

IN THE MATTER OF

HERBERT R. GIBSON, SR. T/A GIBSON PRODUCTS
COMPANY, ETC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE CLAYTON
ACT

Docket 9016. Complaint, Feb. 25, 1975—Decision, June 17, 1976

Consent order requiring Progressive Brokerage, Inc., and Barshell, Inc., two Dallas, Tex., brokerage firms and respondents in this case, among other things to cease collecting brokerage fees, commissions, or other compensations from sellers while acting for, or in behalf of, buyers.

Appearances

For the Commission: *André Trawick, Jr., Paul W. Turley, and Richard H. Gateley.*

For the respondents: *Bardwell D. Odum, Shannon Jones, Jr., Passman, Jones, Andrews, Coplin, Holley & Co., Robert E. Rader, Jr., John M. Gillis, Gillis, Rogers & Taylor, all of Dallas, Tex. and Akin, Gump, Strauss, Hauer & Feld, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45) and Section 2(c) of the Clayton Act, as amended (15 U.S.C. § 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint, charging as follows:

I. RESPONDENTS

PARAGRAPH 1. Respondent Herbert R. Gibson, Sr., is an individual doing business under his own name and the registered trade names of Herbert R. Gibson, Sr., d/b/a Gibson Products Company, and Herbert R. Gibson, Sr., d/b/a The Gibson Trade Show, both unincorporated sole proprietorships. His principal place of business is 1228 East Ledbetter Dr., Dallas, Texas. His residence address is 1358 Bar Harbor Dr., Dallas, Texas.

PAR. 2. Respondents Herbert R. Gibson, Jr., Gerald P. Gibson, and Belva Gibson are individuals doing business under their own names or the registered trade names of Herbert R. Gibson, Sr., d/b/a Gibson Products Company and/or Herbert R. Gibson, Sr., d/b/a The Gibson

Trade Show, or employed by, representing or in some manner associated with either Herbert R. Gibson, Sr., individually or Herbert R. Gibson, Sr., d/b/a Gibson Products Company, or Herbert R. Gibson, Sr., d/b/a The Gibson Trade Show. Said respondents are now and have been participating in, or aiding and abetting in the participation of, the acts and practices hereinafter set forth. Their principal place of business is 519 Gibson St., Seagoville, Texas. Belva Gibson's residence address is 1358 Bar Harbor Dr., Dallas, Texas. Herbert R. Gibson, Jr.'s residence address is 10412 Shiloh Road, Dallas, Texas. Gerald P. Gibson's residence address is 6814 Alexander Dr., Dallas, Texas. Respondents Herbert R. Gibson, Sr., Herbert R. Gibson, Sr. d/b/a Gibson Products Company, Herbert R. Gibson, Sr. d/b/a The Gibson Trade Show, Herbert R. Gibson, Jr., Gerald Gibson, and Belva Gibson may sometimes be referred to hereinafter, collectively, as the "Gibson family respondents."

PAR. 3. (a) Respondents Gibson's, Inc., and Gibson's Discount Center, Inc., Ideal Travel Agency, Inc., and Gibson Warehouse, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Texas, with their principal place of business located at 519 Gibson St., Seagoville, Texas.

(b) Respondent Gibson Products Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at 1228 East Ledbetter Dr., Dallas, Texas. Respondents Gibson's, Inc., Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., Gibson Products Co., Inc., may sometimes be referred to hereinafter as the "Gibson corporate respondents."

PAR. 4. (a) Respondent Progressive Brokerage, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 14802 Inwood Road, Dallas, Texas.

(b) Respondent Barshell, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 14802 Inwood Road, Dallas, Texas.

(c) Respondent Al Cohen & Associates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 12514 Gulf Freeway, Houston, Texas.

