

IN THE MATTER OF

HERBERT R. GIBSON, SR., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 2 OF THE CLAYTON ACT AND THE FEDERAL TRADE
COMMISSION ACT*Docket 9016. Complaint, Feb. 25, 1975*—Final Order, April 30, 1980*

This order requires, among other things, a Dallas, Texas retailer of sundry items, to cease coercing, intimidating, boycotting or taking other action against suppliers because they do not appear in the Gibson Trade Shows; further, the order prohibits certain Gibson officials and corporations from receiving brokerage commissions from a supplier while acting as a buyer for Gibson retail stores.

Appearances

For the Commission: *Andre Trawick, Jr., Robert G. Boomer, J.B. Brookshire and Juliam V. Buenger.*

For the respondents: *Bardwell D. Odum, Dallas, Tex., John M. Gillis, Gillis, Rogers & Taylor, Dallas, Tex., Robert E. Rader, Jr., McCarty & Wilson, Ennis, Tex. and Robert W. Steele and J. Wallace Adair, Howrey & Simon, Washington, D.C.*

INITIAL DECISION BY THEODOR P. VON BRAND, ADMINISTRATIVE LAW
JUDGE

FEBRUARY 26, 1979

PRELIMINARY STATEMENT

[2]The complaint charges that the individual or "Gibson family" respondents, Herbert R. Gibson, Sr., Herbert R. Gibson, Jr., Gerald Gibson and Belva Gibson, and the "Gibson corporate respondents," Gibsons Inc., Gibson Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson Products Co., Inc., have violated Section 5 of the Federal Trade Commission Act and Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act.

The charges against Al Cohen Associates, Inc., Progressive Brokerage, Inc. and Barshell Inc.¹ are confined to allegations that these respondents violated Section 2(c) of the Robinson-Patman Act.

The complaint alleges that the Gibson family respondents have been

* Reported in 87 F.T.C. 1389 as to all parties.

¹ The Commission, by order dated June 17, 1976, accepted a consent settlement negotiated with respondents Progressive Brokerage, Inc. and Barshell, Inc.

engaged in the operation and control of a number of retail stores referred to in the complaint as "Gibson family-owned stores." Such stores, it is alleged, resell sundry types of products to the consuming public, including, but not limited to, soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware. The complaint further alleges that individual respondent Herbert R. Gibson, Sr. doing business as "Gibson Products Company" and "The Gibson Trade Show," together with or acting through respondent Gibson Products Co., Inc., sells or grants license or franchise agreements permitting individuals or corporations to use various Gibson trademarks, service marks and trade names, such as "Gibsons," "Gibsons Products Company," or "Gibson Discount Centers," in the operation of retail stores ("Gibson franchised stores"). It is further alleged that respondent Herbert R. Gibson, Sr., together with or acting through respondent Gibson Products Co., Inc., conducts trade shows for or attended by the various Gibson family or franchised stores.

The Section 5 charges against the Gibson family and corporate respondents are in two counts.

Count I alleges that, acting individually or in concert, the Gibson family and corporate respondents, in connection with the operation of the trade shows, have knowingly induced and received or received payments from suppliers 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 the sale of products to Gibson family-owned stores and the Gibson franchise stores or resale thereof. [3]

Count I charges that the Gibson family and corporate respondents induced from most of their suppliers one or more of the following payments or considerations:

1. Payment for booth rentals;
2. Payment for services in connection with booth rental, including, but not limited to, electrical contracts or services and furnishings;
3. Payment for advertising in a booklet or a 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 sales made at the Gibson Trade Show; and,
7. Special allowances on all sales made at the Gibson Trade Show calculated from a predetermined percentage of all such sales.

The complaint also alleges that respondents, pursuant to the operation of the trade show, 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 the resale thereof.

Count I charges that many suppliers participating in the Gibson Trade Show did not offer or otherwise make available to all of their customers competing with respondents in the sale and distribution of their respective products such payments, allowances, services, facilities or other things of value on proportionally equal terms. According to Count I, the Gibson family and corporate respondents knew or should have known that such payments or services were not offered or otherwise made available on proportionally equal terms to all other customers of such suppliers who competed with respondents. [4]

Count I, in short, alleges that respondents have induced and received or received promotional payments or services contrary to the policy of Sections 2(d) and 2(e) of the Robinson-Patman Act.

Count II of the complaint alleges that the Gibson family and corporate respondents, pursuant to combination, agreement, understanding or conspiracy with all or some of the Gibson family-owned stores and Gibson franchise stores, pursued a course of conduct eliminating or boycotting suppliers who did not grant all or some of the special allowances during or incident to the Gibson Trade Show as set forth in Count I of the complaint.

Count III charges that the Gibson family and corporate respondents have utilized the services of various manufacturers' representatives and brokers, such as respondents Progressive Brokerage, Inc., Barshell Inc. and Al Cohen Associates, Inc., who performed services for Gibson family respondents and 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.

These services, the complaint alleges, were performed by such manufacturers' representatives or brokers as agents or representatives of the Gibson respondents and under their direct or indirect control. Count III charges the Gibson respondents with accepting or receiving, and the broker respondents with paying or granting, commissions, brokerage or other compensation, in lieu thereof, in violation of Section 2(c) of the Robinson-Patman Act.

After extensive hearings, the record closed on November 10, 1978.

This matter is now before the undersigned for decision based on the allegations of the complaint, the answers, the evidence of record and the proposed findings of fact, conclusions and briefs filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having [5]considered the entire record and the contentions of the parties, makes the following findings of fact and conclusions, and issues the orders set out herein.

FINDINGS OF FACT

I. Respondents' Identity, Organization, Structure, and Business

A. Identity of Respondents and Their Related Businesses

1. Respondent H.R. Gibson, Sr. (Gibson, Sr.) is an individual who, in the period 1969 to November 1, 1972, operated and had a financial interest in retail stores operating under various trade names such as Gibson Discount Centers (Findings 5, 6).

The first Gibson Discount Center was founded by H.R. Gibson, Sr. and his wife Belva Gibson in Abilene, Texas in 1958 (CX 1329 Store Directory January-December 1973; Gibson, Sr. 5175).

2. The Gibson Discount Centers are retail discount stores selling to the general public (Moland 3543). Gibson Discount Centers, in the period 1969 to 1975, generally sold hard and soft goods, including beauty aids, health supplies, automotive supplies, housewares, toys and hardware (Gerald Gibson 4941-42).

3. Concurrently, in the period 1969 to November 1, 1972, Gibson, Sr. operated the Gibson Trade Show and licensed various franchisees to use Gibson trade names in their operation of retail stores (Gerald Gibson 4885; Findings 4, 25, 44).

4. Gibson, Sr., in the period 1969 to October 31, 1972, did business under the trade or "d/b/a" name of Gibson Products Company (Gerald Gibson 4784, 4856). He used the Gibson Products Company trade name while doing business in his individual capacity in conducting the trade show and licensing others to utilize Gibson trade names in their retail store operations (CX 1059, 1061, 1063, 1065, 1069, 1071, 1040A-C; Gerald Gibson 4784, 4856; Gibson, Sr. 7222).

5. Gibson, Sr. and his wife, respondent Belva Gibson, in the period 1969 to October 31, 1972, were majority stockholders in the following corporations owning and operating retail discount stores under the Gibson name (Gibson, Sr. 5299; Stipulation April 13, 1978):

Gibson Products Company, Inc.
Gibson Products of Abilene
Gibson Products Co., Inc.
Gibson Products of Big Spring [6]
Gibson Products Co., Inc. of Lubbock
Gibson Products Co., Inc. (a Wyoming corporation)
Gibson's Discount Centers, Inc.²

In the period 1969 through October 31, 1972, H.R. Gibson, Sr. and Belva Gibson also had a minority interest in certain other corporations operating retail stores under the Gibson name (Gibson, Sr. 5567-68). They had a minority interest in the stores at Shreveport, Louisiana, Bruton Terrace in Dallas, Texas, Hobbs, New Mexico and some other locations (Gibson, Sr. 5568).

6. Gibson, Sr. hired the store managers of those stores in which he had a majority interest. His overriding concern was with their overall profitability (Gibson, Sr. 5219-20, 5583), as is evident in the following statement: "My main thing that I watched for all the time is to see that the store was making money" (Tr. 5583). Although day to day operating decisions were left to the store managers, Gibson, Sr. was actively involved in the operation of these stores. As he stated:

The policy decisions that I made was pertaining to the financial affairs of the store. What I wanted was a store that would make money.

They would furnish me with the financial statements of the store. Anytime they didn't make money, I had to do something about it. Might get a new manager I would try to get the store to making money. That was my policy decisions (Tr. 5573).

7. Respondent Gerald Gibson is the son of H.R. Gibson, Sr. In the period 1969 to 1972, he owned Gibson Products Company of Paris, Inc., Gibson Products Company of Shreveport, Inc. and Gibson Products Company of Bruton Terrace, Inc., as well as a minority interest in Gibson Products Company of Garland, Inc., Gibson Products Company of Pueblo, Inc. and Gibson Products Company of Temple, Inc. These corporations operated retail stores at the locations indicated (Gerald Gibson 4844-45; Tr. 5050-51). [7]

Gerald Gibson, in the same period, also had an advertising business

² During the period 1969 to November 1, 1972, H.R. Gibson, Sr. and Belva Gibson (individually and/or collectively) owned in excess of 50% of the stock of the above corporations using the Gibson name. And, during the period 1971 to November 1, 1972, Gibson's Discount Centers, Inc. owned all of H.R. Gibson, Sr.'s and Belva Gibson's shares in the companies listed above.

which he operated as a proprietorship or "d/b/a operation" under the name G&G Advertising Agency³ (Gerald Gibson 4846-48).

8. Respondent H.R. Gibson, Jr. is the son of Gibson, Sr. In the period 1969 to November 1, 1972, he was in the retail business and owned the majority of the stock in corporations operating retail stores under the trade name of Gibson's Discount Centers in Hutchinson, Kansas and San Antonio, Texas. In the same period, he owned some stock in corporations operating Gibson retail stores in Pueblo, Colorado, Richardson, Texas, Temple, Texas, Bruton Road in Dallas, Texas, as well as Plano and Fort Worth, Texas (H.R. Gibson, Jr. 5626, 5677, 5678-5679).

9. As a general rule, with some exceptions, the Gibson stores are separately incorporated (Gerald Gibson 5076). The corporate name of such corporations is frequently "Gibson Products Company" with the town where the store is located included in the corporate name, *e.g.*, "Gibson Products Co., Inc. of Lubbock" (Gerald Gibson 4799; JR 20 pp. 4-5; Stipulation April 13, 1978).

10. In 1971, the Gibson stores owned by Gibson, Sr., his sons and other Gibson franchisees collectively did approximately \$1.6 billion of business (Gibson, Sr. 5529).

11. The stock of the corporate respondents and certain other corporations engaged in retailing was closely held, in the period 1969 to October 31, 1972, by members of the Gibson family. Control over the respondent corporations and some of the retail corporations resided primarily in those members of the Gibson family who are individual respondents herein.

12. In the period 1969 to October 31, 1972, there was extensive overlap in the directors and officers of the corporate respondents, as well as certain other corporations which operated Gibson retail stores. The overlap resulted from the offices held by the individual respondents:⁴ [8]

³ Various Gibson stores, in the period 1969 to 1973, used the services of G&G Advertising. This was true of the majority of the Gibson stores in Texas (Gerald Gibson 4847-48). Gerald Gibson and his brother, H.R. Gibson, Jr., as one part of G&G's business, also prepared a tabloid (Gerald Gibson 4849). G&G Advertising stopped doing business about 1974 (Gerald Gibson 4848).

⁴ The chart is prepared from Appendix A.

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Initial Decision

GIBSON DISCOUNT CENTERS, INC.					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Incorporators	1969	x		x	x
Directors	1969	x	x	x	x
	1971	x	x	x	x
	1972	x	x	x	x
	1973	x	x	x	x
	1974			x	x
	1975			x	x
Officers	1971	x	x	x	x
	1972	x	x	x	x
	1973			x	x
	1974			x	x
	1975			x	x

GIBSON WAREHOUSE, INC.					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1962	x	x		x
	1971	x	x		x
	1972	x	x		x
Officers	1971	x	x		x
	1972	x	x		x

Initial Decision

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IDEAL TRAVEL AGENCY, INC.					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1962 ^{a/}		x		
	1970	x	x		
	1971	x	x		
	1972	x	x	x	
Officers	1970	x	x		
	1971	x	x		
	1972	x	x	x	

^{a/} In the year 1962, the exhibit listed H.R. Gibson as a director but did not state whether it was Sr. or Jr.

GIBSON PRODUCTS COMPANY					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Director	1970	x	x		
	1971	x	x	x	
	1972			x	x
	1973			x	x
Officers	1970	x	x		x
	1971	x	x	x	
	1972			x	x

GIBSON PRODUCTS COMPANY OF SAN ANTONIO, INC.					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1970		x	x	
	1971		x	x	
	1972		x	x	x
Officers	1970		x	x	
	1971		x	x	
	1972		x	x	x

Initial Decision

GIBSON PRODUCTS COMPANY INC. OF GARLAND					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1971	x		x	x
Officers	1971	x		x	x
	1972	x		x	x

GIBSON PRODUCTS COMPANY INC. OF RICHARDSON					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1970	x		x	
	1971	x		x	
	1972	x		x	
Officers	1970	x		x	
	1971	x		x	
	1972	x		x	

GIBSON PRODUCTS COMPANY OF SHREVEPORT, INC.					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1970	x			x
	1971	x			x
	1972			x	x
Officers	1970	x		x	x
	1971	x		x	x
	1972			x	x

GIBSON PRODUCTS COMPANY, INC. OF PLANO					
	Year	H.R. Gibson, Sr.	Belva Gibson	H.R. Gibson, Jr.	Gerald Gibson
Directors	1971	x ^{aa/}	x ^{a/}	x ^{a/}	x ^{aa/}
Officers	1971	x ^{aa/}	x ^{a/}	x ^{a/}	x ^{aa/}

^{a/} Indicates that they were elected at meetings on April 28 and October 26, 1971.

^{aa/} Herbert R. Gibson, Sr. was elected on April 28, 1971, and Gerald Gibson was elected at the October 26, 1971 meeting.

[11]13. Respondent Gibson Products Company, Inc. is a Texas corporation, formed on or about January 28, 1936 (CX 5). Its principal place of business since 1975 has been Ft. Worth, Texas, where it operates a retail discount center (Gerald Gibson 4695). Prior to 1975, its principal place of business was 1228 E. Ledbetter St., Dallas, Texas, where it also operated a retail discount center (JR 12, Gerald Gibson 4695-96.⁵ See also Gibson, Sr. 5162, 5187, 5381).

14. Respondent Ideal Travel Agency, Inc., formerly Gibson Travel Service, Inc., is a Texas corporation, formed on or about April 23, 1962 (CX 3). Ideal's office was located at 519 Gibson St., Seagoville, Texas (Leverett 3790). In the period 1969 to November 1, 1972, Ideal operated as a travel agency and worked with the Gibson Trade Show, often collecting booth fees as the agent of H.R. Gibson, Sr. (H.R. Gibson, Jr. 5636-37, 5659-60; Gerald Gibson 4865-66). Ideal, in that period, also received some show fees from suppliers participating in the Gibson Trade Show (Gibson, Sr. 5193-94). It is now dissolved (H.R. Gibson, Jr. 5736-37; Gerald Gibson 4704).

15. Respondent Gibson Warehouse, Inc. is a Texas corporation, formed on or about May 28, 1962 (CX 4). Its function was to warehouse and resell merchandise. It is now dissolved (H.R. Gibson, Jr. 5637-38).

16. Respondent Gibson Discount Centers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas (CX 2). It was incorporated on or about October 6, 1969 (CX 2). The principal place of business of Gibson Discount Centers, Inc. is 519 Gibson St., Seagoville, Texas (CX 44). Gibson Discount Centers, Inc. originally functioned as a holding company to hold the assets of H.R. Gibson, Sr. and Belva Gibson (Gerald Gibson 5119; Gibson, Jr. 5632). It was formed by Gibson, Sr. to get out of the retail business (H.R. Gibson, Jr. 5626-28). It is currently a wholly-owned subsidiary of Gibsons, Inc. (Finding 28).

17. Respondent Gibsons, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas. It was formed on or about October 25, 1972 (CX 1). Its principal place of business is 519 Gibson St., Seagoville, Texas (Gerald Gibson 4690). Gerald and Herbert Gibson, Jr. formed Gibsons, Inc. in order to buy out their father's retail business and to put the corporations and interests owned by them together into one company (Gerald Gibson 5051-52; H.R. Gibson, Jr. 5680). [12]

18. Gibson Distributors, Inc. is a wholly-owned subsidiary of Gibsons, Inc. It opened for business in 1975, and buys, sells and warehouses merchandise (Findings 28, 35, 36, 55).

⁵ The Dallas store on Ledbetter Street was closed in 1973 or 1974 (Gerald Gibson 4696).

19. Dixie Laboratories, Inc. conducts respondents' manufacturing business, which includes the manufacture of health and beauty aids (H.R. Gibson, Jr. 5692). Dixie Laboratories, which sold to Gibson and non-Gibson stores, also sold private label goods under the Gibson brand (Gerald Gibson 4871).

20. Rack Suppliers, Inc. is a Texas corporation engaged in the business of purchasing and reselling phonograph records, tapes and related products (Gibson, Sr. 5215). It is a wholly-owned subsidiary of Gibsons, Inc. (H.R. Gibson, Jr. 5667).

21. Gibson Data Processing Service, which has its principal office and business location at Seagoville, Texas (H.R. Gibson, Jr. 5724), is now, and for some time past has been, engaged in performing accounting functions for various Gibson retail stores (Gerald Gibson 4878).

22. Gibson Discount Printing was located in the warehouse at respondents' Seagoville complex (Gerald Gibson 4876). In the period 1969 to 1974, it printed show sheets for Gibson, Sr.'s trade show (Gerald Gibson 4877).

23. Gibson Development Corporation is now, and for some time past has been, engaged in the business of a holding corporation for various tracts of land (Gerald Gibson 4885; Gibson, Sr. 5215).

24. Respondent Al Cohen Associates, Inc. is a corporation engaged in the business of providing sales representation to manufacturers (Finding 425).

B. Divestiture of Retail Assets by H.R. Gibson, Sr. and Belva Gibson to H.R. Gibson, Jr. and Gerald Gibson

25. On November 1, 1972, H.R. Gibson, Jr. and Gerald Gibson purchased all or most of Gibson, Sr.'s retail store holdings (H.R. Gibson, Jr. 5644). The transfer of such assets to Gerald and H.R. Gibson, Jr. was accomplished by a sale of Gibson Discount Centers, Inc.'s stock to Gibsons, Inc. (H.R. Gibson, Jr. 5667; Gerald Gibson 5052, 5119). The effective date of this stock transfer was November 1, 1972 (H.R. Gibson, Jr. 5680-81).

H.R. Gibson, Jr. also purchased the assumed name, Gibson Products Company, from his father on November 1, 1972 (H.R. Gibson, Jr. 5702-A). H.R. Gibson, Sr. notified franchisees [13] licensed to use Gibson trade names in the operation of retail stores that, as of October 31, 1972, such franchise agreements were cancelled and further operation under the Gibson name would have to be arranged with the new owner of such trade names, Gibson Discount Centers, Inc., through its president, H.R. Gibson, Jr. (SR 156, McCrea 6816).

The sale of the retail assets by Belva Gibson and Gibson, Sr. to their

sons was publicized and announced at a banquet attended by manufacturers, manufacturers' representatives and Gibson franchisees (Gerald Gibson 5085; Levitt 1971-72; Hardiman 7872).

C. Respondents' Operations after October 31, 1972

26. H.R. Gibson, Sr., on November 1, 1972, registered the name The Gibson Trade Show as a "d/b/a." This name was not registered prior to November 1, 1972 (Gibson, Sr. 5216). He continued to operate the trade show after October 31, 1972 (Gerald Gibson 4885-86) under the name "The Gibson Trade Show."

27. The organization of Gibsons, Inc., beginning in November 1972, was completed in 1976 (Gibsons, Inc. Annual Report 1976; JR 20 p.2).

The voting stock in Gibsons, Inc. has always been in the hands of Herbert Gibson, Jr. and Gerald Gibson. Gibson, Sr. has never owned any voting stock in Gibsons, Inc., nor has he been an officer or director of that company (CX 1, 985-92, 1271-73; Gerald Gibson 5078). The record shows no management control by Gibson, Sr. over Gibsons, Inc. (Banks 7786; Cheek 7770).

In the period November 1, 1972 through 1975, 100% of the voting stock of Gibsons, Inc. was owned by H.R. Gibson, Jr. and Gerald P. Gibson. During that period, Gibsons, Inc., in turn, wholly-owned Ideal Travel Agency, Inc., Gibson Discount Centers, Inc., Gibson Warehouse, Inc. and Gibson Products Company, Inc. of 1228 E. Ledbetter St., Dallas, Texas (H.R. Gibson, Jr. 5736-37, 5739-40; JR 12 See Appendix B). Gibsons, Inc. owned Gibson Warehouse, Inc. and Ideal Travel Agency, Inc. until the two companies were dissolved (Gerald Gibson 5053; JR 12).

H.R. Gibson, Jr. and Gerald Gibson currently own 100% of the voting stock in Gibsons, Inc. (JR 12), with each owning 50% of such stock (Gerald Gibson 5078). And, Gibsons, Inc. continues to be a holding company for the stock of other corporations (H.R. Gibson, Jr. 5667). Gibsons, Inc. is in the retailing, manufacturing and real estate business (H.R. Gibson, Jr. 5667-68). Its principal business is the operation and licensing of retail department discount stores (JR 20 p. 3). [14]

28. At present, the subsidiaries of Gibson, Inc. are Gibson Distributors, Inc., Gibson Discount Centers, Inc., Dixie Laboratories, Inc., Gibson Print Shop Office Supply, Inc., Rack Supply, Inc. and Gibson Data Processing Service (Gerald Gibson 4972). Currently, the various stores in which Gerald and Herbert Gibson, Jr. have an ownership interest are held through Gibson's Discount Centers, Inc. (Gerald Gibson 4972-73).

As of December 31, 1976, the active divisions and corporations comprising Gibsons, Inc. were the following:

GIBSONS INC. (The Parent Company)

Franchising Division

(Not incorporated—all franchise operations)

Dixie Laboratories

(Corporation Mfg. and Sales of Health and Beauty Aids)

Rack Suppliers, Inc.

(Distributor of Records and Tapes)

Gibson Printing and Office Supply Inc.

Equity Development Corporation

(Real Estate)

Gibson Development Corporation

(Real Estate)

Gibson Distributors Inc.

(Warehouse and Distribution)

Gibson's Discount Centers, Inc.

(Parent Company for retail store operations) (JR 20).

29. Gibson's Discount Centers operate in 29 states. As of December 31, 1976, Gibsons, Inc. operated 43 stores through its subsidiary, Gibson's Discount Centers, Inc. In addition, 614 licensed stores were operated under the Gibson trade name. Such licensees pay a monthly fee for use of the Gibson trade name (JR 20 p. 3, Gibsons Inc. Annual Report 1976).

30. In 1975, Gibsons, Inc. and its subsidiaries had assets of \$63,908,000; the corresponding figure for 1974 was \$54,588,000 (JR 20 p. 8). The consolidated net sales in 1975 and 1974 were, respectively, \$135,730,040 and \$127,831,833 (JR 18).

31. Gibson's Discount Centers, Inc., as a subsidiary of Gibsons, Inc., now has all the retailing business as well as the franchise business (H.R. Gibson, Sr. 5692). H.R. Gibson, Jr. and Gerald Gibson own all the stock in Gibson's Discount Centers, Inc. through the parent company (H.R. Gibson, Jr. 5691). All of the various corporation that own or operate stores are held, in turn, by Gibson's Discount Centers, Inc. (Gerald Gibson 4972). [15]

32. Gibson's Discount Centers, Inc. has licensed the use of the Gibson trade names since November 1, 1972. H.R. Gibson, Jr. signs all licensing agreements (H.R. Gibson, Jr. 5668).

33. In 1974 and 1975, the approximate sales volume of stores whose

stock was held wholly or in part by Gibson's Discount Centers, Inc. was approximately \$115 to \$120 million (Gerald Gibson 5022). The pertinent figure for 1976 was \$117 million and, for 1977, about \$110 million (Gerald Gibson 5023). In 1976, there were about 43 stores in this category, while in 1975 and 1974, the figure was 44 (Gerald Gibson 5023).

34. The retail operations controlled by Gibson's Discount Centers, Inc. consist of the following:

UNINCORPORATED DIVISIONS

Gibson's Discount Center	— Plainview, Texas
Gibson's Discount Center	— Ponca City, Oklahoma
Gibson's Discount Center	— Amarillo, Texas
Gibson's Discount Center	— Sulphur Springs, Texas
Gibson's Discount Center	— Abilene, Texas
(841 Judge Ely Blvd.)	

MULTI-STORE CORPORATIONS:

Gibson's Discount Centers, Inc. (A New Mexico Corporation)

Gibson's Discount Center	— Portales, New Mexico
Gibson's Discount Center	— Clovis, New Mexico

Gibson Products Co. of Hobbs, Inc.

Gibson's Discount Center	— Hobbs, New Mexico
Gibson's Discount Center	— Lovington, New Mexico

Gibson Products Co., Inc. of Lubbock

Gibson's Discount Center	— 909 50th Street
Gibson's Discount Center	— 5005 Slide Road
Gibson's Building Supply	— 3117 Avenue H

Gibson Discount Centers of Roswell, Inc.

Gibson's Discount Center	— 2800 North Main Street
Gibson's Discount Center	— 110 West McGaffey

Gibson Products, of Shreveport, Inc.

Gibson's Discount Center	— 3707 Greenwood Road
Gibson's Discount Center	— 2600 Waggoner

Gibson Products, Inc. of Temple, Texas

Gibson Discount Center	— Temple, Texas
Gibson's Discount Center	— Terrell, Texas
Gibson's Discount Center	— Waxahachie, Texas [16]

Initial Decision

Gibson Products Co., Inc. (a Wyoming Corporation)

Gibson's Discount Center — 600 East Carlson,
Cheyenne, Wy.

Gibson's Discount Center — 2717 East Lincolnway,
Cheyenne, Wy.

Gibson's Discount Center — Laramie, Wy.

Greeley Gibson Products Co., Inc.

Gibson's Discount Center — Greeley, Colo.

Gibson's Discount Center — Longmont, Colo.

Gibson Products of San Antonio, Inc.

Gibson's Discount Center — 2627 S.W. Military Pkwy.

Gibson's Discount Center — 1331 Bandera

SINGLE STORE CORPORATIONS

Gibson Products Company of Abilene (2550 Barrow Street)

Gibson Products Company, Inc. of North Abilene (3202 N.
First Street)

Gibson Products Co. of Albany, Inc.

Gibson Products of Batesville, Inc.

Gibson Products Co. Inc. of Big Springs

Gibson Products Company, Inc. of Bruton Terrace (Dallas)

Gibson's Fort Worth South, Inc. (5701 Crowley Rd.)

Gibson Products Inc. of Garland

Gibson Products Company, Inc. (Haltom City)

Gibson Products Company, Inc. of Hutchinson (Ks.)

Gibson Products Company of Newton, Inc. (Ks.)

Gibson Products Co., Inc. of Paris (Greenville, Tx.)

Gibson Products Company, Inc. of Plano, Tx.

Gibson Products Co. Inc. of Pueblo

Gibson Products Inc. of Richardson, Tx.

Gibson Products Company, Inc. of Western Hills (7901
Highway 80 West, Ft. Worth, Tx.)

Gibson Products Company, Inc. of North San Antonio (JR 20
pp. 4-5).

35. Gibson Distributors, Inc. is engaged in the buying and selling of merchandise. It opened for business in 1975, and since that time has been a subsidiary of Gibsons, Inc. (Gerald Gibson 5005-06). Gibson Distributors, Inc. resells merchandise mainly to Gibson's Discount Centers and some garden centers. There may have been a few sales to other companies (Gerald Gibson 5006).

36. Before November 1, 1972, the purchasing decisions of the stores currently controlled by Gibsons, Inc. or Gibson's Discount Centers, Inc. were made at the store level by the store manager (Gerald Gibson 5053-56; H.R. Gibson, Jr. 5680-81). After [17]that date, buying decisions for those stores were centralized in Gibson Distributors, Inc. (Gerald Gibson 5062-63; H.R. Gibson, Jr. 5761; Skelly 7932-33).

Gibson Distributors, Inc. has made purchases from the lines represented by the Gibson Trade Show for the forty-two stores under the ownership of H.R. Gibson, Jr. and Gerald Gibson as well as purchases from other lines (Skelly 7951). Gibson Distributors, Inc. is listed as a customer of the Gibson Trade Show in the Gibson Trade Show's Customer Information List, 1975 edition, published by Gibson, Sr. (CX 1330 p. 28).

D. Respondents' Store Directories

37. In the period 1969 to 1975, respondents prepared store directories containing a listing of the various stores operating under one of the Gibson trade names (H.R. Gibson, Jr. 5708). Prior to November 1, 1972, the directories were published by H.R. Gibson, Sr. in his capacity as franchisor of various persons and entities licensed to use the Gibson name. After that date, they were published by Gibson's Discount Centers, Inc. which, since that time, has taken over the licensing of such stores (H.R. Gibson, Jr. 5708, 5711).

38. Respondents mailed store directories to manufacturers and to retailer customers of the Gibson Trade Show (Gibson, Sr. 5257-58; Gerald Gibson 5084). And, they were available in the Gibson Trade Show (Regeon 6664-66; B. Bradsby 6803). The purpose of such store directories was to enable manufacturers and/or other retailers to determine the proper person to contact in a particular store on matters such as bills (Gerald Gibson 4803-04).

39. The record contains CX 41, 1327 and 1328, which are store directories published in 1970 and 1971 by H.R. Gibson, Sr. while doing business under the Gibson Products Company trade name.⁶ All three directories represented under the main heading, "Seagoville Executives," that H.R. Gibson, Sr. was Chairman of the Board, Mrs. H.R. Gibson, Sr. was Secretary, H.R. Gibson, Jr. was President and Gerald Gibson was Executive-Vice President of Gibson Products Company. A number of individuals were listed as home office personnel of the Gibson Products Company under the heading, "Home Office." And, trade show personnel were listed with the lines for which they were responsible under the heading, "Buyers."

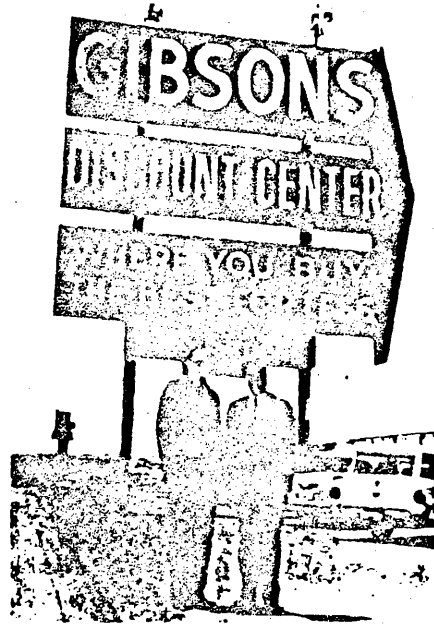
⁶ CX 41 is the Store Directory for July-December 1970; CX 1327 is the Store Directory for January-December 1971; and, CX 1328 is the Store Directory for July-December 1971 (See Appendix C and D).

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The cover page on CX 1327, the store directory for January-December 1971, shows the following: [18]

STORE DIRECTORY
JANUARY - DECEMBER
1971



GIBSON PRODUCTS COMPANY
519 GIBSON STREET
SEAGOVILLE, TEXAS 75159
A/C 214 287-2570

[19]CX 1327 represents the following under the headings, "Seago-ville Executives," "Home Office" and "Buyers": [20]

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Buyers

Home Office

 CHARLES E. JONES President, Home Office	 RAYMOND E. JONES Vice President, Home Office	 LEO ROY NELSON Vice President, Buyers	 JIM PURSLEY Vice President, Buyers	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office	 ROBERT ALBERT Vice President, Home Office
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BOB BROUGHTON
DIST. STORE SECURITIES



BILL BARNES
WAREHOUSE MANAGER



CHARLIE DAVIS
RACK SUPPLIERS



TOM FERRELL
TRAFFIC MANAGER



DAVIS FOSTER
ADVERTISING - DALLAS AREA



MARGIE KAUTZ
IDEAL TRAVEL



B. W. HUDSON
DIXIE LABORATORIES



BILL REA
ADVERTISING - TABLOID



LOYD REECE
GIBSON PRINTING CO.

[23]40. The listing together of the various individuals in the store

directories under the headings, "Seagoville Executives," "Home Office" and "Buyers," represented that the various individual and corporate respondents operated as one entity under the umbrella of "Gibson Products Company." Listing the trade show personnel as "Buyers" in the store directories, which contained a complete listing of Gibson stores, also created the net impression that the Gibson Trade Show and the retail stores constituted an integrated operation.⁷

41. Through the store directories in 1970 and 1971, the individual respondents, H.R. Gibson, Sr., Belva Gibson, Gerald Gibson and H.R. Gibson, Jr., represented that the individuals listed under "Home Office" and as "Buyers" of Gibson Products Company were under their control and acted in behalf of the individual respondents in their capacity as "Seagoville Executives."⁸ The publications were disseminated to stores operating under the Gibson name and suppliers of the trade show alike (Finding 38). As a result, the trade show buyers in their dealings with suppliers and stores operating under the Gibson name acted under the apparent authority of the four individual respondents (see also Appendix C and D). [24]

42. The 1973 store directory published by Gibson's Discount Centers, Inc. (Finding 37) has the following legend on its first page:

⁷ It is true that Gibson Products Co. was Gibson, Sr.'s trade name, under which he did business, and not a corporation. Nevertheless, the explanation that such representations were an error for which the respondents are not responsible is not persuasive (Gibson, Sr. 5254, 5376-78, 5599-5602, 5602-03. See also Gerald Gibson 4783-90). It is improbable that, with three store directories in the space of two years making essentially the same representations, respondents did not intend that such representations be made. There is no evidence in this record that any respondents made any statements to the trade retracting the representations which it is asserted were made in error. CX 1377 and 1406C, stationary used by Gibson, Sr. and Belva Gibson with the letterhead "Home Office Gibson Products Company, 519 Gibson Street, Seagoville, Texas 75159," further indicate that the representations in the store directories did not result from error. In this regard, see also CX 1329, showing that, in 1973, the store directory for that year contained the legend, "Store Directory . . . Gibson Products Company. . .," followed immediately with photographs of H.R. Gibson, Jr. and Gerald Gibson captioned "President" and "Executive Vice President," respectively (See Finding 42).

⁸ The identical representations in three store directories in a two year period compels the inference that they were made with the knowledge and consent of the four individual respondents.



**STORE DIRECTORY
JANUARY - DECEMBER
1973**

•

**GIBSON PRODUCTS COMPANY
519 GIBSON STREET
SEAGOVILLE, TEXAS 75159
A/C 214 287-2570**

The page containing this legend is immediately followed with the pictures of Gibson, Sr.'s sons and the following captions "H.R. GIBSON, JR. PRESIDENT" and "GERALD P. GIBSON EXECUTIVE VICE PRESIDENT" (CX 1329).

43. A 1975 store directory, published by Gibson's Discount Centers, Inc., represented that H.R. Gibson, Sr. and Belva Gibson were "Founders — Now Retired" of that corporation (CX 44).

E. The Franchise Operation

44. H.R. Gibson, Sr. licensed persons and firms to use various Gibson trade names in the operation of retail stores in his individual capacity while doing business under the name Gibson Products Company in the period 1969 to October 31, 1972 (Findings 3, 4, 25). The licensing or franchising operation was taken over by Gibson Discount Centers, Inc. ("GDCI") on November 1, 1972. GDCI is a wholly-owned subsidiary of Gibsons, Inc.; its voting stock is controlled 100% by H.R. Gibson, Jr. and Gerald Gibson, the sons of Gibson, Sr. (Findings 25, 27, 28, 31, 32). [25]

45. The registered trade names which Gibson's Discount Centers, Inc. licenses for use are Gibson Discount Centers and Gibson Products Company (H.R. Gibson, Jr. 5696-97).

46. There are in excess of 100 or 150 entities who own either a single Gibson store or a group of such stores (Gerald Gibson 5076-77). Certain store owners control more stores under the Gibson name than either Gerald Gibson or Herbert Gibson, Jr. (Gerald Gibson 5077). The biggest group is the Pamida group, which owns and operates in excess of 200 stores. West Brothers owns 20 to 25 stores, and several other groups own 10 to 15 stores (Gerald Gibson 5077).

47. The franchise fee is paid monthly and is based on the number of square feet in the store (Gibson, Sr. 5392-93). In 1965, the license fee ranged from \$150 to \$200 per month, depending on the area of the store (SR 155). At present, the licensing fee ranges from \$225 to \$275 per month per store (H.R. Gibson, Jr. 5696).

48. Currently, every Gibson store operates by virtue of a license from GDCI. Each store, including those owned by members of the Gibson family, pays a licensing or franchise fee (Gerald Gibson 5076; H.R. Gibson, Jr. 5690). This was the case before as well as after November 1, 1972 (H.R. Gibson, Jr. 5690).

49. Gibson, Sr. stressed that prospective franchisees needed adequate financing to run their stores (Gibson, Sr. 5390). Since November 1, 1972, the requirements to become a Gibson franchisee have basically been financial stability and some experience in retailing (H.R. Gibson, Jr. 5669). If a franchisee became bankrupt, the licensing agreement was cancelled (Gibson, Sr. 7278).

50. Both Gibson, Sr. and GDCI entered into franchise contracts with persons or entities licensed to use Gibson trade names in the operation of retail stores (SR 155, Munden Deposition Exhibit RX 1; SR 157, 159, 160, 161, 162A-C; CX 1447A-D). GDCI continues to enter into such contracts.⁹

51. Gibson, Sr.'s franchise agreements provided that the licensor would furnish the licensees of his trade names with the benefit of volume purchasing power and advice as to merchandising. Typically, such contracts provided: [26]

GIBSON shall give GRANTEE the benefit of volume purchasing power, advise as to merchandising, and render other assistance to GRANTEE as may be found appropriate by GIBSON in his sole discretion (Munden Deposition Exhibit RX 1. See also SR 155, 160, 161, 162A-C, 166; CX 1428-29).

52. Gibson, Sr. put "quality control" provisions into such contracts in the period 1966 to 1967 (Gibson, Sr. 7223). Typically, such a provision provided:

In consideration of the grant by GIBSON to GRANTEE of the right to use the

⁹ Initially, Gibson, Sr. had oral or "hand shake" agreements with his franchisees. Eventually, however, he had written agreements with all of them (Gibson, Sr. 7223, 7258).

trademarks, service marks and trade names of GIBSON, namely "Gibson's", "Gibson" with design, "Gibson Products Company" and "Gibson Discount Center", GRANTEE conveys to GIBSON and GIBSON specifically retains the absolute, complete and final right of quality control over all products and items sold and all services rendered by GRANTEE to customers of GRANTEE's *Gibson Products Company of Brownfield, Texas*, and GRANTEE agrees to discontinue immediately the sale of any products or items or the rendering of any services under any one or more of the aforesaid marks and names if the quality thereof is disapproved by GIBSON (Munden Deposition Exhibit RX 1. See also SR 162A-C; CX 1429).

53. The cancellation provisions of such licensing agreements provided that they could be cancelled at any time within ninety days and that, upon notice of termination, the licensee was to immediately discontinue use of the Gibson trade names. A typical provision provided:

This agreement may be cancelled at any time within *Ninety (90) days* by written notice sent registered mail, by either party.

Upon termination of this agreement, GRANTEE agrees that he, or they, will immediately discontinue the use of "Gibson Products Company" and/or "Gibson Discount Center", and all other trademarks and/or service marks of GIBSON, [27]specifically including "Gibson's" and "Gibson" with design, and will not thereafter use same (Munden Deposition Exhibit RX 1. See also SR 155, 160, 161, 162A-C).

54. GDCI, in its contracts with licensees, also contracts to furnish them with merchandising advice and reserves to itself the right of quality control over the products sold and services rendered by the licensees (CX 1447). GDCI's standard licensing contract, in use since November 1, 1972, provides in pertinent part:

9. GIBSONS shall in connection with this Agreement render such assistance to LICENSEE in connection with the operation of his discount business as may be found appropriate by GIBSONS after request by LICENSEE, including advice as to merchandising and other business practices so as to enable the LICENSEE to benefit from the knowledge and experience of GIBSONS in the discount business.

10. LICENSEE agrees that GIBSONS retains the absolute, complete and final right of quality control over all products and items sold and over all services rendered by LICENSEE to customers of LICENSEE'S discount business and associated enterprises using the Service Marks and Trade Names licensed hereby to see that the high standards of GIBSONS DISCOUNT CENTERS throughout the United States of America are maintained and to protect the property rights of GIBSONS in the Service Marks and Trade Names set forth in Paragraph 1 hereof. The LICENSEE further agrees that if GIBSONS notifies LICENSEE that GIBSONS disapproves of the quality of products, items, or services sold or rendered in connection with sale of items or products in the discount business of LICENSEE, that LICENSEE will immediately discontinue the sale of such items, [28]products and/or services, or will immediately improve such services so that they meet the standards of excellence maintained by GIBSONS (CX 1447B; Tr. 8058).

55. Respondents expect that expansion of Gibsons, Inc. will be primarily through expansion of the licensing operations. Its subsidiary, Gibson Distributors, Inc., is expected to play an important role in such expansion. The 1976 annual report of Gibsons, Inc. states:¹⁰

Expansion of Gibsons Inc. is to be primarily through expansion of the licensed stores. To this end, Gibson has established a subsidiary—Gibson Distributors Inc. This is an experimental distribution center designed to provide dual services as a profit control center and as a source of inventory for Gibson Discount Stores. Over the next ten years the company anticipates at least eight such regional centers through which the licensed operations can be extended. Although the first center is a wholly owned subsidiary, the expanded regional centers are proposed to be co-operatives to afford the greatest benefit to the licensed stores. Profits from such expansion for Gibsons Inc. should be reflected in increases in license fees and additional charges for management services (emphasis added) (JR 20 p. 3). [29]

56. Respondents, in licensing others to use the Gibson trade names, have a vital interest in the profitability of the licensees or franchisees on whom licensing fees depend (Findings 47, 49, 55).

F. The Trade Show

(1) In General

57. The Gibson Trade Show came into existence about 1964 to 1965 (Rogers 7358; Bradsby 6794; Thomas 6584-85). It is held approximately four times a year (CX 1040A-C, 1041A-D; Leverett 3733).

58. In May 1967, H.R. Gibson, Sr., doing business as the "Gibson Products Company" Seagoville, Texas, leased the premises at Market Hall, Dallas, Texas four times per year, in the period 1967 through 1973, pursuant to the following schedule:

1968	-	February 10-14
		May 20-24
		August 12-16
	*	November 4-8
1969	-	February 8-12
		May 12-16
		August 18-22
	*	November 3-7

¹⁰ This document is inconsistent with the testimony of Gibsons, Inc.'s president, viz.:

JUDGE von BRAND: Well, let me ask you this: Do you have anything to offer [to franchisees] in addition to the [Gibson] name?

THE WITNESS: No, sir, none whatsoever. We've never got involved, we didn't want to get in with the management and the people and things like that to try to help them like McDonald's. We're not that type of organization. We don't charge for it (H.R. Gibson, Jr. 5695).

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- 1970 - February 9-13
May 4-8
August 17-21
* November 2-6
- 1971 - February 8-12
May 10-14
August 16-20
* November 1-5
- 1972 - February 12-16
May 15-19
August 14-18
November 6-10
- 1973 - February 10-14
May 14-18
August 13-17
November 5-9 (CX 1040C).

The lease stated that the leased premises should be used for the sole purpose of: [30]

Holding the Gibson Products private trade show, business meetings, and certain food functions (CX 1040A).

On November 30, 1972, H.R. Gibson, Sr., doing business as The Gibson Trade Show, contracted to rent the premises at Market Hall for the purpose of holding four shows a year in the period 1974 to 1979 (CX 1041A). Gibson, Sr. agreed that the premises were to be used for the sole purpose of "Holding a private trade show" (CX 1041A).

Market Hall in Dallas, Texas, where the Gibson Trade Show is held, is a 212,000 square foot exhibit fully designed for the display of merchandise (Cooper 4636).

59. The show was a closed show; it was necessary to have badges showing the name of the individual and company before gaining admittance (Moland 3596; CX 42, 43).

60. Gibson, Sr. and his employees invited the Gibson retailers to the Gibson Trade Show with letters announcing the date of the shows (Gibson, Sr. 5485).

61. In the period 1969 to 1972, only Gibson franchised or company owned stores attended the Gibson Trade Show (Munden Dep. CX 1435 pp. 24-25; Moland 3595). The jewelry buyer of the trade show recalled

that no one other than Gibson stores attended the show in 1972, 1973 and 1974 (Leverett 3796-97).¹¹

62. Form letters used by the Gibson Trade Show in 1972 requested "All Manufacturers" to state their total dollar volume in the preceding year with all the Gibson stores (CX 307).

63. The Customer Information List 1975 Edition published by Gibson, Sr. is "A Comprehensive List of All Customers of the Gibson Trade Show" (CX 1330). The great majority of the stores listed therein were under the Gibson name. The Gibson Trade Show, as late as 1975, continued to be oriented to the Gibson stores.

64. The Gibson Trade Show affords participating manufacturers the opportunity to set up booths, to display their goods and to attempt to sell or place orders for their products with personnel of the Gibson stores attending the show (Moland 3595). Usually, retailer contacts with suppliers at the Gibson Trade Show are followed up at a later date (Gerald Gibson 5117). [31]

65. The booths at the Gibson Trade Show were staffed by employees of the suppliers or by manufacturers' representatives of the suppliers (Regeon 6687).

66. H.R. Gibson, Sr., in operating the trade show, published a Buyers Guide or Show Directory. This directory was distributed to manufacturers and retailers attending the show. It listed the names of manufacturers appearing at the show and the location of their booths (CX 42; Leverett 3904).

67. The amount of business generated by the Gibson Trade Show is substantial. The February 1974 show, for example, did a \$200 million business (Gibson, Sr. 5519-23). The Gibson Trade Show operated at a profit in 1973, 1974 and 1975 (Gibson, Sr. 5343-B).

68. If a supplier or his representative got a product into the Gibson Trade Show, this meant that he had authorization to sell to the Gibson retailers attending the show. This did not guarantee, however, that a Gibson franchisee would buy such merchandise (Moland 3650).

69. Manufacturers and their suppliers considered it an advantage to meet Gibson retail buyers at the show. Many of these retailers were in locations hard to reach, and it is difficult to call on all of them individually to make a sales presentation (Moland 3650-51).

70. Gibson, Sr. retained money derived from the Gibson Trade Show which he did not pass on to retailers operating under the Gibson name (Gibson, Sr. 5090; Munden Deposition 44-45; Thomas 6591; H. Underwood 7083; Skelly 7956).

71. Trade shows generally, including the Gibson Trade Show,

¹¹ In 1970 to 1971, this witness could only recall the owner of Wal-Mart stores attending as the guest of Gibson, Sr. (Leverett 3795-96).

benefit attending retailers because the merchandise is laid out and it may be easier to shop than trying to look at catalogs or talk to sales personnel (Thomas 6588-89). [32]

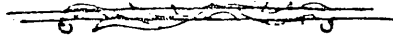
72. In addition to providing facilities where the Gibson stores could select and purchase merchandise, the Gibson Trade Show also afforded them an opportunity to conduct meetings at the show. For example, the Buyers Guide for the Gibson Trade Show held November 5 through November 9, 1973, gave notice of the following meetings:

FRANCHISE OWNERS MEETING

SUBJECT: GENERAL INSURANCE

MONDAY, NOVEMBER 5 - 2:30 P.M.

UPSTAIRS AT MARKET HALL



FRANCHISE OWNERS MEETING

SUBJECT: TRAINING FILM

TUESDAY, NOVEMBER 6 - 2:00 P. M.

UPSTAIRS AT MARKET HALL



GDCI MANAGERS MEETING ON "INVENTORY PROCEDURES"

TUESDAY, NOVEMBER 6 - 7:30 P.M.

SEVILLE ROOM

QUALITY INN - 2015 NO. INDUSTRIAL

(CX 42. See also CX 43, a Buyer's Guide for the December 1975 Trade Show listing a meeting of the Gibson Franchise Association). [33]

73. The Gibson Trade Show has not helped retailers to promote

merchandise at the retail level. Nor have retailers learned to promote the resale of products at the Gibson Trade Show (Thomas 6590-91; Gerald Gibson 5117). There is insufficient time to discuss such promotion at the shows (Leverett 3886Q; Gerald Gibson 5117). Generally, there is more time to discuss such subjects when a sales call is made on a buyer in the buyer's office (Leverett 3886Q).

(2) Functions of Trade Show Buyers or Merchandise Managers

74. H.R. Gibson, Sr., in the period 1969 to 1975, employed buyers in his trade show organization (CX 41, 1327, 1328, 104).¹² These individuals were key employees in the operation of the Gibson Trade Show (See Findings 39, 78, 81, 84). The trade show buyers received instructions as to the functions which they were to perform from Gibson, Sr. (Leverett 3731). [34]

75. Manufacturers or their representatives contacted trade show buyers to have their products listed as authorized sources of supply for the Gibson Discount Centers as well as to obtain approval of such lines for the Gibson Trade Show (Moland 3541-43).

76. Individual Gibson Trade Show buyers were responsible for specific lines of merchandise such as soft goods, sporting goods, health and beauty products, toys, jewelry, stationery, school supplies, luggage, housewares, automotive supplies, hardware, etc. (CX 1327; Leverett 3708-09).

77. Trade show buyers, in contacting suppliers, referred to the "Gibson chain stores" in 1972, numbering "approximately 575 stores" (CX 307).

78. In most cases, it was the buyer's decision whether to put suppliers into the Gibson Trade Show. Sometimes, however, the decision was made by Gibson, Sr. (Leverett 3713). It was the trade show buyer's duty to examine the various product lines, to evaluate the lines and to discuss prices and products with suppliers or their representatives (Leverett 3712-13).

¹² Respondents, in the course of this proceeding, referred to these employees as "merchandise managers." The titles, buyer and merchandise manager, may on occasion be used synonymously in this decision. However, in view of contemporaneous documents such as CX 41, 1327, 1328 and 104 in the period 1969 to 1972, the title, "buyer," is the one which will be used most frequently. Moreover, one of respondents' "buyers" or "merchandise managers" conceded that others had referred to him as a buyer. And, significantly, this witness admitted that these employees in their correspondence referred to themselves as "buyers" in the period 1969 to 1972 (Regeon 6661-62. See also Munden Deposition CX 1435 p. 20). Consider also the spontaneous exclamation of Gary Leverett, "Well, I assumed other buyer's duties -- or, excuse -- not a buyer but a merchandise manager in the trade show" (Tr. 3785). This again throws some doubt on denials that buyer is the appropriate title, particularly when such denials are inconsistent with the contemporaneous documents. See also the testimony of Barney Bradsby, one of respondents' franchisee witnesses:

Q. Do you know what company they [Perkins and Regeon] worked for?

A. They were merchandise managers for Mr. Gibson.

Q. Is that the title that they held, merchandise manager?

A. I don't know what their titles were. I would say they were something, buyers or something (Tr. 6803).

79. Manufacturers' representatives did not try to sell the trade show buyers actual orders but tried to persuade them to have the lines listed (Moland 3548). Buyers (or merchandise managers) of the Gibson Trade Show could not put their name on an order and place merchandise in any Gibson store (Leverett 3873).

80. When suppliers contacted Gibson Trade Show buyers, normally they would want to exhibit their entire line of products (Leverett 3760). Suppliers, however, were not permitted to exhibit their entire line of merchandise at the Gibson Trade Show; "deadwood" in the line was culled out after discussion between the trade show buyer and the supplier's representative (Leverett 3760).

81. The trade show buyers were interested in the price of products because they were evaluating many lines and, in some cases, certain suppliers offered basically the same items (Leverett 3716).

Buyers for the trade show negotiated with suppliers on billing terms and prices (Leverett 3718, 3747-48). Buyers negotiated better terms and prices than originally offered; [35]this was part of their duties (Leverett 3719; Moland 3552, 3560).¹³ Gibson, Sr. and Belva Gibson, on occasion, also sought to negotiate lower prices from manufacturers (Moland 3563, 3602, 3605).¹⁴

If buyers, in their dealings with suppliers, had a question about price, they would call Gibson, Sr. and get his feelings on it (Leverett 3720). Gibson, Sr. expressed his views as follows:

If a manufacturer presented us this item and he wanted \$3 and we knew—would look at it and we knew it could be had for \$2, we would say to Mr. Manufacturer, "Your price is all wet," or something of that nature, that "You're too high on that item. You ought to check on what your competitor is selling that for. We cannot do you a job, Mr. Manufacturer, we cannot sell this item at \$3" (Gibson, Sr. 5364).

[36]Such negotiations to assure them a competitive price benefited the Gibson stores participating in the trade show.¹⁵

82. Respondent Belva Gibson, in the period 1969 to the end of 1970,

¹³ Q. Did you ever get better terms than a supplier initially offered you, as a result of these negotiations?

A. Than what I just discussed? Yes, sir. In some cases, I did.

Q. Was that one of your duties?

A. Yes, sir. I felt like it was.

Q. Did you ever negotiate better prices than those initially offered to you by a supplier?

A. Yes, sir.

Q. Was that one of your duties, also?

A. Yes, sir (Leverett 3719).

¹⁴ Gibson, Sr., in the course of discussions with manufacturers' representatives, has asked, "Well, we know that is the price for the corner drug store; now what is our price [viz., the price of stores operating under the Gibson name]" (Moland 3563).

¹⁵ Q. Did you regard this as a benefit to the stores to be able to buy these products at the prices like, for example, the \$2 price that you mentioned in your testimony just now?

