IN THE MATTER OF

# WILLIAM H. RORER, INC.

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

*Docket 8599. Complaint, Sept. 30, 1963—Decision, Aug. 21, 1967*

Order modifying a cease and desist order issued May 9, 1966, 69 F.T.C. 667, pursuant to a decision of the U.S. Court of Appeals, Second Circuit, 374 F. 2d 622, March 20, 1967 (8 S. & D. 432), by limiting the application of the prohibition against price discrimination in pharmaceutical products to competing retail customers.

## ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the Second Circuit a petition to review and set aside the order to cease and desist issued herein on May 9, 1966 [69 F.T.C. 667]; and the court on March 20, 1967 [8 S. & D. 432], having issued its opinion and on April 17, 1967, having entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed;

*Now therefore, it is hereby ordered,* That the aforesaid order of the Commission to cease and desist be, and it hereby is, modified in accordance with the said final decree of the court of appeals to read as follows:

*It is ordered,* That respondent William H. Rorer, Inc., a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of prescription and nonprescription pharmaceutical products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to some retailers at prices higher than the price charged to any other retailer who, in fact, competes in the resale and distribution of respondent's products with the retailer paying the higher prices.

*It is further ordered,* That, in addition to an apart from the provisions of the preceding paragraph, if respondent at any time after the effective date of this order institutes a price schedule whereby it charges a different price for its products to any person, group or class of its competing retail customers

on the basis or in the belief that such difference in price is justified by savings to the respondent in the cost of manufacture, sale or delivery to the members of such customer group or class, respondent shall

(a) promptly notify the Federal Trade Commission of the institution of such price schedules and submit to the Commission a written statement with necessary underlying data in support of the cost justification of such price discrimination; and

(b) adequately and regularly publicize to all retail customers that prices to some are higher than to others, together with reasons and details of the price differences or discounts.

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

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IN THE MATTER OF

## MICHAEL J. MILLER ET AL. TRADING AS TRACER RESERVE FUND

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

*Docket 8724. Complaint, Dec. 27, 1966—Decision, Aug. 21, 1967*

Order requiring a St. Louis, Missouri, operator of a debt collection business and his wife to cease misrepresenting the purpose of respondents' business, that any money or any other thing of value is being held for delinquent debtors, using any form which does not reveal true intent of asking for information, and misrepresenting that respondents maintain a Chicago office.

### 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 Michael J. Miller and Ida Miller, his wife, individuals trading and doing business as Tracer Reserve Fund, 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 Michael J. Miller and Ida Miller, his wife, are individuals trading and doing business under the name of Tracer Reserve Fund, with their office and principal place of business located at 4 North Eighth Street, St. Louis, Missouri. They formulate, control and direct the policies, acts and practices hereinafter set forth.

PAR. 2. In the course and conduct of their business, respondents are now, and for some time last past have been, receiving accounts for collection, and requests for the location of alleged delinquent debtors from persons, firms, and businesses, located both in and outside the State of Missouri.

PAR. 3. Respondents are now, and for some time last past have been, engaged in the business of preparing and transmitting through the mails, a printed form and other material for use in locating alleged delinquent debtors. Respondents cause said printed form and other material including letters, checks, and documents to be transported from their place of business in the State of Missouri to a mailing address located at 2349 West Devon, Chicago, Illinois, from which address, said form and other material are mailed to addressees located in the various States of the United States. Respondents maintain, and at all times herein mentioned have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents frequently desire to obtain information as to the current address, place of employment, social security number and other pertinent information as to persons whose alleged delinquent accounts the respondents are seeking to collect. For this purpose respondents use, and have used, a certain printed form.

The form is designated "Tracer Reserve Fund" and consists of a single sheet of paper with printing thereon, by which recipient is told that "we are holding a small sum of money for you, upon the return of this form, and the information proves it is correct, we will send this money to you."

The form letter then sets out questions which, if answered, provide information considered to be of value, in the collection of accounts owed or alleged to be owed by the addressee, or in the location of witnesses. These printed forms are mailed under separate cover to a secretarial service mail drop, located in Chicago, Illinois, at 2349 W. Devon Avenue, from where they are then mailed out to the addressee. When replies are received by this

secretarial service mail drop, at 2349 W. Devon Avenue, Chicago, Illinois, they are then mailed in a separate cover to respondents at 1252 Mt. Olive Street, University City, Missouri.

PAR. 5. Through use of the mail drop address at 2349 W. Devon Avenue, Chicago, Illinois, respondents represent, directly or by implication, to addressees to whom the forms are mailed, that business offices are maintained in the city of Chicago, Illinois.

PAR. 6. The aforesaid representations and implications, that respondents maintain business offices in the city of Chicago, Illinois, are false, misleading and deceptive. In truth and in fact, respondents do not maintain business offices in the city of Chicago, Illinois, or in any place other than University City, Missouri. Said mail drop address is used to mislead persons, to whom form is sent, and to conceal respondents' correct business address.

The respondents check the returned forms for information, and then relay the pertinent information to the requesting party or parties.

Said form is designed to be forwarded to addressee in envelopes provided by respondents, in which is enclosed a return envelope addressed to "Tracer Reserve Fund, 2349 W. Devon Avenue, Chicago (45), Illinois."

PAR. 7. The printed form used by respondents is as follows:

Tracer Reserve Fund
2349 W. Devon
Chicago (45), Ill.

— —

No.

— —

If you are the right person, we are holding a small sum of money for you. Upon return of this form, and the information proves it is correct, we will send this money to you.

Inclosed you will find a stamped envelope for your reply.

We tried to locate you at this address: _____

HUSBAND'S NAME _____ EMPLOYED BY _____

ADDRESS _____

DEPT. _____ SOCIAL SEC. NO. _____

WHERE YOU LIVED PREVIOUSLY _____ PHONE NO. _____

WIFE'S NAME _____ EMPLOYED BY _____

ADDRESS _____

DEPT. _____ SOCIAL SEC. NO. _____

REFERENCE _____ ADDRESS _____ PHONE NO. _____

REFERENCE _____ ADDRESS _____ PHONE NO. _____

Please fill out correctly and return to us within Five (5) days.

THIS INFORMATION MUST BE PRINTED. IT IS IMPORTANT THAT WE HAVE THIS INFORMATION CORRECT IN ORDER THAT WE CAN DELIVER THIS CHECK TO THE RIGHT PERSON. WITHOUT DELAY.

Signed _____
Dated _____

PAR. 8. Through the use of the name "Tracer Reserve Fund," and the statement, "If you are the right person, we are holding a small sum of money for you. Upon the return of this form, and the information proves it is correct, we will send this money to you," and by other words on the said form, respondents represent, directly or by implication, to those to whom the form is mailed, that respondent has been named as a depository of a reasonably substantial sum of money to be delivered to the recipients of said form upon proper identification and by furnishing all of the requested information.

PAR. 9. In truth and in fact, respondents are not engaged in any fiduciary or other capacity to receive money for the persons to whom the forms are sent, and the only money sent them is in the sum of twenty-five cents via respondents' check. Respondents use this form to seek the information solely for the purpose of locating alleged delinquent debtors by subterfuge. This practice constitutes a scheme to mislead and conceal the purpose for which the information is sought.

Therefore, the aforesaid statements and representations set forth in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

PAR. 10. The use, as hereinabove set forth, of said form has had, and now has, the tendency and capacity to mislead and deceive persons to whom said form is sent into the erroneous and mistaken belief that the said representations and implications are true and to induce the recipients thereof to supply information which they otherwise would not have supplied.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices, in commerce in violation of Section 5 of the Federal Trade Commission Act.

*Mr. J. Leon Williams* and *Mr. Alan M. Silbergeld* for the Commission.

*Mr. Michael J. Miller pro se.*

## INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

JULY 7, 1967

### STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on December 27, 1966, alleging that the respondents engaged in unfair methods of competition and unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act. More specifically, the respondents were charged with using false and deceptive forms for the purpose of collecting delinquent accounts. A copy of the complaint was served upon the respondents, who filed an admission answer* waiving the right to a hearing and consenting to the issuance of the order attached to the complaint. Based upon the entire record consisting of the complaint, the respondents' admission answer and other matters of record, the hearing examiner makes the following findings of fact, conclusions drawn therefrom and issues the following order:

### FINDINGS OF FACT

1. Respondents Michael J. Miller and Ida Miller, his wife, are individuals trading and doing business under the name of Tracer Reserve Fund, with their office and principal place of business located at 4 North Eighth Street, St. Louis, Missouri. They formulate, control and direct the policies, acts and practices hereinafter set forth.

2. In the course and conduct of their business, respondents are now, and for some time last past have been, receiving accounts for collection, and requests for the location of alleged delinquent debtors from persons, firms, and businesses, located both in and outside the State of Missouri.

3. Respondents are now, and for some time last past have been, engaged in the business of preparing and transmitting through the mails, a printed form and other material for use in locating alleged delinquent debtors. Respondents cause said printed form and other material including letters, checks, and documents to be transported from their place of business in the State of Missouri to a mailing address located at 2349 West Devon, Chicago, Illinois, from which address, said form and other material are mailed to

* Respondents' answer was filed May 23, 1967, the date the matter was set for hearing in St. Louis, Missouri. During the course of a prehearing conference held by the undersigned examiner prior to the opening of a formal hearing, respondents jointly executed their admission answer to the complaint.

addressees located in the various States of the United States. Respondents maintain, and at all times herein mentioned have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, respondents frequently desire to obtain information as to the current address, place of employment, social security number and other pertinent information as to persons whose alleged delinquent accounts the respondents are seeking to collect. For this purpose respondents use, and have used, a certain printed form.

The form is designated "Tracer Reserve Fund" and consists of a single sheet of paper with printing thereon, by which recipient is told that "we are holding a small sum of money for you. Upon the return of this form, and the information proves it is correct, we will send this money to you."

