IN THE MATTER OF

HYMAN MAURER ET AL. TRADING AS H. MAURER & SON

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-785. Complaint, July 13, 1964—Decision, July 13, 1964

Consent order requiring manufacturing furriers in New York City to cease violating the Fur Products Labeling Act by failing, in labeling and invoicing, to show the true animal name of fur; failing in labeling and advertising, to disclose when fur was artificially colored; labeling American Sable as "Sable" and using the word "blended" improperly on labels; failing to show the country of origin of imported furs, using the term "Broadtail" improperly and showing artificially colored furs as "natural" on invoices; and failing in other respects to comply with the requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Hyman Maurer and Maurice Maurer, individually and as copartners trading as H. Maurer & Son, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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:

Respondents Hyman Maurer and Maurice Maurer are individuals and copartners trading as H. Maurer & Son.

Respondents are manufacturers of fur products with their office and principal place of business located at 224 West 30th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products which were labeled as "Sable" when the fur contained in such fur products was, in fact, "American Sable."

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "blended" was used on labels as part of the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs, in violation of Rule 19(f) of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(d) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required

by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show the country of origin of imported furs used in fur products.

PAR 7. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 10. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote or assist, directly or indirectly in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the advertisements, but not limited thereto, were advertising brochures of respondents.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show that the fur contained in the fur products was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Hyman Maurer and Maurice Maurer are individuals and copartners trading as H. Maurer & Son, with their office and principal place of business located at 224 West 30th Street, in the city of New York, State of New York.

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

ORDER

It is ordered, That Hyman Maurer and Maurice Maurer, individually and as copartners trading as H. Maurer & Son or under any other trade name, and respondents' representatives, agents and employees directly or through any corporate or other device, in connec-

tion with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

2. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

3. Setting forth the term "blended" or any term of like import on labels as part of the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs contained in fur products.

4. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting on labels affixed to fur products.

5. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

6. Failing to set forth on labels the item number or mark assigned to a fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Representing directly or by implication on invoices that the fur contained in fur products is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

4. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

5. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

6. Failing to set forth on invoices the item number or mark assigned to fur products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any fur product, and which fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

It is further ordered, That the 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.

IN THE MATTER OF

LAFAYETTE RADIO ELECTRONICS CORPORATION

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

Docket C-788. Complaint, July 14, 1964—Decision, July 14, 1964

Consent order requiring a Long Island, N.Y., manufacturer of radios, phonograph equipment, radio electronic equipment and general merchandise, which operated its own retail stores in New York, Massachusetts, and New Jersey, and sold also to associated stores in various other States and by mail, to cease—in its catalogs and in advertising in magazines and newspapers—misrepresenting the regular and former prices of its products and savings

available to purchasers; representing falsely that TV tubes and stereo phonograph needles were guaranteed for a full year; and misrepresenting the quality and composition, unique nature, and testing of its phonograph needles and styli.

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 Lafayette Radio Electronics Corporation, a corporation, hereinafter referred to as respondent, has 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 Lafayette Radio Electronics Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 111 Jericho Turnpike, Syosset, Long Island, New York.

PAR. 2. Respondent is now, and for some time last past has been engaged in the manufacture, advertising, offering for sale, sale and distribution of radios, phonograph equipment, radio electronic equipment and general merchandise to the public, to retailers for resale to the public and to industrial concerns.

Respondent owns and operates retail stores in the States of New York, Massachusetts and New Jersey, distributes and sells its products and merchandise to the general public and to industrial concerns through the United States mails, and sells its merchandise to associated stores located in various other States of the United States for resale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products and merchandise, when sold, to be shipped from its place of business in the States of New York, Massachusetts and New Jersey, to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade of said products and merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, in the course and conduct of its business, and for the purpose of inducing the purchase of its products and merchandise, advertises the same by means of an annual catalogue with peri-

odic supplements and advertisements in magazines of national circulation and in newspapers of general interstate circulation. The newspaper advertising is primarily in conjunction with respondent's retail stores.

Said catalogues and their supplements are distributed through the United States mail to customers located throughout the United States. Said catalogue and magazine advertising is primarily in conjunction with the mail order phase of respondent's business.

PAR. 5. In its catalogue advertising respondent has made certain statements and representations with respect to prices, savings and the guarantees of its products and merchandise. Typical but not all inclusive of such statements and representations are the following:

NEW TELEFUNKEN 4-SPEED AUTOMATIC RECORD CHANGER Regularly $59.50 Special Price $24.50

LAFAYETTE "TINY" 6-TRANSISTOR RADIO $17.95 Regular $48.50

AMPHENOL INDOOR TV ANTENNA $2.59 Was $14.95

LAFAYETTE TV PICTURE TUBES FULL ONE-YEAR GUARANTEE

LAFAYETTE HI-FI STEREO DIAMOND NEEDLES FULL ONE-YEAR GUARANTEE

On certain catalogues, in large conspicuous letters on the cover, appears the word "SALE."

PAR. 6. By and through the use of statements and representations set forth in Paragraph Five hereof and others of similar import not specifically set out herein, respondent represents and has represented directly and by implication that:

a. The higher stated prices set out in said advertisements in connection with the terms "Regularly," "Regular" and "Was" were the actual, bona fide prices at which the articles referred to were offered to the public at retail by respondent on a regular basis for a reasonably substantial period of time in the recent regular course of business and that the difference between the higher prices and the lower prices set out in conjunction therewith represented savings to purchasers.

b. A major portion of the items of merchandise contained in said catalogue with the word "SALE" on its cover, was offered at a reduction from the respondent's prior selling or offering price.

c. The TV tubes and stereo phonograph needles are guaranteed for one full year in every respect.

PAR. 7. In truth and in fact:

a. The higher stated prices set out in connection with the terms "Regularly," "Regular," and "Was," were in excess of the actual, bona fide prices at which the articles referred to were offered to the public at retail by respondent on a regular basis for a reasonably substantial period of time in the recent regular course of business

and the difference between the said higher prices and the lower prices set out in connection therewith and at which articles of merchandise are offered for sale did not represent savings to purchasers.

b. A major portion of the items of merchandise contained in said catalogue with the word "SALE" on its cover, was not offered at a reduction from the respondent's prior selling or offering price.

c. Respondent does not guarantee the articles of merchandise described in the advertisements in every respect. The terms, conditions and extent to which such guarantees apply, and the manner in which the guarantor will perform thereunder are not disclosed in the advertisements.

Therefore, the statements and representations as set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive.

Par. 8. In conjunction with its retail stores located in the New York Metropolitan Area, respondent has made certain additional statements and representations with respect to prices and savings in advertising placed in newspapers having wide interstate circulation in the New York Metropolitan Area. Typical but not all inclusive of such statements and representations are the following:

PICKERING MODEL U38/AT HI-FI CARTRIDGE without trade-in $46.50—with your old cartridge $17.95 SAVE 61%

FAMOUS "harman kardon" HI-FI STEREO SYSTEM Total Price If Purchased Separately $394.90 LAFAYETTE SALE PRICE $269.95 YOU SAVE $124.95

Par. 9. By and through the use of statements and representations set forth in Paragraph Eight hereof and others of similar import not specifically set out herein, respondent represents and has represented directly and by implication that:

a. The price set out in conjunction with the words "without trade-in" was the actual, bona fide price at which the advertised merchandise was being offered for sale by said retail stores without a trade-in, in the regular course of business and that the difference between the higher and lower prices represented savings to purchasers.

b. The price set out in conjunction with the words "Price If Purchased Separately" was the actual, bona fide price at which the advertised merchandise was being offered for sale by said retail stores if purchased separately, in the regular course of its business and that the difference between the higher and lower prices represented savings to purchasers.

Par. 10. In truth and in fact:

a. The price set out in conjunction with the words "without trade-in" was in excess of the price at which the advertised merchandise was

being offered for sale by said retail stores without a trade-in, in the regular course of business and the difference between the higher and lower amounts did not represent savings to purchasers.

b. The price set out in conjunction with the words "Price If Purchased Separately" was in excess of the actual, bona fide price at which the advertised merchandise was being offered for sale by said retail stores if purchased separately, in the regular course of its business and the difference between the higher and lower prices did not represent savings to purchasers.

Therefore, the statements and representations as set forth in Paragraphs Eight and Nine hereof were and are false, misleading and deceptive.

PAR. 11. In the course and conduct of its business and for the purpose of inducing the sale of its phonograph needles and styli, respondent has made certain statements and representations in its advertising of which the following are typical but not all inclusive:

ALL DIAMOND STYLI ARE NOT ALIKE. Only Lafayette's Superior Diamond Styli are * * * MADE FROM WHOLE DIAMONDS, PRECISION GROUND AND POLISHED. VERTICALLY AND EDGE-WISE GRAIN ORIENTED. SHADOWGRAPHED. Each Lafayette's diamond stylus is * * * shadowgraph tested * * *

LAFAYETE Diamond-sapphire styli $1.69

PAR. 12. Through the use of the aforesaid statements and others of similar import not specifically set out herein, respondent represents, and has represented directly and by implication that:

a. Only Lafayette phonograph needles and styli are made from whole diamonds, are precision ground and polished, and are shadowgraph tested.

b. Lafayette phonograph needles and diamond styli are vertically and edgewise grain oriented and are individually shadowgraph tested.

c. Its diamond-sapphire phonograph styli or needles contain genuine sapphire.

PAR. 13. In truth and in fact:

a. Lafayette phonograph needles and styli are not the only needles or styli that are made from whole diamonds, are precision ground and polished, and are shadowgraph tested.

b. Lafayette phonograph needles or diamond styli are not vertically and edgewise grain oriented and are not individually shadowgraph tested.

c. The aforesaid diamond sapphire phonograph needles or styli advertised, offered for sale and sold by respondent contain synthetic sapphires and not genuine sapphires.

Therefore, the statements and representations set forth in Paragraphs Eleven and Twelve hereof were, and are, false, misleading and deceptive.

PAR. 14. In the conduct of its business, and at all times mentioned herein, respondent has been in substantial competition in commerce, with corporations, firms and individuals in the sale of the same general kind and nature of products and merchandise as that sold by respondent.

PAR. 15. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices and the failure to disclose the facts as hereinabove alleged has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products and merchandise by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, 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 set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Lafayette Radio Electronics Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 111 Jericho Turnpike, Syosset, Long Island, New York.

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

It is ordered, That respondent Lafayette Radio Electronics Corporation, a corporation and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of radios, phonograph equipment, radio electronic equipment or any other articles of merchandise in commence, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. a. Using the words "Regularly," "Regular," "Was," or any other words or terms of similar import, to refer to any price which is in excess of the actual, bona fide price at which the article referred to was offered to the public by respondent in the recent, regular course of its business for a reasonably substantial period of time in the trade area where the representation is made;

b. Otherwise misrepresenting respondent's former offering price of such merchandise to the public in the recent, regular course of its business in the trade area where the representation is made;

c. Misrepresenting in any manner the savings available to purchasers of respondent's merchandise from the actual, bona fide prices at which such merchandise was offered to the public by respondent in the recent, regular course of its business for a reasonably substantial period of time in the trade area where the representation is made;

2. a. Using the expression "Price if Purchased Separately" or any other words or terms of similar import, to refer to any price which is in excess of the actual, bona fide price at which such merchandise is being offered to the public on a regular basis by respondent if purchased separately in the trade area where the representation is made;

b. Misrepresenting in any manner the savings available to purchasers of a combination or group of products from the total of the actual, bona fide prices at which such products are being

offered to the public on a regular basis by respondent if purchased separately in the trade area where the representation is made;

3. a. Using the expression "without trade-in," or any other words or terms of similar import, to refer to any price which is in excess of the actual, bona fide price at which such merchandise is being offered to the public on a regular basis by respondent without a trade-in in the trade area where the representation is made;

b. Misrepresenting in any manner the savings available to purchasers of respondent's merchandise by virtue of a trade-in from the actual, bona fide price at which such merchandise is being offered to the public on a regular basis by respondent without a trade-in in the trade area where the representation is made;

4. Using the term "SALE" or any other word of similar import or meaning, as a designation for any catalogue, circular, newspaper or direct mail advertising, unless the prices at which a major portion of the items of merchandise contained therein are offered constitute reductions from the actual, bona fide prices at which said items of merchandise were offered to the public by respondent in the recent, regular course of its business for a reasonably substantial period of time in the trade area where the representations are made and the amount of each such reduction is not so insignificant as to be meaningless, or represent reductions from the prices at which said items of merchandise or comparable merchandise are offered for sale in the trade area where the representations are made and, in the latter instances, the basis for the represented reductions are clearly and conspicuously stated and the amount of each such reduction is not so insignificant as to be meaningless;

5. Representing, directly or by implication, that such merchandise is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor (except when it is respondent), and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

6. a. Representing, directly or by implication that only respondent's phonograph needles or styli are:

A. Made from whole diamonds;

B. Precision ground and polished;

C. Shadowgraph tested;

b. Representing, directly or by implication that respondent's phonograph needles or styli are:

A. Vertically and edgewise grain oriented;

B. Individually shadowgraph tested;

c. Misrepresenting in any manner the exclusiveness of any feature or characteristic, or the method of manufacture, processing or testing of respondent's phonograph needles, styli or phonograph equipment;

7. Using the term "sapphire" or any other word or term connoting a precious stone to describe or designate a phonograph needle or stylus containing a synthetic stone unless the synthetic nature thereof is affirmatively and clearly disclosed.

Provided however, That respondent's use of its catalogues and flyers in its retail stores for the purpose of (A) distributing the same to its customers and (B) permitting its customers to use the same to serve themselves, shall not be deemed to be a violation of Paragraphs 1, 2, 3 or 4 of this order because of the circumstance that at the time one or more articles of merchandise listed in such catalogues or flyers may then be selling in respondent's retail stores at prices which may be under the prices shown for those articles of merchandise in said catalogues and flyers.

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

IN THE MATTER OF

ARNOTH W. GODDARD ET AL., TRADING AS QUAD-CITY SEWING MACHINE COMPANY, ETC.

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

Docket C-789. Complaint, July 16, 1964—Decision, July 16, 1964

Consent order requiring Davenport, Iowa, retail sellers of sewing machines to cease representing falsely, in advertisements in newspapers and in advertising circulars and by their agents, that sewing machines offered at special prices were repossessed, that such machines were being sold at reduced prices for banks and finance companies by reason of default in payment by previous purchasers, and that they carried a lifetime guarantee.

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 Arnoth W. Goddard

and Alice Maxine Goddard, individuals trading and doing business as Quad-City Sewing Machine Company, and as Q.C.S. Finance Dept., hereinafter 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. Respondents Arnoth W. Goddard and Alice Maxine Goddard are individuals trading and doing business as Quad-City Sewing Machine Company and as Q.C.S. Finance Dept., with their principal office and place of business located at 308 West 2nd Street in the city of Davenport, State of Iowa.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of sewing machines to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of Iowa to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said sewing machines, respondents have made numerous statements in advertisements inserted in newspapers, and in advertising circulars distributed to the general public; and respondents' agents have made numerous oral statements to prospective purchasers. Among and typical, but not all inclusive, of such statements are the following:

REPOSSESSED

Singer slant needle sewing machine, take over 8 payments of $5.10 per month. Write Credit Manager, Box 343 Davenport. Quad-City Sewing Machine.

Must be sold Singer Slant Needle, has automatic zig zag, button holes, etc., 10 payments of $6.10 per month. Call 326-2443.
QUAD CITY SEWING MACHINE CO.
309 W. 2nd St., Davenport, Ia.

* * * * * * *

Q.C.S. FINANCE DEPT.

* * * * * * *

WE ARE SELLING THE FOLLOWING REPOSSESSED MERCHANDISE FOR SEVERAL BANKS AND FINANCE CO. IN YOUR VICINITY. PLEASE FEEL FREE TO WRITE FOR MORE INFORMATION OR ASK TO HAVE OUR TRUCK STOP AT YOUR HOME FOR YOU TO INSPECT ANY OF THE ARTICLES LISTED. YOU ARE UNDER NO OBLIGATION TO BUY.

(Followed by a list of sewing machines and other merchandise stated to be for sale by respondents.)

* * * * * * *

The actual value is $300.00. Our price to you is $140.00.

The machine originally cost $249.00. Our price to you is $154.91.

* * * * * * *

The sewing machine carries a lifetime guarantee.

PAR. 5. By and through the use of said statements, and others of similar import not specifically set out herein, respondents represented, directly or by implication:

(1) That they were making a bona fide offer to sell used electric sewing machines at the prices specified in the advertising.

(2) That the sewing machines being offered for sale by respondents had been repossessed by banks and finance companies or by respondents by reason of default in payment therefor by previous purchasers, and that the respondents were selling said sewing machines for such banks and finance companies.

(3) That the prices of the merchandise were reduced from respondents' former prices, and the amount of such purported reduction constituted savings to purchasers of the merchandise.

(4) That the respondents' merchandise was unconditionally guaranteed for lifetime.

PAR. 6. In truth and in fact:

(1) Respondents' offers were not bona fide offers to sell the said used sewing machines at the advertised prices but were made for the purpose of obtaining leads and information as to persons interested in the purchase of new sewing machines. After obtaining leads through response to said advertisements, respondents' salesmen called upon such persons but made no effort to sell said sewing machines at the advertised prices. Instead, they exhibited the advertised used sewing machines, or ones similar to them, in demonstrating that they were manifestly unsuitable for the purpose intended and disparaged the advertised products in such a manner as to discourage their purchase and attempted to and frequently did sell much higher priced products.

(2) The merchandise offered for sale by respondents had not been repossessed by banks or finance companies or any other person, firm or corporation, and respondents were not selling such merchandise for banks and finance companies.

(3) The alleged former prices were fictitious in that they were not actual, bona fide prices at which respondents offered the merchandise to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of business and the said merchandise was not reduced in price as represented and savings were not afforded purchasers of said merchandise as represented.

(4) Respondents' guarantee is not unconditional but contains certain terms and limitations. The guarantor fails to set forth the nature and extent of the guarantee, and the manner in which the guarantor will perform.

Therefore, the statements and representations set forth in paragraphs Four and Five were and are false, misleading, and deceptive.

PAR. 7. In the conduct of their business at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of sewing machines of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and

which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondents Arnoth W. Goddard and Alice Maxine Goddard, are individuals trading and doing business as Quad-City Sewing Machine Company and as Q.C.S. Finance Dept., with their office and principal place of business located at 308 West 2nd Street, in the city of Davenport, State of Iowa.

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

ORDER

It is ordered, That respondents Arnoth W. Goddard and Alice Maxine Goddard, individuals trading and doing business as Quad-City Sewing Machine Company and as Q.C.S. Finance Dept., or under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services.

2. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any merchandise or services are offered for sale, when such offer is not a bona fide offer to sell said merchandise or services.

4. Representing, directly or by implication, that merchandise offered for sale had been repossessed or that respondents are selling such merchandise for banks or finance companies: *Provided, however*, That it shall be a defense herein for respondent to establish that merchandise offered for sale by them actually had been repossessed, or that respondents are actually selling such merchandise for banks or finance companies.

5. Representing, directly or by implication, that any price, whether or not accompanied by descriptive terminology, is respondents' former price of merchandise when such amount is in excess of the actual, bona fide price at which respondents offered the merchandise to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

6. Misrepresenting, by means of comparative prices, or in any other manner, the savings available to purchasers of respondents' merchandise.

7. Representing, directly or by implication, that any of respondents' products are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It is further ordered, That the 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.

IN THE MATTER OF

BATTELSTEIN'S, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, THE FUR PRODUCTS LABELING AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-790. Complaint, July 16, 1964—Decision, July 16, 1964

Consent order requiring a Houston, Tex., retailer of fur and textile fiber products to cease violating the Fur Products Labeling Act by labeling fur products with excessive prices represented as former regular prices, labeling artificially colored furs as natural, and failing to disclose on labels the true animal name of fur, name of the manufacturer, etc., and when fur was natural; failing on labels and invoices to use the term "natural" for furs that were not dyed or bleached; failing in invoicing and advertising, to show when fur was artificially colored; failing to show the country of origin of imported

furs and naming animals other than those producing certain furs, in advertising; mutilating required labels prior to ultimate sale of fur products; and failing in other respects to comply with requirements of the Act; and to cease violating the Textile Fiber Products Identification Act by advertising textile products in newspapers without giving the fiber content, and by using fiber trademarks in advertising wearing apparel without a full disclosure of the fiber content information as required.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Battelstein's, Inc., hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and the Textile Fiber Products Identification 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 Battelstein's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas.

Respondent is a retailer of fur products and textile fiber products with its office and principal place of business located at 812 Main Street, Houston, Texas.

Par. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

Par. 3. Certain of said fur products were misbranded in violation of Section 4(1) of the Fur Products Labeling Act in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified in that labels affixed to fur products contained representations, either directly or by implication, that the prices of fur products were reduced from the respondent's former prices and the amount of such purported reduction constituted savings to purchasers of respondent's fur products. In truth and in fact, the alleged former prices

were fictitious in that they were not actual, bona fide prices at which respondent offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of business, and said fur products were not reduced in price as represented and savings were not afforded purchasers of respondent's said fur products as represented.

PAR. 4. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored when such was the fact.

3. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.

PAR. 6. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not completely set out on one side of labels, in violation of Rule 29(a) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products

Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of the said Rules and Regulations.

(e) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

(f) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-died or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 9. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondent which appeared in issues of the Houston Chronicle, a newspaper published in the city of Houston, State of Texas.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

1. To show that the fur contained in the fur product was bleached, dyed or otherwise artificially colored when such was the fact.

2. To show the country of origin of imported furs contained in fur products.

PAR. 10. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in that certain of said advertisements contained the name or names of an animal or animals other than those producing the fur contained in the fur product, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 11. Respondent falsely and deceptively advertised fur products by affixing labels thereto which represented, either directly or by implication, that prices of such fur products were reduced from the respondent's former prices and the purported reduction constituted savings to purchasers of respondents fur products. In truth and in fact the alleged former prices were fictitious in that they were not the actual, bona fide prices at which the respondent offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of business, and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 12. Respondent has mutilated and has caused and participated in the mutilation of, prior to the time fur products subject to the provisions of the Fur Products Labeling Act were sold and delivered to the ultimate consumer, labels required by the Fur Products Labeling Act to be affixed to such products, in violation of Section 3(d) of said Act.

PAR. 13. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondent has been and is now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and has sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and has sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in

other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 14. Certain of said textile products were falsely and deceptively advertised in that respondent in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and assist, directly or indirectly, in the sale or offering for sale, of said products, failed to set forth the required information as to fiber content as provided for by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondent which appeared in issues of the Houston Chronicle, a newspaper published in the City of Houston, State of Texas.

Among such falsely and deceptively advertised textile fiber products, but not limited thereto, were articles of wearing apparel which were advertised with fiber implying terms such as "Gabardine," "Broadcloth," "Dacron," "Corduroy," "Oxford" and "Pima," without setting forth the aforesaid required information.

PAR. 15. Certain of said textile fiber products were falsely and deceptively advertised in violation of the Textile Fiber Products Identification Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Fiber trademarks were used in advertising textile fiber products, namely articles of wearing apparel, without a full disclosure of the fiber content information required by the said Act and the Rules and Regulations thereunder in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid Rules and Regulations.

(b) Fiber trademarks were used in advertising textile fiber products, namely articles of wearing apparel, containing more than one fiber and such fiber trademarks did not appear in the required fiber content information in immediate proximity and conjunction with the generic names of the fibers in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

PAR. 16. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and the Textile Fiber Products Identification Act and the Rules and Regulations promul-

gated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

Decision and Order

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, the Fur Products Labeling Act and the Textile Fiber Products Identification Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, 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 set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Battelstein's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 812 Main Street, Houston, Texas.

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

It is ordered, That respondent Battelstein's, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur products; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in com-

merce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing directly or by implication, on labels, that any amount, whether accompanied or not by descriptive terminology, is the respondent's former price of fur products when such amount is in excess of the actual, bona fide price at which respondent offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

2. Misrepresenting in any manner on labels or other means of identification the savings available to purchasers of respondent's fur products.

3. Falsely or deceptively representing in any manner, directly or by implication, on labels or other means of identification that prices of respondent's fur products are reduced.

4. Representing directly or by implication on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

5. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

6. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

7. Failing to completely set out information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder on one side of the labels affixed to fur products.

8. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting on labels affixed to fur products.

9. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

10. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal fur the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

11. Failing to set forth on labels the item number or mark assigned to a fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

3. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

4. Failing to set forth on invoices the item number or mark assigned to fur products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any fur product, and which:

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Sets forth the name or names of any animal or animals other than the name of the animal producing the furs contained in the fur product as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

3. Represents, directly or by implication, that any price, whether accompanied or not by descriptive terminology is the respondent's former price of fur products when such amount is in excess of the actual, bona fide price at which respondent offered the fur products to the public on a regu-

lar basis for a reasonably substantial period of time in the recent, regular course of business.

4. Misrepresents in any manner the savings available to purchasers of respondent's fur products.

5. Falsely or deceptively represents in any manner that prices of respondent's fur products are reduced.

It is further ordered, That respondent Battelstein's, Inc., a corporation, and its officers and respondent's representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from mutilating or causing or participating in the mutilation of, prior to the time any fur product subject to the provisions of the Fur Products Labeling Act is sold and delivered to the ultimate consumer, any label required by the said Act to be affixed to such fur product.

It is further ordered, That respondent Battelstein's, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Indentification Act, do forthwith cease and desist from:

A. Falsely and deceptively advertising textile fiber products by:

1. Making any representations, by disclosure or by implication, as to the fiber content of any textile fiber product in any written advertisement which is used to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such textile fiber product, unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Using a fiber trademark in advertisements without a full disclosure of the required content information in at least one instance in the said advertisement.

3. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

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

IN THE MATTER OF

ILLINOIS FRATERNAL NEWS, INC., ET AL.

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

Docket C-791. Complaint, July 16, 1964—Decision, July 16, 1964

Consent order requiring four affiliated corporations and their officers with a common Chicago, Ill., address, and whose income is derived from the sale of advertising space in the National Fraternal Club News and from a variety of other publications for which they act as advertising brokers, to cease representing falsely that their publications are endorsed by, affiliated with, is an official publication of any fraternal, religious, social or any other similar organization; to cease printing any advertising without prior authorization, seeking to collect for advertising without a bona fide order for such, misrepresenting the extent of circulation of their publications, using threats of legal action or other forms of intimidation to induce persons to pay for unauthorized advertising, attempting to collect such alleged debts by using letterheads or other stationery purporting to be that of a lawyer, and misrepresenting that the Continental Credit and Collection Agency, Inc., is an independent and unaffiliated collection agency.

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 the parties named in the caption hereof, and hereinafter 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. Respondents Illinois Fraternal News, Inc., Woods-Illinois Agency, Inc., Illinois Clubwoman's Agency, Inc., and Continental Credit and Collection Agency, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their principal offices and places of business located at 1020 N. Rush Street in the city of Chicago, State of Illinois.

Respondents Frederick Woods Bodoff, also known as Frederick Woods, hereinafter referred to as Frederick Woods, and Anita Lefton are officers of corporate respondents Illinois Fraternal News, Inc., and Woods-Illinois Agency, Inc.; respondent Frederick Woods is an officer of corporate respondent Illinois Clubwoman's Agency, Inc.; respondents Anita Lefton and Rosalie Feig are officers of corporate respondent Continental Credit and Collection Agency, Inc. The individual respondents formulate, direct and control the acts and practices of the respective corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

All of the aforesaid respondents operate and act together in carrying out the acts and practices hereinafter alleged.

PAR. 2. Respondent Illinois Fraternal News, Inc., is now, and for some time last past has been, engaged in the publication of a magazine called the National Fraternal Club News (formerly called the Illinois Fraternal Club News) and the Masonic News. All of the respondents, including the Illinois Fraternal News, Inc., are engaged in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by longdistance telephone, all between and among various states of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said publications in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. The respondents' income is derived from the sale of advertising space in the magazine published by respondent Illinois Fraternal News, Inc., and a variety of other publications for which the respondents act as advertising brokers. Respondents, through their

employees and representatives, contact prospective advertisers by telephone and seek to induce them to purchase advertising space in one of the publications. In the course of said telephone solicitations, respondents represent, directly or by implication, to prospective advertisers that the particular publication for which the solicitation is being made is endorsed by, affiliated with or an official publication of the Masons, Eastern Star, Rotarians, Kiwanians, and other national or State organizations.

PAR. 4. In truth and in fact, neither the respondents nor the publications for which they solicit advertising are endorsed by, affiliated with nor are they official publications of the Masons, Eastern Star, Rotarians, Kiwanians, or any other national or State organization, but are independently organized and operated publishing companies.

Therefore, the statements and representations referred to in Paragraph Three hereof are false, misleading and deceptive.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their advertising space, respondents have made certain statements and representations by oral representations through their salesmen or representatives with respect to the extent of the circulation of the periodicals in which such advertisements were to be published. Among and typical of such representations are the following:

1. That the National Fraternal News had a paid circulation of over 50,000, or 100,000.

2. That the National Fraternal News goes to members of fraternal organizations, including the Eagles, Elks, and Masons and that 20,000 people in the Milwaukee area would receive a copy.

3. That the Triune magazine has a circulation of 250,000.

PAR. 6. In truth and fact:

1. The National Fraternal News does not have a paid circulation that approximates 50,000 or 100,000.

2. The National Fraternal News is not distributed to any individual because of their affiliation with the Eagles, Elks or Masons, and very few members of such organizations subscribe to the publications. Furthermore, the circulation in the Milwaukee area does not approximate 20,000.

3. The Triune magazine circulation does not approximate 250,000.

Therefore, the statements and representations referred to in Paragraph Five were and are exaggerated, false, misleading and deceptive.

PAR. 7. In the course and conduct of their business as aforesaid, respondents have further engaged in the unfair practice of publishing advertisements without having received an order therefor, and then

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seeking to exact payment for said unauthorized advertising through repeated "demand letters" and by threatening legal action to collect. In an effort to enforce collection of claims arising out of the telephone solicitations referred to above for advertisements, some of which are not authorized by the business organizations being billed, respondents have, in concert with various lawyers, devised and used a series of forms and letterheads which have the capacity to mislead the recipients into the mistaken belief that their accounts have been referred to a lawyer and that they were being sued for the outstanding balances allegedly due on their accounts, and cause said recipients, in their mistaken belief, to pay such amounts.

PAR. 8. In the course and conduct of their aforesaid business, and for the purpose of enforcing payments allegedly due them for advertisements allegedly published, both authorized and unauthorized, respondents have formed a subsidiary and used the name "Continental Credit and Collection Agency, Inc.," and by the use of such name, and by letters, and fictitious addresses and notices, have represented it to be a bona fide collection agency in no way connected with respondents. Under this guise respondents employ various methods of intimidation and harassment to induce payment for advertising, regardless of whether the alleged advertiser has authorized the publication to print the advertisement.

PAR. 9. In truth and in fact, "Continental Credit and Collection Agency, Inc.," is not a bona fide collection agency nor is it independent of and distinct from the other respondents herein, but is a subsidiary whose stock is wholly owned by respondent Frederick Woods and is used for making and enforcing collections as set forth herein.

Therefore, the representation contained in Paragraph Eight is false, misleading and deceptive.

PAR. 10. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of advertising space of the same general kind and nature as that sold by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of nonexistent debts.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Illinois Fraternal News, Inc., Woods-Illinois Agency, Inc., Illinois Clubwoman's Agency, Inc., and Continental Credit and Collection Agency, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their principal offices and places of business located at 1020 N. Rush Street in the city of Chicago, State of Illinois.

Respondents Frederick Woods Bodoff, also known as Frederick Woods, hereinafter referred to as Frederick Woods, and Anita Lefton are officers of corporate respondents Illinois Fraternal News, Inc., and Woods-Illinois Agency, Inc.; respondent Frederick Woods is an officer of corporate respondent Illinois Clubwoman's Agency, Inc.; respondents Anita Lefton and Rosalie Feig are officers of corporate respondent Continental Credit and Collection Agency, Inc. Their address is the same as that of the corporate respondents.

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

ORDER

It is ordered, That the respondents Illinois Fraternal News, Inc., a corporation, and Woods-Illinois Agency, Inc., a corporation, and Frederick Woods Bodoff, also known as Frederick Woods, and Anita Lefton, individually and as officers of said corporations, and Illinois Clubwoman's Agency, Inc., a corporation, and Frederick Woods Bodoff, also known as Frederick Woods, individually and as an officer of said corporation, and Continental Credit and Collection Agency, Inc., a corporation and Anita Lefton and Rosalie Feig, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the soliciting, offering for sale or sale in commerce of advertising space in any newspaper, magazine or other publication, and in connection with the offering for sale, sale, or distribution of such publications in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any of said publications is endorsed by, is affiliated with, is an official publication of, or is otherwise connected with, any fraternal, religious, social or any other organization, unless respondents establish that such is the fact; or representing, directly or by implication, that any of the respondents is endorsed by, affiliated with, or is otherwise connected with, any fraternal, religious, social or any other organization, unless respondents establish that such is the fact.

2. Placing, printing or publishing any advertisement on behalf of any person or firm in any publication without a prior order or agreement to purchase said advertisement.

3. Sending or causing to be sent, bills, letters or other collection notices to any person or firm with regard to an advertisement which has been or is to be printed, inserted or published on behalf of said person or firm, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

4. Misrepresenting in any manner the extent of the circulation of any publication for which an advertisement is being solicited.

5. Using threats of legal action or other forms of coercion and intimidation to induce any person or firm to pay for advertising which has not been authorized by such person or firm.

6. Using the letterheads, billheads or other stationery of any lawyer,

or the letterheads, billheads or other stationery purporting to be that of a lawyer in attempting to enforce the collection of accounts.

7. Representing, directly or indirectly, that the Continental Credit and Collection Agency is an independent and unaffiliated collection agency.

It is further ordered, That the 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.

IN THE MATTER OF

WINTER PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-792. Complaint, July 17, 1964—Decision, July 17, 1964

Consent order requiring New York City manufacturers of fur trimmings, millinery, muffs and neck pieces, to cease violating the Fur Products Labeling Act by labeling and invoicing American Sable as "Tip-dyed Sable" or "Sable"; failing to show the true animal name of fur and when fur was artificially colored, and to set forth such terms as "Dyed Broadtail-processed Lamb" as required, on labels and invoices; invoicing processed fur falsely as "Persian"; failing to use such terms as "Blended," "Natural" and "Persian Lamb" properly on invoices; and failing in other respects to comply with labeling and invoicing requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Winter Products, Inc., a corporation and Jack Winter, Daniel Levy, Charles Miranda and Mark Benson, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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, Winter Products, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Jack Winter, Daniel Levy, Charles Miranda and Mark Benson are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of said corporate respondent, including those hereinafter set forth.

Respondents are engaged in the manufacture of fur trimmings, millinery, muffs and neck pieces, and have their office and principal place of business located at 49 West 37th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products which were labeled as "Tip-dyed Sable" when the fur contained in such product was, in fact "American Sable."

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored when such was the fact.

PAR. 5. Certain of said fur products were misbranded, in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. The term "Dyed Mouton Lamb" was not set forth on labels in the manner required by law, in violation of Rule 9 of the said Rules and Regulations.

2. The term "Dyed Broadtail-processed Lamb" was not set forth on labels in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

3. Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show that the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur when such is the fact.

3. To show the country of origin of imported furs used in fur products.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Sable" when, in fact, the fur contained in such products was "American Sable."

PAR. 8. Certain of said fur products were falsely and deceptively invoiced under Section 5(b)(2) of the Fur Products Labeling Act in that invoices relating thereto contained statements which represented, directly or by implication, that the products contained the fur of a certain fur-bearing animal whereas, in truth and in fact, the product did not contain the fur of such animal.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur-trimmed fabric coats. The fabric in these coats did not contain the fur of the "Persian Lamb" but had been processed to resemble such fur. These said fur products were invoiced as "Persian" and were thus represented falsely and deceptively, directly or by implication, as containing the fur of the Persian Lamb.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

2. The term "Blended" was used on invoices as part of the information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing, or otherwise artificial coloring of furs, in violation of Rule 19(f) of said Rules and Regulations.

3. The term "Natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

4. Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

5. The term "Persian Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 8 of said Rules and Regulations.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement,

makes the following jurisdictional findings, and enters the following order:

1. Respondent Winter Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 49 West 37th Street in the city of New York, State of New York.

Respondents Jack Winter, Daniel Levy, Charles Miranda and Mark Benson are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Winter Products, Inc., a corporation, and its officers and Jack Winter, Daniel Levy, Charles Miranda and Mark Benson, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale, in commerce or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

2. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

3. Failing to set forth the term "Dyed Mouton Lamb" on labels in the manner required where an election is made to use that term instead of the term "Dyed Lamb."

4. Failing to set forth the term "Dyed Broadtail-processed Lamb" on labels in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb."

5. Failing to set forth on labels the item number or mark assigned to a fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all of the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Representing, directly or by implication, on any invoice relating to any fur product that such fur product contains the fur of a fur-bearing animal when the fur product does not contain the fur of such fur-bearing animal.

4. Using the term "Persian" or any other words or terms of similar import on invoices in such a manner as to imply that the product contains the fur of the Persian Lamb when such fur product does not contain the fur of the Persian Lamb.

5. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

6. Setting forth the term "Blended" or any term of like import as part of the information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs contained in fur products.

7. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artifically colored.

8. Failing to set forth on invoices the item number or mark assigned to a fur product.

9. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb."

It is further ordered, That the 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.

IN THE MATTER OF

ATLANTIC SCHOOL, INC., ET AL.

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

Docket C-793. Complaint, July 17, 1964—Decision, July 17, 1964

Consent order requiring Kansas City, Mo., sellers of a course of study to prepare students for employment as stewardesses, ticket agents, reservation agents and other positions with airlines, to cease representing falsely in advertising and by statements of their sales agents, that completion of their course of study would qualify a person for employment with the airlines and that persons who completed the course were assured of such employment.

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 Atlantic School, Inc., a corporation, and R. W. Harriman, individually and as an officer of said corporation, hereinafter 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 Atlantic School, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 2020 Grand Avenue in the city of Kansas City, State of Missouri.

Respondent R. W. Harriman is an officer of said corporate respondent. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for more than two years last past have been, engaged in the sale of a course of study and instruction of-

fered to prepare students thereof for employment as stewardesses, ticket agents, reservation agents and in various other positions with airlines, said course being pursued in part by correspondence through the United States mails and in part through resident training at respondents' place of business in Kansas City, Missouri, or at such other location as may be designated by respondents.

PAR. 3. In the course and conduct of their business, respondents cause said course of study and instruction to be sent from their place of business in the State of Missouri to, into and through other States of the United States. There has been at all times mentioned herein a substantial course of trade in said course in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, respondents have published, and caused to be published, advertisements in magazines of national circulation and in newspapers distributed through the United States mails and by other means. Respondents have sent, and caused to be sent, brochures, pamphlets and other items of printed material through the United States mails to prospective purchasers of respondents' course. In the aforesaid advertisements, brochures, pamphlets and other items of printed material, respondents have made many statements and representations concerning said course for the purpose of inducing, and which have induced, the sale of said course. Among and typical of said statements and others not specifically set forth herein, are the following:

> 12 WAYS TO AN AIRLINE CAREER
>
> FREE illustrated booklet tells you how you can prepare for one of many exciting careers with Jet Airlines * * *
>
> Airlines Training Division, Atlantic School Dept G–13, 2020 Grand Avenue, Kansas City 8, Mo.
>
> BE AN AIRLINE
> Passenger Agent
> Reservationist
> Ticket Agent
> Station Agent
> Hostess
> Secretary, etc.
>
> MEN AND WOMEN. We are looking for high school graduates (or seniors) from this area to train for Jet Age opportunities with expanding Airlines. Interesting public-contact Airlines careers offer good starting salaries, free air travel passes, advancement, security. Age limit 35. See if you can qualify. Send your name and address to: Airlines Training Division, Atlantic School, Box 59, c-o Reporter-Herald.

OPPORTUNITY

Airlines are hiring! 24,460 new employees in last three years. Thousands more will be needed! In demand—Men and Women for Station Agents, Ticket Agents, Hostesses, Reservationists, Communicationists, Passenger Agents, Key Punch Operators. If you are 17 to 35, high school graduate (or senior), get facts on our short training program and placement service. No obligation. Send your name, age, address, and education to: Airlines Training Division, Atlantic School, Box RA, c-o Journal.

MAIL THIS CARD TODAY!
Please tell me more about how your training can prepare ME quickly for an interesting, well-paid career in Aviation. * * *

* * * I hope your qualifications are such that we may be able to help you prepare for a well-paying, successful future with the Airlines. We cannot accept you for training unless you meet certain basic requirements for Airline employment.

* * * * *

Atlantic School and its affiliate, the Hartford Airline Personnel School, have trained and placed hundreds of young men and women in interesting, profitable Airline careers. We hope that we may have the opportunity of doing the same for you * * *

AIRLINES WELCOME ATLANTIC GRADUATES

Par. 5. By means of the foregoing statements and representations set forth in Paragraph Four hereof, and others similar thereto but not set forth herein, respondents represent, directly and by implication, that:

(1) Completion of respondents' course of study and instruction, by itself, qualifies a person for employment with the airlines.

(2) Persons who complete respondents' course are assured of employment with an airline.

Such representations are affirmed and repeated by respondents' sales agents or sales representatives when they call upon prospective purchasers for the purpose of inducing the sale of respondents' said course.

Par. 6. In truth and in fact:

(1) Completion of respondents' course of study and instruction does not, by itself, qualify a person for employment with any airline. Each airline establishes its own qualifications for employment, including such factors as age, weight, height, personality and character, and whether or not a person is qualified for employment with a particular airline can be determined only when that person actually applies for employment with such airline.

(2) Persons who complete respondents' course are not assured of

employment with any airlines. While respondents may endeavor to inform themselves of opportunities for employment with airlines and advise persons completing respondents' course of such opportunities, such persons have no assurance that they will obtain a job with any airline. The availability of opportunities for employment with the airlines is dependent upon many factors over which respondents can exercise no control. Respondents make no disclosure of these material facts in advertising used to secure leads to prospective purchasers or in pamphlets, brochures and other printed matter sent to prospective purchasers prior to their being visited by respondents' sales agents or sales representatives.

Although respondents' application forms used to secure the enrollment contain a statement that respondents do not guarantee or promise employment; respondents' sales agents or sales representatives deprecate such disclaimer and lead prospective purchasers to believe that persons completing respondents' course will be qualified for employment with the airlines and are assured of obtaining such employment after completing respondents' course.

Therefore, the statements, representations and practices as set forth in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

Par. 7. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of study and instruction covering the same or similar subjects as are covered by respondents' course.

Par. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, and their failure to affirmatively disclose to prospective purchasers that the availability of opportunities for employment is subject to factors over which respondents can exercise no control, had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are, true and complete and into the purchase of substantial quantities of respondents' said course by reason of said erroneous and mistaken belief.

Par. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Atlantic School, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 2020 Grand Avenue in the city of Kansas City, State of Missouri.

Respondent R. W. Harriman is an officer of said corporation, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Atlantic School, Inc., a corporation, and its officers, and R. W. Harriman, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any other corporate or other device, in connection with the offering for sale, sale or distribution of courses of study or instruction, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that completion of respondents' course, by itself, qualifies a person for employment with any airline.

2. Representing, directly or by implication, that persons completing respondents' course are assured of employment with an

airline by virtue of completing said course or otherwise misrepresenting the opportunities for employment available to persons completing said course.

3. Making any representations concerning the ability of respondents to obtain or help to obtain employment in the airline industry for persons completing their course or the ability of such persons to otherwise obtain employment in the airline industry as a result of completing respondents' course without making clear disclosure to the effect that respondents do not guarantee or promise employment.

It is further ordered, That the 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.

IN THE MATTER OF

FASHION PARK, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

*Docket C-794. Complaint, July 17, 1964—Decision, July 17, 1964**

Consent order requiring a Rochester, N.Y., distributor of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by granting substantial promotional allowances to certain department stores while not making proportionally equal allowances available to all competitors of said favored customers. The effective date of the order has been postponed until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells

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*This order was made effective on Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-828, et al., Aug. 9, 1965, 68 F.T.C. 393.

and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

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 subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

The respondent having executed the agreement containing a consent order which agreement contains an admission of all the jurisdictional facts set forth in the complaint to issue herein, and a statement that the signing of the said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as set forth in such complaint, and also contains the waivers and provisions required by the Commission's rules; and

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The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fashion Park, Inc. is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 432 Portland Avenue, Rochester 2, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Fashion Park, Inc. a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

MAX FACTOR & COMPANY AND SHULTON, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Dockets 7717 and 7721. Complaints, Jan. 5, 1960—Decisions, July 22, 1964

Orders dismissing, without adjudication of the issues and on the determination that entry of a desist order would not serve the public interest, complaints charging cosmetics manufacturers with violating Sec. 2(d) of the Clayton

Act by making discriminatory payments—such as an allowance of $881 for advertising in 1958 to J. Weingarten Inc., in connection with the sale of its cosmetic products, when they did not make proportionally equal payments available to all Weingarten's competitors.

COMPLAINTS*

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaints, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Max Factor & Company, Docket No. 7717, 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 1655 North McCadden Place, Hollywood, California.

Respondent, Shulton, Inc., Docket No. 7721, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 697 Route 46, Clifton, New Jersey.

PAR. 2. Respondent, Max Factor & Company, Docket No. 7717, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics to retail chain store organizations, department stores, independent drug stores, grocery stores, syndicate stores, rack jobbers and drug wholesalers. Sales made by respondent are substantial and exceeded $45,000,000 in the year 1958.

Respondent, Shulton, Inc., Docket No. 7721, is now and has been engaged in the business of manufacturing, selling and distributing toiletry, chemical and pharmaceutical products. It sells its products to retail chain store organizations, independent drug and grocery stores, department stores, and wholesalers throughout the United States, and certain countries in Europe and Latin America. Respondent's total sales are substantial having exceeded $37,000,000 in the year 1958.

PAR. 3. In the course and conduct of their business, respondents have engaged and are now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondents sell and cause their products to be transported from the respondents' prin-

*The Complaints were consolidated by the Compiler.

cipal place of business, to customers located in other States of the United States, and certain countries in Europe and Latin America.

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondents, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondents' products.

PAR. 5. For example, during the year 1958 respondent, Max Factor & Company, Docket No. 7717, contracted to pay and did pay to J. Weingarten, Inc., Houston, Texas, $881 as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

For example, during the year 1958 respondent, Shulton, Inc., Docket No. 7721, contracted to pay and did pay to J. Weingarten, Inc., $6,000 as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondents, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John H. Brebbia for the Commission, Docket No. 7717.

Mr. Frederick M. Rowe and *Mr. Joseph DuCoeur* of *Kirkland, Ellis, Hodson, Chaffetz & Masters*, Washington, D.C., for respondent, Max Factor & Company, Docket No. 7717.

Mr. Austin H. Forkner for the Commission, Docket No. 7721.

Mr. J. Wallace Adair and *Mr. Richard L. Perry* of *Howrey, Simon, Baker & Murchison*, Washington, D.C., for respondents, Shulton, Inc., Docket No. 7721.

INITIAL DECISION AFTER REMAND BY WALTER R. JOHNSON, HEARING EXAMINER, DOCKET NO. 7717

MARCH 6, 1964

On January 5, 1960, a complaint was issued wherein the respondent was charged with making discriminatory payments to some of its customers in violation of Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13.) As an example, the complaint recites a payment of $881 by respondent to J. Weingarten, Inc., Houston, Texas, during 1958.

Respondent's answer denied any violation and affirmatively pleaded that its payments were made in good faith to meet payments on the part of its competitors. Respondent in its answer also questioned the public interest aspects "to single out one transaction of *de minimis* scope for a formal proceeding which aims at a broad order to cease and desist that can severely handicap a respondent in competing with its numerous rivals who are free of such restraints." A motion of J. Weingarten, Inc. to intervene was denied by the hearing examiner.

Prehearing conferences led to a clarification of the issues and permitted voluntary access by complaint counsel to respondent's business files in Hollywood, California. Hearings for the receipt of evidence were held on January 11, 1961 in Shreveport, Louisiana, on January 12 and June 6, 1961 in Houston, Texas, and on June 13, 1961 in Los Angeles, California. The testimony of 18 witnesses was heard and is contained in a transcript of 544 pages: 61 exhibits were received in evidence.