A. If we bought that for \$3, it would certainly be a bad deal for anybody that bought it. But if he bought it at \$2, and that was the price that all the competitive manufacturers was selling for, well, it would certainly be a benefit to him. He wouldn't get—what is generally said in the trade, he wouldn't get stuck on it (Gibson, Sr. 5364).

assisted trade show personnel in their duties of persuading retailers to visit booths at the show and helping trade show buyers in selecting jewelry and doll items for the show (Leverett 3866-67).

83. During an interval in the period 1969 to 1972, Gerald Gibson advised his father with respect to cameras and electronic equipment, when the latter had no merchandise manager in that area. In this connection, Gerald Gibson advised Gibson, Sr. as to whether the equipment might be good or bad (Gerald Gibson 4886, 4888). He dealt with approximately 50 manufacturers (Gerald Gibson 4916). The manufacturers approached Gerald Gibson; he passed on information and show sheets prepared by them to his father (Gerald Gibson 4889, 4900). Before transmitting such show sheets to his father, Gerald Gibson discussed with some of the suppliers the listings on the show sheets. Such discussions included multiple packaging programs and delivery terms, as well as the suitability of some of the items listed (Gerald Gibson 4900-01). Gerald Gibson reported to his father, who had the final decision on such matters (Gerald Gibson 4913). Although Gerald Gibson was not paid for these services and did not consider himself a merchandise manager (Gerald Gibson 5105), the foregoing activities involved certain of the functions for which merchandise managers were responsible. [37]

84. Buyers sent out letters to family-owned and franchised stores concerning price and product recommendations (Leverett 3727). Such mailings were made to all of the stores (Leverett 3725). And, sometimes a trade show buyer might make phone calls if he "had a red hot price for the trade show" (Leverett 3723). Trade show buyers sent such letters "[t]o attract Gibson people into the trade show" (Leverett 3731).

Franchised stores also received letters from trade show buyers listing items or manufacturers' lines which were not to be purchased (CX 1435 pp. 17, 18, 20 Munden Deposition).

Trade show employees have written to Gibson stores suggesting that certain suppliers be discontinued because the buyers no longer authorized or recommended the line since such suppliers would not sell at a price which the buyers would recommend as profitable for the stores' operation (see, *e.g.*, CX 104).¹⁶

Documents such as CX 104 on their face constitute merchandising advice by trade show buyers to the Gibson stores (*cf.* Finding 51).

85. At the trade show itself, it was the function of the trade show buyers to patrol the aisles and booths, talking to manufacturers and the other people attending. In the course of their duties, the trade show

¹⁶ Bobby Regeon, one of the "Seagoville Buyers" whose signature appears on the document, admitted his signature at Tr. 6638.

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buyers would bring buyers from retail stores attending the show to the booths of particular suppliers (Leverett 3834-35). The trade show buyers also visited the Gibson stores (Leverett 3839).

86. At the Gibson Trade Show, the trade show buyers were responsible for suppliers with lines of merchandise competing with each other (Regeon 6684-85; Leverett 3739, 3742-43, 3835-36; Gibson, Sr. 5357; Gerald Gibson 4953-54).

87. The Gibson Trade Show buyers were responsible for numerous booths at the trade show (Leverett 3735-37). They might be responsible for well over one hundred booths at such shows (Leverett 3736-37, 3762-63; Regeon 6682). It was a physical impossibility for the trade show buyers to see all the retailers at the show (Regeon 6687). A trade show buyer's average length of stay in one of the display booths "might not be but five minutes, just long enough to take the customer [retailer] in, introduce him to the factory, let the factory go to work on him, and I'd go get another customer for somebody else" (Regeon 6687-88). [38]

Essentially, manufacturers had to rely on their own personnel to make sales at the Gibson Trade Show.¹⁷ [39]

88. The duties of such trade show buyers remained the same in the period 1969 to 1975 (Leverett 3724; Gibson, Sr. 5231).

(3) Blanket Orders

89. A blanket order was an order placed by "the Seagoville Office," namely, H.R. Gibson, Sr. or his buyers, for all stores. The stores were classed as A, B and C stores, and the quantity of goods to be purchased depended on the size of the store (Munden Dep. CX 1435 pp. 25-26;¹⁸ Leverett 3842). A blanket order could be increased, decreased or cancelled by the individual stores (Leverett 3842). They are orders

¹⁷ Trade show employees made little or no effort to sell to Pamida, the largest franchisee group. Q. Mr. Underwood, when you were attending the trade show, who would your buyers go to see to buy merchandise?

A. The manufacturer.

Q. And was the manufacturer always present, or did he have a representative?

A. Oh, he may have had a representative. I went to that manufacturer's booth, picked up the show sheets, discussed it with whomever was representing that manufacturer at that booth.

Q. Did you ever discuss goods which you were interested in with trade show personnel?

A. Not to my knowledge.

Q. Did they ever attempt to sell you those goods?

A. Not to my knowledge.

Q. Do you recall whether or not Mr. Gibson, Sr., has ever visited the Pamida offices to sell merchandise?

A. To my knowledge he never has.

Q. Have his employees attempted to sell merchandise at the Pamida headquarters?

A. To my knowledge they never have.

Q. Have you received phone calls from employees or from Mr. Gibson asking you to purchase a certain line of merchandise?

A. No, sir (Underwood 7109-10. See also McCrea 6820-21).

¹⁸ Munden did not order merchandise under blanket orders in 1969 to 1970 (CX 1435 p. 47).

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recommended by the trade show buyers to the Gibson retail stores (Leverett 3844; Regeon 6619).¹⁹ In most cases, the Gibson store thereto in order to cancel or modify such orders during that period (O'Kelley 6422).

In that period 1973 to 1974, blanket orders went to all stores operating under the Gibson name, including those stores in which H.R. Gibson, Jr. and Gerald Gibson had a financial interest (Leverett 3848-50).

Subsequent to the negotiation of a Bunte Candy blanket order, a manufacturer's representative doing business with the Gibson Trade Show received a plaque and membership in the "One Million Dollar Club." Inscribed on the plaque were the names of the following officers of Gibson Discount Centers: H.R. Gibson, Sr., Chairman of the Board, Belva Gibson, Secretary-Treasurer and H.R. Gibson, Jr., President (Moland 3683-84, 3689-90). [40]

(4) Show Sheets

90. Show sheets were essentially abbreviated price lists that manufacturers used to sell merchandise at the Gibson Trade Show (Gerald Gibson 4902). They were also used as order forms by retailers (Leverett 3758; Gibson, Sr. 5584).

Show sheets contained the prices and terms negotiated between trade show buyers and suppliers and approved by the former (Leverett 3754-55). For example, show sheets showed the freight terms under which the products were to be shipped (Leverett 3747).²⁰ And, the "show price" and the duration of such price were also noted on these forms (Leverett 3748-49).²¹

91. One of the preprinted headings on the show sheets was the term, "Ship to," and, underneath that heading, the name, "Gibson Products Company" (CX 196A; Leverett 3756). Underneath the heading "Ship to," and, underneath that heading, the name, "Gibson Products Company" were blank lines for filling in the address of the particular store (Leverett 3757). This heading referred to the retailer customer in the Gibson Trade Show (Leverett 3757). No show sheets were printed with a name other than "Gibson Products Company" under the "Ship to" column (Leverett 3758).

92. After manufacturers had sent in a prepared show sheet and the trade show buyer had approved the prices and terms that had been

¹⁹ For example, on a \$2 million blanket order for candy from the Bunte Candy Company, the shipments were \$300,000 (McLain 6773).

²⁰ Factors indicating that retailers were getting "a real extra special buy in the Gibson Trade Show" were noted in the remarks column (Leverett 3747; CX 196A).

²¹ If there were an "extra special price for the trade show" which ran only for the duration of the trade show, then the buyer had to commit himself during the show to get the "special prices and terms" (Leverett 3749).

filled in, respondents printed the forms for use in conjunction with the trade show (Leverett 3754).

Once the show sheets had been printed,²² they were taken to the Gibson Trade Show and handed out to the manufacturers and manufacturers' representatives (Leverett 3758). Retailers attending the Gibson Trade Show generally picked the show sheets up at the show (Gerald Gibson 4902). [41]

93. Show sheets contained the following notation:

Notice!!! Do not ship at prices higher than listed hereon or we will deduct. Price approval contact the Seagoville, Texas offices (Gibson, Sr. 5504; CX 854B).

The purpose of this notice was to notify Seagoville of any price increases. The language, "Do not ship at prices higher than listed hereon or we will deduct. *Price approval contact the Seagoville, Texas offices*" (emphasis added), is consistent with the Gibson Trade Show's role as an agent or representative of Gibson retailers and inconsistent with the claim that the trade show is a manufacturer's representative.

94. Show sheets were an integral part of the Gibson Trade Show's operations (Findings 90-93).

(5) Booth Fees

95. Booth fees are the amount of money that the manufacturers pay for renting space to display their merchandise at the Gibson Trade Show (Gibson, Sr. 5146-47; Gerald Gibson 4897). The booth fee is a set amount, and is the same for all trade show participants (Gibson, Sr. 5236).

96. In the period 1969 to November 1, 1972, Ideal Travel Agency received booth fees for rental of space at the Gibson Trade Show (Gibson, Sr. 5582). In that period, Ideal had its own bank account and paid no monies to corporations operating retail stores (Gibson, Sr. 5582).

(6) Show Fees

97. Suppliers seeking to participate in the Gibson Trade Show were asked for a show fee by the trade show buyers in the period 1969 to 1975 (Leverett 3785). Suppliers who refused to pay a show fee were not permitted to participate in the Gibson Trade Show (Leverett 3792, 3812). Suppliers were willing to pay the show fee because the Gibson Trade Show generated a lot of sales (Leverett 3834).

²² Show sheets were printed in the respondents' print shop in Seagoville, Texas, under Lloyd Reece, as shown in CX 41 (Leverett 3758-59, 3779). The print shop was just around the corner from the buyers' offices in Seagoville (Leverett 3759).

98. The show fee was based on a percentage of sales made at the Gibson Trade Show to persons attending the show, namely, Gibson stores (Leverett 3791). And, the amount of the show fee was negotiable (Leverett 3790). The show fee, moreover, was to be paid on those sales made outside the Gibson Trade Show as well as those made at the show (Regeon 6689). [42]

Not all suppliers, however, paid a percentage of their sales as the show fee. Some, like Empire Pencil, paid a flat fee of \$15,000 in 1975 (Low 7719-20; CX 1255).

Show fee payments were payable on a quarterly, semi-annual or annual basis (Leverett 3791). The timing of the show fee payments was also negotiable (Leverett 3791-92).

There were no rules on setting show fees on the basis of whether the product was easier or more difficult to sell (Leverett 3886F-G). Setting the show fee with a particular supplier or manufacturer depended on the individual situation of that supplier (Leverett 3886H-I).

99. H.R. Gibson, Sr. instructed trade show buyers that one of their duties was to ask for the show fee (Leverett 3786). Occasionally, trade show buyers would report their show fee negotiations with suppliers to H.R. Gibson, Sr. (Leverett 3809).

Gibson, Sr. gave trade show buyers instructions concerning percentages to be asked in connection with show fees (Leverett 3800). Gibson, Sr. would issue instructions, such as, "Gary, talk to them and see what they can pay us" (Leverett 3802). In the majority of instances, Gibson, Sr. gave no specific instructions as to the percentage that was to be asked (Leverett 3802).

100. Prior to November 1, 1972, agreements concerning show fees were verbal. Subsequent thereto they were the subject of written agreement (Low 7461-62).

101. When Gibson, Sr. received the trade show fees in the period 1969 to November 1, 1972, they were deposited in his personal account and not put into the account of any corporation operating a retail store under the Gibson name (Gibson, Sr. 5581).

102. The Gibson Trade Show buyers (or merchandise managers) received a weekly salary and a small percentage of the show fee ranging from three to five percent (Gibson, Sr. 5238, 5242-43).

103. The show fee payment had nothing to do with suppliers' payment of booth fees for the rental of display space in the Gibson Trade Show (Leverett 3787).

104. The purpose of the show fee based on the percentage of a supplier's sales was to make money for the Gibson Trade Show (Leverett 3808). [43]

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(7) Tabloids

105. A tabloid is an advertising section, usually about half the size of a normal newspaper page, about eight to 16 pages in size folded over and inserted in a newspaper or mailed out (Gerald Gibson 4849; Leverett 3823).

106. H.R. Gibson, Sr., in 1969 and 1970, in connection with the trade show, offered suppliers the opportunity to participate in Gibson tabloids (CX 1420A-B).²³ [44]

107. G&G Advertising, operated by Gerald Gibson as a proprietorship, prepared tabloids advertising products in the Gibson stores in the period 1969 to 1973 (Gerald Gibson 4849). Gerald Gibson put together the tabloid and, then, mailed a mock-up to the stores. The stores, if they so desired, could purchase the tabloid, buying as many pieces as they wanted for their market (Gerald Gibson 4851-53). Those stores buying a tabloid had their names placed on it (Gerald Gibson 4849-50). Sometimes, the tabloids were placed in the windows of the stores purchasing them (Gerald Gibson 4853).

108. Stores purchasing such tabloids did not pay Gerald Gibson's G&G Advertising for the privilege of being listed therein (Gerald Gibson 4851). The tabloids, prepared by G&G, were displayed by a printer, News Inc., at the Gibson Trade Show along with tabloids for other retailers. News Inc. was in the business of selling its publishing services in connection with such tabloids to retailers at the trade show (Gerald Gibson 4853).

²³ Q. *Mr. Gibson, in 1969 in connection with the Trade Show did you offer to serve suppliers the opportunity to advertise in the tabloid?*

A. Yes, sir.

Q. *Mr. Gibson, did you inquire from these suppliers as to whether or not they had any standard advertising program?*

A. I personally didn't. Den Woody who published the tabloid they had a booth in a show and the various exhibitors that wanted to advertise in a tabloid would contact Den Woody for an ad of half a page, quarter a page, or a whole page, or whatever they wanted.

And most all cases they paid Den Woody direct for the ad.

Q. All right, sir.

Mr. Gibson, did you, in conducting the Gibson Trade Show in the year 1970 conduct a tabloid advertising program?

A. Did I conduct one?

Q. Let me rephrase the question, sir.

Did you, Mr. Gibson, in 1970 in your capacity as the individual sponsoring the Gibson Trade Show offer to the suppliers a tabloid program?

A. We had tabloids from time to time; yes, sir.

Q. And, Mr. Gibson, did you have a tabloid program in 1971?

A. I do not recall any at the moment.

Q. All right, sir (emphasis added) (CX 1420A-B).

Gibson, Sr.'s testimony at the evidentiary hearings is inconsistent with his prior deposition testimony in CX 1420A-B. At the hearings, he testified:

A. The trade show never had any tabloid. This is not anything that belongs to the Gibson Trade Show.

Q. Thank you, Mr. Gibson (Gibson, Sr. 5322).

109. Suppliers contacting Gibson Trade Show buyers generally wanted to participate in the tabloid (Leverett 3823). They approached trade show buyers in order to get their products advertised in the tabloid, viz., the so-called "tab items." [45] The trade show buyers presented such tab items to H.R. Gibson, Jr., Gerald Gibson or Bill Rea,²⁴ who had discretion whether to put an item in the tabloid or not (Leverett 3863).

110. If a tab item was put in the tabloid, there was a sign at the booth in the Gibson Trade Show stating, "Recommended tab item." This procedure was in effect in the period 1969 to 1975 (Leverett 3863; Moland 3595). Trade show buyers, in discussing tab items with suppliers, wanted to make sure there was a competitive price on such items (Leverett 3865).

111. Suppliers did not pay for advertisements in the tabloids with trade show fees such as booth fees or show fees (Renninger 461; Gerald Gibson 5102). However, such payments were requested on the invoices of respondents such as Gibson Discount Centers, Inc. and paid to respondents such as Gibsons, Inc. (CX 491A, 491D).

112. Trade show buyers have signed "Gibson Tabloid" authorization forms under the heading, "Approved and Accepted (Gibson Products Co.);" (CX 491E; Leverett 3823-30; CX 1158D; Regeon 6675-76; CX 1326B; Perkins; CX 377B; Low 7642).²⁵ The name, "Gibson Products Company," on such authorization forms refers to the trade name used by H.R. Gibson, Sr. (Regeon 6676). This is also the trade name used by Gibson, Sr. in his trade show operation (see, e.g., CX 1040A-C Trade Show Lease signed by Gibson, Sr. for the period 1967 to 1973). [46]

113. On November 2, 1968, H.R. Gibson, Sr. sent a letter "To: ALL GIBSON SUPPLIERS" requesting their participation in a tabloid supplement in the *Dallas Morning News*. This tabloid was to run on March 2, 1969, and was to be entitled, "March Whirlwind of Savings" (CX 125). In pertinent part, this solicitation stated:

With such fantastic sales results in mind, I feel sure you will want to participate in the March "Whirlwind of Savings" with an appropriate ad in the March 2 tabloid which The Dallas Morning News will again publish exclusively. I firmly endorse it!

Please sign the attached space order and return to me, or take it to The Dallas Morning News representatives in Booth 3 at the show (CX 125).

²⁴ Bill Rea, in February 1975, when Leverett left the Gibson Trade Show, was working under Herbert Gibson, Jr. and Gerald Gibson for the Gibson stores (Leverett 3870).

²⁵ The explanation that the trade show and the trade show buyers had nothing to do with the tabloid is not convincing. One of the "Gibson Tabloid" authorization forms in the record indicates copies thereof are to go to "Bill Rea Ledbetter" and to "Seago Buyer" (CX 491E). Trade show buyers have signed their correspondence as "Seagoville Buyers" (See CX 104; Regeon 6638). In the case of CX 377B, 1158D and 1362B, the signatures of Messrs. Low, Perkins and Regeon appear over the title, "Buyer" (Compare with CX 1327). The forms on their face evidence such a relationship.

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114. On February 21, 1969, H.R. Gibson, Sr. wrote a letter to "NAME BRAND GIBSON SUPPLIERS" requesting participation in cooperative advertising to be published in a "NAME BRAND" tabloid by the *Dallas Times Herald* on May 4, 1969. The letter stated, in pertinent part:

Work carefully with our buyers in the selection of items, to make certain this is an outstanding sales event, as well as an important public relations milestone.

Please give this your immediate attention and work with the Dallas Times Herald representative, who will be contacting you during the February Show. . .

I personally appreciate your cooperation and look forward to a truly important promotion for Gibson Discount Centers and you (CX 75).

115. On February 24, 1969, H.R. Gibson, Sr. sent a letter "TO: ALL GIBSON SUPPLIERS" requesting that they participate in promotional advertising to be published in the June 1, 1969, *Dallas Morning News*. This advertising supplement was to be sponsored by 30 Gibson Discount Centers, including nine stores in Dallas County (CX 74A, D). [47]

116. H.R. Gibson, Sr., in the period 1969 to 1972, at the same time that he was soliciting fees for participation in the Gibson Trade Show, solicited fees for cooperative advertising from "Gibson Suppliers" for the Gibson Discount Centers (Findings 106, 113-15).

117. Respondents' trade show operations and retail operations were interrelated in the solicitation and receipt of payments from suppliers participating in the trade show for tabloid or other advertising directed to the consumer (Findings 106, 107, 109, 110, 112-16). [48]

II. Evidence under Count I of the Complaint

A. L. M. Becker Co.

118. L. M. Becker Co. ("Becker"), of Appleton, Wisconsin, sells and ships vending machines and refills for vending machines throughout the United States (Hare 2527). Such sales include shipments to Gibson stores located outside of Wisconsin (CX 599A-Z-22). Becker is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

119. The vending machines involved in these transactions were manufactured by Becker; the refills were manufactured by other companies (Hare 2527, 2530).

120. From 1969 to 1973, Becker's sales organization consisted of 30 to 35 sales brokers who were employed on a commission basis and helped sell Becker products to retailers (Hare 2528, 2720-21).

Becker employed a broker who served as a manufacturer's representative in the Dallas-Fort Worth area and attended the Gibson Trade Show as Becker's sales representative (Hare 2552). Neither H.R. Gibson, Sr., the Gibson Trade Show, the Gibson Products Company nor anyone associated with respondents was considered by Becker as its manufacturer's representative or food broker in the Gibson Trade Show during the 1969 to 1972 period (Hare 2553, 2740).

121. Becker participated in the Gibson Trade Show in order to be able to make sales to Gibson stores (Hare 2539, 2606). This supplier's sales volume to all Gibson retail stores during the years 1969, 1970 and 1971 was three to five percent of its total sales (Hare 2640).

122. Becker participated in the Gibson Trade Show in 1969, 1970 and 1971 (Hare 2537). It attended two Gibson shows in 1969 and 1970, and one in 1971 (Hare 2603).

123. The services provided by the Gibson Trade Show to Becker included maintaining contact with the Gibson retail stores, preparing and distributing show sheets, bringing retailers over to Becker's booth at the trade show and, generally, helping Becker sell to the Gibson retail stores (Hare 2681, 2683-86, 2720).

124. The requirements for Becker's participation in the Gibson Trade Show were: a ten percent rebate on all sales to Gibson family owned and franchise stores and payment for rental of booth space (Hare 2538-40, 2545-46, 2605). [49]

125. Becker furnished product and price information for show sheets that would be utilized at the Gibson Trade Show. Prior approval from the Gibson Trade Show was necessary before goods could be offered for sale at the show (CX 594, 597; Hare 2607-08). The show sheets served as purchase order forms for use by Gibson retail store buyers both at the trade show and later on (Hare 2684-85). [50]

126. Becker made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
May 12-16, 1969	1	\$225.00	\$225.00	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	CX 580A-F
[Date of payment - April 16, 1970]			\$250.00	Check	Gibson Discount Center Toy Trade Show Market Hall - 2200 Stemmons Freeway Dallas, Texas	CX 592A-B

[51]127. When Becker contacted Gordon Fielden, a buyer for Gibson in Seagoville, about participating in the Gibson Trade Show,

* Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

Fielden said that this supplier would have to pay the ten percent rebate in order to be "authorized" or "listed" to be in the show and authorized to sell to Gibson stores (Hare 2539-40, 2545-46; CX 579). Becker believed that if it were not "authorized" or "listed," it would be unable to sell to any of the Gibson stores (Hare 2541, 2543-44).

Becker agreed to make the ten percent rebate and signed a document so stating: [52]

HERBERT R. GIBSON, SR., ET AL.
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Date 4/10/69

To: GIBSON PRODUCTS CO.
519 Gibson Street
Seagoville, Texas 75159

From:

1 M. Center Co
C. O. Co. 1122
App. Co. NW sec.

It is hereby agreed that we will pay you 1/2 %
on all accumulative purchases from Gibson Products
Company, Gibson Discount Centers and/or any of their
subsidiaries, from above date, subject to exceptions
listed below. This amount will be paid at the end of
each calendar quarter in the form of a check payable
to Gibson Products Company, Warehouse Account, Seago-
ville, Texas for the purpose of promoting our products,
the listing of our approved products to your stores and
allowing us to display our approved products in your
private trade show.

Exceptions: _____

Signed Richard H. Stiley

For

1/2 %
2.01
11/74
Richard H. Stiley
691.6053

4K579

[53] By "promoting our [Becker's] products" (CX 579), Gibson Products Co. was expected by Becker to send out bulletins prepared by Becker to the Gibson retail stores, promote Becker's products at the trade show, put Becker in the trade show directory and help Becker sell their products to Gibson stores (Hare 2549, 2678).

128. The ten percent show fee paid by Becker to the Gibson Products Company was paid for certain promotional services rendered, which consisted of being allowed to sell to Gibson stores and participate in the Gibson Trade Show (Hare 2650). The show fee was paid in connection with the original sale of Becker's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Becker's products to consumers²⁶ (Findings 68, 73, 97, 121, 124, 127).

129. Similarly, the booth fee was paid in order to enable Becker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Becker's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Becker's products to consumers (Hare 2650; Findings 64, 68, 73, 95, 121, 124).

130. Becker's show fee payments to H.R. Gibson, Sr. and Gibson Products Co. in 1969 and 1970 are summarized in the following chart:

[54]

²⁶ Richard Andrew Hare, former national sales manager of Becker (Hare 2526), testified as follows (Hare 2650):
JUDGE VON BRAND: It is not the kind of promotion to sell your product to the consumer?
THE WITNESS: No. It is a total promotion to sell the product to the individual store.

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Becker made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment on Becker Records	CX 579, 58
\$145.50	7/23/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	June 1969	Rebate for month ending June 30, 1969 on shipments for which payment has been received	582A-C
\$364.00	8/20/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	July 1969	Rebate for month ending July 31, 1969 on shipments for which payment has been received	CX 579, 58 583A, C-D
\$318.45	9/23/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	August 1969	Rebate report - August	CX 579, 58 584A-C
\$529.30	10/16/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	September 1969	Rebate report - September	CX 579, 58 585A-C
\$332.50	11/18/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	October 1969	Rebate report - October	CX 579, 58 586A-C
\$452.80	12/12/69	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	November 1969	Rebate report - November	CX 579, 58 587A-C
\$148.80	1/22/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	December 1969	Rebate report - December	CX 579, 58 588A-C
\$ 95.00	2/24/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	January 1970	Rebate report - January	CX 579, 58 589A-C
\$300.50	3/23/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	February 1970	Rebate report - February	CX 579, 58 590A-C
\$153.00	4/16/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	March 1970	Rebate report - March	CX 579, 58 591A-C
\$148.00	5/19/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	April 1970	Rebate report - April	CX 579, 58 592A-B
\$420.05	7/8/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	May 1970	Gibson rebate - May	CX 579, 58 593A-D
\$329.55	7/21/70	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	10%	June 1970	Gibson rebate - June	CX 579, 58 596A-C

[55]131. During the 1969 to 1971 period, Becker neither made nor offered to make payments based upon a percentage of total sales or alternate payments, except for the bulletin payments,²⁷ to any of its customers, other than the Gibson Products Company, for promotional services rendered (Hare 2645, 2652-60).

During the 1969 to 1971 period, Becker did not make any payments based upon a percentage of total sales in connection with any of the trade shows that it attended, other than the Gibson Trade Show (Hare 2661).

During the 1969 to 1971 period, Becker neither made any payments similar to the show fee payments nor made or offered to make an alternate payment to the booth fee to those of its customers that did not hold trade shows (Becker 2662).

132. After Becker ceased participating in the Gibson Trade Show, its sales volume with Gibson retail stores dropped in 1973 and 1974, due in part to competition from another vending company (Hare 2642, 2644, 2718-19).

133. During the 1969 to 1971 period, Becker operated a promotional program wherein it would make payments to wholesalers for bulletins sent by the wholesaler to Becker's retail customers in order to encourage purchases by the retailer from the wholesaler (Hare 2645-46). This same type of bulletin was made available to the Gibson Products Company (Hare 2649). The ten percent show fee paid to the Gibson Trade Show was in addition to the bulletin program (Hare 2649). Other than this bulletin program, Becker had no promotional or advertising program available for its customers (Hare 2648).

134. Becker paid the expenses of its employees who attended the Gibson Trade Show (Hare 2609).

135. The refills sold by Becker were not the type of product that lend themselves to advertising to the general public. Becker was unconcerned with promoting its products to consumers (Hare 2675-77).

136. Becker's vending machines were sold only to retail stores and not to consumers (Hare 2673). Thus, the vending machines were not, and could not be, subject to promotional advertising in connection with their resale.

137. In 1969 and 1970, Becker produced six product lines which included the following machines: a one penny toy and gumball, a one penny toy and hard candy, a nickel toy and gumball, [56]a nickel capsule with toys in it, a dime capsule with toys in it and a quarter capsule with toys in it (Hare 2529, 2535; CX 594).

²⁷ See Finding 133.

The refills, produced by other companies and purchased by Becker, were all standard lines of products that went out to every customer²⁸ (Hare 2530-31).

All of Becker's products cost Becker \$5.00 per box and were retailed at \$10.00 per box. Thus, a penny gumball box would have 1,000 gumballs, while a dime box would have 100 items in it (Hare 2532-33).

The nickel, dime and quarter capsules contained toys such as spiders, bugs, rings, et al. (Hare 2533).

138. The shelf life of the items that went into the capsules is indefinite. The shelf life of the items that went into the gum and candy is approximately one year (Hare 2533).

139. Some of Becker's invoices indicate that the company sold its merchandise to Affiliated Food Stores, Inc., a wholesaler who handled billing for Becker and warehoused merchandise for some of Becker's retail customers. However, individual retail stores were the indirect customers of Becker's products, at least in the majority of instances, when they were the direct recipients of shipments from Becker²⁹ (CX 599A-M, R, Y, Z-6, Z-9, Z-11-Z-22; Hare 2566-70, 2670-72, 2699-2703, 2707-08). Becker regarded as its customer the firm to which the shipments were noted on the invoice (Hare 2569-70).

140. The invoices in the record reveal several contemporaneous sales involving goods of like grade and quality sold to competing customers, including the following examples³⁰ (CX 587U, 589F, 599A, R, Y, Z-6, Z-9, Z-11-Z-15, Z-20, Z-22): [57]

Henderson, Texas: Toy N Joy Toy or Candy 1000/1¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins³¹ - 6/2/70); Toy N Joy Toy or Gum 1000/1¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70); Toy N Joy Capsules 1000/10¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70); Toy N Joy Capsules 40/25¢ (Gibson - 8/4/69, 5/12/70; Luther Jenkins - 6/2/70).

Dallas, Texas: Toy N Joy Toy or Candy 1000/1¢, Toy N Joy Toy or Gum 1000/1¢, Toy N Joy Capsules 200/5¢, Toy N Joy Toy and Gum 200/5¢, Toy N Joy Capsules 100/10¢, Toy N Joy Capsules 40/25¢ (Gibson - 10/7/69, 1/26/70, 3/16/70, 6/10/70, 8/10/70, 9/22/70; Sundown Food Store³¹ - 8/31/70, 9/29/70, 10/26/70; M.E. Moses Company³¹ - 11/30/70; D&J Supermarket³¹ - 6/2/69). [58]

²⁸ Thus, the same penny box of gum or nickel box of capsules went out to every Becker customer (Hare 2531).

²⁹ Certain of the invoices in the record indicate that shipments were made to Affiliated (CX 599N-Q, S-W, Z-Z-5, Z-7, Z-8), or made to entities whose functional level is unknown. In these instances, it is not possible to determine whether the goods sold were sold to a nonfavored customer of Becker's competing at the same functional level as the Gibson stores.

³⁰ Commission counsel introduced numerous invoices of sales by Becker to Gibson retail stores located across the country (CX 582D-Y, 583F-S, U-X, 584D-R, 585D-W, 586D-T, 587D-T, V-W, 588D-J, 589D-E, G-H, 590D-O). However, there is no record evidence of any sales by Becker to any competing stores in these cities.

³¹ Luther Jenkins, Sundown Food Store, M.E. Moses Company and D&J Supermarket function at the retail level of operations (Finding 369).

B. The Parker Pen Company

141. The Parker Pen Company ("Parker"), of Janesville, Wisconsin, sells writing instruments, writing sets and desk sets (Renninger 264).

Its major manufacturing facility is in Janesville, and its products are sold and shipped from there throughout the United States (Renninger 264). Such sales include shipments to Gibson stores located outside of Wisconsin (CX 506A-F). Parker is engaged in interstate commerce and its transactions with the respondents, including the show fee payments based on such sales, are in the course of such commerce.

142. Parker ranks first in the worldwide sales of writing instruments and desk sets; domestically, it ranks third or fourth in such sales (Renninger 264-65).

143. Parker began selling to the Gibson Discount Centers in the early 1960's (Renninger 268). In the period 1971 to 1974, there were approximately 485 Gibson Discount Centers; Parker sold both of its product lines to approximately 210-220 of these stores during this period (Renninger 269, 274). It sold to both company owned and franchised stores (Renninger 272-73).

In the period 1971 to 1974, this supplier's sales to the Gibson retail stores constituted almost one percent of its total sales (Renninger 279). In 1971 to 1973, the Gibson stores as a group were considered Parker's largest account. In 1974, they were number one or number two (Renninger 281-82).

144. Parker shipped goods to the individual Gibson stores and billed the paying office indicated for the particular store (Renninger 270).

145. In the years 1971 to 1974, Parker attended or participated in at least one Gibson Trade Show per year (Renninger 283).

It participated in the Gibson Trade Show because, in its view:

The key to doing business with Gibson at that time was to attend the shows, and prior to attending the show was to get your product authorized and listed on the show sheets.
[59]

The assumption on our part was that if you didn't go through that process, your likelihood of maintaining a rate of sale and volume to the Gibson stores would practically diminish to nothing (Renninger 318-19. See also Tr. 291).³²

146. In the years 1971 through 1974, Parker did not employ H.R. Gibson, Sr. as a manufacturer's representative or broker to represent it at the Gibson Trade Show (Renninger 310-11); Parker considered H.R. Gibson, Sr. to be a customer in the period 1971 to 1974 (Renninger 335-36).

147. In the Gibson Trade Shows in which it participated in 1971,

³² In 1975, a year when Parker did not participate in the Gibson Trade Show, its sales to the Gibson stores were 50 percent of sales in the preceding year (Renninger 282).

1972, 1973 and 1974, Parker made no sales to retailers other than Gibson Discount Centers (Renninger 300, 309). All of Parker's sales at the Gibson Trade Show were made through the use of show sheets (Renninger 308). Furthermore, at the beginning of each show, the trade show staff gave Parker a list of stores in order to verify that someone from each of those stores visited Parker's booth. The check list only contained the names of Gibson stores (Renninger 300-01).

148. Manufacturers' products had to be presented to a Gibson Trade Show buyer, accepted for sale and listed on show sheets before any manufacturer could display and sell its products to the Gibson retail stores (Renninger 291). In the case of Parker, the trade show buyer in question was Gary Leverett, the stationery and jewelry buyer (Renninger 291, 311-12).

Show sheets listed the products to be displayed or sold to Gibson stores. They gave the product description and price, listed whether the product had a special promotional price and stated whether the product was going to be advertised in a Gibson tabloid (Renninger 294).³³

Generally, Parker's customers picked up the show sheets at the trade show and, subsequently, sent in the show sheets to Parker's representative as completed purchase orders (Renninger 298). 25% of Parker's sales to the Gibson stores were during the selling periods shown on the show sheets. The majority, or 75%, of Parker's sales to these stores, however, were made by Parker's sales personnel calling on the stores and writing their orders (Renninger 298). [60]

149. During the 1971 to 1974 period, Parker's employees and representatives staffed the booths at the Gibson Trade Shows (Renninger 283-84, 289-90). And, Parker paid the expenses for its employees attending the Gibson Trade Show, including transportation, lodging and meals (Renninger 316).

150. Parker representatives demonstrated products and discussed selling techniques with Gibson retail store buyers and owners at the Gibson Trade Show (Renninger 289-90). The more product knowledge a buyer has, the better he can sell that product (Renninger 293-94). However, in making sales calls on other customers, Parker's sales force would also explain the advantages of their product, demonstrate the product and help to develop selling methods (Renninger 400-01).

151. During the 1971 to 1974 period, the requirements which Parker had to meet to participate in the Gibson Trade Show were: securing the trade show buyer's approval for merchandise that was to be included on the show sheets; payment for the rental of booth space;

³³ CX 501A and CX 467 are show sheets (Renninger 294-95).

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and, payment of a show fee based on a percentage of total sales to all Gibson stores (Renninger 311, 313-14, 317-18). [61]

152. Parker made the following booth fee payments pursuant to its participation in the Gibson Trade Show in the period 1971-1974:

Show	Number of Booths	Amount of Payment	Form of Payment	Payee		
1971	February '71	2	\$550	Check	Ideal Travel Agency	CX 466A-C
	May '71	1	\$275	Check	Ideal Travel Agency	CX 470A-E
	August '71	1	\$275	Check	Ideal Travel Agency	CX 473A-E
1972	May '72	1	\$300	Check	Ideal Travel Agency	CX 478A-C
	August '72	1	\$350	Check	Ideal Travel Agency	CX 482A-D
1973	May '73	1	\$350	Check	H.R. Gibson, Sr.	CX 488A-E
	August '73	1	\$350	Check	H.R. Gibson, Sr.	CX 492A-E
1974	February '74	1	\$350	Check	H.R. Gibson, Sr.	CX 497A-E
	August '74	2	\$700	Check	H.R. Gibson, Sr.	CX 500A-D

[62]153. The first request made to Parker for a show fee was in early 1971 (Renninger 322, 324). Initially, the supplier refused to pay the show fee (Renninger 324). Subsequently, in August 1971, the Gibson Trade Show buyer, Gary Leverett, told Parker's representative that it would have to pay the show fee (Renninger 324-25). When Parker's representative advised Leverett that he thought such payment would be illegal, Leverett stated it would have to be paid (Renninger 481-83). In this connection, Parker's representative had been informed that, unless the show fee were paid, its products would not be listed and it would not be permitted to participate in the show (Renninger 330).

Parker decided to make the show fee payments in order to participate in the Gibson Trade Show because, at this time, the Gibson stores were considered the largest discount chain that it had. The Gibson stores represented a sizable amount of business and Parker's officials did not feel that they could walk away from this kind of business (Renninger 318, 325-26).³⁴

154. The amount of the show fee was to be based on five percent of total sales to all Gibson Discount Centers, including both company owned and franchised stores (Renninger 317-18, 326). Originally, Leverett had asked for three percent, but the request escalated to five percent by August 1971 (Renninger 326).

³⁴ Parker felt that it could not afford to lose the Gibson business which amounted to about \$100,000 at that time (Renninger 327).

155. Gibson requested that the show fee payment be made by check but Parker paid by credit memorandum (Renninger 328).³⁵

156. Parker wanted an invoice for the show fee but never received one (Renninger 328-29). It wanted the invoice because its counsel felt the payment was illegal and part of the sales upon which the show fee was based were generated by franchised rather than Gibson owned stores (Renninger 329).

The five percent show fee to cover 1974 was paid in 1975 by a check sent to H.R. Gibson, Sr.'s attorney, Bardwell Odum (Renninger 333). Parker had previously advised Mr. Odum that, in its opinion, the fee was illegal. Mr. Odum claimed the fee was not illegal but due under a contract for invoices. Parker decided to pay, but never received any answer as to what services it was paying for in response to a request for that information (Renninger 333-35, 488. See also CX 505B, 505C, 1325; SR 55, 56A-B). [63]

157. Parker's show fee payments for the period 1971-1974 may be summarized as follows:

³⁵ A credit memorandum is a negotiable instrument between a supplier and a customer where the customer may use the credit memorandum to offset part of his bill with the supplier (Renninger 331).

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Amount	Date of Payment	Form of Payment	Payee	Period For Which Payment Was Made	Description of Payment on Parker Records
\$5145.00	1972	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	4/1/71 through 12/31/71	Coop Advertising* X Mas
\$ 515.34	5/9/72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	1 st Quarter 1972	Spring 1972 Coop Advertising**
\$1562.84	8/30/72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2 nd Quarter 1972	Coop Advertising*** Spring
\$2020.24	Nov. '72	Credit Memorandum	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3 rd Quarter 1972	Coop Advertising****
\$ 873.54	Jan. '73	Credit Memorandum	Gibson Inc. 519 Gibson St. Seagoville, Texas	4 th Quarter 1972	Coop Advertising***** X Mas
\$6019.50	2/7/74	Credit Memorandum	Gibson Inc. 519 Gibson St. Seagoville, Texas	1973	5% allowance*****
\$5502.05	4/14/75	Check	H.R. Gibson, Sr.	1974*****	

* CX 477A; Renninger 366-387, 394.

** CX 477C; Renninger 387-388.

*** CX 477E; Renninger 388.

**** CX 477G-H; Renninger 388.

***** CX 477I; Renninger 386.

***** CX 466A; Renninger 395.

***** CX 505-A; Renninger 389-91.

[64]158. Parker regarded the five percent show fee as a discount or price reduction (Renninger 465). Parker did not regard the fee as cooperative advertising payments³⁶ (Renninger 463-64). The payment was made to enable Parker to display its merchandise to the Gibson Discount Center retailers attending (Renninger 497K-L; SR 51).

159. The Gibson Trade Show is not a service in connection with the resale of Parker's products to consumers. Parker's reason for attending the show was to get its products listed and into the hands of the buyers of the Gibson retail stores; it was concerned with making the original sale to the retailer rather than promoting the resale of its products to consumers (Renninger 497F).³⁷ The show fee was paid in connection with the original sale of Parker's products to Gibson retail stores; the

³⁶ References to the five percent payment in Parker's records as "coop advertising" are merely internal bookkeeping charges and do not reflect the actual purpose of the payments (Renninger 464).

³⁷ Q. You indicated on cross examination that you attended these I believe, four shows in order to build goodwill. Did you attend the Gibson Trade Show in order to build goodwill with the buyers there?

A. The reason we attended the Gibson Trade Show was to get our products listed in the hands of the buyers of the Gibson stores (Renninger 497F).

show fee was not a promotional allowance made in connection with the resale of Parker's products to consumers (Renninger 497K-L; SR 51; Findings 68, 73, 97, 145, 151).

160. Similarly, the booth fee was paid in order to enable Parker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Parker's goods to Gibson retail stores. The booth fee, accordingly, was not a promotional allowance made in connection with the resale of Parker's products to consumers (Findings 64, 68, 73, 95, 145, 151).

161. After Parker discontinued its participation in the Gibson Trade Show, it experienced a 50 percent drop in its sales volume to the Gibson Discount Centers (Renninger 282, 335). [65]

162. Customers of Parker, other than stores operating under the Gibson name, were not given payments of five percent or a percentage of their total sales (Renninger 338, 340B, 343).³⁸

163. Parker had a standard cooperative advertising program available to all of its retail customers (Renninger 336-37). This was also available and communicated to each Gibson Discount Center or Gibson retail store (Renninger 337-38, 339).³⁹ The standard cooperative advertising program of Parker was discussed with the trade show buyer, Gary Leverett. The five percent show fee paid to Gibson Products Company was not a part of this regular cooperative advertising program (Renninger 338-39).

Parker's standard cooperative advertising program required proof of performance. None of the respondents in the period 1971 to 1974 furnished proof of performance in connection with the show fee payments (Renninger 343-44).

164. In 1971 or 1972, Parker participated in tabloid advertising in connection with the Gibson Trade Show (Renninger 317).

The supplier also participated in the August 1973 tabloid mailed and delivered to customers in the areas where Gibson stores were located (Renninger 379; CX 491A-E).⁴⁰ The items promoted in the Gibson tabloid advertisement were the Big Red Soft Tip Pen and Big Red Ball Point Pen (CX 491E). For such participation, Parker was billed \$250 by Gibson Discount Centers, Inc. (CX 491D). The agreement to participate in the tabloid, dated May 2, 1973, had been signed by Ray Bostrom for Parker and trade show buyer Gary Leverett for Gibson Products Co. This agreement was entitled, "Gibson Tabloid Authorization Form" (CX 491E). By credit memorandum of June 26, 1973, made out to

³⁸ In 1973, Gibsons Inc. received Parker's credit memorandum for the show fee; such payments were not made available to Parker's other customers (Renninger 340-41).

³⁹ Parker did not have such a program in 1973 (Renninger 339). The payment of the show fee in 1973 was probably charged against a nonexistent cooperative advertising budget (Renninger 339).

⁴⁰ Such tabloids may run prior or subsequent to the period of the trade show (Renninger 381).

Gibsons Inc., Parker made the \$250 remittance for such participation (CX 491A; Renninger 381-82). [66]

There is no record evidence concerning contemporaneous sales of the items promoted in the August 1973 tabloid to Gibson stores and other retailers competing with them in the resale of such merchandise.

165. Parker manufactures 252 to 300 different pens, combinations of colors and permutations thereof (Renninger 421). Parker's most expensive pen, the Presidential solid gold pen, costs \$400 (Renninger 421). The least expensive pen sold by Parker is the Jotter at \$2.50. Between those ranges, there are 50 to 100 different priced pens (Renninger 422). Parker's pens are sold in different types of packaging ranging from open stock boxes with twelve pens in a box to pens in individual gift boxes (Renninger 424). In addition, pens are also sold in combination with a pencil or individually (Renninger 424).

Parker's "midline products" are sold both by Parker's direct sales organization and by a network of wholesalers and distributors (Renninger 424-25). There are approximately 125 products in the "midline," which can be marketed in a number of different combinations (Renninger 425-26).⁴¹

The "prime line" products are primarily precious metal or stainless steel merchandise. These products fall within a higher price category and are considered Parker's jewelry or gift line (Renninger 426). Including all the combinations, there are about 125 products in this line (Renninger 427).

166. The tabulations in the record show contemporaneous transactions involving sales of goods by Parker to various Gibson stores and other Parker customers located in the same town or city (CX 506A-F). However, the record evidence does not disclose at what functional level many customers listed on CX 506A-F, other than the Gibson stores, operated at. For example, there is no way to determine on this record whether Abilene Prt. and Sty. Co. of Abilene, Texas, or Cook United, Inc. of Big Spring, Texas, were wholesalers or retailers (CX 506A). With respect to the majority of the alleged nonfavored customers listed on CX 506, complaint counsel have failed to sustain their burden of proof that Gibson retail stores and other Parker customers listed thereon operated and competed in the resale of Parker's merchandise at the same functional level. [67]

The tabulations also do not specify what products were purchased in a specific transaction. For instance, the products purchased are usually described as "midline products," "prime line products," "pens," "pencils," "sets," "refills," etc. Nor is it possible to determine from this

⁴¹ "Pencil soft, soft tip, ball pen, pencil; ball pen, fountain pen; fountain pen, pencil. You go on and it will go on forever" (Renninger 426).

record the price of the products involved. Parker may have 50 to 100 different prices for pens. Given the wide array of Parker products, the information in the tabulations is insufficient to make the determination of whether the goods sold to Gibson retail stores and the goods sold to alleged competitors of Gibson stores were of like grade and quality.⁴²

C. Tucker Manufacturing Corp.

167. Tucker Manufacturing Corp. ("Tucker"), of Leominster, Massachusetts, manufactures and offers for sale throughout the United States plastic housewares, which include trash cans, wastebaskets, laundry baskets, dish pans, pails and other products (Tocci 2141, 2142, 2153, 2162).

Tucker's products are shipped from Leominster, Massachusetts and Arlington, Texas. However, the invoices on all sales are issued by Tucker's Leominster, Mass. headquarters (Tocci 2143). The invoices in the record show sales to Gibson stores located outside Massachusetts and Texas (CX 320A-R). Tucker is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

168. Tucker employs manufacturer's representatives who are responsible for assigned geographic territories and are paid on a commission basis (Tocci 2150, 2153, 2184-85). For services provided to Tucker, the manufacturer's representative generally receives a five percent commission based on total sales in his or her territory (Tocci 2375-76). [68]

Neither H.R. Gibson, Sr., Tommy Perkins, an employee of Gibson, Sr., nor the Gibson Trade Show ever acted as a manufacturer's representative for Tucker (Tocci 2182-84, 2321, 2325; CX 312A-C).

169. Tucker attended the Gibson Trade Show approximately two times per year during the period 1969 to 1973 (Tocci 2187).

The basic service provided to Tucker by the Gibson Trade Show was the opportunity to sell its line of products to Gibson retail store buyers (Tocci 2339, 2371-72). This was the main reason Tucker participated (Tocci 2188). Services provided by the Gibson Trade Show to Tucker included bringing over prospective customers to the Tucker booth, listing the Tucker booth location in a directory and printing and distributing show sheets to Gibson retail store buyers (Tocci 2372-73).

⁴² Parker sold Jotters and refills to K-Mart, Walgreens and Gibson stores in the period 1971-1974 (Renninger 497G). There is no indication in the record, either from invoices, tabulations, or testimony, as to the approximate dates when such sales were made to K-Mart or Walgreens. No witness from Walgreens or K-Mart testified. The evidence is too sketchy to permit a finding that such sales met the statutory criteria. Sales were also made to Target stores (Renninger 279).

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Such services also benefitted Gibson retail stores attending the Gibson Trade Show (Findings 71, 81; Tocci 2466, 2469-70).

170. Tucker's salaried employees staffed its booths at the Gibson Trade Show, and the expenses of the employees who attended the show were paid by the supplier (Tocci 2188, 2191).

171. In order to sell its products, Tucker's employees and representatives explained the advantages of Tucker's product line to Gibson store buyers at the trade shows; the manufacturer's representatives also made frequent calls on individual Gibson stores (Tocci 2192-93).

172. During the period 1969 to 1973, Tucker never sold its products at the Gibson Trade Show to customers other than Gibson stores. It was this supplier's understanding that other retailers were not allowed to attend (Tocci 2188-89).

173. During the 1969 to 1973 time period, the requirements imposed by the Gibson Trade Show for Tucker to participate in the shows were: reviewing its product line with Tommy Perkins and securing his approval; establishing competitive prices; making a two percent volume rebate payment per year; and, paying for rental of booth space at the trade shows (Tocci 2190-91, 2222-23).

174. Tucker prepared show sheets, which contained product and price information on merchandise presented to Gibson store buyers for their approval, for the February 1972 and February 1973 Gibson Trade Shows (Tocci 2223-24; CX 309A-M, 316A-Z-4). Tommy Perkins, the buyer at Seagoville, Texas, made the final decision with regard to pricing and other arrangements as well as Tucker's participation in the trade show (Tocci 2226). [69]

175. Tucker made the following booth fee payments to the Gibson Trade Show:*

* Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

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Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
February 14-18, 1970	2	\$250.00	\$500.00	Check	Ideal Travel Agency	CX 301A-B
February 12-16, 1972	2	\$275.00	\$550.00	Check	Ideal Travel Agency Seagoville, Texas	CX 308A-B
August 14-18, 1972	2	\$350.00	\$700.00	Check	Ideal Travel Agency Seagoville, Texas	CX 311A-B
February 10-14, 1973	2	\$350.00	\$700.00	Check	Joe W. Yeager	CX 315A-B Tocci 2201; SR 35A
August 13-17, 1973	2	\$350.00	\$700.00	Check		SR 35E, F: Tocci 2437-38

[70]176. In 1968 or 1969, Tucker agreed to a volume rebate after being told by Tommy Perkins that it was a requirement for participation in the Gibson Trade Show (Tocci 2185-86, 2208, 2325, 2411, 2415; CX 312A-C). "It was told to us [Tucker] that if we did not comply with his [Tommy Perkins'] request, we would not be allowed to participate in the Gibson Discount Center Trade Show" (Tocci 2209). Tucker accordingly agreed to pay a two percent volume rebate based on total sales to all Gibson stores, family owned or franchise (Tocci 2186, 2208, 2320, 2322, 2324, 2411, 2415; CX 312A-C). [71]

177. Tucker made the following show fee payments to the Gibson Trade Show:^{9/}

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payments on Tucker Records	
\$2,876.00	3/31/72	Credit Memo	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	1970	Advertising allowance for the year 1970 ^{99/}	CX 305A; Tocci 2246, 2252-53, 2409-10
\$4,818.30	12/31/72	Credit Memo	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	7/1/72 - 10/31/72	Advertising allowance from April 1, 1972 to Oct. 31, 1972 ^{99/}	CX 306B; Tocci 2251-53, 2269
\$ 426.80	2/1/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	2%	November and December 1972	November and December 1972 ad agreement rebate ^{99/}	CX 314 A-C
\$3,309.25	8/3/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas ^{999/}	2%	First half of 1973	Advertising allowance ^{99/}	CX 318 A-C; Tocci 2290, 2410-11
\$1,405.49	4/4/74	Check	The Gibson Trade Show 517 Gibson St. Seagoville, Texas	2%	Last half of 1973	2% trade show fee for the last half of 1973	CX 317 A-C; Tocci 2290, 2440

^{9/} Tucker viewed the two percent trade show fee as going to H.R. Gibson, Sr.

By Mr. Steele (Counsel for Respondents):

Q. Was it your understanding that the two percent payment was going to go to Mr. Herbert R. Gibson, Sr., rather than to any retail stores?

A. It was our understanding that the payment was going to H.R. Gibson, Sr.

Q. And not to the retail stores?

A. That is correct.

(Tocci 2265. See also Tocci 2320). However, the witness immediately followed by acknowledging the interrelationship between H.R. Gibson, Sr. and the retail stores, at least prior to November 1, 1972:

By Mr. Boomer (Complaint Counsel):

Q. It was your understanding at this time, Mr. Tocci, that Mr. H.R. Gibson, Sr., in 1970, owned the retail stores?

A. Yes, it was.

(Tocci 2265)

^{99/} Tucker's vice-president and director of marketing, Leonard J. Tocci, testified as follows:

JUDGE von BRAND: All right.

Mr. Tocci, at the beginning of your testimony, you spoke about volume rebates in connection with certain discussions you had with Mr. Perkins; is that correct?

THE WITNESS: Yes, that is.

JUDGE von BRAND: All right.

Now, what is the difference between those volume rebates and the reference to advertising allowance which I see on the credit memorandum, CX-306-B?

THE WITNESS: It is just the mechanics of processing the paperwork within our company, as far as the volume rebate. Although, it was just terminology used as advertising....

JUDGE von BRAND: All right.

Are you telling us that, as far as this transaction was concerned, it is your testimony, the terms, "volume rebate" and "advertising allowance" is synonymous?

THE WITNESS: Yes.

(Tocci 2252-53).

Based on this testimony, it may be fairly inferred that all of the payments made by Tucker to Gibson Products Co. and recorded by Tucker as advertising allowances were, in fact, show fee payments predicated upon a volume rebate based on total sales (See Tocci 2270, 2409-11).

^{999/} Although the payee on this check was Gibson Products Company, the check was endorsed: "Gibson Products Company, For Deposit Only, H.R. Gibson, Sr., D.B.A. the Gibson Trade Show" (CX 318C; Tocci 2299).

[72]178. The two percent trade show fee paid by Tucker to respondents for sales made to the Gibson retail stores in the years 1970, 1972 and 1973 was not a promotional allowance made in connection with the resale of merchandise at the retail level; rather, it was paid

for the opportunity to make a sales pitch to the Gibson stores at the trade show and is, therefore, an allowance or discount in connection with Tucker's original sale to those stores (Findings 68, 73, 97, 169, 173; SR 35Y; Tocci 2407-08).