The form letter then sets out questions which, if answered, provide information considered to be of value, in the collection of accounts owed or alleged to be owed by the addressee, or in the location of witnesses. These printed forms are mailed under separate cover to a secretarial service mail drop, located in Chicago, Illinois, at 2349 W. Devon Avenue, from where they are then mailed out to the addressee. When replies are received by this secretarial service mail drop, at 2349 W. Devon Avenue, Chicago, Illinois, they are then mailed in a separate cover to respondents at 1252 Mt. Olive Street, University City, Missouri.

5. Through use of the mail drop address at 2349 W. Devon Avenue, Chicago, Illinois, respondents represent, directly or by implication, to addressees to whom the forms are mailed, that business offices are maintained in the city of Chicago, Illinois.

6. The aforesaid representations and implications, that respondents maintain business offices in the city of Chicago, Illinois, are false, misleading and deceptive. In truth and in fact, respondents do not maintain business offices in the city of Chicago, Illinois, or in any place other than University City, Missouri. Said mail drop address is used to mislead persons, to whom form is sent, and to conceal respondents' correct business address.

The respondents check the returned forms for information, and then relay the pertinent information to the requesting party or parties.

Said form is designed to be forwarded to addressees in envelopes provided by respondents, in which is enclosed a return envelope addressed to "Tracer Reserve Fund, 2349 W. Devon Avenue, Chicago (45), Illinois."

7. The printed form used by respondents is as follows:

Tracer Reserve Fund
2349 W. Devon
Chicago (45), Ill.

— —

No.

— —

If you are the right person, we are holding a small sum of money for you. Upon return of this form, and the information proves it is correct, we will send this money to you.

Inclosed you will find a stamped envelope for your reply.

We tried to locate you at this address: _____

HUSBAND'S NAME _____ EMPLOYED BY _____

ADDRESS _____

DEPT. _____ SOCIAL SEC. NO. _____

WHERE YOU LIVED PREVIOUSLY _____ PHONE NO. _____

WIFE'S NAME _____ EMPLOYED BY _____

ADDRESS _____

DEPT. _____ SOCIAL SEC. NO. _____

REFERENCE _____ ADDRESS _____ PHONE NO. _____

REFERENCE _____ ADDRESS _____ PHONE NO. _____

Please fill out correctly and return to us within Five (5) days.

THIS INFORMATION MUST BE PRINTED. IT IS IMPORTANT THAT WE HAVE THIS INFORMATION CORRECT IN ORDER THAT WE CAN DELIVER THIS CHECK TO THE RIGHT PERSON. WITHOUT DELAY.

Signed _____
Dated _____

8. Through the use of the name "Tracer Reserve Fund," and the statement, "If you are the right person, we are holding a small sum of money for you. Upon the return of this form, and the information proves it is correct, we will send this money to you," and by other words on the said form, respondents represent, directly or by implication, to those to whom the form is mailed, that respondents have been named as a depository of a reasonably substantial sum of money to be delivered to the recipients of said form upon proper identification and by furnishing all of the requested information.

9. In truth and in fact, respondents are not engaged in any fiduciary or other capacity to receive money for the persons to whom the forms are sent, and the only money sent them is in the sum of twenty-five cents via respondents' check. Respondents use

this form to seek the information solely for the purpose of locating alleged delinquent debtors by subterfuge. This practice constitutes a scheme to mislead and conceal the purpose for which the information is sought.

Therefore, the aforesaid statements and representations set forth in Paragraphs 7 and 8 were, and are, false, misleading and deceptive.

10. The use, as hereinabove set forth, of said form has had, and now has, the tendency and capacity to mislead and deceive persons to whom said form is sent into the erroneous and mistaken belief that the said representations and implications are true and to induce the recipients thereof to supply information which they otherwise would not have supplied.

## CONCLUSIONS

1. The aforesaid acts and practices of respondents, as herein found, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices, in commerce in violation of Section 5 of the Federal Trade Commission Act.

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

3. The complaint herein states a cause of action and this proceeding is in the public interest.

4. The order, as hereinafter set forth, follows the form of the order contained in the complaint and is also the order agreed to by the parties.

After due consideration, the hearing examiner believes that such order is appropriate and may be entered.

## ORDER

*It is ordered,* That respondents Michael J. Miller and Ida Miller, individuals trading and doing business as Tracer Reserve Fund, 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 business of obtaining information concerning delinquent debtors, or the offering for sale, sale or distribution of forms or other materials, for use in obtaining information concerning delinquent debtors, or in the collection of, or attempting to collect accounts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the name "Tracer Reserve Fund" or any other name of similar import to designate, describe or refer to respondents' business, or otherwise misrepresenting the purpose for which information is sought.

2. Representing, directly or by implication that money or any other thing of value has been deposited with respondents for persons from whom information is sought, unless or until the money or other thing of value has in fact been so deposited, and then only when the exact sum of money or the exact nature of the other thing of value, is clearly and expressly disclosed and described.

3. Using, or placing in the hands of others for use, any form, questionnaire, or other material printed or written, which does not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning alleged delinquent debtors.

4. Representing, directly or by implication, that respondents maintain business offices in Chicago, Illinois, or in any other city other than where business offices of respondents are actually maintained.

## FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective July 1, 1967), the initial decision should be adopted and issued as the decision of the Commission:

*It is ordered,* That the initial decision of the hearing examiner shall, on the 21st day of August 1967, become the decision of the Commission.

*It is further ordered,* That respondents, Michael J. Miller and Ida Miller, individuals trading and doing business as Tracer Reserve Fund, shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

# BEST & CO. INC.*

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

*Docket 8669. Complaint,** November 1, 1965—Decision, September 7, 1967*

Order requiring a New York City corporation and its subsidiary, engaged in the sale at retail of wearing apparel and accessories, to cease knowingly inducing or receiving discriminatory promotional allowances from their suppliers.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent herein, Best & Co., Inc., has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business is located at 645 Fifth Avenue, New York, New York.

PAR. 2. Respondent is principally engaged in the purchase, sale and distribution of retail merchandise, including wearing apparel and accessories such as, but not limited to, costume jewelry, handbags, footwear, umbrellas, gloves and timepieces. It sells to thousands of consumers through 21 retail outlets located in 10 States and the District of Columbia. Respondent's total net sales for its 1964 fiscal year amounted to nearly $50 million.

PAR. 3. In the course and conduct of its business, respondent is, and has been for several years last past, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases products from suppliers located in various States of the United States, and in some cases causes such products to be shipped from such suppliers to itself across state lines. In other cases, in response to orders placed by respondent with suppliers for future delivery of products, such products are caused to be manufactured and to be transported across State lines to such suppliers for delivery to respondent. The products which respondent receives from its suppliers are shipped by respondent

* Beco Industries Corporation is the successor corporation.

** The name of respondent, as it appears in the complaint, erroneously contains a comma after the word "Co." See initial decision p. 529.

across State lines to its retail outlets for resale to consumers. Respondent advertises the products it offers to sell in various media which have an interstate circulation.

Respondent's suppliers also sell, and for several years last past have sold, products to other retailer customers for resale to consumers. Such suppliers ship or cause to be shipped such products across State lines to those customers.

Thus there is and has been, during all periods relevant herein, a continuous course of trade in commerce in such products.

PAR. 4. In the course and conduct of its business, respondent is now, and has been for several years last past, in active competition with other corporations, partnerships, firms and individuals, including the aforesaid customers of respondent's suppliers, in the purchase, sale and distribution of such products within the various trading areas wherein it does business.

PAR. 5. In the course and conduct of its business, respondent, directly or indirectly, induces or receives, and has induced or received, from many of its suppliers various payments, allowances or other things of value to or for its benefit as compensation or in consideration for services or facilities furnished by or through it in connection with the handling, sale or offering for sale of the products of such suppliers. Such payments, allowances or other things of value are and were not made available by such suppliers on proportionally equal terms to such suppliers' aforesaid customers competing with respondent in the sale and distribution of the suppliers' products.

For example, respondent causes, and has caused, to be published catalogs, direct mailers, statement enclosures, and newspaper and magazine advertisements which advertise respondent's outlets and its trade name. Such advertisements also advertise one or more of its suppliers' products which are available at respondent's outlets. In many instances the suppliers of the advertised product or products pay or allow respondent payments, allowances, or other things of value which offset, wholly or in substantial part, the total cost of such advertising. At the same time the suppliers do not make available such payments, allowances, or other things of value on proportionally equal terms to customers competing with respondent in the resale of the suppliers' products. In fact, during 1962, among the many suppliers making such payments to respondent, a sampling of 30 such suppliers disclosed that those suppliers paid respondent approximately $267,000, with several of such suppliers paying over $20,000 each and one paying over $30,000, while at the same time they did

not make such payments available on proportionally equal terms to customers competing with respondent.

One instance of the above described acts or practices involved respondent's dealings with a manufacturer of women's blouses and sportswear. This supplier in 1963 instituted a cooperative advertising allowance program and engaged the services of a third party to administer the program. The program provided for an allowance not exceeding 2% of a customer's past season's purchases to be used by the customer primarily for cooperative newspaper advertising, with other media being available upon request made by the customer to the third party administering the program. The program further provided that competitive products of other suppliers were not to be included in such advertisements and that allowances were not to be deducted from invoices in making payments for products to the supplier. The supplier publicly announced the provisions of the program to the trade and individually announced it to its customers.

During the period in 1963 after the program was put into effect, the program was utilized by a number of customers competing with respondent, and none of such customers received more than the 2% allowed. Respondent, on the other hand, failed and refused to participate in the program. It received during the same period one payment in the amount of $1100 which was unrelated to its past season's purchases and actually equalled more than 4% of those purchases, and during the same year received another payment in the amount of $4,200 which likewise was unrelated to any past purchases. Furthermore respondent totally ignored the requirements of the program, using the payments to advertise in catalogs and magazines without making request to do so to said third party, featuring competitive products in the same advertisements with the supplier's products, and deducting the allowances from the supplier's invoices in making payments.