II. BUSINESS

PAR. 5. Respondents Herbert R. Gibson, Sr., Herbert R. Gibson, Sr., d/b/a Gibson Products Company and respondents Herbert R. Gibson,

Jr., Gerald P. Gibson, and Belva Gibson, individually or as agents or associates of Herbert R. Gibson, Sr., are now and for many years have been engaged in the operation and control of a number of retail stores (hereinafter sometimes referred to as "Gibson family-owned stores"), reselling sundry types of products, including but not limited to soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware to the consuming public. Said products are purchased from a number of manufacturers, suppliers and handlers of such products.

PAR. 6. Respondent Herbert R. Gibson, Sr., Herbert R. Gibson, Sr., d/b/a Gibson Products Company and Herbert R. Gibson, Sr., d/b/a The Gibson Trade Show, together with or acting through respondent Gibson Products Co., Inc., sell or grant license or franchise agreements to retail stores which permit individuals or corporations in several States to use the trademarks, service marks and trade names of "Gibson's," "Gibson" (with design), "Gibson Products Company" and "Gibson Discount Center" (which stores may be referred to hereinafter as "Gibson franchised stores") and conduct trade shows for and/or attended by Gibson stores. There are presently in excess of 536 such retail stores in the States of Texas, Oklahoma, Kansas, Colorado and Arkansas among others. Sales of products by said retail stores, including the sales by the Gibson family-owned stores, are substantial and are believed to exceed \$1,500,000,000 (One billion, five hundred million dollars) annually.

PAR. 7. (a) Respondents Gibson's, Inc. and Gibson's Discount Center, Inc., are now and for many years have been engaged in the business of controlling and operating Gibson family-owned stores, warehousing and selling to the consuming public sundry products in addition to selling or granting licenses or franchises to retail stores as described in Paragraph 6 herein. Said respondents have also served as instrumentalities for conducting other aspects of the Gibson family business including the various practices described herein.

(b) Respondent Ideal Travel Agency, Inc., is now and for many years has been engaged in the business of arranging transportation and accommodations for suppliers selling to some or all Gibson franchised stores and Gibson family-owned stores and has acted as a depository for the payments of induced promotional allowances.

(c) Respondent Gibson Warehouse, Inc. is now and for many years has been engaged in the business of receiving sundry products from some suppliers for resale and/or distribution to some or all Gibson franchised stores and Gibson family-owned stores.

(d) Respondent Gibson Products Company, Inc. is now and for many years has been engaged in the business of selling to the consuming

public sundry products and, in addition, conducting and/or serving as an instrumentality for conducting various other aspects of the Gibson family business and various practices as described herein.

PAR. 8. Respondents Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen and Associates, Inc. are now and for many years have been engaged primarily in the business of affecting sales of sundry products for sellers located in various States of the United States and purchases by buyers located in the State of Texas. In such capacity, said respondents have demanded and received commission, brokerage and other compensation in connection with affecting purchases and sales of sundry products described herein.

III. COMMERCE

PAR. 9. In the course and conduct of their business, the Gibson family respondents and the Gibson corporate respondents have engaged and are now engaged in commerce or their acts and practices affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, in the following manner:

(a) They solicit, handle, arrange for the purchase and sale of products to retail stores from a large number of suppliers located throughout the United States and respondents cause these products when solicited, handled, arranged for or purchased by them to be transported from the place of manufacture to retail stores in several States for resale to the consuming public. There is now, and for many years has been, a constant current of trade in commerce in these products between and among various States of the United States.

(b) They have induced or induced and received payment or consideration from suppliers in various States of the United States for promotional services or facilities. There is now, and for many years has been, a constant current of trade in commerce in these promotional services or facilities between and among the various States of the United States.

(c) In the course and conduct of their business for the past several years, they have purchased, distributed and resold, and are now purchasing, distributing and reselling sundry products in commerce or affecting commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, as amended, which they purchased from sellers located in various States of the United States other than the States in which said respondents are located. Said respondents have transported or caused such products to be transported from the sellers' places of business in various States of the United States to the buyers' places of business located in other States.