179. Similarly, the booth fee was paid in order to enable Tucker to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Tucker's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Tucker's products to consumers (Findings 64, 68, 73, 95, 169, 173).

180. Tucker ceased attending the Gibson Trade Show after 1973 because it wanted to discontinue the two percent volume rebate payments due to its low profit margin (Tocci 2326-27).

During the period following the termination of Tucker's participation in the Gibson Trade Show, Tucker experienced minimal sales volume with regard to Gibson family owned stores. The sales to such stores were: in 1974, \$22,000; in 1975, \$4,000; no sales in 1976 or 1977 (Tocci 2334).

181. In 1970, 1972 and 1973, Tucker neither made nor offered to make payments based on a percentage of sales to any of its customers, other than Gibson Products Co. (Tocci 2246, 2254-57, 2282-83, 2292-94). In these same years, Tucker neither made nor offered to make alternative payments for services rendered to any of its customers, other than Gibson Products Co. (Tocci 2267, 2286-87, 2294-95).

During the period 1969 to 1973, customers of Tucker, other than Gibson, that had a trade show that Tucker attended were Ace Hardware, Cotter and Company and Merchants' Buying Syndicate ("MBS") (Tocci 2212). These customers all operate at the retail level of business (Finding 369). The trade shows operated by each of these organizations were open only to member retail stores (Tocci 2213-15). Tucker attended the MBS trade show from 1964 to 1973 (Tocci 2213); it attended the Ace Hardware show from 1968 to 1972 (Tocci 2214); it attended the Cotter show from 1972 to 1977 (Tocci 2215). While Tucker paid fees for rental of booth space at each of these shows, Tucker neither offered to pay nor did pay to these customers any percentage based on sales made to the stores that attended the show (Tocci 2213-16). Furthermore, Tucker neither offered to make nor did make an alternative payment to these customers for services rendered (Tocci 2267, 2294). [73]

182. During the period 1969 to 1973, Tucker did not offer to its customers either a standard advertising allowance, a standard program of volume rebates or a cooperative advertising program (Tocci 2143, 2150).

183. During the 1969 to 1973 period, Tucker sold its merchandise to

West and Company, Howard Brothers, Wal-Mart, W.E. Walker, Perry Brothers, OTASCO, Abbey Sales, Surplus City, Sterling Storage, H.E. Butt and family owned and franchised Gibson stores (Tocci 2158-59, 2161-62). These customers all sell merchandise at the retail level (Tocci 2159-60, 2168-70, 2175-81; Finding 369).

In that period, Tucker sold trash cans, waste baskets, laundry baskets, pails and dish pans to these retailers (Tocci 2162-63).

184. Tucker manufactures approximately 100 to 120 different products (Tocci 2396; Finding 167). For example, it makes eight to ten different sized trash cans ranging from a size that could be used in restaurants to a size suitable for the home (Tocci 2397). Tucker's waste baskets and dog dishes are also of different sizes and shapes (Tocci 2397).

185. Howard Brothers and West and Company are both licensed to use and do use the Gibson name on some of their stores and their own name on other of their stores (Tocci 2390-91, 2463-64). Both have attended Gibson Trade Shows in which Tucker has participated (Tocci 2391-92). The record accordingly is unclear as to whether, in their case, sales to Howard or West and Company could properly be construed as a sale to a nonfavored customer in a transaction involving a discrimination favoring the Gibson stores. The evidence (CX 320A) does not reveal in which instances Howard Brothers and West and Company were competing with Gibson retail stores; sales to these two customers might be sales to them in their roles as Gibson licensees.

186. There is considerable variation in Tucker's products (Finding 184). There is no evidence in the record pertaining to the specific merchandise purchased by competitors of Gibson. The invoices in the record (CX 320A-R) relate only to purchases by Gibson stores. There is insufficient evidence to support a finding that Gibson stores and other customers of Tucker compete in the resale of Tucker products of like grade and quality. [74]

D. Revell, Inc.

187. Revell, Inc. ("Revell"), of Venice, California, manufactures plastic model kits, including models of airplanes, ships, cars and animals, home racing sets, train sets and craft items, which it markets throughout the United States and the world (Wells 612; Blaustein 780-81).

Revell makes sales to national accounts (whose stores are located throughout the United States), regional accounts and wholesale accounts (Blaustein 785, 789). Revell has made sales to both Gibson franchised stores and Gibson company-owned stores (Blaustein 840-41).

Revell sells and ships its products from its Venice, California manufacturing plant to customers throughout the United States. Such sales include shipments to Gibson stores located outside of California (CX 752A-Z-103; Blaustein 780-81; Wells 613). Revell is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

188. Revell entered into contracts to participate, and did participate, in the Gibson Trade Show in the years 1968 through 1976 (Wells 614-15; Blaustein 813-21; SR 25A-F, H-P). Revell terminated its participation in the Gibson Trade Show in 1977 (Blaustein 802).

189. Defining a customer as an entity for whom Revell would write up an invoice on a shipment, Revell had 500 to 600 customers in 1973, including Gibson stores (Blaustein 782). Among the retail customers to whom Revell sold its products in the period 1973-1976 were J.C. Penney, Sears, Zayre, K-Mart, the Gibson stores and W.T. Grant (Blaustein 850-52).⁴³ Revell, in the relevant period, also made sales to the Target stores, a chain of 59 discount retail stores located in Minnesota, Wisconsin, Illinois, Iowa, Missouri, Colorado, Oklahoma and Texas (Doyle 4288-89, 4291, 4370; CX 1335A-B).

190. In the period 1969 to 1972, Revell representatives called on Gibson stores in addition to attending the Gibson Trade Show (Wells 762). And, Revell set up a program whereby its regional sales managers would contact those individuals having buying jurisdiction for Gibson stores (Wells 720-24). Revell has neither sent invoices nor sold merchandise to Herbert R. Gibson, Sr. or to the Gibson Trade Show (Blaustein 812). [75]

191. Revell's contacts with the respondents in connection with the Gibson Trade Show were with Gary Leverett and Lynn Low. The topic of discussion at meetings in Seagoville, Texas with Leverett and Low in 1973 and 1975, respectively, was Revell's participation in the trade show (Blaustein 790-91). Beginning in March 1975, Revell was advised that the Gibson Trade Show was a selling organization which would represent Revell to sell merchandise (Blaustein 793, 798, 847-48).

Revell, however, did not regard the Gibson Trade Show as its sales representative (Blaustein 807). And, trade show personnel did not write orders for Revell after 1975. Revell's own sales staff wrote the orders (Blaustein 807). Revell regarded the Gibson Trade Show as a customer (Blaustein 807).

192. Revell and Gibson Trade Show employees coordinated blanket and makeup orders. Some of the sales by Revell were made through a

⁴³ Revell's products were listed in the catalogs of Sears, J.C. Penney and Montgomery Ward (Blaustein 836).

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blanket order (Finding 89; Blaustein 803-04). Beginning in 1975, sales were effected through makeup orders, whereby Revell and Gibson Products personnel set up specific orders that required Gibson stores to sign and return purchasing orders so as to receive the merchandise (Blaustein 804). In the case of the blanket orders, while the customer could modify the order, the store would receive the merchandise specified on the order if it did nothing (Blaustein 804). In 1973, 1974 and 1975, blanket orders covered all Gibson stores, franchised as well as company-owned (Blaustein 853-54).

193. In 1968, the requirements for Revell's participation in the Gibson Trade Show were payment of a booth fee and development of a selling program to be presented to all Gibson stores at the show (Wells 618). In the years 1969 through 1976, the additional requirement of payment to the Gibson Trade Show of a one percent allowance on total sales to all Gibson stores (franchised and company-owned) was imposed (Wells 619-20; Blaustein 859). [76]

194. Revell paid booth fees to the Gibson Trade Show as follows:

Date of Show	Number of Booths	Rate Per Booth	Amount Paid	Payee	
November 1969	3	\$250.00	\$ 750.00	Ideal Travel Agency at Seagoville, Texas	CX 731A-C; Wells 638
May 4-8, 1970	4	250.00	1000.00	Ideal Travel Agency at Seagoville, Texas	CX 735A-C; Wells 653
May 14-18, 1973	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25H
August 13-17, 1973	1	350.00	350.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25L
November 5-9, 1973	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25K
May 13-17, 1974	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25I
November 4-7, 1974	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25H
May 12-16, 1975	2	350.00	700.00	H.R. Gibson, Sr. at Seagoville, Texas	SR 25E
November 8-12, 1975	2	350.00	700.00	H.R. Gibson, Sr. at Dallas, Texas	SR 25D
May 15-19, 1976	2	350.00	700.00	H.R. Gibson, Sr. at Dallas, Texas	SR 25C
October 2-6, 1976	2	350.00	700.00	The Gibson Trade Show at Dallas, Texas	SR 25B

[77]195. Revell agreed to pay, and did pay, to the Gibson Trade Show the one percent rebate for 1969 and subsequent years (Wells 629-

30, 649-50, 660-62, 663-64; Blaustein 859). For instance, in exchange for participating in the 1975 trade show, Lynn Low suggested that Revell make a payment based on annual sales. As a result, Revell agreed to pay a one percent allowance at the end of the year on all the business which it did with the Gibson Products Company for the 1975 calendar year (Blaustein 799-800).

The one percent rebate payments were made by Revell in order to assure participation in the Gibson Trade Show and use of blanket orders (Wells 727; Blaustein 800). However, Revell had no specific understanding with any Gibson personnel as to what the one percent payment might be used for (Wells 743).

Revell had been advised that it would be the beneficiary of various services performed by the Gibson Trade Show, including marketing presentations, a directory of all Gibson stores, blanket orders, mailings and advertising. Revell was especially drawn to the trade show by a so-called Extensive Sales Program, which promised to generate orders for manufacturers (Wells 726-27; Blaustein 801-02). [78]

196. Revell made show fee payments to the Gibson Trade Show, based on one percent of total sales to all Gibson stores, as follows:

Year	Amount of Shipments	Amount Paid	Payee	Invoice Date	
1969	\$313,122.26	\$3,131.22	Gibson Products Co. of Seagoville, Texas	1/20/70	CX 733A, B, D
1970	372,718.00	3,727.18	Gibson Products Co. of Seagoville, Texas	2/02/71	CX 739A, C
1970	Balance due on 1970 purchases	391.76	Gibson Products Co. of Seagoville, Texas	3/19/71	CX 740B-C

[79]197. The one percent trade show fee paid by Revell to the respondents for sales made to Gibson stores in 1969 and 1970 was not a promotional allowance made in connection with the resale of Revell's products to consumers (Findings 68, 73, 97, 193).

198. Similarly, the booth fee was paid in order to enable Revell to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Revell's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Revell's products to consumers (Findings 64, 68, 73, 95, 193).

199. During the period 1969 to 1972, Revell did not make any payments to any of its customers, other than the Gibson Trade Show, based on a percentage of total sales (Wells 663-64, 750). Nor did Revell make any payments for its merchandise being listed in the catalogs of retailers such as Sears and J.C. Penney (Blaustein 855-56).

200. The Gibson Newspaper Mat Service, which prepared tabloids advertising products offered for sale in Gibson stores, prepared an

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advertising tabloid for Revell. Revell paid \$300.00, on November 24, 1969, to Gibson Products Co. of Seagoville, Texas for the newspaper mat service (Wells 641-42; CX 732F). Revell did not have ad mats prepared for any customers other than Gibson Discount Centers, Gibson franchised stores or Gibson family-owned stores (Wells 641). The record, however, does not show what products were promoted for resale in the tabloid.⁴⁴ Under the circumstances, there is insufficient evidence on the question of whether customers competing in the resale of products of like grade and quality were subjected to a discrimination cognizable under Section 2(d) of the Robinson-Patman Act.

201. In 1969, 1970, 1971 and 1972, some of the accounts to whom Revell sold plastic model kits included Gibson Discount Centers, Gibson Products Co., Sears, Roebuck and Company, W.T. Grant, S.S. Kresge, J.C. Penney and G.C. Murphy (Wells 666-68; CX 752). Revell products purchased by customers such as Sears, Grant, Penney and K-Mart were shipped to customer warehouse locations with subsequent redistribution by the customer to its retail or catalog outlets (Wells 706-08). [80]

202. During each of the years in the period 1969 through 1975, there were approximately 200 items in the plastic model kits line manufactured by Revell. Since a third of the items were changed from year to year, there were about 600 to 700 different items in the product line for the 1969 to 1975 time frame (Wells 703). The prices of the different items in the plastic model kits product line may range from \$1.50 to \$10.00 or \$20.00 (Wells 705).

203. The tabulations in the record, summarizing Revell sales in 1970 and 1971, show the following contemporaneous transactions which involve sales of goods of like grade and quality to competing customers (CX 752A-Z-103):⁴⁵

Hattiesburg, Mississippi: Baja car⁴⁶ (Gibson - 10/1/70; Sears⁴⁷ - 8/3/70, 11/5/70).

Brownsville, Texas: Baja car (Gibson - 8/7/70; Sears - 10/2/70).

Dallas, Texas: Baja car (Gibson - 8/7/70, 11/6/70; Sears - 7/22/70, 7/23/70, 8/4/70, 8/14/70, 8/27/70, 9/18/70, 9/22/70, 9/24/70); Trano

⁴⁴ Generally, the tabloids promoted particular items for resale. Products to be advertised in Gibson tabloids were noted as such at the trade show (Finding 110). Also compare CX 491E.

⁴⁵ The tabulations show many other transactions, including contemporaneous sales involving the Gibson stores and other customers of Revell. In the majority of these sales, however, there is no record evidence establishing the functional level at which such customers operated. Nor, in most of the transactions recorded, is there sufficient evidence to determine whether the like grade and quality requirement has been met. Given the hundreds of types of models put out by Revell and their wide price variation (Finding 202), product descriptions such as "planes," "bikes," "cars," "ships," etc. do not meet the like grade and quality requirement.

⁴⁶ The so-called "Baja car" is noted in the tabulations as, variously, Baja car, Baja 500, Sears Baja, Baja. In these instances, the product description is sufficiently precise to permit a finding that the products involved are of like grade and quality.

⁴⁷ Sears and J.C. Penney function at the retail level of operations (Finding 369).

Base (Gibson - 6/12/70; J.C. Penney⁴⁷ - 2/13/70); Dune Buggy (Gibson - 9/11/70, 11/10/70, 11/16/70; Sears - 8/18/70, 9/24/70, 10/2/70, 11/10/70); Evil Iron (Gibson - 12/27/71; J.C. Penney - 9/15/71). [81]
 Irving, Texas: Baja car (Gibson - 8/11/70; Sears - 7/70).

Victoria, Texas: Baja car (Gibson - 8/7/70; Sears - 8/70, 10/2/70).

Wichita Falls, Texas: Baja car (Gibson - 5/7/70; Sears - 7/23/70, 11/4/70).

Sherman, Texas: 12 pc. Disney (Gibson - 6/23/71; J.C. Penney - 6/25/71, 7/9/71, 7/29/71, 9/15/71, 10/1/71, 11/1/71).

Revell's sales to Target (Finding 189) are not recorded in the tabulations. Nor is there other record evidence as to the specific model type, style, price or price range of the plastic model kits purchased by Target, or as to the exact dates of those purchases.

E. Regal Ware, Inc.

204. Regal Ware, Inc. ("Regal"), of Kewaskum, Wisconsin, manufactures cookware and electric appliances (Mehring 1350-51).

Regal manufactures its products at four locations in the U.S.; they are Kewaskum, Wisconsin; Wooster, Ohio; Flora, Mississippi; and Peoria, Illinois. From these points, Regal sells and ships its products throughout the United States (Mehring 1351), including shipments to Gibson stores located outside of the above four states (CX 696A-E). Regal is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

205. Regal sells to wholesalers, catalog houses, premium accounts, military exchanges, cooperatives who service retailers, hardware wholesale distributors and electrical distributors, among others (Mehring 1589). It also sells to major chain store accounts as well as non-chain store accounts. The chain store accounts, with multiple stores operating under the same name, encompass discount stores, drug stores and variety stores (Mehring 1352). The chain store accounts that were customers of Regal during the period 1971 to 1975 include Woolworth, K-Mart, Gibson, Wal-Mart, Sterling stores, Koons, Jefferson stores, Target, TG&Y and Zayre (Mehring 1352-53, 1712; CX 696A-E; Evans 3951-52; Pettit 4100). [82]

In 1975, Regal did \$888,359 in business with all Gibson retail stores (SR 18R). Regal's 1975 volume of business with Target was approximately one-tenth of this amount (Mehring 1710-11). Its volume with TG & Y in that year was approximately one-fourth to one-third of the business with the Gibson stores (Mehring 1712). Regal did approximately at least four times as much business with all of the Gibson stores taken together as with Woolworth (Mehring 1628). Only S.S.

Kresge Company and the Zayre Corporation had larger purchase volumes with Regal in 1975 than the Gibson stores (Mehring 1712). 206. Regal sold and shipped goods directly to individual Gibson stores in 1971 and 1972, and continued to ship a majority of the goods in this manner in 1974 and 1975 (Mehring 1362, 1366-67).

In 1971, although shipments of merchandise were sent by Regal to individual stores, the Gibson Products Company, 519 Gibson Street, Seagoville, Texas, was the paying office with accounting responsibility for a number of individual Gibson stores (Mehring 1565-67). Regal viewed Gibson Products Company, at 519 Gibson Street, as a customer since it appeared on Regal's accounts receivable ledger (Mehring 1568). 207. Personnel who worked for Regal on a commission basis were regarded as manufacturer's representatives (Mehring 1576-77). H.R. Gibson, Sr. did not demonstrate Regal products in Gibson stores to consumers, did not put up Regal product displays in Gibson stores, did not write orders for Regal products to Gibson retail stores and did not staff the Regal booth at the Gibson Trade Show in 1971 (Mehring 1573-75). Regal did not regard H.R. Gibson, Sr., or personnel in his employ, as a manufacturer's representative (Mehring 1577). Rather, he was regarded as a special type of representative; other special representatives were involved in the areas of military sales and direct mail sales (Mehring 1578). In 1971 through 1975, Gibson was the only chain store account that fell into this category of special representation (Mehring 1581).

208. Regal participated in at least one Gibson Trade Show per year in the years 1971 to 1975, and often attended two shows per year, generally in February and August (Mehring 1382). It attended Gibson Trade Shows in 1977, and plans to participate in future shows (Mehring 1382). [83]

209. Regal participated in the Gibson Trade Show because of the opportunity to meet the greatest number of buyers within a limited period of time in one place (Mehring 1383, 1646-47).

210. Approximately four to six Regal employees attended the trade shows (Mehring 1384, 1482). Regal always paid the expenses of its sales personnel, all of whom were salaried employees of Regal (Mehring 1387, 1477; CX 660A-E, 664A-E, 670A-D, 676A-E, 690A-H, 695A-E).⁴⁸ At the trade shows, Regal verbally described how its products worked and discussed selling techniques with buyers (Mehring 1385, 1486).

211. Regal and the Gibson Trade Show utilized show sheets as actual order forms in connection with the price listings of Regal items

⁴⁸ Not all of the expenses in the listed documents necessarily relate to the Gibson Trade Show, since Regal personnel attending the show would also attempt to call on other customers (Mehring 1481, 1605-06).

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to be offered for sale at the trade show (CX 647C, 649A-C, 659A-B, 663A-N, 665, 669A-N, 671A-M, 675A-M, 689A-I; Mehring 1511-12). Blank forms were submitted to Regal, who filled them in with product information and price listings. The show sheets were then forwarded to the Gibson Trade Show for bulk printing and distribution (Mehring 1511). The show sheets were not final until initialed by someone at Regal (Mehring 1516-17).

The show sheets were important in helping to sell Regal products to the Gibson retailers (Mehring 1647). In preparing show sheets, Gibson personnel might inform Regal that certain items were inappropriate for Gibson stores. Regal considered this helpful (Mehring 1645). 212. The requirements for participation at the Gibson Trade Show during the years 1971 to 1975 were: payment of a booth fee; and, payment of a show fee which consisted of a percentage of total annual sales to all Gibson stores (Mehring 1385-88; CX 672B). [84]

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213. Regal made the following booth fee payments to the Gibson Trade Show during the period 1969 to 1977: ^{*/}

Date of Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
July 10, 1969	2		\$450.00	Check	Gibson Discount Center Market Hall, 2200 Stemmons Freeway Dallas, Texas	CX 642A-C
February 14-18, 1970	2		\$500.00	Check	Gibson Products Co. c/o Ideal Travel Agency 519 Gibson Street Seagoville, Texas	CX 643A-C
February 8-12, 1971	2		\$550.00	Check	Gibson Discount Center February Trade Show Market Hall, 2200 Stemmons Freeway Dallas, Texas	CX 645, 646A-C
August 16-20, 1971	2		\$550.00	Check	Ideal Travel Agency	CX 648A-F
February 12-16, 1972	2		\$550.00			CX 658
August 14-18, 1972	2		\$700.00	Check	Ideal Travel Agency	CX 662A-E
February 10-14, 1973	2		\$700.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 668A-G; SR 18E
August 13-17, 1973	2		\$700.00	Check	H.R. Gibson, Sr.	CX 674A-E; SR 18H
February 9-13, 1974	2		\$700.00	Check	The Gibson Trade Show	CX 681, 682A-C
August 12-16, 1974	2	\$350.00	\$700.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 687, 688A-C, SR 18F
February 8-12, 1975	2	\$350.00	\$700.00	Check	H.R. Gibson, Sr. The Gibson Trade Show Seagoville, Texas	CX 692, 693A-C
August 4-8, 1975	2	\$350.00	\$700.00			SR 18D ^{**/}
February 9-13, 1976	2	\$350.00	\$700.00			SR 18C ^{**/}
January 5-7, 1977	3	\$225.00	\$675.00			SR 18A ^{**/}

^{*/} Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

^{**/} The record evidence is deficient as to further information about these payments; no copies of checks were introduced into the record, nor was testimony offered, such as would establish that these payments were actually made.

[85]214. Regal paid the Gibson Trade Show a show fee in order to meet what it viewed as its competition (Mehring 1673-77). For instance, Regal learned that a competitor, Oster, was going to participate in the trade show and would pay a four percent show fee (CX 672D; Mehring 1548, 1676). Regal took such facts into consideration in deciding the amount of the show fee that it would pay (Mehring 1548-49, 1675).

The show fee percentage paid to the Gibson Trade Show was two percent in 1971, 1972 and 1973 (Mehring 1387-88; CX 677B). In 1974, the percentage was increased to three percent and has remained at that level ever since (CX 677B; SR 18B, E, G; Mehring 1388, 1390, 1417, 1422, 1562-63, 1648). [86]

215. Regal made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Regal Records	Case No.
\$15,044.83	2/14/70	Check	Gibson Products Co., Attn: Tomy Perkins	2%	1969	Volume rebate	CX 620A-C
11,884.38	10/20/71	Check	Gibson Products of Seagoville	2%	11 months of 1970 sales	Rebate of 2% advertising allowance for 11 months of 1970 sales to Gibson stores. ^{9/}	CX 620A-C
5,725.20	12/28/71	Check	Gibson Products Co., 319 Gibson St., Seagoville, Texas	2%	1971	1971 Advertising - 2% of sales ^{10/}	CX 632A-C; Mehring 1545-46
12,046.30	12/17/72	Credit Memo	"	2%	1972	Advertising allowance for 1972 ^{9/}	CX 632A-C; 635, 678C
5,852.34	10/27/73	Credit Memo	The Gibson Trade Show 317 Gibson St., Seagoville, Texas	2%	Jan.-June 1973	Show fee for Jan. - June 1973	CX 677A-D; 678
4,799.50	10/15/74	Credit Memo	"	2%	July-Dec. 1973	Show fee for July-Dec. 1973	CX 665, 677E; 680A-B; Mehring 1689-90
11,525.44	10/17/74	Credit Memo	"	2%	Jan.-June 1974	Show fee for Jan. - June 1974	CX 685, 686
8,313.18	2/3/75	Credit Memo	"	2%	July-Dec. 1974	Show fee for July-Dec. 1974	CX 691
8,075.89	9/30/75	Check	The Gibson Trade Show 1206 E. Lubbocker Dallas, Texas	2%	Jan.-June 1975	Show fee for Jan. - June 1975	CX 180
17,576.88	10/17/76	Check	"	2%	July-Dec. 1975	Show fee for July-Dec. 1975	SR 186, R, S
10,933.40	9/21/76	Check	The Gibson Trade Show 319 Gibson St., Seagoville, Texas	2%	Jan.-June 1976	Show fee for Jan. - June 1976	SR 181, U, V
14,248.85	2/9/77	Check	The Gibson Trade Show 1206 E. Lubbocker Dallas, Texas	2%	July-Dec. 1976	Show fee for July-Dec. 1976	SR 188

^{9/} While the documents introduced into evidence describe these payments as advertising allowances, there is reason to doubt that description. Unlike the other records of payments made for advertising by Gibson of Regal products (see the chart detailing advertising allowances made by Regal to the Gibson Trade Show infra), the two instant payments cover blanket periods of 11 months in one case and one year in the other, do not specify whether the advertising was in tabloid form, in print ads or in some other form and do not specify what product(s) or product line(s) were advertised. Further, the payments are for substantially large sums and are within the same monetary range as the remaining show fee payments during the 1969 to 1976 time period.

^{10/} While the documents introduced into evidence describe this payment as an advertising allowance, the Regal witness admitted that the payment was, in fact, a show fee (Mehring 1545-46). Such an admission casts further doubt on the descriptions of the two payments referred to in the footnote above and suggests that they, too, may well be show fees.

[87]216. The three percent show fee paid by Regal to the Gibson Trade Show was viewed by Regal as payment for the trade show's services in helping Regal make sales to retailers (Mehring 1648-49). Regal did not consider the three percent show fee, or the two percent show fee paid prior to 1973, as promotional payments (Mehring 1648-49).

217. The services received by Regal from the trade show in exchange for the percentage payments made from 1971 through the present basically consisted of the opportunity to sell to buyers for the Gibson organization (Mehring 1392). The show fee was paid in connection with the original sale of Regal's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Regal's products to consumers (Findings 68, 73, 97, 209, 212, 216).

218. Similarly, the booth fees were paid in order to enable Regal to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Regal's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Regal's products to consumers (Finding 64, 68, 73, 95, 209, 212).

219. In 1972, Regal sold its products to Woolworth and TG & Y, in addition to Gibson stores (Mehring 1400; Finding 205). It did not make payments to Woolworth or TG & Y or any other chain store accounts.

based on volume of sales in that year (Mehring 1398, 1400). Nor did Regal make such payments to Woolworth in 1973 (Mehring 1405-06).

Regal did not make the three percent payment based on volume of total sales available to Woolworth in 1975. It only made a one percent advertising allowance available to Woolworth (Mehring 1422; Finding 223).

220. In the period 1969 to 1975, Regal had a standard two percent advertising allowance available for all its customers. This was the only promotional allowance made available to the Gibson stores in that period (Mehring 1392, 1641). [88]

221. Regal made the following advertising allowances to the Gibson Trade Show from 1971 onward:

Amount	Payee	Date of Payment	Form of Payment	Description of Payment on Regal Records	
\$ 880.80	Gibson Products Co. Seagoville, Texas Attn.: Tommy Perkins	12/22/71	Credit Memo	Advertising allowance on #840AV and F Buckeye Decorated sets appearing in November tab	CX 654A-B
\$ 1,161.75	Gibson Products Co. 519 Gibson St. Seagoville, Texas	4/17/72	Credit Memo	Advertising allowance on W740 Set in the April tab	CX 661A, C; Mehring 1429, 1431
\$ 500.00	Gibson Products Co. 519 Gibson St. Seagoville, Texas	5/22/72	Credit Memo	Advertising allowance for Spring Specials	CX 661B
\$ 500.00				IL 6726 in pre-Christmas tab. */	CX 672C
\$ 500.00				W820 in Spring tab.*/	CX 677D
\$ 500.00				IL 6727 in November tab. */	CX 677B, D

*/ The record evidence does not provide any further information as to these payments; neither copies of invoices nor copies of checks or credit memos were introduced into evidence, so as to establish the exact details of these payments and whether they were, in fact, paid out.

[89]222. The tabloids utilized in 1972 were under Regal's standard advertising program. Regal did not specify whether an advertisement was to run in a tabloid, as a print ad or in some other format (Mehring 1432-33).

The Gibson Trade Show discontinued the procedure of running tabloids for Regal products in 1973 (Mehring 1431-32).

223. Regal made available to Woolworth its regular two percent promotional allowance for promotion of Regal products during the 1969 to 1975 time period (Mehring 1633-34). However, Woolworth demanded and obtained a special promotional package from Regal.

Woolworth received a one percent advertising allowance and a one percent price reduction based on invoice price⁴⁹ (Mehring 1635-36). Under that arrangement, in 1973, 1974 and 1975, Woolworth received approximately a one percent allowance on print advertising. The Gibson stores, in that period, received a two percent allowance for print or tabloid advertising (Mehring 1414, 1417-18, 1421-22, 1425-26). The Gibson stores, however, did not receive a price reduction as part of their promotional program from Regal (Mehring 1641).

224. Regal sold its products to TG & Y in 1973, 1974 and 1975 (Mehring 1423). Regal made available to TG & Y an advertising allowance based on TG & Y's sales in the 1973 to 1975 period. TG & Y availed itself of the advertising allowance offer by running a tabloid which included Regal products (Mehring 1423-24, 1433).

Regal made various promotional offers available to TG & Y during the 1971 to 1975 time period (Pettit 4162). Different Regal products could have had different percentage advertising allowances or, even, lump sum advertising allowances (Pettit 4237-38). Promotional offers made by Regal to TG & Y were a thousand dollars credit memo in exchange for which TG & Y had to buy Regal products and advertise them in their company-wide advertising program (Pettit 4169-70, 4232), as well as other lump sum dollar amounts (Pettit 4173; SR 111F-G).

225. Regal sold its products to Target in 1975 (Mehring 1442). It made its standard advertising program available to Target in that year (Mehring 1443-44). [90]

Other than an advertising allowance based on two percent of total sales under Regal's standard advertising program (Mehring 1443), Regal made no other percentage of total sales payments available to Target in 1975 (Mehring 1444).

226. The two percent advertising allowance paid by Regal to Gibson retail stores was separate and distinct from the three percent of total sales volume paid to the Gibson Trade Show in 1973 (Mehring 1417; CX 683A).

227. The record does not support a finding that the Regal tabloid payments to respondents were beyond the scope of its regular advertising programs available to Regal's other customers and, thus, discriminatory (Finding 220).

228. Regal offered various promotional services to its customers who did not have trade shows. These services included in-store demonstrations of Regal products by Regal personnel for consumers at

⁴⁹ Woolworth placed Regal products in a tabloid as part of its promotional arrangement with Regal. The one percent price reduction in Woolworth's net invoice price was Regal's payment for the tabloid advertising (Mehring 1644-45).

the retail level, store display stands and product knowledge sessions where Regal personnel discussed Regal products with retail store sales personnel (Mehring 1488-90, 1601). These services were an extension of Regal's sales activities and were expected by its customers; they were not part of a formal program (Mehring 1493).

229. Regal manufactures about eight different cookware lines under the Regal name (Mehring 1370).

230. Regal also manufactures so-called "traffic appliances," which are small, hand-held electrical appliances such as coffee makers, fry pans, corn poppers, fondues, hot pots, griddles, slow cookers and french friers (Mehring 1370, 1611). Regal lists all of the electrical appliances that it produces under the heading, "traffic appliances" (Mehring 1377). The traffic appliance category is comprised of entirely different products. Including color variations, Regal manufactures over 50 different types of traffic appliances (Mehring 1610-11). Regal's customers generally do not purchase all of the traffic appliances which it manufactures (Mehring 1612-13).

Regal manufactures approximately 10 different models of coffee-makers, with color variations within each model (Mehring 1613, 1617-19). For instance, during the 1969 to 1975 time period, one type of Regal coffeemaker, called Poly Perk, had four different sized models, with three different colors in each size, to serve different consumer needs and preferences (Mehring 1617-19). [91]

During the 1969 to 1975 time period, the electric fry pans manufactured by Regal were all Teflon coated, with various exterior color combinations; there were two sizes (Mehring 1619-20).

Regal manufactures only one basic model of a corn popper. There were only color variations in the fondue and slow cooker models. There were different models, aside from color variation, of the other electrical products in the traffic appliance category (Mehring 1620).

231. There are differences in quality, color, styling and metals used in the various cookware lines manufactured by Regal (Mehring 1372, 1621-22). During the 1969 to 1975 time period, Regal's cookware lines fell into two basic subcategories, Teflon coated and non-Teflon coated interior surfaces (Mehring 1619-20, 1622-24). The purpose of this differentiation was to meet consumer needs and preferences (Mehring 1623).

Regal sold as many as four cookware lines to Gibson stores in 1971. The names of these lines are Duncan Hines, Imperial, Buckeye and Mardi Gras (Mehring 1371-72). There are different individual products and sets within each of the four lines (Mehring 1620-24). Regal's customers, *i.e.*, wholesale houses, distributors, central buyers, could

purchase products within each of the four lines either individually or in sets (Mehring 1621-22).

The Duncan Hines and Imperial lines are made of stainless steel, but of different weights. The Buckeye and Mardi Gras lines are made of aluminum, and are also of different weights (Mehring 1373).

During the 1969 to 1975 time period, the Buckeye line consisted of the following six individual products: three different sized saucepans, a Dutch oven and two different sized fry pans. The purchase of these product differentiations was to meet consumer needs (Mehring 1621).

232. The record shows that Regal sold traffic appliances to the following customers in the years indicated:

Gibson Stores	1971 - 1975
K-Mart	1973 - 1975
T.G. & Y.	1974, 1975
Woolco	1975
Target	1975

(Mehring 1378-79, 1380, 1442).

[92] In 1969 to 1975, TG & Y purchased Regal products, including so-called "staple items" such as Poly Perk coffee makers, tea kettles, pots and pans (Pettit 4102).

In 1975, Regal sold its Duncan Hines cookware line to TG & Y and Gibson stores (Mehring 1374), its Imperial cookware line to K-Mart, TG & Y, Target and Gibson stores (Mehring 1374-75, 1442), and its Buckeye cookware line to TG & Y and Gibson stores (Mehring 1375).

233. The array of Regal products carried by retailers, including Gibson stores, varies widely (Mehring 1624).

234. The tabulations in the record, summarizing Regal sales between 1969 and 1975, show the following contemporaneous transactions which appear to involve sales of goods of like grade and quality to competing customers (CX 696A-E):⁵⁰

⁵⁰ The tabulations and record testimony disclose other contemporaneous transactions. However, in many of these sales, there is no record evidence of the functional level that the customer was operating at. Thus, it is not possible to determine whether the customer was competing with Gibson retail stores in the resale of Regal's products. Moreover, there is no record evidence showing that these transactions involve goods of like grade and quality. For instance, the tabulations describe certain products as "Dutch oven," "fry pan," "Poly Perk" and "pan." Poly Perks come in four different sizes (Finding 230). Dutch ovens and fry pans also come in different sizes, are made of different metals, come in different weights and styles, and have Teflon or non-Teflon interior surfaces (Finding 231). The difference in interior surfaces may alone vitiate any showing of like grade and quality, although this difference in combination with the others just listed remove any possibility of like grade and quality having been established for these products. Fry pans may be electric or non-electric (Findings 230, 231).

The testimony discloses that, in 1975, Regal sold each of its four cookware lines as sets to Gibson retail stores and certain stores allegedly in competition with the Gibson stores (Finding 232). However, there is no record evidence, in the form of documentation or otherwise, stating the places and dates of these transactions. Moreover, each of the four cookware lines sold were either Teflon coated or non-Teflon coated (Finding 231). Thus, like grade and quality was not established for these products.

[93]Shreveport, Louisiana: Cups⁵¹ (Gibson - 3/14/72, 3/27/72; TG & Y⁵² - 4/10/72); Pot-o-Plenty⁵¹ (Gibson - 10/10/73; TG & Y - 9/7/73); Poly Urn⁵¹ Gibson - 9/20/73, 9/25/73; TG & Y - 11/19/73).

Lubbock, Texas: Poly Urn⁵¹ (Gibson - 3/2/73, 9/14/73; TG & Y - 3/13/73, 11/19/73); Tea Kettle⁵¹ (Gibson - 9/14/73, 9/10/74, 10/7/74, 12/12/74; TG & Y - 9/26/73, 2/18/74, 10/25/74); Bowls⁵¹ (Gibson - 2/6/74; TG & Y - 2/19/74).

F. Waltham Watch Company

235. Waltham Watch Company ("Waltham"), of Chicago, Illinois, manufactures and sells watches, jewelry and clocks (Levitt 1764-65).

Waltham sells and ships its goods from Chicago to throughout the continental United States, including sales to Gibson stores located outside of Illinois (Levitt 1765; CX 216A-D). Waltham is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such interstate sales, are in the course of such commerce.

236. Waltham sold its products to wholesalers for resale to catalog houses and to premium houses in the 1969 to 1975 period (Levitt 1993-94). It also sold to retailers such as the Gibson stores (CX 205A-B).

237. Waltham had a total sales volume for watches of \$185,716.25 with all Gibson stores during 1973 (CX 205A-B). Most of Waltham's sales of watches to Gibson stores in 1973 were shipped to individual stores (Levitt 1838; CX 209B).

238. During the 1969 to 1975 period, Waltham merchandise could not be displayed at the Gibson Trade Show unless listed on show sheets (Levitt 1868). [94]

Waltham furnished the product and price information contained in the show sheets, which were prepared and distributed by the Gibson Trade Show for use at their various shows in connection with the placement of orders (CX 194A-F, 196A-K, 208A-C, 212A-N; Lehman 1257-58, 1261, 1264, 1266; Levitt 1874-75). The show sheets could serve as prospective orders, with the individual Gibson retail stores filling in the blanks regarding quantity (Levitt 1987).

During the 1969 to 1974 time period, Waltham presented merchandise to Gibson buyers; the buyers, then, preselected merchandise and authorized the merchandise to be listed on the show sheets (Levitt 1863-64, 1866-67, 1877-78). Waltham's sales representative considered this procedure to be a sales presentation (Levitt 1866, 1881).

The Gibson Trade Show buyers, such as Gary Leverett, preselected

⁵¹ There is no record evidence indicating that there are variations in any of these products, such as materials used, range of sizes, weight or electric versus non-electric operation.

⁵² TG & Y functions at the retail level of operations (Finding 369).

merchandise for the benefit of the Gibson stores attending the trade show throughout the 1969 to 1975 time period (Levitt 2007-08). As such, Leverett was acting on behalf of the Gibson stores (Levitt 2008). Distribution of the show sheets at the trade show was a benefit to the Gibson stores as well as an effective selling tool for Waltham (Levitt 1988, 2008, 2020-22).

239. Belva Gibson participated at various times in physically selecting the merchandise, usually jewelry, that she thought would sell in Gibson stores (Levitt 1826-27).

240. In 1971, Gary Leverett, the jewelry buyer for Gibson Products Company, selected four models of watches from Waltham's sales representative for purchase. The transaction took place in Seagoville (Levitt 1823-25).

Although Leverett assumed the title of merchandising manager in 1973 or 1974, he continued to perform the same functions he had performed in earlier years as far as Waltham was concerned (Levitt 1913-14). Waltham's sales representative regarded Gary Leverett, who held the title of merchandising manager in 1973 (CX 203A; Levitt 1978-79), as a buyer (Levitt 1976).

241. During the 1969 to 1974 time period, Waltham made no sales at the Gibson Trade Show to stores other than the Gibson Discount Centers (Levitt 1899-1900).

242. At the Gibson Trade Shows, trade show employees introduced new franchise owners to Waltham personnel and asked Waltham to assist in writing an opening order for such stores. Gibson, Sr. also brought new managers to the Waltham booth and assisted them in selecting goods for the new store (Levitt 1904). [95]

At the trade shows, new store managers, Leverett and the Waltham sales representative discussed merchandise. Leverett assisted the new store manager in making decisions about what to buy (Levitt 1907, 1910). For already existing stores, the store managers would be able to finalize orders (Levitt 1908-09).

243. Neither Gibson, Sr. nor his employees staffed the Waltham booths at the trade shows in the 1969 to 1974 period; those booths were run by Waltham personnel (Levitt 1911-12). Leverett did not perform a selling function on behalf of Waltham at the trade shows (Levitt 1911).

244. The requirements imposed upon Waltham by the Gibson Trade Show to participate in the shows were: payment for the rental of booth space; and, payment of a five percent allowance based on total watch sales to all Gibson stores (Levitt 1803-05, 1809-10, 1829-31, 1834-35, 1838). [96]

245. Waltham made the following booth fee payments to the Gibson Trade Show:

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
May 14-18, 1973	1	\$350.00	\$350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 193A-B
August 1973	6	\$350.00	\$2,100.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 197A-B
Nov. 5-9, 1973	1	\$350.00	\$350.00	Check	H.R. Gibson, Sr. 519 Gibson Seagoville, Texas	CX 198A-B
February 1974	6	\$350.00	\$2,100.00	Check	H.R. Gibson, Sr. 517 Gibson St. Seagoville, Texas	CX 206A-C
May 13-17, 1974	1	\$350.00	\$350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 210A-B
Aug. 12-16, 1974	6	\$350.00	\$2,100.00	Check	H.R. Gibson	CX 211A-E

[97]246. From 1969 to 1974, Waltham set up a warehousing allowance to Gibson Products Company, payable in merchandise. The allowance was five percent of total sales of watches to all Gibson retail stores, regardless of whether the watches were shipped directly to individual stores or to a warehouse (Levitt 1803-05, 1838; Lehman 1284, 1301-02). In the case of Waltham's Dallas area representative, 99.9% of the shipments were shipped directly to the Gibson stores (Levitt 1838. See also CX 209).

247. Belva Gibson participated in discussions with Waltham's sales representative in 1971 as to the amount, \$118,768, that was to be paid on warehousing (Levitt 1813-14, 1822-23, 1825-26; CX 201C).

248. Sales made at the Gibson Trade Show to individuals who leased jewelry departments in Gibson stores were not included as part of the total annual sales to Gibson stores from which the warehousing allowance was computed (Levitt 1997; Finding 257).⁵³

249. Waltham did not refer to or make use of the term, "trade show fee." It used, instead, the term, "warehousing allowance" (Levitt 1829-31, 1834-35; CX 203A). The five percent warehousing allowance had nothing to do with advertising or otherwise promoting the resale of Waltham products (Levitt 1968-69; Lehman 1284). Warehousing allowances are, in fact, trade show fees in the case of Waltham's dealings with Gibson stores. Such show fees effectively operate as

⁵³ In 1975, 25% of the sales made at the Gibson Trade Show were made to such leased jewelry departments (Levitt 1997).

price reductions to the Gibson stores, and were paid in connection with the original sale of Waltham's products to Gibson retail stores (Findings 68, 73, 97, 244).

250. Similarly, the booth fee was paid in order to enable Waltham to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Waltham's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Waltham's products to consumers (Findings 64, 68, 73, 95, 244). [98]

251. Waltham made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Waltham Records	
\$2,414.70	11/24/70	House Order	Gibson Products Co. Attn: Gary Leverett 519 Gibson St. Seagoville, Texas	5%	1969	Warehousing allowance for 1969 purchases	CX 204B-Levitt 1 31
\$5,937.75	5/20/71	House Order	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn: Gary Leverett	5%	1970	Warehousing allowance	CX 201A-Lehman 1 72, Levitt 1813-15, 1822-23, 1829-31
\$6,776.00	3/13/72	House Order	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn: Gary Leverett	5%	1971	Warehousing allowance	CX 202A-Lehman 1 73, Levitt 1829-31
\$7,290.00	4/16/73	Credit Auth.	Gibson Products Co. 519 Gibson St. Seagoville, Texas Attn: Gary Leverett	5%	1972	Warehousing allowance	CX 203A-Lehman 1 Levitt 1 31
\$8,387.00	3/11/74	House Order	Gibson Products Co. 519 Gibson St. Seagoville, Texas	5%	1973	Warehousing allowance	CX 209A-Levitt 1 31

[99]252. During the 1969 to 1974 time period, Waltham conducted a cooperative advertising program that offered 10 percent off the face of invoices. The program covered watches, though not clocks or jewelry, and was made available to all retail and discount stores, but not to catalog stores. Retail and discount stores did not have to meet any requirements in order to participate in the advertising program (Levitt 1797-1800, 1858; CX 214A-B, 215A-B).

Payments under Waltham's cooperative advertising program (see, e.g., CX 214A-B) were made by credits to the customer's account (Lehman 1284). [100]

253. Waltham made the following advertising allowance payments to the respondents:

Amount	Date of Payment	Form of Payment	Payee	Description of Payment	
\$300.00	7/25/73	Check	Gibsons 519 Gibson St. Seagoville, Texas	For advertising ladies' and men's rings and pendants in June tab	CX 195A-D
\$250.00	9/16/74	Credit Auth.	Gibson's Inc. 519 Gibson St. Seagoville, Texas	Christmas Tabloid, 1973	CX 213A-B

[101]254. The prerequisite showing of sales of goods of like grade and quality involved in such tabloid promotions with respect to Gibson stores and other Waltham customers competing in the resale of such goods has not been made (Finding 259).

255. Waltham's line of watches were distinguished by price, style, color and quality (Levitt 1778, 1958). There were differences in the number of jewels; some watches were larger than others; some had dials of varying colors; some were stainless steel; some were calendar, some day and date; some were automatic, some not (Levitt 1958-60). Waltham had approximately 500 watches, priced from \$10 to \$1,000 (Levitt 1776).

Waltham considered one group of watches to be those in the \$15 to \$50 category; other groups were in the \$50 to \$75 and \$75 to \$100 categories (Levitt 1780). The \$15 to \$50 group of watches, however, is comprised of a large number of individual types of watches (Levitt 1957-58). No customer of Waltham ever purchased all of the types of watches in the \$15 to \$50 group (Levitt 1959).

256. Waltham sold watches in the \$15 to \$50, \$50 to \$75 and \$75 to \$100 categories to Gibson stores during the 1969 to 1974 time period (Levitt 1775, 1780-81, 1794). The \$15 to \$50 group of watches purchased by Gibson stores might be entirely different from the group of watches in the same price range sold to another Waltham customer (Levitt 1957). Furthermore, individual Gibson stores did not necessarily purchase the same group of \$15 to \$50 watches as other Gibson stores (Levitt 1957, 1959).

257. There were leased jewelry departments in some of the Gibson family owned and franchise stores in various locations, including Dallas, Fort Worth, Lubbock and Amarillo, Texas (Levitt 1954-55). Waltham sold its merchandise to individuals who leased such space in Gibson stores (Levitt 1996-97). Resale of Waltham products by leased departments in Gibson stores is not a sale by the Gibson store (Levitt 1956, 1986-87).

258. Waltham made direct sales of its watches in the \$15 to \$50 group to the lease division of Zale Company, which operated leased departments in other stores⁵⁴ during the 1969 to 1974 time period (Levitt 1789-90, 1930-31). There is no record evidence as to the specific model, style or price of the watches purchased by Zale, nor is there any evidence of the exact dates of those purchases. [102]

Waltham watches were carried in all Target stores in 1974 and 1975 (Doyle 4367-70). There is no evidence in the record as to the model,

⁵⁴ For instance, Zale leased the jewelry department in Globe stores (Levitt 1946).

style, price or price range of the watches purchased by Target, nor is there any evidence of the exact dates of those purchases.

259. The tabulations in the record, summarizing sales by Waltham to Gibson stores and other customers in New Mexico and Texas during 1973 and 1974, reveal contemporaneous transactions involving sales of watches by Waltham to various Gibson stores and other Waltham customers located in the same town or city (CX 216A-D).

However, there is virtually no record evidence regarding the functional level of any of the alleged nonfavored customers who are shown in the tabulations.⁵⁵ They may be wholesalers, retailers, warehousemen or even perform some other function. Thus, the record evidence does not show that these alleged nonfavored customers were in competition with Gibson retail stores.

Moreover, the tabulations do not specify what products were purchased in a specific transaction. The only description given for the type of products purchased in all of the transactions shown is "watches." There is also no way to determine the prices of the products involved.⁵⁶ Given the great assortment of Waltham watches,⁵⁷ the information contained in the tabulations is insufficient to make the determination of whether the goods sold to Gibson retail stores and the goods sold to alleged competitors of Gibson stores were of like grade and quality. [103]

G. Wagner Products

260. E. R. Wagner Manufacturing Company, Wagner Products Division ("Wagner"), of Hurlisford, Wisconsin, manufactured and sold carpet sweepers, rug shampooers, rug shampoo, an electric clothes dryer and home food craft kits during the period 1969 through 1973 (Hornick 3156-57).

Wagner sells and ships its products throughout the United States and Canada (Hornick 3156-57), including shipments to Gibson Stores located outside of Wisconsin (CX 640A-N). Wagner is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such sales, are in the course of such commerce.

261. In 1973, Wagner had approximately 300-400 customers for its carpet sweeper product line, including Gibson, OTASCO, TG & Y, White stores, Nash Hardware, hardware retailers and hardware distributors and wholesalers (Hornick 3164-65, 3211-12, 3214, 3259-61).

⁵⁵ Southwestern Drug, one of the alleged nonfavored customers (CX 216C), is a wholesale drug distributor (Levitt 1784) and, thus, is not at the same functional level of operations as the Gibson stores.

⁵⁶ Waltham watches fall into several price categories, with many watches within each category (Findings 255, 256).

⁵⁷ Finding 255.

In 1973, Wagner's volume of sales on carpet sweepers to all of its customers was approximately \$600,000 to \$700,000 (Hornick 3194). In the same year, Wagner's sales of carpet sweepers to all the Gibson stores amounted to \$69,531.73, or approximately 10% of its total sales volume on this product (Hornick 3191-93; CX 634D, 637D).

262. Wagner received orders from different Gibson franchisees in their individual capacity. The products were shipped to the franchisees' stores (Hornick 3239).

263. Wagner's sales force was comprised of independent manufacturer's representatives located throughout the country. Its manufacturer's representative in the Texas and Oklahoma area during the 1969 to 1973 period was the Weldon Jacobs Company ("Jacobs").⁵⁸ Jacobs was paid on a commission basis (Hornick 3157). The duties of Wagner's manufacturer's representatives were to solicit business and service Wagner's accounts (Hornick 3158).

Neither H. R. Gibson, Sr., Tommy Perkins nor any of Gibson, Sr.'s employees was ever a manufacturer's representative for Wagner (Hornick 3196).

264. Wagner participated in the Gibson Trade Show in the years 1969 through 1973 (Hornick 3167). Wagner's purpose in [104]attending the Gibson Trade Show was to be able to display and sell its products to the Gibson retail store buyers who were at the show (Hornick 3169-70, 3217-18, 3227, 3250). Wagner utilized show sheets in connection with the Gibson Trade Show (Hornick 3170; CX 632A-B, 635A-B).

265. The requirements imposed upon Wagner by the Gibson Trade Show for Wagner to participate in the show were: payment for rental of booth space; and, in 1973, payment of a percentage fee based on total sales to all Gibson stores (Hornick 3167, 3190-91, 3195). [105]

266. Wagner made the following booth fee payments to the Gibson Trade Show:*

⁵⁸ Jacobs was Wagner's manufacturer's representative at the Gibson Trade Show (Hornick 3196).

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
1970			\$125.00	Check	Weldon M. Jacobs Co. Inc.,** 1616 Dallas Trade Mart Dallas, Texas	CX 626A-C
August 1970			\$125.00	Check	The Weldon Jacobs Co., Inc.,** 1616 Dallas Trade Mart Dallas, Texas	CX 627A-C
February 1971			\$125.00	Check	Weldon Jacobs Company** 1616 Dallas Trade Mart Dallas, Texas	CX 628A-C
November 1971			\$125.00	Check	The Weldon M. Jacobs Co., Inc.,** 1616 Dallas Trade Mart Dallas, Texas	CX 629A-D

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence did not establish such information.

**/ Wagner's manufacturer's representative, Jacobs, would pay the bills for rental of booth space at the Gibson Trade Show and, subsequently, was reimbursed by Wagner (Hornick 3167-68, 3251).

[106]267. In 1973, and again in 1974, Wagner agreed to pay to the Gibson Products Co. three percent of total sales to all Gibson retail stores for promotional services rendered (Hornick 3190-91, 3195, 3198-99; SR 17B, C). Wagner agreed to make such show fee payments because "[i]t was our understanding that if we didn't do that, we might not be able to get into the trade show" and, if that were to result, "[w]e felt that our sales would suffer" (Hornick 3195, 3202, 3215, 3237). [107]

268. Wagner made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Wagner Records
\$1,234.36	7/19/73	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3%	January-June 1973	Volume rebate through June 1973*
851.99	4/1/74	Check	Gibson Products Co. 519 Gibson St. Seagoville, Texas	3%	July-December 1973	Volume rebate - July-Dec. 1973 - Our credit memo #56855**

* CX 634A-D

** CX 637A-D; SR 17A.

[108]269. Wagner did not receive any services from the Gibson Trade Show for the payment of the three percent show fee in 1973, above and beyond the services it had received in prior years when it

had not made any show fee payments (Hornick 3195). The show fee was paid in connection with the original sale of Wagner's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Wagner's products to consumers (Findings 68, 73, 97, 264, 265, 267).

270. Similarly, the booth fee was paid in order to enable Wagner to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Wagner's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Wagner's products to consumers (Findings 64, 68, 73, 95, 264, 265).

271. Wagner did not have a volume rebate program in 1973 (Hornick 3196). In that year, Wagner neither made nor offered to make payments based upon a percentage of total sales or alternate payments to any of its customers, other than Gibson Products Company, for services rendered (Hornick 3200-02).

During the 1969 to 1973 period, Wagner neither made nor offered to make payments based upon a percentage of total sales to any of the other trade shows that it attended (Hornick 3202-03).

272. In the years 1969 to 1973, Wagner neither made nor offered to make booth payments or alternate payments, other than newspaper or tabloid advertising, to any of its customers that did not hold trade shows (Hornick 3203-04).