PAR. 6. Respondent, in so directly or indirectly inducing or receiving the aforesaid payments, allowances or other things of value from such suppliers, knew or should have known that such suppliers were not making available to their customers competing with respondent in the resale and distribution of such products such payments, allowances or other things of value on proportionally equal terms.

PAR. 7. The acts and practices, as above alleged, are all to the prejudice of the public and constitute unfair methods of competition or unfair acts or practices within the intent and meaning

of, and in violation of, Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45).

*Mr. Brockman Horne, Mr. Francis J. Stewart, Mr. Ronald D. Schwartz,* and *Mr. Allan Finkel,* supporting complaint.

*Spitzer & Feldman,* by *Mr. M. James Spitzer* and *Mr. Ronald J. Offenkrantz;* and *Roth, Carlson, Kwit & Spengler,* by *Mr. Robert S. Carlson,* all of New York, N.Y., for respondent.[1]

## INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

MARCH 20, 1967

## INDEX



[1] The law firm [Roth, Carlson, Kwit & Spengler, by Mr. Robert S. Carlson, of New York, N.Y.], was substituted as counsel for respondent on December 1, 1966, and did not participate in the trial of this proceeding.

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on November 1, 1965, charging it with having violated Section 5 of the Federal Trade Commission Act by knowingly inducing or receiving from its suppliers, advertising and promotional allowances which were not made available to its competitors on proportionally equal terms. Following service of a copy of said complaint upon it, respondent appeared by counsel and moved for a dismissal of the complaint or, in the alternative, for a more definite statement concerning the allegations of the complaint. By order dated December 1, 1965, the undersigned denied respondent's motion for a dismissal of the complaint, but granted its alternative request for a more definite statement, to the extent of the particulars set forth in the answer to said motion filed by counsel supporting the complaint. Thereafter, respondent filed its answer admitting the receipt of certain advertising allowances from suppliers, but denying knowledge as to whether said allowances were made available to its competitors on proportionally equal terms, and denying that it had knowingly induced or received such allowances under the circumstances alleged.

A series of four prehearing conferences were convened before the undersigned on various dates between February 18, 1966, and June 2, 1966. By agreement of counsel the transcripts of said conferences were made a part of the record in this proceeding. Pursuant to various prehearing orders of the undersigned the parties exchanged, prior to the start of hearings, considerable information with respect to the evidence proposed to be offered by them, including the names of proposed witnesses and narrative statements of their expected testimony, and copies of proposed documentary evidence. During the course of prehearing procedures various motions and applications were filed by respondent, including motions or applications for (a) the taking of depositions of certain witnesses proposed to be called by complaint counsel, (b) the suspension or debarment of complaint counsel, (c) the postponement of hearings and (d) the issuance of subpoenas duces tecum to certain witnesses under subpoena by complaint counsel. Said motions or applications were denied by orders of the examiner issued May 10, May 27, and June 27, 1966, respectively. Appeals or requests for permission to file interlocutory

appeals from said orders of the examiner were denied by the Commission on June 9, June 23, and June 28, 1966, respectively.

Hearings for the reception of evidence in support of and in opposition to the complaint were held in Washington, D.C., and New York, New York, on various dates between June 29 and September 29, 1966.[2] There were 23 days of hearings and 77 witnesses testified. The record herein consists of approximately 3,400 pages of transcript, and over 500 documentary and statistical exhibits aggregating over 20,000 pages. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order, together with a supporting brief by respondent, were filed on January 4, 1967, and replies thereto were filed on January 16, 1967.[3]

After having carefully reviewed the evidence in this proceeding and the proposed findings and conclusions submitted (including the replies thereto and supporting briefs),[4] and based on his observation of the witnesses, the undersigned makes the following:

## FINDINGS OF FACT [5]

### I. The Respondent

### A. *Identity and Business*

1. At all times material herein, respondent was a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of

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[2] Pursuant to certificates of necessity of the examiner, the Commission, by orders issued June 3, 1966, and August 5, 1966, authorized the holding of hearings in more than one place, and a suspension of hearings of approximately a month and a half due to the absence of a Commission witness from the country and to enable respondent to prepare its defense.

[3] The time for filing proposed findings was initially fixed for November 14, 1966, but was later extended to December 14, 1966, and then to January 4, 1967, on application of counsel for respondent.

[4] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to the proposed findings, replies and briefs are made with the following abbreviations: "CPF" (for proposed findings of complaint counsel), "RPF" (for proposed findings of respondent), "CR" (for reply of complaint counsel), "RR" (for reply of respondent), "CB" (for brief of complaint counsel), and "RB" (for brief of respondent).

[5] References are hereinafter made to certain portions of the record in support of particular findings. Such references are to the principal portions of the record relied upon by the examiner, but are not intended as an exhaustive compendium of the portions of the record reviewed and relied upon by him. References to the record will be made with the following abbreviations: "Tr." (for transcript of testimony), "CX" (for complaint counsel's exhibits), and "RX" (for respondent's exhibits).

business was located at 645 Fifth Avenue, New York, New York (Admitted, Ans.).

2. At all times material herein, respondent was principally engaged in the purchase, sale and distribution, at retail, of wearing apparel and of accessories thereto, including costume jewelry, handbags, footwear, umbrellas, gloves and time pieces (Admitted, Ans.). Its main store was located at 645 Fifth Avenue, New York City, and it operated 20 branch stores in ten States of the United States and in the District of Columbia. It also operated three additional stores in the State of Wisconsin under its Grand Apparel Division. Respondent's total net sales in 1962, 1963, and 1964 were: $47.5 million, $48.5 million, and approximately $50 million, respectively (CX 3 and 4; Admitted, Ans., as to 1964 sales figures).

3. In early 1966 respondent caused to be organized, under the laws of the State of Delaware, a wholly owned subsidiary corporation, under the name Best & Co. Stores of Delaware Inc., to which it transferred all of its assets other than its real estate and certain cash and securities. Since such transfer, Best & Co. Stores of Delaware Inc., has operated the retail stores and merchandise business formerly operated by respondent (CX 15; Tr. 3153–3155).[6] There has been no change in the activities of the subsidiary, insofar as they involve the practices here at issue (Tr. 3153, 3181).

B. *Advertising Program*

4. Respondent engages in extensive advertising of its retail outlets and trade name, and of the products sold by it. For this purpose it utilizes (a) catalogs, brochures, statement enclosures and other direct mailing pieces, and (b) newspapers and magazines. In advertising the products sold by it, it frequently features the trade or brand name (sometimes referred to as the "logo") of the manufacturer of such product. Generally, where such trade or brand name was featured in an advertisement, respondent received a payment or allowance from the manufacturer toward the cost of the advertisement. In 1962 and 1963 it received advertising allowances from 320 of its suppliers. In 1962 its total

[6] Complaint counsel have proposed certain findings with respect to a transfer and sale, in October 1966, of the major portion of the retail business formerly operated by respondent's subsidiary (CPF, p. 17). The basis of such finding are certain statements made by counsel for respondent in a motion filed by them following the close of the reception of evidence in this proceeding. Since such facts are not part of the evidentiary record in this proceeding they cannot be made the subject of any findings. Moreover, since respondent has raised no issue of mootness, they appear to be immaterial.

advertising expenditures were approximately $1.9 million, of which $692,000 was contributed by suppliers. In 1963 its total advertising expenditures were approximately $2.2 million, of which $654,000 was contributed by suppliers (Admitted in part, Ans., par. 3; CX 9–B; Tr. 3185, 3289–3290).

5. Of the $1.9 million expended by respondent for advertising in 1962, $825,000 was expended for direct mail advertising, consisting principally of catalogs and brochures. Of the $2.2 million expended for advertising in 1963, $915,000 was for direct mail advertising. During each of the years 1962 and 1963 respondent prepared and mailed to its list of customers in the United States and abroad, six different catalogs. Each catalog was in the form of a booklet and consisted of a minimum of 32 pages. Two of these featured children's merchandise and were designated as "Spring" and "Fall." Four catalogs featured adult merchandise and were designated as "Spring," "Summer," "Fall," and "Christmas." Approximately 600,000 catalogs were sent out in each mailing, for a total of approximately 3.7 million in each year. The brochures, which were called envelope mailers, were somewhat less elaborate than the catalogs. In 1962 and 1963 respondent prepared and mailed out seven of these brochures, designated as "January," "Cashmere," "May," "College," "September," "October," and "Resort." The number of brochures sent out on each occasion varied from approximately 350,000 to 600,000. The total number of brochures mailed in 1962 and 1963 were 3.3 million and 3.6 million, respectively (CX 9–B; Tr. 3156–3163).

6. Prior to the preparation and mailing of each of the catalogs and/or brochures, a series of meetings were held among various of respondent's employees, including the advertising manager, the sales promotion director, and the buyers, to determine what merchandise to feature in the publication. Each buyer was assigned a certain number of pages in the catalog or brochure which would feature the merchandise of her department. The overall cost of the publication was estimated and the suppliers, as a group, were expected to defray one-half the cost thereof. Each buyer was given a quota consisting of her suppliers' respective shares of the cost of the section featuring merchandise in her department. Each supplier's contribution would vary with the number of pages or portions of the page featuring, or the number of figures illustrating, his merchandise. The buyers were expected to discuss with each of their prospective participating suppliers the merchandise to be featured and the amount of each supplier's contri-

bution (Tr. 3166–3169, 3172, 3281–3288, 1019–1021, 1031–1033, 1292–1295, 2402–2405).