In connection with its defense, respondent made application for subpoenas addressed to eight competitors who participated in the Weingarten promotions. For the reason that the Commission had held in prior cases that the meeting competition defense of subsection (b) was not available in a subsection (d) proceeding, the hearing examiner denied the request of respondent. An interlocutory appeal from the ruling was denied by the Commission, one member dissenting.

Proposed findings were filed by both parties and the hearing examiner heard arguments thereon on September 28, 1961. On October 4, 1961, the hearing examiner issued an initial decision which found that the respondent was guilty as charged and set forth a cease and desist order. On October 23, 1961, the respondent initiated an appeal with the Commission which heard oral arguments thereon on February 28, 1962. On November 2, 1962, the Commission issued an order wherein it recited that the Commission had determined "that respondent should be afforded an opportunity to present a defense under Sec-

tion 2(b) of the amended Clayton Act" and remanded the matter to the hearing examiner "for further proceedings consistent with the Commission's aforesaid determination".[1] It was "*Further ordered*, That the hearing examiner, upon completion of the hearings, shall file with the Commission a new initial decision on the basis of the entire record herein", including findings and conclusions "upon all the material issues of fact, law or discretion" presented.

Prehearing conferences again led to a clarification of issues and resulted in agreed procedures that facilitated the disposition of the hearings on respondent's defense. A detailed stipulation between the parties (RX 29) also simplified the defense hearings and set forth facts which obviated the necessity for calling numerous witnesses in support of respondent's meeting competition defense. The examiner on May 27, 1963 entered an agreed order which, among other things, required each party to file a pre-trial brief containing (1) a summary of the issues of fact and law the party considered to be presented by the case; (2) the names and addresses of each witness the party intended to call at the hearings, together with a statement of the nature of the witness' testimony; and (3) a list of the exhibits the party intended to introduce in evidence. Inasmuch as respondent had the burden of going forward with evidence on its Section 2(b) defense, it filed its pre-trial brief first, and complaint counsel filed an answering brief thereafter.

Hearings for the receipt of respondent's meeting competition defense were held on August 5–7, 1963 in New York City. Respondent's presentation conformed with the outlines of its pre-trial brief in all pertinent respects. Respondent also presented a detailed stipulation concerning the participation of numerous competitors in the promotional events of J. Weingarten, Inc., together with the amounts of their respective participations (RX 29), and presented the testimony of seven officials of competitors as to their participation in the Weingarten events. In all nine witnesses testified and forty-one exhibits were introduced in support of respondent's meeting competition defense. Complaint counsel's rebuttal evidence was received on October 16, 1963 in Washington, D.C. Only one rebuttal witness was called to testify and two other witnesses were excused by complaint counsel after subpoenas were issued by the examiner for their appearance on complaint counsel's motion. On the latter date, the record was closed for the receipt of evidence. The parties filed proposed findings on November 29, 1963

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[1] The courts held the "meeting competition" defense available in Section 2(d) proceedings. *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F. 2d 499 (D.C. Cir., 1961), cert. denied, 369 U.S. 888 (1962); *Shulton, Inc.* v. *FTC*, 305 F. 2d 36 (7th Cir., 1962).

and replies thereto on December 11, 1963. The hearing examiner has given full consideration thereto and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

Respondent, Max Factor & Company, 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 1655 North McCadden Place, Hollywood, California (Complaint, par. 1; Answer, par. 1). Respondent is now and has been engaged in the business of manufacturing, selling and distributing cosmetics to retail chain store organizations, department stores, independent drug stores, grocery stores, syndicate stores, rack jobbers, and drug wholesalers. Sales made by respondent are substantial and exceeded $45,000,000 in the year 1958, and $53,000,000 in 1959 (Complaint, par. 2; Answer, par. 2; CX 1).

In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in California, to customers located in other States of the United States and in the District of Columbia (Complaint, par. 3; Answer, par. 3).

One of respondent's customers, J. Weingarten, Inc. (hereinafter referred to as Weingarten), with its principal office located at Houston, Texas, is engaged in the operation of a chain of retail supermarkets purchasing and reselling a large number of products, including food, drugs, cosmetics and household articles. Weingarten has 60 such supermarkets located in the States of Texas, Louisiana and Tennessee. 47 of the stores are in Texas, 5 in Louisiana, and 8 in Tennessee. For a number of years Weingarten has been having "Anniversary", "Health and Beauty Carnival" and other promotional sales and, in connection with such sales, its suppliers are requested to participate by making payments in return for which they are to receive newspaper advertising and other promotional services (RX 23). The issues in this case are limited to respondent's participation in three promotional sales. In 1958 it paid Weingarten $885.86 (although $881.14 was the Commitment figure) in connection with the 57th Anniversary Sale and $884.40 for the Ninth Annual May Beauty Carnival; and in 1959 it paid $760.60 in connection with the May Beauty Carnival, as compensation or as allowances for advertising or other services or facilities furnished by or through Weingarten in its offering for sale of products sold to

it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Weingarten in the sale and distribution of products of like grade and quality purchased from respondent. The evidence relating to these matters is detailed in the findings hereinafter set forth.

Before proceeding to discuss the evidence, the observation should be made that the complaint counsel in putting in their case-in-chief were confronted with the situation of using one Max Factor employee and two Weingarten employees as witnesses who were unfriendly and evasive. Mr. James J. Millett, Jr., who has been the respondent's sales representative in the Houston area since August 1953, appeared as a witness on three different occasions, the first time when called by complaint counsel, the second time when he was used by respondent in putting in its defense prior to the remand and the third time when called by the respondent in connection with its meeting competition defense. The testimony given by Mr. Millett is not only evasive but is full of contradictions and in many respects cannot be regarded as credible. The circumstance is illustrated by reciting from page 341 of the transcript when he was called as a witness by complaint counsel:

CROSS EXAMINATION

By Mr. Rowe:

Q. Mr. Millett, very briefly, will you tell us what your responsibilities are as an employee of Max Factor in the Houston area? You are principally a salesperson?

A. Yes, I am a salesman, go out all day long and take orders from people that are our customers.

Q. Do you have any authority with respect to advertising or promotional agreements with Max Factor, with customers in this area?

A. No, I don't.

Then, when called as a witness for the respondent, he had this to say:

By Mr. Rowe:

Q. You have previously testified in this proceeding, Mr. Millett, in the hearings held January 12, 1961?

A. Yes, I did.

Q. Would you state again, sir, the nature of your business on behalf of the Max Factor Company?

A. I am the territorial representative, which includes calling on all of the people that we do business with down here, to write their orders and to handle all the other business that we have with them, which includes calling on the drugstores, department stores, chain stores, building up displays on counters, working with their salespeople, handling our promotions and handling all correspondence pertinent to this territory. (Tr. 359–60.)

In January 1958, Weingarten sent out a letter to its suppliers, soliciting their participation in its *57TH ANNIVERSARY SALE* (CX 20A), which was to be held from February 25 to March 8, 1958. The letter reads in part:

We are highlighting this progress with our great annual event this year * * * the *57TH ANNIVERSARY SALE*. Thirty-nine great big units are taking part, and we are sure that you will want to avail yourself of the opportunity to participate.

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

Many of our suppliers have asked us concerning this event, and we are, therefore, extending to you an opportunity to participate.

The attached sheet shows the prices of participation in the entire promotional program with the difference in prices being due to the different size ads in the various cities which will be included in a newspaper section.

Please mail the attached card indicating your intentions, and we would appreciate it if it would reach us no later than February 3rd, so we may formulate our plans accordingly.

There was attached to the letter a sheet setting forth a schedule of prices *for the entire promotional program* and the supplier was given the option of selecting one of five categories of participation with the prices varying according to the size of the newspaper advertisement (CX 20B). For example, $881.14 was specified for the "Entire Service Which Includes Approximately 1/8 Page" newspaper ads in five Weingarten trade areas. Ninety of Weingarten's suppliers participated in the sale and made contributions totaling $23,538.37 (CX 6A–D). Mr. Millett received a copy of the letter and discussed with Mr. Bob Framson, Weingarten's cosmetics buyer, Max Factor's participation in the promotion. Such discussion may have taken place prior to the time the letter was sent out (Tr. 843–45). Apparently at that time it was agreed that Max Factor would participate, featuring its product "Creme Puff Combination" (Tr. 404). However, on January 31, 1958 Mr. Millett and the respondent's Sales Manager, Al Rubin, met with Weingarten's Mr. Framson when the 57th Anniversary Sale was discussed, and it was agreed that the products "Sebb" and "Curl Control" would be featured instead of "Creme Puff Combination" (Tr. 818–20). When Mr. Millett was questioned with regard to the extent of Max Factor's participation, he gave the unbelievable answer: "No mention was made of a certain figure that we would pay" (Tr. 849). A written advertising authorization, dated February 19, 1958, was issued by Max Factor at its Hollywood, California office to Weingar-

ten to run advertising in specified newspapers on a cooperative 75-25% basis during the 57th Anniversary Sale, product Creme Puff Combs, in the total amount of $881.14, of which Factor's 75% share would be $660.86 (CX 4). It should be noted that the authorization is for newspaper advertising only, and it would seem that it was issued on the basis of Mr. Millett's first discussion with Weingarten's Mr. Framson with regard to the 57th Anniversary Sale. On March 7, 1958, Weingarten billed Max Factor "For Your Participation in Our 57th Anniversary Sale $881.14" (CX 7). Payment of the billed amount is shown by a tabulation prepared by Weingarten, which sets forth that on 4-8-58 it received Max Factor's check # 12084 dated 3/25 and on 6-6-58 it received Max Factor's check # 6868 dated 6/4 (CX 9). The newspaper cost to Weingarten for advertising Max Factor & Company and the featured products in connection with the 57th Anniversary Sale totaled $373.77, but, as the record shows, the newspaper cost was only part of the promotion purchased by Max Factor and did not include Radio, television, bulletins and other items involved in the promotion (CX 10). The specific expense to Weingarten for items other than newspaper costs is not shown by the record.

It is the position of respondent that it had only participated in the promotional sale in the amount of $660 as set forth in the written authorization (CX 4). In putting in its defense, respondent called Mr. Melcombe, one of its accountants from its Hollywood office, who was the custodian of some of its records, and through him there were offered and received in evidence the two checks which the Weingarten records showed that it had received from respondent in payment of Max Factor's participation in the promotion in question. Check #12084 (RX 20) payable to Weingarten, Inc., dated 3-25-58, is in the amount of $660.86 and drawn on Max Factor's account in the Security-First National Bank of Los Angeles. Check #6868 (RX 21) payable to Weingarten's, Attention: Mr. Bob Framson, Buyer, dated June 4-58, is in the amount of $225.00 and drawn on the Max Factor account in the Citizens National Trust & Savings Bank of Los Angeles. Mr. Melcombe testified that his company makes payment to its customers for authorized cooperative advertising from a special checking account kept in the Security-First National Bank of Los Angeles (Tr. 501). The witness also identified a confirmation request which the respondent received from Weingarten with reference to the correctness of the item in the amount of $220.78 appearing in Weingarten's books as being due from Max Factor as of May 31, 1958. Weingarten asked that the reply to the request be made to the auditing firm of Touche, Niven, Bailey & Smart of Houston, Texas

(RX 19A–B). It should be noted that Mr. Melcombe did not profess to have any personal familiarity with the Weingarten transactions and his lack of knowledge in this respect is revealed by the following questions and answers given by him on cross-examination:

Q. Are you familiar with the J. Weingarten account, Mr. Melcombe?

A. I know they are located in Texas. (Tr. 532.)

* * * * * * *

Q. Mr. Melcombe, would you take Respondent's Exhibit No. 21 in evidence, please and tell me why Max Factor paid that sum of $225.00?

A. I haven't got the slightest idea why it was paid.

Q. But you know that it was paid?

A. Yes, sir. I have the canceled check. (Tr 534–5.)

Mr. Millett, called as respondent's witness, identified a copy of a letter dated July 3, 1958 sent to Touche, Niven, Bailey & Smart by Max Factor & Co., authored by Howard A. Lawrence, in reply to the aforementioned confirmation request, which reads in part:

Regarding invoice #27132 dated March 7, 1958 for $220.28, when this bill was originally submitted it was in the amount of $881.14 which represented the full cost of advertising and the agreement that we have with this company is that we pay only 75%. On March 25, 1958 we mailed them our check #12084 in the amount of $660.86 in full payment of this invoice. The balance that you show, $220.28 is the additional 25% that we do not pay and, therefore, is not a valid claim against our company. (RX 15A–B.)

With reference to the foregoing document, Mr. Millett had this to say:

By Mr. Rowe:

* * * * * * *

Q. Thank you, Mr. Millett.

I would like to recall in your mind one aspect of the testimony you rendered on the occasion of the previous hearing here held in January, and I invite your attention, if I may, to the transcript at Page 336, and in substance, Mr. Millett, on that portion of the transcript appears your testimony which, in substance, refers to being bothered by a representative of Weingarten as to certain monies being in dispute between Max Factor Company and the Weingarten Company; is that correct?

A. That's correct.

Q. You testified at that time that you were bothered, to use your word, by representatives of Weingarten at that time in that connection.

A. Yes. They kept mentioning would I contact the company to get them to pay the money they said we owed them.

Q. Have you, to your recollection, Mr. Millett, ever received any correspondence or copies of correspondence relating to this situation of dispute between Max Factor and Weingarten?

A. Yes. I received a letter from Howard Lawrence or a copy of a letter. to a firm of accountants.

Q. I show you at this time, Mr. Millett, a document marked Respondent's Exhibit 15–A and –B for identification, this being a letter by Max Factor, or

a copy of a letter from Max Factor & Company to Touche, Niven, Bailey & Smart, which are accountants in Houston, Texas, dated July 3, 1958, and I ask you whether or not this is a copy of the correspondence which you received.

A. Yes, sir, it is.

Q. And I invite your attention to the third paragraph from the bottom of Page 15-A, and ask you whether the contents of this paragraph refer to the dispute over monies owing, to which you testified in our January hearings in this case.

A. Yes, it does. (Tr. 442-3.)

* * * * * * *

Q. With respect to Exhibit 15-A and -B, Mr. Millett, to the best of your recollection was this sum outstanding dispute ever paid by Max Factor to Weingarten?

A. I don't know that it was, no. (Tr. 444.)

The portion of page 336 of the transcript to which Mr. Millett's attention was invited referred to testimony given by him when called as a witness by complaint counsel. It reads in part:

By Mr. GOODHOPE:

* * * * * * *

Q. You participated in the May Beauty Carnival, did you not, 1958?

A. We were on their counters in a competitive position through the May Carnival.

Q. You also participated in making them a payment for that promotion?

A. As far as I know, we didn't make them a payment.

Q. You didn't?

A. I don't know whether we did or didn't. He bothered me to see if I could get the company to pay the money he said was in dispute. I didn't know anything about it.

Q. What was he bothering you about?

A. As I went in to get the orders from him, he would say, "You still owe us some money."

Hearing Examiner JOHNSON: Who is "he"?

The WITNESS: Mr. Bob Framson.

By Mr. GOODHOPE:

Q. Was that in connection with the Fifty-Seventh Anniversary Sale he was bothering you?

A. He didn't specifically say. As I was leaving, he said once or twice, not on every call, he said, "Would you stop in and see—" whatever that lady's name was—"about this money you owe us?" And she would show me this and that, which didn't make very much sense to me. And as long as I had what I was in there to accomplish, I just let it slide. (Tr. 336-7.)

It seems to be the position of respondent that, because the check #6868 listed on the Weingarten tabulations was in the amount of $225.00 and not for $220.28, which was the amount claimed by Weingarten, together with the letter dated July 3, 1958 sent by respondent to Weingarten's auditors, the inference should be drawn that check

#6868 was in payment of some transaction other than the 57th Anniversary Sale as shown by the Weingarten records. There is no direct testimony in the record that the respondent did not make the payments shown by the Weingarten tabulations received in evidence (CX 6A–D; CX 9). If the $225.00 check was in payment of something other than the 57th Anniversary Sale, the respondent should have produced some one who was familiar with the situation to explain the transaction. This it failed to do. If Max Factor's participation had been limited to newspaper advertising on a 75/25 basis, it would not have paid $660.86, but it would have paid only $280.33, which is 75% of $373.77, the amount expended by Weingarten for Max Factor ads in connection with the promotion sale. Furthermore, if it should be assumed that the respondent's participation totaled only $660.86, it would not alter the conclusions drawn herein.

On April 3, 1958, Weingarten sent a letter to Mr. Jim Millett announcing its 9TH ANNUAL MAY HEALTH & BEAUTY CARNIVAL to take place during May 5, 1958 through May 31, 1958, stating that his company was among twenty participants in the 1957 Carnival. The letter outlined the details of the promotion, showed the extent of the respondent's participation in the 1957 event, and suggested figures for its participation in the 1958 event (CX 21A–B). A tabulation prepared from Weingarten's records shows that 20 of its cosmetic suppliers participated in the 1958 Carnival event and the amount each contributed, totaling $17,639.86. It shows that respondent paid $884.40 (CX 12). In Weingarten's invoices (CX 13 and 14) billing respondent, it lists the latter's participation as follows:

Cash prizes	$300.00
Additional 5% of retail P.M. paid to sales personnel	449.40
Newspaper advertising totaling $180.00 on a "¾ local rate your share"	135.00
Total	884.40

The Max Factor products featured in the 1958 Carnival event were Natural Wave and Primitive Combination (Tr. 412–416). The respondent does not seem to dispute facts set forth in this paragraph detailing its participation in the 1958 Carnival.

On March 17, 1959, Weingarten sent a letter to Mr. C. R. Ruston, Max Factor & Co., Hollywood, California, announcing its 10TH ANNUAL MAY HEALTH & BEAUTY CARNIVAL to be held from May 4, 1959 through May 30, 1959 and invited respondent's participation (CX 27A–B). In reply thereto, Mr. Ruston, on March 24, 1959, wrote to Weingarten wherein he said:

We are asking our Sales Representative in your area, Jim Millett, to contact you personally and discuss this promotion, as in going over past correspondence regarding this same subject for 1958 there seemed to be some misunderstanding regarding cash prizes and by Jim discussing this subject thoroughly with you this year we will not have the same misunderstanding.

The matter of the 5% and advertising will be no problem, but in order to avoid confusion this entire matter will be covered with you at the time of Jim's contact. (CX 28.)

A memorandum signed by Jim Millett and penned at the buyer's desk at Weingarten on April 14, 1959 reads:

MAX FACTOR & Co.

We agree to participate in J. Weingarten's May Carnival by paying a 5% extra PM during the month of May on MFH sales.

We will furnish merchandise prizes of $300.00 at cost. Regular Stock merchandise, of your own choice. (CX 16.)

When called as a witness by complaint counsel, he testified on cross-examination with reference to the document as follows:

By Mr. ROWE:

Q. You say you did not make any copies of this document. Did you inform anyone at the company in Hollywood, your superiors, that such a document had been filled out by you?

A. No, I did not.

Q. Can you tell us why you did not?

A. Well, as I said, I don't have the authority to O.K. arrangements of that nature with an account that size or any other size, and I just preferred that they didn't know about it.

Q. Do you know, Mr. Millett, as a fact, whether or not this particular memorandum which you wrote up was ever fulfilled in any form, whether the arrangements there specified were ever fulfilled by the company.

A. I really don't know. (Tr. 343–44.)

When called as respondent's witness, he testified on cross-examination as follows:

By Mr. BREBBIA:

Q. What was the reason for Mr. Framson making you sign this memo that Mr. Rowe just mentioned, pertaining to the 1959 Carnival?

A. He wanted to know definitely would Max Factor be participating or not participating in this Carnival, and he had to know right then and he wanted to make sure that we were, and I told him that I had to find out from the office before I could commit the company, and that was good enough, and so I had to sign this little bulletin.

Q. In other words, you committed the company without the company's permission?

A. That's right.

Q. You testified earlier you didn't have the authority to commit the company.

A. That's right. I subsequently got my commitment approved by the office.

Hearing Examiner JOHNSON: You say you did get it approved, is that correct?

The WITNESS: Yes, sir. I phoned them later and told them what had occurred. (Tr. 871-72.)

A tabulation prepared from Weingarten's records shows that 20 of its cosmetic suppliers participated in the 1959 Carnival and the amount each contributed, totaling $20,791.45. It shows that respondent paid $760.60 (CX 17). In Weingarten's invoice (CX 18) billing respondent, it lists the latter's participation as follows:

Cash prizes	$300.00
Additional 5% of retail PM paid personnel	460.60
Total	760.60

The products featured in the displays in Weingarten stores were Hypnotique Fragrance and Hi-Society Lipstick. In reference to the 1959 Carnival, the figures shown by the Weingarten records are not disputed by the respondent.

Weingarten carried a complete line of Max Factor products which it purchased directly from the respondent (Tr. 206). Mr. Millett testified, where newspaper advertising was authorized by his company, it was "always made in relation to particular products of the company", and these products were agreed upon by the parties (Tr. 394). Mr. Alfred Firestein, of Hollywood, California, Executive Vice President of the respondent company, testified that:

Every ad for a Max Factor product will carry the Max Factor name. The Max Factor is what we are selling basically. It is the reputation and integrity, the fine quality products that meet the needs of the consumer at a price that is reasonable for the average consumer. (Tr. 772-73.)

In the newspaper ads devoted to respondent in the promotions heretofore discussed, the name Max Factor was prominently set forth, as well as the featured products. In the three promotional events involved herein, the participants were favored with special displays in each of the Weingarten stores. The displays devoted to Max Factor were not devoted to the featured products alone, but to its entire line (Tr. 799). With respect to the special push money (PM), as well as the regular push money, paid by the respondent to Weingarten, the sales clerks were paid the proper percentage of the total of all Max Factor products that they sold during the Carnivals in 1958 and 1959, and had no relation to any particular product (Tr. 857). The "cash prizes", monies paid in connection with said Carnivals by the respondent to Weingarten, were used to make awards to the latter's personnel for displays, percentage of increase over assigned sales quotas and the like which pertain to Max Factor's entire line of products (CX 21A-B). It is therefore found that the promotional payments made by the

respondent to Weingarten, as hereinbefore related, were in connection with the sale by the respondent to Weingarten of all of its products.

To establish that other customers of respondent in the trade areas of Shreveport, Louisiana, and Houston, Texas, competed with Weingarten in the sale and distribution of respondent's products and that such competing customers were not offered payments, such as were paid to Weingarten, on proportionally equal terms, complaint counsel presented the testimony of thirteen witnesses representing twelve retailers and one wholesaler. Three of the retailers had stores in Shreveport, eight had stores in Houston, and one had stores in both cities.

There was evidence that during 1958 and 1959 a Shreveport wholesaler purchased respondent's full line of products and resold them to retailers who were in direct competition with Weingarten, and that the respondent never offered or made available to the wholesaler any advertising or promotional allowances (Tr. 70–87). The Hearing Examiner will disregard this evidence, although he is familiar with the decision of the Commission in *Fred Meyer, Inc.*, Docket No. 7492 (March 29, 1963), now pending on appeal in the U.S. Court of Appeals (Ninth Circuit), for the reason that he does not consider it necessary to involve such an issue in this proceeding.

Each of the retail dealers who testified was appointed a Max Factor dealer by the execution of a written franchise agreement. Under the terms of the agreement, respondent agreed to supply the retailer's normal requirements for Max Factor products and to pay, under specified conditions, advertising and promotional allowances. The retailer agreed to sell Max Factor products, to maintain adequate inventories, to use his best efforts in featuring and promoting the sale of Max Factor products, and to furnish respondent regular and special promotional services (CX 3). The record contains copies of the franchise agreements, which contain the details of three different promotional allowance plans available to the retailer. The franchise agreements also set forth that the respondent would make available on request of the retailer, when authorized by Factor, on a share and share basis, allowances for advertising in newspapers of paid circulation, or radio or television. It would serve no purpose to recite the details of the promotional allowances, including newspaper advertising allowances, available under the franchise agreements in that the respondent cancelled and superseded all such provisions and initiated a new plan effective January 1, 1958. On December 1, 1957, respondent wrote to all of its retailers as follows:

To enable you to achieve a much greater Max Factor volume and profit, we are pleased to announce that we will merge our Cosmetic Division and our Pharma-

ceutical and Specialty Division on January 1, 1958. This means that starting January 1st, all Max Factor products may be combined for discount, promotional allowance and prepaid freight. You will now enjoy 10% greater profit by the direct purchase of products formerly distributed through our Pharmaceutical and Specialty Division and it will be easier and more profitable for you to do an even greater volume on the entire Max Factor line.