273. Wagner had an advertising and promotional program which was made available to all of its customers, including all Gibson stores. The program encompassed the use of tabloids, newspaper advertising and sales floor demonstrations (Hornick 3196-97, 3201, 3229-32). The payments made by Wagner would vary, depending on the type of service utilized by the customer (Hornick 3231).

274. Wagner participated with the Gibson stores, in 1972 and 1973, in advertising in Gibson tabloids which were directed at the ultimate consumers⁵⁹ (Hornick 3171, 3174, 3176, 3254). Wagner paid \$500.00, by check dated May 3, 1973, [109]to the Gibson Products Corp. for advertising in the April 1972 Gibson tabloid⁶⁰ (CX 633A-F. See also Hornick 3179-80, 3186, 3187, 3190). The tabloid payment to Gibson Products Company was not based upon a percentage of total sales (Hornick 3198). Moreover, it was in addition to the show fee payments made in 1973 (Hornick 3200, 3232).

There is no showing that Wagner's tabloid payments were not within the scope of its cooperative advertising and promotional program made available to all of its customers (Finding 274). A

⁵⁹ Wagner believed that participation in the Gibson tabloid advertisements would facilitate sales to Gibson retail stores (Hornick 3255, 3265).

⁶⁰ The products advertised were the following model carpet sweepers: Tidy-Up, Handy, Un-Litter Bug and Sweep-A-Smile (CX 633F).

discrimination cognizable under Count I of the complaint with respect to tabloid payments has not been proven.

275. Wagner participated in Gibson store directory advertising in which Wagner's name and products, along with other vendors, were listed for purposes of distribution to the Gibson retail stores (Hornick 3171-72, 3228-29). Wagner paid \$50.00, by check dated September 21, 1972, to the Gibson Products Company for advertising in the January-June 1973 Gibson store directory (CX 631A-E). Wagner viewed the store directory advertisement as an aid in making sales to the Gibson retail stores (Hornick 3228).

276. Wagner considered its carpet sweepers as one product line. However, there were four basic types of chassis for the carpet sweepers (Hornick 3159). There were three basic sizes. Other variations included still larger units, a unit with a dial and a larger unit with a dial and a bigger bumper (Hornick 3163-64, 3225). Even where the only variations were that of color and name, such a carpet sweeper would have its own part number (Hornick 3223).

Aladdin was the smallest carpet sweeper in size, with the least number of features; it would come in different colors and have different names, such as Aladdin Sunset Red or Aladdin Avocado Handy (Hornick 3159-60. See *e.g.*, CX 640A, B). Floormaster was another chassis type; it also came in different colors with different names, such as Floormaster Bittersweet, Floormaster Lettuce Green, Floormaster Bright Yellow, or Floormaster Brown (Hornick 3161. See, *e.g.*, CX 640A, D). The Lite N Easy Blue Mist, Aladdin, Dial A Sweep, Calico Daisies, Tidy Up and Whisk Up models were all the same type carpet sweeper, differing only in terms of color and name (Hornick 3161-62. See, *e.g.*, CX 640A, E).

Wagner also offered and sold a promotional carpet sweeper, which was specially priced at a lower price to move well. This promotional product, described only as "Carpet Sweeper A" on some of Wagner's invoices (CX 640J, L), is the [110]same type carpet sweeper as the Lite N Easy Blue Mist, Aladdin, et al. (Hornick 3162-63); for instance, the Light N Easy Blue Mist and the promotional "Carpet Sweeper A" have the same part numbers (CX 640E-N). This promotional carpet sweeper is the product sold in the case of the invoices numbered CX 640E-N.

277. The invoices in the record disclose the following contemporaneous transactions involving sales of goods of like grade and quality (CX 640A-N).

San Antonio, Texas: Aladdin/Lite N Easy Blue Mist/Carpet Sweeper A (Gibson - 3/30/73, 8/29/73; White Stores⁶¹ - 2/6/73, 3/14/73, 5/18/73, 6/13/73, 8/20/73, 4/25/73, 12/5/73, 3/8/74).

H. Farber Brothers

278. Farber Brothers ("Farber"), of Memphis, Tennessee, sells interior automotive products, including seat covers, slip covers and air cooled cushions (Farber, 1104-05).

Farber normally sends all of its shipments out of Memphis (Farber 1105-06), including sales to Gibson stores located outside of Tennessee (CX 1204A-J). Farber is engaged in interstate commerce and its transactions with the respondents, including show fee payments based on such sales, are in the course of such commerce.

279. Farber has had employees who worked on a commission basis as well as direct sales representatives (Farber 1143-44). Sales representatives normally received a five percent commission (Farber 1145).

280. Farber's major accounts are Montgomery Ward, Western Auto, TG & Y, Gibson stores and White's (Farber 1105, 1107).

281. Farber has participated in the Gibson Trade Show from its inception (Farber 1112-13, 1118-19). Its purpose in participating in the Gibson Trade Show was to obtain more sales from retailers attending the show (Farber 1142).

282. Farber usually has two to three of its employees attending the Gibson Trade Show. These employees are responsible for displaying merchandise to Gibson store buyers, presenting them with show sheets and taking their orders (Farber 1118). [111]

Farber has paid for the expenses incurred by its employees while attending the show (CX 1180, 1181A-D, 1182A-B, 1183A-D, 1174A-D, 1175A-C, 1176A-B, 1178, 1179, 1170A-B, 1171A-B, 1172, 1173, 1163, 1164, 1165; Farber 1117, 1122-23, 1126, 1129, 1132, 1139).

283. Farber listed the merchandise that it would exhibit at the Gibson Trade Show on show sheets (Farber 1164). This supplier suggested the items to be listed, and H.R. Gibson, Sr. and Bobby Regeon selected those products that they believed would sell to the buyers at the trade show (Farber 1164-65, 1183-84). Farber considered the trade show buyer to be a "merchandise selector" (Farber 1165). Regeon did not actually purchase any merchandise but "would select the products that he considered worthwhile to go to the shows, to the Gibson stores" (Farber 1182, 1184).

284. The requirements placed upon Farber to participate in the Gibson Trade Show were: payment for the rental of booth space; and,

⁶¹ White Stores function at the retail level of operations (Finding 369).

beginning in 1973, payment of a two percent rebate to H.R. Gibson, Sr., doing business as the Gibson Trade Show, based on total annual sales to Gibson stores (Farber 1119, 1132-36, 1147-48; CX 1084, 1085, 1157A-B). [112]

285. Farber made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Aug. 18-22, 1969	3		\$675.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 1127, 1109A
Nov. 3-7, 1969	2		500.00	Check	"	CX 1126, 1103A
Feb. 14-18, 1970	1		250.00	Check	Ideal Travel Agency	CX 1125, 1102A
May 4-8, 1970	1		250.00	Check	"	CX 1124, 1101A
Aug. 17-21, 1970	2		500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 1123, 1100A
Aug. 16-20, 1971	1		275.00	Check	Ideal Travel Agency	CX 1121, 1097A
Nov. 1-5, 1971	2		550.00	Check	"	CX 1122, 1096A
Aug. 14-18, 1972	1		350.00	Check	"	CX 1118; Farber 1129
Feb. 10-14, 1973	1		350.00	Check	H.R. Gibson	CX 1116, 1095; Farber 1132
May 14-18, 1973	1		350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 1115, 1094; Farber 1132
Aug. 13-17, 1973	1		350.00	Check	"	CX 1114, 1093A; Farber 1132
Nov. 5-9, 1973	3		1,050.00	Check	H.R. Gibson, Sr.	CX 1113, 1092; Farber 1132
Feb. 8-12, 1975	1		350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 1108, 1088; Farber 1138
May 12-16, 1975	1		350.00	Check	H.R. Gibson, Sr.	CX 1107, 1087; Farber 1138
Aug. 4-8, 1975	1		350.00	Check	H.R. Gibson, Sr. 1266 E. Ledbetter Dr. Dallas, Texas	CX 1106, 1086A; Farber 1138

[113]286. On November 1, 1973, after discussions with H. R. Gibson, Sr., Farber signed an agreement to pay to the Gibson Trade Show "2% of all sales made at this show and on all sales made as a result of Supplier being represented by THE GIBSON TRADE SHOW" (CX 1084, 1157A-B; Farber 1132-35). This agreement covered 1974 (Farber 1141). Farber signed an agreement on January 2, 1975, containing the same provisions as the above agreement (CX 1085). This agreement covered 1975 (Farber 1140).

The two percent fee arrangement based on sales to Gibson stores was intended to be for H.R. Gibson, Sr.'s services in bringing customers to Farber's booth at the trade show (Farber 1133-34, 1193; CX 1157A). The services that Farber received from H.R. Gibson, Sr. included preselecting merchandise to put in the show, distributing show sheets to retailers, bringing Gibson store buyers to the trade show, encouraging them to buy merchandise and calling delinquent accounts on behalf of Farber (Farber 1142, 1193-96, 1207-08).

287. Farber regarded H.R. Gibson, Sr. as its manufacturer's representative, albeit not as an exclusive manufacturer's representa-

* Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

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tive, since 1973, the time at which Farber began making two percent volume rebates to the Gibson Trade Show (Farber 1176-78). However, Farber paid its direct sales force their percentage commission and paid H.R. Gibson, Sr. his two percent volume rebate, all on the same sales (Farber 1211).

288. The two percent payments to the Gibson Trade Show are carried on Farber's books as a sales expense (Farber 1167). [114]

289. Farber made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment
\$4,000.00	1/22/75	Check	Gibson Products Co.	ZL	1974	ZL of dollar volume for 1974 CX 1155A-B; Farber 1168-50
7,648.02	1/23/75	Memo Billing (no charge)	Mr. H.R. Gibson, Sr. Gibson Products Co. 519 Gibson St. Seagrville, Texas	ZL	1974	ZL of dollar volume for 1974 CX 1155E, 1156A-B; Farber 1168-50
1,059.53	6/13/75	Check	H.R. Gibson, Sr.	ZL	2nd quarter 1975	Show expense - ZL of \$152,976.35 quarterly sales CX 1154A-B; Farber 1159B
2,496.67	7/15/75	Check	Gibson Trade Show	ZL	Not known	Not known CX 1152; Farber 1163
3,155.30	10/8/75	Check	The Gibson Trade Show	ZL	July, Aug., Sept. 1975	ZL trade show fee as per contract CX 1151A-B

[115]290. The show fee was paid in connection with the original sale of Farber's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Farber's products to consumers (Findings 68, 73, 97, 281, 284, 286).

291. Similarly, the booth fee was paid in order to enable Farber to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Farber's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Farber's products to consumers (Findings 64, 68, 73, 95, 281, 284).

292. Farber did not make any percentage payments to any other customer during the time period, beginning in 1973, in which it made two percent payments to the Gibson Trade Show (Farber 1167).

293. The Gibson Buyers Guide is a show directory that lists the trade show exhibitors and indicates their location at the show (Farber 1167-68). There were no requirements for any payments in order to be listed; however, if an exhibitor wished to place an advertisement in the directory, a payment was required (Farber 1168). Advertisements in the Buyers Guide were directed at buyers for the retail stores and did not constitute advertising to consumers (Farber 1194-95). [116]

294. Farber made the following payments to the Gibson Trade Show for advertisements in the show directory:

Amount	Date of Payment	Payee	Description of Payment	
\$30.00	1/18/72	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	Ad in January 1972 store directory	CX 1161
17.00	2/29/72	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	Page ad in February Gibson Trade Show Buyers Guide	CX 1162A-B
17.00	5/7/73	The Gibson Trade Show 517 Gibson St. Seagoville, Texas	Page ad in May Gibson Trade Show Buyers Guide	CX 1160A-B

[117]295. Farber has continued its participation in the Gibson Trade Show in 1976 and 1977. In those years, it paid booth rental fees and a two percent volume rebate (Farber 1170-71).

296. Farber has never offered nor operated a standard advertising program (Farber 1168). However, during the period 1969 through 1975, Farber did offer to make advertising allowances available on the same basis to its customers, such as Gibson stores, TG & Y, Wal-Mart and Woolco (Farber 1203-05, 1212-13; CX 1203A-B; Pettit 4195-96, 4199). According to Farber, it offers advertising payments "the same to all customers" (Farber 1204).

Farber participated in placing advertisements in the Gibson tabloid, including an advertisement authorized on February 6, 1970, for which Farber agreed to pay Gibson Products Company \$500.00 (CX 1158D; Farber 1213-14).

Farber, which did not conduct a standard advertising program, nevertheless claimed that advertising allowances were offered on the same basis to all customers. Such ambiguous evidence affords no basis for a finding that the tabloid payments constituted a cognizable discrimination under Count I of the complaint. In any event, complaint counsel have not sustained their burden of proof regarding a showing that the tabloid payments discriminated between Gibson stores and other customers competing in the products featured in such advertisements. The tabloid payment in question was made by Farber in 1970. The tabulations and other evidence in the record with respect to goods purchased by Farber's customers covers the period 1972 to 1975 (CX 1204A-B). There is no record evidence as to any sales transactions in 1970.

297. Farber manufactures approximately 14 to 15 different grades

of vinyl slip covers in order to meet consumer preferences (Farber 1202). It also manufactures about 14 to 15 different grades of cushions and ventilated or cooled cushions (Farber 1203).

298. The tabulations of purchases from Farber by Gibson stores and other customers generally give only descriptions such as "cushions" or "slip covers" (CX 1204A-B). This is insufficient to sustain a finding that such transactions involved sales of goods of like grade and quality. The following contemporaneous sales were recorded with more precision and meet the like grade and quality requirements (CX 1204A-B): [118]

Fayetteville, Ark. - carpet roll (Gibson 3/11/74; Wal-Mart^{61a} - 1/4/74).

Shreveport, La. - nylon cushion (Gibson - 3/14/75 and 6/24/75; TG & Y^{61a} - 1/14/75).

Abilene, Tex. - truck vinyl (Gibson - 3/14/75; TG & Y - 3/11/75).

I. Armstrong Environmental Industries

299. Armstrong Environmental Industries ("Armstrong"), of Los Angeles, California, manufactures both aboveground and underground home sprinklers (Fox 3046-47).

Armstrong sells its products throughout the United States, including sales to Gibson stores located outside of California (Fox 3046, 3050-51). Armstrong's products are shipped from California and Florida (Fox 3080). Armstrong is engaged in interstate commerce and its transactions with respondents, including show fee payments based on such sales, are in the course of such commerce.

300. Armstrong sells to distributors, chain retail establishments, retail stores and catalog houses (Fox 3048). Armstrong's retail customers in 1969 included J. C. Penney, Montgomery Ward, Oklahoma Tire, White Stores, Leonards, Angels, Builders Emporium, Gamble-Skogmo, H.B. Meyers, K-Mart, Handy Dan and Gibson stores (Fox 3048-50).

The Gibson stores, collectively, were Armstrong's eighth or ninth largest customer (Fox 3055, 3093). Armstrong did a total volume of net sales with all Gibson stores of \$28,000.00 for the business year ending June 24, 1970 (CX 781B; Fox 3068-69).

301. Individual franchisees using the Gibson name placed orders with Armstrong. The franchisees were billed on an individual basis (Fox 3094).

302. Armstrong's sales force consists solely of manufacturer's

^{61a} Wal-Mart and TG & Y function at the retail level of operations (Finding 369).

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representatives located throughout the country (Fox 3046-47). The manufacturer's representatives are compensated on the basis of the gross sales they make on behalf of Armstrong (Fox 3059-60). They call on customers, solicit business and take orders (Fox 3061). They call Tranchina Company ("Tranchina") is Armstrong's manufacturer's representative in Texas; it helped Armstrong begin selling to Gibson stores (Fox 3051-52). H.R. Gibson, Sr. was never Armstrong's manufacturer's representative (Fox 3061). [119]

303. Armstrong participated in the Gibson Trade Show in 1969, 1970 and 1971 (Fox 3052-55). In the course of such participation, it listed the merchandise, along with the prices, that it presented for sale at the 1969, 1970 and 1971 Gibson Trade Shows on the show sheets provided by the Gibson Trade Show. The show sheets served as purchase order forms (Fox 3065-66; CX 778A-F, 779, 780A-F, 784A-G). Armstrong participated in the Gibson Trade Show because it facilitated its sales to retailers (Fox 3091). And, the services provided by the Gibson Trade Show such as show sheets, show directories and the introduction of customers to Armstrong representatives by trade show personnel also facilitated such sales to retailers (Fox 3091-92).

304. The only requirement imposed upon Armstrong by the Gibson Trade Show for Armstrong to be in the 1969 show was payment for the rental of booth space (Fox 3053). In 1970 and 1971, Armstrong was required to pay rental for booth space and a five percent fee on total annual gross sales to all Gibson stores in 1969 and 1970, respectively, in order to participate in the Gibson Trade Show (Fox 3053-55, 3077-78, 3100). [120]

305. Armstrong made the following booth fee payments to the Gibson Trade Show. *

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Nov. 1970			\$175.00	Check	F.F. Tranchina Co. Inc. **	CX 782A-B
Nov. 1-5, 1971			\$275.00	Check	F.F. Tranchina Co. Inc. **	CX 788A, D.

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

**/ Tranchina is Armstrong's manufacturer's representative in the area that encompasses the Gibson Trade Show (Fox 3051-52). Tranchina paid out the expenses for Armstrong's participation in the trade shows and was subsequently reimbursed (CX 782A; Fox 3062, 3064).

306. Armstrong made the following show fee payments to the Gibson Trade Show:

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Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Armstrong Records	
\$1,390.58	10/21/70	Check	Gibson Products Co. Seagrville, Texas	5%	Business year ending June 24, 1970	5% of net sales for past season	CX 781A-C; Rox 3068-69
\$2,636.55	10/27/71	Check	Gibson Products Co.	5%	October 15, 1970 - October 15, 1971	5% rebate of total net sales of \$52,730.94 for 10/15/70 through 10/15/71	CX 785A-C

[122]307. Armstrong paid the Gibson Trade Show five percent of gross sales to all Gibson stores in the year prior to the trade show because, "[i]f we [Armstrong] hadn't paid the five percent for the prior years' gross sales, we would not be invited to the next Gibson show" (Fox 3077). The show fee had nothing to do with promoting or advertising goods for resale at the retail level (Fox 3093).

308. The show fee was paid in connection with the original sale of Armstrong's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Armstrong's products to consumers (Findings 68, 73, 97, 303, 304, 307).

309. Similarly, the booth fee was paid in order to enable Armstrong to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Armstrong's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Armstrong's products to consumers (Findings 64, 68, 73, 95, 303, 304).

310. In the period 1969 through 1971, Armstrong neither made nor offered to make any payments based on a percentage of total sales to any of its customers, other than the five percent paid to Gibson to participate in the Gibson Trade Show (Fox 3058).

During the period 1969 through 1971, Armstrong neither paid nor offered to pay any percentage fee based on total sales to any of the other trade shows that it attended (Fox 3055-57).

311. During the period 1969 through 1971, Armstrong neither made nor offered to make an alternate payment equal to the cost of the booth fee to any of its customers that did not hold a trade show (Fox 3057).

312. During the period 1969 through 1971, Armstrong offered to all of its customers, including Gibson stores, an advertising allowance with proof of advertising of five percent of gross sales (Fox 3059). This advertising allowance is to be distinguished from the five percent show fee paid to the Gibson Trade Show (Fox 3074-75, 3092-93). The five percent show fee paid to participate in the Gibson Trade Show was in addition to the five percent cooperative advertising allowance also made available to Gibson retail stores (Fox 3075).

In 1970, Armstrong had an industry-wide promotional program consisting of a sprinkler display unit, which it offered to all of its customers (Fox 3054). [123]

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313. During the period 1969 through 1971, excluding the show fee payment to the Gibson Trade Show and its five percent cooperative advertising program, Armstrong neither offered to pay nor made available to any customer a percentage payment based on total sales or an alternate payment for promotional services rendered (Fox 3076-77).

314. Armstrong manufactures 53 different types of sprinkler devices, which fall into two basic product lines. One line consists of above ground sprinklers and includes impulse sprinklers, oscillating sprinklers and spike sprinklers. The other line consists of underground products and includes pop-up sprinklers, flathead sprinklers and bubblers (Fox 3047-48).

315. Armstrong's customers, including Gibson stores, selectively purchased certain items from among the different types of sprinklers in Armstrong's two sprinkler lines (Fox 3096, 3105-06).

316. The record contains no documentary evidence bearing on the question of whether Gibson stores and other Armstrong customers competing with them in the resale of Armstrong products purchased goods of like grade and quality in the relevant period.

J. Unitron

317. Unitron, of Hawthorne, California, imports and distributes home improvement and do-it-yourself merchandise, including mahogany shelving, roll-up blinds, window shades, folding floor screens, casters, grilles, framing, beads, window shades, folding floor screens, casters, miscellaneous hardware, louvered doors, window shutters, mahogany stools and rattan chairs (Kern 2795-96).

Unitron warehouses its products in California, Texas, Florida, New York and Illinois (Kern 2796).

Unitron sells and ships its products throughout the United States, including sales to Gibson stores located outside of the above states (CX 835A-M; Kern 2796). Unitron is engaged in interstate commerce and its transactions with respondents, including show fee payments based on such sales, are in the course of such commerce. [124]

318. Unitron sells to both retailers and distributors (Kern 2870). During the period 1969 through 1972, some of Unitron's customers were Sears Roebuck, J.C. Penney, Montgomery Ward, Acme Quality Paint, Gibson Discount Stores, Gulf Mart Stores, Handy Dan, Angels Home Centers, Baldrige Lumber Company, Oklahoma Candy, Saxon Paint Company, Fred Meyer and Thrifty Drug Stores (Kern 2799-2800).

In 1969, the Gibson group of stores constituted one of Unitron's ten largest customers, making up about ten percent of its business (Kern

2822). Unitron's total net sales to all Gibson stores in 1969 was \$107,089.50 (CX 816; Kern 2848-49).

319. Unitron personnel and manufacturer's representatives were utilized in soliciting and servicing customer accounts (Kern 2797-98). Manufacturer's representatives were employed on a commission basis, receiving between three and ten percent commission depending upon the product sold (Kern 2798). In the period 1969 through 1972, Unitron's manufacturer's representative in the Southwest was Bill Blair and Associates (Kern 2797).

320. Unitron participated in four Gibson Trade Shows per year in the period 1969 to 1972 (Kern 2823).

321. Unitron personnel as well as its manufacturer's representative in the area, Bill Blair and Associates, attended the trade shows and staffed Unitron's booths at the shows (Kern 2824, 2884).

322. Unitron never made sales to customers other than Gibson stores while at the Gibson Trade Show. The show was open only to exhibitors, Gibson employees, Gibson store personnel and other persons whose admission was authorized (Kern 2824-25).

323. Attendance at the Gibson Trade Show by a Gibson franchisee did not guarantee purchases from Unitron. For example, Pamida, a group with a large number of franchised stores, did not purchase from the supplier (Kern 2896-97).

324. Gibson franchisees placed their orders individually with Unitron on their own order forms imprinted with the Gibson name (Kern 2884, 2893-94, 2898). Where an organization such as West and Company operated stores under its own name as well as under one of the Gibson trade names, Unitron could only sell to the group's Gibson franchise stores at the Gibson Trade Show (Kern 2895-96). [125]

Although individual franchisees were responsible for paying their bills, Unitron customarily contacted H.R. Gibson, Sr. or the Gibson accounts payable staff at the Seagoville headquarters office to provide assistance in resolving delinquent franchisee accounts (Kern 2898-99, 2966; SR 23J).

325. In 1969, the requirements for Unitron's participation in the Gibson Trade Show were: payment of booth fees; and, payment of special allowances on sales volume (Kern 2804-05). [126]

326. Unitron made the following booth fee payments to the Gibson Trade Show:*

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Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Spring 1969	2		\$370.00	Check		CX 810: Kern 2835
February 1970	2		\$500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 817, 818
May 1970	2		\$500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 819A-B
August 1970			\$500.00	Check	Ideal Travel Agency	CX 820A-B
November 1970			\$750.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 821A-B
November 1971	2		\$550.00	Check	Ideal Travel Agency	CX 824, 826
[Date of payment: 4/13/72]			\$600.00	Check	Ideal Travel Agency	CX 829: Kern 2838- 39
May 1972			\$350.00	Check	Ideal Travel Agency	CX 830A-B
November 1972	2		\$700.00	Check	Ideal Travel Agency	CX 831A-B

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

[127]327. In 1968, Bobby Regeon traveled to California in response to Unitron's invitation to see its new mobile showroom which it wanted to use in the Gibson Trade Show. Regeon requested a five percent special compensation on the total gross volume done with all Gibson stores⁶² (Kern 2805-08).

Unitron discussed the special allowance with Regeon in light of its desires to develop its business relationship with Gibson Discount stores and obtain Gibson assistance in promoting the advertisement and sale of Unitron products (Kern 2806-07). Subsequently, Unitron agreed to make payments, beginning in 1969, based on two and one-half percent of adjusted gross sales⁶³ to all Gibson stores⁶⁴ (Kern 2808).

Unitron made the payments of two and one-half percent of adjusted gross sales to the Gibson Trade Show because it was promised promotions, advertising, special marketing assistance, generation of greater sales volume, choice of prime booth space at the trade shows and "a trouble-free relationship between Gibson and Unitron"⁶⁵ (Kern

⁶² Sidney Kern, Unitron's executive vice president between 1969 and 1972 (Kern 2794-95), testified: "In order to be assured of booth space in a prime location, there was the requirement that we [Unitron] participate in the payment of special allowances on volume" (Kern 2805).

⁶³ Adjusted gross sales refers to gross sales less any sales discounts that appeared on the invoice (Kern 2808).

⁶⁴ The two and one-half percent payments, which were above and beyond normal discounts and allowances, did not go to Gibson retail stores; consequently, these payments did not appear on the face of the invoices (Kern 2965, 2972).

⁶⁵ In fact, Unitron's Sidney Kern had a telephone conversation with H.R. Gibson, Sr., in 1971 or early 1972, in which Gibson, Sr. complained that Unitron's regular prices on its shelving products were too high. Kern testified that:

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2817, 2858-59, 2861-63, [128]2908-10). Discussions with Gibson personnel, such as Bobby Regeon, had indicated that Unitron would be afforded tabloid advertising if the two and one-half percent allowance were paid (Kern 2841-42, 2844-45, 2906-07, 2908-09; CX 812, 822). Unitron wanted tabloid advertising since this would force the Gibson stores to stock the items advertised to the public (Kern 2845-46, 2906-07). Although Unitron expected the show fee percentage payments to generate advertising at the retail level,⁶⁶ these expectations were never realized. No tabloids featuring Unitron's products were issued (Kern 2914-15, 2840; CX 822).

Effective January 1, 1972, Unitron and Gibson Products Company agreed to Unitron making payments on two, rather than two and one-half, percent of adjusted gross sales to all Gibson stores (CX 827A-B; Kern 2851-53).

Unitron believed that if it had not made the percentage payments to Gibson Products Company, it would not have been allowed to participate in the Gibson Trade Show (Kern 2857). [129]

328. Unitron made the following show fee payments to the Gibson Trade Show.*

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment	Case
\$ 877.42	7/3/69	Check		2 1/2%	Second quarter of 1969	Allowance of 2 1/2% on the second quarter sales to Gibson stores as per agreement	CX 812
\$1,029.32	12/26/72	Check	Gibson Products Co., 519 Gibson St., Seagrville, Texas	2%	January-September 1972	Payment of the rebate computations	CX 813 Kern 2855-56 2917
\$ 392.55				2%	January-March 1972	2% of sales to Gibson Products for Jan. - March 1972	CX 828

*/ Unitron's Sidney Kern testified that Unitron paid a percentage show fee to the Gibson Trade Show in each of the years during the 1969 to 1972 period; however, the only record documentation of actual show fee payments is as indicated on this chart - thus, there is no record proof of any payments for the years 1970 or 1971 (Kern 2914-20).

Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

[130]329. The show fee was paid in connection with the original sale of Unitron's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Unitron's products to consumers (Findings 68, 73, 97, 325, 327).

330. Similarly, the booth fee was paid in order to enable Unitron to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Unitron's goods to Gibson retail stores. The booth fee was not a

... I recalled to him that we were part of his rebate team, so to speak, and that suffered the end to any other questions on his part, any other problems, and that was the end of it, and we continued offering the product at the same pricing and without any other additional difficulties (Kern 2859. See also Kern 2858-59, 2861-63).

⁶⁶ Consistent with this, Unitron did not expect its payment of booth fees to generate any advertising; the booth fees were paid for the rental of space used to participate in the Gibson Trade Shows (Kern 2914).

promotional allowance made in connection with the resale of Unitron's products to consumers (Findings 64, 68, 73, 95, 325, 327 n. 66).

331. During the 1969 to 1972 period, Unitron did not make available to all of its customers either a percentage payment based on adjusted gross sales or an alternate payment for promotional services rendered (Kern 2811, 2863-64).

332. In regard to the booth fee payments that Unitron made at all the trade shows it attended, Unitron did not make available alternate payments to those customers that did not conduct a trade show (Kern 2833-34).

333. In this period, however, Unitron paid Thrifty Drug Stores and Fred Meyer one and one-half percent of adjusted gross sales and one percent of adjusted gross sales, respectively. These were not standard allowances available to all customers; they were made because of the sales volume of these powerful buyers coupled, in the case of Thrifty, with a threat to discontinue doing business if the discount were not paid (Kern 2811-12, 2816-17, 2957-58).

334. Unitron made available to all of its customers, including Gibson stores, a standard promotional program, which consisted of a ten percent discount⁶⁷ given to any customer merely for the asking. The discount was variously designated as a sales promotion, advertising allowance or freight allowance, depending on what use the customer applied it to (Kern 2808-10, 2966). The show fee payment to Gibson, Sr. was over and above that program.

335. On occasion, Unitron dealt directly with Gibson franchisees in regard to advertising Unitron products to consumers (Kern 2903-04; SR 23-0). Unitron did not make or offer to make any payments to compensate individual Gibson retail stores that chose to advertise Unitron products (Kern 2905-06). [131]

336. There is wide variation in Unitron's product lines. It sells about 10 or 12 different kinds of mats, including the Cecil mat and the Diamond Weave mat (Kern 2942). There are different styles of chairs, including Luan mahogany stools in four different sizes and two or three different types of rattan chairs (Kern 2943, 2945-46). Unitron's interior decorative items include grillwork of Luan mahogany, frames of Luan mahogany, plungers that go with the frame sets, different sizes of grills, different sizes of frames, and decorative bead curtains for draperies, for short curtains and for long curtains (Kern 2943-44). It sells two types of shutters in different sizes, made of Luan mahogany and beechwood (Kern 2944). Unitron's decorative folding screens come in a variety of different designs, different materials and

⁶⁷ This ten percent allowance would normally appear on the face of an invoice (Kern 2966).

different styles (Kern 2944-45). Its bamboo blinds and plastic blinds also come in different sizes and styles (Kern 2947).

337. The tabulations in the record, summarizing Unitron sales in 1970 and 1971, show the following contemporaneous transactions which involve sales of goods of like grade and quality⁶⁸ to competing customers (CX 835A-M):⁶⁹

San Antonio, Texas: Deluxe Mahogany Shelves (Gibson - 9/8/70, 4/30/71, 8/13/71; Handy Dan Hardware⁷⁰ - 3/2/70, 4/14/70, 7/20/70, 8/21/70, 11/25/70, 12/1/70, 12/4/70, 12/29/70, 1/12/71, 3/2/71, 3/25/71, 3/26/71, 5/17/71, 5/18/71, 7/19/71, 8/12/71, 8/17/71, 8/23/71, 8/30/71, 10/7/71, 10/11/71, 10/15/71, 10/21/71, 11/4/71, 11/5/71, 11/19/71, 12/1/71, 12/6/71); [132]Milk Stools (Gibson - 8/26/70, 9/8/70, 9/28/70; Handy Dan Hardware - 2/13/70); Bookcase Kit (Gibson - 9/8/70; Handy Dan Hardware - 2/13/70, 5/14/70, 11/25/70, 12/1/70); Louver Door (Gibson - 9/8/70; Handy Dan Hardware - 12/1/70); Cork Panels (Gibson - 6/24/71, 8/3/71; Handy Dan Hardware - 8/17/71, 9/22/71, 10/15/71); Swivel Casters (Gibson - 5/20/71; Handy Dan Hardware - 1/22/71, 9/29/71); Oval Blinds (Gibson - 6/4/71, 6/24/71, 8/3/71; Handy Dan Hardware - 1/21/71, 10/7/71).

This is the only documentary evidence concerning such sales. As already noted, booth fees were paid in 1969, 1970, 1971 and 1972. However, there is no documentary evidence of show fee payments in 1970-1971, and some doubt whether they were paid in those years.⁷¹ Under the circumstances, there has been a failure to document sales of goods of like grade and quality to Gibson stores in the relevant period with respect to show fee payments.

K. Comfort Products, Inc.

338. Comfort Products, Inc. ("Comfort"),⁷² of Memphis, Tennessee, manufactures and sells ventilated cushions and slip-on seat covers (F. Miller 500-01). In the past, Comfort has manufactured and sold electronic equipment such as radios, CB's and stereos (F. Miller 502).

⁶⁸ For each of the products listed, there is no evidence of variations going to like grade and quality, such as differences in size, style or type of material used.

⁶⁹ The tabulations show other contemporaneous transactions. However, in the majority of these sales, there is no record evidence of the functional level that the customer was operating at. Thus, it is not possible to determine whether the customer was competing with Gibson retail stores in the resale of Unitron's merchandise. Moreover, there is no record evidence that these transactions involve goods of like grade and quality. For instance, the tabulations describe some products only as "mats," "stools," "doors," "grills," "fences" and "casters," despite the fact that these products come in different sizes and styles along with other possible variations (Finding 336).

⁷⁰ Handy Dan Hardware functions at the retail level of operations (Finding 369).

⁷¹ The record is unclear. It shows booth fee payments in 1970 to 1971 (Finding 326), and Mr. Kern testified that show fee payments were made in those years (Kern 2920). Nevertheless, the documentary evidence pertaining to show payments relates only to 1969 and 1972 with no explanation why records of show fee payments for 1970 and 1971 were not secured, if they had, in fact, been made. In view of this ambiguity in the record, no confident finding can be made that Unitron made show fee payments in 1970 and 1971.

⁷² Comfort is an affiliate of a company called Arthur Fulmer (Miller 501).

Comfort's manufacturing plant is located in Olive Branch, Mississippi (F. Miller 503). [133]

Comfort ships its products from its Mississippi plant to various customers (F. Miller 503), including shipments to Gibson stores located outside of Mississippi (CX 909F-H). Comfort is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are in the course of such commerce.

339. Some of Comfort's major accounts are Fed-Mart, Pep Boys, Advance Stores and Gibsons (F. Miller 502-03).

340. Comfort employs manufacturer's representatives who act as the company's sales agents. These representatives usually receive a five to six percent commission (F. Miller 523-24).

341. Comfort participated in the Gibson Trade Show because it thought the show would increase its sales by performing certain services (F. Miller 504-05, 593, 602-03). Comfort's primary purpose in attending a trade show such as the Gibson Trade Show is to sell its products to retailers (F. Miller 603).

342. Comfort considered the Gibson Trade Show to represent it at the trade show with respect to the sale of merchandise (F. Miller 523). However, Comfort personnel staffed its booth and took orders at the Gibson Trade Show (F. Miller 512, 557). Comfort also had a sales representative in the Dallas area who attended the trade show and received the regular commission on sales made at the show; this sales commission was in addition to the show fee percentage payments made to the Gibson Trade Show (F. Miller 557-58).

343. Comfort and Bobby Regeon, who the supplier knew as the buyer for Gibson Products Company (F. Miller 558-59, 582-83), together decided what merchandise would be listed on the show sheets and, thus, the products to be offered for sale at the trade show (CX 848C-H, 854B-C, 855D-J; F. Miller 535-36, 541). The show sheets are made available to buyers at the trade show, and are generally the only forms used in writing orders for buyers that visit Comfort's booth (F. Miller 536-37, 541-42).

344. The requirements for Comfort's participation in the Gibson Trade Shows were: payment of a booth fee; and, show fee payments based on a percentage of sales volume (F. Miller 505, 516, 549-50, 553-54; CX 855C, 899A-B). [134]

345. Comfort made the following booth fee payments to the Gibson Trade Show:*

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Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee
February 12-17, 1972	1		\$275.00	Check	Smoky Hale Sales** 7616 LBJ Freeway Dallas, Texas CX 844A-C; Miller 507
November 6-10, 1972	1		\$350.00		CX 847A, C-D
February 10-14, 1973***					CX 853B; Miller

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

**/ Smoky Hale Sales, Comfort's representative in Dallas, paid the booth fees for Comfort and was subsequently reimbursed (Miller 507).

***/ CX 853B, the contract governing Comfort's participation in the February 10-14, 1973 Gibson Trade Show, shows that \$1,400.00 in booth fees were to be paid to the Gibson Trade Show by Keller-Hyden, Comfort's sales representative. However, Keller-Hyden was also representing two other companies who, presumably, occupied at least two, and perhaps three, of the booths indicated on the contract. Thus, the record does not show what portion of this \$1,400.00 was paid by Comfort (Miller 539-40; CX 853B).

[135,346. On December 21, 1972, Comfort, with Keller-Hyden representing it,⁷³ agreed "that in consideration of the services rendered by THE TRADE SHOW that it will pay to THE GIBSON TRADE SHOW two percent of all sales made by Supplier at the TRADE SHOW and on all sales made as a result of Supplier being represented by THE TRADE SHOW" (CX 855C; F. Miller 518-19, 527).

Comfort viewed the agreement to pay two percent of all sales to the Gibson Trade Show as "[a] fee for services rendered . . . at the trade show" (F. Miller 521-22; CX 855C).

The two percent trade show fee in 1973 was to be paid on sales of manufactured products, *i.e.*, ventilated cushions and seat covers. A three percent trade show fee in 1973 was to be paid on sales of stereos (CX 862B, C, 874C; F. Miller 533-34, 543). In 1974, Comfort agreed to an increase in its percentage payment based on sales resulting from the Gibson Trade Show from two percent to three percent for manufactured products, such as ventilated cushions and seat covers, and from three percent to four percent for stereos (F. Miller 549-50, 53-54; CX 899A-B, 876C, 877B).

347. The services that Comfort expected to receive and did receive from the Gibson Trade Show included getting many Gibson store buyers together in one place, help of the trade show operators in bringing customers to Comfort's booth and help in explaining Comfort's products and programs (F. Miller 522, 593, 602-03). Comfort did not expect the show fee to be used in connection with advertising at

Keller-Hyden served as Comfort's sales representative (F. Miller 540).

the retail level or otherwise with promoting the resale of Comfort products⁷⁴ (F. Miller 591-93). [136]

348. Comfort made the following show fee payments to the Gibson Trade Show:

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment on Comfort Records	
\$ 3,218.64	7/20/73	Check	Gibson Products	31-Sternos 2L-Mfg. prod.*	First half of 1973	Rebate on merchandise purchased from December 1972 through June 1973	CX 862B-Y
6,263.71	1/9/74	Credit Memo	Gibson Products Co. 519 Gibson St. Seagrville, Texas	31-Sternos 2L-Mfg. prod.*	Second half of 1973	Special allowance on purchases - July through Dec. 1973	CX 874A-C
11,034.33	8/7/74	Credit Memo	"	41-Sternos 3L-Mfg. prod.*	First half of 1974	Special allowance on purchases - Jan. through June 1974	CX 877A-C
6,208.69	1/15/75	Credit Memo	"	41-Sternos 3L-Mfg. prod.*	Second half of 1974	Special allowance on purchases - July through Dec. 1974	CX 876A-C

*/ The manufactured products consist almost exclusively of ventilated cushions and seat covers (Miller 532-33).

[137]349. The show fee was paid in connection with the original sale of Comfort's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Comfort's products to consumers (Findings 68, 73, 97, 341, 344, 347).

350. Similarly, the booth fee was paid in order to enable Comfort to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Comfort's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Comfort's products to consumers (Findings 64, 68, 73, 95, 341, 344).

351. Comfort did not make any percentage payments based on volume of purchases to anyone other than Gibson Products for the years 1972, 1973 and 1974 (F. Miller 564-65).

352. The invoices in the record disclose contemporaneous transactions involving sales of goods by Comfort to Gibson stores and other Comfort customers located in the same town or city (CX 909A-H, J, L, N, O). However, the record evidence is silent as to the functional level at which the non-Gibson customers operated. Moreover, the invoices show the sale of goods to Gibson stores that are entirely different from the goods sold to the non-Gibson customers. Thus, complaint counsel have not satisfied their burden of proof with respect to a showing that Gibson retail stores and other Comfort customers competed in the resale of Comfort products of like grade and quality.

L. Beagle Manufacturing Company

353. Beagle Manufacturing Company ("Beagle"), of El Monte, California, manufactures wrought iron, planter stands, flower arranging accessories, candle holders, baker's racks and decorative furniture, fabricates styrofoam and supplies a general line of clay products to the florist supply business (McCracken 52-53, 201).

Beagle sells its products throughout the United States, including

⁷⁴ The Comfort witness, Fred J. Miller, testified that "[n]obody ever told me what it [the trade show fee] was going to be used for" (F. Miller 592).

sales to Gibson stores located outside of California (McCracken 54, 200-01). Beagle is engaged in interstate commerce and its transactions with respondents, including the show fee payments based on such sales, are made in the course of such commerce. [138]

354. Beagle has 800 to 1,000 customers, including K-Mart, Woolworth, McCrory-McClellan, Gibson, Pacific Coast Commercial Company, Arett Sales, Motts and House of Decorative Accessories (McCracken 53-54, 200). Beagle made sales of approximately \$40,000 to the Gibson stores in 1972 (McCracken 223-24).

355. Invoices for orders received from Gibson stores are sent by Beagle to the individual Gibson stores (McCracken 211-13, 230).

356. Beagle's sales force has been comprised of manufacturer's representatives from 1968 to the time of trial (McCracken 60-61). The manufacturer's representatives received a five percent commission based on what they sold and what was shipped (McCracken 61-62). In 1970, Beagle hired Dick Snow as its manufacturer's representative to cover Oklahoma and Texas⁷⁵ (McCracken 59-60, 200). Snow represents Beagle at the Gibson Trade Shows (McCracken 205). H.R. Gibson, Sr. is not Beagle's manufacturer's representative (McCracken 205).

357. Beagle began attending the Gibson Trade Show in 1970 (McCracken 64, 185-86). Beagle desired to participate in the Gibson Trade Show in order to facilitate sales to Gibson stores (McCracken 213). Prior to 1970, the first year in which Beagle was listed on the Gibson show sheets and allowed to participate in the Gibson Trade Show, Beagle was able to make only minimal sales to Gibson stores. Beginning in 1970, however, Beagle was able to sell its merchandise to Gibson stores in considerable volume (McCracken 62, 64, 220-21).

358. The requirements imposed on Beagle by the Gibson Trade Show for Beagle to attend the show were: payment for rental of booth space; acceptance by the Gibson buyer of Beagle's merchandise to be listed at the show; and, beginning in 1972, payment of a three percent fee based on total sales to all Gibson stores (McCracken 64-66, 79-81, 82, 208; SR 45B, C, D, E).

359. Beagle listed the merchandise that it would present for sale to Gibson store buyers at the Gibson Trade Show on show sheets. The show sheet forms were provided by Gibson and were to be used throughout the year by the Gibson [139]stores to order listed merchandise.⁷⁶ Beagle, through its manufacturer's representative, Dick Snow, furnished the product and price information to Gibson to put on the

⁷⁵ Beagle also utilizes the services of another manufacturer's representative in Dallas, Claude Garrison & associates. This representative covers the entire south for Beagle, selling to floor supply jobbers only (McCracken 205).

⁷⁶ Robert Stanton McCracken, sales manager and vice president of Beagle (McCracken 52-53), testified that "practically every order we ever got from them [the Gibson stores] was on this document [the show sheets — CX 6A-M and CX 797A-P] here" (McCracken 223, 225).

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forms (McCracken 215, 219-20, 222-23, 225, 249T-Y; CX 796A-M, 797A-P). [140]

360. Beagle made the following booth fee payments to the Gibson Trade Show:*

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee
February 1970			\$250.00	Check	R.J. Snow & Associates** P.O. Box 24273 Dallas, Texas CX 799
February 1971			\$300.00	Check	Snow Associates** P. O. Box 24273 Dallas, Texas CX 800
February 1972			\$300.00	Check	R.J. Snow & Associates** P. O. Box 24273 Dallas, Texas CX 801A-B

*/ Where certain factual points are not indicated with respect to a particular payment, the record evidence failed to establish such information.

**/ Snow, Beagle's manufacturer's representative in the area that includes the Gibson Trade Show (McCracken 59-60, 200, 205), paid out the expenses for Beagle's participation in the trade shows and was subsequently reimbursed (McCracken 195).

[141]361. In 1972, Beagle was advised by Tommy Perkins, acting on behalf of "the Gibson buying office," that it would have to pay five percent of total sales made to all Gibson stores in order to be listed in the Gibson Trade Show (McCracken 66, 71-72). Subsequently, Beagle and Perkins agreed that Beagle would make payments based on three percent of total sales to all Gibson stores (McCracken 79-81). The three percent payments were made, beginning in 1972, on a monthly basis, paid to Gibson Products Company⁷⁷ and sent to Tommy Perkins (McCracken 81-82, 208; SR 45B-E). Such payments have continued from 1972 to the present (McCracken 208).

Beagle made the three percent payments in order to be able to sell to the Gibson retail chain (McCracken 82). [142]

362. Beagle made the following show fee payments to the Gibson Trade Show:

⁷⁷ Beagle made these payments, in the form of check, payable to Gibson Products Company until October 1975, after which time the checks were made payable to the Gibson Trade Show (McCracken 192, 249K, N-Q; SR 48).

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Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period For Which Payment Was Made	Description of Payment on Beagle Records	CA No.
\$135.66	3/1/72	Check	Gibson Products Co. 519 Gibson St. Seagrville, Texas Attn. Mr. T. Perkins	1%	February 1972	1% discount for month of February/1972 purchases on \$4,321.99	CA 7584
\$131.99	4/3/72	Check	Gibson Products Co. 519 Gibson St. Seagrville, Texas Attn. Mr. T. Perkins	1%	March 1972	1% discount for total sales month of March/1972 on \$10,466.17	CA 7585
\$ 70.41	4/2/72	Check		1%	April 1972	1% discount for total sales month of April/1972 after 6% freight allowance	CA 7586
\$215.35	6/5/72	Check		1%	May 1972	1% discount for month of May/1972 sales on \$2,198.24	CA 7590
\$154.80	7/5/72	Check		1%	June 1972	1% discount for purchases for month of June/1972 on \$5,153.35	CA 7591
\$102.28	8/1/72	Check		1%	July 1972	1% discount on purchases for month of July/1972 on \$3,415.96	CA 7592
\$142.25	8/29/72	Check		1%	August 1972	1% discount for total sales month of August/1972 on \$6,741.80	CA 7594
\$404.15	10/3/72	Check		1%		1% discount for month of Oct. 1972 on \$13,471.72	CA 7595
\$332.12	11/7/72	Check		1%	October 1972	1% discount for month of Oct. 1972 purchases on \$11,070.89	CA 7597
\$ 87.44	12/7/72	Check		1%	November 1972	1% discount on purchases for month of Nov. 1972	CA 7598
\$ 21.77	12/29/72	Check		1%	December 1972	1% discount on purchases for month of Dec. 1972 on \$935.58	CA 7599
\$ 30.54	1/31/73	Check		1%	January 1973	1% discount for total sales Jan. 1973	CA 7600
\$ 43.20	2/2/73	Check		1%	February 1973	1% discount on purchases for month of Feb. 1973	CA 7601
\$385.36	4/3/73	Check		1%	March 1973	1% discount for total sales during March/1973 on \$2,845.46	CA 7602
\$215.26	5/1/73	Check		1%	April 1973	1% discount for purchases for month of April/1973 on \$7,186.07	CA 7603
\$ 94.31	5/25/73	Check		1%	May 1973	1% discount on purchases for month of May/1973 on \$2,150.26	CA 7604
\$137.03	7/3/73	Check		1%	June 1973	1% discount for total sales June/1973 on \$6,367.87	CA 7605
\$ 31.90	8/3/73	Check		1%	July 1973	1% discount for total sales July/1973 on \$1,729.93	CA 7606
\$141.80	9/10/73	Check		1%	August 1973	1% discount on sales of August/1973 after 6% freight allowance	CA 7607
\$290.52	10/2/73	Check		1%	September 1973	1% discount for total sales Sept. 1973 on \$9,640.00	CA 7608
\$316.15	11/8/73	Check		1%	October 1973	1% discount for total sales Oct./1973 on \$10,348.38	CA 7609
\$119.47	12/4/73	Check		1%	November 1973	1% discount for month of Nov. 1973 on \$3,362.36	CA 7610
\$ 28.03	1/3/74	Check		1%	December 1973	1% discount on purchases for month of Dec. 1973	CA 7611

[143]363. The show fee was paid in connection with the original sale of Beagle's products to Gibson retail stores; the show fee was not a promotional allowance made in connection with the resale of Beagle's products to consumers (Findings 68, 73, 97, 357, 358, 361).

364. Similarly, the booth fee was paid in order to enable Beagle to attend the Gibson Trade Show and, thereby, to facilitate the original sale of Beagle's goods to Gibson retail stores. The booth fee was not a promotional allowance made in connection with the resale of Beagle's products to consumers (Findings 64, 68, 73, 95, 357, 358).

365. In 1972, Beagle neither made nor offered to make a payment based on three percent of total sales or an alternate payment to any of its other customers (McCracken 81, 82).

366. Beagle has six basic product lines, which include about 500 different products. Each of the six lines is comprised of at least 20 different items (McCracken 53, 239). Beagle's styrofoam line has about 300 products of different size, shape and form. Some of the products fabricated in the styrofoam line are eight sizes of balls ranging from one inch to 12 inches, cones, adhesive-based foam, round foam for ficking artificial flowers in, wreaths, pyramids, Easter eggs, sheets, discs and pedestals (McCracken 239).

367. Beagle's customers do not buy all of the product lines sold by Beagle (McCracken 200-01).

368. The record contains no documentary evidence bearing on the question of whether the Gibson stores and other Beagle customers competed in the resale of goods of like grade and quality. [144]

M. General Findings

369. The following firms function at the retail level of operations (Tocci 2159-60, 2168-69, 2212-15, 2361-62; Hare 2571-72, 2574-77, 2580-86, 2596; Hornick 3166; Evans 3937, 3946-49; Pettit 4093, 4108-12; Doyle 4288-89): TG & Y, K-Mart, Wal-Mart, Target, Gibson, Woolco, Roses, M.E. Moses, Wackers, J.C. Penney, Sears Roebuck, W.T. Grant, J.J. Newberry, Montgomery Ward, Western Auto Supply, Ben Franklin, Handy Dan Hardware, Ace Hardware, Cotter and Company, Wynn Stores, Duke and Ayers, H.L. Green, McCrory, Kress, Merchants' Buying Syndicate, D & J Supermarket, Parkit Market, Silver Dollar Grocery, Duggers Food Mart Inc., La Boya Grocery, Burton Dairy Way, Food Basket, Cherry's Drive-in, Sundown Food Store, Landers Little Giant, Minyard's, Luther Jenkins, West and Company,⁷⁸ Howard Brothers,⁷⁸ Abbey Sales, Surplus City, Sterling Stores, W.E. Walker, Perry Brothers, OTASCO, White Stores.

370. The agreements between suppliers and the Gibson Trade Show, governing the suppliers' participation in the trade show, contain the following provisions or provisions similar in effect:

WHEREAS Lessor has reserved the right to sub-lease exhibition booth space in said Market Hall (during the term of said primary lease) to such persons, firms, and corporations as he may choose in his sole discretion for the purpose of exhibiting and selling goods, wares, merchandise or services to owners, operators, and managers of GIBSON DISCOUNT CENTERS which are admitted by Lessor to said GIBSON TRADE SHOW (CX 1097A).

6. All equipment furnished by Lessor herein for the construction of Lessee's booth and any additional personal equipment such as pegboards, carpets, coat racks or additional signs (which Lessee shall order at its own expense), shall be obtained from Freeman Decorating Company, 1300 Wycliff Ave., Dallas, Texas 75207, [145]the official exhibit contractor and decorator of said Gibson Trade Show. All such equipment shall be delivered up by Lessee to Freeman Decorating Company at the end of this sublease in substantially as good condition as when obtained, reasonable wear and tear excepted (CX 1097B).

3. Lessee shall not exhibit or sell or take any order for the sale of any goods, wares, merchandise or services at Gibson Trade Show other than those itemized on the printed SHOW ORDER SHEETS supplied to Lessee by Lessor pursuant to previous agreements between Lessee and Lessor (CX 1097B).

⁷⁸ West and Company and Howard Brothers operate under their own name in some locations and under the Gibson name as Gibson franchisees in other locations. See Finding 185.

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This sub-lease agreement is conditioned upon Lessee agreeing that he will sell merchandise to all Gibson Franchise Holders at the same price for like quantities. Lessee further agrees that in the event he offers merchandise to any Gibson Franchise Holder at a price lower than that specified on the Gibson Show Sheet that he will make the same price available to all Gibson Franchise Holders, making retroactive price adjustments, if necessary, to comply (CX 1097A).

See CX 207A-B, 210A, 211A-B, 301A, 302A, 308A, 470D-E, 473D-E, 482C-D, 488D-E, 492C-D, 497D-E, 500D, 580A-B, 645, 648B-C, 658, 662B-C, 668B-C, 674A-B, 681, 687, 692, 847A, 1086A-C, 1087, 1088, 1092, 1093A-B, 1094, 1095, 1096A-B, 1097A-B, 1098A-B, 1099A-B, 1100A-B, 1101A-B, 1102A-B, 1103A-B, 1104A-B, 1105A-B; SR 35A, 35E.