PAR. 10. Respondents Progressive Brokerage, Inc., Barshell, Inc., and

Al Cohen and Associates, Inc., in the course and conduct of their business as manufacturers representatives or brokers have been and are now affecting sales of sundry products including but not limited to soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware by sellers located in various States of the United States other than the State of Texas, and purchases by buyers located in the State of Texas, in or affecting commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, as amended. Said respondents have transported or caused such products to be transported from the sellers' places of business in various States of the United States to the buyers' places of business located in other States.

IV. COMPETITION

PAR. 11. In the course and conduct of their business in or affecting commerce, except to the extent limited or restrained by the practices identified hereinafter, respondents, individually or in concert, are now and have been in competition with other corporations, persons, firms and partnerships in the soliciting, handling, arranging for or purchasing for resale or sale and distribution of sundry products including but not limited to soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware.

V. COUNT I — INDUCING DISCRIMINATORY ALLOWANCES

PAR. 12. The allegations of Paragraphs 1-3, 5-7, 9 and 11 are incorporated herein by reference.

PAR. 13. In the course and conduct of business in or affecting commerce, and particularly since 1959, the Gibson family respondents and the Gibson corporate respondents, acting individually or in concert, have knowingly induced and received, or received, from suppliers payment of something of value to or for said respondents' benefit as compensation or in consideration for services or facilities furnished by or through said respondents in connection with said respondents offering for sale, selling, soliciting, handling or arranging for sale of products to Gibson family-owned stores and to Gibson franchised stores or resale thereof.

PAR. 14. (a) For example, during February, May, August and November of each year, said respondents conduct, hold or direct or assist in conducting, holding or directing a trade show (hereinafter sometimes called the "Gibson Trade Show") at which products of suppliers are displayed. The Gibson Trade Shows are attended by employees, agents and associates of said respondents; franchisees and

licensees of respondents Herbert R. Gibson, Sr., and Herbert R. Gibson, Sr., d/b/a Gibson Products Company and their employees, agents and associates.

(b) In the course of the Gibson Trade Shows held during February, May, August and November of each year for 1969, 1970, 1971 and 1972, said respondents solicited and induced from most, if not all, suppliers one or more of the following payments or considerations:

(1) Payment for booth rental.

(2) Payment for services in connection with booth rental including but not limited to electrical contractor services and furnishings.

(3) Payment for advertising in a booklet or tabloid which was circulated among persons attending the Gibson Trade Show.

(4) Special trade show prices on one or more of the suppliers' products offered for sale at the Gibson Trade Show.

(5) Provision of personnel to prepare and attend the booth throughout the time the Gibson Trade Show was open.

(6) Special billing terms on all sales made at the Gibson Trade Show.

(7) Special allowances on all sales made at the Gibson Trade Show, calculated from a predetermined percentage of all such sales.

(c) Said respondents received from participating suppliers substantial sums each year for the 1969, 1970, 1971 and 1972 Gibson Trade Shows.

PAR. 15. In the course and conduct of business in or affecting commerce, and particularly since 1959, the Gibson family respondents and the Gibson corporate respondents, acting individually or in concert, have knowingly induced and received, or received, from suppliers the furnishing of services or facilities in connection with the selling, offering for sale, soliciting, handling or arranging for the sale of products sold to Gibson family-owned stores and Gibson franchised stores or resale thereof.

PAR. 16. For example, during the Gibson Trade Shows, agents, employees or representatives of suppliers performed valuable services such as staffing the booths rented by suppliers from respondents and demonstrating the suppliers' products therein. In addition to the furnishing of such services, other services were performed by suppliers which aided said respondents in the resale of suppliers' products.