7. While substantially all of respondent's direct mail advertising is cooperative, *i.e.*, it features the trade or brand name of particular suppliers and is supported by contributions from such suppliers, the greater part of respondent's advertising in newspapers is not cooperative and is not paid for by suppliers (Tr. 3179, 3300, 3309). Respondent does, however, engage in substantial cooperative advertising with suppliers in both newspapers and magazines. The planning and procedure for obtaining suppliers' contributions for such advertising are similar to that pertaining to direct mail advertising, except that it generally involves a shorter period of planning and the suppliers' contributions are geared to the space costs of the advertisements (Tr. 3174–3180, 3282, 1032, 1296). In terms of the number of allowances received by respondent from suppliers for advertising, those relating to direct mail advertising preponderate over those received for advertising in mass media such as newspapers and magazines. Thus, of 327 allowances received from a representative group of 16 manufacturers in 1962 and 1963, 190 were for direct mail advertising or for a combination of direct mail advertising and magazine promotion, 117 were for newspaper advertisements, and 20 were for magazine advertisements (CX 16 A–B, 24 A–E, 65 A–B, 75, 82 A–B, 94 A–B, 102 A–C, 123 A–B, 141 A–E, 188 A–B, 195 A–J, 274 A–D, 303 A–B, 312 A–B, 331 A–B, 348 A–B).

8. In its newspaper advertising, respondent utilized principally the New York Times (daily and Sunday editions), but also advertised in other New York newspapers such as the Herald Tribune and World Telegram. It also advertised in local newspapers in the communities where its branches were located. In its magazine advertising respondent utilized principally the so-called "fashion" magazines such as Glamour, Vogue, Mademoiselle, Harper's Bazaar, and Seventeen (Tr. 1037, 2416–2417, 3195; CX 24 A–E, 65 A–B, 75, 102 A–C, 123 A–B, 141 A–E, 188 A–B, 195 A–J, 274 A–D, 312 A–B, 331 A–B, 341 A–B).

9. In 1963 the New York Times had a total circulation of 727,600 for the daily edition and 1,400,750 for the Sunday edition. These papers were distributed in every State of the United States and in various foreign countries. Approximately 240,000 copies of the daily edition and 621,000 copies of the Sunday edition were distributed outside of New York State (CX 381). The pattern of distribution for 1962 was substantially similar (CX 427). The magazines, Glamour, Vogue and Mademoiselle, which were exten-

sively used by respondent in its magazine advertising, had a combined circulation of approximately 2.1 million copies in 1962 and 1963, and were distributed throughout the United States (Tr. 954–955; CX 401–C, 403–B).

### C. *Commerce*

10. Respondent, for a number of years prior to the issuance of the complaint herein, purchased products from suppliers whose manufacturing facilities were located in various States of the United States other than the State of New York, or outside the United States. A number of said suppliers manufactured such products for respondent in response to orders previously placed by it. Respondent's suppliers shipped the products purchased by it to its main office at 645 Fifth Avenue, New York City, either from manufacturing plants located outside the State or from facilities maintained by them in New York State (Tr. 375, 573–574, 636, 649, 692, 703, 814, 873, 1059, 1086, 1134, 1148, 1204, 1344, 1391, 1424, 1698, 3197). After the receipt of such merchandise, respondent regularly shipped substantial portions thereof to various of its branch stores located in States other than the State of New York (Tr. 1040, 1311, 2416, 3307). Respondent advertised the products offered by it for sale, in various media having an interstate circulation (Admitted, Ans.). It is found that, in the course and conduct of its business, respondent has been, at all times material herein, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, Ans.).

## II. The Alleged Unlawful Practices

### A. *The Charges and the Issues*

11. The complaint, in substance, charges respondent with having knowingly induced or received from many of its suppliers advertising allowances which were not made available, on proportionally equal terms, to such suppliers' other customers who competed with respondent in the sale and distribution of the suppliers' products. Such payment by the suppliers, under the circumstances alleged, constitutes conduct which is proscribed by Section 2(d) of the Clayton Act. In essence, therefore, respondent is charged with having knowingly induced or received advertising payments which were made in violation of Section 2(d) of the Clayton Act.

12. Respondent, while conceding that it received advertising allowances from a number of its suppliers, contends that complaint

counsel have failed to prove that such payments by its suppliers were in violation of Section 2(d) of the Clayton Act since the evidence fails to establish all of the requisite elements of a Section 2(d) violation, *viz,* (a) that the so-called "nonfavored" customers competed with respondent, (b) that such customers purchased goods of like grade and quality as those on which respondent received advertising allowances, (c) that the purchases of such customers were made contemporaneously with those on which respondent received advertising allowances, and (d) that proportionally equal payments were not made to such customers as competed with respondent (Prehearing Order No. 1, par. 5; RB, pp. 2–3). In addition, respondent contends that complaint counsel have failed to prove a violation of Section 5 of the Federal Trade Commission Act, since the record does not establish that respondent knew the advertising payments it received were made under conditions which were in violation of Section 2(d) of the Clayton Act. Complaint counsel, of course, contend that the requirements for establishing that the payments by the suppliers were in violation of Section 2(d) of the Clayton Act have been met, as have the requirements of Section 5 of the Federal Trade Commission Act, that respondent knew or should have known that the payments made to it had not been made available to respondent's competitors on proportionally equal terms.

B. *The Evidence*

13. Complaint counsel initially identified 32 suppliers as having made disproportionate advertising allowances to respondent (Ans. to Motion for More Definite Statement). However, during pretrial procedures counsel agreed to limit their proof to 16 suppliers whose representatives were to be called to testify. They also agreed to limit their proof with respect to the nonfavored customers of these suppliers to those retailers who were located in the New York City and Washington, D.C., metropolitan areas.

14. Representatives of the 16 suppliers testified as to their respective company's general program or policy, if any, with respect to the payment of advertising allowances, and as to the circumstances of their payments to respondent in particular. In addition, complaint counsel offered certain statistical tables purporting to show, for the years 1962 and 1963, (a) all of the advertising allowances which the 16 suppliers paid to respondent, including the date of payment and the medium in which the advertisements appeared, and (b) the total annual sales and payments of advertising allowances by the 16 suppliers to each

of their customers in the New York and Washington, D.C., areas.[7] Because of respondent's contention that complaint counsel would have to prove that the products sold to the nonfavored retailers were of like grade and quality as those on which respondent received advertising allowances, and that the transactions with such retailers were contemporaneous with those with it, complaint counsel offered upwards of 19,000 invoices of the 16 suppliers, purporting to represent transactions in which products bearing identical style numbers were sold to respondent and to other customers in the New York and Washington areas.[8] In addition to testimony and other evidence from the 16 suppliers and from certain of respondent's officials and employees, complaint counsel called representatives of 37 allegedly nonfavored retailers purporting to be in competition with respondent in the New York and Washington, D.C., areas. Respondent offered only limited defense evidence, consisting principally of the testimony of one of its officials and one buyer, relying primarily on its cross-examination of the Government's witnesses and its position that complaint counsel failed to establish a prima facie case.

15. In considering the evidence in the record, it is necessary to determine, in substance, (a) whether the advertising allowances received by respondent were paid in violation of Section 2(d) of the Clayton Act, and (b) whether respondent knew or should have known it was getting such preferential treatment. In order to sustain the complaint, it is not necessary to establish that each of the 16 suppliers violated Section 2(d) in making advertising payments to respondent and that respondent, in each instance, knew or should have known it was getting preferential treatment. A violation with respect to any supplier would suffice. However, in order that a reviewing or appellate body may have the benefit of the examiner's findings with respect to all of the

[7] The tables will be hereafter identified by their specific exhibit numbers. However, it may be noted that each of the two groups of tables was designated, for convenience, by complaint counsel as Table I and Table II, and they are sometimes referred to in the record by these designations. Those designated as Table II are the tables showing the individual advertising payments to respondent by each supplier, and those designated as Table I are the total annual sales and payments made to each of their customers in the New York and Washington areas. The data in the Table II's were compiled by complaint counsel principally from respondent's records and were stipulated to be substantially accurate. The data in the Table I's were compiled from the suppliers' records. In some instances there are minor discrepancies in the two groups of records with respect to the total amount of advertising allowances paid to respondent. These discrepancies will be hereafter noted.

[8] The invoices will hereafter be identified by their specific exhibit numbers. As an index to the voluminous invoices, complaint counsel offered a series of tables for each manufacturer, identifying each invoice by number or date and name of retailer. Each of such tables was referred to, for convenience, as Table III. Although the tables contain other information taken from the invoices, they were received in evidence only as a convenient index to the underlying invoices.

suppliers as to which there is evidence in the record and, particularly, since this proceeding involves the difficult issue of proving the "knowing" inducement of the allegedly discriminatory allowances, the examiner will make findings concerning respondent's dealings with each of the 16 suppliers. The examiner accordingly turns to a consideration of the evidence in the record pertaining to each of the 16 suppliers for the purpose of determining (a) whether the payments made by each of these suppliers were in violation of Section 2(d) of the Clayton Act, and (b) whether respondent knew or should have known it was getting preferential advertising payments. Discussion of respondent's relations with the suppliers will be, for the most part, in alphabetical order.

### C. *The Suppliers*

#### (1) *Bertlyn Corporation*

16. Bertlyn Corporation is a manufacturer of women's slippers, with its head office and showroom located in New York City and manufacturing plants located in Puerto Rico, and in the States of New Jersey and New York. Its annual sales are between $3½ and $4 million. Its products are sold to department stores and women's specialty shops throughout the United States. The bulk of its sales are made by road salesmen, although some are made at its New York showroom. Some of the products sold by it are manufactured after it has received orders therefor from its customers. All products are shipped to customers from its headquarters in New York City (Tr. 1697–1700). Deliveries to customers are made within two to six weeks after the placing of an order (Tr. 1733).