Our discounts for all Max Factor products will be retail list price less 33⅓%, less 10% allowance for display and free flow of merchandise less 2% cash discount 10 days EOM. All Max Factor products will be shipped to you on a freight prepaid basis providing the net amount of the order before cash discount equals $75.00 or more.

In addition, we will allow you an extra 8⅓% allowance from the net invoiced amount for payment of P.M.'s providing such incentive compensation is paid to your sales personnel and if you provide us with feature display in your cosmetic department and extra push and extra effort in promoting the sale of Max Factor products in accordance with the attached application. If you will sign and return this application in the self-addressed envelope enclosed, we will process it immediately. The schedule of discounts and allowance outlined here supercedes any earlier agreements and franchises which are to be considered as cancelled January 1, 1958.

We have planned the most dramatic advertising campaign in our history to start off 1958. In addition to strong network TV programming, we will have spot TV, magazines and local newspapers. We feel this is the start of what will be the greatest year in our history and we most sincerely hope that you will participate with us and share in this greatly increased volume.

The provisions of the plan remained in effect during the years of 1958 and 1959. During that period, each retailer called as a witness, and Weingarten, received the 33⅓% trade discount and the 10% allowance for display and free flow of merchandise, the mathematical equivalent of 40%. Respondent invoiced its retailers at the retail list price of the products purchased, less the two discounts or 40%, which would give the amount the retailer was to pay. Each retailer witness, who paid PM's to his salespeople, and Weingarten received the 8⅓% incentive compensation allowance from the net invoice amount (5% of retail list price) (Tr. 421–22, 490–91; CX 38). Each retailer witness, during the period involved, purchased Max Factor products directly from the respondent (Tr. 89, 92, 107, 210, 218, 220, 234, 248, 260, 269, 280, 291, 300, 309), and in the resale of the products was in competition with Weingarten (Tr. 93, 114, 115, 215, 220, 236, 250, 263, 275, 281, 293, 301, 325). Eleven of the retailers, outside of the usual 10% allowance for display and 8⅓% PM's (in the instances where paid) were not offered by the respondent, nor did they receive from the respondent, during the years 1958 or 1959, any advertising or other promotional allowance. The situation was the same with the twelfth retailer, except that it had received newspaper allowances during both years on a 75/25 basis (Tr. 307–326).

There is no evidence in the record to refute the testimony of the Shreveport dealers that, other than the regular and usual 10% and 8⅓% allowances, the respondent did not offer, make available or pay to them any promotional allowances. Respondent called as a witness Mr. Fred W. Hansen who was, at the time involved, its Southern Sales Manager with his headquarters at Atlanta, Georgia, and his territory included the Shreveport area. The testimony given by him does not contradict the facts as hereinbefore found. Mr. Hansen acted in a supervisory capacity, and it does not appear that he had personal contact with the Shreveport dealers. Respondent's salesman, who dealt with such accounts, was not called as a witness.

With reference to the accounts in the Houston area, there is the testimony of Mr. Millett, respondent's sales representative in that area. When called as a witness by complaint counsel on January 12, 1961, Mr. Millet, after evasively going over the circumstances surrounding the payments made by his company for its participation in the Weingarten Anniversary and Carnival Sales in 1958 and 1959, gave the following answers to questions put to him:

Q. Did you make a similar offer to all the other customers in the area?

A. There was no offer made by me at all.

Q. You agreed to make a payment. Do you agree, or did you agree to make a similar payment to all the other customers?

A. I was under pressure to meet the competition of the other lines he showed me were in there.

Q. Did you make the same offer to the other customers?

Mr. ROWE: Object. He hasn't stated he made any offer.

Hearing Examiner JOHNSON: He may answer.

By Mr. GOODHOPE:

Q. Did you agree to make any such payment to any other customers in the area?

A. No, I did not. (Tr. 334–35.)

* * * * * * *

Q. Did you make a similar offer to all the rest of all your competitors of Weingarten in the area about the same time you agreed to make this payment to Weingarten?

A. No. I said I didn't offer to make it. I was sort of forced into making it to maintain my position in his stores.

Q. And you didn't make a similar offer to any of your other customers in that area?

A. No, I did not. (Tr. 337.)

The respondent would disregard what has been recited and rely on portions of Mr. Millett's testimony given by him when called as a witness by respondent on June 6, 1961. At that time he explained how the retail accounts he serviced looked to him as to advertising and

promotional allowances, saying: "I am the person they see from Max Factor and only person—the printed document (franchise agreement) is nice but it gets lost in the files and more or less when they want something clarified, they wait until I come there and discuss it with me" (Tr. 389). Mr. Millett said he periodically called on his retail accounts and discussed with them the promotional and advertising allowances that respondent had available, and that "we discuss with each account on a periodic basis the fact that we do have cooperative advertising, that we are also doing other forms of promotion that they are engaged in" (Tr. 389, 393, 394, 460). On cross-examination, the following exchanges took place:

Q. In the absence of a request, do you offer cooperative advertising to your retailers?

A. My primary job is to sell merchandise, and in the line of selling it, we discuss any way we can to sell more of it. To say I went in and offered it to every account I call on, that would not be true. But we discuss it with everybody. (Tr. 459.)

* * * * * * *

Q. My question is: You were not offering to the other retailers the same you gave to Weingarten, is that correct?

A. That's correct. We didn't offer to Weingarten or to anybody else. (Tr. 471.)

There is no credible evidence in the record to refute the testimony of the Houston dealers that, other than the regular and usual 10% and 8⅓% allowances (except in one instance, previously mentioned, where a dealer received advertising allowances), the respondent did not offer, make available or pay to them any promotional allowances.

That Weingarten received preferential treatment is indicated by respondent's witness, Executive Vice President, Mr. Alfred Firestein, who, on direct examination, testified:

Q. Can you tell us whether cosmetic suppliers, including Max Factor and Company, compete for the business of particular retail accounts?

A. Yes, sir. Certain retail accounts which by reason of their aggressiveness, their prestige, their location, their traffic flow, a number of reasons, have specialized in selling of cosmetics and toiletries, have made quite an effort to sell cosmetics and toiletries, and we as well as all of our competition try to cultivate those accounts who are actively engaged in promoting the sale of cosmetics and toiletries. (Tr. 773–74.)

* * * * * * *

A. When you have a particularly aggressive retailer within an area who, because of his prestige and the nature of his business, is going to have a promotion in which all of our competitors or many of our competitors are going to participate, it would be incumbent upon us probably to go along and participate in that promotion with our competitors, so that we would not lose position within the store during this period and we would not lose the favor of the sales girls,

and we would also not be quite conspicuous to the consumer by our absence by something that would be receiving a great deal of publicity.

Q. Do you know, sir, whether in the years 1958 and 1959 the J. Weingarten Company of Houston, Texas, was such a retailer from your company's standpoint?

A. Yes. (Tr. 780–81.)

On cross-examination he testified:

Q. I asked the question because you indicated the necessity in certain instances of entering promotions where your competitors are involved.

A. Yes.

Q. And I asked you whether the logical corollary to that answer of yours would be if you would participate if competition required it regardless of the plan.

Mr. ROWE: Objection. That isn't a corollary.

Hearing Examiner JOHNSON: He may answer it.

A. It is possible that under extreme competitive pressure, yes, we would go along with the promotion. (Tr. 788.)

In respondent's proposed findings, it is said:

37. Therefore, with respect to the availability of respondent's promotional allowances, the record shows that each independent retailer who was called to testify in this proceeding was party signatory to a franchise agreement; that he received written and oral notification of modifications of the agreement from time to time; that he was periodically apprised by respondent's sales representatives as to the availability of the allowances under Max Factor's program; and, finally, that he in fact received the 10% promotional and 8⅓% incentive allowance available under the Max Factor program. * * *

38. Staff counsel's only evidence to controvert this showing is the testimony of twelve "competitor" witnesses, in response to leading questions whether or not the witness had been "offered" allowances by respondent's representatives or employees in 1958 and 1959. Precisely what staff counsel intended to elicit by his question is not entirely clear, since Section 2(d) speaks in terms of "availability" of promotional payments. * * *

In the initial decision of *HMH Publishing Co., Inc.*, Docket No. 8516, dated February 5, 1963 (adopted by the Commission on March 28, 1963), this hearing examiner had the following to say about the term "available":

The respondent considers the provision prohibiting respondent from making a payment which is not "affirmatively offered and otherwise made available" to competing customers as being unusual and unique and it goes on to state that such a requirement goes far beyond the terms of Section 2(d) which direct only that the payments be "made available" to competing customers.

The Commission has held in a number of cases that a customer must be informed of an allowance before it can be deemed to be available. In *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89, 95 (1954), in rejecting respondents' contention that the Hearing Examiner erred in concluding in effect that the Act requires that sellers must inform customers as to the terms under which they may receive compensation for services or otherwise offer such credits

when they have been made available to sellers competing with such customers, the Commission stated:

Although the word "available" rather than "offered" appears in the relevant subsection of the Act, the statute contemplates that customers competing in the resale of a seller's merchandise be afforded equal opportunity to share in payments for promotional services in the event the seller elects in the first instance to provide it to one of their competitors. A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not "available" to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated.

In *Henry Rosenfield, Inc., et al.*, 52 F.T.C. 1535, 1548 (1956), the Commission said:

The respondents' advertising allowances have not been granted by them on proportionally equal terms to their competing customers; and there is clear record showing that their failure to inform all accounts as to the terms under which allowances were being accorded has deprived those so disfavored of equal competitive opportunities in reselling the dresses. It follows, therefore, that respondents' promotional allowances were unavailable, as a matter of law, among competing customers. Under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals. *In the Matter of Kay Windsor Frocks, Inc., et al.*, Docket No. 5735.

In *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050, 1059, 1060 (1957), it is said:

The Commission's interpretation of the word "available" used in Section 2(d) as requiring an offer has been clearly expressed in the matters of *Kay Windsor Frocks, Inc., et al.*, Docket No. 5735, and *Henry Rosenfeld, Inc., et al.*, Docket No. 6212. It is that, under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals.

It is further stated:

Once a seller determines upon a plan of advertising allowances, the plan must be affirmatively made known to every customer. Whether or not a customer participates therein is a decision for the customer. The customer obviously must know the specific terms of a plan before he can determine whether he is interested in participating. In this respect the seller's offering of a plan serves a worthwhile purpose.

In the initial decision in *Exquisite Form Brassiere, Inc.*, Docket No. 6966, adopted by the Commission on October 31, 1960, it is said:

It is settled law, and indeed respondent's counsel concedes, that the term "available" as used in § 2(d) means that the payment must be offered, and the terms made known, to all competing customers.

The foregoing pronouncements interpreting the statutory term "available" leave no doubt that an affirmative offering to each and every competing customer must be made by the seller once the latter decides to grant advertising allowances to any. It should be apparent that respondent's objections to the use of the words "affirmatively offered" are groundless, in that it does not involve any obligation on the respondent which is not imposed by the statute as construed by the Commission.

Respondent's "de minimis" Defense

With respect to the respondent's "de minimis" defense, pleaded in its answer, the Hearing Examiner does not regard the payments made by the respondent as negligible or inconsequential, and therefore finds that there is no merit to such defense.

Respondent's Meeting Competition Defense

In addition to the respondent, a number of companies, engaged in the business of manufacturing, selling and distributing cosmetics and toiletries to retail chain store organizations, department stores and independent drug stores, participated in the three special promotional events of Weingarten which are the subject of this controversy. The amounts paid by such companies to Weingarten in connection with the promotions were as follows:

57TH ANNIVERSARY SALE—1958

Lanolin Plus, Inc	$881.14
Nestle-Lemur	881.14
Shulton, Inc	881.14
Bourjois, Inc	881.14
Helene Curtis Industries, Inc	326.05
Rapidol Distributing Corp	352.35

(CX 5, CX 6A–D.)

BEAUTY CARNIVAL—1958

Beaute Vues Corp	900.50
Bourjois, Inc	1,054.05
Barbara Gould Diversified Associates	616.20
Dorothy Gray, Ltd	737.70
Dorothy Perkins Co	506.00
David, Redfield & Johnstone, Inc. (Blensol)	489.70
Houbigant Sales Corp	153.81
Lambert-Hudnut Pharmaceutical	991.15
Lanolin Plus, Inc	1,093.50
Lenel Perfumes	747.10
Lenthric, Inc	462.80

Paragon Distributing Corp	$576.00
Revlon Products, Inc	998.00
Richard Hudnut Sales, Inc	1,252.10
Tussy Cosmetiques	1,592.55
Shulton, Inc	1,721.30

(CX 12, RX 29.)

BEAUTY CARNIVAL—1959

Alberto-Culver Co	929.75
Beaute Vues Corp	943.70
Bourjois, Inc	1,140.15
Barbara Gould Dana Perfumes Corp	1,008.80
Dorothy Perkins Co	997.10
Fletcher, Richards, Culkins & Holden (Blensol)	504.00
Dorothy Gray, Ltd	1,076.90
Hazel Bishop, Inc	489.90
Houbigant Sales Corp	214.50
Helena Rubinstein, Inc	1,620.20
Paragon Distributing Corp	690.00
Revlon, Inc	1,248.30
Richard Hudnut Sales, Inc	1,382.40
Tussy Cosmetiques	1,828.50
Shulton, Inc	2,047.40

(CX 17, RX 29.)

Respondent, at the hearings on its meeting competition defense, called officers or employees of some of its competitors, who testified regarding the participation of their own companies in one or more of the three Weingarten sales events. Specifically with respect to the 57th Anniversary Sale, testimony was adduced from Charles T. Bigelman, treasurer of Bourjois, Inc., a full line cosmetic and toiletry supplier which competes with respondent in the sale of such products to J. Weingarten, Inc.; and Allen D. Choka, chief counsel of Helene Curtis Industries, Inc., a hair, toiletry and fragrance product supplier which also competes with respondent (Tr. 689–98, 752–63). Specifically with respect to the May Health and Beauty Carnivals in 1958 and 1959, testimony was adduced from James M. Boohecker, General Manager of Dorothy Gray, Ltd., a full line cosmetic and toiletry supplier which competes with respondent for the custom of Weingarten; William P. Schliemann, marketing services manager of Tussy Cosmetics, a division of Lehn & Fink Products Corp. which markets a full line of cosmetic and toiletry products in competition with respondent; and Herbert T. Georgi, vice president of Houparco, Inc., parent of Houbigant, Inc. and Cheramy Co. which manufacture fragrance products that are sold in competition with respondent (Tr. 702–43). In addition, Victor Silberfeld, executive assistant to the vice president for ad-

vertising and sales of Helena Rubinstein, Inc., a full line cosmetic and toiletry supplier which competes with respondent, testified specifically with respect to participation in the May 1959 Health and Beauty Carnival, and Bernard Nemtzow, counsel and general secretary of Warner-Lambert Pharmaceutical Co. which, through one of its divisions, sells various products in competition with respondent, specifically testified with respect to participation in the 1958 May Health and Beauty Carnival (Tr. 663–83, 744–51). Respondent also presented the testimony of Alfred Firestein, Executive Vice President and formerly Director of Marketing of Max Factor & Co., and of James Millett, Max Factor sales representative in the Houston, Texas area. Both witnesses testified as to the background and circumstances surrounding respondent's participation in each of the controverted sales events of Weingarten (Tr. 765–875). Complaint counsel called only one witness in rebuttal, Robert H. Tetley, regional sales manager for Dorothy Gray, Ltd., although he had previously subpoenaed two other witnesses, George Barbat, a sales representative for Tussy Cosmetics, and Robert Framson, cosmetic and toiletry buyer for J. Weingarten, Inc. (Tr. 887, 890–925; Motion for Submission of Rebuttal Evidence, August 16, 1963).

As the testimony of industry witnesses makes clear, adequate shelf space, proper display and aggressive personal selling at the retail level—the final link between the manufacturer and the ultimate consumer—are essential to sales success in the highly competitive cosmetics industry (Tr. 723–24, 773–77). Consequently, suppliers' sales representatives are continually alert to preserve and improve their line's shelf space, position and display, and must constantly maintain good relations with retailers' sales personnel to build and maintain their enthusiasm for the supplier's products (Tr. 785, 805, 864). As an incentive to the salesgirls, respondent and other cosmetic suppliers provide funds for the payment of PM's (push money) or incentive compensation. These payments are made to the girls in the form of commissions based on each girl's sales of each supplier's products, typically 5% of their retail price or its equivalent (Tr. 495–96, 668, 709, 737, 777–78). In view of her small regular salary, it is only natural that a salesgirl's motivations to emphasize the sales of a particular supplier's products will be affected by the amount of such incentive compensation she receives (Tr. 724, 777–78, 864). During special sales events such as the Weingarten Anniversary Sales and Beauty Carnivals, promotional efforts at the retail level are greatly increased. Eye-catching mass displays (e.g., RX 40A–F, 41A–J) supplement normal shelf space arrangement (Tr. 668, 736, 804, 806–8). Salesgirls step up

their demonstration and sales activity to stimulate the sales of the products of suppliers participating in the event through the payment of extra PM's and prize money (or merchandise) for the girls (Tr. 669, 707–8, 721–22, 736–37, 778, 833–34). The increased promotional activity at such special sales events has important short and long range effects on a participating supplier's sales. Not only are the immediate sales of the featured products sharply increased, but new users may be attracted, both to the featured products and the manufacturer's entire line (Tr. 356, 411). In addition, the extra PM's and prize money create a favorable attitude in the salesgirls which continues long after the event (Tr. 723–24, 834–35). Conversely, a nonparticipating supplier may expect enduring adverse effects. His products may be shunted to unfavorable locations or even taken off display entirely to make room for participating suppliers' products (Tr. 826, 833, 838–40). In such a case, it is difficult to regain the former shelf and display position, which has taken years to build up (Tr. 776, 834–35, 839–40). Moreover, because the salesgirls naturally concentrate their efforts during special events in the lines paying them increased compensation, it is "ridiculous" for a manufacturer not to match the special incentives offered by his competitors (Tr. 671). And in view of the "mental gymnastics" required for a salesgirl to switch loyalties and push the products of suppliers who have not assisted her in the past, failure to participate in special events may also have a longer range adverse effect on the salesgirls' attitude toward non-participating manufacturers and hence on the essential personal sales push to the ultimate consumer (Tr. 778–79, 835).

As to the participation by respondent's customers in the Weingarten 57th Anniversary Sale, respondent's representative, Mr. Millett, testified that he "certainly had no reason to believe they were unlawful. They had had anniversary sales in the past, and I had seen ads and I certainly didn't—nobody ever raised any question about them being legal or illegal to me" (Tr. 827). With reference to competitors' participation in the 1958 Carnival, the same witness testified that he "had no reason to believe that anything was unlawful. There had been these carnivals ever since I had been in the territory, and nobody ever raised any question" (Tr. 835). As for the participation of respondent's competitors in the Weingarten 1959 Carnival, the witness testified that he "certainly didn't have any reason to believe they were unlawful" for the reason "They had been as many other anniversary and carnival type sales, and nobody ever raised any question of whether they were illegal to me" (Tr. 840–41). The seven competitors' witnesses called

by the respondent testified with reference to the lawfulness of their participation in the Weingarten promotions.

Mr. Silberfeld identified a document (RX 33) which reflected Helena Rubinstein's advertising and promotional allowance plan, which was in effect in the year 1959 and available to all retailers in the Houston trade area at the time (Tr. 665). He said that Helena Rubinstein's participation in the Weingarten 1959 promotional event was within the framework of the company's policy (Tr. 670). The witness said that "the Helena Rubinstein program as reflected on Respondent's Exhibit 33 was * * * submitted to the Federal Trade Commission as part of a notice of compliance by Helena Rubinstein" (Tr. 671–72). Official notice was taken that there is a cease and desist order issued in the matter of *Helena Rubinstein*, Docket No. 6441, of the Federal Trade Commission (Tr. 673–74). He also said that, subsequent to the participation of Helena Rubinstein in the Weingarten 1959 Beauty Carnival, such participation was never questioned by the Commission (Tr. 675). The witness stated that Helena Rubinstein's participation in the Weingarten 1959 Carnival "was in accordance with the advertising and promotional policy, Exhibit 33 * * * which was made available to all retail customers in the trade area in which Weingarten was a customer of Helena Rubinstein" (Tr. 685–86).

Mr. Bigelman, after identifying the Bourjois Advertising and Promotion Agreement with Weingarten, which was in effect in the year 1958 (RX 54, Tr. 692), testified that he had no personal knowledge of the transactions between his company and Weingarten in 1958 (Tr. 693), and he was unable to say whether or not Bourjois' participation in the 1957 Anniversary Sale fell within the company's policy (Tr. 696). He testified further that the files of the company show Bourjois was contacted by the Federal Trade Commission with reference to its participation in the Weingarten Anniversary Sale, but he was unable to say whether there was any subsequent inquiry by the Commission with respect thereto (Tr. 696–97).

Mr. Georgi testified that the advertising and promotional programs of Houbigant, as reflected in Respondent's Exhibits 46A through E, and 47A and B, were in effect during the years 1958 and 1959, and were available to all retail customers of the company (Tr. 704–5). He said that Houbigant's participations in the 1958 and 1959 Weingarten May Carnivals were "definitely" within the framework of the Company's programs. He also said, as far as he knew, the participations were never questioned by the Federal Trade Commission (Tr. 710).

Dorothy Gray's General Manager Boohecker identified a docu-

ment, "Statement of Marketing Policy" (RX 39A–D), setting forth the company's promotional program which was in effect in 1958 and 1959 and available to Dorothy Gray's retail accounts in the Houston, Texas trading area (Tr. 719). It was his testimony that Dorothy Gray's participation with Weingarten in the May, 1958 and 1959 promotions was within the framework of the company's marketing policy (Tr. 722). On cross-examination, when asked for the "prime reason for agreeing to participating in specifically these two promotions" (Tr. 732), Mr. Boohecker answered: "Because it fitted perfectly with Dorothy Gray's merchandising plans in general." The witness also said, on direct, that, to his knowledge, Dorothy Gray's participation in the May, 1958 and 1959 Weingarten Carnivals was never questioned by the Commission (Tr. 724).

Mr. Schliemann identified a "Tussy Cosmetic, Statement of Marketing Policy" (RX 37A–D), which was in effect in 1958 and 1959 and available to Tussy's retail customers in the Houston area in those years (Tr. 735). The witness said that the participation in the May, 1958 and May, 1959 Weingarten Carnivals was within the framework of the Tussy marketing policy and, to the best of his knowledge, such participation was never questioned by the Commission (Tr. 737–38).

Mr. Nemtzow identified the "Lambert-Hudnut, General Promotion Agreement" (RX 50), which was in force during 1958 and available to retail customers in the Houston, Texas area. He testified that, to his knowledge, the company's participations in the Weingarten promotions were never questioned by the Federal Trade Commission (Tr. 748).

Mr. Choka, of Helene Curtis Company, identified a "Special Cooperative Advertising Promotion Agreement" (RX 59), which was used during 1958 for promotions that were run by his company, and he stated that Helene Curtis' participation in the Weingarten 57th Anniversary Sale in the amount of $320.05 was "within the over-all framework of its promotional program." The witness testified that his company received a letter from the Federal Trade Commission, dated March 20, 1959, stating that an investigation was being conducted to determine whether Weingarten or its suppliers have engaged in acts which are in violation of the Federal Trade Commission Act or the Clayton Act, and requested considerable detailed information with respect to Helene Curtis' participation in Weingarten's promotion sales during 1958 (RX 61A–D, Tr. 756). By letters, dated April 27, 1959 (RX 62A–C), and June 5, 1959 (RX 63), Helene Curtis made an explanation with respect to its participation in the Weingarten event (Tr. 756–57). Thereafter, Helene Curtis did not hear from the

Commission on this subject. One of the details set forth in the first reply letter read:

> (d) Our salesman was told that other firms were cooperating with Weingarten and felt that we would be prejudiced if we did not participate. We communicated with our salesman on September 23, 1958 after learning about his commitment. He was a new salesman not familiar with our practices and we advised him these required him to submit the matter to the Home Office for approval. The amount paid to J. Weingarten, Inc. for the advertising in question was not in excess of the amount they would have been entitled to receive under our regular sales promotion allowance, which is offered to all customers of the same class. (RX 62B.)

