CX 39-47).

Dolly Madison did not attempt to make proportionately equal promotional offers or advertising programs available to Alterman's competitors as a result of its participation in respondent's food shows (Hayes 420).

50. Alterman competed in the sale of Dolly Madison products at the retail level of distribution with individual A.G. members (Tr. 598, 603-05, 701, 707-08, 781, 784, 803, 805-06, 809, 811, 817, 820, 824, 828, 929, 932, 936, 938, 980-81, 984, 991, 993).

The food show, which was a wholesale promotion, was not a service or facility furnished by Alterman in connection with its offering for sale or resale of Dolly Madison products at the retail level. The promotion was directed to Alterman's chain store employees as well as A.B.C. store personnel and not the consumer. The food show facilitated the purchase of these products by respondent for its own stores but not their resale at retail (Finding 17-21, *supra*). Since the discriminatory food show payments and related services were not in connection with respondents offering for sale or resale of Dolly Madison products at the retail level which is the functional level of distribution involved here, the discrimination is not cognizable under the allegations of the complaint.

G. Martha White Foods, Inc.

51. Martha White Foods, Inc. (Martha White), sells flour, cornmeal, and some convenience items in the Atlanta area through its wholly-owned subsidiary, the Atlanta Flour Co., Inc. The principal customers of Martha White in that market are Big Apple, A&P, Colonial, Kroger, and most of the independents, including A.G. members and A.B.C. stores. The Big Apple, A.G. members, and A&P stores purchased approximately the same products from this supplier in 1969. (Watts 867-68, 870-71)

The product is distributed in the Atlanta market by the supplier's trucks to the individual stores as a store door delivery

item. Martha White headquarters bills the chain stores every week for the previous week's deliveries, but the A.G. members and A.B.C. stores are individually billed because they are separately owned (Watts 870-71).

52. In 1969, Martha White had a series of promotions available to the entire trade offering a price reduction for each unit purchased for specific periods of time. Certain of the promotions specified that no performance would be required but that promotional performance would be solicited. Other of these promotions were silent on the subject of performance (CX 85-A-O; Watts 872-74). Martha White also made available promotions restricted to new store openings that were also available to all customers in the Atlanta area (CX 86; Watts 873-74).

In addition to the foregoing special offers, Martha White's customers were also offered the opportunity to advertise cooperatively, normally at quarterly intervals although this could vary. Such cooperative advertising allowances were offered at the same frequency to independent and chain stores. Under such an arrangement certain amounts would be granted for each unit of product purchased, this amount varying with the product and size of package involved in the promotion (Watts 875, 881-82, 886).

On May 6, 1969, Alterman entered such a cooperative advertising agreement with Martha White under which it would receive \$1 a bale, or 10 cents a package, on purchases of plain and self-rising flour in return for featuring those products at a special price when no other competitive brand was being featured in the same advertisement (CX 90-C). The period of this promotion, involving 66 Big Apple stores, was in the week of May 19, 1969—the same month that Martha White participated in respondent's food show of that year.

53. In addition to making available its regular promotional programs, Martha White participated in the Alterman food show by paying a rental of \$375 for a full booth where a complete line of Martha White products was displayed. The supplier furnished labor for setting up, manning, and dismantling the display. This supplier, moreover, had participated in respondent's food show as early as 1967 (Watts 887, 890; RX 37).

Martha White did not participate in other food shows in the Atlanta area in 1969, nor did it, as a result of its participation in the Alterman food show, announce an affirmative offer to its

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other customers making such an allowance available on a proportionally equal basis (Watts 891-92).

54. Alterman competed with A&P and individual A.G. members in the sale of Martha White products at the retail level (Watts 870-71; Clark 937; Harris 998-1001; Gantt 930-31; Jones 920).

In the case of respondent's retail operation, the food show and the related services constituted essentially a sales presentation of the products of Martha White to the personnel of its chain stores designed to facilitate Alterman's own purchases from the supplier (Findings 17-21, *supra*).

The food show, which was a wholesale promotion, was not a service or facility furnished by Alterman in connection with its offering for sale or resale of Martha White products at the retail level. Similarly, services furnished by Martha White, such as manning the food show display, were not services furnished in connection with the offering for sale or resale of Martha White products at the retail level to the consumer (Findings 17-20 *supra*). Since the discriminatory food show payment and the related services furnished by the supplier were not in connection with the offering for sale or resale at the retail level, which is the functional level of distribution involved here, the discrimination is not cognizable under the allegations of the complaint.

DISCUSSION

The complaint charges essentially that respondent has violated Section 5 of the Federal Trade Commission Act by inducing its suppliers to grant it payments or to furnish it services or facilities in contravention of Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.¹² On the facts as alleged in this case, both sections of the Act reach only discriminations between customers competing for resale at the same functional level (See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).)

The threshold question presented is at what functional level were respondent and its competitors operating in the period 1966 through 1969, and, in addition, whether the food show promotion, which is at the center of this controversy, relates to both the wholesale and retail levels of distribution. Equally

¹² See CPF 6-7 and Tr. 6.

important is the issue of whether at both or either functional levels, the food show and the supplier services furnished in connection therewith can be considered services or facilities within the scope of Sections 2(d) and 2(e) as defined in the complaint.