17. Bertlyn products are produced and sold on a seasonal basis, its principal seasons being spring and fall. It produces some 200 to 300 styles, each style being designated with a different style number. Differences in style numbers are based on such differences as fabric used, shape, soles, heels and trimmings. Its customers make their selection of purchases from Bertlyn's entire line, but generally choose a limited number of styles for purchase. None of its customers purchases the entire line. Respondent, which was considered a "medium-sized" customer by Bertlyn, generally purchased six to twelve different styles. Some customers purchased as many as 30 different styles (Tr. 1700, 1708, 1716–1718).

18. Bertlyn advertised its products in newspapers and by direct mail. All such advertising was cooperative (Tr. 1700, 1703, 1727).

Its policy on newspaper advertising was to match the contributions of its customers on a "50–50" basis, with the payments not to exceed 2% of the previous year's business with the customer. This policy had been in effect for a number of years prior to 1962 and 1963, and had been announced to its customers by the company's salesmen and by a form letter sent out to customers (Tr. 1701–1702). Bertlyn had no regular plan for participation in catalogs and other direct mail advertising of its customers. Its participation in such media was generally limited to customers requesting a contribution. The amount contributed varied with the customer and the type of catalog or mailing piece involved, but apparently bore no relationship to the amount of sales to such customers (Tr. 1703–1706).

19. From time to time during 1962 and 1963 Bertlyn received requests from respondent's hosiery department buyer for contributions to various of the catalogs or brochures which respondent was preparing for mailing to its customers. The amount of the contributions which she requested varied with the amount of space allocated to Bertlyn products or the number of such products selected by the buyer to be featured in the catalog or brochure. Such amount was not related to the amount of respondent's purchases from Bertlyn and the latter was not informed what proportion of the cost of its space it was bearing (Tr. 1710–1716). Whenever Bertlyn was requested to participate in a catalog or brochure by respondent, it did so (Tr. 1729). At the time of the negotiation of such advertising allowances, respondent was advised, and was aware, of Bertlyn's regular plan for participating in newspaper advertising with its customers on a 50–50, 2% basis. However, respondent never participated in such plan since respondent preferred to use catalogs in advertising Bertlyn products (Tr. 1719–1720).

20. In 1962 Bertlyn made four contributions, totaling $1,000, toward various of respondent's catalogs and brochures. In 1963, it made three contributions totaling $925 (CX 16 A–B). Of 69 of Bertlyn's customers located in the New York and Washington areas, as to which there is evidence in the record, 48 received no advertising allowances in either 1962 or 1963. Of these so-called nonfavored customers, the purchases of five in 1962 and four in 1963 were in excess of $2,000. The purchases of the three largest customers were between $3,800 and $7,800 during this period. Respondent received the largest percentage of allowances, in relation to sales, of any of Bertlyn's customers in 1962 and 1963 (CX 454 A–G). Set forth below is a table showing the annual

sales to those customers which received some allowance from Bertlyn in 1962 or 1963, and the ratio of such allowances to total sales:

Ratio of Allowances to Sales (Bertlyn)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $10,665 | 9.4% | $13,849 | 6.7% |
| *New York Area* | | | | |
| Abraham & Strauss | 21,047 | 2.4 | 27,716 | 1.8 |
| B. Altman | 67,174 | 1.4 | 62,954 | 1.0 |
| Bamberger's | 22,397 | 3.3 | 23,021 | 2.2 |
| Bloomingdales | 88,105 | 0.8 | 101,884 | 0.5 |
| Bonwit Teller | 78,092 | 4.5 | 85,351 | 1.3 |
| Arnold Constable | 14,325 | 3.5 | 6,626 | 0.0 |
| Franklin Simon | 43,303 | 3.2 | 35,590 | 5.4 |
| B. Gertz | 9,374 | 2.6 | 14,769 | 0.5 |
| Gimbels | 18,652 | 2.1 | 29,229 | 3.0 |
| Hahne & Co. | 2,822 | 0.0 | 6,856 | 3.6 |
| Here's How | 1,732 | 2.0 | 1,416 | 2.5 |
| Lord & Taylor | 71,514 | 1.7 | 83,552 | 3.0 |
| Saks 34th Street | 8,271 | 6.0 | 7,027 | 5.0 |
| Stern Bros. | 13,610 | 2.4 | 15,567 | 1.5 |
| Teppers | 3,833 | 0.0 | 2,335 | 0.6 |
| Wallachs, Inc. | 1,575 | 0.0 | 1,976 | 2.5 |
| *Washington Area* | | | | |
| The Hecht Co. | 27,334 | 0.7 | 31,881 | 3.5 |
| Frank R. Jelleff, Inc. | 3,904 | 0.8 | 8,557 | 1.0 |
| S. Kann Sons Co. | 2,453 | 0.0 | 1,892 | 4.2 |
| Lansburgh's | 4,898 | 0.0 | 5,144 | 4.9 |
| Woodward & Lothrop | 27,585 | 3.3 | 30,984 | 1.3 |

21. Two of the nonfavored customers of this supplier testified in this proceeding, both of which were located in the New York metropolitan area. One of these was A. G. Fields, a large women's specialty store in the Jackson Heights area of Queens, New York, with annual sales in excess of $3 million. While drawing its customers primarily from Queens, Fields had customers in other portions of New York City. Some of its customers work and shop in Manhattan, where respondent's main store is located. Fields regularly advertises in both newspapers and by direct mail. Its advertising expenditures in 1962 and 1963 were between $35,000 and $40,000. It purchased some 15 to 18 styles from Bertlyn in 1962 and 1963, which were selected from the entire line exhibited to it (Tr. 1947–1955). Fields' total purchases from Bertlyn amounted to $7,445 in 1962 and $7,824 in 1963, compared to

purchases of approximately $10,000 and $13,000 made by respondent (CX 454–A, C). Fields received no advertising allowances from Bertlyn in 1962 or 1963. However, it did receive a contribution in early 1964 for an advertisement which appeared in its Christmas catalog in late 1963. Such contribution was based on the cost of the portion of the advertisement featuring Bertlyn products, not to exceed 2% of its purchases from the supplier. As indicated in the above table, respondent received contributions from Bertlyn amounting to 9.4% and 6.7% in 1962 and 1963. The contribution received by Fields from Bertlyn in early 1964 was the first contribution it had received from that supplier, and resulted from a proposal made by Bertlyn's salesman to Fields (Tr. 1956–1961).

22. The other nonfavored customer in the New York metropolitan area to testify was D. W. Rogers Co. of Greenwich, Connecticut. Rogers operates a "hometown" department store, with annual sales of approximately $600,000. It advertises in local newspapers, magazines and by direct mail, its annual expenditures for advertising being about $8,000. While drawing most of its customers from Greenwich, 15 to 20% of its customers come from the surrounding communities, including Stamford, Connecticut, and White Plains, New York, in both of which respondent operates branch stores. A number of its customers work or shop in Manhattan. A number of them gave respondent as a reference on applications for charge accounts (Tr. 1444–1450). Its purchases from Bertlyn, which were selected from the latter's entire line, were $2,099 and $2,241 in 1962 and 1963, respectively (CX 454–D; Tr. 1451). From time to time Rogers featured Bertlyn products in its advertising. However, it was never offered or received, nor did it request any advertising allowances from Bertlyn. Had such allowances been offered to it, it would have considered using them (Tr. 1451–1453).

23. In 1962 and 1963 Fields and/or Rogers purchased four of the same styles as those which were purchased by respondent and featured in advertisements for which respondent received contributions from Bertlyn. Illustrative of such transactions are those involving Style #'s 101 and 780, which were featured in respondent's Fall and Winter Catalog, published in August 1962. Respondent received a contribution of $450 from Bertlyn toward the cost of this advertisement (CX 16–A). Respondent's purchases of Style #101 amounted to 26¼ dozen, which were delivered in August and October 1962, and its purchases of Style #780 amounted to 29$\frac{5}{12}$ dozen, which were delivered in August and

September 1962. Fields made purchases of 4½ dozen of Style #101, which were delivered between August and October and in December 1962, and 9 11/12 dozen of Style #780, on which deliveries were made in September and November 1962. Rogers purchased 1 7/12 dozen of Style #780, which were delivered in August 1962 (CX 360 A–C).

(2) *David Crystal, Inc.*

24. David Crystal is a manufacturer of women's dresses, suits and raincoats, with its main office and showroom located in New York City. Its annual sales are approximately $8 million. David Crystal is controlled by the same interests as control two other companies in the apparel field, Haymaker Sports, Inc., a manufacturer of women's separates, and Izod, Inc., a manufacturer of men's slacks, shirts and accessories. The latter two companies' relations with respondent are hereinafter separately discussed. The manufacturing facilities of the three companies are located in Pennsylvania, Connecticut, Maryland, and New Jersey. The products of all three companies are sold to department and specialty stores throughout the United States. Shipments to customers are made from a central warehouse located in the State of Pennsylvania (Tr. 1386–1394).

25. The David Crystal line of products is produced and sold on a seasonal basis, the principal seasonal lines being spring, summer, fall, and resort. The company produces about 500 different styles a year, each denominated by a different style number. Differences in fabric or design are the principal factors resulting in differences in style numbers. David Crystal's entire line is generally available to all of its customers, except that in some instances it may confine a group of styles to certain of its larger customers (Tr. 1388–1390, 1395).

26. David Crystal engages in both institutional advertising, *i.e.*, advertising placed by it and featuring its own name and products, and in cooperative advertising with customers. Its total expenditures for advertising on its own behalf and that of its two affiliates is approximately $200,000 annually. Most of its advertising is done on a cooperative basis with customers. This involves contributions to advertising in newspapers and in catalogs, brochures and other direct mailing pieces. It also supplies customers with its own mailing pieces, for which it makes a charge. In 1962 and 1963 David Crystal had a cooperative advertising program which provided for the payment of one-half the cost of newspaper advertising or 50¢ per garment purchased by the customer, which-

ever amount was less. This program was communicated to David Crystal's customers by its salesmen (Tr. 1396–1401).