The witness on direct examination expressed the opinion, as counsel for the company, that Helene Curtis acted lawfully in this matter. On cross-examination, Mr. Choka testified that the salesman who made the arrangements with Weingarten was reprimanded for two reasons: One, that the participation did not fall within the company's plan; and, two, all promotions were to be approved by the home office.

Mr. Millett consistently testified that respondent's participation in the Weingarten promotions in every instance was for the purpose of meeting competition in order to protect Max Factor's competitive position with Weingarten in self defense (Tr. 841, 860–61). He also testified that he was without "any authority with respect to advertising or promotional agreements with Max Factor, with customers in this area" (Tr. 341). He stated further that newspaper advertising is approved in Hollywood and "Max Factor's participation on incentive payments or other promotional payments" is "approved by the people directly above me, the Sales Department" (Tr. 342). With reference to the memorandum (CX 16), hereinbefore referred to, where he committed the respondent to participate in the 1959 Carnival, he had this to say: "Well, as I said, I don't have the authority to O.K. arrangements of that nature with an account that size or any other size . . . ." (Tr. 343). The situation with reference to Mr. Millett's authority is well illustrated when he testified:

> Q. Would you ever participate in a promotion in which your major competitors did not?
>
> A. Possibly we would, yes.
>
> Q. And if you did, what would the reason be?
>
> A. The decision to participate in promotions and special events is in the hands of the sales manager. The theory behind it would be, if it fitted in with our plans, if it seemed to be important at the time, whatever the reason was that it just seemed we wanted to participate in this promotion with this particular account, we might.
>
> Q. What would be your prime reason in participating aside from competition?

A. Aside from competition, it hasn't occurred in my territory, but the sales manager, as I say, has the final say-so over these approvals or disapprovals, and what all of the circumstances would be, I can't imagine, but I'm sure it could happen.

Q. Did you have any authority to make arrangements in these promotions for the company?

A. I didn't have authority to commit the company; no. (Tr. 849–50.)

There is a want of any evidence in the record that the person, who authorized respondent's participation in the Weingarten promotions, based his decision to participate on the competitive situation.

The only evidence in the record with reference to prior knowledge of the acts of respondent's competitors which it purports to be meeting is the testimony of Mr. Millett.

With respect to the respondent's participation in the 57th Anniversary Sale, Mr. Millett said that on January 13, 1958 he and Al Rubin, his sales manager, called upon Bob Framson, Weingarten's cosmetic buyer (Tr. 818–19). As to what took place at that time, Mr. Millett had this to say:

Q. Would you tell us, Mr. Millett, prior to and at the time the decision was made as you have testified to on January 31, 1958 for Max Factor to participate by advertising Sebb and Curl Control, whether you knew of other companies or competitors participating also?

A. Yes.

Q. Would you tell us how you know that or knew that? (Tr. 821.)

* * * * * * *

The WITNESS: Well, in our discussions when these particular events were brought up, he mentioned, or he told us that Helene Curtis and Bourjois, Lanolin Plus, and other similar companies to this, will be competing in this Anniversary event, particularly since we wanted to feature these type of commodity products, Curl Control and Sebb, we felt that it would be highly to our disadvantage if we weren't also being featured, because these companies were heavily involved in commodity-type products, and so, with this background, we decided to participate in this Anniversary event, and feature these type of products. (Tr. 822.)

* * * * * * *

Hearing Examiner JOHNSON: Did he tell the extent in which these competitors were going to compete in this event?

The WITNESS: Not exactly what they were going to do, but from my experience, the way he told us—

Hearing Examiner JOHNSON: I am just asking you what he told you.

The WITNESS: They would make mass displays of these competitive products, that's what he said, and I have seen mass displays in these type of stores, so I knew roughly what he was talking about.

Hearing Examiner JOHNSON: But he did not tell you specifically in what manner they were going to produce it?

The WITNESS: No, except that it was going to be advertising.

Hearing Examiner JOHNSON: I am asking if he said anything specific.

The WITNESS: No; he said these competing companies would be participating in this Anniversary event, and I presume—

Hearing Examiner JOHNSON: Not what you presume. What did he tell you?

The WITNESS: He didn't say specifically what size or anything that they were going to take.

Hearing Examiner JOHNSON: Are there any details about it?

The WITNESS: No; he said that they were going to be in it. (Tr. 823–24.)

According to Mr. Millett, Max Factor's decision to participate in the 1958 Carnival was tentatively made on March 23, 1958 when he and Mr. Rubin called on Mr. Framson at Weingarten's (Tr. 827–29). With reference to the meeting, the witness said:

Well, in our discussions, he [Mr. Framson] said that the Carnival was coming up and that our major competitors Dorothy Gray, Tussy, and Revlon and DuBarry were going to be participating in it, and that he would like very much to line up our participating right then and there, and that was about it. We agreed tentatively to participate, and that he said that Mr. Rubin said that I would be back in a few weeks to line up the details. At that time we also took these orders for the products that we had mutually agreed upon to feature during the forthcoming event. (Tr. 829.)

Mr. Millett testified that his company's decision to participate in the 1959 Carnival was made on April 14, 1959 when he called on Mr. Framson who "told me again that our major competitors were going to be—in fact—had already signed up to participate, including Revlon, Dorothy Gray, Tussy, DuBarry" (Tr. 835–36). It was during this meeting that Mr. Millett wrote and signed the memo (CX 16), which has been mentioned before, to the effect that Max Factor would participate to the extent of an extra five percent P.M. and $300 worth of prizes (Tr. 836). However, the decision to participate in the 1959 Carnival appears to have been made on March 24, 1959 by Mr. C. R. Ruston, who was at the time the respondent's Sales Manager located at Hollywood. On March 17, 1959, Weingarten wrote a letter to Mr. Ruston soliciting the respondent's participation in the 1959 Carnival and suggesting prizes in the amount of $300.00, an additional 5% P.M. on reported retail sales and newspaper advertising of $200.00 (CX 27A–B). Mr. Ruston, by letter dated March 24, 1959 (CX 28) in responding to the solicitation, said:

We are asking our Sales Representative in your area, Jim Millett, to contact you personally and discuss this promotion, as in going over past correspondence regarding this same subject for 1958 there seemed to be some misunderstanding regarding cash prizes and by Jim discussing this subject thoroughly with you this year we will not have the same misunderstanding.

The matter of the 5% and advertising will be no problem, but in order to avoid confusion this entire matter will be covered with you at the time of Jim's contact.

Mr. Millett said that he received the letter and was asked by Mr. Ruston on that day to contact Weingarten for that purpose (Tr. 837–38). With respect to this situation, Mr. Millett on cross-examination testified:

The company and I were in virtual agreement on this prior to my committing them, but this was something I had to do to get this sewed up at this time. Mr. Ruston's letter to me, which I have a copy, to Weingarten's, virtually laid out the way we would operate, but he wanted more information as to the exact details of it, and I normally would have reported in to him that evening and told him the details, and then we could have come back another day and tied the whole thing up, but in this instance he had to know right then. (Tr. 873–74.)

On further cross-examination, he had this to say:

By Mr. BREBBIA:

Q. Mr. Millett, you have testified that in each one of these three Weingarten promotions that we have been discussing here today, that Mr. Framson, the drug buyer, informed you of certain competitors who would be participating in these promotions, and I believe you stated that he did not give you any further details of the promotions or participations of these individuals.

Mr. ROWE: I object, Your Honor. I don't believe that's an accurate characterization of the record as to what Mr. Framson did.

Hearing Examiner JOHNSON: He may answer the question.

A. Any further details of their participation, like, for instance, in the anniversary sale that these competitors would be involved in, the advertising in all of these cities, he would tell me that.

Q. How much, for instance, they would participate, in what amount?

A. Dollars and cents wise?

Q. Yes.

A. No; he didn't mention that.

Q. He didn't?

A. No.

Q. Did you attempt to elicit from Mr. Framson any further details of the participation aside from the information that you have testified to today that he gave you?

A. No; I didn't. (Tr. 841–42.)

Mr. Millett admitted that he did not even know the amount of his company's participation in the 57th Anniversary Sale (Tr. 846–48):

By Mr. BREBBIA:

Q. Did you participate in this promotion, the 57th Anniversary Sale under one of the form of the participation which is listed in Commission's Exhibit 20–B and C?

A. We agreed in the 57th Anniversary Sale to participate and to run so much advertising, whatever number of instances were involved, and at that time it was decided upon how much advertising would be run, and as far as I know, it was under our regular plan.

Q. Was the amount determined by this literature, Commission's Exhibit—

* * * * * * *

Q. —Commission's Exhibit 20–B or C, which lists amounts of participation in the 57th Annual Sale?

A. I wouldn't know that. The only thing I know, these things are paid from Hollywood, and the only thing I can say is what happened the day we were there.

Q. What was mentioned regarding your participation in the sale?

A. That we would feature Curl Control and Sebb, and that we would run some advertising in all of the cities that they had stores in.

Q. Did you determine at that time what the amount of the advertising was?

A. No; this was—as far as I know, we didn't know. Nothing was said to me, except that we would run advertising under a certain size ad in each of these cities. (Tr. 846–48.)

Subsequently, on re-direct, respondent's counsel tried to develop through Mr. Millett that a recipient of Weingarten's solicitation letters in connection with the Beauty Carnivals in 1958 and 1959 (CX 21A–B, CX 27A–B) would know the type and general basis of the participation of another company which was participating (Tr. 864–65):

Q. Would the recipient of such a circular know the type and general basis of the participation of another company which was participating?

A. Yes; he would.

Hearing Examiner JOHNSON: How would he known that?

The WITNESS: The extra five percent PM——

Hearing Examiner JOHNSON: The question is, how do you know that? Do you remember the question?

The WITNESS: How would I know that this was more or less a standard set of participation?

Hearing Examiner JOHNSON: How do you know it, the extent of their participation? You have indicated contradictory testimony. You said you didn't know the extent of their participation.

The WITNESS: I knew to the extent that they, the girls, got ten percent of the PMs on all of the lines that did participate in the Carnivals.

Hearing Examiner JOHNSON: How do you know that?

The WITNESS: By talking to the girls.

Hearing Examiner JOHNSON: After the promotion?

The WITNESS: No; during the promotion. (Tr. 865.)

On re-cross-examination, Mr. Millett responded:

By Mr. BREBBIA:

Q. Did you ever have occasion to specifically discuss CX–21–A, that's the solicitation letter dated April, 1958, in April or when you made the visit to him regarding your participation in the sale?

A. I don't believe so; not specifically.

Q. How about CX–27–A, which is the solicitation—

* * * * * * *

Q. — for your participation in the 1959 Annual Health and Beauty Carnival?

A. Yes; I believe I discussed it with Mr. Framson on this one.

Q. Did you have any discussion with Mr. Framson under this solicitation letter that your competitors would make?

A. As to any specific sum of money, no.

Hearing Examiner JOHNSON: Or any specific percentage?

The WITNESS: He told me that they paid an extra five percent, all of them that participated, extra push money, but, of course, it would vary from the sales, how much they actually paid. In other words, if one line sold $5,000 and another line sold $3,000, the line that sold $5,000, they would have to pay more money.

By Mr. BREBBIA:

Q. How about prize money?

A. This was usually a fixed amount; it didn't fluctuate with the amount of sales.

Q. When you originally testified today, you testified that the only details that Mr. Framson discussed with you was the participation of particular competitors of yours, is that correct?

Mr. ROWE: Counsel, I don't recall that specific testimony.

Hearing Examiner JOHNSON: Let him answer the question.

A. Again, the question was—

Q. You did not at the time of your original testimony on the subject of your visit with Mr. Framson regarding the 1959 May Health Beauty Carnival, indicate that he discussed with you the fact that the competitors whom he named were going to pay a ten percent additional PM.

Mr. ROWE: There is no ten percent; it is five percent.

A. They paid an additional five percent. If he didn't suggest it, he didn't say it in so many words. We both knew this was exactly what we were talking about, this is the basis of participating, that is, paying the extra five percent PM recorded on our line in that month.

Hearing Examiner JOHNSON: It isn't so much what you knew. What was said?

The WITNESS: He certainly would have told me what the participations for the other lines were as well as ours.

By Mr. BREBBIA:

Q. You are saying he would have. The question is did he.

A. Yes; he did. (Tr. 867–70.)

There are the following expressions of the Commission with reference to the necessity of showing prior knowledge on the part of the discriminator of the acts of the competitor which he purports to be meeting to sustain a meeting competition defense:

In *Forster Mfg. Co., Inc., et al.*, Docket No. 7207 (March 18, 1963), the Commission said:

> Respondents contend that the four discriminatory sales made to Armour in 1956 were all "preceded" by sales at even lower prices by competitors. But here again, as in their discriminations in favor of MCA and Hantover, there was no showing that, when respondents granted these special prices to Armour, they had any knowledge of the prices being charged Armour by their competitors. In the absence of such knowledge, it is impossible to find that respondents' discriminatory sales were made "in good faith to meet an equally low price of a competitor." (p. 28.)

* * * * * * *

It is important, therefore, that the seller relying on Section 2(b) ascertain in advance not only the price he purports to be meeting, but the identity of the competitor who is allegedly offering it. (p. 36.)

In *Exquisite Form Brassiere, Inc.*, Docket No. 6966, the Commission, in its opinion issued on January 20, 1964, said:

An essential element in the establishment of a meeting competition defense is that of "good faith." Implicit within the element of good faith is evidence that the respondent was genuinely responding to some particular action on the part of a competitor. Patently, an awareness of the competitor's allowance prior to the attempt to meet it is an integral aspect of a showing of good faith responsiveness. Examination of the legislative history of this section lends strong support of the requirement of actual awareness of the acts purportedly met. There it was stated:

This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices *until his competitor has first offered* lower prices, * * * In other words, the proviso permits the seller to meet the price *actually previously offered* by a local competitor. * * * H.R. Rep. 2287, 74th Cong., 2d Sess., p. 16. (Emphasis supplied.) (p. 6.)

* * * * * * *

In a case where a proponent of the Section 2(b) defense wholly fails to show any prior knowledge of the acts of his competitor which he purports to be meeting, we conclude that the element of good faith is lacking. The meeting competition defense does not sanction the fortuitous meeting of competition which occurs when the manufacturer discriminates and then in hindsight points to the previously unknown fact that another was granting similar allowances at the same time. The absence of even a scintilla of evidence showing that the proponent of the defense was in some manner aware of its competitors' acts, which it was supposedly meeting, clearly precludes a finding of the good faith responsiveness required by this defense. (p. 7.)

CONCLUSION

It is concluded and found that the payments made by the respondent to J. Weingarten, Inc. in 1958 and 1959 for participation in each of the three Weingarten promotional events in violation of Section 2(d), as hereinbefore found, were not made in good faith to meet the payments of competitors as authorized by Section 2(b) of the amended Clayton Act.

ORDERED

It is ordered, That respondent, Max Factor & Company, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of cosmetics, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other retail customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of cosmetics, unless such payment is made available on proportionally equal terms to all other retail customers competing in the distribution or resale of such products.

INITIAL DECISION AFTER REMAND BY WALTER R. JOHNSON, HEARING EXAMINER, DOCKET NO. 7721

JANUARY 7, 1964

On January 5, 1960, the Commission issued a complaint wherein the respondent is charged with having made discriminatory payments to some of its customers in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Subsequent thereto, the respondent filed a number of pleadings including answers to the complaint. During the course of the proceedings, the Hearing Examiner denied the request of respondent to adduce evidence that the payments were made in good faith to meet competition pursuant to the provisions of subsection 2(b) of the Robinson-Patman Act, the Hearing Examiner basing his ruling on the Commission's holdings in prior cases that such defense was not available in a Subsection (d) proceeding.

In the last answer of the respondent, filed on September 14, 1960, it elected not to contest the allegations of fact set forth in the complaint, admitted all material allegations of fact set forth in the complaint, and waived a hearing as to the facts so alleged. In such answer, the respondent reserved the right to submit proposed findings of fact and conclusions of law and such other rights as it may have in the premises. On January 5, 1961, the Hearing Examiner filed an initial decision which found that the respondent was guilty of the violation as charged in the complaint, and set forth a cease and desist order. The respondent appealed to the Commission. On July 25, 1961, the Commission denied the appeal and by a three to two vote refused to permit the respondent to present a Section 2(b) defense. Thereafter, respondent filed a petition for review with the United States Court of Appeals for the Seventh Circuit. The Court, on May 10, 1962, set aside the Commission's order to cease and desist and dismissed the complaint without prejudice. The Court in its opinion recited that it was in agreement with the decision of the United States Court of Appeals

for the District of Columbia Circuit, dated November 22, 1961, in *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, ruling that the Section 2(b) defense was available in cases arising under Section 2(d) of the Robinson-Patman Act. On July 12, 1962, the Court set aside the portion of the order directing that the complaint be dismissed and provided that the cause "be remanded to the Commission with directions to afford the petitioner an opportunity to present a defense under Section 2(b) of the statute to the charges that petitioner has violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act" (305 F. 2d 36).

In compliance with the Court's order, the Commission, on October 16, 1962, reopened the proceeding and remanded the case to the Hearing Examiner "for such further proceedings as are necessary to comply fully with the opinions and judgments of the Court and for the receipt of such rebuttal evidence as counsel supporting the complaint may offer." Thereafter, the Hearing Examiner convened a prehearing conference which was held on May 9, 1963. The Hearing Examiner's "Pre-Hearing Order", filed May 10, 1963, which recited the results of the conference and agreed to by the parties, directed respondent to submit its trial brief on or before July 8, and allowed complaint counsel until August 9 to submit his trial brief. Respondent's trial brief was filed on July 8, 1963, and complaint counsel, having received an extension of time, filed his trial brief on August 16, 1963. Respondent's answer to complaint counsel's trial brief was filed on August 26, 1963.

By agreement of the parties, the Hearing Examiner's "Pre-Hearing Order" of May 10, 1963 allowed respondent one week beginning August 26 for the presentation of its defensive case, and complaint counsel one week beginning September 9 for presentation of rebuttal. The rebuttal hearings, however, were subsequently rescheduled at the request of complaint counsel to begin on October 8, 1963. Hearings for the defense were held on four days during the week of August 26, 1963 in New York City and Houston, Texas, and respondent rested its case on August 30 (Tr. 785). Rebuttal hearings were held on four days during the week of October 7 in New York City and Houston, Texas, and complaint counsel rested his case on October 11. The Hearing Examiner, on that day, declared the case closed for the reception of evidence (Tr. 1394).

The parties filed proposed findings on November 26, 1963 and replies thereto on December 6, 1963. The Hearing Examiner has given full consideration thereto and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected.

Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

Respondent, Shulton, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 697 Route 46, Clifton, New Jersey.

Respondent is now and has been engaged in the business of manufacturing, selling and distributing toiletry, chemical and pharmaceutical products. It sells its products to retail chain store organizations, independent drug and grocery stores, department stores, and wholesalers throughout the United States, and certain countries in Europe and Latin America. Respondent's total sales are substantial having exceeded $37,000,000 in the year 1958.

In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in New Jersey, to customers located in other States of the United States, and certain countries in Europe and Latin America.

In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

For example, during the year 1958 respondent contracted to pay and did pay to J. Weingarten, Inc., $6,000 as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

(Complaint; Answer September 14, 1960.)

The parties are in agreement that the issue presented is whether respondent's payments to J. Weingarten, Inc. in 1958 were made in good faith to meet the payments of one or more competitors who par-

ticipated in the three promotional events involved in this case (RPF 61, CCR 1-2).[1]

Respondent called ten witnesses who testified in this case, three of whom were with or had been with Shulton, Inc., six were representatives of cosmetics and toiletries companies, and one who was an employee of J. Weingarten, Inc. They were: Richard N. Parks, Vice-President of Sales of Shulton; Jack W. Wilson, Administrative Assistant to the National Sales Manager of Shulton; Robert E. Lee, Sales Representative of Shulton for South Texas from 1954 to 1960; Allen D. Choka, General Counsel of Helene Curtis Industries; Charles T. Bigelman, Treasurer of Bourjois, Inc.; Ralph DePadua, Assistant Treasurer of Houbigant, Inc.; William Warren Lee, Assistant Controller of Warner-Lambert Pharmaceutical Company; James M. Boohecker, General Manager of Dorothy Gray, Ltd.; William P. Schleimann, Marketing Service Manager of Lehn & Fink Products Corporation, Tussy Division, and Robert S. Framson, Buyer of Cosmetics and Toiletries of J. Weingarten, Inc.

Complaint counsel, in his rebuttal case, called fourteen witnesses. In addition to Messrs. Wilson, Robert E. Lee, Choka, Bigelman, William Warren Lee, Boohecker, Schleimann, and Framson who are heretofore listed, he called William H. Walling, a former employee of Bourjois, Inc.; Herbert T. Georgi, Vice-President of Houparco Company; Robert H. Tetley, Sales Representative of Dorothy Gray, Ltd.; George W. Barbate, Territorial Manager of Tussy; Joseph T. Finkelstein, Department Head of Non-foods of J. Weingarten, Inc.; and Edward W. Underwood, Accountant for the Federal Trade Commission, Bureau of Restraint of Trade.

Description of Respondent's Business

Shulton, Inc. sells and distributes various and unrelated products through three distinct and separate divisions. These are: (1) the Domestic Toiletries Division which is engaged in the manufacture, sale and distribution of cosmetics and toiletries; (2) the Chemicals Division, which is engaged in manufacturing fine chemicals such as flavorings; and (3) the Home Products Division, which sells an distributes products in the household chemical specialty field such as insecticides, cleaners, air fresheners and pharmaceuticals (Parks, Tr. 362-64). Each of the foregoing divisions has its own separate management, sales force, and methods of promotion and advertising (Parks,

[1] "RPF" herein refers to respondent's proposed findings; "RR" to respondent's reply to complaint counsel's proposed findings; "CCPF" to complaint counsel's proposed findings; and "CCR" to complaint counsel's reply to respondent's proposed findings.

Tr. 362–64). The acts and practices involved in this case relate only to the sale and promotion of cosmetics and toiletries by the Domestic Toiletries Division. No question is raised with respect to Shulton's practices in connection with its other divisions. References herein to Shulton's products are limited to cosmetic and toiletry products except as otherwise specifically noted.

Shulton sells cosmetics and toiletries to retail chain stores, department stores, independent drug and grocery stores, and wholesalers in most of the states of the United States. The products it sold in 1958 are described in its product catalogs and are identified by such trade names as Old Spice, Desert Flower, Friendship Garden, and Thylox (Parks, Tr. 409; RX 1 and 2). Comparable competitive products are described in the following catalogs, price lists, and reports: Helene Curtis (RX 3, 6); Lentheric (RX 4, 5); Houbigant (RX 18, 19), Tussy (RX 25, 118); Dorothy Gray (RX 22, 24, 128); Warner-Lambert (Hudnut) (RX28, 29). In terms of physical characteristics and uses, Shulton's products are classified in accordance with the following lines which correspond with the method of product classification employed throughout the industry (Parks, Tr. 390–91; Boohecker, Tr. 231–303; Framson, Tr. 513–14).

(a) *Fragrance line.* This line includes dusting powders, cologne, bubble bath, soap, sachet, and gift sets (RX 33 A–B; Wilson, Tr. 208–10).

(b) *Utility line.* This line includes deodorants (Parks, Tr. 391).

(c) *Treatment line.* This line includes hand lotions, cleansing creams, moisturizers, and skin fresheners (RX 1, 2, 33A–B; Wilson, Tr. 208–10).

(d) *Men's line.* This line includes shaving cream, after shave lotions, men's cologne, pre-shave lotions, men's hair grooming products powders, and gift sets (RX 1, 2, 33A–B; Wilson, Tr. 211).

(e) *Hair care line.* This line includes shampoos, and hair grooms for women (Parks, Tr. 391, 409; Boohecker, Tr. 231, 303).

Nature of Competition in the Cosmetics and Toiletries Industry

In the course and conduct of its business, Shulton is in substantial competition with other manufacturers of cosmetics and toiletries. This record shows that each line of Shulton's products competes with similar lines of other cosmetic and toiletry companies and that each category of products within each Shulton product line, such as colognes, is of like grade and quality and is the same commodity as the colognes of other companies. Each of these product categories is manufactured from the same basic raw materials and serves the same end use (Parks,

Tr. 392; Wilson, Tr. 208–9, 211, 214–15, 405–6). For example, deodorants are used as a cover-up or antiperspirant and are equally competitive whether sold in the form of cream, stick, or roll-on (Parks, Tr. 395). It is customary for customers to switch back and forth in their purchases between the deodorants of one cosmetic and toiletry company and deodorants of a competitor and to switch back and forth between cream deodorants and stick deodorants (Parks, Tr. 395, 398–99; Framson, Tr. 521). They are the same commodity (Parks, Tr. 392–96, 398–408).