Respondent contends that the food show was strictly a wholesale promotion. It urges that the supplier payments in connection with this event were made for the purpose of promoting the featured products to the retail stores of the A.B.C. group and the Big Apple stores purchasing from respondent at wholesale. As a result, according to Alterman, such payments must be characterized as promotional payments to a wholesaler. Since the alleged nonfavored customers, A.G. and A&P, are retailers, respondent asserts that no cognizable discrimination exists between them and Alterman which operates at the wholesale level (RPF 92-93).

The record nevertheless indicates that, as a practical matter with respect to its Big Apple, Food Giant, and K-Mart operations, Alterman should be classified among those direct-buying retailers who "find it feasible to undertake the traditional wholesaling functions for themselves." *FTC v. Fred Meyer, Inc., supra*, at 352. This is the clear thrust of respondent's description of its retail operations in its annual reports summarized in the findings, *supra*.

The finding that Alterman is a retailer is not negated by the fact that most of the Big Apple stores are wholly-owned subsidiaries. The inference that this corporate device has little significance as far as Alterman's functional classification as a retailer is concerned is strengthened by the fact that throughout the period in question two of the Big Apple stores, albeit small, were in fact not separately incorporated. In this connection, see also Paragraph 2 of respondent's answer referring to "respondent's chain of retail grocery stores." In short, Alterman, insofar as its purchases for its Big Apple, K-Mart, and Food Giant stores are concerned, should be regarded as a retailer for the purposes of Sections 2(d) and 2 (e) of the Robinson-Patman Act.¹³

¹³ Respondent's counsel recognized the practicalities of the situation in his cross-examination of Charles Godchaux.

Q. You've always been aware that Alterman sells at both retail and wholesale, have you not?

A. Yes. (Tr. 663-64)

The record clearly demonstrates that A&P is a chain retailer in the Atlanta area. The next question presented is whether A.G. or its members should be considered as "customers" for the purpose of determining whether there is a cognizable discrimination in those cases where the headquarters of the group buys for its members. Equally crucial is the question of at what functional level of distribution the cooperative was operating during the period under consideration.

The determination of who is a "competing customer" for the purposes of this case is governed by the Commission's "Guides for advertising allowances and other merchandising payments and services" (16 C.F.R. Section 240.3 (1971)). That provision provides in pertinent part:

(b) "Competing customers" are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase direct from the supplier or through some intermediary.

* * * * *

Example 2: A manufacturer sells directly to some independent retailers, sells to the headquarters of chains and of retailer-owned cooperatives, and also sells to wholesalers. The direct-buying independent retailers, the headquarters of chains and of retailer-owned cooperatives, and the wholesalers' independent retailer customers are customers of the manufacturer. Individual retail outlets which are part of the chains or members of the retailer-owned cooperatives are not customers of the manufacturer.

It is clear that under the definition of Guide 3, A.G. headquarters, on the basis of this record, must be viewed as a retailer rather than as a wholesaler although it may have assumed many of the functions formerly performed by traditional wholesalers. Further, the record shows that Alterman and A.G. do not compete in the resale of goods at the wholesale level (Finding 23, *supra*).

Insofar as the food show was directed to the personnel of respondent's retail chain and to the extent that it purchased the promoted merchandise for that operation, Alterman, under these criteria, must be regarded as a chain-retailer competing with A.G. headquarters and A&P headquarters at the retail level of distribution.¹⁴

¹⁴ The Guide's determination that under these circumstances the headquarters of the retail-buying cooperative is to be considered as the customer rather than the members may well be a

The food show, as Alterman contends, was not directed to the consuming public; rather, it was a promotion aimed at the employees of Alterman's chain stores and the members of its voluntary buying cooperative, the A.B.C. stores.

The question of whether the food show is a service or facility within the scope of Sections 2(d) and 2(e) of the Robinson-Patman Act as defined in the complaint, is critical. It is a question which must be answered with respect to each level of distribution. Neither side has addressed itself directly to that issue. In this connection, Section 2(d) expressly relates to "services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale" of the supplier's products. The complaint is more narrowly drawn—it refers in Paragraph Five, relating to the inducement of a Section 2(d) violation, to "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." [Emphasis supplied]

Similarly, Section 2(e) of the Act defines the services within its scope furnished by a supplier as "services or facilities connected with the processing, handling, sale, or offering for sale of such commodity." Paragraph Seven of the complaint referring to the inducement of a Section 2(e) violation is again more narrowly drawn. It refers to the "furnishing of services or facilities connected with respondent's offering for sale or resale, of such products."

The fact that the allegations of the complaint eliminate the statutory references to "processing" and "handling" is significant. According to recent precedent, their inclusion in Section 2(e) indicates that Congress meant to ban discriminatory practices though not of a typically sales promotional nature. *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971) *cert. denied*, 405 U.S. 921 (1972).¹⁵ Their omission

shift from previous Commission decisions. These held that the individual members were to be considered the customers for Robinson-Patman Act purposes and that the cooperative group was merely the agent of its members. *E.g.*, see *Alhambra Motor Parts, et al.*, 68 F.T.C. 1039 (1965). However, the Guides that are the latest expression of the Commission's policy on the subject appear to be determinative in this instance. Where A.G.'s members make "store door" purchases as in the case of *Martha White* or *Interstate Bakery* (*Dolly Madison*) the individual stores, of course, would be considered as "competing customers."