371. The agreements in effect between Gibson, Sr. and suppliers participating in the Gibson Trade Show in the period 1969 to 1972 limited the supplier's sales presentations at the Gibson Trade Show to sales efforts directed almost exclusively to the Gibson Discount Centers by providing that: [146]

WHEREAS Lessor has reserved the right to sub-lease exhibition booth space in said Market Hall (during the term of said primary lease) to such persons, firms, and corporations as he may choose in his sole discretion for the purpose of exhibiting and selling goods, wares, merchandise or services to owners, operators, and managers of GIBSON DISCOUNT CENTERS which are admitted by Lessor to said GIBSON TRADE SHOW (CX 1097A. See also CX 301A, 308A, 470D, 1103A) (emphasis added).

3. Lessee shall not exhibit or sell or take any order for the sale of any goods, wares, merchandise or services at Gibson Trade Show other than those itemized on the printed SHOW ORDER SHEETS supplied to Lessee by Lessor pursuant to previous agreements between Lessee and Lessor (CX 1097B) (emphasis added).⁷⁹

This sub-lease agreement is conditioned upon Lessee agreeing that he will sell merchandise to all Gibson Franchise Holders at the same price for like quantities. Lessee further agrees that in the event he offers merchandise to any Gibson Franchise Holder at a price lower than that specified on the Gibson Show Sheet that he will make the same price available to all Gibson Franchise Holders, making retroactive price adjustments, if necessary, to comply (CX 1097A. See also CX 308A, 648B) (emphasis added).

In fact, participating suppliers made sales at the Gibson Trade Show in the relevant period only to retail stores operating under the Gibson name (Findings 147, 172, 241, 322).

The Gibson Trade Show, at least in that period, was limited to the Gibson Discount Centers and, thus, run for their benefit. [147]

372. The provision on the show sheets regarding price approval by the respondents' Seagoville offices with respect to any changes in the prices listed on the show sheets is inconsistent with the claim that the

⁷⁹ Show sheets were preprinted with the Gibson Products trade name under the "ship to column" in the period 59-1972 (Finding 91).

Gibson Trade Show acts as a manufacturer's representative (Finding 93).

373. The staffing of booths at the trade show involved the furnishing of services for the benefit of Gibson Discount Centers attending the trade show. However, such services were furnished in connection with the original sale of such goods to the retail stores and not in connection with their promotion for resale (Findings 64, 71, 73).

374. The suppliers incurred various costs associated with operating booths at the Gibson Trade Show. Decorating, electrical, telephone, drayage and assorted other expenses were paid directly by suppliers to the company providing the particular service. There is no record evidence that these payments were received by the Gibson Trade Show (see, *e.g.*, CX 468A-C, 472A-J, 481A-F, 484A-H, 844A-C, 845A-C, 847B, 849A-B; Mehring 1606-07). Such payments, associated with the staffing of booths by suppliers, were for the benefit of the Gibson stores attending the show (Finding 71). Such services were in connection with the original sale to such retailers (Finding 373).

375. The trade show and the services to suppliers associated therewith, such as the show sheets, authorization to sell to the Gibson stores, etc., facilitated sales by the participating suppliers to the Gibson Discount Centers (Findings 64, 68, 71, 85, 90, 97, 128, 158-59, 209, 211, 216, 217, 242, 303, 347). Show fees and booth fees received by respondents constituted payments in connection with services related to the original sale (*e.g.*, Findings 64, 68, 71, 97, 128, 158, 216, 217, 249, 286, 290, 307, 308, 347, 349), and were not promotional payments in connection with the resale of such merchandise. Similarly, supplier advertising in show directories and buyer's guides, directed to the buyers of Gibson retail stores, was not a promotion in connection with the resale of goods at the retail level (Finding 293).

376. The trade show and the payments received in connection therewith originated with respondents. In the case of each supplier, respondents or their employees solicited the show fee and booth fee payments (Findings 95, 97, 99, 127, 153, 176, 286, 327, 361). The show fee payments, based on varying percentages of sales volume, were solicited by respondents or their employees seeking whatever the traffic would bear (Findings 98, 99). Such payments were solicited whether or not a supplier had a standard cooperative advertising or promotional program (*e.g.*, Findings 127, 133, 153, 163, 176, 182). When suppliers had a standard promotional program, the show fees were not paid pursuant to such programs (*e.g.*, Findings 163, 226, 312). [148]

377. The payments were solicited and received even after a supplier had raised the possible illegality of the payment (Findings 153, 156). Respondents were on notice that the show fee payments had no

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relationship to any supplier's standard advertising or promotional program (Findings 133, 163, 226, 273, 274, 312, 334). As a result, respondents knew or should have known that the show and booth fee payments were not available to other customers competing with the Gibson retail stores on proportionally equal terms. [149]

III. Evidence under Count II of the Complaint

A. Toastmaster Division, McGraw-Edison Company

378. The Toastmaster Division of the McGraw-Edison Company ("Toastmaster") is a division of the portable appliance and tool group of that corporation (May 3395-96).
 Toastmaster, in the period 1969-1973, produced small appliances, power tools, garden tools, electric fans and heaters. These products were produced primarily in Missouri, Iowa and Arkansas and shipped to all of the 50 states (May 3396-97).

379. Toastmaster, which participated in the Gibson Trade Show in the period 1966 through May of 1970, sold its products to the Gibson Discount Centers (May 3399, 3401).

380. The Gibson Trade Shows (May 3409, 3412).
 381. Toastmaster's sales volume with the Gibson stores, as of August 1970, had been increasing steadily. The orders written at various Gibson Trade Shows, although sizable, represented only a small percentage of Toastmaster's sales volume with the Gibson stores (CX 102A).

382. Toastmaster's salesman went to the Gibson office, in Seagoville, Texas, to line up booth space for the upcoming shows. In this connection, he dealt mainly with Bobby Regeon and Tommy Perkins (May 3402). Tommy Perkins was the person to be contacted on power tools and electric heaters. Perkins, Regeon and the Toastmaster representative agreed on the items to be displayed at the Gibson Trade Show and the booth space to be assigned (May 3402-03).

Toastmaster's representative made a sales presentation to Perkins and Regeon as he would to a customer (May 3405).⁸⁰ The Toastmaster representative and the trade show buyers attempted to pick those items which would move in the greatest volume (May 3411). Prices and special deals were discussed at such meetings (May 3404). The decision

⁸⁰ Toastmaster's sales representative referred to Perkins and Regeon as "buyers." They made no actual purchases, but one of the functions of a buyer is to select merchandise (May 3406). Perkins, Regeon and the Toastmaster salesman selected the items to be displayed at the show (May 3407-08).

on the items to be shown was reached as a result of such discussions (May 3405). [150]

Perkins, in his discussions with the Toastmaster representative, was interested in the lowest possible prices for the Gibson stores (May 3414). The prices in question applied to both franchised and Seagoville-owned stores (May 3415). Billing and special dating terms for all the Gibson stores were also discussed between Toastmaster representatives and the trade show buyers (May 3415-16).

383. Toastmaster, at the Gibson Trade Show, utilized show sheets and sold orders to buyers for individual stores (May 3408). It intended to sell to all Gibson stores whether franchised or Seagoville-owned (May 3409-3412). Toastmaster participated in the Gibson tabloid; the items featured in the tabloid were publicized by a sign at its display booth at the Gibson Trade Show (May 3423, 3424, 3439).⁸¹

384. In 1969, Toastmaster's salesman, Henry May, and Tommy Perkins had a conversation pertaining to an upcoming show (May 3432-33). At that time, Perkins stated that he needed a better price to continue promoting or showing Toastmaster in the Gibson Trade Show (May 3433). When Toastmaster's representative stated, "I don't have a better price. We have one price for all" (May 3433), Perkins replied, "You do not cooperate with Seagoville" (May 3434).⁸²

In several conversations, Perkins repeated that Toastmaster was not "cooperating with Seagoville" (May 3434).⁸³ Such conversations took place in the period September 1969 - June 1970 (May 3437-38; CX 101). Eventually, Perkins explained that cooperation meant a three percent better price. This was to cover Toastmaster sales both to Gibson franchised and Seagoville stores (May 3440). This request was over and above Toastmaster's three percent standard advertising program (May 3440). [151]

385. At a meeting on June 22, 1970, concerning the upcoming August show, Perkins stated that he did not know whether there would be room for Toastmaster at the show (May 3441). "Cooperation" was again discussed, with Perkins asking for a payment of three percent of sales volume to the Gibson stores (May 3443; CX 101A-B). Toastmaster refused to make such a payment on the ground that it sold to all distributors at the same price (May 3443).⁸⁴ [152]

⁸¹ Buyers for retail stores were more apt to purchase a tabloid item knowing that it was backed up by advertising in their area (May 3422-23).

⁸² Toastmaster was able to participate in the upcoming show in August 1969 (May 3434).

⁸³ Perkins, on approximately three occasions, demanded a better price and stated that Toastmaster did not cooperate after the initial conversation on this subject (May 3439-40).

⁸⁴ The contemporaneous memorandum of Henry May, Toastmaster's sales representative, summarized this conversation, in pertinent part, as follows:

On September 3, 1969, I wrote you regarding the Gibson Seagoville kick-back conversation I get when I am with the Seagoville buyers. You wrote me on September 12, 1969 that you agree with the way I have handled

(Continued)

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386. Toastmaster was unable, at the June 22, 1970, meeting or in subsequent attempts, to get booths for the August 1970 show (May 3347, 3348). Subsequently, it was also unable to get into the November 1970 show because the trade show buyer felt that Toastmaster was not "cooperating" (May 3450-51). This show was important to Toastmaster because of its fan business. The Gibson stores sell a lot of fans (May 3450). Toastmaster was in none of the Gibson Trade Shows in the succeeding period from August 1970 through 1973 (May 3468, 3470).

387. After its exclusion from the August 1970 Gibson Trade Show, Toastmaster made extensive efforts to maintain its sales volume by making sales to the individual Gibson stores (CX 102A-B). In the fall of 1970, Toastmaster's representative told Tommy Perkins that:

...all of our men were continuing calling on the stores and trying to get orders, and servicing, still taking care of defectives, and so forth. And that we certainly would like to be in it. [153]

And I hoped that he was not going to put out a letter on me, and he said he wouldn't (May 3452).⁸⁵

388. In January or February 1971, Henry May saw a copy of a letter sent by Tommy Perkins regarding Toastmaster on a bulletin board in a Gibson store in Fort Worth, Texas on West Highway 80 (May 3462-63; CX 104). This letter, signed by both Bobby Regeon and Tommy Perkins as "Seagoville Buyers," states as follows: [154]

this matter. Well, three Gibson Shows have gone by since then and there is still the same kick-back conversation in Seagoville. Today at 10:00 a.m. I had an appointment with Tommy Perkins, the appliance buyer in Seagoville, to line up my booths for the August 17th thru 21st Show. I went over our new items, new colors, special offers, etc., and he remarked that Toastmaster and McGraw-Edison Co. do not cooperate with Gibsons enough. He thinks Mr. Gibson should decide whether Toastmaster should be in the next show or not. He says he has talked this with me for over a year and nothing has happened. He says Mr. Gibson can explain a way that the kick-back is not illegal. He wants to have a meeting in Chicago with you and Mr. Gibson; maybe the 11th or 12th of July, before the Housewares show. Tommy thinks Mr. Gibson can convince you to come around to their thinking.

Tommy states that he has written Toastmaster asking for their volume dollar figures and does not get any type answer. He questions whether Toastmaster volume is huge enough to continue being in their shows. However, he says it may be bigger than he thinks. I know why we have not given Gibson this figure. They would use it as a wedge threatening us.

(Memorandum, Henry May to Scott Rexinger, dated June 22, 1970, CX 101A).

⁸⁵ Q. What do you mean "put out a letter on you?"
A. I had heard rumors that there was letters that they had sent out on some different companies, that I didn't want it to be one against me (May 3452).

THE WITNESS: Well, my understanding was that the letter would more or less disapprove your line as a source of doing business with. Disapprove your company (May 3455).
The rumors were in fact well-founded. See CX 104, 136 and 303.



Gibson Products Company

OF SEAGOVILLE, TEXAS

A/C 714/737-2376

January 22, 1971

TO: ALL STORES

FROM: BOBBY REGEON & TOMMY PERKINS, SEAGOVILLE BUYERS

SUBJECT: TOASTMASTER DIVISION
MCGRAW-EDISON COMPANY
ELGIN, ILLINOIS 60120

The above company will not sell us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or authorize this line, and suggest that you discontinue the same.

Please give this your attention, and we appreciate your continued co-operation.

Thank you,

Bobby Regeon & Tommy Perkins
Bobby Regeon & Tommy Perkins
Seagoville Buyers

Tommy Perkins

BR&TP/je

317 GIBSON STREET



SEAGOVILLE, TEXAS 75159

[155]The language of this letter was discussed with Lynn Low, Assistant to H.R. Gibson, Sr., by its author and one of its signatories, Bobby Regeon (Regeon 6641-42).

Toastmaster's sales representative, Henry May, after CX 104 came to his attention, made several attempts to talk to Perkins who told him that there was no longer room for Toastmaster in the show. May was unable to reach Gibson, Sr. when he attempted to do so (May 3469).

389. Toastmaster, after it received notice of CX 104, continued to

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try to make sales to both the Seagoville-owned and franchised Gibson stores (May 3464-65; CX 105A-B). After Toastmaster received notice of CX 104, Roy Love, a franchisee in Oklahoma City, stated to Henry May, "if he wanted to keep his sign out in front of his store, saying Gibsons, he had to go by what Seagoville ordered or told him to do." Love had received CX 104 at the time of this conversation (May 3466, 3501).⁸⁶ Previously, Love's store had been doing business with May (May 3466).

Subsequent to the dissemination of CX 104, May continued to try to sell to franchised stores with the result that some stores continued to buy from him and some didn't (May 3466-67). He also continued to call on "Seagoville" stores and was unable to make any sales to them (May 3468).⁸⁷

A Toastmaster salesman who called on a Gibson store in Columbia, Mo. was informed by E.A. Drewel of that store "that they were going along with Gibsons Hqs. instructions — not to purchase Toastmaster" (Memorandum of V.W. Moritz, 2-20-71, CX 106A).

390. Toastmaster had the following sales volume with the Gibson stores in the period 1970-1973: [156]

1970	\$953,656.53
1971	\$296,778.33
1972	\$501,036.97
1973	\$446,528.74 (CX 117A-D). ⁸⁸

391. As of April 25, 1972, there were 93 Gibson stores in the territory of Henry May and he was selling to only 20 of them (CX 116A).

392. Toastmaster again participated in the August 1974 show after Perkins had explained to them the services which the trade show would perform and that a show fee was to be charged therefor (May 3470). Toastmaster's sales to the Gibson stores went up after it again began to participate in the Gibson Trade Show. For that privilege, it pays a show fee on all sales to franchised and Seagoville stores, namely, two percent on fans and three percent on appliances (May 3471-72).⁸⁹

⁸⁶ Roy Love was a brother-in-law of Gibson, Sr.; on that basis, the witness felt that the store in question could be classified as a family store (May 3500-02).

⁸⁷ Toastmaster personnel referred to the stores owned by Gibson, Sr. as "Seagoville-owned" (May 3400-01).

⁸⁸ Similarly, the sales statistics of Henry May reflect a sales volume of \$278,000 in 1970, the last full year Toastmaster was in the Gibson Trade Show, as compared to a sales volume of \$83,914 for 1971 (CX 116A). See also the sales figures for Bill Anderson for his sales volume to Gibson stores:

1969	\$208,960
1970	\$222,694
1971	\$ 84,173
(4 months) 1972	\$ 75,000 (CX 116C).

⁸⁹ The show fee payments are in addition to Toastmaster's standard advertising allowance (May 3471-72).

393. CX 104 was a request to Gibson franchised and family-owned stores to boycott Toastmaster because it refused to pay H.R. Gibson, Sr. the three percent rebate requested (Findings 384-89). The withdrawal of authorization and the recommendation by H.R. Gibson, Sr.'s "Seagoville Buyers" to discontinue the Toastmaster products resulted in a precipitous drop in sales volume to Gibson stores by Toastmaster in 1971 (Finding 390). The request by Gibson, Sr.'s buyers to discontinue the Toastmaster line gave rise to a combination between respondents and a substantial number of Gibson stores to boycott Toastmaster. [157]

B. Tucker Manufacturing Company

394. In connection with the February 1971 Gibson Trade Show, Tommy Perkins, a trade show buyer, advised Tucker Manufacturing Company that Tucker would have to pay a volume rebate for its trade show participation (Tocci 4548-49). When Tucker refused to make such a payment, it was advised that it would not be allowed to participate in the trade show (Tocci 4549).⁹⁰ Tucker did not want to pay the two percent volume rebate demanded because of low profit margins (Tocci 4549).

395. Tucker had already, on January 4, 1971, sent in its deposit for payment of booth numbers 585 and 586 for the February 1971 show. On April 8, 1971, it requested return of the deposit after being informed that it would not be allowed to participate in the show (Tocci 4549-50, 4560; CX 304).

396. In the meantime, on March 11, 1971, Tommy Perkins had sent the following letter: [158]

⁹⁰ The volume rebate in question was two percent of sales to the Gibson stores (Tocci 4549).

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95 F.T.C.

W. H. Gibson
Gibson Products Company
 OF SEACOVILLE, TEXAS
 March 11, 1971
 000013

TO: ALL STORES
 SUBJECT: TUCKER MANUFACTURING CORP.
 ARLINGTON, TEXAS

WE HAVE REVIEWED THIS LINE AND FEEL THAT THEY WILL NOT
 SELL US AT A PRICE WE WOULD RECOMMEND AS BEING PROFITABLE
 AND BENEFICIAL FOR YOUR OPERATION. WE THEREFORE DO NOT
 RECOMMEND OR AUTHORIZE THIS LINE, AND SUGGEST THAT YOU
 DISCONTINUE THE SAME.

PLEASE GIVE THIS YOUR ATTENTION.

THANK YOU FOR YOUR COOPERATION.

Tommy Perkins
 TOMMY PERKINS
 HOUSEWARES BUYER

TP:lb

[159]397. Tucker, at the time that it was refused admission to the February 1971 Gibson Trade Show, was selling at a competitive price (Tocci 4559).

398. Tucker's representatives had conversations with Perkins about getting back into the trade show (Tocci 4561). Tucker's representatives were advised that payment of the two percent volume rebate was prerequisite to getting back into the trade show (Tocci 4561-62).

Tucker, as a result, agreed to reestablish the volume rebate of two percent of Tucker's total sales to the Gibson stores (Tocci 4562). Tucker participated in the August 1971 Gibson Trade Show, having agreed to pay the volume rebate approximately two months prior to the actual show date (Tocci 4563).

Tucker had been advised by its sales representatives that the family-owned stores were not authorized to purchase products from it and that the reason it was unable to make sales to such stores was the failure to pay the volume rebate (Tocci 4563-65). Tucker decided to again pay the two percent for that reason (Tocci 4565).

399. In 1973, Tucker discontinued participation in the Gibson Trade Show because of its low profit margin and the requirement for the two percent volume rebate (Tocci 2326-27).

C. Jeannette Glass Company

400. Jeannette Glass Company ("Jeannette"), of Jeannette, Pennsylvania, is engaged in the business of manufacturing and selling glassware (Pawlik 887, 889). These products are shipped throughout the United States and most of the world from Jeannette, Pennsylvania (Pawlik 889-90).

401. Jeannette, in the period 1967 to the end of 1970, sold to Gibson franchised stores and family-owned stores (Pawlik 909-10). Jeannette contacted Tommy Perkins with respect to both categories of stores (Pawlik 911).

402. In the period 1967-1971, Jeannette did not offer advertising allowances to its customers (Pawlik 915). It offered quarterly specials to all its customers. Jeannette also had a jobbers' discount of ten percent off list price available to jobbers, mass merchandisers and volume users, including the Gibson stores (Pawlik 921-22). [160]

403. Jeannette participated in the Gibson Trade Show (Pawlik 922). Prerequisite to getting into the trade show, Jeannette had to have its line approved by trade show personnel (Pawlik 923). In order to get its lines approved in the period 1967-1971, Jeannette dealt with Tommy Perkins (Pawlik 924, 926).

Jeannette wanted to get into the Gibson Trade Show because "Gibson does a terrific amount of business" (Pawlik 926-27). The only stores attending the Gibson Trade Show in the period 1967-1970 were Gibson stores (Pawlik 927-28). And, this was also true in 1974 and 1975 (Pawlik 930).

404. Jeannette's brokers advised its officials that Tommy Perkins had asked for a five percent rebate on sales to Gibson stores (Pawlik 941-43. See also CX 124A). This rebate was to be paid to Gibson, Sr. and not to the individual stores (Pawlik 943). Jeannette's officials

rejected the suggestion by its brokers as well as similar requests by trade show officials that rebates be paid to Gibson Products Company in the period 1969-1971 (CX 124A-B, 132A-B, 134A-B; Pawlik 963-64). They refused to pay the five percent rebate requested (Pawlik 974).⁹¹

405. On March 30, 1971, Tommy Perkins, on behalf of Gibson Products Company, wrote the following letter to "All Stores": [161]

⁹¹ Jeannette made no payments to its customers based on a percentage of sales in the period 1968-1971 (Pawlik 974).

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STAN DOLAN
FOR YOUR INFO.
JC09

March 30, 1971

John [unclear]

Gibson Products Company
OF SEACOVILLE, TEXAS
March 30, 1971

TO: ALL STORES

SUBJECT: JEANNETTE GLASS COMPANY, BROOKPARK-ROYLON
ROYAL CHINA

WE HAVE REVIEWED THIS LINE AND FEEL THAT THEY WILL NOT
SELL US AT A PRICE WE WOULD RECOMMEND AS BEING PROFITABLE
AND BENEFICIAL FOR YOUR OPERATION. WE THEREFORE DO NOT
RECOMMEND OR AUTHORIZE THIS LINE, AND SUGGEST THAT YOU
DISCONTINUE THE SAME.

PLEASE GIVE THIS YOUR ATTENTION.

THANK YOU FOR YOUR COOPERATION.

Tommy Perkins
TOMMY PERKINS
HOUSEWARES BUYER

TP:16

Schubert 4pl
OBTAINED BY *Paul Surley* 1173
AT SEACOVILLE, TEXAS
FILE NO. 6910058

1X-136

[162]406. Subsequently, Jeannette's sales representative⁹² attempted to contact Tommy Perkins to get back in the show (Pawlik 975). Perkins rejected the Jeannette lines and refused to approve them, since Jeannette had dropped out of the show. According to Perkins, other lines had replaced Jeannette and there was no need for

⁹² This individual, up to June 1971, had been Jeannette's midwest sales manager and then went into business for himself as a sales or manufacturer's representative (Pawlik 975).

additional lines (Pawlik 976). Perkins, moreover, refused to see Jeannette's representatives when contacted on numerous occasions (Pawlik 980).

407. In the period July 1971 to January 1972, Perkins did offer to represent Jeannette to the Gibson stores for a fee of five percent. Jeannette's representative, however, refused to enter into such an agreement (Pawlik 1013-16).

408. Since June 1971, Jeannette's sales representative, Steve Pawlik has made an effort to sell glassware products to Gibson family stores (Pawlik 982). He has made no sales to family stores since that time because the lines were not approved (Pawlik 982, 987-88). Since June 1971, Pawlik's sales in the case of the Gibson stores have been confined to the franchised stores (Pawlik 988, 990). Pawlik has sold Jeannette products to franchised stores on an individual basis but not to respondents' warehouse (Pawlik 1011). He has also been unable to make sales to certain franchisees such as Love of Oklahoma City and the San Benito, Texas group (Pawlik 991-92). [163]

IV. Evidence under Count III of the Complaint

409. The Ray-O-Vac Division of ESB Incorporated⁹³ ("Ray-O-Vac"), of Madison, Wisconsin, is a manufacturer of dry cell batteries and lighting products (CX 140A, 154A, 169A).

Its sales to the Gibson stores in 1975 were in excess of \$2 million (Blake 4449-50).

A. Barshell, Inc.

410. Jim Miller was a broker employed by Ray-O-Vac to represent its products to the Gibson stores for approximately five years in the period 1969 to January 1, 1974 (Blake 4430).

411. Barshell, Inc. ("Barshell") was a distributor of health and beauty aid products, redistributing such products to various retailers and wholesalers throughout the Southwest (Miller 3118). Jim Miller wholly owned the stock of this corporation which was incorporated in 1971 (Miller 3118-19).

412. Ray-O-Vac did not consider the Gibson Trade Show to be its sales representative at the time that it was represented by Barshell, Inc. In Ray-O-Vac's view, the Gibson Trade Show is a service organization which helps a manufacturer to display his wares (Blake 4436).

413. Gibson, Sr. placed an order in 1969 for some 60-70 of the so-

⁹³ Acquired by International Nickel Company (Blake 4418).

called family stores. This order was given to start off Ray-O-Vac with the Gibson stores pursuant to a sales call by Jim Miller, Ray-O-Vac's broker, and Frank Blake, Ray-O-Vac's Regional Sales Manager. The order in question, moreover, was not a recommendation but a flat shipment (Blake 4422-23, 4479).

414. Beginning in 1971, Barshell became the sales representative of Ray-O-Vac (Miller 3119-20).⁹⁴ Ray-O-Vac retained Barshell to represent it to the Gibson stores. Under this arrangement, Barshell was to present Ray-O-Vac's sales promotions to Gibson headquarters, conduct necessary negotiations, have Ray-O-Vac's products listed and attend the Gibson Trade Show (Miller 3121, 3126; CX 154A-F).

415. Barshell paid Ray-O-Vac's booth fees for participation in the Gibson Trade Show and was reimbursed for such payments by the supplier (Blake 4448). [164]

416. Ray-O-Vac, through its broker Barshell, Inc., participated in every Gibson Trade Show to the end of 1973 (Blake 4424). In the period 1969-1975, Ray-O-Vac, however, paid no show fee to the Gibson Trade Show, although its representatives participated therein (Blake 4443).

417. Ray-O-Vac compensated Barshell with a ten percent brokerage fee (CX 154B).

418. As far as Barshell was concerned, at the time that it sold to the Gibson accounts, Gibson, Sr. was a very enormous and powerful customer (Miller 3135). About eighty percent of Barshell's sales at the time it represented Ray-O-Vac were to the Gibson stores (Miller 3139).

419. When Ray-O-Vac got into the Gibson Trade Show, Gibson, Sr. approved Ray-O-Vac products for purchase by Gibson franchised and Gibson family stores (Miller 3141).

Barshell had numerous meetings with Gibson, Sr. or his buyers after it began representing Ray-O-Vac. Such meetings, concerning Ray-O-Vac, occurred prior to almost every Gibson Trade Show (Miller 3126-27).⁹⁵

Prices were discussed at some of those meetings. On one occasion, there was a discussion concerning a nine percent discount, either in deal form or in advertising, to Gibson or Gibson stores buying the Ray-O-Vac line (Miller 3128-29).

420. On a number of occasions, H.R. Gibson, Sr. visited the office of Jim Miller in connection with Ray-O-Vac (Miller 3132). On such visits, Gibson, Sr. negotiated deals with Miller and Barshell to pay Gibson or the Gibson Trade Show promotional allowances based on sales and the

⁹⁴ Prior thereto Miller owned another corporation which had represented the Ray-O-Vac account at that time (Miller 3120).

⁹⁵ Frank Blake, of Ray-O-Vac, was present at a number of those meetings (Miller 3128).

activities Gibson performed to sell Ray-O-Vac products to the Gibson stores (Miller 3132).⁹⁶

[165]The basis of such payments to Gibson, Sr. by Barshell, pertaining to Ray-O-Vac (Miller 3132-33), varied:

Well, it would just depend. Mr. Gibson, was never consistent with that. It would depend on what he felt like he did for you.

If he had written a general order, where he had insisted that the stores, or suggested that the stores buy a certain quantity of merchandise, and if this order amounted to a hundred thousand dollars, he would expect more from the agency than he would if you had solicited the business yourself from those stores (Miller 3133).

421. Ray-O-Vac automatically sent commission statements to Barshell (Miller 3134). The commission statements recorded all of Ray-O-Vac's shipments to the individual Gibson stores, showing the dollar volume shipped to those stores; along with the dollar volume figures, such statements showed the commission which Barshell had earned through those sales (Miller 3134). Gibson, Sr. checked Barshell's commission statements received from Ray-O-Vac in connection with his visits to Miller concerning Barshell's activities for that supplier (Miller 3132-33).

422. After Gibson, Sr. had checked Ray-O-Vac's commission statements, Barshell made payments to Gibson, Sr., termed promotional allowances, on the basis of Ray-O-Vac sales recorded in such commission statements (Miller 3132-35). CX 192, a Barshell check in the amount of \$13,173.43, dated September 23, 1972, is one such payment (Miller 3134-35).⁹⁷ [166]

423. CX 192 is a check transmitting brokerage fees by Barshell, received from Ray-O-Vac, to H.R. Gibson, Sr. (Miller 3132-35, 3140, 3147-48)⁹⁸ at a time when Gibson, Sr. was owner and operator of

⁹⁶ Q. Now, when you are referring to Gibson, who are you speaking of?

A. Well, that would be Mr. Gibson, Sr., or Gibson Trade Show. Because it was, you know, kind of interwoven there. We really never knew who we were dealing with (Miller 3132).

⁹⁷ The check is made out to H.R. Gibson, and endorsed "H.R. Gibson DBA Gibson Products Company" (CX 192). The witness testified:

JUDGE VON BRAND: All right. Where did the commission statement originate?

THE WITNESS: They would originate with the Ray-O-Vac Company. They would be sent to us automatically.

JUDGE VON BRAND: Proceed.

(A paper was marked for identification as Commission's Exhibit No. 192.)

By Mr. Brookshire:

Q. Mr. Miller, I hand you what has been marked as CX-192 for identification. And I ask if you can identify that document, please, sir?

A. Yes. This is a check drawn on North Central State Bank on Barshell, Incorporated, dated 9-23-1972, in the amount of \$13,173.43.

Q. What was the purpose of that check?

A. This would have been promotional allowance given to Gibson for whatever group of commission statements or activity covered for a period of time with Gibson (Tr. 3134-35).

⁹⁸ Q. Mr. Miller, referring to a document which has been identified, or been admitted into evidence as CX-192, were there ever any other checks issued under the same or similar circumstances by Barshell?

various retail stores or, in short, a buyer from Ray-O-Vac (Findings 5, 6). [168]

424. Frank Blake, the Ray-O-Vac official responsible, has not discussed with brokers their disposition of the Ray-O-Vac commissions. "We pay the commissions, what he [the broker] does with them is his business" (Blake 4484).

B. Al Cohen Associates, Inc.

425. Al Cohen Associates, Inc. ("Al Cohen"), of 12514 Gulf Freeway, Houston, Texas, is a corporation formed in 1961 or 1962 (Cohen 3981-82). Al Cohen, a sales representative, is essentially a one man business (Cohen 3980). Its only officers and shareholders are Alpha Meyer Cohen and his wife (Cohen 3981).

426. Al Cohen acquired the Ray-O-Vac account on December 28, 1973, to become effective on January 1, 1974 (Cohen 3987-88, 3992; CX 169A-C). The representation agreement provides that Al Cohen is to represent Ray-O-Vac to:

- A. Gibson Discount Centers, Inc. Seagoville, Texas
- B. All Gibson franchise stores (CX 169A).

The agreement further provides, in pertinent part:

PERFORMANCE

The REPRESENTATIVE agrees to do the following:

- A. To maintain continuous headquarters contact with Gibson Discount Centers in Seagoville, Texas.
- B. To secure adequate space in any dealer shows the COMPANY desires to enter through Gibson Discount Centers, Inc.
- C. To supply adequate manpower in conjunction with the COMPANY'S manpower to adequately man the booths at any of these dealer shows.
- D. To assist COMPANY personnel to service at retail all Gibson Discount Centers throughout the United States. [169]
- E. To refrain from acting in any capacity as a promoter of sales of product which compete with those listed in Paragraph #2 above, and which are not manufactured by the COMPANY.
- F. To send orders to the COMPANY promptly as they are received.

A. Yes.

Q. To who?

A. To Gibson. Mr. Gibson, Sr.

Q. Do you recall whether or not such checks were issued in 1971?

A. I would have to assume that they were. Offhand, I don't recall. I would have to assume, yes, depending upon what time of the year that Barshell took over the representation of Ray-O-Vac.

Q. How often were these checks payable?

A. Well, most of the time, it would depend upon when Mr. Gibson came by and sat down to negotiate with us. And that could be anywhere from, usually every other month, to three or four months (Tr. 3140).

COMPENSATION

In return for performance of the duties specified in Point #2 above, the COMPANY agrees to pay the REPRESENTATIVE ten per cent (10%) of net sales billed for sales which result from orders solicited by the REPRESENTATIVE (CX 169A-B).

427. Ray-O-Vac also paid commissions to Al Cohen on sales to the Gibson stores generated by the calls of Ray-O-Vac's own sales staff (Blake 4488).

428. Alpha M. Cohen contacted H.R. Gibson, Sr. after he received the Ray-O-Vac contract, and an oral agreement between these two respondents was reached (Cohen 4007-08).⁹⁹ Under that agreement, Gibson, Sr. was to increase the sales volume of Ray-O-Vac the best way he knew how. Otherwise, Gibson, Sr.'s functions pursuant to this verbal agreement were not spelled out (Cohen 4008). Cohen, under this agreement, undertook to pay Gibson, Sr. ninety percent of the ten percent commission which Al Cohen received from Ray-O-Vac (Cohen 4011-12). Put another way, Gibson, Sr. received a payment equivalent to nine percent of Ray-O-Vac's sales to the various Gibson stores. [170]

429. Al Cohen made such payments monthly by check to Gibson, Sr. after receipt of a commission check and statement from Ray-O-Vac (Cohen 4012-15; CX 1212-17). Such payments commenced in 1974 and continued up until at least March 1978 (Cohen 4015-16).

In 1974, payments of commissions by Al Cohen to Gibson, Sr. totaled \$174,907.10 (CX 1218).

The record shows the following commission payments by Cohen to Gibson, Sr. in 1975:

January 15	\$ 17,972.39
January 31	10,901.47
March 10	7,327.26
April 14	25,398.00
April 30	31,634.99
June 10	10,127.29
July 7	12,986.47
July 31	17,746.04
September 4	<u>16,367.02</u>
Total	\$150,460.93 (CX 1215-17).

430. Alpha Cohen's assertion that H.R. Gibson, Sr. is a salesman to whom he sublet the Ray-O-Vac line is undercut by his recognition of Gibson, Sr.'s buying function in behalf of the Gibson stores:

⁹⁹ According to Alpha Cohen:

Mr. H.R. Gibson, Sr. agreed to do the lion's share of the work in advancing the sale of Ray-O-Vac products to the Gibson stores through his trade show and we worked out an agreement where he would do the lion's share of the work and I would pay him for that work (Tr. 4007).

Q. Did Mr. Gibson ever solicit you to give a special reduced price to the stores that use the Gibson name?

A. I don't believe I understand your question, Mr. Steele.

Q. Let me take it this way; in the period 1969 through 1974, to your recollection, did Mr. Gibson, Herbert R. Gibson, Sr. come to you and request that you work out any reduced prices for the Gibson stores on any line?

A. Mr. Steele, awhile ago I told you that all buyers are interested in price, everyone of them, whether they be H.R. Gibson, Sr. or Mr. Bill Houton with Winn stores or regardless of who it is, they are always bucking for a better price. I don't care who you are. [171]

To specifically say that he has bucked for a better price for the Gibson stores with the Gibson name, it would be difficult for me to answer that either way because everyone of them tried to get a better price (Cohen 4077-78).¹⁰⁰

431. Gibson, Sr., although "bucking for a better price" (Finding 430), was not himself a buyer in 1974 or 1975 (Finding 25). [172]

DISCUSSION

I. The Issues

The complaint alleges that respondents, through the operation of a trade show, violated Section 5 of the Federal Trade Commission Act and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. The details of the complaint have already been outlined and need not be repeated here (See Preliminary Statement). Essentially, the Section 5 charges under Count I allege that respondents have induced and/or received from suppliers various promotional payments and services not available on proportionally equal terms to those who compete with them in the resale of such products. Count II alleges that respondents have agreed, combined and engaged in an understanding and conspiracy with all or some of the Gibson family-owned and franchise stores to eliminate or boycott suppliers who did not grant the special allowances charged as illegal under Count I. Count III of the complaint charges that the Gibson respondents and certain brokers or sales representatives have, in violation of Section 2(c) of the Robinson-Patman Act, collected brokerage, commissions or other compensations from sellers of various products when, in fact, the brokers were acting for or in behalf of the Gibson family or corporate respondents or subject to the direct or indirect control of the Gibson respondents.

At this stage, the case presents a multiplicity of issues under all counts of the complaint. Common to all counts are the following questions: (1) is the Gibson Trade Show conducted by H.R. Gibson, Sr.

¹⁰⁰ Cohen's recognition of Gibson, Sr.'s buying function is not vitiated by his assertion, at Tr. 4078, that he did not consider Gibson, Sr. to be a buyer in 1973 and 1974 because he then owned no stores. While technically correct, it ignores the practicalities of the situation he had recognized in his previous answer. Compare also Finding 81 and note 15.

a bona fide manufacturer's agent representing suppliers participating therein; (2) is the Gibson Trade Show so interrelated with the various Gibson family and corporate respondents that respondents' franchising, trade show and retailing operations should be considered as an integrated enterprise; (3) should the services of the trade show and related payments be regarded as for the benefit of participating retailers or for the benefit of participating manufacturers or both; (4) was the Gibson Trade Show open to all retailers desiring to participate therein; and, (5) is the Gibson Trade Show oriented to the Gibson Discount Centers.

Under Count I, the following issues should be resolved: (1) under Count I, must the government prove the requisite elements of a violation under Sections 2(d) and 2(e) of the Robinson-Patman Act; (2) is the Gibson Trade Show a promotional service furnished by respondents in connection with the resale of goods or is it essentially a vehicle for suppliers to make the original sale to retailers; (3) should the legality of the [173]Gibson Trade Show fees more properly have been tested under the price discrimination sections of the Robinson-Patman Act; (4) has the government sustained its burden of proof in showing that respondents have knowingly induced suppliers to pay allowances not available on proportionally equal terms to customers competing in the resale of such goods; (5) has the government sustained its burden of proof in showing that allegedly nonfavored customers were on the same functional level and in sufficient geographic proximity to warrant a finding that they compete with retailers operating under the Gibson name; and, (6) has the government sustained its burden of proof in demonstrating that Gibson stores and nonfavored customers purchased goods of like grade and quality at contemporaneous times.

The primary questions to be resolved under Count II of the complaint are the following: (1) did respondents issue an invitation to boycott by virtue of letters from trade show buyers asking "All Stores" to discontinue purchases of certain suppliers, and did a boycott and/or combination in restraint of trade result from such invitations; (2) were such letters sent or circulated to all the Gibson stores or a substantial number thereof; and, (3) did trade show buyers employed by Gibson, Sr., signing and sending such letters, have authority to request stores operating under the Gibson name to discontinue dealing with certain suppliers.

Count III presents the following issues: (1) under complaint counsel's theory of the case, is it necessary to demonstrate that H.R. Gibson, Sr. received the brokerage or commission payments in issue as a "buyer." If so, has that criterion been met; (2) in any event, are the payments in question sanctioned by the "for services rendered" section of the

statute; (3) is the element of price discrimination prerequisite to a showing of a violation of Section 2(c) of the Robinson-Patman Act; and, (4) after October 31, 1972, was H.R. Gibson, Sr. a dummy broker, agent or intermediary acting in behalf of the other respondents. If so, does the theory under which the case was tried preclude the finding of a violation on that basis. [174]

II. The Function of the Gibson Trade Show

An issue common to all counts of the complaint is the nature of the functions performed by the Gibson Trade Show. Complaint counsel urge that the trade show, the individual respondents and their various corporations, including the retailing operations, should be considered a single economic entity. Respondents, on the other hand, contend that the trade show functions as a manufacturer's representative selling to retailers, with no relationship to the retailing operations under the Gibson name, whether "family" or franchised stores.

The central fact is that Gibson, Sr., in the period 1969 to October 31, 1972, simultaneously operated the trade show as an individual proprietorship, controlled various retail stores and individually licensed several hundred retailers, from whom he also collected a monthly licensing fee, to use the Gibson trade names (Findings 3, 4, 5, 6, 44, 47, 50). After Gibson, Sr. divested himself of his retail interests to his sons on October 31, 1972, the trade show continued to operate without essential change from its past operations.

The Gibson Trade Show, in the period 1969-1972, was confined essentially to retailers operating under the Gibson name (Findings 59, 60-61, 91). Trade show buyers from the "Seagoville Office" contacted suppliers in connection with "all the Gibson chain stores regardless of owner" (CX 307). Meetings of Gibson franchisees were held in conjunction with the trade shows (Finding 72). Trade show buyers authorized and listed the items which could be sold through the trade show (Finding 75). Trade show buyers culled deadwood from the suppliers lines and, in effect, preselected the items to be sold at the show (Finding 80). Gibson Trade Show buyers negotiated for better or competitive prices and billing terms [175](Finding 81).¹⁰¹ Show sheets,

¹⁰¹ Respondents assert that evidence as to price negotiations may not be relied upon in connection with the interrelationship issue, viz., the relationship of the Gibson Trade Show to the retailers. However, the December 7, 1977 Order, on which they rely, was limited to Count I evidence because respondents had no opportunity for third party discovery on the issue of proportional availability as it might relate to show prices and billing terms. Evidence on this point by the general witnesses was expressly permitted on "the interrelationship issue, including the function which Respondents' trade show officials perform" (Tr. 3773). In connection with this ruling, it was noted that insofar as the general witnesses testified as to the methodology of negotiating and approving show prices and billing terms, no third party discovery was necessary (Tr. 3765-66, 3777. See also Tr. 3537-38, 3553-60). Where the evidence is limited to the function performed by trade show employees and proportional availability is not involved, respondents need no discovery from nonparties. For example, respondents clearly did not need nonparty discovery as to Gibson, Sr.'s

i.e., order forms and price lists, which were an integral part of the trade show operation, were preprinted with only the Gibson Products name on that section of the form identifying the retailer giving the order (Finding 91). Respondents' show sheets instructed manufacturers not to ship at prices higher than those listed thereon and to contact respondents' "Seagoville, Texas offices" for price approval (Finding 93). At the shows, the trade show buyers or merchandise managers could do little more than introduce retailers to the supplier's sales representatives. The trade show buyers, because of the number of lines that they represented, had to leave the actual selling at the shows to the "factory" (Finding 87). The Gibson Trade Show simultaneously handled [176]competing suppliers (Finding 86). Gibson, Sr., while simultaneously owning and operating certain Gibson stores, franchising others and conducting his trade show, requested suppliers to participate in newspaper advertising promoting merchandise in the Gibson stores to the consumer (Findings 113-16). There was extensive overlap in the directors and officers of the respondent corporations and certain nonrespondent corporations operating Gibson stores by virtue of the offices held by the individual respondents, including Gibson, Sr., in the period 1969-1972 (Finding 12; Appendix A). The four individual respondents, through publication of store directories in 1970-1971, made or were responsible for making representations creating the net impression that the businesses of the four individual respondents and the corporate respondents were an integrated operation (Findings 39-41). Finally, trade show buyers suggested that the Gibson retailers stop buying from certain suppliers because "They will not sell us at a price we would recommend as being profitable and beneficial for your operation" (CX 104, 136, 303).

In the period 1969-October 31, 1972, Gibson, Sr., while he operated the trade show, had a direct financial interest in the stores he operated as well as in the financial health of the franchised stores from whom he derived franchise fees (Findings 6, 47, 49). The Gibson Trade Show, as already noted, benefited the retailers operating under the Gibson name in various ways. At the same time, the trade show, whose revenues Gibson, Sr. pocketed, depended on the attendance of the Gibson stores to attract the participation of suppliers. The Gibson family-owned retail operation, the franchising business and the trade show, as well as

testimony that he sought a competitive price so that the Gibson stores, in making a purchase, "wouldn't get stuck on it" (Finding 81 and note 15). There is no need to find a price discrimination to define the Gibson Trade Show's role. The benefit to the Gibson retailers from Gibson, Sr.'s concern on this point is plain as is the role played by the trade show on behalf of the retailer.

On this point, see also Order Pertaining to General Witness' Testimony Concerning Show Prices and Billing Terms dated March 14, 1978.

ancillary operations such as Ideal Travel, were mutually interdependent.

The trade show or Gibson, Sr., in dealing with suppliers, accordingly acted on behalf of retailers operating under the Gibson name, and payments to the Gibson Trade Show were for the benefit of participating retailers. In the period 1969 to October 31, 1972, Gibson, Sr. was also a "buyer" (Findings 5-6). The Gibson Trade Show cannot be considered a manufacturer's representative. To the extent that he "represented" manufacturers, the loyalties of Gibson, Sr. or his trade show must be considered divided between suppliers and retailers.

The pattern of the various enterprises, as a whole, conducted by the Gibson respondents and the respondents' mutual interdependence, compels the finding that the Gibson respondents in the period 1969-1972 operated as an integrated enterprise. [177]

III. The Count I Charges

The complaint charges that respondents violated Section 5 of the Federal Trade Commission Act by inducing suppliers to violate Sections 2(d) and 2(e) of the Robinson-Patman Act. Complaint counsel have tried the Count I allegations under the theory that respondents' acts are *per se* illegal (Tr. 39; CPF p. 153). Under the circumstances, they have the burden of proving in this Section 5 proceeding that the statutory elements of Sections 2(d) and 2(e) have been met. There is a "general assimilation of Robinson-Patman standards of liability and proof" in these cases. *Fred Meyer, Inc. v. FTC*, 359 F.2d 351, 365 (9th Cir. 1966), *rev'd and remanded on other grounds*, 390 U.S. 341 (1968). See also *J. Weingarten, Inc.*, 62 F.T.C. 1521, 1524-25 (1963). In short, the Count I charges, although under Section 5, are not being tried under an incipency standard.

Under Count I, the Commission must prove the following basic factual elements to demonstrate that respondents have engaged in unfair methods of competition by inducing discriminatory payments violative of the Clayton Act:

- (1) that a respondent in commerce knowingly solicited or induced and received from a supplier promotional allowances, services, or facilities;
- (2) that the solicited promotional considerations were received in connection with the resale of the supplier's product;
- (3) that respondents had competitors at the same functional level; and,
- (4) that respondents knew or should have known that its competitors

were not offered the promotional considerations in question on proportionally equal terms.

Alterman Foods, Inc. v. FTC, 497 F.2d 993, 997 (5th Cir. 1974).

Respondents contend that neither Gibson, Sr. nor his trade show are "customers" of suppliers participating in the trade show within the meaning of the Robinson-Patman Act. As a result, they argue that no discrimination cognizable under Sections 2(d) and 2(e) of the Robinson-Patman Act has been shown. Respondents urge that a finding that a supplier's "customer" has received the allegedly discriminatory allowance or services is prerequisite to a finding of violation. [178]

The argument misses the mark on two grounds. First, Section 2(d) is not limited to payments "to" a customer. It covers also payments "for the benefit of a customer." See *Swanee Paper Corp. v. FTC*, 291 F.2d 833, 836 (2nd Cir. 1961), *cert. denied*, 368 U.S. 987 (1962). In short, there is no need to make a finding that the payments in question were made directly to a buyer. Laying aside, for the moment, the question of whether the trade show constituted a promotional service in connection with the resale, it is clear that the trade show benefited the Gibson retailers as a group. As a result, payments to the trade show in the person of H.R. Gibson, Sr. were, at minimum, payments for the benefit of such customers.

Relying on precedents holding that the corporate entity should not be disregarded, respondents assert that Gibson, Sr. cannot be regarded as a customer since the retail operations in which he had a financial interest, in the period 1969-October 31, 1972, were incorporated. They contend that "[t]he crystal clear fact is that H.R. Gibson, Sr. never had anything to do with the operation of any retailers in this case" (RPF SR p. 236). Gibson, Sr.'s own testimony makes it clear that he played an active role at least in those corporations operating retail stores in which he was a majority stockholder. He hired the key employees, the store managers, and actively reviewed store financial records. And, "Anytime they didn't make money, I had to do something about it. Might get a new manager real quick. I would try to get the store to making money" (Tr. 5573; Finding 6). Gibson, Sr. had the authority to make managerial decisions in those areas that counted and did not hesitate to exercise it. The individual who reviews the performance of key corporate employees and fires them for inadequate performance, as a practical matter, runs that corporation. Gibson, Sr. clearly controlled the retail corporations wherein he had a majority interest in the period 1969 to October 31, 1972.

This testimony and the showing in the record that the trade show operated for the benefit of the Gibson retailers as a group compels the

finding that Gibson, Sr., in 1969-1972, combined the function of trade show operator and buyer from the participating suppliers. Trade show payments to Gibson, Sr., in the period 1969-October 31, 1972, were payments to a buyer and for the benefit of retailers operating under the Gibson name. Subsequent to October 31, 1972, they were for the benefit of such retailers. [179]

A crucial point is that the Gibson Trade Show was oriented to the retailers operating under the Gibson name.¹⁰² Accordingly, trade show payments necessarily were for the benefit of the Gibson stores, irrespective of whether Gibson, Sr. had an ownership interest therein or whether the trade show fee payments were passed on. The cases cited by respondents for interposing the corporate veil between Gibson, Sr. and the retail corporations do not apply.

A. Payments or Services Challenged under Sections 2(d) and 2(e) Must Be in Connection with the Promotion of the Goods for Resale

Sections 2(d) and 2(e) impose a more rigid standard than the flexible criteria of the pricing provisions of the statute. As a result, the first essential step in the legal analysis is to ascertain whether the price or promotional provisions of the Act apply. Rowe, *Price Discrimination Under the Robinson-Patman Act*, Little Brown & Company, 372 (1962). Under Section 2(a) of the Act, price discriminations are lawful unless the prescribed adverse effect on competition is shown and unless such discrimination cannot be justified under one of the defenses provided by the statute. Sections 2(d) and 2(e), on the contrary, have a *per se* standard of illegality irrespective of the competitive impact, and the opportunity to defend on the basis of the statutory defenses is sharply circumscribed. *Ibid.* As a result, "the stricter sanctions of these provisions [Sections 2(d) and 2(e)] create a legal premium for the FTC or other plaintiffs to ease their evidentiary burdens by classifying trade practices under Sections 2(d) and 2(e) rather than the price provisions in Section 2(a) [or 2(f)]." *Ibid.*

Payments, allowances or discounts in connection with the seller's original sale to the buyer are not within the scope of Section 2(d). *New England Confectionary Co.*, 46 F.T.C. 1041, 1059 (1948);¹⁰³ *Rutledge v.*

¹⁰² Consider, for example, Becker's agreement with Gibson Products Company to pay the 10% show fee on purchases by the Gibson stores in consideration for "the listing of our approved products to your stores and allowing us to display our approved products in your private trade show" (Finding 127). Moreover, supplier sales in the relevant period through the Gibson Trade Show were confined to Gibson stores (Finding 371).

¹⁰³ The "[m]ere acceptance by a purchaser of a promotional offer intended to facilitate the original sale, does not constitute the rendering of a service or facility by the purchaser within the meaning of Section 2(d)." *New England Confectionary Co.*, 46 F.T.C. at 1059 (emphasis added). That decision dismissed allegations charging as illegal under Section 2(d) the payment of rebates or discounts equal to the savings and costs attributed to different procedures followed in packing, selling or delivering its products where respondent compensated the favored customers for such services or facilities performed by them. Such payments, the Commission held, were made in connection with the original sale to the favored customers and not in connection with the resale.

Electric Hose & Rubber Company, [180]511 F.2d 668, 678 (9th Cir. 1975). And, the coverage of Sections 2(d) and 2(e) is limited by their implicit restrictions or terms of sale. Rowe, *supra* at 377. Other incidents of Sections 2(d) and 2(e) should be limited to promotional arrangements related to the customers' resale of the product, although the literal text of these provisions might reach distributive arrangements in connection with the resale.¹⁰⁴ "[S]uch a limitation is essential to prevent incongruity and overlap between several statutory provisions. If the 'proportional equality' requirements of the provisions governed all distributive 'services' or 'facilities' rather than cooperative promotions alone, the 'functional' discounts implicitly permitted by the price provisions of Section 2(a) for rewarding pure 'wholesalers' and, thus, made subject to the proportional availability requirements of Sections 2(d) and 2(e). In addition, legitimate brokerage allowances, regulated by Section 2(c), might also be governed by the proportional equality requirement of Section 2(d). Rowe, *supra* at 380-81. Accordingly, unless Sections 2(d) and 2(e) are limited to cooperative promotional arrangements, they would conflict with the separate price and brokerage provisions of the Act. *Id.* at 381. See also *New England Confectionary Co.*, 46 F.T.C. at 1060; *Carpel Frosted Foods*, 48 F.T.C. 561, 602 (1951).

The Commission in cases of this nature has, in fact, defined as one of the basic elements of this violation:

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

J. Weingarten, 62 F.T.C. at 1524.

[181] The principle that the reach of Sections 2(d) and 2(e) should be limited to promotions in connection with the resale was again confirmed in 1975 by the Ninth Circuit:

Section 2(d) does not refer to benefits to "favored buyers" in connection with the original sale to the buyer, such as discounts, nor does it refer to a seller who charges different prices to different buyers according to the qualification or functional level of the buyer; rather it refers to payments in connection with the resale by the buyer of the goods, for advertising, promotion or other similar purposes. *Exquisite Form Brassiere, Inc. v. F.T.C.*, 112 U.S. App. D.C. 175, 301 F.2d 499 (1961); *Rowe, Price Discrimination Under the Robinson-Patman Act*, at 371. Cf. *Surprise Brassiere Co. v. F.T.C.*, 406 F.2d 711 (5th Cir. 1969).

¹⁰⁴ E.g., *Champion Spark Plug Co.*, 50 F.T.C. 30, 50 (1953), held that payments for distributional services such as Special Warehouse Compensation were, in fact, reductions in net price not properly alleged as violations of Section 2(d) of the Robinson-Patman Act.

Rutledge v. Electric Hose & Rubber Company, 511 F.2d at 678 (emphasis added).