The undisputed evidence shows that products manufactured and sold by the following cosmetic and toiletry companies are directly competitive with products manufactured and sold by Shulton: Helene Curtis (including King's Men and Lentheric) (Choka, Tr. 78, 81, 109–10; RX 33); Dorothy Gray (Boohecker, Tr. 231, 236; RX 22, 24, 33); Tussy (Schleimann, Tr. 333; RX 25, 33); Bourjois (Barbara Gould) (Parks, Tr. 405; RX 13 H–K, 14, 15, 16, 33, 44); Warner-Lambert (Hudnut-DuBarry) (Parks, Tr. 372, 398–99; RX 33 F); Houbigant Sales Corp. (Cheramy) (Parks, Tr. 417; RX 18, 19, 33); Max Factor and Co. (Parks, Tr. 421; RX 33 L); Dorothy Perkins (Parks, Tr. 416; RX 33 M); Revlon (Parks, Tr. 421; RX 33 N); Helena Rubinstein, Inc. (RX 33 P); Lenel (Parks, Tr. 418; RX 33 Q); Dana Perfumes Corp. (RX 33 R); Parfums Corday, Inc. (RX 33 S); Lanolin Plus (Parks, Tr. 417; RX 33 T); Nestle-Lemur Co. (RX 33 U).

Companies in the cosmetics and toiletries industry engage in various forms of promotional activity. Many of them have national advertising programs, including television and national magazines, designed to promote good will and to promote the image of the company and its products (Parks, Tr. 390; Framson, Tr. 521; Boohecker, Tr. 241–43). Because cosmetic and toiletry products are "impulse items", displays and other promotional efforts are the most important competitive factors in obtaining shelf space and selling these products (Parks, Tr. 396–98, 425; Framson, Tr. 514–16; R. Lee, Tr. 679, 762–63). The customer's choice between competing brands is easily influenced by such things as packaging, display, and the payment of P.M.'s to sales personnel (Parks, Tr. 398, 410–12, 427–28; Framson, Tr. 517–19; R. Lee, Tr. 681). As Mr. Parks, Vice-President of Sales for Shulton, testified:

> * * * it has been conclusively proven through controlled tests that they [cosmetics and toiletries] are impulse items, and to the extent that they are displayed, in traffic locations, sales respond immediately. People go out with

products that had no intention * * * of buying when they went into the store (Parks, Tr. 396).

* * * * * * *

It has been proven time and time again in controlled tests that customers are easily switched from one brand of commodity to another, and the one they see is the one most likely to be picked up (Parks, Tr. 398).

At another point in his testimony regarding impulse buying, Mr. Parks commented:

Well, it is a well-known fact backed up by experience and surveys and studies, that women are very fickle in their attachment to a fragrance. Most women have several fragrances that she will use alternately, and is very prone to try a new fragrance.

There is very little customer loyalty, so that a final decision at the counter, she may end up buying something entirely different from what she had in mind. She might have had one brand in mind, and gone to another. Maybe she has no brand in mind, and going by a display is intrigued into buying something (Parks, Tr. 411; emphasis added).

It is important in promoting sales to stimulate the interest of sales clerks by training programs and the payment of P.M.'s because the sales clerks are in contact with the ultimate consumers and have the ability to switch customers from one product to another (Boohecker, Tr. 237–38). As Mr. Boohecker testified:

Q. Suppose one of the items does not have a PM on it? Would she promote the item with the PM?

A. My answer would be yes.

Q. Have you found this to be your experience throughout your many years in this industry?

A. Your question is have I found that to be my experience? My observation has been this: if a consumer asks for an item—we will say cleansing cream—there is a PM on one cleansing cream and no PM on a second cleansing cream and the prices are about the same, that girl, logically, would attempt to sell the one that carried the PM (Boohecker, Tr. 238–39; see also Tr. 241).

Mr. Parks summed up the importance of paying P.M.'s and creating good will with the sales clerks as follows:

She controls what they call the last three feet of movement of your product, the most important—

Q. Would you explain that?

A. The most important three feet of movement in your product is between the retail clerk and the customer. We can ship it thousands of miles and control all those activities, but it is no good if it doesn't go across that counter, and she is the last person you have any contact with to help influence the sale (Parks, Tr. 428).

* * * * * * *

Q. And would you tell us whether or not the salesgirls, if they are skilled, have the ability to switch customers from one product to another?
A. They certainly do (Parks, Tr. 430).

Mr. Parks listed the payment of P.M.'s by the supplier as the "number one" motivation in influencing the sales girls "to switch customers to your products" from a competitor's product (Parks, Tr. 430).

Since cosmetic and toiletry products are primarily "impulse" items where the purchase decision is made at the point of sale, the efforts of the sales girls, the amount of shelf space and display space, and the location of such space in the cosmetic and toiletry department of the retail outlet determines to a great extent the volume of movement of a cosmetic company's product through such outlets. This is true whether competitors are advertising a particular product, a product category, or a line of products because when one cosmetic and toiletry competitor gains favored promotional effort, display and shelf space, it necessarily does so at the expense of another product or product line which is also displayed within the limited cosmetic and toiletry section of the retail outlet. As Mr. Parks testified, "the battle of advertising and promotion and salesmanship have pretty much resolved itself down to a battle for space" (Parks, Tr. 410, 429; R. Lee, Tr. 679; Framson, Tr. 513–16). Thus the larger the number of cosmetic and toiletry companies vying for competitive locations in the cosmetics and toiletries section of a retail outlet, the greater the vigor and degree of competition for the available space.

It is customary in the cosmetics and toiletries industry for companies to estimate annual sales to their customers (including Weingarten) at the beginning of the year and to budget the promotional and advertising allowances available under their programs to customers on an annual basis (Parks, Tr. 465–66; Schleimann, Tr. 335; R. Lee, Tr. 682; Tetley, Tr. 1188–89). These promotional and advertising programs included regular P.M. incentives, extra P.M.'s for special promotions, cash prize monies and cooperative advertising allowances (Parks, Tr. 389; Boohecker, Tr. 244–45; Framson, Tr. 517–19, 557, 559, 573). This record shows that many customers decline the promotional allowances made available to them by cosmetics and toiletries companies. Some decide not to make sufficient space available in order to promote every manufacturer's product, while others are not promotionally minded and refuse to take promotional allowances offered by any supplier (Parks, Tr. 384–388). Weingarten has also declined to accept many promotional payments which have been offered by its suppliers (Framson, Tr. 592–93; Boohecker, Tr. 277).

Most cosmetics and toiletries companies, including competitors of

Shulton, offered their customers a regular 5% P.M. (Framson, Tr. 539–46, 557, 559, 618, 619; R. Lee, Tr. 715–16, 737, 742–43, 775; Choka, Tr. 105; Bigelman, Tr. 131; Boohecker, Tr. 244–45, 258–59, Tetley, Tr. 1195; W. Lee, Tr. 173; Schleimann, Tr. 335; Tr. Parks, 389, 434). During Weingarten's May Health and Beauty Carnival and its 1958 Christmas Sale this was increased to 10% by the payment of an additional 5% P.M. (Choka, Tr. 83, 103; Schleimann, Tr. 337; Boohecker, Tr. 245–47, 259–60, 1169–70; Georgi, Tr. 1035; W. Lee, Tr. 173–74; CX 24, 30 A, 128; RX 47, 48, 49 A–B, 90, 91, 92, 93, 97, 98). Unlike most competitors, Shulton did not offer a regular 5% P.M. on a continuing basis (Framson, Tr. 540–46, 552; R. Lee, Tr. 701). During Weingarten's May and Christmas promotions, therefore, Shulton, to be competitive, paid a full 10% P.M. Shulton's P.M. during these promotions thus equalled the 10% P.M.'s (5% plus and additional 5%) which were being paid by its competitors (R. Lee, Tr. 715).

There is nothing peculiar about the type of promotions conducted by Weingarten. Such promotions are conducted by other stores throughout the country and are sometimes referred to as "concentration drives" (Boohecker, Tr. 243). Indeed, in the cosmetics and toiletries industry, it is a common practice for suppliers to offer additional P.M.'s at certain times of the year, such as the graduation—Mother's Day—Father's Day period and at Christmas (RPF 10, 18, 25, 27, 29, 33, 39). Thus, Mr. Parks testified:

Q. And what about extra P.M.'s. were they made available, generally throughout the industry in 1958?

A. Yes. sir (Parks, Tr. 389).

Similarly, Mr. Choka of Helene Curtis (Lentheric-King's Men) testified regarding the extra 5% P.M.:

Q. Do your files show any other companies who received the 5 percent P.M. who might be competitors of Weingarten?

A. Yes. sir.

Q. How many have you got. about?

A. In checking this over. I would guess there were perhaps 25 or 30 in the Houston area which was the area I was looking at (Choka. Tr. 101–2).

The Advertising and Promotional Plans Offered by Shulton's Competitors to Their Customers in 1958

On the basis of all of the evidence offered in this case, it must be concluded that the advertising and promotional plans of Shulton's competitors which participated in Weingarten's three 1958 promotional events which have been challenged by complaint counsel were lawful. The evidence demonstrates that such plans were offered to all customers

on proportionally equal terms, and that the payments to Weingarten by Shulton's competitors were within the allowances provided by such plans (Boohecker, Tr. 243–45, 252, 253–56, 262; Schleimann, Tr. 335, 337, 469; Choka, Tr. 84–85, 97, 101–2, 105; W. Lee, Tr. 157, 168; Bigelman, Tr. 125–26, 139; Parks, Tr. 372–73; R. Lee, Tr. 706–7, 722–23; Framson, Tr. 558; RX 11, 12, 17, 32, 34, 35, 117).

Bourjois, Inc.—Barbara Gould

In compliance with a Federal Trade Commission Order to Cease and Desist, the "Advertising and Promotion Agreements" of Bourjois, Inc. and Barbara Gould were submitted to the Federal Trade Commission's Division of Compliance, and were marked "received and filed"[2] on May 23, 1957 (RX 17 A–L).[3] Although these programs, which were in effect in 1958, were investigated by the Commission in 1959, no action was taken challenging the promotional and advertising payments to Weingarten (Bigelman, Tr. 124–26). Under its program, Bourjois offered 13⅓% of annual net purchases to all of its customers for cooperative advertising and other promotional services, including P.M.'s, and 5% for cooperative advertising (Bigelman, Tr. 122, 131, 140).

The Bourjois and Barbara Gould plans authorize the payment to sales personnel of a regular 5% commission on sales and further state that any funds available under the plans may be used for the payment of salaries or commissions (RX 17 G–J).[4] It is permissible, under the plans, to offer a customer a 10% P.M. for particular promotions so long as all P.M.'s paid come within the 8⅓% limitation based on the whole year's purchase (Bigelman, Tr. 122–23).

Mr. Bigelman testified that payments made by Bourjois (Barbara Gould) in connection with Weingarten's 57th Anniversary Sale, the Ninth May Health and Beauty Carnival, and the 1958 Christmas Sale were all within the framework of the Bourjois and Barbara Gould "Advertising and Promotion Agreements" (Bigelman, Tr. 139). In 1958, Weingarten's purchases from Barbara Gould amounted to $3,758.00 and its purchases from Bourjois amounted to $15,504.00 (Bigelman, Tr. 130–31, 140). The total amount of promotional monies

[2] It was stipulated that the handwritten notations at the bottom of the Federal Trade Commission compliance reports for Bourjois, Revlon, Helena Rubinstein and Hudnut Sales Co., Inc. were made by the Commission's Compliance Division, and are authentic notations used by the Commission's staff in connection with those matters (Tr. 899).

[3] *Bourjois, Inc.*, Dkt. No. 6635.

[4] Following the provisions authorizing payments for cooperative advertising and a regular 5% P.M., the plans provide: "3. Funds available under this agreement can also be used for the payment of a demonstrator's salary and commission" (RX 17 H, J).

budgeted for the Weingarten account in 1958, thus came to $3,945.68 (Bigelman, Tr. 123, 937).[5] Bourjois and Barbara Gould's payments to Weingarten during that year, however, amounted to only $3,760.02 (Bigelman, Tr. 124, 937).

Dorothy Gray

Dorothy Gray's "Statement of Marketing Policy", which makes promotional allowances available to each customer, was in effect in 1958 (RX 27 A–D). These allowances are estimated on the basis of the dollar value of all merchandise (both staple and promotional) purchased during the preceding year, adjusted in accordance with purchases during the current calendar year (Boohecker, Tr. 242–43, 258, 262, 309; RX 27 C). The 8% and 7% allowances authorized by the plan may be used for the payment of double P.M.'s or for prize money at particular times in the year (Boohecker, Tr. 243; RX 27 E).

Dorothy Gray's sales force has considerable flexibility in administering the funds available under its marketing policy (Boohecker, Tr. 278–79). Thus, Mr. Boohecker, Vice-President of Lehn & Fink Products Corp. and General Manager of Dorothy Gray, testified:

Q. Then is it a fact that your program makes possible a wide variety of alternative, depending upon the needs of each of your customers?

A. Yes, sir (Boohecker, Tr. 323).

In addition to the foregoing 8% and 7% allowances, which are available for demonstrators, P.M.'s or prize money, Dorothy Gray also offers a 5% cooperative advertising allowance on staple merchandise (RX 27 D).

Like most companies in the cosmetics and toiletries industry, Dorothy Gray's program is geared to a uniform percentage of merchandise purchased by each customer during the current calendar year (Boohecker, Tr. 309). Because Dorothy Gray is a "semi-franchised" set-up having restricted distribution and therefore relatively few customers in any area, it has experienced no difficulty in proportionalizing its offers of promotional and cooperative advertising assistance among all of its customers (Boohecker, Tr. 236–37).

In 1958, Dorothy Gray's payments to Weingarten in connection with the May Health and Beauty Carnival and the 1958 Christmas Sale were made pursuant to its marketing policy (Boohecker, Tr. 243–57, 266–67, 322–24; Tetley, Tr. 1195, 1297; RX 82, 92). Dorothy Gray also authorized the payment of funds for cooperative advertising un-

[5] Thirteen and one-third percent of $15,504.00 equals $2,066.68 (Bourjois), and 50% of $3,758.00 equals $1,879.00 (Barbara Gould), for a total of $3,945.68.

der its plan for the 1958 May Health and Beauty Carnival, but Weingarten did not elect to accept this authorized cooperative advertising (Boohecker, Tr. 247, 270–75, 277; RX 49 A–B, 57).

Dorothy Gray's marketing policy was investigated by the Federal Trade Commission on several occasions, but no action challenging its payments under its policy was taken as a result of that investigation (Boohecker, Tr. 253–56; RX 117).

Helene Curtis Industries

Helene Curtis' advertising and promotional policy was described as follows by Mr. R. K. Ryerson, General Sales Manager:

> Approximately bi-monthly we make available to all our retail customers promotional allowances on a proportionately equal basis. Cooperative advertising is one form of promotional which qualifies for our regular promotional allowance. Since not all customers can conform to a single program of promotion, we permit these funds to be expended for various forms of promotion to suit individual circumstances (RX 12 B).

Promotional payments by Helene Curtis Industries (Lentheric-King's Men) are made under the "Special Cooperative Advertising Promotion Agreement" employed by that company which provides 8⅓% of purchases for promotional allowances and 5% for cooperative advertising. This program permits payments for extra P.M.'s and cash prizes to customers provided the total expenditure does not exceed 13⅓% of annual purchases (Choka, Tr. 97, 101–2, 105; RX 9, 10, 89). The availability of promotional allowances offered by Helene Curtis is brought to the attention of all customers by the company's salesmen. In addition, announcements are made in trade bulletins and trade journals (Choka, Tr. 98; RX 12 C). Helene Curtis participated in Weingarten's 57th Anniversary Sale, Ninth May Health and Beauty Carnival, and the 1958 Christmas Sale (Choka, Tr. 106; CX 14; RX 9, 89). Participation in these events involved the payment of additional 5% P.M.'s (Choka, Tr. 81–83, 97, 103–4). These allowances were within the framework of Helene Curtis' cooperative advertising and promotional policies and were offered to all customers, including competitors of Weingarten, on proportionally equal terms (Choka, Tr. 83, 88, 100, 101–2, 103–4, 105).

Mr. Choka, General Counsel of Helene Curtis, testified that in his opinion and based on his examination of company records, payments by Helene Curtis to Weingarten in 1958 were lawful (Choka, Tr. 87–88, 96–97, 100, 112, 1093–94). Furthermore, although the Commission investigated Helene Curtis' promotional and advertising payments

to Weingarten in 1958, no action challenging these payments was taken (Choka, Tr. 85; RX 11 A–D, 12 A–C).

Helena Rubenstein

Official notice was taken of the Order to Cease and Desist and the Report of Compliance which was submitted by Helena Rubinstein, Inc. to the Federal Trade Commission and marked "received and filed" on September 13, 1956 (Tr. 49).[6] Helena Rubinstein's program offers seven "Sales and Service Allowance Plans." Plan No. 1 offers 1% of net purchases for each foot of display space provided by the customer, with a minimum of 3% and a maximum of 15%, and a 3% allowance for companies employing a full-time cosmetician. Plan No. 2 offers an allowance of 15% to customers employing a full-time cosmetician who provide a minimum of eight feet of display space or, alternatively, an 18% allowance if two or more cosmeticians are employed and if a minimum of 12 feet of display space is provided. Plan No. 3 offers a 10% allowance to customers who provide part time services of a cosmetician and furnish a minimum of 5 feet of display space. Plans No. 4 and No. 5 offer stated percentages of net purchases to customers who provide counter wall shelves in accordance with schedules set forth in the plans. Plan No. 6 offers stated percentages of net purchases for customers who provide window displays. Plan No. 7 is an "inventory control program" which offers allowances of 2% to 7% depending on the amount of display space furnished as well as an additional 3% of net purchases to be used as a cosmetician's sales allowance.

In addition to the foregoing allowances for promotional services, Helena Rubenstein's plan offers to pay the actual cost of newspaper, television, and radio advertising at the customer's lowest contract rate.

Houbigant Sales Corporation

Houbigant participated in the Ninth May Health and Beauty Carnival and the 1958 Christmas Sale (Georgi, Tr. 1029; Framson, Tr. 1302, 1304; RX 88, 97, 104, 127; CX 178, 179, 180). During the May Health and Beauty Carnival Houbigant paid Weingarten an additional 5% P.M. and furnished merchandise for prizes (CX 178, 179, 180). During the 1958 Christmas Sale it paid an extra 5% P.M. and made payments for cooperative advertising (RX 88, 89, 104).

[6] Helena Rubinstein, Dkt. No. 6441.

Hudnut Sales Company

Hudnut Sales Company, a sales Division of Warner-Lambert Pharmaceutical Co., distributed the Hudnut, DuBarry and Sportsman lines (W. Lee, Tr. 154). Hudnut's cooperative advertising and promotional program, which was in effect in 1958 and available to all customers, was furnished to the Federal Trade Commission's Division of Compliance and marked "received and filed" on June 26, 1956 (RX 32 A–T).[7]

Hudnut's cooperative advertising plan offers an allowance of 7½% based on net purchases during each calendar year (RX 31 A–B). The plan states that charges are accepted up to the full cost of advertising (RX 31 A, 32 E). Mr. William W. Lee of Warner-Lambert, testified that Hudnut's cooperative advertising payments to Weingarten in 1958 were made pursuant to the arrangements shown in RX 31 A–B (W. Lee, Tr. 157).

Hudnut's "Alternate Promotion Plan", number one (RX 32 M–O), offers a promotional allowance "equal to 5% of retail (approximately 8% of the net)" for sales clerks' incentives. The allowance is payable on all lines combined, *i.e.*, DuBarry, Sportsman, and Hudnut (RX 32 M). "Alternate Promotional Plan", number two (RX 32 P–R), offers a similar basic 8% allowance as well as an additional 3% allowance to customers who provide six feet of display space. "Alternate Promotional Plan" number three (RX 32 S–T) offers a 10% demonstrator allowance to customers who provide permanent counter, shelf, and case display space.

Hudnut was one of the companies which offered a regular 5% P.M. to Weingarten in 1958 (W. Lee, Tr. 161). In addition, Hudnut offered its customers, including Weingarten, additional 5% P.M.'s at various times. Mr. Lee explained his company's policy in paying additional 5% P.M.'s as follows:

> The sales department is authorized to grant an additional 5 percent, to offer an additional 5 percent, to customers at specific times of the year, like Christmas and sometimes in May (W. Lee, Tr. 161).

The payment of additional 5% P.M.'s to customers on such special occasions is a regular policy of the company and additional 5% P.M.'s are made available to all customers (W. Lee, Tr. 161). Hudnut's sales force was instructed to inform all customers of the availability of additional 5% P.M.'s when they became available, by means of the Richard Hudnut Almanac (W. Lee, Tr. 162–63).

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[7] Hudnut Sales Co., Inc., Dkt. No. 6440.

Hudnut participated in Weingarten's May Health and Beauty Carnival and in the 1958 Christmas Sale (RX 47, 53, 80, 90). Total promotional payments to J. Weingarten, Inc. in 1958 were $3,356.95, which is equal to 8% of cumulative net purchases by Weingarten of $41,961.86 during that year, and is less than the total promotional payments which were available under Hudnut's promotional allowance plan (CX 248 A, F).

Revlon

Official notice was taken of the cease and desist order and the report of compliance filed by Revlon with the Commission on April 2, 1957 and marked "received and filed" on April 2, 1957, together with related documents (Tr. 49).[8] Revlon's advertising and promotional program was originally promulgated on February 7, 1952 (see memorandum from Carl Mitson, February 7, 1952). The allowances authorized by Revlon's 1952 program were supplemented by additional allowances described in the memorandum from Andrew A. Lynn, dated December 15, 1956 (see letter from James T. Welch to Federal Trade Commission, January 16, 1957).

As originally promulgated, Revlon's program provided for eight different types of promotional assistance to its customers, including demonstrator allowances, P.M.'s and cooperative advertising. Allowances and services described in the program were interchangeable and different combinations thereof could be worked out to the mutual benefit of the customer and Revlon (see memorandum from Carl Mitson, February 7, 1952, p. 1).

As originally promulgated in 1952, Revlon's plan authorized a demonstrator allowance up to 10% of net purchases and cooperative advertising on a 50-50 basis. As supplemented by the memorandum of December 15, 1956, Revlon authorized its customers to choose between advertising reimbursed on a 100% basis up to 4% of net purchases, or, alternatively, on a 50-50 basis (see memorandum from Andrew A. Lynn, December 15, 1956, p. 1). Additional P.M.'s up to 10⅓% of purchases (8⅓% plus an additional 2% for customers employing ten or more cosmeticians) were also authorized by the memorandum of December 15, 1956.

Tussy

The "Statement of Marketing Policy" of Tussy Cosmetics, originally promulgated in 1952, offered a 12% allowance for "demonstration services" which was based on the net dollar value of all merchandise

[8] *Revlon, Inc.* Dkt. No. 6519.

purchased by the customer during the calendar year (RX 26 A–C; Schleimann, Tr. 334). Tussy also offered an allowance up to 5% of the customer's purchases of staple merchandise for cooperative advertising (RX 26 C). In addition, the plan provided that when special promotions are conducted in a given area, all customers in the area may be offered an allowance for display and advertising in an amount equivalent to a uniform percentage of the promotional merchandise purchased. The percentage of such special allowances was not stated in the program (RX 26 C).

Mr. Schleimann, Marketing Services Manager for Tussy, testified that in the Houston area in 1958, Tussy offered all customers a basic promotional allowance of 8% of net purchases plus another 7% when additional services were performed (Schleimann, Tr. 334–36). The additional 7% was available for such things as prize money, circulating demonstrators, and for the payment of additional 5% P.M.'s (Schleimann, Tr. 336). An additional 10% promotional allowance was also available on promotional merchandise (Schleimann, Tr. 335). Tussy's package of promotional allowances in the Houston area thus consisted of a basic 8%, an additional 7% for additional services, and an extra 10% on promotional merchandise.