¹⁵ Sections 2(d) and 2(e) are "reciprocal bans of coextensive scope irrespective of minor textual variations" Rowe, "Price Discrimination Under the Robinson-Patman Act" 390 (1962). A precedent under one therefore has application to the other.

in the complaint conversely indicates that the allegations therein are in fact confined to practices of that type.¹⁶

The food show is clearly not a retail sales promotion. Where Alterman performs a wholesale function in selling to the members of its A.B.C. group, the food show is, however, a service within the scope of the definition of services or facilities set forth in Paragraphs Five and Seven of the complaint. The food show is designed to promote Alterman's wholesale sales to A.B.C. stores, and therefore it must be considered to be a promotional service "in connection with" respondent's offering for sale or resale at the wholesale level of distribution.

It is also plain that to the extent that the charges under consideration here relate to respondent's competition with other retailers; namely, A.G. and A&P, the complaint contemplated that the evidence would demonstrate that the food show promotion was directed to and would facilitate retail sales to the consuming public. Otherwise, the allegations of the complaint would not have limited the definition of services or facilities to those of a sales promotion type in connection with respondent's sale and offering for sale of the products in question.

The services furnished by respondent in the case of the food show, which is a wholesale promotion, are too remote from the resale of the product at retail to be considered a service in connection with respondent's sales of such merchandise to the consumer. As a result, the record does not demonstrate that the food show payments or related services discriminating between Alterman and other retailers were within the scope of the charges set forth in the complaint.¹⁷

As far as Alterman's retail operation is concerned, the food show payments and the services furnished in connection therewith were designed to facilitate respondent's own purchases from its suppliers rather than to promote the resale of such merchandise at retail. The food show and related services were in the

¹⁶ The reference in Paragraph Eight of the complaint to services performed by some suppliers "which aided respondent in the resale of the suppliers' products" and the reference in Paragraph Ten to payments or other compensation for "promotional" services or facilities similarly confirm that the allegations of illegality are confined to discriminations involving services or facilities of a sales promotion nature which aided Alterman's resale.

¹⁷ Even conceding for argument's sake that the complaint in this instance is not limited to services of a sales promotional nature, no finding can be made here that the food show, a wholesale promotion, would facilitate retail sales. Unlike the "consistently faster deliveries" considered by the court in *Centex-Winston*, *supra*, no finding can be made in this case that a discrimination in the payment for or the furnishing of the services involved here "would impede" the sale of the featured commodities at retail.

nature of a sales presentation to the personnel of Alterman's retail stores (Findings 17-21, *supra*). The acceptance by a purchaser of a promotional offer intended to facilitate the original sale of the product does not, however, constitute the rendering of a service or facility within the meaning of Section 2(d). (See *New England Confectionary Co.*, 46 F.T.C. 1041, 1059 (1949).)¹⁸ Similarly, where a service or facility furnished by the supplier is connected only with the original sale of a product to a retailer and not with any further handling, processing, or resale, it is not within the scope of Section 2(e). *Secator's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959); see also *Skinner v. United States Steel Corporation*, 233 F.2d 762, 765 (5th Cir. 1956).

As far as the Airwick, Sweet Sue, Riviana, Interstate Bakeries (Dolly Madison), Martha White, and Bernardin food show payments are concerned, the record does not demonstrate a discrimination cognizable under the allegations of the complaint. The only competition documented between respondent and other customers of these suppliers is at the retail level; namely, between Alterman, A.G., and A&P.¹⁹ As already noted, the food show is not a service facilitating Alterman's resale of these products to the consumer at retail. The food show payments in the case of these suppliers are accordingly not payments for a service or facility within the scope of the allegations of the complaint. Similarly, the services furnished by these suppliers in connection with the food show are not within the scope of the charges under consideration here.

Complaint counsel assert that there is a cognizable discrimination at the retail level since the payments in question were generated by the buying power of respondent's retail operation and were to its benefit. The food show payments made to respondent as an entity may well have benefited Alterman's retail business. However, that is only one element of the violation. It is not a substitute for proof that the payment is for a service rendered in

¹⁸ Although *New England Confectionary* was concerned with a situation where no service was required, the principle appears equally applicable to situations where the service actually rendered is not related to the purchaser's further handling, processing, or resale at the functional level involved in the discrimination. In this connection, see *J. Weingarten, Inc.*, 62 F.T.C. 1521, 1524 (1963) holding that among the basic factual elements of the law violation charged here is "The solicitation and receipt by respondent in commerce of payments for promotional services in connection with the [respondent's] resale of a supplier's product" (emphasis supplied).

¹⁹ In the case of Martha White and Dolly Madison products, the competition would be between Alterman and A.G. members.

connection with the purchaser's offering for sale or resale of the product. That showing, with respect to discriminations at the retail level, has not been made.