Payments by a supplier to customers or their intermediaries for services performed by the customer or intermediaries of the customer in connection with the *original sale* to such customers, as, for example, sending bulletins to encourage such retailers to make purchases, are not promotional payments within the scope of Section 2(d) of the Act. *Carpel Frosted Foods, Inc.*, 48 F.T.C. at 602. Payments for advertising and promotional services in order to stimulate the resale of the supplier's products *after* the product reaches the store are within the purview of this section. *Ibid.*

The Gibson Trade Show served as a vehicle to facilitate the original sale by suppliers to Gibson family and franchise stores attending such shows. As a practical matter, it enabled participating suppliers to make a sales pitch to Gibson retailers attending the show. The show did not admit consumers and the services performed by respondents for which they were compensated by suppliers were services facilitating the suppliers' sales to the retailers, analogous to the DGS bulletins aiding supplier sales to members of that cooperative in *Carpel*. The Gibson Trade Show, facilitating the vendors' original sales to the retailers, is not a case like *Macy's*, where the buyer "used the payments for institutional advertising and promotions to get more people into its store to buy the goods of all its vendors." *R.H. Macy & Co., Inc. v. FTC*, 326 F.2d 445, 450 (2d Cir. 1964).

The services for which the show fees were paid included authorization to display and sell certain merchandise, listing on the show sheets, introduction to retailers at the show, etc. [182] The booth fees permitted suppliers to display their wares and sell to the Gibson retailers. Supplier advertising in the store directories and buyers guides, circulated to persons attending the show but not to consumers, again related only to the manufacturer's sale to the retailers (Finding 293). The show fees, booth fees and advertising in store directories and buyers guides were compensation for services furnished in connection with the original sale to the retailers. Services such as the staffing and decorating of booths were similarly related to the original sale (See generally Findings 373-75).

Credit arrangements, such as billing terms, are not within the scope of the promotional provisions of the statute since they are connected only with the original sale of the product and not with its further handling or resale. *Secatore's, Inc. v. Esso Standard Oil Company*, 171 F. Supp. 665, 668 (D. Mass. 1959). As another court has recently stated, credit terms are not a cause of action under Sections 2(d) or 2(e); rather, they may state a cause of action under Section 2(a). *Robbins*

Cornborg, Inc. v. Federal Floors, Inc., 616 (E.D. Pa. 1977).¹⁰⁵ The charge in the complaint and billing terms induced by respondents were not made a part of their competitors' proportionally equal terms is an anomaly. The determination in *Alterman* that the food shows in that case were in connection with retail resales of the participating suppliers' products has been taken into consideration.¹⁰⁶ Complaint counsel, urging that the instant proceeding is within the scope of *Alterman*, stress [183]the benefits derived by the Gibson stores from the trade show. The Gibson stores, in fact, benefited from the trade show from supplier payments underwriting its operation. Such benefits include a convenient place for the retailers to make their purchases (Finding 71), Gibson, Sr.'s attempt to assure them a competitive price so they would not get "stuck" (Finding 81 n. 15),¹⁰⁷ preselection of merchandise (Finding 80), an opportunity to confer with other retailers (Finding 72), etc. Such benefits, however, are not concerned "with any of the services with which Section 2(d) concerns itself, to wit, promotion, advertising or similar activities connected with the resale of goods." *Rutledge v. Electric Hose & Rubber Company*, 511 F.2d at 678. [184]The legality of the show fees, booth fees, and payments for advertising in the buyers guides and store directories could have been challenged under Section 2(f) of the Act. See *New England Confectionary Co.*, 46 F.T.C. at 1060; *Champion Spark Plug Co.*, 50 F.T.C. at 50. An expansive reading of *Alterman*, which would bring such payments within the purview of Section 2(d), as a practical matter, would erase

105 See also *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 284 F. Supp. 148, 155 (D. Minn. 1967): "... Neither the price discriminations nor the credit preferences alleged in Count III can be considered to be services or facilities furnished in connection with the processing, handling, sale, or offering for sale of Hamm's beer. ..."

The record contains substantial evidence supporting the Commission's determination that the food shows were in connection with Alterman's retail resales of the participating suppliers' products. Suppliers were invited by Alterman vice-president in charge of the Company's retail division as well as for its wholesale business. The managers definitely benefit from participation. The store managers have general discretion in stocking and their managers stresses the benefits to them of participation. Company literature encouraging retailers to attend the shows "cement the relationship between a manager can acquire information on new products. He can also observe methods of promoting sales and building up his store. According to another Alterman vice-president, the food shows "cement the relationship between a food supplier and the retailer." Thus, the suppliers' promotional services at food shows benefited Alterman at the retail level.

"The profits on booth rentals were, in effect, price reductions on suppliers' products. See *Grand Union Co. v. ...*, 92, 99 (2d Cir. 1962). Although, as Alterman argues, there is no formal proof that this additional profit level while charging less in its other many competitors. This inference lies within the competence of the court to use [the] absence of contrary evidence produced by Alterman..." 17 & 18 (5th Cir. 1971).

The profits on booth rentals were, in effect, price reductions on suppliers' products. See *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962). Although, as Alterman argues, there is no formal proof that its profits on the food shows were put to use at the retail level, the Commission could properly infer that this additional source of profit enabled the Company to maintain a given overall profit level while charging less in its other operations, an advantage denied to Alterman's competitors. This inference lies within the competence of the Commission and constitutes substantial evidence in the absence of contrary evidence produced by Alterman. See *Colonial Stores, Inc. v. FTC*, 450 F.2d 733, 739 n. 13, 741 nn. 17 & 18 (5th Cir. 1971).

See *Colonial Stores, Inc. v. FTC*, 497 F.2d at 999.
It is irrelevant that show specials were available at a show c

The profits on booth rentals were put to use at the retail level, thus the food shows were put to use at the retail level, given over to the source of profit enabled the Company to maintain a given over to the operations, an advantage denied to Alterman's competitors. This inference Commission and constitutes substantial evidence in the absence of contrary evidence. See *Colonial Stores, Inc. v. FTC*, 450 F.2d 733, 739 n. 13, 741 nn. 17 & 18 (5th Cir. 1971).

Alterman Foods, Inc. v. FTC, 497 F.2d at 999.

¹⁰⁷ It is irrelevant that show specials may have been no more advantageous than those available at other shows. The show specials were available at a show oriented to the Gibson retailers.

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the distinction between the promotional and price provisions of the Act. Confining the application of Sections 2(d) and 2(e), under the rule of *Rutledge*, "to payments in connection with the resale by the buyer of goods for advertising, promotion or other similar purposes" is the sounder approach.

The record does show that certain suppliers made payments for tabloid advertising to consumers. Such payments are promotional allowances for services in connection with the resale. The fact that some tabloid payments may have been received from certain suppliers does not alter the critical fact that the show fees and other challenged payments made in relation to the Gibson Trade Show are in connection with the original sale. Even where payments are made pursuant to a common program, the applicability of the various allowances to the specific Robinson-Patman provision depends on the nature of the service for which the compensation is paid. See *Carpel Frosted Foods, Inc.*, 48 F.T.C. at 602.¹⁰⁸ The elements of the violation must be proven with respect to each category of payment. All the elements of the violation have not been established in connection with the tabloid payments documented by this record. Complaint counsel have not sustained their burden of showing sales of goods of like grade and quality to respondents and customers competing in the resale of items promoted in the tabloids (See pp. 188-89 *infra*).

The Count I charges will be dismissed since the show fees, booth fees and related services in connection with the original sale are not properly within the scope of Sections 2(d) and 2(e). The other elements of a violation under these [185] sections will, nevertheless, be discussed to facilitate review. Complaint counsel must also demonstrate that the challenged discriminatory allowances or services were knowingly induced, and that such discrimination involved customers purchasing goods of like grade and quality who were competing in the resale of such products. This includes a showing that the favored and nonfavored customers operate at the same functional level in sufficient geographic proximity to support a finding that they compete.

B. Evidence as to Competition in the Resale of Goods of Like Grade And Quality Involved in the Alleged Discriminations

The concept of like grade and quality "was designed to serve as one lump sum. The Commission, in evaluating the nature of the services for which payment was made, noted, "but the activities were of a distinctly different character and involved important differences in their competitive and legal effects." Compensation for distributional services in connection with the original sale to the cooperative and legal behalf of the buyers was ruled within the scope of Section 2(c), since "those activities were equivalent to the functions of brokers, and the compensation for them was in lieu of brokerage." Payments for services to stimulate the resale of the products after they reached the store were held covered by Section 2(d).

of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute." *Report of the Attorney General's Committee to Study the Antitrust Laws*, 157 (1955); *Moog Industries, Inc. v. FTC*, 238 F.2d 43, 49-50 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958). Although Sections 2(d) and 2(e) of the Robinson-Patman Act do not explicitly refer to the like grade and quality concept contained in the pricing provision of the statute, they are, nevertheless, governed by that limitation. *Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 368-69 (2d Cir. 1958). See also *Shulton, Inc.*, 59 F.T.C. 106, 111 (1961). Under the Robinson-Patman Act, unlike the older Clayton Act, the burden is on the plaintiff, here the government, to prove that the goods involved in the allegedly discriminatory transactions are of like grade and quality.¹⁰⁹ the standard of proof which must be met in demonstrating that favored and nonfavored customers compete in the sale of goods of like grade and quality has been formulated as follows:

... Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made. . . .

J. Weingarten, 62 F.T.C. 1527-28.

[186] The question of whether products are of like grade and quality is to be determined by the characteristics of the products themselves. *FTC v. Borden Co.*, 383 U.S. 637, 641 (1966). Physical differences in products are one of the prime determinants in deciding whether or not the like grade and quality criteria are met. *Bona fide* physical differences affecting marketability preclude a finding of like grade and quality even though the differences are small and have no effect on the seller's cost. *Antitrust Law Developments* ABA, 115 (1975). *Universal-Rundle Corp.*, 65 F.T.C. 924, 955 (1964), *order set aside*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded*, 387 U.S. 244 (1967); *The Quaker Oats Co.*, 66 F.T.C. 1131, 1192 (1964); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 184 F. Supp. 312, 314 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir. 1961), *cert. denied*, 368 U.S. 829 (1961). Price differences demonstrating cross-inelasticity and the nonsubstitutability of items also militate against a finding of like grade and quality.¹¹⁰ *Willow Run Garden Shop, Inc. v. Mr. Christmas, Inc.*, 1973-2 Trade Cases ¶ 74,816 (D.N.J. 1973).

¹⁰⁹ Rowe, *supra* at 64. Under the Clayton Act provisions, preceding the Robinson-Patman Act, a seller might defend by relating pricing variations to the grade or quality of the different products. *Ibid.*

¹¹⁰ Consider, for example, Parker Pen's "midline" and its "prime line" involving 50 to 100 different priced pens (Finding 165).

Complaint counsel urge that since the show fees are based on a percentage of all sales to Gibson stores during the course of a year, the *Weingarten* criteria need not be met in this instance. Relying on cases such as *Moog Industries, Inc.*, *supra*, they contend that an item-by-item analysis of purchases by favored and nonfavored customers is unnecessary. Cases such as *Moog, Dayton Rubber Company*, 66 F.T.C. 423, 466 (1964), *rev'd in part on other grounds*, 362 F.2d 180 (6th Cir. 1966), and *Joseph A. Kaplan & Sons, Inc.*, 63 F.T.C. 1308, 1348 (1963), *modified on other grounds*, 347 F.2d 785 (D.C. Cir. 1965), held that where a supplier sells or promotes merchandise as a line and the rebates are granted on the line, there is no need to show that favored and nonfavored customers purchased identical items.¹¹¹ Those cases are not controlling here. For, although [187]these precedents do not require a showing that all items in the line are identical, at least a minimal showing must be made that the items comprising a "line" are of one grade and quality. There is no basis for the contention that the extraction by a customer of a uniform discount or allowance on all items purchased converts all products that a supplier sells into a "line" within the scope of *Moog, Dayton Rubber*, or *Joseph Kaplan*. To the contrary, those cases involved a fact situation where it was the supplier's determination that goods were to be sold as a "line." Furthermore, the records in those proceedings showed that the items within such lines were of the same grade and quality. In *Moog*, the respondent conceded that its products "may all be of one grade and quality." *Moog*, 238 F.2d at 49. In *Dayton Rubber*, the Commission found that the record affirmatively showed that "[r]espondent's line was composed of products of only one grade and quality." 66 F.T.C. at 466. In *Joseph Kaplan and Sons*, 63 F.T.C. at 1348, the Commission found, "[w]e have here a line of products promoted as a line, that is, the shower curtain line, and all of the items in the line are used for the same purpose. The fact that this case deals with such a unified line of goods clearly distinguishes the case from *Atalanta*." In addition, the Commission, in holding that

¹¹¹ The court in *Moog* held, in pertinent part:

... while leaf springs, coil springs or piston rings may not be interchangeable and usable in all makes, models and ages of automobiles, we believe that when such items are sold to competitors in lines, as petitioner has sold them, and when, as here, a discriminatory rebate is paid upon all items in a line, the Commission may properly find that such items are 'sufficiently comparable for price regulation by the statute.'

The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not.

Moog, 238 F.2d at 50.

different patterns in shower curtains did not preclude a finding of like grade and quality, also found that some of the products involved in the discrimination "were apparently the same in everything except pattern." 63 F.T.C. at 1348. [188]

In this case, for most of the suppliers involved, there is little evidence that the goods sold were sold as "lines" by the supplier. More significantly, there appears to be no affirmative evidence with respect to most of the suppliers involved herein that all the items marketed by such suppliers were of the same grade and quality as was shown in the case of certain lines sold by the manufacturers in *Moog*. Rather, with respect to many of the suppliers involved in this proceeding, the record shows substantial differences in price and in the physical qualities of the products which they marketed to their customers. Variation of merchandise within a line precludes the facile assumption that different customers each purchased an identical or even a similar cross section of merchandise within each line. *Willow Run Garden Shop, Inc. v. Mr. Christmas, Inc., supra*. The meaningful way to compare commodities between two competing retailers is on an "individual item" basis, not on a "line item" basis. *Id.*

In summary, insofar as most of the suppliers herein are concerned, there is little affirmative evidence that all of the items upon which the trade show fees were paid were of the same grade and quality. Under the circumstances, the Commission cannot rely on the auto parts cases or *Joseph Kaplan* for the proposition that an across-the-board discount over the period of a year, in and of itself, obviates the need for analysis of the products purchased by favored and nonfavored customers.

In the case of payments for tabloid advertising, complaint counsel could not prevail even under their interpretation of *Moog*. Complaint counsel recognize that where the payment is for the promotion of a particular item or limited number of items, they have the burden of showing competition in the resale of those items between favored and nonfavored customers¹¹² (CPF p. 134). Suppliers are not obliged to give advertising allowances on all of their products if they choose to accord them on only some of their products. *Sunbeam Corporation*, 67 F.T.C. 20, 55 (1965); *Atalanta Trading Corp.*, [189]258 F.2d at 369. In short, where a specific item is promoted, a showing must be made that

¹¹² See *Shulton*, 59 F.T.C. at 111-12, holding:

In further excepting to the order, respondent has interpreted such order to require that if it elects to accord advertising or promotional allowances on any product within a product line, such as toiletries, such allowances must be granted on all other products within that line, including those which are not of like grade and quality. Section 2(d), of course, does not impose such a requirement, but neither, however, does the order to cease and desist. Although the order covers all products which respondent sells, respondent will be required thereby to extend allowances granted in connection with a particular product only to those customers competing in the distribution or resale of that product or products of like grade and quality purchased from respondent.

avored and nonavored customers competed in the resale of that particular product at a time contemporaneous with the challenged promotion.

The tabloids generally did not involve across the board promotions; rather, as the Gibson Tabloid Authorization forms showed, they related to particular items, as for example in the case of Parker (Finding 164). With respect to the tabloid advertising shown in this record, the Section 2(d) criteria have not been met. There has been no showing that specific items promoted in the tabloids were resold by favored and nonavored customers contemporaneously with the promotional event.¹¹³ Thus, no finding of violation can be based thereon.

An additional factor precluding a finding of discrimination or the knowing inducement thereof with respect to tabloid payments in the case of some suppliers, such as Regal and Wagner, is the fact that the payments were within the suppliers' standard advertising or promotional programs (Findings 220-22, 273-74).

The parties also disagree as to proof of geographic proximity prerequisite to a finding of competition between favored and nonavored customers. Under *Sunbeam Corporation*, 67 F.T.C. at 55, and *Viviano Macaroni Co.*, 73 F.T.C. 313, 341, *aff'd*, 411 F.2d 255 (3d Cir. 1969), there is a rebuttable presumption that competition exists between customers operating at the same functional level so long as they are located in the same trade area. Similarly, there is no need to trace goods to the shelves of competing outlets, where the direct customers of a supplier operate only at one functional level. Then, it is sufficient to prove: [190]

... that one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer.

Tri-Valley Packing Association v. FTC, 329 F.2d 694, 708 (9th Cir. 1964).

In order to meet the requirement of contemporaneous sales of goods of like grade and quality to favored and nonavored customers competing in the resale of the goods involved in the alleged discriminations, complaint counsel introduced tabulations of invoices for certain of the suppliers.¹¹⁴ In the case of other suppliers, invoices were

¹¹³ As respondents note, RRB Sr. p. 77 n. 30, complaint counsel have proposed no findings from which a determination can be made on this point. In the case of Farber, for example, this would have been hard to do. The documentary evidence pertaining to Farber's tabloid participation pertains to 1970, while the tabulations of purchases by Gibson stores and Farber's other customers cover the period 1972-1975 (Finding 296).

¹¹⁴ Respondents urged that these documents could not be so used because of complaint counsel's explanations of

(Continued)

provided for the same purpose. For some of the suppliers, there are neither tabulations nor invoices, thus making a finding of contemporaneous sales of goods of like grade and quality to customers competing with Gibson retailers impossible as to such suppliers. Significantly, the tabulations were prepared with no attempt to determine whether the customers listed were wholesalers or retailers (Underwood 4529).¹¹⁵ Nor was there an attempt made in the preparation of such tabulations to record the individual model or item numbers of the particular products that appeared on the underlying invoices (Underwood 4528-29). As a result, where the record shows that a supplier has a widely differentiated product line, the tabulations are of little help in establishing competition between the Gibson retailers and others in the resale of such merchandise. Other problems of proof also [191]exist. Without going into an exhaustive recitation, a number of examples will be noted.

There was insufficient documentary proof of sales to Gibson stores and their competitors with respect to Tucker Manufacturing Corp., Armstrong Environmental Industries and Beagle Manufacturing Company (Findings 168, 316, 368, 369 n. 78).

In the case of Waltham Watch Company, as with a number of other suppliers, the record does not define with sufficient precision the products involved in the alleged discrimination. The Waltham tabulations describe the products sold only as "watches." The record, however, shows that Waltham's watches differ significantly in quality, style and price, among other factors (Findings 255-56, 259).

With regard to the Parker tabulation, there was no adequate showing that the allegedly nonfavored customers functioned at the retail level of operations and, thus, competed with Gibson stores in the resale of Parker products (Finding 166). Similarly, the record is devoid of proof of the functional level of the allegedly nonfavored customers of Comfort (Finding 352). With respect to Waltham, the showing on this point was also weak (Finding 259).

In the case of Unitron, the only documentary evidence concerning sales to Gibson retailers and their allegedly nonfavored competitors is CX 855. This tabulation covers the period 1970 to 1971. But, for that

their purpose during pretrial. That objection was overruled on March 16, 1978, when the documents were received (Tr. 4533). Moreover, earlier in the trial, on December 7, 1977, respondents recognized that these were "tabulation[s] of disfavored competitors" (Tr. 278). By definition, a "disfavored competitor" is one who is operating at the same functional level as the favored customer and whose purchases are of like grade and quality as those bought by a favored customer. Thus, the purpose for which the tabulations were to be used was clear at the beginning of the trial.

¹¹⁵ In many instances, that gap was not filled by other evidence.

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period, there was no documentary proof of the payment of the 2 1/2% show fee (Finding 337 and note 71).¹¹⁶ As far as show fees are concerned, no case has been made with respect to Unitron. In a number of isolated instances, the burden of proof on this point has been met in the case of some suppliers, such as Becker, Wagner,¹¹⁷ Revell, Unitron as to booth fees, Regal and Farber (Findings 140, 203, 234, 276-77, 298, 337). [192]

The Commission noted in *Weingarten*:
... The evidence adduced in this record in support of the element under consideration is, of course, not totally lacking in probative value, for a good deal of reliable and important information was secured. . . . But the evidence does not quite reach the level of reliability and substantiality necessary for a concrete finding on this particular point.

J. Weingarten, 62 F.T.C. at 1528. That observation is pertinent here. This record demonstrates the validity of the *Weingarten* criteria. As the Fifth Circuit held:

... it seems plain to us that apart from mechanical difficulties, there could hardly be any real problem in getting data as to exact sales and purchases, item by item, made by these suppliers and competitors.

FTC v. J. Weingarten, Inc., 336 F.2d 687, 695 (5th Cir. 1964). "[T]he problem of establishing that the goods sold were of like grade and quality cannot be left to inference." *Castlegate, Inc. v. National Tea Company*, 34 F.R.D. 221, 230 (D. Colo. 1963).

C. Knowing Inducement

Complaint counsel must establish that respondents knew or should have known that the payments and services induced and received were not available on proportionally equal terms to their competitors. The evidence need not be direct, and circumstantial evidence permitting the inference that respondents knew or, in the exercise of normal care, should have known of the disproportionality is sufficient. *American News Co. v. FTC*, 300 F.2d 104, 110 (2d Cir. 1962), cert. denied, 371 U.S. 824 (1962). See also *R.H. Macy & Co. v. FTC*, 326 F.2d 445, 447 (2d Cir. 1964).

Had the show fees and booth fees and other payments been compensation for promotional services in connection with the resale of the goods involved in the discrimination, then the burden would have

¹¹⁶ In fairness, it should be noted that there is proof of booth fee payments by Unitron in 1970-1971 and some evidence meeting the requisite criteria as to competition in the resale of goods of like grade and quality in that period (Findings 326, 337).

¹¹⁷ The only difference between the Wagner products in question was in color (Hornick 3161, 3164). Color, contrary to respondents' position, does not preclude a finding of like grade and quality where products are otherwise identical. See *Joseph Kaplan*, 63 F.T.C. at 1348, where differences in the pattern of shower curtains were held immaterial.

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been met. Respondents initiated the show fees, booth fees and related services which they solicited in connection with the Gibson Trade Show. Basically, Gibson, Sr. fixed the rate for the booth fees and charged whatever the traffic would bear for the show fees (Finding 376). In one instance, a supplier's representative objected that the payments demanded were illegal (Finding 377). Under the circumstances, [193]respondents had sufficient notice to put them under the duty of inquiring as to whether the suppliers were taking steps to make such payments available to other buyers. *Fred Meyer, Inc.*, 63 F.T.C. 1, 59 (1963), *modified on other grounds*, 359 F.2d 351 (9th Cir. 1966), *rev'd*, 390 U.S. 341 (1968). The record is devoid of evidence showing such inquiry by respondents. Failing to take such steps, respondents were chargeable at least with constructive knowledge of the discriminatory nature of the payments induced.

D. Public Interest

The Robinson-Patman Act was promulgated to foster smaller independent business enterprises because Congress felt that "the buying practices of large retailers, particularly the chain stores . . . were threatening the continued existence of the independent merchant." *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 350 (1968). The three "nonfavored" customers testifying herein were Woolworth, TG & Y¹¹⁸ and Target, all large chain retailers. No independent merchant appeared. The statute does not preclude a finding that a cognizable discrimination exists where a "Woolworth" is the nonfavored customer. Nevertheless, in view of the complete absence of testimony by smaller independent merchants, it is unclear whether the Count 1 proceedings are entirely consistent with the Congressional intent.

Complaint counsel urge that "[t]he central issue is the inducement of allowances which gives Gibson stores an advantage over nonfavored competitors" (CPF p. 153). They assert, further, that "[t]here is no defense once discriminatory treatment is proved especially when results benefit respondents." *Ibid.* The government's reliance on the testimony of "nonfavored" customers with the size and economic power of Woolworth and the absence of testimony from independent merchants further supports application of the "original sale" doctrine to this case. On the basis of these facts, the existence of discrimination should not mark the end of analysis; rather, it should initiate an examination of the impact of such practices on the marketplace. The economic power of the nonfavored customers, whose testimony has

¹¹⁸ TG & Y is a subsidiary of City Products Corporation which, in turn, is owned by the Household Finance Corp. Household Finance also own other chains, such as White stores, Von's Groceries and Ben Franklin stores (Pettit 4205-06).

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been adduced, argues compellingly for a test under the pricing provisions of the Robinson-Patman Act. Section 2(f) of the statute, unlike Sections 2(d) and 2(e), permits and, in fact, requires an evaluation of the competitive impact of the "advantage" conferred by discriminatory transactions. That approach would harmonize Robinson-Patman enforcement with the general antitrust objective of promoting competition. [194]

IV. The Count III Brokerage Charges

Section 2(c) of the Robinson-Patman Act provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Respondents assert that the jurisdictional requirements of sales in commerce have not been met. Section 2(c) of the Robinson-Patman Act covers the receipt of brokerage in the course of commerce by a person engaged in commerce. The brokers in question were appointed by Ray-O-Vac as its representatives to all the Gibson stores; they were to assist with respect to the servicing of such accounts throughout the United States (CX 154B, 169A-C). The area involved covered some 20 states (Blake 4499). Gibson, Sr., at that time, licensed Gibson Discount Centers in a multistate area. The challenged brokerage payments covered sales to the Gibson stores wherever made. The payments in question met the jurisdictional requirements of the Act. See *Shreveport Macaroni Mfg. Co., Inc. v. FTC*, 321 F.2d 404, 409 (5th Cir. 1963), cert. denied, 375 U.S. 971 (1969), holding:

We do not read the statute to qualify payment in the "course of . . . commerce," once that appears, by a further requirement that the payment be in connection with goods sold in interstate commerce, resold in interstate commerce, or that the competition between competing customers be in interstate commerce where there is ample nexus to interstate commerce in the whole transaction as here. There is no warrant in the law for any such fragmentation.

Shreveport involved a violation under Section 2(d). However, the commerce requirements under Sections 2(c) and 2(d) are essentially the same. In light of that precedent, it is evident that the jurisdictional requisite of payments made and received in the course of commerce have also been met under Count I. Under both Counts I and III, there

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is ample nexus to interstate commerce in the whole transaction in the case of the challenged payments. [195]

The statute absolutely bars payments of brokerage by one party in a transaction to the other and by either party to the other's agent. A principal may pay brokerage to his own agent for services rendered. In short, the Act permits a seller to compensate his broker for services actually rendered on the seller's behalf. Direct or indirect payments of commissions or brokerage to a person buying on his own account for resale are, however, banned. *Tillie Lewis Foods, Inc., et al.*, 65 F.T.C. 1099, 1134-35 (1964), *rev'd on other grounds*, 358 F.2d 224 (9th Cir. 1966).

The rule has been stated succinctly by the First Circuit:

... It is plain enough that the paragraph, as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.

Quality Bakers Co. of America v. FTC, 114 F.2d 393, 398 (1st Cir. 1940). See also *Southgate Brokerage Co., Inc. v. FTC*, 150 F.2d 607, 609 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

Complaint counsel evidently have elected not to try the Count III charges on the theory that H.R. Gibson, Sr., in receiving brokerage or commission payments, was the agent or intermediary of other respondents or nonrespondent franchisees engaged in retail operations.¹¹⁹ The charges of illegal [196] brokerage involve the receipt of

¹¹⁹ Complaint counsel, in replying to Gibson, Sr.'s motion to exclude evidence, explained their theory of the case under Count III as follows:

... we do not intend to attempt to prove that Gibson Senior¹ is a dummy broker under Count III. This is entirely consistent with complaint counsel's position taken in our answer to motions to exclude evidence where it was stated:

In support of Count III complaint counsel intend to show that the payments in question were made to members of the Gibson organization including H.R. Gibson, Sr. by various manufacturer's representatives and brokers such as Al Cohen. Complaint counsel have never asserted that respondents H.R. Gibson, Sr. and Belva Gibson have made the payments referred to in Count III. Complaint counsel have been consistent on this position throughout the entire pretrial. To the contrary, we intend to show that respondents H.R. Gibson, Sr. and Belva Gibson are a part and parcel of the Gibson organization which receives the payments and that for example, respondent Al Cohen shared his commission with Herbert R. Gibson, Sr. (Answer to Motions to Exclude Evidence p. 2, dated December 1, 1977).

In other words we intend to prove under Count III that they were receiving, not that they were paying illegal brokerage. Count III of the complaint also incorporates paragraphs 1-11 and pursuant to those paragraphs complaint counsel intend to prove that substance and market realities prevail over form and that the reality is that Gibson Senior is still a part and Parcel of the Gibson organization because there is, and has continued since November of 1972 to be a continuing interrelationship between Gibson Senior and Gibson Junior. Complaint counsel submit that this explanation should once and for all satisfy the respondents.

Since complaint counsel have cleared any misunderstandings respondents could reasonably have had as to Count III, respondents' three proposed order paragraphs are improper.

The Order of January 31, 1978, held on the basis of the foregoing:

Complaint counsel's foregoing outline of the proof they intend to introduce under Count III delineates the

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commissions by Gibson, Sr. from two brokers representing the Ray-O-Vac Company, Barshell, Inc. and Al Cohen Associates, Inc. The status of Gibson, Sr. as a buyer is critical in resolving the Section 2(c) charges in each of the two instances. [197]

The record shows that Jim Miller doing business as Barshell, Inc., a corporation which he wholly owned, had been appointed as a seller's broker by Ray-O-Vac. Miller, who was appointed to represent Ray-O-Vac products to the Gibson stores, held the position for approximately five years in the period 1969-January 1, 1974 (Findings 410, 411, 414). Miller or Barshell split the Ray-O-Vac commission with H.R. Gibson, Sr. (Findings 419-23). One such payment was received in September 1972 (Findings 422-23).

Gibson, Sr. checked Ray-O-Vac's commission statements furnished to Miller in connection with his receipt from Barshell of split commissions based on Ray-O-Vac's sales (Findings 421-22). Gibson, Sr.'s review of Ray-O-Vac's commission statements to Miller, ostensibly a seller's broker, to determine how much brokerage he should receive, demonstrates respondent's control of the latter.

From his review of the commission statements in connection with his demand for rebates, Gibson, Sr. knew or should have known that he was requiring Miller to pass on part of his brokerage fee received from Ray-O-Vac. Knowledge by the buyer that he is receiving brokerage from the seller's broker is not a statutory element of the violation. Nevertheless, it may [198] under certain circumstances be material to determining the nature of the payment. See *Rowe, supra* at 346. Here, Gibson, Sr.'s knowledge of the nature of the payment effectively negates any contention that these gratuities were not, in fact, brokerage passed on by the seller's broker to Gibson, Sr.

The record shows one such payment, on September 23, 1972.¹²⁰ At that time, Gibson, Sr. was owner and operator of various retail stores while simultaneously conducting his trade show (Findings 3, 5, 6). This payment to Gibson, Sr., a buyer, was within the absolute prohibition of

issues on the basis of which the case will be tried and decided. Complaint counsel state "we do not intend to prove Gibson, Sr. is a dummy broker." It is clear that complaint counsel do not intend to prove under Count III that Gibson, Sr. was an "intermediary or representative" acting for or on behalf of the other respondents. Rather, they intend to prove that "H.R. Gibson, Sr. and Belva Gibson are a part and parcel of the Gibson organization which receives the payments and that for example, respondent Al Cohen shared his commission with H.R. Gibson, Sr." The agency, through complaint counsel, in this instance has given its statement of the theory on which the case is to be tried. Under the circumstances, there is no justification for the relief sought (emphasis added).

Under the circumstances, for the purposes of the transactions relevant to Count III, a finding that Gibson, Sr. is a buyer is deemed prerequisite to the determination that a law violation has been proven under those allegations.

¹²⁰ There is a conflict between the testimony of Miller and one of respondent's trade show buyers as to whether CX 192 represents a split of the Ray-O-Vac commission between Barshell and Gibson, Sr. The testimony that CX 192 represents a three percent show fee on sales of health and beauty aid products owned and warehoused by Miller has been reviewed. See, e.g., Tr. 7532, 7540-43. The testimony of Miller is relied upon in making the finding.

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Section 2(c), and within the theory of violation espoused by complaint counsel.

Pursuant to an oral agreement between Al Cohen Associates, Inc. and Gibson, Sr., the former, beginning in January 1974, split his commissions with the latter on Ray-O-Vac purchases by all the Gibson stores. The commissions paid to Gibson, Sr. by Al Cohen were \$150,460.93 (Findings 425-29).

In 1974 and 1975, Gibson, Sr. no longer had any ownership interest in any retail operation (Finding 25). In that time period, he cannot be considered a buyer. An agent or intermediary for the buyer cannot lawfully collect brokerage fees directly or indirectly from the seller even where the intermediary performs services for the seller for "[t]he agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both." *Quality Bakers Co. of America*, 114 F.2d at 399; *Patman, Complete Guide to the Robinson-Patman Act*, 109 Prentice Hall Inc. (1963). Moreover, the passing on of brokerage by a buyer's agent or intermediary receiving such commissions to his principals is not prerequisite to a finding of violation under Section 2(c) of the statute. See *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851, 858 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966). Nevertheless, complaint counsel did not proceed under Count III on the theory that such payments were made to Gibson, Sr. as an agent or intermediary acting for or on behalf of the Gibson retailing operations. See note 119, *supra*. The complaint against Al Cohen should, accordingly, be dismissed. See *Bendix Corp. v. FTC*, 450 F.2d 534 (6th Cir. 1971). [199]

Respondents urge that the payments in question fall within the "except for services rendered" proviso of Section 2(c) and that a showing of price discrimination is prerequisite to finding a violation of this section (RPF Sr. pp. 139, 142). These contentions require analysis in light of *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1966), and succeeding cases. Respondents' reliance on the "except for services rendered" proviso is misplaced. Gibson, Sr. received such payment in 1972 from Barshell as a buyer, before he had divested himself of his retail assets. The services he rendered in connection with the trade show were, in effect, rendered for himself and, thus, not cognizable under the exception. The fact that the supplier may also have benefited is immaterial. *Southgate*, 150 F.2d at 610.

Hruby Distributing Co., 61 F.T.C. 1437 (1962), and *Empire Rayon Yarn Co., Inc. v. American Viscose Corp.*, 364 F.2d 491 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967),¹²¹ raise the question whether

¹²¹ That decision adopted the statutory interpretation set forth in the dissent to *Empire Rayon Yarn Co., Inc. v. American Viscose Corp.*, 354 F.2d 182, 188-92 (2d Cir. 1965).

respondents here performed a service entitling them to a functional discount which should be evaluated under the pricing provision of the statute irrespective of the form of the payment. In making that determination, the central question is what was the purpose and reason for the concession. *Empire Rayon Yarn Co.*, 354 F.2d at 189. There is no showing that, in connection with the split commissions he received from Barshell, Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. Cf. *Hruby*, 61 F.T.C. at 1446; *Empire Rayon Yarn Co.*, 364 F.2d at 492. Moreover, at Gibson, Sr.'s trade show, participating suppliers had to depend largely on their own personnel or that of their brokers to do the selling (Finding 87). In addition, there is no showing that Gibson, Sr., who operated retail stores in 1969-October 31, 1972, operated at a different functional level which would justify the pricing variations.¹²² Further, unlike the [200]customers in *Hruby* and *Empire Rayon*, Gibson, Sr. was regarded as a powerful buyer by the broker who split his commission with him (Finding 418). In light of the foregoing, there is no showing here that Gibson, Sr. performed a distributional service entitling him to a functional discount which should be evaluated under Section 2(a).

Gibson, Sr. pocketed the split commission based on the purchases of all Gibson stores. No finding can therefore be made that the payments were immune from Section 2(c) because they were part of a "worthy effort" on behalf of retailers "to reduce the ultimate sales prices to the consumer" by entering into arrangements making them stronger in their competition with large chain stores. Cf. *Central Retailer-Owned Grocers Inc. v. FTC*, 319 F.2d 410, 415 (7th Cir. 1963). There is no evidence that the split commissions received by Gibson, Sr. strengthened the competitive position of the nonfamily franchised stores in any way.

Applying the "purpose and effect" test to the payment,¹²³ it is significant that Ray-O-Vac did not discuss with its brokers their passing on of brokerage to Gibson, Sr. (Finding 424). Accordingly, Ray-O-Vac's broker chose to split his commission with Gibson, Sr. in transactions which may not have been known to the broker's principal, the supplier. This militates against any finding that the split brokerage

¹²² Cf. *Hruby*, 61 F.T.C. at 1446:

In its Section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices. The lawfulness of such functional price differences derives from the fact that they result in no adverse economic effects upon particular competitors or competition in general. Thus, since Hruby operates at a higher competitive or functional level than wholesalers, the granting to Hruby or receipt by him of a lower price than afforded to wholesalers would ordinarily not be questioned. But the manner and form in which Hruby received his lower prices created the doubts concerning their validity which led to this complaint.

¹²³ See *Empire Rayon Yarn Co.*, 354 F.2d at 189.

constituted a functional discount for distributional services. Rather, this is precisely the kind of transaction which Section 2(c) was designed to reach in order to force hidden price discriminations into the open. [201]

In summary, developments under Section 2(c) since *Broch* do not warrant an exception to the rule of *Southgate* in this proceeding.

Even if the "except for services rendered" proviso were available under these circumstances, the burden would still be on respondents to establish it. The provision would become a sham unless those seeking to take advantage of it established the value in concrete terms of the services rendered in relation to the commission payments received. In addition to a claim that brokerage was paid for services rendered, there must be a showing that the distribution costs saved justified the amount of the allowance. No such showing has been made here and respondents' reliance on the provision is rejected.¹²⁴

[202]The Supreme Court's *Broch* decision does not stand for the proposition that price discrimination is prerequisite to a finding of violation in each Section 2(c) case. The prior Supreme Court decision in *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959), distinguishing Sections 2(c), (d) and (e) from the pricing provisions of the Act, indicates that *Broch* imposed no universal requirement that price discrimination must be proven in each 2(c) case. As the Court stated, while holding Section 2(b) inapplicable in a 2(e) proceeding:

*Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations. * * ** In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition (emphasis added).

360 U.S. at 65.

Neither the text of Section 2(c) nor the statutory context of that section requires that it be limited to instances of price discrimination. *Rangen Inc.*, 351 F.2d at 856. In light of *Broch*, the element of price

¹²⁴ Implicit in the *Broch* dicta concerning the "except for services rendered" proviso is a requirement that the party asserting the defense demonstrate that the services in question gave rise to sufficient cost savings to warrant the reduction in brokerage. In this connection, the Court stated in pertinent part:

We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. *There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge.* We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances. *One thing is clear — the absence of such evidence and the absence of a claim that the rendition of services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated* (emphasis added).

363 U.S. at 173-74.

discrimination may be helpful under certain circumstances in determining whether a payment was made in "lieu of brokerage." However, the holding on this point does not apply to cases, such as the instant proceeding, involving the outright payments of unearned brokerage by a seller's broker to a buyer. As the Ninth Circuit held in *Rangen*:

There has been some speculation that the Broch case may have superimposed a requirement of price discrimination on section 2(c). Rowe, Price Discrimination Under the Robinson-Patman Act 344-45 (1962); Federal Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 189, 80 S.Ct. 1158 (dissenting opinion). However, discrimination was used in Broch to determine if the price arrangement was an "in lieu" of brokerage transaction; and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage.

351 F.2d at 858.

The Count III allegations against H.R. Gibson, Jr. and Gerald Gibson have not been sustained. Complaint counsel apparently intended to tie these respondents to the receipt of illegal brokerage by showing that they had stock ownership in a manufacturer's representative, Jim Miller Sales Company, [203]another firm owned by Jim Miller (Tr. 3629-31).¹²⁵ Two of complaint counsel's nonrespondent witnesses should have had firsthand knowledge of such transactions, if they took place. One was Omer Nix, the other was Jim Miller. Complaint counsel struck Omer Nix from their witness list after he had declined to respond to two subpoenas during the course of trial and failed to appear for a deposition scheduled for the pretrial. Jim Miller appeared and testified but was asked no questions concerning this matter. The record gives no indication why Miller was not questioned on this subject. Under the circumstances, these respondents are entitled to the application of the adverse inference rule, for:

The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle v. Burnham*, 153 U.S. 216, 225; *Kirby v. Tallmadge*, 160 U.S. 379, 383; *Bilokumsky v. Tod*, 263 U.S. 149, 153, 154; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 111, 112; *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52; *Local 167 v. United States*, 291 U.S. 293, 298.

Interstate Circuit v. U.S., 306 U.S. 208, 226 (1939). The Count III allegations as to H.R. Gibson, Jr. and Gerald Gibson will be dismissed. Similarly, the allegations under this count should also be dismissed as

¹²⁵ Complaint counsel expected to prove that H.R. Gibson, Sr. owned fifty percent of the stock in Jim Miller Sales Company, a manufacturer's representative, which he subsequently gave to his sons, Gerald and Herbert, Jr. (Tr. 3629). Jerry Moland testified that Gerald Gibson, in 1967 or 1968, had admitted such facts to him (Tr. 3634). Complaint counsel apparently relied on Omer Nix to testify that this transaction continued in the relevant period 1969-1975 (Tr. 3629-30).

to the other respondents, with the exception of Gibson, Sr., since the evidence fails to link them with these practices.

V. The Boycott Allegations

The purpose of the Gibson Trade Show was to make money (Leverett 3800), and suppliers who refused to pay a show fee were not permitted to participate therein (Leverett 3792, 3812).

In at least three instances, suppliers who refused to make the trade show payments that had been demanded of them were excluded from further participation in the shows. Subsequent to such exclusions, letters were sent out by trade show or "Seagoville" buyers to "All Stores" stating that the company would not "sell us at a price we would recommend as being profitable and beneficial for your operation." The letters [204] continued that such lines were no longer recommended or authorized and suggested that the stores discontinue them. They concluded with the request that this be given attention coupled with an expression of appreciation for the stores' continued cooperation. These letters, dealing with the Toastmaster Division of the McGraw-Edison Company, Tucker Manufacturing Corporation and Jeannette Glass Company, were sent out in January and March 1971 (CX 104, 136, 303).

The letter by two Seagoville Buyers, Tommy Perkins and Bobby Regeon, requesting the Gibson stores to discontinue Toastmaster purchases, was sent in January 1971. The record shows that Toastmaster's sales volume to the various Gibson stores in 1970 amounted to \$953,656.53, and dropped to \$296,778.33 in 1971. Corresponding sales figures for the territories of individual sales personnel showed similar declines (Finding 390; CX 116A, C, 117A-D).

CX 104 was written and mailed out (Findings 388, 389, note 129, *infra*). The parties disagree as to the motive for the letter, the extent of its dissemination and whether it was acted upon. One of the signatories to CX 104 explained that the letter was written so that the trade show would not be blamed by its customers for problems they were experiencing with Toastmaster (Regeon 6639, 6643).¹²⁶ The testimony is not persuasive. The explanation is inconsistent with the plain meaning of the contemporaneous document. Moreover, the

¹²⁶ The witness explained the difficulties he had experienced with Toastmaster, which impelled the writing of this letter, as follows:

We had a lot of problems in getting merchandise shipped, especially into the metropolitan areas around Christmas time, as they just wouldn't ship the merchandise in. They just wouldn't get it in there. Of course I know that they had some distributors in the area, and maybe they wanted to protect their distributors. But I know that we could not get merchandise, and numerous customers called in complaining about it, and that's the reason I put the letter out, because I didn't want the trade show to be blamed for the problems that were happening with Toastmaster (Regeon 6639. See also Low 7735-37, 7552-57).

witness claimed that CX 104 arose out of "a very unusual situation" (Tr. 6639). However, the letters in question, sent out by the trade show, also use essentially the same boilerplate language in the case of Jeannette and Tucker. It is inherently unlikely that CX 104 was written because of problems unique to Toastmaster when identical letters were employed in the case of two other manufacturers who similarly refused to make show fee payments. The logical inference is that in all three [205]instances trade show personnel requested the Gibson stores to discontinue purchases because of a failure or refusal to pay the trade show fees.¹²⁷

There is also the testimony by one of the signatories to CX 104 that, after sending the letter, he did not expect or anticipate that franchisees would drop the Toastmaster line (Regeon 6643). This testimony also conflicts with the plain meaning of the contemporaneous document which is studded with phrases such as that Toastmaster would not sell at a price "We would recommend as being profitable and beneficial for your operation" and that the buyers no longer "recommend" or "authorize" the line and "suggest that you discontinue the same." The stores are asked to give this matter their "attention" and are assured that "We appreciate your continued cooperation." The suggestion that stores discontinue purchases, coupled with the request that the stores give this matter their attention and cooperation can be construed only one way. The authors of the letter wrote it with the expectation that the recipients would discontinue purchasing from Toastmaster.

Similarly, testimony by respondents' employees that the letter was only sent to a limited class of Gibson retailers is unconvincing. There are conflicts in the testimony on this point. See note 129, *infra*. Moreover, it is unlikely that CX 104 was sent only to those Gibson stores complaining about Toastmaster since the letter employed language essentially identical to the letters sent in the case of Jeannette Glass Company and Tucker Manufacturing Company. The record, as a whole, compels the finding that "All Stores" on CX 104 means all stores operating under the Gibson name.¹²⁸

[206] Respondents' explanation that retailer dissatisfaction with Toastmaster shipments gave rise to the writing of CX 104 must be

¹²⁷ As one of respondent's employees, Bobby Regeon, stated, the "Number one" reason for writing CX 104 was that Toastmaster would not pay its show fee (Tr. 6706):

Q. If you were having these problems with the Toastmaster line, why did you send the letter out when they were no longer in the show? Why did you wait until January to do that?

A. Number one, they wouldn't pay their trade show fee; number two, we had problems, and I did not want the Gibson Trade Show to be blamed for the problems.

¹²⁸ In this connection, see CX 27, a letter dated July 31, 1972 from H.R. Gibson, Sr. to "H.R. GIBSON STORES (also for information of all stores)." This letter demonstrates that "all stores" means what it says; if limited distribution of such a letter were intended, it would be indicated on the face of the letter.

rejected for the reasons stated. The record, accordingly, does not support a finding that Toastmaster's drastic decline in sales to the Gibson stores in 1971 resulted from business reasons, such as customer dissatisfaction, independent of the appeal to boycott in CX 104.

Certain franchisees testified that they had not received CX 104 or similar letters from the trade show.¹²⁹ However, on the facts of this case, there is no need to show that specific retailers stopped or diminished their purchases from Toastmaster in response to CX 104. The precipitous sales drop of Toastmaster to the Gibson stores, from \$953,656 in 1970 to \$296,778 in 1971, [207]compels the inference that the letter requesting the Gibson stores to boycott Toastmaster was received and acted upon by a substantial number of stores.¹³⁰

In summary, CX 104 was a request by respondents that the Gibson stores boycott Toastmaster. The letter to "All Stores" requesting their "attention" and "cooperation" clearly contemplated concerted action by the recipients and must have been so construed by them. The extent of the drop in Toastmaster's sales in 1971 to the Gibson stores demonstrates that a substantial number of stores participated in the combination. The necessary consequences of such a combination are to diminish the suppliers' freedom to sell to retailers and to curtail the retailers' choice of the suppliers with whom they may deal.

The allegations under Count II of the complaint have been sustained.

¹²⁹ The testimony does not preclude a finding of a combination in restraint of trade. Significantly, one of respondents' franchisee witnesses was unable to recall whether or not he received CX 104, 136 and 303 (McCrea 6823-29). Moreover, one of respondents' employees conceded that the letters were mailed to "HRG" stores, while the other signatory to CX 104 admitted that the letter had been sent to customers in the metropolitan areas making complaints about Toastmaster (Perkins 3332-33; Regeon 6710-11). Regeon's admission that, before taking the stand, he had stated to complaint counsel that the letter had been sent to the trade show customers generally detracts from the weight of his testimony that the distribution was limited:

Q. Do you recall I asked you regarding "all stores"? And do you remember when I asked you what "all stores" referred to in regard to this letter, you indicated that it referred to all Gibson Trade Show customers?

[Question read by reporter]

A. Yes, I did.

Q. When I asked you what you meant by that, do you recall saying "all retail stores attending the trade show"?

A. I believe I said "all Gibson Trade Show customers."

Q. And that would be all of the retail stores attending the Gibson Trade Show would be the customers of the Gibson Trade Show?

A. Any customer of the Gibson Trade Show, whether he was a Gibson store or otherwise (Regeon 6711-12).

¹³⁰ This alone is sufficient to support a finding of unlawful combination. That finding is further corroborated by the testimony of Henry May, a Toastmaster sales representative. May, after Toastmaster received notice of CX 104, was informed by Roy Love, an Oklahoma City franchisee who was also Gibson Sr.'s brother-in-law, that if he wanted to keep the Gibson sign, Love had to go by what Seagoville told him to do. Love had received CX 104 (Tr. 3466; Finding 389). And, in January or February 1971, May saw CX 104 in a Fort Worth Gibson store (Finding 388). The finding concerning the Fort Worth store is made taking into consideration the conflict with another witness on this point (See Tr. 7307-09). The May testimony is further corroborated by the contemporaneous memorandum of another salesman in February 1971, concerning a Columbia, Mo. Gibson store, stating that he had been informed by one Ed Drewel of this store "that they were going along with Gibson Hqs. instructions not to purchase Toastmaster" (Finding 389).

The Commission need not establish an express agreement to boycott. A combination or conspiracy may be found in a course of dealing or other circumstances; a formal agreement or exchange of words is not necessary. *Fort Howard Paper Co. v. FTC*, 156 F.2d 899, 905 (7th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946); *American Tobacco Co. v. U.S.*, 328 U.S. 781, 809-10 (1946). Business behavior is admissible circumstantial evidence from which agreement may be inferred. See *Interstate Circuit v. U.S.*, 306 U.S. 208 (1939). And, an agreement may be implied from a contemplated pattern of conduct. It is enough that concerted action is contemplated and that those invited to do so give their adherence to the scheme and participate therein. *Id.* at 226. Further, an unlawful conspiracy may be formed without simultaneous action or agreement by the conspirators. *Id.* at 227. [208]

Respondents assert that they were concerned that shipment problems with Toastmaster stemmed from the supplier's desire to protect certain of its distributor customers from price competition with the Gibson stores. Even if these contentions were accepted for the sake of argument, they would not constitute a defense to the group boycott initiated by CX 104. Group boycotts and concerted refusals to deal are *per se* illegal. Allegations that they were reasonable in specific circumstances is no defense. Nor are they saved by a failure to show adverse economic affect or actual restraint on competition. *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 468 (1941).

The fact that not all stores may have participated in the boycott and that some stores continued to purchase from Toastmaster is immaterial. A combination is unlawful even though it may not as yet have resulted in a restraint. And, an agreement to follow a course of action which would necessarily restrain or monopolize a part of commerce violates the Sherman Act whether "wholly nascent or abortive on the one hand, or successful on the other." *Associated Press v. U.S.*, 326 U.S. 1, 12 (1945). Moreover, it is the object of the Federal Trade Commission Act to reach in their incipency combinations which could lead to trade restraints or other unfair practices. *Fashion Originators' Guild*, 312 U.S. at 466. The Commission under Section 5 of the Federal Trade Commission Act has the power to arrest trade restraints in their incipency without proof that they amount to an outright violation of the provisions of other antitrust laws. *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316, 322 (1966).

The interrelationship of the respondents herein and their various affiliates does not preclude a finding of conspiracy. Parties closely affiliated with each other such as parent companies, their affiliates, as well as their officers and directors, are not immune from conspiracy

charges merely by virtue of their relationship. *Schine Theatres v. U.S.*, 334 U.S. 110, 116 (1948); *U.S. v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *U.S. v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); *Timken Co. v. U.S.*, 341 U.S. 593, 598 (1951).

Finally, coming to the question of remedy, it is immaterial whether or not the individual respondents such as Gibson, Sr. gave the trade show buyers express authority to write letters such as CX 104. In this case, the record shows that the trade show buyers had broad authority to deal with suppliers and Gibson retailers in connection with their trade show functions. The writing of CX 104 was directly related to their principals' business. Accordingly, the principals, such as Gibson, Sr., are bound by their employees' or agents' unlawful acts in [209] instigating combinations or agreements to boycott. See *Continental Baking Company v. U.S.*, 281 F.2d 137, 149-50 (6th Cir. 1960). Under such circumstances, the principals must stand or fall with those they select to act for them. The failure of the principals, in such a case, to prevent the illegal acts of their agents constitutes the nonperformance of a nondelegable duty. *Id.* at 150; *U.S. v. Armour & Co.*, 168 F.2d 342, 344 (3d Cir. 1948).

In the period 1970-1971, respondents Gibson, Sr., Belva Gibson, Herbert Gibson, Jr. and Gerald Gibson represented through the Store Directories that they were, respectively, Chairman of the Board, Secretary, President and Executive Vice President of Gibson Products Company, 519 Gibson Street, Seagoville, Texas, and that the individuals listed as "Home Office" personnel or as "Buyers" were under their control and acted on their behalf (Findings 39-41). CX 104, under the Gibson Products Company letterhead, was within the scope of the apparent authority conferred by the individual respondents. Accordingly, all are liable for the buyers' acts in that period even though no express authority had been conferred and regardless of whether their own stores continued to buy from Toastmaster or not. In the case of Gibson, Sr., moreover, liability by way of apparent authority for the illegal acts may be found from the employment relationship alone.

An order to prohibit the practice will issue.

REMEDY

The violations found under Counts II and III of the complaint occurred prior to Gibson, Sr.'s divestiture of his retail assets to his sons on October 31, 1972. As respondents assert, after the divestiture of such assets, there is little or no evidence of control by Gibson, Sr. over Gibsons Inc. or its subsidiaries, including the retail operations. Nevertheless, the Gibson Trade Show continued to be oriented to those

retailers operating under the Gibson name. No finding can be made that the tie was completely broken.