27. During 1962 and 1964, and for some time prior thereto, David Crystal engaged in cooperative advertising with respondent, which was one of its largest accounts. Such advertising included newspapers such as The New York Times, fashion magazines such as Harper's Bazaar and Vogue, and various of respondent's catalogs and brochures. Respondent generally selected the media to be used in advertising David Crystal products. In the case of the catalog advertising, the David Crystal salesman sometimes approached respondent's buyer to participate in a cooperative advertisement and sometimes it was approached by the buyer (Tr. 1403–1409). The David Crystal official who testified in this proceeding was uncertain whether respondent's buyer was aware of his company's regular plan of paying 50¢ a dress or 50% of the cost of an advertisement, but opined that respondent might have been aware of it "in a very vague way" (Tr. 1410). However, the plan was generally not adhered to in the case of cooperative advertising with respondent since, as the witness stated, respondent "could almost get anything they wanted from me because of being such a good customer" (Tr. 1409). In the case of newspaper advertisements, it was the understanding of David Crystal that it was contributing one-half the cost. However, in the case of catalog advertising, it was not aware of what portion of the cost it was paying (Tr. 1416–1417).

28. According to data obtained from respondent's records, David Crystal participated in 16 advertisements with it in 1962, contributing $9,703, and in 24 advertisements in 1963, contributing $12,678 (CX 24 A–E). Of David Crystal's 61 customers in the New York and Washington areas, as to which there is evidence in the record, 46 received no advertising allowances in either 1962 or 1963. Between 26 and 27 of the non-favored customers purchased over $2,000 from David Crystal in 1962 and 1963, and the three largest of these bought over $10,000 from this supplier in each of these two years. David Crystal's own records reflecting total sales and allowances paid to respondent and other customers in the New York and Washington areas indicate total advertising payments to respondents of $13,961 in 1962 and $15,578 in 1963. With the exception of one other customer in 1962, respondent received the largest proportion of advertising allowances of any of David Crystal's customers in these two areas (CX 450 A–B). Set forth below is a table showing David Crystal's sales to those

customers to whom it paid advertising allowances in 1962 or 1963, and the ratio of such allowances to total sales.

Ratio of Allowances to Sales (David Crystal)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $341,496 | 4.1% [9] | $308,742 | 5.0% [9] |
| *New York Area* | | | | |
| Abercrombie & Fitch | 13,767 | 0.0 | 76,136 | 0.5 |
| B. Altman & Co. | 143,376 | 1.3 | 174,002 | 0.0 |
| L. Bamberger Co. | 12,278 | 1.2 | 3,837 | 0.0 |
| Bergdorf Goodman | 225,101 | 3.2 | 107,446 | 2.9 |
| Bloomingdales | 27,503 | 2.9 | 23,408 | 0.0 |
| Bonwit Teller | 53,418 | 1.3 | 79,677 | 1.2 |
| De Pinna | 33,220 | 4.2 | 14,192 | 1.6 |
| Hahne & Co. | 13,961 | 0.7 | 13,216 | 0.4 |
| Henri Bendel | 12,798 | 1.6 | 13,424 | 0.7 |
| Liz Landau | 5,288 | 0.0 | 4,582 | 1.3 |
| Lord & Taylor | 97,252 | 3.0 | 122,885 | 1.1 |
| Martin Trencher | 2,105 | 1.4 | 1,248 | 2.2 |
| Peck & Peck | 166,634 | 3.4 | 198,863 | 2.1 |
| Saks 5th Avenue | 167,452 | 0.9 | 197,621 | 0.7 |
| *Washington Area* | | | | |
| Julius Garfinckel | 100,774 | 0.5 | 97,660 | 0.3 |

29. Of the nonfavored customers who testified in this proceeding, three were located in the New York area and two in the Washington, D.C., area. One of these received an advertising allowance from David Crystal, but the amount was proportionately smaller than the allowances paid to respondent. The other customers received no advertising allowances from David Crystal. The customer receiving an advertising allowance was Martin Trencher, Inc., which operates a ladies' ready-to-wear shop in Garden City, Long Island, about four blocks from respondent's branch store in Garden City. Many of its customers have charge accounts with respondent. Trencher's sales in 1962 and 1963 were between $450,000 and $500,000, and it expended approximately $15,000 for newspaper, direct mail and radio advertising (Tr. 2305–2309). As indicated in the above table, its purchases from David Crystal were $2,105 and $1,248 in 1962 and 1963, respectively. It received advertising allowances of $30 and $27 in each of these years. Trencher was permitted to advertise David Crystal's products once a year, based on the formula above referred to, of 50¢ a

[9] Based on the figures of advertising allowances reflected in respondent's records, the above ratio figures for respondent would be 2.8% for 1962 and 4.1% for 1963.

dress or one-half the cost of newspaper advertisement (Tr. 2342, 3051).

30. One of the New York area customers which received no advertising allowances from David Crystal was Margaret Stevens, Ltd. Stevens operated a women's specialty shop in Woodmere, Long Island, about 15 minutes' drive from respondent's branch store in Garden City. Many of its customers shopped in Manhattan. Its annual sales were approximately $185,000. Its purchases from David Crystal were $2,299 in 1962 and $2,074 in 1963, the orders therefor being placed as soon as the line was available for inspection. Stevens was never offered any advertising allowances by David Crystal. It expended approximately $1,000 for advertising in 1962 and 1963, consisting of fashion shows and advertisements in local newspapers (Tr. 2203–2211).

31. The other New York area nonfavored retailer was William Gengarelly, Inc., which operates a women's specialty shop in Greenwich, Connecticut. Gengarelly's customers come from an area which includes the communities in which respondent's branch stores in Stamford, Connecticut, and White Plains, New York are located. Some of its customers commute to New York City to shop (Tr. 2018–2019). Gengarelly's sales were approximately $150,000 and its purchases from David Crystal were $1,669 and $3,052 in 1962 and 1963, respectively. Its expenditures for advertising were approximately $5,000 (CX 450–F; Tr. 2022). It was not offered any advertising allowances by David Crystal in 1962 and 1963. If such allowances had been offered, they would have been accepted. During an earlier period Gengarelly was offered an allowance by Crystal, which it accepted, to advertise the brand name of a fabric whose manufacturer had supplied funds to Crystal for that purpose (Tr. 2024–2027).

32. One of the nonfavored customers in the Washington, D.C., area was Lewis & Thomas Saltz, which operates two stores in the District of Columbia, one carrying men's and women's apparel and the other only men's apparel. Its stores are within commuting distance of respondent's two Washington area stores. Saltz' sales volume is in excess of $1 million, about 10% of which is ladies' apparel. Its advertising expenditures are approximately 4% of its sales, and include both newspaper and direct mail advertising. Saltz engages in cooperative advertising with a number of its suppliers. Its purchases from David Crystal in 1962 and 1963 were $2,563 and $2,277, respectively, on which it received no advertising allowances (Tr. 2852–2856, 2862–2865; CX 450–G).

33. The other nonfavored customer in the Washington, D.C.,

area was Tweeds 'n Things, Inc., which operates a women's sportswear shop in Chevy Chase, Maryland, about three miles north of respondent's branch store in the District of Columbia. Its sales in 1962 and 1963 were between $350,000 and $400,000, and it expended between $42,000 and $48,000 for advertising, including newspapers, magazines and direct mail advertising. Its purchases from David Crystal in 1962 and 1963 were $2,819 and $2,522, respectively. It was never offered any advertising allowances by David Crystal, except on a single occasion when the latter offered it an allowance to be paid for by the fabric maker. It did not avail itself of this allowance since it was its policy to advertise a garment and not the fabric (Tr. 2429–2437, 2440–2441; CX 450–G).

34. The record discloses that in 1962 and 1963 three of the above-mentioned nonfavored customers (Gengarelly, Trencher and Tweeds 'n Things) purchased from David Crystal one or more styles which were identical to those cooperatively advertised by respondent. In most instances the merchandise was delivered to the nonfavored customers in reasonable proximity to the time it was delivered to and advertised by respondent. It would unduly prolong this decision to discuss each of the six transactions where this occurred. However, illustrative thereof is that involving Style # 6914. This style was advertised in respondent's Resort Booklet in 1963. It purchased 116 garments of the style, which were delivered between October and December 1963. Tweeds 'n Things purchased three garments, which were delivered in December 1963 (CX 361).

(3) *Haymaker Sports, Inc.*

35. As previously mentioned, Haymaker is owned by the same interests that control David Crystal. It manufactures women's separates, consisting of slacks, shorts, blouses and sweaters. Haymaker's sales are approximately $3½ million annually. Its office and plant locations are the same as David Crystal's. Its garments, like those of David Crystal, are produced and sold on a seasonal basis. It produces approximately 500 styles each year. Its garments are sold throughout the United States (Tr. 1387–1391).

36. Haymaker had no formal advertising plan during the period at issue. Unlike David Crystal, it had no policy of contributing to newspaper advertising on the basis of a 50–50 sharing of cost or 50¢ a garment. Its contributions to advertising by its customers

were frequently made in response to requests from the customers, and were on an individually negotiated basis (Tr. 1400–1401).

37. According to the figures compiled from respondent's records, Haymaker contributed to six advertisements by respondent in 1962, for a total of $6,695, and to five advertisements in 1963 for a total of $3,435. These advertisements were principally in catalogs and brochures issued by respondent seasonally (CX 8 A–B). Of the 46 Haymaker customers in the New York and Washington areas as to which there is evidence in the record, 37 received no advertising allowances in either 1962 or 1963. Between 24 and 25 of the latter made purchases of $2,000 or more. The purchases of the three largest of these ranged from $18,000 to $31,000. Haymaker's own records indicate the payment of advertising allowances to respondent of $5,895 in 1962 and $3,035 in 1963, which is somewhat less than the totals reflected in respondent's records (CX 451 A–C). Set forth below is a table showing Haymaker's sales to those customers to whom it paid advertising allowances in 1962 or 1963, and the ratio of such allowances to total sales.