PAR. 17. Typical of the suppliers who participated in the Gibson Trade Show at least once during the years of 1969, 1970, 1971 or 1972, and granted one or more of the special payments or considerations described above are:

Doranne of California, Inc.
Los Angeles, California

Ceramic Wares

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Complaint

Armstrong Environmental Industries	
Los Angeles, California	Water Sprinklers
Revel, Inc.	
Venice, California	Toys (model kits)
L. M. Becker & Company	
Appleton, Wisconsin	Housewares
Beagle Manufacturing Company	
El Monte, California	Housewares
Bomar Manufacturing Co., Inc.	
Dallas, Texas	Jewelry
Ben-Mont Corporation	
Bennington, Vermont	Gift Wrapping Paper

PAR. 18. Many suppliers participating in the Gibson Trade Show for the years 1969, 1970, 1971 or 1972 did not offer or otherwise make available to all their customers competing with respondents in the sale and distribution of their respective products payments, allowances, services, facilities or other things of value on terms proportionally equal to those granted respondents.

PAR. 19. When the Gibson family respondents and the Gibson corporate respondents induced and received or received, payments, allowances, services, facilities or other things of value from suppliers, said respondents knew or should have known that they were inducing and receiving, or receiving, payments, allowances, services, facilities or other things of value from suppliers which said suppliers were not offering or otherwise making available on proportionally equal terms to all other customers of such suppliers who were competing with respondents.

PAR. 20. The acts and practices of respondents, as herein alleged, are all to the prejudice of the public and constitute unfair methods of competition in or affecting commerce and unfair acts and practices in or affecting commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45).

VI. COUNT II — BOYCOTTING

PAR. 21. The allegations of Paragraphs 1-3, 5-7, 9 and 11 are incorporated herein by reference.

PAR. 22. The Gibson family respondents and the Gibson corporate respondents, in combination, agreement, understanding and conspiracy with all or some of the Gibson family-owned stores and Gibson franchised stores, have established, maintained and pursued a course of conduct eliminating or boycotting suppliers which did not grant all or some of the special allowances on sales during or incident to the Gibson Trade Show as described in Count I herein.

PAR. 23. Said respondents are now engaged and for many years have been engaged in the following unfair acts and practices, among others, in furtherance of the boycott:

(a) Dissemination of bulletins advising the Gibson family-owned stores and Gibson franchised stores not to purchase from designated suppliers.

(b) Communicating, directly or indirectly, to the Gibson family-owned stores and Gibson franchised stores not to purchase from designated suppliers.

PAR. 24. Such acts and practices, as herein alleged, of said respondents are all to the prejudice of the public and constitute unfair methods of competition and unfair acts and practices in or affecting commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45).

VII. COUNT III — ILLEGAL BROKERAGE

PAR. 25. The allegations of Paragraphs 1-11 are incorporated herein by reference.

PAR. 26. (a) In the course and conduct of their business, the Gibson family respondents and the Gibson corporate respondents have been or are now utilizing the services of various manufacturers representatives and brokers such as respondents Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen and Associates, Inc., to perform services for the Gibson family respondents and the Gibson corporate respondents by:

- (1) Furnishing information concerning market conditions;
- (2) Maintaining contact with various sellers;
- (3) Inspecting and selecting specified qualities and quantities of sundry products; and
- (4) Negotiating purchases of said products.

(b) Such manufacturers representatives and brokers, in performing the services enumerated above, have been or are now acting as agents or representatives of the Gibson family respondents and the Gibson corporate respondents. In such capacity, said manufacturers representatives and brokers, were or are subject to and under the direct or indirect control of the Gibson family respondents and the Gibson corporate respondents.

(c) In connection with such transactions, such manufacturers representatives and brokers, including respondents Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen and Associates, Inc., are now or have been collecting and receiving brokerage, commissions, or other compensations from sellers of sundry products, when in fact they have been or are now acting for or in behalf of the Gibson family respondents or Gibson corporate respondents or are subject to the direct or indirect control of said respondents.

PAR. 27. The aforesaid acts and practices of said respondents, individually or in conjunction with each other, in receiving or accepting, or paying and granting, directly or indirectly, anything of value as commission, brokerage or other compensation, or any allowance or discount in lieu thereof from sellers, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13) and are all to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts and practices in or affecting commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45).