Here the complaint closely tracks the language of Sections 2(d) and 2(e) of the Robinson-Patman Act which in the case of the former has been described as "a rigid definition of acts constituting 'unlawfulness'".²⁰ In fact, the complaint's definition of the alleged law violation on this point by eliminating the Act's references to "processing" and "handling" is more restrictive than that of the statute. This is not to say that the Commission could not reach such discriminations under the broad powers conferred by Section 5 of the Federal Trade Commission Act. That statute permits the FTC in measuring a practice against the congressionally mandated standards of fairness to consider values beyond those enshrined in the letter of the antitrust laws. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). The complaint herein, however, does not apparently attempt to encompass the broader reaches of Section 5.

The record demonstrates food show payments by one supplier and its broker evidencing discrimination at the wholesale level where the payment was made to Alterman in its capacity as a wholesaler and where the food show involved a service in connection with respondent's resale of the product to the independent stores of its voluntary group. The evidence shows that Cumberland Manufacturing Company in 1968 paid \$187.50 as rental for half a booth at the 1968 Food Show and that a similar payment was made by its broker in 1969. The record further shows that Alterman and May & Co. competed in wholesale sales to the A.B.C. retailers of respondent's voluntary group in the sale of Cumberland's products.²¹

Respondent contends that the charges of the complaint are limited to discriminations at the retail level of distribution on the ground that Paragraphs Five and Seven of the complaint describe allegedly nonfavored customers as all other customers, including retail customers, who do not purchase directly from

²⁰ *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F.2d 831, 837 (7th Cir. 1958) cert. denied, 358 U.S. 947 (1959).

²¹ Respondent's argument at RPF 30 that May & Co. is selling a service rather than a product and is therefore not in competition with Alterman at the wholesale level, is without merit. May's prices were higher because of the services it performed in connection with the sales of Cumberland's products. This, of course, does not preclude a finding of a sale of merchandise where such a sale was actually made. Cf. *Clairol, Inc. v. FTC*, 410 F.2d 647 (9th Cir. 1969).

such suppliers. Respondent contends that the phrase "including retail customers who do not purchase directly" describes all other customers as retail customers. This is a possible interpretation. However, the phrase "including retail customers who do not purchase directly" does not on its face exclude wholesale competition from the scope of this proceeding. Fairness in this instance does not require that the sentence in question be read in its narrowest possible sense. In any event, the record shows that respondent in the course of the hearings, had ample opportunity to explore complaint counsel's contention on this issue (Tr. 837-43).

The discrimination in this instance is clear. Cumberland Manufacturing Company, which has sold its products in the Atlanta area for at least 20 years, has never made a promotional or advertising offer to the grocery trade and none were made in 1968 to Alterman's competitors.²²

Alterman knew or should have known on the basis of its trade experience that Cumberland had not made such offers available to the grocery trade. As a result, Alterman also knew or should have known that Cumberland had no promotional plan on the basis of which the payment in question could be proportionalized.

Moreover, the food show payments and the services furnished by the suppliers under consideration here, were granted in connection with a promotion initiated by the respondent. Alterman fixed the rate of compensation in return for the services furnished. Under the circumstances, respondent possessed sufficient information to put upon it the duty of making inquiry as to whether this supplier was taking steps to make such payments available to other buyers. *Fred Meyer, Inc.*, 63 F.T.C. 1, 59 (1963), *rev'd.* 359 F.2d 351 (9th Cir. 1966), *rev'd.* 390 U.S. 341 (1968). See also *Individualized Catalogues, Inc.*, 65 F.T.C. 48, 68, 69 (1964).

Respondent, it is clear, at no time instituted any inquiry as to whether the food show payments were available to its competi-

²² Respondent contends, RFP 31 to 33, that May & Co., because of Cumberland's return policy and Cumberland's prepricing of products, received promotional allowances and services proportionally equal to those received by respondent in the relevant period. The short answer is that Cumberland has the same return policy for all customers (Tr. 776) and that at the time of the food show May & Co. was not purchasing Cumberland's line which was prepriced. In fact, May did not begin purchasing this line until after August of 1968 (Tr. 777). Moreover, there is no showing in the record that the prepriced line was not available to May's competitors. The argument that May's participation in the Georgia Retail Food Dealers Association demonstrates proportionally equal benefits received by this wholesaler is also without merit. The record here shows no participation by Cumberland in that event.

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tors. Under the circumstances here disclosed, respondent in the case of the Cumberland payments had the duty of:

[taking] such affirmative steps as would satisfy a reasonable and prudent businessman that such allowances are affirmatively offered and otherwise made available by such seller on proportionally equal terms to all of its other customers competing with the customer in the distribution of the seller's products and that usable and suitable alternatives are offered them if the basic offer is not suitable for and usable by them. (Example 1, Guide 14, Guides for advertising allowances and other merchandising payments and services, 16 C.F.R. §240.14 (1971))

Failing to take such steps, Alterman is chargeable with at least constructive knowledge of the discriminatory nature of the Cumberland payments and the discriminatory furnishing of services in connection therewith.

A presumption of legality does not arise, as respondent contends, merely because Cumberland had previously participated in the food show. The fact that the Commission did not challenge earlier payments demonstrates no more than that it must exercise discretion in the allocation of its law enforcement resources, *Cf. Moog Industries v. FTC*, 355 U.S. 411, 413 (1958).