Ratio of Allowances to Sales (Haymaker)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $130,897 | 4.5% [10] | $98,933 | 3.1% [10] |
| *New York Area* | | | | |
| Abercrombie & Fitch | 36,391 | 0.0 | 103,332 | 0.4 |
| B. Altman | 50,691 | 5.5 | 77,547 | 0.0 |
| Bergdorf Goodman | 28,992 | 14.5 | 17,898 | 25.9 |
| Bonwit Teller | 4,722 | 4.7 | 19,238 | 0.6 |
| De Pinna | 38,094 | 2.3 | 19,712 | 0.0 |
| Molbe Shoes | 4,040 | 4.7 | 2,111 | 3.8 |
| Peck & Peck | 69,776 | 3.6 | 107,830 | 2.5 |
| Saks 5th Avenue | 30,795 | 1.6 | 56,752 | 2.5 |
| *Washington Area* | | | | |
| Julius Garfinckel | 58,026 | 0.5 | 39,609 | 1.0 |

38. There were two nonfavored customers who testified in this proceeding, one from the New York area and one from the Washington area. These were Margaret Stevens and Tweeds 'n Things, the locations and operations of which have been previously described in paragraphs 30 and 33, *supra*. Margaret Stevens' purchases from Haymaker were $1,216 in 1962 and $1,263 in 1963.

[10] Based on the figures compiled from respondent's records, of allowances received from Haymaker, the above ratios would be 5.1% in 1962 and 3.4% in 1963.

Tweeds 'n Things' purchases were $13,849 in 1962 and $11,521 in 1963 (CX 451–C). Neither of these customers received any advertising allowances from Haymaker, nor were they offered any by that supplier (Tr. 2209, 2443). The owner of Tweeds 'n Things discussed advertising allowances with a representative of Haymaker on several occasions between 1960 and 1963, and was told no such allowances were available. In 1962 the store advertised Haymaker products in New Yorker magazine and in a brochure, but received no contribution from the supplier (Tr. 2442–2448; CX 461). Since the record contains no copies of Haymaker's invoices, it cannot be determined whether any of the styles involved in Haymaker's cooperative advertising with respondent were sold to Tweeds 'n Things or any of Haymaker's other customers.

(4) *Izod, Ltd.*

39. As previously noted, Izod is owned by the same interests that control David Crystal. Izod is a manufacturer and distributor of men's accessory apparel, including slacks, shirts, sweaters and socks. It also imports, from France, a knit sport shirt which it sells under the trade name LaCoste. Izod's office and plant locations are identical with those of David Crystal. Its sales are approximately $4 million annually. Its garments are produced and sold on a seasonal basis. It produces approximately 100 different styles each year (Tr. 1386–1391).

40. Izod's advertising policy is similar to that of Haymaker. It has no formal advertising plan, but makes some contributions for cooperative advertising when requested to do so by individual customers. Such allowances are arranged for on an individually negotiated basis (Tr. 1400–1401). According to the figures compiled from respondent's records, Izod contributed to three advertisements by respondent in 1962 for a total of $1,000, and to four advertisements in 1963 for a total of $3,517. Such advertisements involved principally catalogs and other direct mail advertising issued periodically by respondent (CX 94 A–B).

41. Izod's own records indicate that it made payments and allowances to respondent for advertising amounting to $2,381 in 1962 and $1,000 in 1963. Of 51 Izod customers in the New York and Washington areas as to which there is evidence in the record, 39 received no advertising allowances in either 1962 or 1963. Twenty-one of the nonfavored customers made purchases of $2,000 or more. The three largest of these made purchases ranging from $15,000 to $60,000 (CX 452 A–B). Set forth below is a table showing Izod's sales to those customers to which it paid some adver-

tising allowances in 1962 and 1963, and the ratio of such allowances to total sales.

Ratio of Allowances to Sales (Izod)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $14,069 | 16.9% [11] | $43,344 | 2.3% [11] |
| *New York Area* | | | | |
| B. Altman | 25,424 | 2.3 | 24,192 | 2.8 |
| Bergdorf Goodman | 18,750 | 7.9 | 22,773 | 4.2 |
| De Pinna | 50,233 | 1.9 | 29,478 | 2.3 |
| Lord & Taylor | 40,592 | 1.2 | 54,898 | 0.0 |
| Macy's | 5,282 | 6.0 | 8,589 | 0.0 |
| Pauljean | 3,579 | 10.0 | 3,275 | 0.0 |
| Roger Kent | 7,652 | 3.5 | 0 | 0.0 |
| Root's Men's Shop | 5,406 | 0.0 | 4,270 | 2.3 |
| F. R. Tripler | 25,104 | 2.0 | 21,216 | 1.9 |
| Wallachs | 8,513 | 3.5 | 11,808 | 2.5 |
| *Washington Area* | | | | |
| Goldheims | 4,190 | 1.5 | 5,515 | 0.0 |
| Julius Garfinckel | 20,416 | 0.0 | 9,488 | 4.2 |
| Lewis & Thomas Saltz | 4,576 | 2.3 | 3,170 | 0.0 |

42. Of the nonfavored customers who testified in this proceeding, one is located in the New York area and two are in the Washington area. The New York area customer is Bob's Sports, Inc., which operates stores in Stamford and New Canaan, Connecticut. Bob's service area includes White Plains, New York, as well as Stamford, in both of which respondent operates branch stores. Respondent's store in Stamford is directly across the street from Bob's store in that community. Some of Bob's customers shop and work in New York City, and a number of them have charge accounts with respondent. Bob's sells both men's and women's sportswear. Its total sales volume in 1962 and 1963 was between $750,000 and $900,000, of which approximately $300,000 was women's wear. It advertised in newspapers and on radio, its annual advertising expenditures being approximately $7,000 (Tr. 1874–1884). In 1962 and 1963 Bob's purchased men's and women's shirts from Izod. Its total purchases were approximately $5,000 in each year. It selected approximately 10 to 20 styles from the Izod line exhibited to it. Bob's periodically advertised Izod's shirts, but was not offered any advertising allowances by the supplier (Tr. 1919–1925, 1942–1943; CX 452–A).

[11] Based on the figures compiled from respondent's records, of advertising allowances received from Izod, its ratio figures would be 7.1% in 1962 and 8.0% in 1963.

43. One of the nonfavored customers in the Washington, D.C., area is Raleigh Haberdasher, whose main store is located in downtown Washington and operates branch stores in Chevy Chase and Wheaton, Maryland. The Chevy Chase store is located on Wisconsin Avenue, about a mile and a half north of respondent's Washington store on Wisconsin Avenue. Its downtown store is located about four and a half miles from respondent's branch store in Arlington. Raleigh's draws its customers from the entire Washington metropolitan area. It carries a broad line of men's and women's apparel, with approximately two-thirds of its volume being in men's wear and the balance in women's (Tr. 2803–2806). Raleigh's considers itself a competitor of Best in view of the proximity of their store locations and the fact that they carry similar merchandise in some of their departments (Tr. 2807). While Raleigh's volume of sales was not disclosed, it has in excess of 50,000 charge customers and expends over $150,000 annually for advertising. It engages in cooperative advertising with some of its suppliers which have cooperative advertising programs (Tr. 2807, 2809, 2811–2812). Raleigh's purchases from Izod amounted to $8,122 in 1962 and $3,073 in 1963 (CX 454–B). It periodically advertised Izod products in 1962 and 1963, including advertisements in a Christmas brochure. Izod made no contributions toward these advertisements (Tr. 2824; CX 467).

44. The other Washington area nonfavored customer was Lewis & Thomas Saltz, whose location and operations have been described in paragraph 32, *supra*. Saltz' purchases from Izod amounted to $4,576 in 1962 and $3,170 in 1963 (CX 454–B). As indicated in the above table, Saltz did receive and advertising allowance from Izod in 1962, amounting to 2.3% of its purchases. However, it received no allowance in 1963, although it sought to obtain one to advertise Izod's LaCoste shirt. Within the past year Saltz has received a formal cooperative advertising plan from Izod and is using the plan (Tr. 2855–2860).

45. The record discloses that in 1962 and 1963 six of the styles cooperatively advertised by respondent with Izod were sold to one or more of the above-mentioned nonfavored customers. In most instances the merchandise was delivered to the nonfavored customers in reasonable proximity to the time it was delivered to and advertised by respondent. It would unduly prolong this decision to discuss each of the transactions in detail. However, illustrative thereof is that involving Style # 2058. This style was advertised by respondent in June 1962 in its Summer Booklet, and in Decem-

ber 1962 in its Christmas Booklet (CX 94–A). Respondent received 360 garments of this style, deliveries being made each month from May to December 1962. Bob's purchased 323 garments of this style, on which deliveries were made in January, February, May and December 1962. Lewis & Thomas Saltz purchased 278 of this style, receiving delivery each month except February and September. Raleigh's purchased 240 garments of this style, receiving delivery each month from March to July and in November 1962 (CX 363).

(5) *Devonbrook, Inc.*

46. Devonbrook is a manufacturer of women's coats and suits, including ensembles consisting of jackets, skirts and blouses. Its products are sold under the brand names Devonbrook, Devonair, and Devon Knit. Its main office and showroom is located in New York City, and its garments are manufactured by contractors located in New York State and New Jersey. The garments are frequently manufactured after orders have been received from customers on the basis of sample garments displayed to them. Its products are sold to department stores and women's specialty shops throughout the United States. Deliveries to customers are made from Devonbrook's New York office (Tr. 1340–1344).