DECISION AND ORDER AS TO RESPONDENTS PROGRESSIVE
BROKERAGE, INC. AND BARSHELL, INC.

The Commission having issued its complaint on February 25, 1975, charging the respondents named in the caption hereof with violations of the Federal Trade Commission Act and the Clayton Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion certified to the Commission under Section 3.25 of the Commission's Rules of Practice that, in the circumstances presented, there was a likelihood of settlement and that the public interest would be served by withdrawing the matter as to respondents Progressive Brokerage, Inc. and Barshell, Inc., from adjudication; and

Respondents Progressive Brokerage, Inc. and Barshell, Inc., and counsel for the Commission having executed an agreement containing a consent order, an admission by respondents Progressive Brokerage, Inc. and Barshell, Inc., of all jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents Progressive Brokerage, Inc. and Barshell, Inc., that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's Rules; and

The Commission having thereafter considered the aforesaid agreement and having determined that it provides an adequate basis for

appropriate disposition in part of this proceeding, and having accepted said agreement, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order in disposition of the proceeding as to respondents Progressive Brokerage, Inc. and Barshell, Inc.:

1. Respondent Progressive Brokerage, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 14802 Inwood Road, Dallas, Texas.

Respondent Barshell, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 14802 Inwood Road, Dallas, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Progressive Brokerage, Inc. and Barshell, Inc., and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Progressive Brokerage, Inc., and Barshell, Inc., corporations (hereinafter referred to as respondents), their representatives, agents or employees, directly or through any corporate or other device, in connection with the sale of goods, wares or merchandise for any seller principal, in commerce, as "commerce" is defined in the Clayton Act, as amended, and in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist, except as otherwise permitted by law, from:

1. Paying, granting or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any goods, wares or merchandise to such buyer at prices reflecting a reduction from the prices at which sales of such products are currently being effected by respondents for any seller principal where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

2. In any other manner, paying, granting or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any

allowance or discount in lieu thereof upon, or in connection with, any sale of goods, wares or merchandise to such buyer for its own account.

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

It is further ordered, That respondents Progressive Brokerage, Inc. and Barshell, Inc., shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Order

87 F.T.C.

IN THE MATTER OF
RSR CORPORATION

Docket 8959. Order, June 22, 1976

Denial of complaint counsel's motion to deem respondent's failure to file timely notice of intention to appeal as waiver of its right to appeal.

Appearances

For the Commission: *K. Keith Thurman, James C. Egan, Jr. and Annthalia Lingos.*

For the respondent: *Wald, Harkrader & Ross, Washington, D.C.*

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO DEEM
RESPONDENT'S FAILURE TO FILE A TIMELY NOTICE OF INTENTION
TO APPEAL AS A WAIVER OF ITS RIGHT TO APPEAL

Complaint counsel have moved for a determination by the Commission that respondent's failure to file a timely notice of intention to appeal from the initial decision, pursuant to Rule 3.52(a), or for an extension of time in which to file a notice, constitutes a waiver of its right to appeal. Respondent asserts that it decided not to appeal from the administrative law judge's determination of liability based on its belief that complaint counsel did not intend to appeal from the law judge's partial divestiture order. Once respondent was served with complaint counsel's notice, and after the filing deadline had passed, it filed its notice of intention to appeal.

Whether or not an adversary intends to challenge an order may well be relevant to a party's decision whether to appeal.* In the present case, respondent should have either filed a "protective" notice or attempted to determine from complaint counsel personally whether they intended to appeal. However, in view of respondent's apparent good faith belief that complaint counsel would not appeal and the fact that the untimeliness of respondent's filing has not delayed the briefing or the argument of the instant appeals, the Commission has determined to deny complaint counsel's motion.

It is so ordered.

* See 9 J. Moore, *Federal Practice*, ¶204.11[1] at 927-28 (2d ed. 1975).