The final question is whether the violation found; namely, the Cumberland food show payment in 1968 of \$187.50 and the broker's payment in the succeeding year, constitutes substantial evidence supporting the imposition of a cease and desist order. The violation of law, as alleged by the complaint, proven here, is isolated and narrowly based. The record does not clearly demonstrate to what extent, if any, wholesalers other than May & Co. in the Atlanta area compete with Alterman and are likely to be discriminated against as a result of respondent's food show. Nor, does the record show whether suppliers other than Cumberland would be involved in discriminations as a result of the food show adverse to May. Finally, respondent's 1968 purchases for its retail operation accounted for 82.5 percent of its total purchases as opposed to a figure of 17.3 percent for the wholesale division (RX 36). To what extent these figures apply to Alterman's Cumberland purchases the record does not show. Conceivably, much less than the entire Cumberland payments may be allocable to the respondent's wholesale operation.²³

Here the proof of violation does not justify the injunction of

²³ There are significant differences between this case and *J. A. Folger & Co.*, 61 F.T.C. 1166, 1186 (1962). There the Commission held that a \$150 payment for participation in a "Foodarama" promotion justified a cease and desist order against the supplier because of the

all violations of the statute sought by the proposed order in this proceeding. Cf. *Grand Union Company v. FTC*, 300 F.2d 92 (2nd Cir. 1962). Moreover, the *de minimis* rule applies to the Robinson-Patman Act. See *Skinner v. United States Steel Corp.*, *supra*, 764; *Centex-Winston Corp.*, *supra*, at 589. Under the circumstances, the evidence of the illegality proven here is not of that substantial nature justifying the imposition of an order to cease and desist.²⁴

Final Conclusions of Law

1. Respondent Alterman Foods, Inc., was at all times material herein, a corporation engaged in commerce as "commerce" is defined in the Clayton Act as amended, and the Federal Trade Commission Act.

2. Counsel supporting the complaint have failed to sustain the burden of establishing by substantial reliable probative evidence that respondent has violated Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the complaint in the above-entitled proceeding be, and the same hereby is, dismissed.

DISSENTING STATEMENT

BY KIRKPATRICK, *Commissioner*:

I see nothing in the record of this case to suggest that any substantial public purpose would be served by the entry of an order.

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner*:

I.

Complaint in this matter was issued on May 26, 1971 alleging respondent violated Section 5 of the Federal Trade Commission

relationship that payment bore to the other discriminatory payments received by the customer instituting that promotion. There was no indication in *Folger*, however, that the majority of the payments induced did not come within the scope of the complaint's allegations.

²⁴ The decision of the Fifth Circuit refusing to apply the *de minimis* concept in *Shreveport Mfg. Co., Inc. v. FTC*, 321 F.2d 404 (5th Cir. 1963) *cert. denied*, 375 U.S. 971 (1964) appears inapplicable here because of the differences in the factual situations.

Act by inducing certain of its suppliers to violate Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, and receiving promotional considerations from them. After extensive hearings, the administrative law judge found that no violation¹ occurred and, consequently, dismissed the complaint on April 17, 1972. Counsel supporting the complaint has appealed this finding and disposition.

Section 2(d) prohibits a seller from discriminatorily *paying* any customer for promotional services or facilities furnished by such customer in connection with the processing, handling or sale of the seller's product. Section 2(e) prohibits the seller from discriminatorily *furnishing* to a customer promotional services or facilities connected with the processing, handling or sale of the seller's product. Sections 2(d) and 2(e) are "reciprocal bans of coextensive scope irrespective of minor textual variations."² Because of apparent Congressional "inadvertence," buyer misconduct in inducing sellers to violate Sections 2(d) and 2(e) is not a violation of the Robinson-Patman Act.³ However, that is not to say the buyer has not engaged in an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act.⁴

Alterman Foods, Inc., engages in the dual distribution of food products: to the public, at retail, through its wholly-owned subsidiaries—Big Apple stores [approximately 72 in number, located in Georgia and Alabama (RX 41)] and at discount operations in Food Giant, Food Town and K-Mart food sections (I.D. Finding 10 [p. 305 herein]) Alterman's nonpublic sales are through its wholesale and institutional divisions. The wholesale division sells to independent merchants comprising a voluntary cooperative called the A.B.C. Food Stores (I.D. Finding 6 [p. 304 herein]). Alterman is a major competitive factor in the grocery business in the Atlanta, Georgia, area as well as other areas in Georgia and Alabama (I.D. Finding 3[p. 303 herein]). In 1969, Alterman's sales were \$89,582,611 allocable as follows: Big Apple stores—\$74,317,577; Institutional Divisions—\$57,994; and A.B.C. stores—\$15,207,040 (I.D. Finding 5[p. 304 herein]).

Alterman instituted a food show in 1956. These annual events are "put on for the institutional, independent and supermarket buyers, and [they are] attended by the A.B.C. Food Store mem-

¹ Or, at most, a *de minimis* violation.

² Rowe, *Price Discrimination Under the Robinson-Patman Act*, 390 (1962).