In addition to the foregoing promotional allowances, an allowance of 5% was available for cooperative advertising (Schleimann, Tr. 334). Tussy generally paid for cooperative advertising on a 50–50 basis, but, depending upon the availability of funds accrued under its policy, it could allow payment on a two-thirds or a 100% basis. Reimbursement on an increased basis, of course, was available to all customers (Schleimann, Tr. 336–37, 339).

Shulton's Promotional and Advertising Program

Mr. Parks, as Vice-President in Charge of Sales, had principal responsibility for Shulton's sales and promotional program. As part of his duties, he kept himself informed of the general promotional and advertising programs of competitors by contacts with competitors at conventions, personal calls on customers, attending sales meetings and receiving reports from Shulton's sales force, and by reading trade publications such as the Drug "Pink Sheet" (Parks, Tr. 366–69). The knowledge thus gained about competitive programs was used as a basis of determining sales policy and was disseminated to Shulton's sales force at meetings throughout the year (Parks, Tr. 366).

Following an investigation of the promotional and advertising programs of Shulton and all of its major competitors, the Commission promulgated its Trade Practice Conference Rules for the Cosmetic and Toilet Preparations Industry (4 CCH Trade Reg. Rep. ¶ 41,221;

Parks, Tr. 372–74). Shortly thereafter, in 1952, Shulton developed its "Federal Trade Commission Program" for administering promotional and cooperative advertising funds (Parks, Tr. 373–76; CX 68 E–Q; RX 130). This program, as originally designed, permitted its sales representatives to offer an allowance of 6% of purchases for promotional services and 5% for cooperative advertising. The total allowance provided under the program was 8½% by Shulton and 2½% by the customer (Parks, Tr. 378; CX 68 D). Shulton's program was based essentially upon participation in selected retailer promotions (Parks, Tr. 412–13), and contemplated the spending of promotional money:

> * * * when our goods naturally sell over [the customer's] counter in the greatest volume—such as Christmas, Father's Day, Mother's Day, or in conjunction with our special price or general line or item promotions—(CX 68 E).

Shortly after promulgation of its "Federal Trade Commission Program" in 1952, Shulton discovered that the program's budgetary limits were inadequate to permit its sales representatives "to meet this competition" (Parks, Tr. 378). Promotional allowances available under the program therefore were increased by 5%, making a total of 8⅓% of purchases for promotional allowances and 5% of purchases for cooperative advertising allowances, or a maximum allowance of 13⅓% of purchases for competitive promotions (Parks, Tr. 378–79; RX 130). After Shulton had established its promotional and advertising program, the Commission again investigated Shulton and other cosmetics and toiletries companies in 1953 to determine whether the Trade Practice Conference Rules were in fact being carried out by the industry (Parks, Tr. 379–80). No action was taken as a result of that investigation (Parks, Tr. 381).

The basic operating policies of Shulton's promotional and advertising program are formulated by top management "on the basis of our own judgment supplemented by regional managers, competitive knowledge, and so on. Then we indoctrinate our sales people as to the policies and they in turn indoctrinate the salesmen, and it is the local salesman's responsibility to handle the account within the scope of our policies".[9] Testifying regarding the information which he had available to keep abreast of competitive conditions, Mr. Lee stated:

> Well, the first and primary source of information was our Shulton management. At our sales meetings we would discuss our plans and they would make known to us as much information as they had on competitive companies' plans and programs.

[9] In the course of his duties as Sales Manager, Mr. Parks was aware that the Federal Trade Commission had investigated and issued complaints and orders against certain of Shulton's competitors in 1955 and 1956. He kept Shulton's salesmen informed on these matters at sales meetings where the sales force discussed the promotional plans of Shulton and its competitors (Parks, Tr. 381–82).

In addition to that, of course, there were trade papers, we regularly obtained information from buyers, we were in a position where exchanging information was to our mutual benefit. We got a great deal of information on procedures and conditions in the industry from the sales girls in the cosmetic departments of the stores that we called on as a regular part of our duty, and we also had rather close association with the other representatives, * * * (R. Lee, Tr. 678–79).

Thus in order to be competitive, Shulton's promotional policies and those of its competitors were made known to its sales force.

Sales Representatives Were Authorized To Arrange the Terms of Participation in the Weingarten Promotions

Mr. Lee,[10] local sales representative for Shulton, and the local sales representatives for competing cosmetics and toiletries companies were authorized to enter into agreements on behalf of their companies to participate in promotional events conducted by Weingarten in 1958. Although it was customary to confirm in writing the promotional arrangements which had been agreed to between the local sales representatives and Mr. Framson, the Weingarten cosmetics buyer, in practice it was very unusual for any company to modify an arrangement which have previously been worked out by its sales representative with Mr. Framson (Framson, Tr. 554–55, 1324, 1368, 1369, 1379; R. Lee, Tr. 718–19, 732, 733–34, 758, 767; Parks, Tr. 436, 460, 465; Bigelman, Tr. 925; Boohecker, Tr. 232, 258, 280; Choka, Tr. 1098; Georgi, Tr. 1032; Schleimann, Tr. 993, 998; Tetley, Tr. 1186).

Shulton's confirmation of its participation in the May Health and Beauty Carnival in 1958 is probably typical of the procedure followed by the sales representatives. Mr. Lee called on Mr. Framson and arranged for Shulton's participation on April 8 (R. Lee, Tr. 698; RX 122). That evening Lee wrote a letter in longhand addressed to Weingarten, confirming this participation; he attached a short memorandum to his branch manager's secretary in Dallas and requested that the letter be typed and forwarded to Weingarten (RX 123). On April 11th a typewritten letter in almost the identical form as that prepared by Mr. Lee on April 9th was forwarded to Weingarten by the Shulton branch manager confirming Shulton's participation in the May Health and Beauty Carnival (CX 18 A).

The confirmation letters in the record typically refer to arrangements which had previously been agreed to by the sales representative and Weingarten, for example:

* * * [our representative] has completed an arrangement with you * * * (CX 18 A);

[10] Mr. Lee left Shulton in 1960 to take a position with Pitney-Bowes Company (R. Lee, Tr. 676–77).

This will merely serve as written confirmation of our telephone conversation * * * (CX 29 C);

* * * [our representative] has arranged with you for an extra 5% commission * * * (CX 30 A);

This will confirm the arrangement made with [our local representative] for an extra 5% PM * * * (RX 81);

This will merely serve as confirmation for your records * * * (RX 82);

We wish to confirm the P.M. arrangement set up with your good firm by our territory representative, * * * (RX 87).

From all of the evidence in this record, it is concluded that sales representatives were authorized by cosmetics and toiletries companies to arrange for participation in Weingarten's promotions in 1958.

The Weingarten Promotions

In General

J. Weingarten, Inc. of Houston, Texas, was one of the first retail grocery chains in the United States to include a cosmetics and toiletries department in a supermarket (Framson, Tr. 512). By 1958, Weingarten was engaged in the sale of cosmetics and toiletries of more than twenty competing suppliers (Framson, Tr. 519; R. Lee, Tr. 680). Weingarten was actively promoting and displaying these products in the high-traffic cosmetics departments of its outlets by the use of several promotional events throughout the year (Framson, Tr. 512–16, 521–22). During these promotional events, special efforts and special display space was provided for those cosmetics and toiletries suppliers that participated in the events (Framson, Tr. 518, 527, 537–38, 581; R. Lee, Tr. 695; RX 67–69).

Weingarten's cosmetics and toiletries departments are comparable to such departments in many department stores and large drug stores. The cosmetics and toiletries which are displayed and sold in these departments are classified in accordance with the following general categories: fragrance, make-up and treatment, hair-care, and men's line. Deodorants (and certain other utility products) are sometimes classified in more than one of the foregoing general categories. Cosmetics and toiletries are allocated a definite but limited space within the drug and cosmetics departments of Weingarten's retail outlets where they are displayed according to line. For example, the fragrance line of all suppliers is supplied in one section; and categories of products, such as lipsticks, are displayed together. As Mr. Framson explained, "If a customer wanted to purchase a lipstick she had free access to all lipsticks that were available in one place" (Framson, Tr. 513–14).

The testimony of Mr. Framson demonstrates the importance of promotional and advertising allowances in developing shelf and display space for suppliers in Weingarten outlets. As Mr. Framson characterized it, the suppliers are "screaming for it" because "the more shelf space designated for an item, the more it helped the impulse buyer" (Framson, Tr. 514). Explaining the impulse buyer, Mr. Framson commented: "Lady customers are supposed to be tremendous impulse customers, according to the records, and if you devote more space to certain items, chances are, * * * that the sales are greatly enhanced on the particular items, if they are given the greater shelf space" (Framson, Tr. 515).

That there are advantages to having front display space or attractive display space, as opposed to being in the rear of a display or not being displayed prominently in a Weingarten outlet, was stipulated by counsel. It was also stipulated by counsel that front display space would be a substantial factor in causing a product to move more rapidly than products in less prominently displayed areas (Framson, Tr. 515–16).

Mr. Framson noted that sales girls are "extremely important" in determining which products are going to move in the cosmetics and toiletries department of Weingarten's outlets. Items on which the sales girls are paid promotional allowances (P.M.'s) are promoted and pushed in preference to items on which the girls do not receive promotional allowances (Framson, Tr. 517–18). Similarly, cash prizes "definitely" increase the incentive of the sales girls to sell and promote the particular product on which the prize money is offered (Framson, Tr. 518).

It was stipulated by counsel that Weingarten has found that the housewife purchasing cosmetics and toiletries switches back and forth between the products of different suppliers (Tr. 520). As Mr. Framson stated, "Promotional advertising, national advertising, co-op advertising by the local companies, enhanced displays, improved displays, point of sale displays, plus suggestions by the cosmetic clerk," are the principal reasons why housewives switch back and forth between the products of suppliers. Thus, the promotional allowances and cooperative advertising allowances of the various suppliers which agreed to participate in Weingarten's promotions in 1958 would have increased the sale of their products at the expense of Shulton, had Shulton failed to meet that competition (Framson, Tr. 521).

In 1958 Weingarten conducted six promotional events: The Store Manager's Sale, the Harvest Sale, the Texas Products Sale, the 57th Anniversary Sale, the Ninth May Health and Beauty Carnival and

the Christmas Sale (Framson, Tr. 522). To be competitive, Shulton participated in three of these events: the 57th Anniversary Sale, the Ninth May Health and Beauty Carnival, and the Christmas Sale (Framson, Tr. 534–35; R. Lee, Tr. 682, 685–89, 698, 714–15).[11]

The specific products sold to Weingarten in 1958 by Shulton and other cosmetics and toiletries suppliers are set forth in a tabulation of Weingarten's invoices (RX 33 A–U).[12] This tabulation was prepared by Mr. Wilson of Shulton. Mr. Underwood, an accountant assigned to this matter by the Commission, agreed that it accurately reflects the product information contained on the invoices (RX 33; Wilson, Tr. 207, 211, 214–18; Underwood, Tr. 1052–53, 1116–17). Competitive products were grouped in the tabulation depending on whether they were of like grade and quality (Parks, Tr. 406–8; Wilson, Tr. 215). An examination of this tabulation and the testimony of the witnesses shows that the Shulton products and product lines were directly competitive with the products and product lines of its competitors purchased, displayed and sold by Weingarten throughout 1958.

Shulton's decision to participate in these events was made on an individual basis in each case; it did not offer Weingarten a regular P.M. (Framson, Tr. 540–46; R. Lee, Tr. 701). Payments made by Shulton in connection with these three events were as follows:

Sales event	Services rendered by Weingarten	Amount	Citation
1. 57th Anniversary Sale	Newspaper advertising and other services.	$881.14	RX 43
2. The 9th Health and Beauty Carnival.	Cash Prizes	400.00	RX 56
	10% PM	798.30	RX 56
	Co-op Advertising	563.25	RX 52 A–B
3. 1958 Christmas Sale	10% PM	2,611.90	RX 96
	Co-op Advertising	759.00	RX 103; Tr. 656–59
Total		[1] 6,013.59	

[1] In meeting the promotional payments of its competitors in these three events, Shulton kept within the maximum allowances of 13 1/3% available under its plan. Maximum payments allowable on sales of $46,217 to Weingarten would have been $6,160.73 (CX 52).

As buyer for Weingarten's drug department in 1958, Mr. Robert Framson was in charge of contacting sales representatives of cosmetics and toiletries suppliers (Framson, Tr. 510–11, 1347; Finkelstein, Tr. 1372). Mr. Framson was also in charge of working out the ar-

[11] Shulton did not participate in the Texas Products Sale because competition did not require it (R. Lee, Tr. 728–30, 770).

[12] The invoice dates are shown on RX 33. Mr. Framson testified that the turnover of cosmetic and toiletry products at Weingarten was three to four times per year. The record shows that a considerable part of the merchandise invoices in a third quarter was sold by Weingarten during the fourth quarter (Framson, Tr. 576, 1357).

rangements with sales representatives for the three promotions involved in this case (Framson, Tr. 1352–53). Mr. Finkelstein, manager of the cosmetics department, was concerned with the promotions involved in this case only in a supervisory capacity and did not handle direct contacts with the sales representatives himself (Framson, Tr. 598, 1347, 1348; Finkelstein, Tr. 1366, 1368). In this supervisory role, Mr. Finkelstein, in connection with the May Health and Beauty Carnival signed letters which were sent to the suppliers and received replies from them which merely confirmed arrangements that had previously been worked out between Mr. Framson and the sales representatives (Finkelstein, Tr. 1368, 1375–76). All contacts with the sales representatives, including follow-ups on letters received by Mr. Finkelstein were part of Mr. Framson's responsibilities (Finkelstein Tr. 1371).

The Weingarten 57th Anniversary Sale

Weingarten began planning its 57th Anniversary Sale, which was to be held from February 24th to March 8, 1958, in December 1957 (Framson, Tr. 526–29; RX 38 A). As planned by Weingarten this Anniversary Sale "increased the traffic flow of consumers through" Weingarten's retail outlets and "boosted the sales of displayed products" through the use of extensive advertising and promotion. In consideration of their participation the suppliers were offered cooperative advertising in newspapers and preferential displays in the Weingarten outlets for a particular product (Framson, Tr. 528–31; RX 38 A–B).

Mr. Framson began discussing participation in this Anniversary Sale with suppliers in December 1957. One of the first cosmetic and toiletry companies to agree upon the terms of participation in this event was Bourjois, Inc. These arrangements were made in the latter part of December, 1957 (Framson, Tr. 529, 659; Walling, Tr. 943, 947–48). At that time Bourjois was coming out with a promotion on its deodorant at the special price of two for $1.00, and Mr. Framson and Mr. Walling, salesman for Bourjois, agreed in December, 1957 that this item would be featured in the 57th Anniversary Sale (Framson, Tr. 529–30; Walling, Tr. 948; RX 44).[13] Bourjois agreed to participate in the 57th Anniversay Sale in accordance with the Weingarten rate sheet at a cost of $881.14 (Framson, Tr. 530, RX 37,

[13] Tussy regularly conducts an annual one-half price sale in April of each year (Framson, Tr. 531–32). When Mr. Lee spoke to Mr. Framson on January 15, 1958, Mr. Lee was told that Bourjois was trying to "beat the gun" by coming out with its deodorant special earlier in the year (R. Lee. Tr. 744).

44),[14] and Mr. Framson placed an order for 3,600 of the special priced deodorants with Mr. Walling (Framson, Tr. 659, 1300; RX 121).[15]

Later on January 15, 1958, Mr. Framson discussed the 57th Anniversary Sale with Mr. Lee of Shulton and informed Mr. Lee that other companies were participating in the Anniversary Sale[16] (Framson, Tr. 533), and particularly mentioned the "Bourjois deodorant promotion" (Framson, Tr. 534). He told Mr. Lee that Bourjois which had come out with a two for $1.00 deodorant had agreed to participate in the 57th Anniversary Sale and to purchase one-eighth page of cooperative advertising in all territories (Framson, Tr. 533, 616; R. Lee, Tr. 682–84, 766; see RX 121). At that time Shulton was also introducing a special two for one sale on its deodorant (R. Lee, Tr. 683–86; Framson, Tr. 533). When Lee learned that Bourjois had agreed to participate in the Anniversary Sale with its two for one deodorant promotion, the following described conversation ensued:

Q. Did he tell you whether or not Evening in Paris had committed themselves to participate in his sale—

A. Yes, sir.

Q. — by making promotional and co-op payments?

A. Yes, sir.

Q. What did he tell you about that?

A. Well, I asked Bob what the level of their participation would be, because our basic agreement with Weingarten was based on—the promotional allowance was based on periodic promotion, so it was of the utmost importance to me to know what the other people were doing at this time. And Bob was always cooperative, and he told me what Bourjois was doing. And they were participating on a chain-wide level. And I thought it was very important, particularly because of the fact that deodorants is a big, a growing business, and it was important to us at this time, and I felt that it was of the utmost importance that we not let Bourjois steal our thunder in this case, that we had to meet—it was imperative that we meet this condition.

Q. Did you agree on January 15 to meet this participation by Bourjois?

A. Yes, sir, we did.

Q. And did you participate in a greater or lesser amount than Bourjois?

A. In the same amount, the one-eighth page level (Tr. 686–87).

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[14] In addition to newspaper advertising, participating companies received other services in consideration for their payment of $881.14 (Framson, Tr. 656–57). For example, the payment of $881.14 entitled participating suppliers to one-eighth of a page of newspaper advertising in approximately 15 newspapers, mass displays in each of the Weingarten stores, radio and television advertising, and point of sale displays, including special effects and art work (R. Lee, Tr. 688).

[15] Mr. Framson refreshed his recollection as to the date of the arrangement by reference to a purchase order to Bourjois for its deodorant at the special price (Framson, Tr. 661).

[16] Participants in the 57th Anniversary Sale were: Lanolin Plus, Inc., The Nestle-LeMur Company, Bourjois, Inc., Barbara Gould, Max Factor & Co., Helene Curtis, Rapidol Distribution Co., Dowd, Redfield & Johnstone, and Shulton, Inc. (Framson, Tr. 525).

Mr. Lee's purpose in agreeing to participate in the 57th Anniversary Sale was solely to enable Shulton to retain its sales position in Weingarten's stores. When he agreed to participate, Mr. Lee considered deodorants to be a large and growing business and it was important to him "that we not let Bourjois steal our thunder in this case, that we had to meet—it was imperative that we meet this condition" (R. Lee, Tr. 686–87). Mr. Lee testified further:

Q. If you had not met this advertising promotion by Bourjois at this time of the anniversary sale, can you tell us whether or not Shulton would have lost sales position and volume of sales in the Weingarten * * * stores?

A. Absolutely. Our loss would have been substantial in point of immediate sales volume. It would have been serious in loss of position. We would lose the interest of the sales girls, which was always an important item, and when you lose position like that, *it is even a greater struggle to attempt to regain it*, so it is an important thing all around (R. Lee, Tr. 688–89; see also Tr. 729).[17]

Mr. Lee had no reason to believe that the participation in the 57th Anniversary Sale by Bourjois, or any other competitor, was discriminatory or unlawful (R. Lee, Tr. 689). Thus, Mr. Lee testified that he did not know that "Bourjois was doing anything but what was right" (R. Lee, Tr. 691). When the Hearing Examiner asked whether Mr. Lee had given any thought to the legality of Shulton competitors' participation in the Anniversary Sale, Mr. Lee testified:

The WITNESS: Well, we are talking about five years ago, Your Honor, and it may be hard to say, but I would just say this, we were aware of the fact generally that there had been some FTC Commission citations, or I don't know what you call them, some activity in that field. Again, because of the close nature of this cosmetic field, information like this went around the trade quickly. I have no information—as a matter of fact, several years ago there had been—Bourjois was one of the companies that had been involved, as I understand this thing.

Hearing Examiner JOHNSON: Prior to 1958?

* * * * * * *

The WITNESS: Yes, sir, and because of the fact that the FTC had proceeded against them somehow, I would say that in this sale they are bending over backwards to do what was expected of them by the FTC.

Q. This was your assumption, anyway?

A. Yes (R. Lee, Tr. 690).

* * * * * * *

Q. In your calls on any of these [other] accounts, can you recall of any instance where you became aware or had reason to believe that they were discriminating in their promotion allowances or cooperative advertising?

* * * * * * *

[17] When he met with Mr. Lee on January 15, 1958, Mr. Framson placed an order for 3,600 pieces of Shulton's deodorant product, which was equal to his order for 3,600 pieces which he had previously placed with Bourjois (Framson, Tr. 659, R. Lee, Tr. 683). (Emphasis in quotation added.)

A. I had no indication that Bourjois was doing anything but what was right (R. Lee, Tr. 691).

Upon consideration of all of the evidence in this case it must be concluded that Mr. Lee's purpose in agreeing, on behalf of Shulton, to participate in the 57th Anniversary Sale was to meet an individual competitive situation in good faith in order to avoid a loss of substantial sales.

Weingarten's 1958 May Health and Beauty Carnival

Weingarten's May Health and Beauty Carnival, which was conducted during the period May 5 through May 31, was inaugurated to coincide with special springtime events such as Mother's Day and school graduations (Framson, Tr. 537; *e.g.*, RX 54). The 1958 May Health and Beauty Carnival was a full line promotion and was similar to carnivals conducted by Weingarten in prior years which had involved cash prizes, cooperative advertising and extra P.M.'s (Framson, Tr. 550–52, 581, 702). Planning for the 1958 May Beauty Carnival began the latter part of January 1958. At that time Weingarten reviewed the results of the Carnival of the previous year and discussed possible participation in the 1958 Carnival with various sales representatives (Framson, Tr. 550–51, 553, 561, 567). By the latter part of March, Mr. Framson's plans for the 1958 Carnival had been completed and, with one or two exceptions sales representatives of the participating companies had indicated that their companies were going to participate (Framson, Tr. 553, 561).

Mr. Framson described the promotional and display effort in the Weingarten stores during the May Beauty Carnival as "truly magnanimous" (Tr. 538).[18] Asked whether or not suppliers who participated in the 1958 May Beauty Carnival enjoyed greater sales and movement of their products than those suppliers who for one reason or another did not participate, Mr. Framson explained that they "did" because they had "greater exposure, advertising, increased interest on the clerk's part" (Framson, Tr. 550). In describing the May Beauty Carnival, Mr. Lee testified that "This was one of the most outstanding cosmetic promotions in this area, and perhaps even in the country. It greatly increased traffic. There was a great increase in sales * * *" (R. Lee, Tr. 694).

In preparation for this May Beauty Carnival, Weingarten rearranged its set-ups and displays in the cosmetic section of its outlets.

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[18] The displays are graphically depicted by the photographs showing proof of performance which were furnished to the suppliers (RX 65 A–79 B).

Previous shelf arrangements and displays were done away with. "Some lines had to come down" (R. Lee, Tr. 695). After the displays and promotional materials were set up for the May Beauty Carnival "the companies that were participating in the promotion, of course, got the front space, the major space and those companies that did not participate were relegated to lesser important positions. In some cases under or behind the counter" (R. Lee, Tr. 695–96).

The sales girls eagerly accepted and participated in the May Beauty Carnival because "Or course, it meant money in their pockets, they were getting benefit from the merchandise that they sold," and therefore they pushed the products on which there were extra P.M.'s. Since cosmetics are "such impulse items, it is relatively easy to sway customers, and so if a sales girl had a stake in it, they can exert a tremendous influence on the sale of any item that they choose to push" (R. Lee, Tr. 697).

Mr. Lee testified that he called on Mr. Framson on April 8, 1958 (confirmed by Field Representatives Daily Call Report on that date; RX 122) and that Mr. Framson advised him that certain of Shulton's competitors had already agreed to participate in the May Beauty Carnival by paying a 10% P.M., cash prizes at the level of about $400, and co-op advertising (R. Lee, Tr. 698–700; Framson, Tr. 554, 555, 562).[19]

Dorothy Gray, for example, had discussed the 1958 Health and Beauty Carnival with Mr. Framson as early as February 12, 1958 (Tetley, Tr. 1190–91). Mr. Framson testified that Mr. Corriden of Dorothy Gray agreed to participate during the meeting between Framson and Corriden March 17, 1958 (Framson, Tr. 1354; as to the date of this meeting, see CX 212 A). Mr. Lee testified:

Q. Did he indicate whether or not any of your competitors had agreed to participate in the May Beauty Carnival?

A. Yes, he did. From both Bob and from the representatives themselves, we were all enthusiastic about this sale. It was an important event.