In any event, there is no assurance that the practices in question have been surely stopped. In connection with the Section 2(c) violation, the payments received from Al Cohen were not within the scope of the theory of the case as it was tried. However, the payments by Cohen in 1974 and 1975 bore a distinct resemblance to the Section 2(c) violations found in connection with Barshell. In the case of the boycott violations, it is significant that the licensing agreement in effect since [210]October 31, 1972, under which Gibson Discount Centers, Inc. licensed various franchisees, continued to contain provisions whereunder the licensor promised merchandising advice to the licensees and reserved the right in his sole discretion to determine whether the goods and services of the licensed stores were of acceptable quality (Findings 51-54). Whether or not the powers conferred by those provisions have, in fact, been exercised, respondents' latent power to control the purchasing decisions of the franchisees continues. An order will issue to preclude both further violation of Section 2(c) of the Robinson-Patman Act and group boycotts by the respondents.

Although the evidence may be old, this does not *per se* mean that an order based upon it is vitiated. Where a law violation has been proven against an enterprise and is capable of being perpetuated or resumed, it may be presumed that it has continued. An order may issue to prevent it even upon a showing of discontinuance or abandonment. *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 275 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970).

The mutual interdependence of the respondents, at least in the period 1969-October 31, 1972, compels the finding that the Gibson individual and corporate respondents operated an integrated business (pp. 174-76 *supra*). Under the circumstances, to prevent circumvention, an order may issue against all whether or not each engaged in the prohibited conduct. *Sunshine Art Studio Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *Delaware Watch Company v. FTC*, 332 F.2d 745 (2nd Cir. 1964). Accordingly, the provisions of the order dealing with the boycott violation will run against all the Gibson respondents. The exception is Gibsons Inc., which was not in existence at the time that the boycott violations took place in 1970-1971.

The order, in addition to prohibiting the boycott violations found, will also prohibit future use of licensing or franchising agreements which contain provisions for giving merchandising advice to franchisees or permit respondents to control the quality of merchandise sold and the services rendered by the licensees. CX 104, the letter giving rise to the illegal combination, on its face constituted merchandising

advice. This prohibition will prevent respondents from indirectly achieving the result prohibited by the order provision against boycotts. The Commission may prohibit practices which are related to the unlawful practices found to exist so as to make the order effective. *Jacob Siegel v. FTC*, 327 U.S. 608 (1946); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957). For, it is obliged "not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices." *Id.* at 430. [211] In view of respondents' insistence that those provisions in the agreement have not been exercised, the imposition of such a provision in the order deprives them of no valuable right.

Respondents' operation as an integrated enterprise, at least in the period 1969-October 31, 1972, does not, in the case of the Section 2(c) violation, justify the imposition of an order against all respondents. In this respect, complaint counsel's failure to question the broker, Jim Miller, concerning the respondents other than Gibson, Sr. compelled the inference that such evidence would have been adverse (see pp. 202-03 *supra*). The provisions in the order dealing with the receipt of brokerage will be limited to Gibson, Sr.

Complaint counsel also ask for restrictions on the Gibson Trade Show, such as a five year moratorium on its operations and a ban on trade show profits when it is resumed. These provisions cannot be justified since the allegations under Count I alleging the discriminatory receipt of promotional allowances have not been sustained.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter in this proceeding and of the respondents:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva Gibson
Gerald Gibson
Gibsons Inc.
Gibson Discount Centers, Inc.
Ideal Travel Agency, Inc.
Gibson Warehouse, Inc.
Gibson Products Co., Inc.
Al Cohen Associates, Inc.

2. This proceeding is in the public interest.

3. The allegations under Count I of the complaint have not been sustained.

4. The aforesaid acts and practices of the respondents as herein found under Count II of the complaint were and are to the prejudice and injury of the public and constituted and now constitute unfair acts and practices and unfair methods of competition in and affecting commerce within the intent and meaning of the Federal Trade Commission Act.

5. The aforesaid acts and practices of respondent H.R. Gibson, Sr. as herein found under Count III of the complaint were and are to the prejudice and injury of the public and constitute violations of Section 2(c) of the Robinson-Patman Act. [212]

ORDER

It is ordered, That respondents Herbert R. Gibson, Sr., Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson Products Co., Inc. their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the operation of a trade show, the operation of any retailing business, or the operation of any business related to retailing in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Combining, agreeing, engaging in an understanding, or conspiring with any of said other respondents, or any other person, partnership or corporation, to boycott or eliminate any supplier in order to prevent or hinder the supplier's sales to or business dealings with any of the respondents or any other person, partnership, or corporation.
2. Coercing or intimidating any supplier in any manner to prevent such supplier from competing for the sale of any products to any retailer or any person, partnership or corporation.
3. Representing directly or indirectly or implying to any supplier that the supplier may not compete for the sale of any products to any retailer, or any person, partnership or corporation.
4. Taking any individual action to eliminate a supplier or to prevent or hinder the supplier's sales to or business dealings with any other person, partnership or corporation when such supplier does not utilize the services of the Gibson Trade Show or appear in shows conducted by the Gibson Trade Show.
5. Utilizing franchising or licensing agreements containing (a) provisions whereunder respondents undertake to give merchandising advice to the licensees or franchisees and (b) provisions whereunder respondents retain the right of quality control over the products sold

and services rendered by such licensees or franchisees. *Provided, however,* that this provision shall not apply to those retail operations wholly owned by respondent Gibson's Discount Centers, Inc. [213]

It is further ordered, That H.R. Gibson, Sr., individually, and his officers, agents, representatives and employees, directly or through any corporate or other device in connection with the purchase of merchandise in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Receiving or accepting directly or indirectly from any seller anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names such as "Gibson Discount Center."
2. Assuming control of or influencing any seller's broker to induce such broker to pay him anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names such as "Gibson Discount Center."

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

It is further ordered, That Count III of the complaint be, and it hereby is, dismissed as to respondents Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, Gibsons Inc., Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., Gibson Products Co., Inc. and Al Cohen Associates, Inc.

It is further ordered, That, for a period of 10 years from the date of service of this order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [214]

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

553

Initial Decision

It is further ordered, That respondents herein 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.

Gibson Discount Centers, Inc.
The Incorporators of
the Corporation
on or about September 17, 1969

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Gerald Gibson (CX 2L) [ii]

Gibson Discount Centers, Inc.

Directors

On September 17, 1969, the names and addresses of the first Board of Directors of respondent Gibson's Discount Centers, Inc. were:

<u>Names</u>	<u>Addresses</u>
Herbert R. Gibson, Sr.	519 Gibson Street Seagoville, Texas
Mrs. H.R. Gibson, Sr.	519 Gibson Street Seagoville, Texas
Herbert R. Gibson, Jr.	519 Gibson Street Seagoville, Texas
Gerald Gibson	6814 Alexander Drive Dallas, Texas
Richard Gibson	2100 South Mobberly Longview, Texas

(CX 2, p. 9)

Elected at the annual meeting of the shareholders on April 7, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson
Richard Gibson
Gerald Gibson

(CX 1274)

Elected at the annual meeting of the shareholders on April 3, 1972:

Herbert R. Gibson, Sr.
Herbert R. Gibson, Jr.
Belva G. Gibson
Richard Gibson
Gerald Gibson

(CX 1275)

Elected at the annual meeting of the shareholders on April 9, 1973:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 1276A)

Officers

Elected at the annual meeting of the Board of Directors on April 7, 1971:

H.R. Gibson, Sr.	Chairman of the Board
H.R. Gibson, Jr.	President
Belva G. Gibson	Vice President
Richard Gibson	Vice President
Gerald Gibson	Secretary-Treasurer

(CX 1277A)

Elected at the annual meeting of the Board of Directors on April 3, 1972:

H.R. Gibson, Sr.	Chairman of the Board
H.R. Gibson, Jr.	President
Belva G. Gibson	Vice President
Richard Gibson	Vice President
Gerald Gibson	Secretary-Treasurer

(CX 1278) [iii]

Elected at the annual meeting of the Board of Directors on April 9, 1973:

H.R. Gibson, Jr.	President
Gerald P. Gibson	Vice-President
B.R. Mercer	Secretary-Treasurer
Robert E. Rader, Jr.	Asst. Secretary

(CX 1279)

FEDERAL TRADE COMMISSION DECISIONS

95 F.T.C.

Initial Decision

Directors

Elected at the annual meeting of the shareholders on April 2, 1974:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 994)

Elected at the annual meeting of the shareholders on April 17, 1975:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 993)

The initial board of directors in May 1962 was:

H.R. Gibson, Sr.
Belva Grace Gibson
H.R. Gibson, Jr.

(CX 4C) [v]

Directors

Elected at the annual meeting of the shareholders on June 8, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson

(CX 1295)

Elected at the annual meeting of the shareholders on June 12, 1972:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson

(CX 1296)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1297)

Officers

Elected at the annual meeting of the Board of Directors on April 2, 1974:

H.R. Gibson, Jr.
Gerald Gibson
B.R. Mercer
Robert E. Rader,
Jr.
J.W. Carter

(CX 996)

President
Vice-President
Secretary-Treasurer
Asst. Secretary
Asst. Secretary

Elected at the annual meeting of the Board of Directors on April 17, 1975:

H.R. Gibson, Jr.
Gerald P. Gibson
B.R. Mercer

(CX 998) [iv]

President
Vice-President
Secretary-Treasurer

Gibson Warehouse, Inc.

6814 Alexander Drive
6814 Alexander Drive
519 Gibson Street

Dallas, Texas
Dallas, Texas
Seagoville, Texas

Gibson Warehouse, Inc.

Elected at the annual meeting of the Board of Directors on June 8, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson

(CX 1299)

President
Vice-President
Secretary-Treasurer

Elected at the annual meeting of the Board of Directors on June 12, 1972:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva G. Gibson
Bill R. Mercer

(CX 1300)

President
Vice-President
Secretary-Treasurer
Asst. Secretary-Treasurer

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill R. Mercer

(CX 1301A)* [vi]

President
Vice-President
Secretary-Treasurer

* H.R. Gibson, Sr. and Belva tendered their resignations as officers and directors on October 31, 1972 (CX 1301B, 1301D).

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Initial Decision

Ideal Travel Agency, Inc.

The initial board of directors on or about April 19, 1962:*

H.R. Gibson	6814 Alexander Drive	Dallas, Texas
Belva Grace Gibson	6814 Alexander Drive	Dallas, Texas
W.C. Greer	519 Gibson Street	Seagoville, Texas [vii]

(CX 3C)

* At that time Gibson Travel Service.

Ideal Travel Agency, Inc.Directors

Elected at the annual meeting of the shareholders on April 15, 1970:

H.R. Gibson, Sr.
Roy R. Love
Belva Gibson
(CX 1282)

Elected at the annual meeting of the shareholders on April 15, 1971:

H.R. Gibson, Sr.
Roy R. Love
Belva Gibson
(CX 1283)

Elected at the annual meeting of the shareholders on April 14, 1972:

H.R. Gibson, Sr.
Belva Gibson
H.R. Gibson, Jr.
(CX 1284)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer
(CX 1285)

Officers

Elected at the annual meeting of the Board of Directors on April 15, 1970:

H.R. Gibson, Sr.	President
Roy R. Love	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1287)

Elected at the annual meeting of the Board of Directors on April 15, 1971:

H.R. Gibson, Sr.	President
Roy R. Love	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1288)

Elected at the annual meeting of the Board of Directors on April 14, 1972:

H.R. Gibson, Sr.	President
Belva Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1289)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1290A)* [viii]

* Belva Gibson and H.R. Gibson, Sr. resigned as officers and directors of the corporation on October 31, 1972 (CX 1290C, 1290E).

Initial Decision

95 F.T.C.

Gibson Products CompanyDirectors

Elected at the annual meeting of the shareholders on December 1, 1970:

H.R. Gibson, Sr.
Belva Gibson
Betty Rogers

(CX 1308, 1411A)

Elected at the annual meeting of the shareholders on December 8, 1971:

H.R. Gibson, Sr.
Belva Gibson
H.R. Gibson, Jr.

(CX 1309)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1310)

Elected at the annual meeting of the shareholders on December 19, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill R. Mercer

(CX 1311)

Officers

Elected at the annual meeting of the Board of Directors on December 1, 1970:

H.R. Gibson, Sr.	President
Betty Rogers	Vice-President
Belva Gibson	Secretary-Treasurer
Gerald P. Gibson	Asst. Secretary

(CX 1313)

Elected at the annual meeting of the Board of Directors on December 8, 1971:

H.R. Gibson, Sr.	President
Belva Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1314)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Sr.	President
Gerald Gibson	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1315A)*

Elected at the annual meeting of the Board of Directors on December 19, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Bill R. Mercer	Secretary-Treasurer

(CX 1316) [ix]

* H.R. Gibson, Sr. and Belva Gibson resigned as officers and directors of the company on October 31, 1972 (CX 1315B, 1315D).

Gibson Products CompanyDirectors

Elected at the annual meeting of the shareholders on December 4, 1973:

H.R. Gibson, Jr.
Gerald Gibson
B.R. Mercer

(CX 1312) [x]

OfficersGibson Products Company of San Antonio, Inc.Directors

Elected at the annual meeting of the shareholders on June 2, 1970:

H.R. Gibson, Jr.
Belva Gibson
Sarah Wheat

(CX 1349)

Officers

Elected at the annual meeting of the Board of Directors on June 2, 1970:

H.R. Gibson, Jr.	President
Sarah Wheat	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1350)

553

Initial Decision

Directors

Elected at the annual meeting of the shareholders on June 2, 1971:

H.R. Gibson, Jr.
Belva Gibson
Sarah Wheat
(CX 1348)

Elected at the annual meeting of the shareholders on June 12, 1972:

H.R. Gibson, Jr.
Belva Gibson
Gerald Gibson
(CX 1346)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer
(CX 1344A)

Officers

Elected at the annual meeting of the Board of Directors on June 2, 1971:

H.R. Gibson, Jr. President
Sarah Wheat Vice-President
Belva Gibson Secretary-Treasurer
(CX 1347)

Elected at the annual meeting of the Board of Directors on June 12, 1972:

H.R. Gibson, Jr. President
Gerald P. Gibson Vice-President
Belva Gibson Secretary-Treasurer
Bill R. Mercer Asst. Secretary-Treasurer
(CX 1345)

Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr. President
Gerald Gibson Vice-President
Bill Mercer Secretary-Treasurer
(CX 1344B)* [xi]

* Belva Gibson resigned as an officer and director of the corporation on October 31, 1972 (CX 1344C).

Gibson Products Company, Inc. of GarlandDirectors

Elected at the annual meeting of the shareholders on February 10, 1971:

H.R. Gibson, Sr.
Gerald Gibson
H.R. Gibson, Jr.
(CX 1365)

Elected at the special meeting of the shareholders on November 8, 1972:

H.R. Gibson, Jr.
Gerald Gibson
B.R. Mercer
(CX 1359)

Officers

Elected at the annual meeting of the Board of Directors on February 10, 1971:

H.R. Gibson, Sr. President
Gerald P. Gibson Vice-President
H.R. Gibson, Jr. Secretary-Treasurer
(CX 1364A)

Elected at the annual meeting of the Board of Directors on February 14, 1972:

H.R. Gibson, Sr. President
Gerald P. Gibson Vice-President
H.R. Gibson, Jr. Secretary-Treasurer
Bill R. Mercer Asst. Secretary-Treasurer
(CX 1363)

Elected at the special meeting of the Board of Directors on November 8, 1972:

H.R. Gibson, Jr. President
Gerald Gibson Vice-President
Bill Mercer Secretary-Treasurer
(CX 1360)* [xii]

* H.R. Gibson, Sr. tendered his resignation as President and Director of the Corporation on October 31, 1972 (CX 1361).

Gibson Products Company, Inc. of RichardsonDirectors

Elected at the annual meeting of the shareholders on February 3, 1970:

H.R. Gibson, Jr.
H.R. Gibson, Sr.
J.H. Acklin

(CX 1383)*

Elected at the annual meeting of the shareholders on February 3, 1971:

H.R. Gibson, Jr.
H.R. Gibson, Sr.
J.H. Acklin

(CX 1382)

Elected at the annual meeting of the shareholders on February 8, 1972:

H.R. Gibson, Jr.
J.H. Acklin
H.R. Gibson, Sr.

(CX 1380)

Elected at the special meeting of the shareholders on November 8, 1972:

H.R. Gibson, Jr.
J.H. Acklin
Bill Mercer

(CX 1376)**

* One of the shareholders constituting the quorum at this meeting was Belva G. Gibson (CX 1383).

** On October 31, 1972, H.R. Gibson, Sr. tendered his resignation as officer and director of the corporation (CX 1377).

Officers

Elected at the annual meeting of the Board of Directors on February 3, 1970:

H.R. Gibson, Jr. President
J.H. Acklin Vice-President
H.R. Gibson, Sr. Secretary-Treasurer

(CX 1384)

Elected at the annual meeting of the Board of Directors on February 3, 1971:

H.R. Gibson, Jr. President
J.H. Acklin Vice-President
H.R. Gibson, Sr. Secretary-Treasurer

(CX 1381)

Elected at the annual meeting of the Board of Directors on February 8, 1972:

H.R. Gibson, Jr. President
J.H. Acklin Vice-President
H.R. Gibson, Sr. Secretary-Treasurer
Bill R. Mercer Asst. Secretary-Treasurer

(CX 1379)

Elected at the special meeting of the Board of Directors on November 8, 1972:

H.R. Gibson, Jr. President
J.H. Acklin Vice-President
Bill Mercer Secretary-Treasurer

(CX 1375) [xiii]

Gibson Products Company of Shreveport, Inc.Directors

Elected at the annual meeting of the shareholders on October 5, 1970:

R. Gibson, Sr.
Barbara Gibson
Gerald Gibson

(CX 1397)

Elected at the annual meeting of the shareholders on October 5, 1971:

Gibson, Sr.
Barbara Gibson
Gerald Gibson

(CX 1395)

Officers

Elected at the annual meeting of the Board of Directors on October 5, 1970:

Gerald Gibson President
H.R. Gibson, Sr. Vice-President
Barbara Gibson Secretary-Treasurer
H.R. Gibson, Jr. Asst. Secretary-Treasurer

(CX 1396)

Elected at the annual meeting of the Board of Directors on October 5, 1971:

Gerald Gibson President
H.R. Gibson, Sr. Vice-President
Barbara Gibson Secretary-Treasurer
H.R. Gibson, Jr. Asst. Secretary-Treasurer

(CX 1394)

HERBERT R. GIBSON, SR., ET AL.

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Initial Decision

Directors

Elected at the annual meeting of the shareholders on October 3, 1972:

Barbara Gibson
H.R. Gibson, Jr.
Gerald Gibson

(CX 1393)

Officers

Elected at the annual meeting of the Board of Directors on October 3, 1972:

Gerald Gibson	President
Barbara Gibson	Vice-President
H.R. Gibson, Jr.	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1392) [xiv]

Gibson Products Company, Inc. of Plano

Directors

Elected at the annual meeting of the shareholders on April 28, 1971:

H.R. Gibson, Sr.
H.R. Gibson, Jr.
Belva Gibson

(CX 1410)

Officers

Elected at the annual meeting of the Board of Directors on April 28, 1971:

H.R. Gibson, Sr.	President
H.R. Gibson, Jr.	Vice-President
Belva Gibson	Secretary-Treasurer

(CX 1409)

Elected at the annual meeting of the shareholders on October 26, 1971:

H.R. Gibson, Jr.
Gerald Gibson
Belva Gibson

(CX 1408)

Elected at the annual meeting of the Board of Directors on October 26, 1971:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Jack Weinblatt	Vice-President
Belva Gibson	Secretary-Treasurer
Bill R. Mercer	Asst. Secretary-Treasurer

(CX 1407)

Elected at the special meeting of the shareholders on November 1, 1972:

H.R. Gibson, Jr.
Gerald Gibson
Bill Mercer

(CX 1406B)

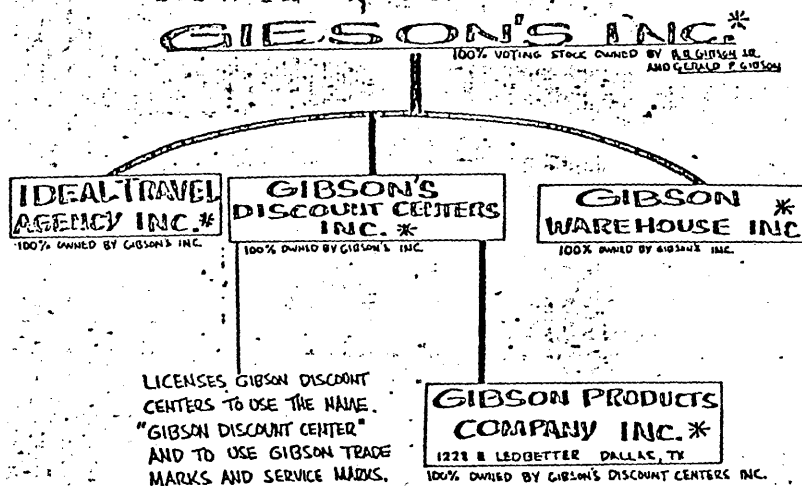
Elected at the special meeting of the Board of Directors on November 1, 1972:

H.R. Gibson, Jr.	President
Gerald Gibson	Vice-President
Jack Weinblatt	Vice-President
Bill Mercer	Secretary-Treasurer

(CX 1406A)*

* On October 13, 1972, Belva Gibson submitted her resignation as an officer and director of this corporation (CX 1406C).

APPENDIX B



*H.R. GIBSON JR. AND GERALD P. GIBSON
ARE PRINCIPAL OFFICERS AND DIRECTORS
OF EACH OF THE ABOVE CORPORATIONS

HERBERT R. GIBSON, SR., ET AL.

Initial Decision

APPENDIX C

CX 4-1

STORE DIRECTORY
GIBSON
PRODUCTS
COMPANY

JULY - DECEMBER

1970



CX 4-1

HOME OFFICE
A/C 214 - 287-2570
519 Gibson Street

Seagraves, Texas

FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

95 F.T.C.

SEACOVILLE EXECUTIVES



100-107,000, 100-107,000, 100-107,000

FEDERAL TRADE COMMISSION
 9/16/66
 In the Matter of *Seacoville Executives*
 Docket # 15-75



934
 GIBSON
 GIBSON
 GIBSON

FEDERAL TRADE COMMISSION
 DEPT. OF COMMERCE
 100-107,000, 100-107,000, 100-107,000



MERCHANDISE-TAILORED DISPLAY EQUIPMENT



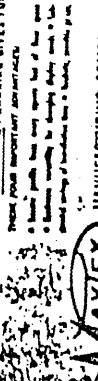
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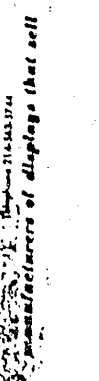
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MANUFACTURING COMPANY

100-107,000, 100-107,000, 100-107,000

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Home Office



NORWOOD FIELDEN
GENERAL MANAGER



FRANK M. KELLY
CHIEF OF POLICE



ANDY ANDERSON
BUYER



JIM FERGUSON
BUYER



LEE M. KELSO
BUYER



GAYLE OLER
GENERAL COUNSEL



A. W. HAMILTON, JR.
ROOM DIRECTOR



CHARLES CLUNIE
BUYER



J. P. RIDD
BUYER



WILL MERCER
BUYER



BOBBY NELSON
BUYER



BOB STEVENS
BUYER



FRANK TERHUNE
BUYER



GARY LEVENETT
BUYER



LYNN M. LOW
BUYER



TOMMY PERKINS
BUYER

HERBERT R. GIBSON, SR., ET AL.
Initial Decision

Buyers

FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

95 F.T.C.



BOB BROUGHTON
DIST. STORE SECURITIES



BILL BARNES
WAREHOUSE MANAGER



CHARLIE DAVIS
PAPER SUPPLIERS



TOM FERRELL
TRAFFIC MANAGER



DAVIS FOSTER
ADVERTISING - DALLAS AREA



MARGIE AAUTZ
IDEAL TRAVEL



B. W. HUDSON
DIXIE LANCHEATRIES



BILL REA
ADVERTISING - TABLOID

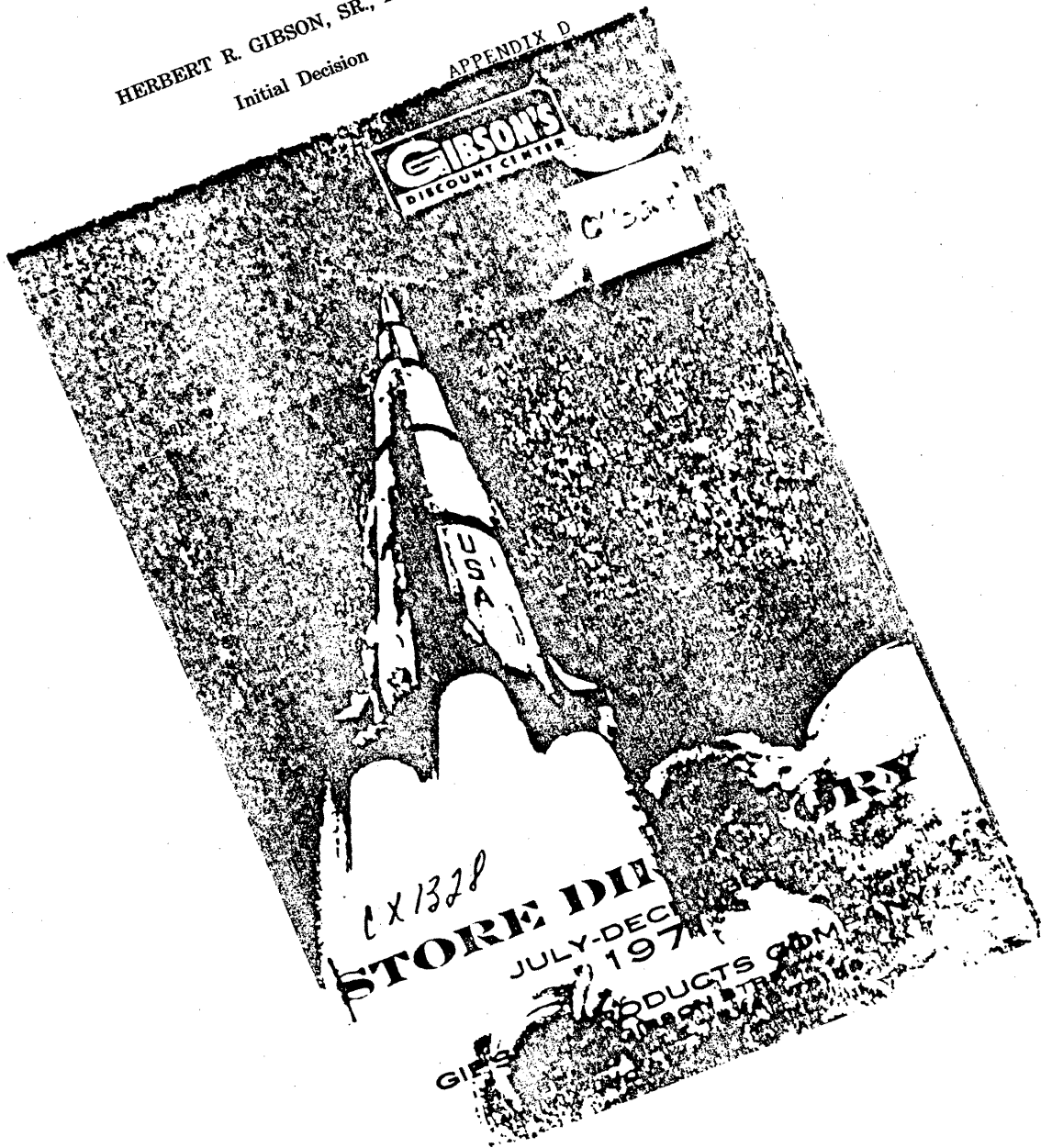


LOYD REECE
GIBSON PRINTING CO.

HERBERT R. GIBSON, SR., ET AL.
Initial Decision

APPENDIX D

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SEAGOVILLE EXECUTIVES



H. R. GIBSON, SR.
CHAIRMAN OF THE BOARD



MRS. H. R. GIBSON, SR.
SECRETARY



H. R. GIBSON, JR.
PRESIDENT



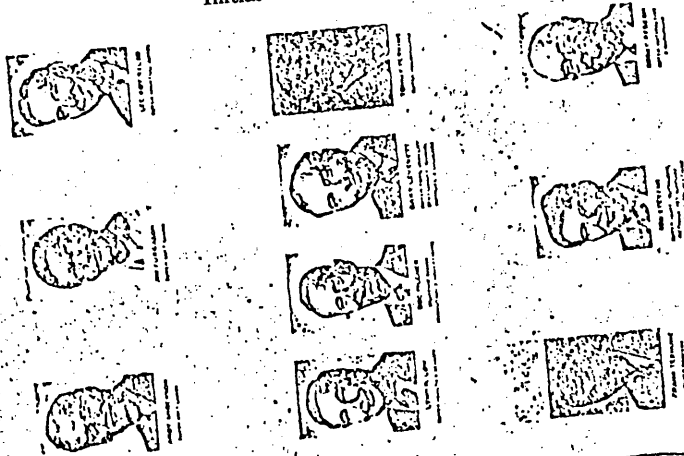
GERALD GIBSON
EXECUTIVE VICE PRESIDENT

CX 1528

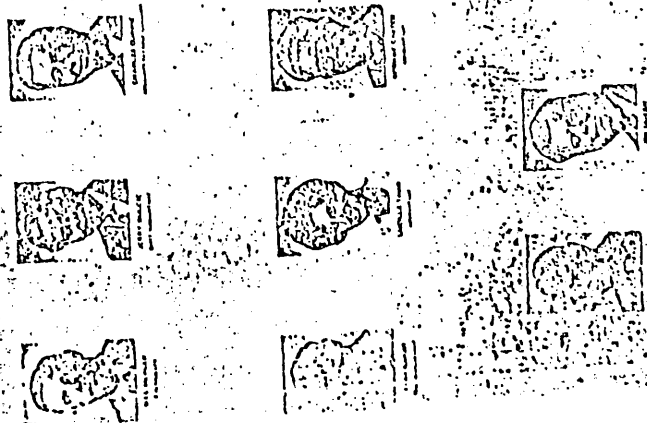
Initial Decision

553

BUYERS



HOME OFFICE



Initial Decision

95 F.T.C.



BOB BROUGHTON
DRY STORE BROUGHTON



BARDWELL D. ODUM
GENERAL COUNSEL



BILL CADDELL
PERSONNEL MANAGER



BOB DAMPROW
TRAFFIC MANAGER



S. W. HAMILTON JR.
SHOW DIRECTOR



BILL BARNES
WAREHOUSE MANAGER



MARGIE KAUTZ
IDEAL TRAVEL



E. W. HUDSON
DYE LABORATORIES



CHARLIE DAVIS
RACK SUPPLIES



JIMMY COBB
GIBSON PRINTING



BILL REA
ADVERTISING

APPENDIX E

Abbreviations used throughout this Initial Decision are as follows:

CX	-	Complaint counsel's exhibits
RX	-	Respondents' exhibit
Tr.	-	Transcript page
SR	-	Herbert R. Gibson, Sr.'s exhibit
JR	-	Herbert R. Gibson, Jr.'s exhibit
CPF	-	Complaint counsel's proposed finding
CRB	-	Complaint counsel's reply brief
RPF SR.	-	Respondents' proposed finding (Herbert R. Gibson, Sr. and Belva Gibson)
RPF JR.	-	Respondents' proposed finding (Herbert R. Gibson, Jr. and all other respondents)
RRB SR.	-	Respondents' reply brief (Herbert R. Gibson, Sr. and Belva Gibson)
RRB JR.	-	Respondents' reply brief (Herbert R. Gibson, Jr. and all other respondents)

OPINION OF THE COMMISSION

By CLANTON, *Commissioner*:

The complaint in this case charges respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a) (1976), and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(c) (1976), stemming principally from the operation of the "Gibson Trade Show," one part of a network of respondent family enterprises. Individual members of the Gibson family control corporations which own 43 retail discount stores, known as "Gibson Discount Centers"; a family corporation also licenses 614 other stores to operate under the Gibson name.¹ (ID 29) Together, the Gibson-owned and franchised stores combine to buy many of their products from suppliers at a quarterly private fete in Dallas, staged by the Gibson family, and known as the Gibson Trade Show. (ID 60-61)

[2]Count I of the complaint charges respondents with inducing the payment from suppliers of promotional allowances in connection with the Gibson Trade Show, which allowances were not available on a proportionally equal basis to other customers of these suppliers. This allegation, while maintained under Section 5 of the FTC Act, is

¹ The following abbreviations will be used in this opinion.

ID	-	Initial Decision Finding number
ID p.	-	Initial Decision page number
Tr.	-	Transcript page number
CX	-	Complaint Counsel's exhibit number
RAB	-	Appeal brief of Gibson, Sr.
CAB	-	Complaint Counsel's appeal brief

patterned after and draws from Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. Count II alleges that respondents, in violation of Section 5 of the FTC Act, collectively boycotted suppliers who did not grant the promotional allowances charged in Count I. Finally, Count III is a distinct allegation of the payment of illegal brokerage in violation of Section 2(c) of the Clayton Act.

Administrative Law Judge Theodor P. von Brand (the "ALJ") dismissed Count I, issued an order against all respondents except Gibson's, Inc., under Count II, and issued an order only against respondent Herbert R. Gibson, Sr. under Count III. Complaint counsel and respondents both appeal.

Respondents' Businesses

A description of the numerous Gibson corporate entities and the intertwining relationship among them and Gibson family members is set forth at length in the initial decision and will not be repeated here. (ID 1-117)

Briefly, the respondents are Herbert R. Gibson, Sr., ("Gibson, Sr."), individually and doing business as Gibson Products Co. and The Gibson Trade Show; his wife Belva Gibson ("Belva"); two sons, Herbert R. Gibson, Jr. ("Gibson, Jr.") and Gerald Gibson ("Gerald"); and eight corporations, five of which are Gibson family controlled.² Of the remaining three corporations, two³ negotiated consent settlements in 1976, and one, Al Cohen Associates, Inc., charged solely in Count III, is still in the case. [3]

Gibson, Sr. founded the retail discount store chain and, until November 1, 1972, directed the franchising and trade show aspects of the family enterprise, doing business as the Gibson Products Company. (ID 3-4) Two other Gibson-controlled corporations, Gibson Warehouse, Inc., and Ideal Travel Agency, were used by Gibson, Sr. as vehicles to store and resell merchandise and to collect booth and show fees at The Gibson Trade Show. (ID 14-15)

As of November 1, 1972, a reorganization and change in operating control of various aspects of the family business was effected, essentially through a transfer of stock by Gibson, Sr. and his wife to a corporation, Gibson's, Inc., all of whose shares were owned by two of their sons, Herbert R. Gibson, Jr. and Gerald Gibson. This corporation now owns and operates the franchising and retail aspects of the family business. Gibson, Sr. retained the trade show business and, having sold

² Gibsons, Inc., Gibson Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Gibson Products Co., Inc.

³ Progressive Brokerage, Inc. and Barshell, Inc.

the Gibson Products Company name to Gibson, Jr. (ID 16, 25), he registered the name, "The Gibson Trade Show," on November 1, 1972. (ID 26)

The Gibson Trade Show, upon which much of this case turns, is a private trade show where manufacturers display their products to buyers for Gibson owned and franchised stores. (ID 59-61) The show provides the booth space from which the suppliers' representatives can show their wares and attempt to obtain orders.

Gibson, Sr. employs "merchandise managers" or "trade show buyers" to operate the show. These buyers recruit the participation of manufacturers to sell at the show. (ID 78) Buyers discuss product lines, billing terms and prices with suppliers, negotiating to get the best deal on the products to be shown. Upon the satisfactory conclusion of negotiations, a buyer fills in a "show sheet" with the price and terms for each product. These sheets, which are the exclusive order forms used at the shows (ID 90), are headlined "Ship to Gibson Products Company," followed by blank lines for the address of a particular store. (ID 91) They contain a notation that items are not to be shipped at prices higher than those listed or else a deduction will be taken. (ID 93) The trade show buyers patrol the aisles and [4]booths during the show, talking to suppliers' and retailers' representatives.⁴ (ID 85)

Payments made by suppliers, and allegedly illegally induced by respondents, in connection with the trade show included the following, for each year from 1969 through 1972: (1) payment for booth rental, in an amount which was identical for all suppliers; (2) payment for services in connection with booth rental including, but not limited to electrical contractor services and furnishings; (3) payment for provision of personnel to prepare and attend the booth throughout the time The Gibson Trade Show was open; (4) payment for advertising in a Gibson tabloid; (5) special trade show prices on one or more of the suppliers' products offered for sale at The Gibson Trade Show; (6) special billing terms on all sales made at the trade show; and (7) special allowances on sales made at the trade show, calculated from a previously negotiated percentage of all such sales (the so-called "show fee").

The principal family business, from at least 1969 to November 1972,

⁴ In addition to the provision of booth space, the trade show provides meeting facilities and other services, including the opportunity for placement of "blanket orders," recommendations sent to Gibson stores to purchase particular items. (ID 89)

Suppliers are also solicited to advertise in Gibson tabloids, which are used by Gibson retailers as newspaper supplements or which are mailed out or posted in stores. (ID 105) Participating stores purchase the finished tabloids from one of the Gibson family corporations; the tabloids are prepared and printed by G&G Advertising, a proprietorship run by Gerald Gibson. (ID 107) Also, Gibson, Sr. at times sends letters to suppliers requesting that they advertise in particular tabloids. (ID 113-115) If an item is to be advertised in a tabloid, there is a sign on its suppliers' booth at The Gibson Trade Show which states "Recommended tab item."

from November, 1972 to the date complaint issued in 1975, and to the present, was the ownership and operation of Gibson retail discount stores and the franchising of those stores. Both before and after the November 1972 transfer, the franchise agreements promised the franchisee the benefit of Gibson volume purchasing and advice on merchandise, but reserved to the franchisor the right to order the discontinuance of an item or service if the quality was disapproved.

Participation in the Gibson Trade Show is a standard vehicle for manufacturers wishing to sell to Gibson retail stores. Few other retailers stage private trade shows, however, and, accordingly, the complaint charges that the myriad payments made to the Gibson enterprises were not matched by similar payments or terms to the suppliers' other customers. [5]

No additional facts are pertinent to Count I of the complaint; additional information needed to dispose of Counts II and III is set forth *infra*.

Count I

Count I of the complaint largely tracks the language of the Clayton Act Sections 2(d) and 2(e)⁵, as amended, and alleges that the Gibson family and corporate respondents knowingly induced and/or received promotional payments and services in connection with the sale of products to Gibson owned and franchised stores in violation of Section 5 of the FTC Act.⁶ The seven types of allegedly illegal allowances are those set forth *supra*. [6]

The ALJ found that the variety of fees and special terms given by manufacturers to respondents were not within the purview of Sections

⁵ Section 2(d), 15 U.S.C. 13(d) (1976), provides:

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

Section 2(e), 15 U.S.C. 13(e) (1976), provides:

That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

⁶ Although buyer misconduct is not a violation of Sections 2(d) and 2(e), this omission appears to be only a matter of congressional inadvertence. See *Grand Union Co. v. FTC*, 300 F.2d 92, 96 (2d Cir. 1962). Nevertheless, such misconduct is cognizable under Section 5 of the FTC Act. *R. H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964).

2(d) and 2(e), because they were in connection with the original sale of a product, rather than in connection with its resale.⁷ In his view, the allegations of Count I should have been brought under Section 2(a) for price discrimination. Complaint counsel, relying principally on *Alterman Foods, Inc.*, 82 F.T.C. 298 (1973), *aff'd*, 497 F.2d 993 (5th Cir. 1974), which was distinguished by the ALJ, appeal.⁸

Two features differentiate Sections 2(d) and 2(e) from the provisions of Section 2(a). The first is that the seller must either provide "services or facilities" or make payment in consideration of "services or facilities furnished by or through [the] customer." It has been held that the service or payment at issue must be promotional in nature, such as for advertising. See *P. Lorillard Co. v. FTC*, 267 F.2d 439, 443 (3d Cir.), *cert. denied*, 361 U.S. 923 (1959). The second is that the payment made or service rendered must be in connection with the "processing, handling, sale, or offering for sale" of a product by the customer, *i.e.*, it must bear a nexus to the resale or preparation for resale by the retailer. See *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975). If these conditions can be met, the plaintiff may take advantage of Sections 2(d) and 2(e), which carry an easier standard of proof than does Section 2(a). Under Section 2(a), price discrimination is lawful, unless it may substantially lessen or injure competition and, *inter alia*, it is neither cost-justified, nor undertaken to meet competition. Sections 2(d) and 2(e) require no showing of competitive effect, nor do they allow resort to Section 2(a) statutory defenses, save perhaps the "meeting competition" defense. See E. Kintner, *A Robinson-Patman Primer* 270-72 (2d ed. 1979); *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); but see *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956). Thus, Sections 2(d) and 2(e) "create a legal premium for the FTC or other plaintiffs to ease their evidentiary burdens." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 372 (1964).

The traditional use of Sections 2(d) and 2(e) has been in the realm of cooperative promotional arrangements. See *FTC v. [7]Fred Meyer, Inc.*, 390 U.S. 341 (1968). In the classic Section 2(d) and 2(e) case, a manufacturer has compensated a high volume retailer via a discriminatory plan, sometimes in an amount far in excess of that retailer's actual promotional costs, and in so doing has utilized a scheme not realistically available to small retailers. In addition, the manufacturer often rebates a "promotional allowance" to a retailer in an amount tied

⁷ The ALJ found that the solicitation of fees for tabloid advertising was within the purview of Section 2(d). (ID p. 184) However, he held that complaint counsel had not sustained their burden of showing contemporaneous sales with respect to the items promoted in the tabloids, ID p. 189, and complaint counsel did not appeal from this holding.

⁸ Complaint counsel have appealed from other holdings of the ALJ on this count of the complaint, but in light of our disposition of this threshold question, we do not reach these other issues.

to the number of units resold by the retailer to the public, but not linked to the retailer's actual promotional expenditures. Plainly, such a transaction is in connection with a resale and within the ambit of Sections 2(d) and 2(e). Similarly, making employees available or arranging with a third party to furnish personnel for purposes of performing work for a customer would also come within Sections 2(d) and 2(e). FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 CFR 240.7, example 6 (1980).

Because of the easier threshold of proof carved out for Sections 2(d) and 2(e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed. Accordingly, we will generally find that Sections 2(d) and 2(e) apply to cooperative promotional arrangements. See *Rowe, supra* at 381 ("[T]he legal criteria of Sections 2(d) and 2(e), unless confined to the sphere of cooperative promotional arrangements, would cut across and confound the legal requirements of the separate price and brokerage provisions of the Act.")

The legislative history of Sections 2(d) and 2(e) evidences the relatively narrow scope that Congress intended these specific provisions to have. For example, Representative Utterback, Chairman of the Senate-House Conferees, stated that:

The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. 80 Cong. Rec. 9418 (1936).

And the Senate and House Judiciary Committee Reports also focus on "special allowances in purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally." S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936).

In keeping with this narrow scope courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a). [8]Variations in credit terms have consistently been held to present only a Section 2(a) issue, and courts have refused to allow such claims to be maintained under Sections 2(d) and 2(e). See, e.g., *Robbins Flooring, Inc. v. Federal Floors, Inc.*, 445 F. Supp. 4, 8 (E.D. Pa. 1977); *Glowacki v. Borden, Inc.*, 420 F. Supp. 348, 353 (N.D. Ill. 1976). Likewise, discriminatory freight allowances have been held to be in connection with delivery on the original sale and as such within Section 2(a) rather than Sections 2(d) or 2(e), see *Chicago Spring Products Co. v. United States Steel Corp.*, 371 F.2d 428 (7th Cir.

1966), and other so-called delivery allowances have been held not to be in connection with resale and so to state a Section 2(a) rather than a Section 2(d) claim, *Glowacki, supra* at 358-359.

Furthermore, courts have recognized that the purpose of Sections 2(d) and 2(e) is to strengthen Section 2(a) by prohibiting outright hard-ances, thus forcing most discrimination in the form of promotional allowances or discounts, where it can be measured and adjudicated under Section 2(a). *FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 68 (1959). In light of this salutary, but narrow, statutory purpose, the courts have, albeit not unanimously, resisted expanding the "scope of Sections 2(d) and 2(e) beyond the limited area of applicability intended by Congress," *Cecil Corley Motor Co., Inc. v. General Motors Corp.*, 380 F. Supp. 819, 850 (M.D. Tenn. 1974); and see generally *Skinner v. United States Steel Corp.*, 233 F.2d 762 (5th Cir. 1956); *New Amsterdam Cheese Corp. v. Kraftco Corp.*, 363 F. Supp. 135 (S.D.N.Y. 1973); *David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

There is some authority, however, for expanding the scope of Section 2(e). *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972), cited by complaint counsel, held that preferential differences in the timeliness of delivery were within the purview of Section 2(e) because consistently faster deliveries would ultimately promote and facilitate resale. The very limited acceptance of this decision, see *Glowacki v. Borden, supra* at 356; *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 371 F. Supp. 701, 710 (S.D.N.Y.), aff'd, 493 F.2d 1352 (2d Cir. 1974) (dicta); *Palmer News, Inc. v. ARA Services, Inc.*, 476 F. Supp. 1176, 1183 (D. Kan. 1979) (dicta), is outweighed by the strenuous criticism of its expansive view, see Rowe, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. [9]98, 108-09 (1972); *Cecil Corley Motor Co., Inc. v. Yamaha International Corp.*, 1977-1 Trade Cas. (CCH) ¶61,245 at 70,728-29 (D. Ore. 1976), or distinguished the decision, *David Buchanan v. Champion Home Builders Co.*, 594 F.2d 1313, 1317-18 (9th Cir. 1979).

Indeed, it is not entirely clear whether the Seventh Circuit continues to hold firmly to its *Centex-Winston* decision. See *Kirby v. P. R. Mallory & Co., Inc.*, 489 F.2d 904, 910 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974); *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, [1980] 5 Trade Reg. Rep. (CCH) ¶63,229 at 78,126-27 (7th Cir. March 17, 1980); but cf. *Glowacki, supra* at 356. In *Kirby*, which dealt with advertising allowances, the court reaffirmed the accepted distinction between

payments and services in connection with the original sale, which are challengeable only under Section 2(a), and those with a connection to the resale, which are cognizable under Sections 2(d) or 2(e). The court then concluded:

In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price discrimination in the supplier-customer sale and drafted §§ 2(d) and 2(e) to apply exclusively to promotional discriminations like those alleged in this case. 489 F.2d at 910-11.

Whatever vitality remains in the *Centex-Winston* decision, it does not contravene the general standards which we bring to bear upon the facts of this case.

Against this legal background, we approach our earlier decision in *Alterman Foods, Inc.*, *supra*. Unlike the ALJ, we are unable to discern a principled basis upon which to distinguish that case from the one at bar. In a factual setting quite similar to the instant case, *Alterman* held that discriminatory payments to a private trade show were, in fact, unlawful promotional allowances under Sections 2(d) and 2(e) of the Clayton Act. In finding that the *Alterman* food show had induced suppliers to violate Sections 2(d) and 2(e), the Commission relied upon two kinds of benefits which had accrued to the *Alterman* retail operation. These benefits were described as "[d]irect 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." 82 F.T.C. at 343. [10]

After careful reexamination of our decision in *Alterman*, we conclude that its reasoning is flawed and, henceforth, we decline to follow it. Specifically, we do not judge the "benefits" recited in *Alterman*, which are relied upon by complaint counsel, to be sufficiently related to the promotional allowance and resale requirements of Sections 2(d) and 2(e) to trigger application of those provisions.

Undoubtedly, the products purchased by Gibson retail buyers from manufacturers at the trade show were intended for resale to the ultimate consumer. But this fact standing alone is insufficient to transform what is plainly the original sale into one that is in connection with resale. To the extent that Gibson entities received booth rentals and Gibson buyers received price concessions not available to competing customers, an action may lie under Section 2(a). But to focus on the translation of these "direct benefits" down to the next level of competition, *i.e.*, to rely on the fact that these concessions generally enhanced the overall financial strength of the company,

enabling Gibson retailers to undercut competitors on subsequent resales, is to misapply the statute.⁹ "Benefits" of this sort are inherent in any transaction in which goods are ultimately destined for resale, and to accept the *Alterman* holding would mean opening up Sections 2(d) and 2(e) to practices that Congress intended to be challenged solely under Section 2(a).¹⁰ [11]

As to the "indirect benefits" identified in *Alterman*, we believe they play a role too incidental in the overall transaction here to warrant application of Sections 2(d) and 2(e). In general, marketing assistance, if discriminatorily granted, does run afoul of Sections 2(d) and 2(e). But in the present case, it is clear that the principal function of the trade show was to funnel a high volume of products from manufacturers to participating retailers at a discount price, and not to provide promotional assistance. While various suppliers may have laid out their merchandise and demonstrated their products as complaint counsel contend (CAB 22), and while suppliers may even have discussed selling techniques with would-be buyers, plainly the suppliers' principal purpose in engaging in these acts was to induce retail store buyers to make the original purchases, not to provide marketing or promotional assistance to them.¹¹ Moreover, no real showing has been made that retailers received "services or facilities" furnished or underwritten by suppliers beyond completion of the original sale. We do not mean to suggest that trade shows are free of the constraints of Sections 2(d) and 2(e) insofar as they facilitate promotion upon resale, but rather we will look realistically at transactions as a whole before deciding to apply Sections 2(d) and 2(e), the narrower statutory provisions, instead of Section 2(a). In this case, the sundry fees paid by suppliers at the trade show were, at bottom, little more than reductions in price necessary to induce Gibson retailers to make the original purchase of the products.

⁹ Of course, an examination of such direct benefits *ab initio* may be necessary to determine whether there has been discrimination among competing customers. See Kintner, *supra* at 254. But even if we assume for purposes of this discussion that all seven categories of alleged discriminatory payments, including the show fees, inured somehow to the benefit of the Gibson retailers, that does not automatically bring such payments within the purview of Sections 2(d) or 2(e). Although it is not entirely clear, it appears that the Commission in *Alterman* analyzed the direct benefits in terms of both the discrimination and resale issues.

¹⁰ Our holding is not inconsistent with *R. H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964), in which Macy's solicited vendors to contribute \$1,000 apiece to help defray advertising and promotional costs of its 100th anniversary celebration. While complaint counsel would read *Macy* as proscribing the receipt of payments as "general revenue," in fact the court specifically found that Macy's used the contributions for advertising purposes:

Macy's used the payments for institutional advertising and promotions to get more people into its stores to buy the goods of all its vendors. The payments by the contributing vendors were thus in consideration for services or facilities furnished by Macy's in connection with the offering for sale of the vendor's goods. *Id.* at 450.

¹¹ In *Elizabeth Arden, Inc. v. FTC*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); and *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962), for example, manufacturers' employees were utilized to demonstrate product use to customers at retail outlets. The marketing assistance in the instant case, by contrast, was no more than a tangential element of the transaction.

We believe this result comports most closely with the intent of Congress and the meaning of the statute. Accordingly, Count I, which rests on too expansive an interpretation of the jurisdictional requisites of Sections 2(d) and 2(e) of the Clayton Act, is dismissed.

Count II

Few manufacturers could resist the subtle persuasion of Herbert R. Gibson, Sr. to participate in the Gibson Trade Show. And, indeed, as Gibson, Sr. would point out, matters had been arranged so that the Gibson Trade Show was a very important vehicle for selling to Gibson retail stores. The trade show afforded suppliers a unique opportunity to exhibit their wares to a multitude of Gibson retail stores [12] at once. On occasion, however, Gibson, Sr. and would-be trade show participants, such as the Toastmaster Division of McGraw Edison Company, would have a disagreement over the sundry fees to be paid by the exhibitor.

Toastmaster had participated in Gibson trade shows from 1966 to 1970, but in 1970 was unable to agree with Gibson buyers on terms for its future participation. (ID 379, 384-386) On January 22, 1971, a letter was sent out to "All Stores" by two buyers from the Gibson Products Company, Tommy Perkins and Bobby Regeon, concerning Toastmaster. (CX 104) It read:

The above company will not sell us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or authorize this line, and suggest that you discontinue the same.

Please give this your attention, and we appreciate your continued co-operation.

Similar letters, signed by Tommy Perkins, were sent out on March 11, 1971 and March 30, 1971 concerning Tucker Manufacturing Co. and Jeannette Glass Co., respectively. (CX 303, CX 136) There was evidence as well of other direct and indirect communications to Gibson-owned and franchised stores suggesting they not purchase from designated suppliers.

Toastmaster sales to Gibson-owned and franchised stores, which had amounted to \$953,656 in 1970, plummeted to \$296,778 in 1971. (ID 390) Tucker and Jeannette sales also fell sharply following the Perkins letters. (ID 398-99, 408)

Despite efforts by Toastmaster representatives to sell directly to individual Gibson franchised stores, sales remained depressed for two additional years. In 1974, Toastmaster met Gibson, Sr.'s terms for participation in the trade show, and its sales to Gibson stores went up. (ID 392)

The ALJ found that the Gibson family respondents and the Gibson corporate respondents, in combination with some or all of the Gibson family owned stores and Gibson franchised stores, had maintained an illegal boycott of suppliers who would not grant the special allowances demanded on sales during or incident to the trade show. He found that respondents had induced Gibson franchised stores to stop buying from specified suppliers in order to coerce those suppliers into paying increased show fees to Gibson, Sr. for participation in the trade show. All Gibson family [13]respondents were placed under order, as they were officers and directors of Gibson Products Company (ID p. 9), the name under which the trade show operated until November 1, 1972.¹² The order also binds all Gibson corporate respondents, save Gibson's, Inc., which was not in existence when the boycott began. Inclusion of these respondents was premised on the ALJ's finding of mutual interdependence and integrated operation among all Gibson corporate and family respondents.