³ *Grand Union v. Federal Trade Commission*, 300 F.2d 92, 96 (2d Cir. 1962).

⁴ *R. H. Macy & Co., Inc. v. Federal Trade Commission*, 326 F.2d 445 (2d Cir. 1964).

bers, their families, and friends * * *; by Big Apple store managers, co-managers, employees and their families * * *; and by the customers of the respondent's Institutional Division * * * Personnel from respondent's K-Mart and Food Giant supermarket also attend * * * The suppliers are also given tickets and may invite whomever they wish * * * ." (I.D. Finding 18 [p. 309 herein]). Approximately 12,000 to 15,000 tickets were given away for each of the 1967 and 1968 food shows.

All of Alterman's suppliers receive invitations to participate in the food show. Participation costs the suppliers from \$350 to \$375 for booth rental paid to Alterman by the suppliers. Alterman realized profits from the food shows as follows: \$85,360 (1966); \$88,510 (1967); \$85,152 (1968) (I.D. Finding 22 [p. 311 herein]). The purpose of the show, as indicated by the solicitation to Alterman's suppliers, is "to expose suppliers' products to our own Big Apple employees, operators of our ABC Co-op group, and institutional buyers * * *" (CX 211-B). Because each Big Apple store generally orders its merchandise from Alterman headquarters and does not make purchases from suppliers,⁵ only A.B.C. store members and institutional customers place orders at the food show and, since the drawings, giveaways, prizes and rebates are predicated upon placing an order with the suppliers, only A.B.C. store members and institutional customers receive such prizes and rebates (I.D. Finding 19 [p. 309 herein]).

To demonstrate respondent's unlawful conduct, complaint counsel relied on transactions with seven of Alterman's suppliers:

Airwick Industries, Inc.
Bernardin, Inc.
Sweet Sue Kitchens, Inc.
Riviana Foods, Inc.
Cumberland Manufacturing Co.
Interstate Brands Corporation
Martha White Foods, Inc.

Each of these suppliers participated in the respondent's food shows.

It was alleged that respondent knowingly induced its suppliers to participate in these food shows; that such participation was

⁵ There is some indication the individual store managers can, under certain circumstances, purchase some stock such as store door delivery from outside vendors (Max Alterman, Tr. 193-97).

discriminatory against respondent's competitors, and that such participation amounted to the furnishing of promotional services or considerations therefor. The administrative law judge found that the complaint did not clearly set forth in a violation with respect to discriminatory practices *vis-a-vis* retail competitors (I.D. p. 37-38 [pp. 332-33 herein]) and that the food show was in the nature of a sales presentation to its Big Apple employees. The law judge did find a discriminatory promotional service or allowance when considering the food show as a wholesaling function. He found, however, the violation so minor as to be *de minimis* (I.D. p. 43 [pp. 336-37 herein]).

II.

In considering Alterman's food show as a wholesaling function, the following factors must exist before a violation can be found:

- a) Alterman must have knowingly induced and received from its suppliers promotional services or allowances;
- b) such services or allowances must be furnished in connection with the sale of such suppliers' products;
- c) Alterman must be in competition with other firms at the wholesaling level; and
- d) that such firms were discriminatorily disfavored.

In the Atlanta area the administrative law judge found only Alterman, through its A.B.C. buying group and Associated Grocers Co-op, Inc. (A.G.), a retail owned cooperative, provided a complete wholesale line to independent retailers (I.D. Finding 8 [p. 305 herein]). May & Company, a nonfood wholesaler, was in competition with Alterman for the sale of some rack jobbing products to retailers. The law judge found that, with respect to A.G., it was a retailer's cooperative and, under Guide 3, Example 2 of the Commission's *Guides for Advertising Allowances and Other Merchandising Payments and Services* [16 C.F.R. Section 240.3 (1971)] such cooperatives are *deemed* to be retailers. As such, it was at a different functional level than Alterman, hence not deemed to be in competition. The record indicates that the A.G. headquarters performs many of the same functions and operates in the same manner as Alterman does in its voluntary cooperative, the A.B.C. Food Stores (Tr. 948-49).

We find the law judge's reliance on the "Fred Meyer" guides ill-founded. In the introduction to the guides we said:

Simply stated, what the law requires * * * is that those who grant promotional and advertising allowances treat their customers fairly and without discrimination, and not use such allowances to disguise discriminatory price discounts. In interpreting and enforcing the law, *the Commission will recognize the practicalities of business while preventing the kind of discriminatory practices at which the law was aimed.*

* * * *the Guides are not meant to cover every situation, and "The examples are not intended to be all inclusive" [The R-P Act] * * * is directed at preventing competitive inequalities that come from certain types of discrimination by sellers in interstate commerce.* (34 F.R. 8285) (Emphasis added)

In a note to Guide 3, we stated:

In determining whether a seller has fulfilled his obligation toward his customers, the Commission will recognize that there may be some exceptions to this general definition of "customer".

In *Colonial Stores, Inc.*,⁶ the hearing examiner and the Commission, in considering the Atlanta market, alluded to A.G. as a "wholesaler-cooperative" and considered its retail-members as nonfavored customers of various supplier.