Q. What did he tell you with regard to your competitor's participation when you visited him on April 8?

A. Yes, April 8th. Well, he told me that most of the companies were participating on the ten per cent PM and on the prize level at about $400, and because as always these promotions were important events, it was important to me and important to Shulton that we be in there among those lines that were represented during this important promotion.

Q. Did he tell you whether or not most of your competitors or many of your competitors were participating in an advertising co-op in connection with the May Beauty Carnival?

[19] The following companies participated in the May Beauty Carnival: Tussy, Lanolin Plus, Beaute-Vues, Blensol, Diversified, Lenel, Paragon, Warner-Lambert, Dorothy Perkins, Bourjois-Barbara Gould, Helene Curtis (Lentheric, King's Men), Revlon, Corday, Shulton, Dorothy Gray, Houbigant, Max Factor, Gillette, and Johnson & Johnson (Framson, Tr. 565–66).

A. Yes, sir, he did.

Q. What did you decide at that time, if anything, to do about it?

A. We agreed to participate on this average level, and so we agreed.

Q. What do you mean "on the average level"?

A. I figured $400 in prizes.

Q. What about the ten per cent PM?

A. We agreed to the ten per cent. In our case again, this was meeting the ten per cent. We did not have the continuing PM (R. Lee, Tr. 700–01; see also Framson, Tr. 1350–51).

The allowances authorized by Mr. Lee for Shulton's participation in the May Health and Beauty Carnival did not exceed the percentages (where made on a percentage basis) or the dollar amounts (where made on a dollar amount basis) which Mr. Framson told Mr. Lee represented the levels of participation by Shulton's competitors. Thus, Shulton agreed to participate "on the average level", which, because Shulton did not pay a regular 5% P.M., meant that it would pay a full 10% P.M. for the duration of the event together with a $400.00 cash prize and cooperative advertising (R. Lee, Tr. 700–1; Framson, Tr. 562–63). The following companies, among others, had participated in the 10% P.M., cash prize, and cooperative advertising for the 1958 May Beauty Carnival: Tussy (RX 48, 54; CX 37), Dorothy Gray [20] (RX 49 A–B, 57); Hudnut (RX 50 A–B, 53); Bourjois-Barbara Gould (RX 55; CX 32); and Lanolin Plus (RX 59; CX 38).

Mr. Lee's purpose in agreeing to participate in the May Health and Beauty Carnival was to enable Shulton to retain its sales position and to avoid being placed at a serious competitive disadvantage. Thus, Mr. Lee testified:

Q. Why did you decide to participate in the 1958 May Beauty Carnival?

A. Because of the fact that this was a very important promotion and we would be at a serious promotional disadvantage if we did not participate.

Q. In your opinion, if you had not participated in the 1958 May Health and Beauty Contest, would it have any effect on the volume of movement of your merchandise through the Weingarten store at that time?

A. Yes, sir. This May Health and Beauty Carnival encompassed several promotional areas for Shulton and for the cosmetic industry. There was the Easter, Mother's Day, graduation cycle there, and to pass up a promotional effort such as this, tied up in that time, would have cost us, and I just couldn't afford to suffer that loss. (R. Lee, Tr. 701–02).

When he agreed to participate, Mr. Lee had no reason to believe that payments by competing suppliers of cosmetics and toiletries were unlawful (R. Lee, Tr. 705, 706–7). He testified:

Q. Did you have any idea that the competitors which Mr. Framson told you were competing in participating in this contest, were participating contrary to their own promotional and advertising policies?

[20] Dorothy Gray did not participate in the cooperative advertising because Weingarten declined to accept it (Boohecker, Tr. 247, 270–75, 277; RX 49 A–B, 57).

A. No. At least to the contrary, based on that, what was mentioned earlier about the FTC hearing that we knew about, I kind of felt that the competition was clean at this time (R. Lee, Tr. 707).

Upon consideration of all the evidence in this case, it must be concluded that Shulton, in making available promotional advertising allowances to Weingarten for its 1958 May Health and Beauty Carnival, was meeting an individual competitive situation in good faith to avoid the loss of substantial sales.

Weingarten's 1958 Christmas Sale

For a number of years prior to 1958, Weingarten had conducted special promotions during the Christmas period (Framson, Tr. 569–70). These promotions, in prior years, had consisted of the payment by suppliers of an additional 5% P.M. and cooperative advertising (Framson, Tr. 570). In 1958 Weingarten's Christmas Sale took place during the period November 28 through December 24, 1958 (e.g., RX 90).

For approximately 20 years, suppliers of cosmetics and toiletries had conducted cosmetics shows at the Rice Hotel in Houston, Texas, generally held during the month of August (Framson, Tr. 568–69; R. Lee, Tr. 707). Since the Christmas season was the most important season of the year for the movement of cosmetic products, these shows permitted the sales representatives to show their Christmas lines and take orders for fall and Christmas promotions with deliveries beginning September 15 (Framson, Tr. 569, 575–76; R. Lee, Tr. 711–12). Although Mr. Framson began planning for Weingarten's 1958 Christmas Sale in July, 1958, no orders were placed and no terms for participation were agreed to until the 1958 Cosmetics Show, which was opened officially on Sunday, August 10, and ran through Thursday, August 14, 1958 (Framson, Tr. 571, 574–75; R. Lee, Tr. 707–08). A few days prior to the official opening of the Show, sales representatives of the major cosmetics companies arranged for a pre-showing at which buyers from the more important accounts were invited to attend (R. Lee, Tr. 708–11, 714; Framson, Tr. 571–72; RX 124). Mr. Framson attended the pre-showing prior to the official opening, where he examined the lines, the packaging of the goods, obtained price lists and catalogs, and discussed the suppliers' advertising programs as well as Weingarten's own plans for the Christmas season (Framson, Tr. 571–73).

Mr. Framson placed orders with most of the sales representatives of Weingarten cosmetics and toiletry suppliers during the Cosmetics Show and they agreed at that time to participate in Weingarten's

Christmas promotion (Framson, Tr. 574–75). When Mr. Framson talked to Mr. Lee at the Show, they discussed Weingarten's Christmas program and Mr. Framson informed Mr. Lee that other cosmetics and toiletry companies had already agreed to participate in Weingarten's Christmas Sale (Framson, Tr. 576–77; R. Lee, Tr. 718). For example, on July 23, 1958, Mr. Tetley, salesman for Dorothy Gray, made a note to obtain confirmation of an additional 5% P.M. for the period November 25 to December 24, 1958 (Tetley, Tr. 1194–95; RX 129).[21] Mr. Lee, however, did not make any arrangement for participation in Weingarten's 1958 Christmas Sale until August 15, 1958, which was after the Cosmetics Show had closed (Framson, Tr. 577–78; R. Lee, Tr. 714; RX 125). In this connection, Mr. Lee testified:

Q. In connection with securing this order, will you tell us what, if any, discussion you had regarding Weingarten's Christmas promotion?

A. Well, Bob informed me that the promotional efforts would take the form of the ten per cent PM on the line and on the gift set sales and in our case, of course, this meant agreeing on a period during which we would, in effect, *meet competition and pay a comparable ten per cent promotion*, and we also discussed the cooperative advertising, and because of the fact that we were making, again, another one of our periodic promotional efforts, I asked him what the promotional efforts of our competition would be and he said in the neighborhood of five hundred to a thousand dollars.

Q. On what?

A. On the cooperative advertising.

* * * * * * *

Q. Did he inform you that competitors had agreed to pay him co-op advertising and a ten per cent PM at that time?

A. Yes, sir.

Q. Were most of the competitors, in fact, paying an extra five, rather than straight ten?

A. Yes, sir.

Q. But to meet that would Shulton have to pay a ten per cent promotion?

A. Yes, sir, for the period of the sale. (R. Lee, Tr. 715–16. See also 717–18, 681; Framson, Tr. 577–78; emphasis added.)

Under the circumstances, Mr. Lee agreed at the meeting on August 15 to participate in the Weingarten Christmas Sale "on the level of the competition" (R. Lee, Tr. 716) and that Shulton would pay a 10% P.M. and furnish cooperative advertising (R. Lee, Tr. 714–15; Framson, Tr. 577–78).[22] The allowances thus authorized by Mr. Lee for

[21] Weingarten's purchase order for Bourjois, Inc., dated August 14, 1958 contains a notation that Bourjois was to participate in the 1958 Christmas Sale with "Five percent extra PM, November 24 through December 25" (Framson, Tr. 661). The same notation was found in the Bourjois file (CX 128).

[22] The following companies participated in the 1958 Christmas Sale: Tussy, Houbigant, Warner-Lambert, Helena Rubinstein, Lenel, Max Factor, Bourjois, Dana, Revlon, Shulton, Dorothy Gray, Corday, Helene Curtis (Lentheric and King's Men), Gillette (Framson, Tr. 574–75; RX 80, 81, 83, 88, 90, 91, 93, 97, 99, 100, 101 A, 104).

Shulton's participation in the Weingarten 1958 Christmas Sale did not exceed the percentages (where made on a percentage basis) or the dollar amount (where made on a dollar amount basis) which represented the levels of participation by Shulton's competitiors.

Mr. Lee's purpose in agreeing to participate in the 1958 Christmas Sale was to prevent substantial injury to Shulton's sales position in the Weingarten stores. Thus, he testified:

Q. Will you tell us whether or not it was desirable for you to participate in this promotion in order to meet the competition of these competitors who had agreed to it?

A. Yes, sir. Not only desirable, it was an absolute necessity. (R. Lee, Tr. 717.)

Otherwise, Shulton would have lost considerable volume of business and its sales to Weingarten for the Christmas season would have been substantially reduced (R. Lee, Tr. 718).

As Mr. Lee's testimony shows, when he agreed to participate in the Christmas Sale, he had no reason to believe that payments by competing suppliers were unlawful (R. Lee, Tr. 722–23, 736):

Q. Mr. Lee, at the time of your decision, your conference with Framson when you agreed to participate in Weingarten's 1958 sale, Christmas sale, did you have any reason to believe that the participation of your competitors that had previously agreed to participate in this sale was discriminatory or in any way unlawful?

* * * * * * *

A. No, sir. I had no reason to believe that they were discriminatory in any way.

* * * * * * *

Q. Had anyone, competitors, customers, accounts, or anyone in Shulton, ever suggested to you that the participation in the Weingarten sales at Christmas was in any way discriminatory as against other accounts?

A. No, sir (R. Lee, Tr. 722–23).

Upon consideration of all the evidence in this case, it must be concluded that Shulton, in making available a promotional and advertising allowance to Weingarten for its 1958 Christmas Sale, was meeting an individual competitive situation in good faith to avoid the loss of substantial sales.

Questions of Law

The Commission in *J. A. Folger & Company*, Docket No. 8094, page 5 (November 14, 1962)[23] had this to say:

The Commission's views as to a respondent's burden in proving its defense under Section 2(b) are expressed in the following recent Commission decisions: *Tri-Valley Packing Association*, Docket No. 7225 and Docket No. 7496 (May 10, 1962); *American Oil Company*, Docket No. 8183 (June 27, 1962).

[23] 1–11–63 Petition to review filed by Folger with 5th CCA.

In *Tri-Valley Packing Association*, *supra*, page 7,[24] the Commission stated:

In order to establish this defense, respondent has the affirmative duty of proving that it reduced its prices to certain customers in good faith to meet the equally low price of a competitor. The Supreme Court in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951), clearly indicated that the lower price which may be met by a seller under the proviso must be a "lawful" price. Certain it is, therefore, that as part of the good faith requirement of this defense, respondent must at least show the existence of circumstances which would lead a reasonable person to believe that the lower prices it was meeting were lawful prices.

Commissioner Elman, dissenting in *Tri-Valley*, said in part:

Where a seller in an active market meets the lower prices of other sellers and invokes the meeting-competition-in-good-faith defense allowed by Section 2(b), considerations of elementary fairness, effective administration of the statute, and the realities of a competitive market preclude imposition on him of a heavier burden than showing that he had no reason to suppose that the competitive lower prices he was meeting were unlawful. The law should not be construed as forcing a seller to compete at his peril. A "sales manager who is trying to compete * * * is not, of course, required to become a detective or a judge." A businessman who must operate in the pressures of the marketplace cannot be expected to conduct a survey into his competitor's costs or to prophesy whether the competitor's lower price will later be held unlawful. Accordingly, if the statute is not to be made an impediment to free and fair price competition, the lower price met by a seller in good faith in a competitive situation should be deemed to be lawful if the seller shows that he neither knew nor had reason to believe that it was unlawful, *and* if no counter-showing is made of facts known to the seller which would indicate to a reasonable and prudent business man that the lower price was probably unlawful.

In *American Oil Company*, *supra*, page 10,[25] the Commission stated:

And in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951), the court stated that the interpretation put on the proviso in the *Staley* case is "that the lower price which lawfully may be met by the seller must be a lawful price". We have not construed the proviso, however, as placing on respondent the burden of proving the legality of the price it was meeting although the Supreme Court has indicated that the person claiming the defense has this burden. 340 U.S., at 249, n. 14. And we need not decide at this time whether proof of the illegality of a competitor's price in itself is sufficient to rebut a claim of meeting competition. We are of the opinion, however, that a seller who meets a competitor's lower price which he knows or has reason to believe is illegal has failed to meet the good faith requirement of the defense. *Standard Oil Co.* v. *Brown*, 238 F. 2d 54 (5th Cir. 1956). Since the seller claiming this defense has the affirmative duty of establishing each element thereof, including good faith, we think it incumbent upon him to show, at least, the existence of facts which would lead a

[24] 7-13-62 Petition to review filed by Tri-Valley with 9th CCA.

[25] Order of Commission set aside with directions to dismiss complaint by 7th CCA 11-19-63.

reasonable and prudent person to believe that the price he was meeting was lawful.

Commissioner Elman, dissenting in *American Oil*, said:

The majority opinion also raises substantial questions concerning application of the meeting competition in good faith defense. For example, in its discussion of the lawfulness of the lower competitive prices met by American, the Commission seems again to have overlooked that the controlling inquiry is the seller's subjective good faith. A seller's burden of establishing good faith is satisfied by showing that he had no reason to believe the lower price met was unlawful. He should not be required, as the Commission states (opinion, p. 10), to go further and show positive facts, known to him when he met the competitive lower price, "which would lead a reasonable and prudent person to believe that the price he was meeting was lawful." See my dissent in *Tri-Valley Packing Association*, Dockets 7225 and 7496, May 10, 1962.

While the difference between these evidentiary burdens may seem slight, the evidence on which the Commission relies to show that respondent was not acting in good faith illustrates how important the difference actually is.

In *Standard Oil Company* v. *Brown*, referred to in the majority opinion in the *American Oil* case, the Court said, at page 58:

Appellee here contends that there is a burden on the seller to prove that the competing price was lawful. There is certainly no authority for this in either the Supreme Court or later Court of Appeals opinions in the case referred to at such great length. The most, it seems to us, that could be made out of the use by the Supreme Court of the word "lawful" is that if the seller discriminates in price to meet prices that he knows to be illegal or that are of such a nature as are inherently illegal, as was the basing point pricing system in the Staley case, supra, there is a failure to prove the "good faith" requirement in § 2(b). There is nowhere a suggestion that the seller must carry the burden of proving the actual legality of the sales of its competitors in order to come within the protection of the proviso.

In an appended note, the Court stated further:

Not only is there no precedent for requiring such proof, but it is apparent that such a requirement would practically destroy the value of the proviso, for the legality vel non of the competitor's prices depends on many facts, including what it might be doing to meet low prices of its competitors. The inquiry into these collateral issues would be endless.

It is apparent that questions of law are presented in this proceeding which have not been resolved by the courts but, applying the test in keeping with the interpretation of the law as laid down by the majority of the Commission, it is the opinion of the hearing examiner that the respondent has shown positive facts, known to it at the time it met the competitive payments, which would lead a reasonable and prudent person to believe that the payments it was meeting were lawful.

CONCLUSION

It is the conclusion of the Hearing Examiner that the payments made by the respondent to J. Weingarten, Inc. in 1958, as alleged in the complaint, were made in good faith to meet the payments of competitors as authorized by Section 2(b) of the amended Clayton Act.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION*

JULY 22, 1964

BY ELMAN, COMMISSIONER:

The complaints in these closely related cases were issued on January 5, 1960, and charged respondents (cosmetics manufacturers) with having violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, in granting allowances for advertising and promotional services to J. Weingarten, Inc., a large supermarket chain, in 1958 and 1959. At issue is respondents' participation in several promotional events sponsored by Weingarten: the 57th Anniversary Sale and Ninth Annual May Beauty Carnival in 1958, the 1958 Christmas Sale (No. 7721 only), and the Tenth Annual May Beauty Carnival in 1959 (No. 7717 only). After extended proceedings, the hearing examiner issued his initial decisions after remand, entering a cease-and-desist order in No. 7717, but accepting respondent's good-faith meeting of competition defense and dismissing the complaint in No. 7721. These matters are before the Commission on cross-appeals of complaint counsel and respondent in No. 7717 and on complaint counsel's appeal in No. 7721.

These cases present a factual pattern that has recurred frequently in the Commission's administration of Section 2(d). The pattern is this: A large or chain retailer will sponsor a special promotional event, for example, an anniversary sale. It will solicit the participation of competing suppliers, often sending a large number of these suppliers identical contracts which provide that the supplier shall grant the retailer special advertising and promotional allowances in connection with the event. A supplier thus solicited may face a difficult choice. He may be very reluctant, for many reasons, to accede to the buyer's request for favored treatment. But he may also be aware that if competing suppliers participate in the promotional event and he does not,

*In the following related cases of Max Factor & Company, Docket No.7717 and Shulton, Inc., Docket No. 7721.

it will put him at a serious competitive disadvantage. For, as the records of the present cases show, failure to participate in a large retailer's special promotional events may cost a supplier dearly in the fight for retail shelf space and salespersons' goodwill and loyalty, extremely important competitive factors.

The Commission's experience in this type of case has demonstrated that the "enforcement policy best calculated to achieve the ends contemplated by Congress" (*Moog Industries* v. *F.T.C.*, 355 U.S. 411, 413) is one based on Section 5 of the Federal Trade Commission Act and directed primarily at large buyers who, knowing or having reason to know that such concessions to them are discriminatory and not fairly available on comparable terms to competing buyers, induce suppliers to grant payments or allowances in connection with special promotional events.

The Supreme Court has held that conduct which "runs counter to the public policy declared in the Sherman and Clayton Acts" violates Section 5 of the Federal Trade Commission Act.[1] The Robinson-Patman Act was passed "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *F.T.C.* v. *Henry Broch & Co.*, 363 U.S. 166, 168. Unfair conduct by the buyer, not the seller, was the primary evil at which the Act was aimed. In the words of its principal draftsman, "buying power is the source of the evil. The seller is merely an innocent victim compelled usually in self-defense to grant the concessions demanded." (Quoted in *Grand Union Co.*, 57 F.T.C. 382, 420.) One way in which such power may be unfairly exercised is by the buyer's demanding and receiving discriminatory advertising and promotional allowances: "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services. * * * Such an allowance becomes unjust when * * * the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15–16 (1936).

In view of the basic Congressional policy embodied in the Robinson-Patman Act, particularly in Section 2(d), the courts have recog-

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[1] *Fashion Originators' Guild of America* v. *F.T.C.*, 312 U.S. 457, 463. See also *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392; *Grand Union Co.* v. *F.T.C.*, 300 F. 2d 92 (2d Cir. 1962)

nized that the Commission may declare to be an unfair method of competition, forbidden by Section 5 of the Federal Trade Commission Act, the practice whereby powerful buyers knowingly induce their suppliers to grant them discriminatory advertising and promotional allowances that do not meet the proportionality requirements of Section 2(d).[2] That principle has been applied by the Commission in factual situations essentially indistinguishable from that of the present cases.[3]

Accordingly, the Commission, in the exercise of its administrative responsibility to determine what enforcement policy, in the circumstances, is "best calculated to achieve the ends contemplated by Congress", has decided to dismiss the complaints in the present cases. The respondents are only two among a very large number of suppliers who participated in Weingarten's special promotional events during the period in question. The entry of cease-and-desist orders against these particular respondents, therefore, would not be an equitable and fully effective method of eliminating the discriminatory practices in which respondents engaged, along with many others, and would not be in the public interest.

Our disposition of these cases makes it unnecessary to adjudicate any of the issues raised in the appeals, including the question whether respondents have sustained the burden of establishing the good-faith meeting of competition defense.[4]

Commissioner MacIntyre, without concurring in the result, states that he does agree that an *appropriate* proceeding under Section 5 of the Federal Trade Commission Act is a better means for challenging practices of this type.

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[2] *Grand Union Co.* v. *F.T.C., supra; Giant Food, Inc.* v. *F.T.C.* 307 F. 2d 184 (D.C. Cir. 1962); *American News Co.* v. *F.T.C.,* 300 F. 2d 104 (2d Cir. 1962); *R. H. Macy & Co.* v. *F.T.C.,* 326 F. 2d 445 (2d Cir. 1964); *Fred Meyer, Inc.,* F.T.C. Docket 7492 (decided July 9, 1963) [63 F.T.C. 1]. In an action against a buyer under Section 5, the buyer could not, of course, defend on the ground that his unlawful conduct was justified by similar conduct on the part of one or more of his competitors. As has been held many times, the fact that an unfair method of competition is widespread in an industry is not a defense on the merits to an action brought against a single competitor, although it should be considered by the Commission in exercising administrative discretion as to how most effectively to stop the practice. *Moog Industries, supra,* at 413.

[3] See, e.g., *Giant Food, Inc., supra; R. H. Macy & Co., supra.*

[4] Even assuming that the respondents had a good-faith meeting of competition defense on the facts of the present cases (a question we neither reach nor decide), it would not necessarily follow that there could be no unlawful inducement by the buyer under Section 5. In the special situation where the buyer, by inducing nonproportionalized allowances from a group of suppliers, has himself created the conditions under which they may be able to establish a Section 2(b) defense, it would be anomalous and destructive of the statutory policy to hold that the buyer was also sheltered by the defense. The general language of the *Automatic Canteen* decision (*Automatic Canteen Co.,* v. *F.T.C.,* 346 U.S. 61, 71) cannot be read as answering this particular question, which was not even remotely presented by the facts before the Court in that case.

FINAL ORDERS*

These matters have been heard on appeal (by complaint counsel and respondent in No. 7717, and by complaint counsel in No. 7721) from initial decisions of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission, without adjudicating any of the issues raised by these appeals, has determined that the public interest would not be served by entry of cease-and-desist orders in these proceedings and that the complaints in these matters should be dismissed. Accordingly,

It is ordered, That the initial decisions be, and they hereby are, vacated and set aside.

It is further ordered, That the complaints against respondents be, and they hereby are, dismissed.

Commissioner MacIntyre not concurring in the result.

IN THE MATTER OF

CHESEBROUGH-PONDS, INC.**

ORDERS, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Dockets 8491–8500, 8502–8508. Complaints, June 13, 1962—Decisions, July 27, 1964

Orders setting aside initial decisions—respondents having ceased making the alleged discriminatory payments—and opinion setting forth declaratory findings defining the requirements of the law as a binding guide for future conduct in cases in which complaints charged 17 manufacturers of drugs, cosmetics and sundries with violating Sec. 2(d) of the Clayton Act by making payments for advertising in customer-owned publications including (1) wholesalers' catalogs distributed to retailer customers for use in ordering merchandise, and (2) catalogs distributed by wholesalers to retailers for dissemination to the buying public.

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*In the following related cases of Max Factor & Company, Docket No. 7717 and Shulton, Inc., Docket No. 7721.

**And the following related cases: Union Carbide Corporation, Docket No. 8492; Becton, Dickinson & Company, Docket No. 8493; Warner-Lambert Pharmaceutical Company, Docket No. 8494; Julius Schmid, Inc., Docket No. 8495; The Mennen Company, Docket No. 8496; Eversharp, Inc., Docket No. 8497; Sterling Drug, Inc., Docket No. 8498; Corn Products Company, Docket No. 8499; White Laboratories, Inc., Docket No. 8500; Chemway Corporation, Docket No. 8502; The d-Con Company, Inc., Docket No. 8503; Hazel Bishop, Inc., Docket No. 8504; Philip Morris, Incorporated, Docket No. 8505; Lehn & Fink Products Corporation, Docket No. 8506; B. T. Babbitt, Inc., Docket No. 8507; Youngs Rubber Corporation, Docket No. 8508.

The Complaints and Final Orders in these cases were consolidated by the compiler.