Respondents appeal, contending that the evidence is insufficient to sustain a finding that there was a boycott. Respondents argue that there is no evidence that specific retailers ceased buying Toastmaster products because of the January 22, 1971 letter; that it was improper for the ALJ to find a drop in Toastmaster sales from 1970 to 1971; and, finally, that it was improper for the ALJ to infer a boycott from the drop in sales. Complaint counsel appeal from the ALJ's refusal to include Gibson's, Inc. in the order. For the reasons discussed below, we agree with complaint counsel.

Group boycotts generally are *per se* violations of the antitrust laws. "[C]ertain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . . [G]roup boycotts are of this character." *United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966).¹³

[14]The rule of *per se* illegality has been applied to three types of group boycotts: (1) horizontal combinations of traders at one level of distribution, the purpose of which is to exclude direct competitors from the market; (2) vertical combinations of traders at different marketing

¹² Belva Gibson appeals from her inclusion in the boycott finding and order, claiming she did not actively participate in the boycott. In light of the fact that Belva Gibson was an officer and director of all of the Gibson corporate respondents, except for Gibsons, Inc., we find that she was properly included in the order.

¹³ We are not unaware of decisions applying the rule of reason to conduct that was alleged to be a "boycott," *see, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). But the considerable differences between the conduct in those cases and conduct traditionally proscribed under a *per se* standard suggests that there may be no real inconsistency in approach. *See* Sullivan, *Handbook of the Law of Antitrust* 256-59 (1977). In any event, the facts of the instant case fall well within existing *per se* decisional law, and hence we have no occasion to explore the precise dividing line between *per se* illegal boycotts and arrangements that should be examined under the rule of reason. *See generally St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 542-43 (1978).

levels, the purpose of which is to exclude competitors of some members of the combination; and (3) combinations "designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors." *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 187 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973). See also *United States v. General Motors Corp.*, supra; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941); *Worthen Bank & Trust Co. v. National BankAmericard Inc.*, 485 F.2d 119, 127 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974).

The conduct at issue here plainly falls within the third category noted above. The boycott victims all refused to pay or increase the percentage paid to Gibson, Sr. as a show fee for participation in the Gibson Trade Show. In order to induce these firms to pay the demanded amount, Gibson Products Co. requested Gibson-owned and franchised stores to stop buying their products, thus denying them access to the Gibson market. This action manifests both exclusionary and coercive conduct, thereby exhibiting rather clear anticompetitive effects. And respondents' utilization of their status as franchisor to Gibson stores for the purpose of coercing firms to participate in the trade shows at a price they were unwilling or unable to pay admits of no redeeming virtue.

Respondents' appeal, premised almost exclusively on factual grounds, is unpersuasive. The letters to Gibson stores were plainly invitations to boycott.¹⁴ On their face, these letters went significantly further than the communications in *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1914), the circulation of which was held to be a violation of Section 1 of the Sherman Act. The *Eastern States* letters contained no request to refrain from dealing, but merely set out the names and addresses of wholesalers who also sold at retail. The Supreme Court found, in light of the record in that case, that the circulation of such information had the "natural effect of causing [15]such retailers to withhold their patronage from the concern listed." 234 U.S. at 609. And the letters in this case contained the very suggestion of incitement and mutual action that was found lacking in the case relied upon by respondents, *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 112 (2d Cir. 1975).

Neither does the fact that there was no express mutual agreement to boycott vitiate the finding of a collective refusal to deal. See *Eastern*

¹⁴ The ALJ found that respondents' testimony that the letter regarding Toastmaster was sent out only to those stores which had already complained about Toastmaster products was not credible, and we agree. The record compels the finding that "All Stores" meant just that, and that the letter was received, or intended to be received, by all stores operating under the Gibson name, both franchised and family-owned.

States, supra at 608-609. It is sufficient that knowing concerted action was contemplated and invited, the stores adhered to the request.¹⁵ *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939); *FTC v. Cement Institute*, 333 U.S. 683, 716 n.17 (1948). All stores which received the letter are chargeable with knowledge that concerted action was at least contemplated, *see Interstate Circuit, supra* at 222, and it is evident from sales data and corroborative testimony that a very substantial number of stores did participate in the scheme.

Respondents attack the chart which displays sales data, CX 117A-D, contending that it is impermissible to infer a "precipitous drop" in Toastmaster sales to Gibson stores from that chart. Supposedly, it is not clear on the face of the document which figure represents total sales for a particular year.

Each of the four documents in this exhibit contains two charts. The first is labeled "Monthly Dollars," the second "Cumulative Dollars." On both charts each row is labeled with a month and each of the first eleven columns is labeled with a product. The twelfth column is labeled "other appliances" and the last column is labeled "total." It is clear that each figure in the "Total" column of the Monthly Dollars chart represents the dollar value of all products sold that month. It is equally clear that each figure in the "Total" column of the Cumulative Dollars chart represents the cumulative total of all products sold in the preceeding months. Consequently, the last figure in the "Total" column of the chart represents the sale of all products through December, or the total for that year. Respondents have advanced no alternative interpretation of this figure, and indeed, the chart will support none. We thus find respondents' argument in this respect to be utterly without merit. [16]

Respondents, citing the general rule against admissibility of hearsay, also object to reliance on testimony and memoranda by Toastmaster representatives who recalled being told by Gibson franchisees that, essentially, they were under boycott. (*See* Tr. 3464-66, CX 106A) Hearsay evidence is admissible, however, in FTC adjudicative proceedings, provided that it meets the standard set out in our Rules of Practice Section 3.43(b), *viz.*, that it be "relevant, material, and reliable." *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 963 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975). In this case, the proffered evidence is consistent with and corroborative of other facts in the record. While we would attach less weight to hearsay evidence

¹⁵ The fact that the letters were sent out on Gibson Products Company stationery, the name under which Gibson, Sr. granted the stores their franchises, itself suggests the presence of considerable inducement to the franchisees to comply. Roy Love, a franchisee in Oklahoma City, clearly had this in mind when he told Toastmaster's representative, after receiving his copy of the letter, that "if he wanted to keep his sign out in front of his store, saying 'Gibson's,' he had to go by what Seagoville [Gibson management] ordered or told him to do." (Tr. 3466)

standing alone, under the circumstances presented here we see no reason to exclude it or ignore it.

Respondents' final argument is that even if Toastmaster sales to Gibson stores did drop, the decline was more likely attributable to factors other than the boycott, *viz.*, dissatisfaction with Toastmaster products, an asserted preference by Toastmaster's sales representative to sell to distributors instead of directly to retailers, and Toastmaster's lack of access to Gibson retailers because of its non-participation in the Gibson Trade Show.¹⁶

We agree that an inference of conspiracy should not be drawn where other inferences are equally plausible, *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968), but respondents clearly fail to make this showing.

Although respondents offered testimony on complaints received about Toastmaster's shipping policies at Christmas time (Tr. 6639), there was no evidence that any store stopped buying Toastmaster goods due to these problems, nor did the witnesses themselves suggest that this was the case. Furthermore, respondents' claim that dissatisfaction with Toastmaster's warranty program contributed to the decline in sales is supported only by the testimony of one witness, who stated that such dissatisfaction caused him to discontinue selling the Toastmaster line sometime in the mid-1960's. (Tr. 7893-94) No evidence is offered that this caused any store to discontinue buying Toastmaster goods in 1970-1971. The additional claim that Toastmaster's failure to live up to its commitments caused the decline is supported only by testimony from the witness who claimed he stopped buying this line of goods during a period [17] of time when he was not working for any Gibson discount store but for another store altogether (Tr. 7938-39). All of this evidence fails to establish that any Gibson store stopped buying Toastmaster products in the relevant period for any of the suggested reasons.

The second explanation offered, that Toastmaster's representative preferred selling to distributors, and that he did not want to increase his sales to Gibson stores (Tr. 3507-08), also fails to find support in the record. No evidence was offered to establish a decision on that representative's part to stop selling to Gibson stores. Nor could it be inferred that because he did not wish to increase sales that he, therefore, wished to decrease them. By contrast, his own testimony indicates that he continued to try to sell to individual Gibson stores, even after the January 22, 1971 letter. (Tr. 3464-65)

¹⁶ Respondents Gibson, Jr. and Gerald also contend that retail stores in which they were financially interested did not participate in the boycott. These respondents have offered little evidence to rebut complaint counsel's *prima facie* case in this respect, however. In any event, since responsibility for sending the boycott invitations may be attributed to these respondents, the question of their stores' acceptance of their invitations is essentially immaterial.

The last alternative explanation, which cites Toastmaster's non-participation in the trade show as the cause of its decline in sales, is rather ironic, since it was Toastmaster's refusal to accept Gibson, Sr.'s demand for increased trade show participation fees which led to its being blacklisted in the first place. Even if we were to dignify this argument by full consideration of it, however, we would have to conclude that it is not adequately supported by the record. Respondents proffered no direct evidence of the impact, in the absence of a boycott, that non-participation in the trade show would have on a firm's ability to sell directly to individual Gibson stores. Without any indication of the magnitude of this impact, we cannot infer that non-participation in the trade show alone could have caused such a sharp drop in Toastmaster sales in 1971.

Respondents have failed to establish the existence of legitimate business reasons on the part of Gibson retailers, wholly distinct from their receipt of the boycott letter, which would account for the sharp drop in Toastmaster sales. Cf., *DuPont Glove Forgan, Inc. v. American Telephone & Telegraph Co.*, 437 F. Supp. 1104, 1126 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978). Neither are we persuaded that this drop in Toastmaster sales was "mere chance." *Interstate Circuit, supra* at 223. Respondents' actions and their consequences cannot be explained by alternate inferences that can be drawn from the record, and in light of the specific invitation to boycott and the subsequent evidence as to the effects of the invitation, we find that respondents have violated Section 5 of the FTC Act by engaging in an unfair method of competition, *viz.*, a group boycott.¹⁷ We find further that, despite a modest rebound in Toastmaster sales to individual Gibson stores in 1972 and 1973, this boycott plainly continued until at least 1974 when Toastmaster capitulated to the demands of Gibson, Sr.'s representatives [18] for higher fees for participation in the Gibson Trade Show. (ID 392) We note also that respondents have offered no evidence to show that the boycott was discontinued prior to 1974.

The ALJ, finding that the individual and corporate Gibson respondents comprised a single entity, issued an order on this count of the complaint binding all of them, save Gibson's, Inc. Without necessarily agreeing that there was complete unanimity of interest among all respondents under the pre-November 1, 1972 organizational structure of the Gibson family business, we conclude that the ALJ was correct in placing all such respondents under order.

First, substantial commonality of interest was demonstrated, espe-

¹⁷ Indeed, under these circumstances an invitation to boycott, irrespective of its actual effects, might violate Section 5 if the soliciting party has a reasonable expectation that the invitation will be accepted and acted upon.

cially in the pre-November 1, 1972, environment. The ALJ found that all individual respondents, including Gibson, Jr. and Gerald, were officers of Gibson Products Company, the franchisor corporation, with authority broad enough to include knowledge and approval of the dissemination of the boycott letters. Inclusion of the corporate respondents was correctly premised on the ALJ's finding of their mutual interdependence and on the interdependence among the corporate and individual respondents collectively. It is not necessary for this purpose to determine, as the ALJ did, that all respondents were part of a single enterprise in the pre-November 1, 1972 period.

Second, respondents' operations are sufficiently integrated that an order embracing all of them is necessary to insure the effectiveness of the relief we have directed. Some fencing in to prevent circumvention of Commission orders is appropriate and lawful, see *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171 (1st Cir. 1973); *Delaware Watch Co., Inc. v. FTC*, 332 F.2d 745 (2d Cir. 1964), and where, as here, it has been shown that respondents' operations are closely integrated, it is probably indispensable.¹⁸

[19] Complaint counsel appeal from the failure to include Gibson's, Inc., the principal post-November 1, 1972, corporate entity, in the boycott provisions of the order. The ALJ reasoned that since Gibson's, Inc., did not exist at the time of the boycott, it should not be covered. (ID p. 210) We disagree.

The evidence indicates and we have found that the boycott of Toastmaster continued until at least 1974, and indeed, complaint counsel contend that Jeannette is still being boycotted. (RAB 31) Since institutional management of the Toastmaster boycott, at least in the post-November 1, 1972, period, was in the hands of Gibson's, Inc., which became the franchisor corporation, or of its officials, we find that that corporation participated substantially in the conspiracy, and is chargeable as a member thereof.

Indeed, even if the boycott had not continued after November 1,

¹⁸ Respondents object also to the entry of an order against the lot of them precisely because they are so closely interwoven, on the ground that corporations cannot conspire with their own subsidiaries, affiliates, or officers. *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346 (N.D. Cal. 1974), modified, 401 F. Supp. 1374 (N.D. Cal. 1975), modified, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977). It is contended, for example, that Gibson, Sr. and his wife could not have conspired with the corporate respondents because they owned a controlling interest in each. Without discussing the permutations of who amongst the Gibson corporate and family respondents could be held to have conspired with whom, we simply note that concerted action between related corporations which has the purpose or effect of unreasonably restraining the trade of unrelated third parties is highly suspect under the intra-enterprise conspiracy doctrine. See, e.g., American Bar Association, Antitrust Law Developments 33 (1975), and cases cited therein. Moreover, we have made appropriate provision in Part I of the Final Order for those circumstances in which some of the respondents collectively own retail stores.

We have no occasion here to examine the outer reaches of intra-firm conspiracy doctrine in any event, principally because the conspiracy we have found relates mainly to the agreement between the respondents (and each of them) and the Gibson franchised stores to boycott designated suppliers' product lines. Also, of course, the corporate respondents were all held because their interdependence required doing so in order to insure the effectiveness of the relief ordered, and "bathtub conspiracy" doctrine does not address this question at all.

1972, it would still be necessary and proper to include Gibson's, Inc. in the order. Where a business found guilty of unfair trade practices is continued by a subsequently formed corporation, both businesses may be subject to the cease and desist order, *P. F. Collier & Son Corp. v. FTC*, 427 F.2d 261 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970). The determination to include the newly formed company hinges on various factors which include whether both companies engaged in the same business, the capability of the new company to resume the unfair practices, and whether there is substantial identity of ownership between the old company and the new, *id.* at 272. Prior to November 1, 1972, the franchising business and the Gibson trade show were operated by Gibson, Sr. under the aegis of the Gibson Products Co. Gibson, Jr. and Gerald Gibson were president and executive vice president of that company. Currently, Gibson, Sr. operates the trade show and Gibson, Jr. and Gerald carry on the franchising business through Gibson's, Inc. Clearly the same parties found to have engaged in the boycott are still in control of the same businesses which were involved in the boycott. In light of the integrated nature of the business operations prior to November 1, 1972, the fact that the Gibson Trade Show continued to be oriented to Gibson stores, and the existing family relationship, the division of labor represented by the franchising business being taken over by the newly formed Gibson's, Inc. does not justify excluding that corporation from the order. Thus, the order will run to this corporation as well. [20]

COUNT III

Complaint counsel challenge under Section 2(c) of the Clayton Act¹⁹ the receipt of commissions by Gibson, Sr., from two brokers representing Ray-O-Vac Company, Barshell, Inc., and Al Cohen Associates, Inc. The statute bans payments of brokerage or allowances in lieu thereof by one party in a transaction to the other and by either party to the other's agent. Complaint counsel tried the Count III charges on the theory that Gibson, Sr. acted in these transactions as a principal or buyer, not on the theory that he acted as intermediary or agent of other respondents or nonrespondent franchisees.

The ALJ found that Gibson, Sr. (but none of the other Gibson family

¹⁹ Section 2(c), 15 U.S.C. 13(c) (1976), provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

respondents) had violated Section 2(c) by splitting brokerage fees with Barshell.²⁰ (ID p. 198) At least one such payment by Barshell to Gibson, Sr. of a part of its commissions from Ray-O-Vac was made in September, 1972, while Gibson, Sr. was owner and operator of various Gibson retail stores, and, thus, while he was clearly a "buyer." As a consequence, an order was entered against Gibson, Sr. [21] With respect to the charge of splitting commissions with Al Cohen Associates, the ALJ found that while substantial payments to Gibson, Sr. had been made by Al Cohen in 1974 and 1975, Gibson, Sr. was not a "buyer" at the time, because he no longer had an ownership interest in any retail operation. The law judge, therefore, found that Section 2(c) had not been violated and dismissed the complaint against Al Cohen Associates. (ID p. 198)

Both sides appeal, and we will consider each of the issues raised *seriatim*. First, Gibson, Sr., relying on *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974), contends that the "in commerce" requirement of Section 2(c) has not been met. (RAB 19-22) We disagree.

The question answered in the negative by the Supreme Court in *Copp* was "whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation 'in commerce' within the meaning of each of these sections [§ 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, and §§ 3 and 7 of the Clayton Act] and whether such sales are 'in commerce' and 'in the course of such commerce' within the meaning of §§ 2(a) and 3 respectively." *Id.* at 188. There was no argument in *Copp* that sales were, in fact, made in interstate commerce or were otherwise directly involved in national markets. Rather, *Copp* argued only that the "in commerce" requirement was satisfied because the asphaltic concrete was used in construction of interstate highways. *Id.* at 198.

By contrast, the brokerage payments made in this case were allowances upon all Ray-O-Vac sales to Gibson retail stores, both family-owned and franchised, in a 20-state area. (ID p. 194) Thus, not only could one find an "ample nexus to interstate commerce in the whole transaction," *Shreveport Macaroni Manufacturing Co. v. FTC*, 321 F.2d 404, 409 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964), as the ALJ did, but the underlying sales were, in fact, directly in interstate commerce, making this a straightforward case.

²⁰ Gibson, Sr. argues that the specific violation found by the ALJ was not alleged in the complaint. (RAB 8) We find, however, that respondent had ample notice of what complaint counsel intended to prove, that he had adequate opportunity to defend against the charges, and that he, in fact, took advantage of this opportunity. See, *inter alia*, complaint Counsel's Answer to Motions to Exclude Evidence, and Respondent's Reply to Answer to Motions to Exclude Evidence, each filed December 2, 1977.

Respondent's other threshold argument is that a showing of discrimination is a necessary prerequisite to a finding of a Section 2(c) violation. (RAB 22-25) Once again, we disagree.

The proscription of Section 2(c) is absolute in prohibiting the payment of brokerage to the other party to a transaction or to that party's agent, "except for services [22]rendered." The legislative history²¹ and the case law support this understanding. Such doubt as exists in this area was created by dicta in the decision of the Supreme Court in *FTC v. Broch & Co.*, 363 U.S. 166 (1960).²² While *Broch* may have generated some confusion, see *Rowe supra* at 344-345, the weight of authority is that a showing of discrimination in the payment of "dummy brokerage" is not a generic statutory requirement.

In *Broch* an independent broker agreed to lower his commission in order to give a purchaser a lower price. The issue was whether the lower price that the buyer obtained was an allowance in lieu of brokerage in violation of Section 2(c). The Supreme Court found a violation, reasoning that this situation was analogous to a broker splitting part of his commission with the buyer. The Court was concerned, however, that brokers be able to change their prices without every consequent saving to a buyer being judged an "allowance in lieu of brokerage." Thus, the Court wrote, "[t]his is not to say that every reduction in price coupled with a reduction in brokerage, automatically compels the conclusion that an allowance in lieu of brokerage has been granted." 363 U.S. at 175. The Court went on to explain that "[a] price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers." *Id.* at 176. The Court's language that "whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case," *id.*, cannot fairly be read to require a showing of discrimination as a prerequisite to finding any Section 2(c) violation. [23]

Read as a whole, *Broch* represents an effort by the Court to plug a possible statutory loophole through use of the "allowance in lieu of brokerage" provision. Because of difficulties peculiar to transactions of

²¹ The Conference Report states:

[T]his subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.

H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936).

²² Respondent's argument is not based on a specific holding in *Broch*, but only upon the Court's occasional references, in the context of the facts of that case, to "discriminatory" brokerage.

the type considered in *Broch*, it was necessary to use the notion of discrimination as an element in establishing whether a price reduction was an allowance in lieu of brokerage.

The instant case is quite different, however. Here it is alleged that the seller made payments to a broker who, in fact, was under the control of the buyer and who passed on most of his commissions to that buyer.²³ *Broch* reviews the legislative history of Section 2(c), finding:

One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. 363 U.S. at 169.

Thus, the type of transaction we consider here is precisely that which it was the major legislative purpose to curtail. While respondent quotes at great length from such cases as *Shreveport Macaroni Manufacturing Co. v. FTC*, *supra*; *Gulf Oil Corp. v. Copp Paving Co., Inc.*, *supra*; and *Rohrer v. Sears, Roebuck & Co.*, 1975-1 Trade Cas. ¶60,352 (E.D. Mich. 1975), for the proposition that Section 2(c) is directed at discrimination, none of these cases is factually apposite and none demonstrates that, in general, discrimination is a necessary element of a Section 2(c) violation.

As a matter of statutory construction of Section 2 as a whole, subsection 2(c), like subsections 2(d) and 2(e), necessarily makes certain business practices, other than price discrimination, unlawful, as it is designed to eliminate hidden preferences by forcing them "into the open" for measurement and adjudication under the more forgiving price discrimination provisions. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959).²⁴ Moreover, subsections 2(d) and 2(e) on their face require a showing of discrimination, while subsection 2(c) does not, thus manifesting an explicit congressional determination not to require discrimination as a precondition to finding illegal [24]dummy brokerage. Given the purpose and structure of the Act and the illogic of addressing the problem of dummy brokerage in terms of discrimination, a general requirement that discrimination be shown cannot and should not be read into Section 2(c).

Complaint counsel cites *Rangen, Inc. v. Sterling Nelson & Sons*, 351 U.S. 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), for the

²³ The ALJ found that "Gibson, Sr.'s review of Ray-O-Vac's commission statements to Miller, ostensibly a seller's broker, to determine how much brokerage he should receive, demonstrates respondent's control of the latter." (ID 197)

²⁴ The Court in *FTC v. Simplicity Pattern Co.* noted expressly that each of subsections (c), (d), and (e) makes certain practices other than price discrimination unlawful. 360 U.S. at 65.

proposition that *Broch* is not to be understood to require generically a showing of discrimination, and we find the discussion in that case convincing. In *Rangen* it was concluded that Section 2(c) applies to payment of commercial bribery and that discrimination is not a necessary element of a Section 2(c) violation.

The Court explained that:

discrimination was used in *Broch* to determine if the price arrangement was an "in lieu" of brokerage transaction; and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage. 351 F.2d at 858.

Respondent cites no decisions other than *Broch*-type cases involving allowances in lieu of brokerage in which a Section 2(c) case was dismissed for failure to show discrimination. We, therefore, conclude that Section 2(c) means, in essence, what it says, and that complaint counsel need not demonstrate, as respondent would require, that dummy brokerage has been paid to others, with favored customers receiving larger payments. Accordingly, the threshold requirements to utilize Section 2(c) have been satisfied in this case.

Respondent next raises certain factual objections to a finding of a Section 2(c) violation. Gibson, Sr. contends that the check that was issued to him on September 23, 1972 (CX 192), which was found by the ALJ to be evidence of the illegal brokerage, was, in fact, an unrelated 3% commission or show fee due Gibson, Sr. for sales by the Gibson Trade Show of merchandise belonging to Barshell. (RAB 13) There is a conflict in the testimony on this point between Barshell's proprietor, Mr. James Miller, and Mr. Lynn Low, a trade show buyer for Gibson, Sr. We resolve the conflict as the ALJ did, by crediting Mr. Miller's testimony.

Mr. Miller testified, in essence, that Gibson, Sr. would review his "commission statements" (which indicated total sales by Ray-O-Vac through Barshell to Gibson stores) and assess a corresponding charge as his brokerage fee upon Mr. Miller's commission. (Tr. 3132-34) Mr. Miller identified the check in question, CX 192, as his payment to Gibson, Sr., for this purpose. Mr. Low contended that CX 192 was Barshell's check in payment for the Gibson Trade Show's sales of Barshell's health and beauty aids. (Tr. 7523-24) There is evidence, however, [25] that Mr. Miller sold health and beauty aids, not through Barshell, but through his other corporation, Progressive Brokerage. (Tr. 3136-37) In fact, Mr. Miller testified that Barshell was formed specifically to be a housewares distributor, "[a]nd that's why I chose to move it [Ray-O-Vac] into that company [Barshell], as opposed to our beauty aids rep." (Tr. 3145) Had the payments been for the purpose

described by Mr. Low, therefore, the check presumably would have been made out to Progressive Brokerage, rather than to Barshell. Moreover, Mr. Miller's testimony is consistent with evidence of Gibson, Sr.'s course of dealing, and is specifically consistent with the ALJ's finding that Gibson, Sr. had an agreement with Mr. Miller's successor as agent for Ray-O-Vac to do precisely the same thing. (ID 425-29)

Gibson, Sr. next contends that he was not a buyer in September, 1972, and, thus, cannot be liable under complaint counsel's theory of violation. (RAB 17-19) This argument is without merit. We agree with the ALJ that at least in the context of his personal ownership and operation of individual retail stores, as well as in his role as head of Gibson Products Company, Gibson, Sr. was plainly a buyer.

Respondent relies heavily on *Nuarc Co. v. FTC*, 316 F.2d 576 (7th Cir. 1963), where it was held that under certain circumstances mere ownership may not suffice to make one a buyer within the meaning of the Act, but *Nuarc* is factually inapposite. In that case the Commission was required to try to establish a link between two corporations to show a pass-through of benefits from one to another. The instant case is substantially different. Purchases from Ray-O-Vac by at least the Gibson, Sr.-owned retail operations can be attributed to the actions of Gibson, Sr. personally. No pass-through of benefits need be demonstrated. Gibson, Sr. is covered by the statutory provision because, as the buyer in the transaction, he or his agent received brokerage payments from the other party to the transaction or from his agent.

Finally, respondent argues that assuming CX 192 represents a brokerage check and assuming that he was a buyer at the time, he has met the statutory exception for "services rendered." (RAB 28-30) It is unclear whether this exception applies as between buyer and seller, although *Broch, supra* at 173-74, suggests that it may.²⁵ However, even assuming that buyers may avail themselves of it, respondent has not come forward with adequate evidence to substantiate this claim. [26]

Respondent has made no effort in concrete terms to establish the value of the services he rendered in relation to the brokerage payments he received. It is not contested that respondent's services in inducing the purchase of Ray-O-Vac products by Gibson stores were in the nature of brokerage or were "selling type" services within the exception in Section 2(c). But, even assuming this exception is available to buyers, respondent's burden is considerably greater and

²⁵ "There is no evidence that the buyer rendered any services to the seller or to the respondent [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to 1 circumstances," *FTC v. Broch & Co., supra* at 173; but, cf., *Southgate Brokerage Co., Inc. v. FTC*, 150 F.2d 607 (4th Cir., cert. denied, 326 U.S. 774 (1945)).

more specific than he contends, and by doing little more than articulating his claim to the exception, he has failed to meet that burden.

Alternatively, several cases suggest the availability in these circumstances of a "functional discount" justification. See *Central Retailer-Owned Grocers, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963); *Empire Rayon Yarn Co., Inc. v. American Viscose Corp.*, 364 F.2d 491 (2d Cir. 1966) (en banc), cert. denied, 385 U.S. 1002 (1967); and *Hruby Distributing Co.*, 61 F.T.C. 1437 (1962). Specifically, respondent would have to demonstrate that he performed a valuable service entitling him to a functional discount, the size of which would correspond to the distribution costs the seller saved as a result. See *Central Retailer*, supra at 414; *Empire Rayon*, supra at 492.

The analysis that would be undertaken to ascertain whether respondent had proffered an adequate functional discount justification would closely approximate that undertaken to evaluate the "services rendered" by him. The two concepts share a marked similarity, although the focus of each differs slightly, in that the first examines the overall value of respondent's services, while the second fixes upon the savings to the supplier as a consequence of respondent's performance of certain functions the supplier otherwise would have undertaken itself. Arguably, the "services rendered" exception is broad enough to encompass any justification which might be offered under the functional discount rubric, but the ALJ considered them separately and, for purposes of review, we do likewise.

The ALJ concluded, correctly, that there was no showing here that respondent performed any functions that might have entitled him to a discount of a measurable size. For example, it was not shown that Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. Nor was there evidence that Ray-O-Vac was even aware of his activities. As the ALJ noted, this militates strongly against any finding that the split brokerage constituted a functional discount for distributional services. Respondent's appeal, therefore, is denied.

Complaint counsel's appeal is premised exclusively upon the theory that all of the Gibson respondents constituted a "single economic enterprise," both before and after November 1, 1972. Under this scenario, all respondents should be found liable and placed under order as a consequence of the Barshell transaction, and Al Cohen Associates should be held as a consequence of the transactions in which it was involved, for if [27]all respondents comprised a single enterprise, then Gibson, Sr. must have been a buyer even in 1974 and 1975, when he no longer owned any Gibson retail stores.

Opinion

To a large extent, we need not address the merits of complaint counsel's appeal. Leaving aside the "single economic enterprise" contention, there is no doubt that before November 1, 1972, all Gibson businesses were at least closely knit. (See discussion *supra* at pp. 18-19). The Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson-owned retail stores were operated were completely interdependent and under the control of the same few individuals in the Gibson family. For purposes of relief, in this environment, there is ample justification to bind all Gibson corporate respondents in order to insure that the order we issue today is not circumvented.²⁶ *Sunshine Art Studios, Inc. v. FTC, supra*; *Delaware Watch Co., Inc. v. FTC, supra*.

We are aware that this disposition means that no order will issue against Al Cohen Associates, for we do not address whether a "single economic enterprise" existed after November 1, 1972. In view of the fact that we are binding all of the individual Gibson respondents, however, we do not find this to be a significant omission.

Remedy

A broad order is warranted against all respondents charged in connection with Count II. A substantial question is presented, however, with respect to paragraph 5 of the ALJ's order, which directs respondents to cease and desist from "utilizing franchising or licensing agreements containing (a) provisions whereunder respondents undertake to give merchandising advice to the licensees or franchisees and (b) provisions whereunder respondents retain the right of quality control over the products sold and services rendered by such licensees or franchisees." [28]

The ALJ found that virtually the only occasions upon which these provisions had been exercised had been to further group boycotts of the type we condemn today. He concluded that, "[i]n view of respondents' insistence that those provisions in the agreement have not been exercised, the imposition of such a provision in the order deprives them of no valuable right." (ID p. 211)

We are troubled by this provision, because merchandising advice and quality control clauses in franchise agreements are hardly novel, and they frequently offer legitimate protection to the franchisor's trade-

²⁶ The ALJ found that the liability of respondents H. R. Gibson, Jr. and Gerald Gibson for Section 2(c) violations could not be established, because complaint counsel failed convincingly to tie them to the receipt of illegal brokerage. (ID pp. 202-03) While we do not reverse this determination, neither does this result preclude, for fencing-in purposes, placing Gerald Gibson and Gibson, Jr. under order.

name without also serving an anticompetitive purpose. It may indeed be the case that respondent's illegal conduct has been perpetrated under the guise of these clauses, but the remedy may be to restrain the conduct, not the clauses. We are satisfied that an order addressed to conduct, especially as it affects price or concerns suppliers vis-a-vis the trade show, will be adequate to insure that the underlying purpose of the order is not circumvented. We have modified the order to substitute for paragraph 5 of the ALJ's order a more narrow provision focusing on the content of communications from respondents to franchisees. It should, accordingly, be very difficult for respondents to utilize the merchandising advice and quality control clauses they retain in an anticompetitive manner without thereby violating another provision of the order.

Respondents' additional objections to paragraphs 3 and 4 of the ALJ's order are denied, as these provisions constitute reasonable fencing-in related directly to the conduct held to be illegal in this case. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 388 (1959); *FTC v. National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946). Essentially, these provisions prevent respondents from blocking supplier sales to franchisees, either at respondents' whim or, more specifically, because the supplier has not met respondents' terms for participation in the trade show. Thus, these provisions operate to frustrate nascent group boycotts by preventing respondents from interfering with supplier-franchisee transactions under specified circumstances.

All other objections raised to the order provisions relating to Count II have been considered and are denied.

Gibson, Sr. contends that the order provisions resulting from Count III violations are also overbroad, in that they are not limited to transactions in which he is a buyer, but include those in which he acts as agent or intermediary for a buyer. We see no infirmity in this extension; rather we view it as permissible fencing-in related directly to the conduct held to be illegal herein.

Such fencing-in is particularly appropriate in light of the interrelationship among respondents. At least since November 1, 1972, there has been an enhanced potential for [29]Gibson, Sr. to act as agent or intermediary for retail stores owned by other members of the Gibson family. Indeed, he owns no stores outright at this time, meaning that, leaving aside the possibility of treating all respondents as a "single enterprise," an order limited to Gibson, Sr. as a buyer might have little practical effect. Finally, it is not true, as Gibson, Sr. suggests, that the ALJ's finding that no liability attached to the Al Cohen transaction constituted a vindication for Gibson, Sr. in those circumstances where

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he was not a buyer, but merely an agent. The issue of Gibson, Sr.'s agency was not joined, for complaint counsel elected to try the case solely on the theory that Gibson, Sr. was a buyer. The ALJ's finding, therefore, does not bear on this question of order coverage.

All other objections raised to the order provisions relating to Count III have been considered and are denied.

Finally, respondents contend generally that no order should be issued, because the evidence is old and the practices found to be unlawful are isolated instances of misconduct. We do not agree. Respondents cannot and do not contend that the law violations were inadvertent or that these practices were voluntarily abandoned, even after issuance of the complaint. Given the nature and structure of their business operation, which remains essentially unchanged, and given the absence of any evidence of abandonment, we find that an order is necessary to combat a cognizable danger of recurrence of the violations.

To promote clarity, we have made numerous stylistic and grammatical changes to the order entered by the ALJ.

FINAL ORDER

This matter having been heard by the Commission upon the appeals of complaint counsel and respondents from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1-214, as amended, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

I.

It is ordered, That respondents Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, individually and/or as officers of corporate respondents; and corporate respondents Gibson's, Inc., Gibson's Discount Center, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, [2]Inc. and Gibson Products Co., Inc., their

successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the operation of a trade show, the operation or franchising of any retailing business, or the operation of any business related to retailing in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Combining, agreeing, engaging in an understanding, or conspiring with any of said other respondents, or any other person, partnership or corporation, to eliminate or boycott any supplier in order to prevent or hinder the supplier's sales to or business dealings with any of the respondents or any other person, partnership, or corporation; provided that nothing herein shall prevent respondents from acting collectively to further legitimate business decisionmaking with respect to businesses, including retail stores, which said respondents own collectively.

2. Coercing or intimidating any supplier in any manner to prevent such supplier from competing for the sale of any products to any retailer or any other person, partnership or corporation.

3. Representing directly or indirectly or implying to any supplier that the supplier may not compete for the sale of any products to any other person, partnership or corporation.

4. Taking any individual action to eliminate a supplier or to prevent or hinder the supplier's sales to or business dealings with any other person, partnership or corporation because such supplier does not appear in shows conducted by the Gibson Trade Show.

5. Recommending, suggesting or advising any retailer or any other person, partnership or corporation not to deal with a supplier because such supplier does not appear in shows conducted by the Gibson Trade Show, or because such supplier is unwilling to meet the price, delivery, or billing terms demanded by respondent[s] or by any retailer or any other person, partnership or corporation.

II.

It is further ordered, That Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, [3]Jr., Gerald Gibson, Gibson Products Co., Inc., Gibson's Inc., Gibson's Discount Centers, Inc., their successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the purchase of merchandise, in commerce, as

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"commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Receiving or accepting, directly or indirectly, as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer, from any seller or seller's broker anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."
2. Assuming control of or influencing any seller or seller's broker to induce such seller or seller's broker to pay to respondent[s] anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."

III.

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

IV.

It is further ordered, That Count III of the complaint be, and it hereby is, dismissed as to respondents Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Al Cohen Associates, Inc.

V.

It is further ordered, That, for a period of 10 years from the date of service of this order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and of each affiliation with a new business or [4]employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VI.

It is further ordered, That respondents shall notify the Commission

at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondents herein 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.

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IN THE MATTER OF
COMMERCIAL LIGHTING PRODUCTS, INC.

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

Docket C-3018. Complaint, May 6, 1980—Decision, May 6, 1980

This consent order requires, among other things, an Englewood, N.J. seller of light bulbs and other products to cease shipping or billing for unordered merchandise; soliciting orders from unauthorized persons; shipping goods that vary in quantity or price from that ordered; offering discounts or sending collection letters to induce payment for unordered merchandise; and transferring alleged delinquent accounts to debt collection agencies, after being informed that the merchandise had not been ordered. The firm is further prohibited from shipping merchandise pursuant to any unsigned purchase order. Should such a form be received, the company must mail to the "Lighting Buyer" of the business an acknowledgment card containing prescribed information and a toll-free number to call should problems arise. Additionally, the order requires that the firm develop and provide relevant personnel with an approved statement of operating principles and practices, and maintain a surveillance program designed to detect those who fail to conform.

Appearances

For the Commission: *G. Martin Shepherd.*
For the respondent: *Paul G. Pennoyer, Chadbourne, Parke, White-
side & Wolfe, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Commercial Lighting Products, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act and the provisions of 39 U.S.C. 3009, 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 Commercial Lighting Products, 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 and place of business located at 50 East Palisade Ave., Suite 220, Englewood, New Jersey. Respondent is not a non-profit corporation or a charity.

PAR. 2. Respondent is now and for some time has been engaged in offering for sale, selling and distributing light bulbs and other

products by soliciting orders by telephone and by personal contacts, shipping said products by mail and by common carriers to persons, business establishments, schools, educational and religious institutions and other entities (hereafter referred to as "persons" in this complaint), located in various States of the United States, under its corporate name and also through its division named AAA Lighting Products, Inc. Respondent therefore maintains and has maintained a substantial trade in said light bulbs and other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act as amended.

PAR. 3. In the course and conduct of its business, respondent is now and for some time has been engaged in the following acts or practices:

(a) Distributing or causing to be distributed, light bulbs and other products to persons who have not requested or consented to the shipment of such products and, in connection with such shipments, failing to disclose to such persons that they may treat such products as gifts and that they have the right to retain, use, discard, or dispose of such products in any manner as they see fit without any obligation.

(b) Mailing or causing to be mailed, bills and collection letters to recipients of light bulbs and other products who did not request or consent to the shipment of such products.

The acts and practices set forth above were and are unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent is now and for some time has represented, contrary to fact, that:

(a) Persons who do not pay for light bulbs or other products will have their alleged delinquent accounts referred to an attorney, debt collection company, credit bureau, or credit reporting agency.

(b) Respondent will adversely affect the credit rating of persons with alleged delinquent accounts.

(c) Failure to accept delivery of respondent's products will result in the persons being liable for storage charges or other charges assessed by common carriers attempting to deliver such products.

Such acts or practices were and are deceptive.

PAR. 5. Respondent's representatives have contacted janitors, custodians, maintenance personnel and other persons in various business establishments and institutions and represented themselves, contrary to facts, as being friends or acquaintances of such persons or as salesmen who have supplied said business establishments and institu-

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tions with products in the past or represented that they contacted such persons for the purpose of offering them free gifts, and, in a significant number of instances, have not attempted to determine whether such persons were authorized to order products in the amount of the orders solicited. Such acts and practices have been, and are, deceptive.

PAR. 6. Respondent has induced and attempted to induce persons employed by various business establishments and institutions to consent to the shipment of light bulbs or other products by falsely representing that said persons would receive a small number of light bulbs or other products on approval or that such persons would receive only an amount sufficient to cover the shipment of free gifts that would be sent to such persons, or that such persons would receive only a small number of light bulbs or other products to insure that they would not exhaust their existing supply of light bulbs or other products before deciding to order additional products from respondent, when in fact persons who agreed to accept allegedly small quantities of light bulbs or other products received, in a significant number of instances, large quantities of light bulbs or other products for which they or their business establishments or institutions were subsequently billed substantial amounts of money whether or not they agreed to accept or retain said products. Such acts and practices have been, and are, unfair or deceptive.

PAR. 7. Respondent has, in a significant number of instances, sent light bulbs or other products in quantities substantially larger than quantities ordered or at prices substantially higher than prices quoted to the persons who ordered said products. Such acts and practices have been, and are, unfair and deceptive acts and practices.

PAR. 8. Respondent's "verifiers" and other employees have telephoned business establishments and institutions that allegedly confirmed number of light bulbs or other products to allegedly confirm orders that were in fact never made and respondent has, in a significant number of instances, not made good faith efforts to resolve complaints from business establishments and institutions that have complained that they did not order merchandise allegedly ordered or that they received unordered merchandise or overshipments from respondent or shipments of bulbs or other products from respondent at prices higher than previously quoted. Instead, respondent has misrepresented, in a significant number of instances, that shipments complained about were shipped according to bona fide orders or that said orders were verified before shipment or that the complainants would have to resolve their disputes with respondent's salesman who respondent alleged were independent contractors for whose actions respondent is

not responsible or respondent has offered discounts to induce persons to accept, retain, or pay for the products. Such acts and practices have been, and are, unfair or deceptive acts and practices.

PAR. 9. Respondent has, as aforesaid, used unfair or deceptive acts and practices to induce business establishments and institutions to accept or retain unordered merchandise and merchandise priced higher than represented at the time it was ordered and to pay to respondent substantial sums of money for said merchandise. Respondent has received said sums of money and has failed to refund or offer to refund said money. The use by respondent of said acts and practices and the continued retention of said sums of money are unfair or deceptive acts and practices.

PAR. 10. Respondent, which has been in substantial competition in commerce with corporations, firms and individuals engaged in the sale of light bulbs and other products, has used, as aforesaid, unfair and deceptive acts and practices to induce persons, business establishments and institutions to retain or accept and pay for said products.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, have been and are all to the prejudice and injury of the public and are in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act or the provisions of 39 U.S.C. 3009.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and Section 3009 of the Postal Reorganization Act (39 U.S.C. 3009); and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its

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charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Commercial Lighting Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 East Palisade Ave., in the City of Englewood, State of New Jersey.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

As used in this order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting directly or indirectly and by any manner or means.

The provisions of this order are applicable to the acts and practices of Respondent, Commercial Lighting Products, Inc., a corporation, through its agents, representatives and employees and its successors and assigns which are in the lighting business, or through any successor corporation, assign, subsidiary, division, franchisee or other device in connection with the advertising, offering for sale, sale or distribution of light bulbs or other Products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

For purposes of this order the following definitions shall be applicable:

"Person" shall mean a recipient of Products from the Respondent or the recipient of any telephonic, written or other type of communication from Respondent in connection with the advertising, offering for sale or sale of Products, as defined. *Provided, however,* that Person shall not mean a natural person, business establishment or institution which does not purchase said Products for consumption (i.e., independent jobbers or wholesalers).

"Respondent" shall mean Commercial Lighting Products, Inc. through its agents, representatives, employees and its successors and assigns, which are in the lighting business, or through any successor corporation, subsidiary, division, franchisee or other device. It shall not include Respondent's Canadian subsidiary or any other foreign subsid-

iary, division or franchisee, if they do not sell substantial amounts of Products to Persons in the United States. In addition, Respondent shall not mean any unrelated wholesalers, jobbers or persons not affiliated with Respondent, nor shall any part of this order be construed to include the acts or practices of such persons. *Provided further*, that Respondent shall not mean a successor to, or assign of, Commercial Lighting Products, Inc. into which Commercial Lighting Products, Inc. is liquidated pursuant to Section 332 of the Internal Revenue Code, where such successor or assign in good faith receives distributions in complete liquidation of Commercial Lighting Products, Inc. and such successor or assign no longer carries on the business of Commercial Lighting Products, Inc. in any way.

"Products" shall mean light bulbs, fluorescent tubes or any lighting equipment or any other merchandise currently sold by Commercial Lighting Products, Inc. or sold by Commercial Lighting Products, Inc. in the future.

"Shipping" shall mean sending, or causing to be sent, any Products by mail or by any carrier or by any means.

I

It is ordered, That Respondent cease and desist from:

1. Shipping Products or causing Products to be shipped, without the expressed request or consent of a Person.
2. Mailing, or causing to be mailed, a bill to a Person for Products which have been shipped without the prior expressed request or consent of the Person.
3. Soliciting an order for Products from any Person without first making a good faith effort to determine whether such Person is authorized to order said Products in the dollar amount of said order.
4. Shipping Products to a Person in larger quantities than ordered or at prices greater than prices quoted at the time of the order.
5. Offering discounts to induce Persons who allege that they received unordered Products from Respondent to accept, retain, or pay for said Products until after a bona fide effort has been made to ascertain whether or not the Products were unordered.
6. Shipping, or causing to be shipped, a collection letter to a Person to whom Products have been shipped without the prior expressed request or consent of such Person.
7. Transferring, or causing to be transferred, to a debt collection company, credit bureau or any credit reporting agency, the alleged delinquent account of a Person who has informed Respondent that the

Products involved were not ordered, until after a bona fide effort has been made to ascertain whether or not the Products were unordered.

Provided, however, that Respondent may act in accordance with the exceptions set forth in the Postal Reorganization Act, 39 U.S.C. 3009, as amended or modified.

Provided further, however, that for purposes of this order, no Products shall be deemed to have been shipped without the prior expressed request or consent of a Person if the procedures outlined below in Parts III and IV of this order have been complied with and the acts enjoined in Part II of this order have not been committed in connection with the shipping of such Products.

II

It is further ordered, That Respondent cease and desist from representing that:

1. The individual contacting a Person being solicited is a friend or acquaintance or has been referred by another individual in the business or institution of the Person solicited or that Respondent has supplied light bulbs or other Products to such Person or such Person's business establishment or institution in the past unless such is the fact.

2. Any Person from whom an order for Products is solicited is being contacted for the purpose of offering him a free gift unless such is the fact.

3. The quantity or price of Products that will be shipped by Respondent in connection with soliciting any Person's consent to receive said Products is less than the quantity or the price of the Products that will be shipped. However, Respondent shall not be deemed to have violated this subsection if it shows that such quantity or price variance was the result of a clerical error.

4. Respondent will send or has sent a notice of an alleged delinquent account to a debt collection company, credit bureau, credit reporting agency, attorney or other individual or entity unless such is the fact.

III

It is further ordered, That:

1. Respondent shall not mail or otherwise ship Products pursuant to any order which does not include on the order form, in addition to any other information, the following information in legible form: (a) the name of the individual who ordered the Products; (b) the job title

of the individual who ordered the Products; (c) the quantity of each item ordered; (d) the unit price of each item and the total price of the order; (e) the date said individual ordered the Products; (f) whether the order was taken on the telephone or in person; (g) whether the individual placing the order signed the order; (h) whether the individual placing the order has received a copy of the order; (i) the name of the salesman or other individual who wrote the order; and (j) whether the individual who ordered the Products states that he has ordered any such Products from Respondent in the past.

2. Respondent will utilize an "Acknowledgment" form which will be addressed to the attention of "Lighting Buyer" of the Person in question, which will contain the information required by items (a) through (j) of Part III, paragraph 1 above, and a notice that if there is any problem with the order, the Person may call Respondent on a free "800" telephone number listed conspicuously on the Acknowledgment. The Acknowledgment will be sent by first class mail to the Person. Respondent will not ship Products to the Person within ten days after mailing of the Acknowledgment. (A representative copy of the Acknowledgment form is attached hereto as Appendix A.)

3. Respondent shall not ship Products to any Person who informs Respondent, before said Products are shipped, that the merchandise allegedly ordered was not ordered.

Provided, however, that the provisions of paragraphs 1-3 above shall not apply where Respondent has received a signed order from a Person on the Person's purchase order or similar form.

4. Respondent shall retain for a period of two (2) years each written communication of the type referred to in Part III, paragraph 2 of this order and each letter sent by Respondent in response to any communication of the type referred to in Part III, paragraph 3 of this order, as well as all other written complaints alleging receipt of unordered merchandise, and shall make said communications and letters available to the Commission's staff for inspection and copying upon request.

IV

It is further ordered, That:

1. Respondent adopt a Statement of Operating Principles and Practices ("Statement") as set forth in Appendix B, and deliver a copy of this Statement to each of its employees, salesmen, agents, solicitors, problem solvers, collectors, customer service personnel and all other individuals who communicate with Persons in connection with the

offering to sell or the terms of sale of Respondent's Products to Persons, the requesting of payment, or the handling of complaints that Products shipped were allegedly unordered.

2. Respondent provide each individual described in Part IV, paragraph 1 of this order with a form to be signed and returned to Respondent, clearly stating his intention to be bound by and to conform his business practices thereto during the period said individual is so engaged and for a period of two (2) years thereafter, and make said forms available to the Commission's staff for inspection and copying upon request.

3. Respondent will not use or engage or will terminate the use or engagement of any such individual described in Part IV, paragraph 1 of this order who does not sign said Statement.

4. Respondent discontinue dealing with or terminate the use or engagement of any individual described in Part IV, paragraph 1 of this order who continues on his own any act or practice prohibited by this order.

5. Respondent shall forthwith distribute a copy of this order to each of its divisions or subsidiary corporations that is involved in the offering for sale, sale or distribution of Products to Persons.

6. Respondent institute a program of continuing surveillance satisfactory to the Commission designed to reveal whether the individuals described in Part IV, paragraph 1 of this order are conforming to the requirements of this order as incorporated in the Statement.

V

It is further ordered, That:

1. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising from this order.

2. Respondent 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.

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APPENDIX A

[letterhead
with return address]

ACKNOWLEDGMENT OF ORDER

TO: Lighting Buyer

Items Ordered	Quantity	Unit Price	Total
Total Price of Order			

Order placed by _____

Title of individual who placed order _____

Date of order _____

Order was placed (circle one): In Person By Telephone

Did individual placing the order sign it? Yes No

Did individual placing the order receive a copy of it? Yes No

Name of salesperson or other person who wrote the order _____

Did the individual who placed the order state that she/he had ever ordered any such products from Commercial Lighting Products, Inc., AAA Lighting or Pennstar in the past?

IMPORTANT: IF THERE IS ANY PROBLEM WITH THIS ORDER, YOU MAY CALL US TOLL FREE AT 800-xxx-xxxx.

APPENDIX B

COMMERCIAL LIGHTING PRODUCTS, INC.STATEMENT OF OPERATING PRINCIPLES AND PRACTICES

As an employee of Commercial Lighting Products, Inc. ("CLP") you should know the Principles and Practices upon which CLP operates and expects its employees to operate.

The success of CLP is based on customer good will and belief in CLP's products. Unfair and unethical sales practices undercut this success, and will not be tolerated by CLP.

Specifically, the following acts or practices are both unethical and unlawful, and will not be tolerated by CLP:

1. The sending of products without the expressed request or consent of the customer.
2. Sending a bill to a customer for products that have been shipped without the prior expressed request or consent of the customer.
3. Soliciting an order for products from any potential customer without first making

a good faith effort to determine whether such person is authorized to order products in the dollar amount of the order.

4. Sending products to a customer in larger quantities than ordered or at prices greater than prices quoted at the time of the order.

5. Offering discounts to induce customers who say they received unordered products from CLP to accept, retain, or pay for the products, until after a bona fide effort to ascertain whether or not the products were unordered.

6. Sending a collection letter to a customer for products which have been shipped without the prior expressed request or consent of the customer.

7. Transferring in any way to a debt collection company, credit bureau or any credit reporting agency, a delinquent account of a customer who has informed CLP that the products involved were not ordered until after a bona fide effort to ascertain whether or not the products were unordered.

8. Telling a potential customer that the individual contacting the customer is a friend or acquaintance or has been referred by another individual in the business or institution of that potential customer, or stating that CLP has supplied light bulbs or other products to the potential customer or the potential customer's business establishment or institution in the past unless such is the fact.

9. Telling a potential customer that he or she is being contacted for the purpose of offering him or her a free gift unless such is the fact.

10. Telling any potential customer the quantity or price of products that will be shipped by CLP is less than the quantity or the price of the products that will be shipped.

11. Telling any customer that CLP will send or has sent a notice of an alleged delinquent account to a debt collection company, credit bureau, credit reporting agency, attorney or other person or entity unless such is the fact.

In addition, CLP requires that an order shall not be mailed or shipped unless the order is legibly written on a properly completed CLP order form, or CLP receives a signed order on the customer's purchase order or similar form.

Furthermore, those CLP procedures which make it obligatory that CLP not ship products to a customer until 10 days after the mailing of the CLP "Acknowledgment" form, must be strictly adhered to. It is CLP's policy to keep these Acknowledgment forms.

Finally, it is also CLP's policy to keep all correspondence between CLP and persons who say they received unordered merchandise from CLP. If you engage in any such correspondence or have custody of any such correspondence, you must not destroy it unless CLP gives you authority to do so in writing.

These procedures and practices are required by CLP and are mandatory. You will be discharged if you do not adhere to them.

I will be bound by this Statement of Operating Principles and Practices and will act accordingly.

Date: _____

Complaint

IN THE MATTER OF

BELL & HOWELL COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9099. Complaint, May 27, 1977—Decision, May 8, 1980*

This consent order requires, among other things, a Lincolnwood, Ill. seller of home study courses and its subsidiary to cease misrepresenting admission criteria, potential earnings, employment opportunities, and the need or demand for their graduates. The firms are further prohibited from misrepresenting the effectiveness of their job placement service; that experience is not necessary or advantageous in obtaining employment; that their courses are endorsed by a governmental agency; and that students are provided with instructional assistance. The order also requires respondents to make prescribed disclosures regarding the job success of previous students; the manner in which contracts can be cancelled; and the method used to calculate tuition obligations should a student drop out of a course. Additionally, Bell & Howell is required to deposit in an escrow account the sum of \$1.2 million to provide refunds for former eligible students.

Appearances

For the Commission: *Brian Hennigan, Carlton Lowe, and David Marx, Jr.*

For the respondents: *Samuel Weisbard, Bruce Schoumacher and William A. Cerillo, McDermott, Will & Emery, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Bell & Howell Company, a corporation, and Bell & Howell Schools, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, 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 Bell & Howell Company, (hereinafter sometimes referred to as BHC), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 7100 McCormick Ave., Lincolnwood, Illinois.

Respondent Bell & Howell Schools, Inc., (hereinafter sometimes