With respect to the receiving of promotional services and allowances, we hold that respondent, as a practical matter, was in competition at the wholesaling level with A.G. headquarters. A.G.'s operation is not unlike that found in *Central Retailer-Owned Grocers, Inc., et al. v. Federal Trade Commission*,⁷ where the seventh circuit reversed a Commission finding that the appellant violated Section 2(c) of the Robinson-Patman Act. The court stated:

Reason does not permit our ignoring these facts [that appellant was functioning at a different level from its retailer-owners] in order to declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sales prices to the consumer, by entering into the arrangement with Central, which made them stronger in their competition with large chainstores.⁸

Respondent states that the critical question is: At what level does Alterman compete with A.G.? We agree this is the central question. Our conclusion is that respondent, with its dual functions, competes with A.G. headquarters at the wholesaling level and with A.G. members at the retailing level. Respondent chose this marketing system and created both a retail and wholesale marketing system. To further its business and profitmaking ob-

⁶ Docket No. 8768 [77 F.T.C. 554] (May 7, 1970).

⁷ 319 F.2d 410 (7th Cir. 1963).

⁸ *Id.*, at 415.

jective it solicited and received favored treatment from its suppliers who participated in the food shows. This favored treatment unlawfully discriminated against A.G. headquarters which competed with Alterman at the wholesale level.

Respondent makes great moment of the similarities between A.G. and the appellant in *General Auto Suppliers, Inc. v. Federal Trade Commission*,⁹ particularly the fact that the objective of both concerns was not to "drum up wholesale business."¹⁰

While questioning the law judge's conclusion as to A.G.'s motive, we are also compelled to point out that National Parts Warehouse (the joint effort in *General Auto Supplies, Inc.*) was created as a vehicle, not to carry on traditional wholesaling functions but, for its members to claim and receive discriminatory allowances. In that case we looked at the market realities and determined the joint effort was a subterfuge by which some retailers, under the guise of being wholesalers, were obtaining favored treatment *vis-a-vis* other retailers. In the case before us here the market reality is that both Alterman's A.B.C. group and A.G. Co-op are voluntary organizations of retailers. Both compete, *albeit* indirectly, for the sale of food products through their secondary level of distribution, *i.e.*, that of sales by their respective retail-members, and it is in this method they compete with each other. *Perkins v. Standard Oil Company of California*, 395 U.S. 642 (1969).

With respect to the wholesaling function of May & Company, the nonfood wholesaler who sold some of the products supplied by Cumberland Manufacturing Company, we reject the *de minimis* theory of the law judge. In applying the *de minimis* theory to this case grounded on the Robinson-Patman Act, the law judge cites two civil cases.¹¹ In 1962 we disposed of the defense of *de minimis* as follows:

Respondent also contends that the activities here complained of were so insignificant and negligible that the complaint should be dismissed under the rule of "*de minimis*". Two cases are cited: *Skinner v. United States Steel Corporation*, 233 F. 2d 762 (5th Cir. 1956), and *E. Edelmann & Company v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956). The facts in the former case, involving private litigation, are so different from those herein that it would not constitute a precedent for this case. As for

⁹ 346 F.2d 311 (7th Cir. 1965), *affirming* 63 F.T.C. 1692 (1963).

¹⁰ Initial Decision Finding 23 [p. 311 herein].

¹¹ *Skinner v. United States Steel Corp.*, 233 F.2d 762 (5th Cir. 1956); *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971), *cert. den.*, 405 U.S. 921 (1972).

the *Edelmann* case, the court there held it is implicit in the Act (Section 2(a)) that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. To the extent that this case offers a guide to the discriminations in price which are negligible, and the court there upheld the violation, it can provide little help in this Section 2(d) matter. *In the Matter of Shreveport Macaroni Mfg. Co., Inc.*, D. 7719, 60 F.T.C. 196, 205.

This Section 5 inducing case is predicated upon a Section 2(d) and 2(e) discrimination factual situation. Complaint counsel choose seven Alterman suppliers as illustrative of the law violation. Respondent's favored treatment by Cumberland indeed illustrates a violation. We are not now, nor have we ever been required to show all violations by a particular respondent in order to sustain a cease-and-desist order. It is sufficient in this matter to show that respondent knowingly induced and received promotional considerations not available to a competitor.

III.

When the law judge examined the retail function of Alterman's dual operation, he concluded that the food show was in the nature of a sales presentation and, hence, not a prohibited payment or service. Complaint counsel maintain that suppliers' participation in the food show was both a direct and indirect benefit to Alterman's retail operation. Direct in the sense that profits from booth rentals enhanced the financial position of the respondent, and indirect in the sense that the suppliers' booths, displays and demonstrations at the food show were intended to aid in and promote the product's resale to the consuming public.

The record shows that Alterman was in competition at the retail level with several food stores, including A&P and other chains together with retailers in the A.G. group, indeed, with members of its own A.B.C. group.

We are in agreement with complaint counsel that participation in the food show discriminates against other retailers in the Atlanta area. The economic realities constrain us to find the profit from the show benefited respondent's retail division in some way, if only proportionally to other divisions (CX 223).

Additionally, the market realities compel us to find the promotional services and allowances supplied by respondent's suppliers at the food show indirectly facilitated sales to the consuming public. A realistic assessment of the promotions and allowances

granted respondent would require us to find other retailers in the area were being discriminated against. The law judge concluded this indirect benefit was too far removed from the sale at retail to be considered. We disagree. Indeed, the Supreme Court in *Perkins v. Standard Oil Company of California*,¹² retraced almost the entire chain of distribution to find the consideration which resulted in the unfairness at the retailing level. Respondent would have us affix labels to its various functions and pigeonhole each transaction to find no benefit and/or no competition. This we cannot and will not do. Our mandate is to "make realistic appraisals of relevant competitive facts. Invocation of word formulas cannot be made to substitute for adequate probative analysis."¹³ We agree with the following finding of the law judge as to respondent's scienter:

The food show payments and the services furnished by the suppliers under consideration here, were granted in connection with a promotion initiated by the respondent. Alterman fixed the rate of compensation in return for the services furnished. Under the circumstances, respondent possessed sufficient information to put upon it the duty of making inquiry as to whether this supplier was taking steps to make such payments available to other buyers. *Fred Meyer, Inc.*, 63 F.T.C. 1, 59 (1963), *rev'd.* 359 F. 2d 351 (9th Cir. 1966), *rev'd.* 390 U.S. 341 (1968). See also *Individualized Catalogues, Inc.*, 65 F.T.C. 48, 68, 69 (1964).¹⁴

Consequently, we find that respondent knew or should have known they were soliciting and receiving discriminatory promotional considerations.

Additionally, we agree with the law judge with respect to the promotional payment under certain bill-back arrangements. The record fails to support a finding that Alterman knew or should have known these bill-back payments were discriminatory.

IV.

In conclusion we find the respondent knowingly induced suppliers to favor them over their competition by granting promotional allowances or services and that they did, in fact, receive these favored allowances and services, all in violation of Section 5 of the Federal Trade Commission Act. Additionally, we find that both Associated Grocers Cooperative, Inc., and May & Company were competitors of respondent at the wholesaling level

¹² 395 U.S. 642 (1969).

¹³ *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 527 (1963).

¹⁴ Initial Decision, pp. 41-42 [p. 335 herein].

and the competition was sufficient to support an order. Finally, we find that such promotional considerations discriminated against respondent's retail competitors both directly and indirectly. Therefore, an appropriate order will issue against respondent. To the extent the administrative law judge's findings and conclusions are not rejected or modified by this opinion, they are adopted. The decision of the law judge is reversed, Chairman Kirkpatrick dissenting.

FINAL ORDER

This matter has been submitted to the Commission on the appeal of complaint counsel from the initial decision of the administrative law judge filed on April 24, 1972. The Commission has rendered its decision granting the appeal of complaint counsel and issuing its order accordingly. To the extent they are consistent with the opinion accompanying this order, the findings of the administrative law judge are adopted. 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 administrative law judge should be reversed. Accordingly,

It is ordered, That respondent Alterman Foods, Inc., a corporation, and its officers, representatives, agents and employees, successors and assigns, 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, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in purchasing, distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Inducing and receiving, receiving or contracting for the receipt of, anything of value from any supplier as compensation or in consideration for services or facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of such supplier's products, when respondent knows or should know that such compensation or consideration is not affirmatively offered and otherwise made available by such supplier on proportionally equal terms to all of its other customers,

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including retailer customers who do not purchase directly from such supplier, who compete with respondent in the distribution of such supplier's products.

2. Inducing and receiving, receiving or contracting for the receipt of, the furnishing of services or facilities connected with respondent's offering for sale or sale of such products so purchased, when respondent knows or should know that such services or facilities are not affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers, including retailer customers who do not purchase directly from such suppliers, who compete with respondent in the distribution of such supplier's products.

It is further ordered. That respondent shall not organize, direct, sponsor, or participate in any food show except under the following terms and conditions:

1. A copy of this order shall be delivered to each person or organization invited to participate in any such food show at the time such invitation is extended; and

2. Respondent shall bear its proper share of the operating expenses of any such food show and any profit, surplus, or funds remaining at the conclusion of any such food show shall be promptly repaid to all participants in the food show on a basis proportional to the payment made by each such participant.

It is further ordered. That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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.

Chairman Kirkpatrick dissenting.

Complaint

IN THE MATTER OF

ROBERT BURNS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-2352. Complaint, Feb. 13, 1973—Decision, Feb. 13, 1973.

Consent order requiring a Bellingham, Washington, importer and seller of scarves and other textile fiber products, among other things to cease manufacturing for sale, selling, importing, or distributing any product, fabric, or related material which fails to conform to an applicable standard of flammability or regulation issued under the provisions of the Flammable Fabrics Act, as amended.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Robert Burns, Inc., a corporation, and Tyrus R. Lovelace, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Robert Burns, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington. Respondent Tyrus R. Lovelace is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of said corporations.

Respondents are engaged in the business of the sale and distribution of various textile fiber products, including, but not limited to, scarves. Their office and principal place of business is located at Holly at Cornwall Street, Bellingham, Washington.

PAR. 2. Respondents are now and for some time last past have been engaged in the sale and offering for sale, in commerce and the importation into the United States, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or