47. Devonbrook's products are produced and sold on a seasonal basis, the principal seasons being spring, summer and fall. It produces 75 to 80 styles in its coat and suit division, such garments selling at retail from $40 to $90. There is a substantial similarity between garments produced in the various seasons, the principal difference being in the fabric used (Tr. 1345, 1358, 1368–1369). Devonbrook's entire line was available to all its customers, but most customers purchased only a limited number of styles. Respondent generally purchased two or three styles each season. Most other customers purchased more styles, but a lesser number of garments than those purchased by respondent (Tr. 1358). Respondent was considered one of Devonbrook's more substantial customers (Tr. 1351).

48. Devonbrook has engaged in both institutional and cooperative advertising. The institutional advertising, *i.e.*, advertising featuring Devonbrook's name and products, but not the name of the individual customer, was found not to be fruitful and has been largely discontinued. However, it continues to engage in cooperative advertising with customers. In 1962 and 1963 Devonbrook expended approximately $25,000 for advertising. It had no formal advertising plan, but waited until it received a request from a

customer. Advertising allowances were negotiated with those customers whose advertising Devonbrook felt would help promote its name. In recent years, following its signing of a consent order agreement with the Commission, Devonbrook has adopted a formal cooperative advertising plan under which customers are offered a payment of 2% of their purchases to advertise Devonbrook products (Tr. 1345–1349, 1362).

49. From time to time in 1962 and 1963 Devonbrook received requests to participate in cooperative advertising from respondent's buyer handling Devonbrook merchandise. The buyer would select the styles which she wished to advertise and request a contribution from Devonbrook. The amount of the contribution requested would vary with the number of styles of Devonbrook merchandise selected to be advertised. Devonbrook was never advised that respondent would not make any purchases from it if it did not participate in cooperative advertising. However, when respondent bought styles which were not advertised, the quantity purchased was smaller. No inquiry was made by respondent's buyer as to whether Devonbrook had a formal advertising plan. However, when Devonbrook adopted its formal plan in 1965, it was submitted to respondent (Tr. 1353–1360, 1370).

50. According to the figures compiled from respondent's records, Devonbrook contributed to five advertisements in 1962 for a total of $7,300, and to four advertisements in 1963 for a total of $6,850. These contributions all involved participation in one of respondent's catalogs or brochures, except that in one instance it involved combined participation in a mailer and a fashion magazine (CX 65 A–B). The record does not disclose what contributions were made by Devonbrook to other customers in 1962. However, it does appear that in 1963, of 81 customers in the New York and Washington areas, 72 received no advertising allowances. Of these, 28 made purchases of $2,000 or more a year. The three largest nonfavored customers made purchases ranging from $16,000 to $86,000. According to Devonbrook's records, its total advertising payments to respondent in 1963 were $8,400, resulting in a ratio of advertising allowances to sales of 6.2%. With one exception, respondent received the highest proportion of allowances of any of Devonbrook's customers. Set forth below is a table reflecting Devonbrook's sales to those customers to whom it paid advertising allowances in 1963 and the ratio of such allowances to total sales (CX 447 A–I).

Ratio of Allowances to Sales (Devonbrook)

| | 1963 | |
|---|---|---|
| | Sales | Ratio |
| Best & Co. | $135,019 | 6.2% [12] |
| *New York Area* | | |
| B. Altman | 36,349 | 0.1 |
| Bonwit Teller | 53,041 | 0.4 |
| De Pinna | 8,336 | 1.2 |
| Franklin Simon | 60,333 | 0.3 |
| John Wanamaker | 1,139 | 17.5 |
| Martins | 10,316 | 1.0 |
| Peck & Peck | [13] | [13] |
| Saks Fifth Avenue | 91,675 | 0.5 |
| *Washington Area* | | |
| Julius Garfinckel | 21,322 | 0.2 |

51. Of the nonfavored customers who testified regarding this supplier, four were located in the New York area and two in the Washington area. One of the New York area customers is A.G. Fields, whose location and operations have been previously described in paragraph 21, *supra*. Fields' purchases from Devonbrook in 1963 were $6,883, on which it was not offered any advertising allowances by Devonbrook (Tr. 1982; CX 447–C). Another New York area customer is H. E. Brown & Company, a ladies' specialty shop located in Garden City, Long Island, about four blocks from respondent's branch store in that community. Brown's sales amounted to approximately $750,000 annually, and it expended approximately 5% of that amount for advertising. Brown's purchases from Devonbrook amounted to $3,055 in 1963. It made its selection from Devonbrook's entire line. Brown was never offered any advertising allowances by Devonbrook. It considered itself a competitor of Best since both stores were located in the same trading area, carried similar merchandise and catered to the same customers (Tr. 1495–1503; CX 447–B). A third New York area customer is Parisette Fashions, Ltd., located on Fifth Avenue near 36th Street in Manhattan, south of respondent's main store on Fifth Avenue at 51st Street. Parisette is a ladies' specialty shop drawing its customers from the New York metropolitan area and nearby Connecticut. Its sales volume in 1962 and 1963 was approximately $300,000, and it expended about $3,000 for adver-

[12] Based on the allowance figures compiled from respondent's records, the ratio figure would be 5.0%.

[13] The record contains no sales figures for this customer. However, it did receive an advertising allowance of $1,250.

tising. Its purchases from Devonbrook in 1963 were $2,800, on which it was not offered any cooperative advertising allowances (Tr. 1842–1848). The final New York area customer is Village Set, Inc., a ladies' specialty shop in Rego Park, Queens, New York. Some of its customers work in Manhattan where respondent's main store is located. Its annual sales were in excess of $350,000 in 1963, and it expended approximately $3,000 for advertising. Village Set's purchases from Devonbrook in 1963 were $2,135, for which it was offered no advertising allowances (Tr. 2127–2130, 2138).

52. The two nonfavored Washington area customers who testified were Raleigh Haberdasher and Lady Hamilton, Inc. The location and nature of Raleigh's business has already been described at paragraph 43, *supra*. Raleigh's purchases from Devonbrook amounted to $4,384 in 1963, on which it was not offered any advertising allowances (Tr. 2811–2814; CX 447–I). The other Washington area customer, Lady Hamilton, operates a ladies' specialty shop in Arlington, Virginia, approximately one mile from respondent's Arlington branch store. Its sales volume in 1963 was approximately $300,000 and it expended approximately $6,000 for advertising. Its purchases from Devonbrook amounted to $503 in 1963, on which it was not offered any advertising allowances (Tr. 2486–2495). Since there are no Devonbrook invoices in the record, it is not possible to determine whether any of the above-mentioned nonfavored customers purchased styles which were identical to those on which respondent received advertising allowances from Devonbrook.

(6) *Evan-Picone, Inc.*

53. Evan-Picone is a manufacturer of ladies' sportswear, including skirts, blouses, pants, sweaters and jackets. These are sold under its brand name, Evan-Picone. Its main office and showroom is located in New York City, and its manufacturing plant and warehouse in the State of New Jersey. Its products are sold to department stores and women's specialty stores throughout the United States. Sales are made at its New York showroom and by road salesmen. All shipments to customers are made from its manufacturing plant or warehouse in the State of New Jersey (Tr. 646-649).

54. Evan-Picone's garments are produced and sold on a seasonal basis, the principal seasons being spring, summer, back-to-school, fall, holiday and transition. It produces 150 to 200 styles each season. Its garments sell, at retail, from $8 to $40. The entire line

is available to all of its customers but no customer purchases the entire line. Respondent purchased 15 to 20 different styles. Some customers purchased a greater number of styles, and others a lesser number (Tr. 651, 674, 682).

55. Evan-Picone expended approximately $300,000 for advertising in 1963. Most of this was for institutional advertising. It did some cooperative advertising with its customers in newspapers, magazines and direct mail advertisements, but had no formal cooperative advertising program. Allowances for cooperative advertising were generally limited to customers who requested them, and the granting thereof was limited to those whose volume of purchases justified it. In addition to making contributions to the direct mail advertising of some of its customers, Evan-Picone supplied its customers with its own mailing pieces depicting garments which could be utilized by the customers as mail enclosures with their monthly statements to their own customers (Tr. 652–659, 662, 675–677, 687–688).

56. Evan-Picone engaged in cooperative advertising with respondent, which it considered one of its more substantial customers. Such advertising resulted from requests received, from time to time, from either the buyer handling its merchandise, or from respondent's sales promotion director. The buyer would select the particular garments or group of garments which she wished to advertise, and would advise Evan-Picone as to the advertising medium which was to be used and the amount of the contribution to be made by the supplier. If Evan-Picone saw fit to participate in the advertisement, it generally accepted the amount of the contribution proposed by respondent. In the case of cooperative advertising in newspapers, it was the understanding of Evan-Picone that it was assuming a specific proportion of the cost of the advertisement. However, in the case of respondent's own catalogs and brochures, Evan-Picone had no idea, nor was it informed, what proportion of the cost it was assuming. There were some occasions when Evan-Picone did not participate in cooperative advertising after being requested to do so by respondent. When it did participate, respondent would generally purchase substantial quantities of the merchandise to be advertised. Evan-Picone did not advise respondent, nor did the latter inquire, whether it had a formal cooperative advertising program (Tr. 659–674, 686–687, 692).

57. In 1963 Evan-Picone participated in eight cooperative advertisements with respondent, the total amount of its contributions

being between $11,400 and $11,600 (CX 75, 422–A).[14] Most of these contributions involved participation in one of respondent's catalogs or brochures. Of Evan-Picone's 75 customers in the New York and Washington areas as to which there is evidence in the record, 64 received no advertising allowances from it in 1963. Of these wholly disfavored customers, all but one purchased at least $2,000 worth of merchandise from it, and the three largest customers made purchases of between $142,000 and $376,000. Set forth below is a table showing the annual sales to those customers who received some advertising allowance from Evan-Picone in 1963, and the ratio of such allowances to total sales (CX 422 A–G).

Ratio of Allowances to Sales (Evan-Picone)

| | 1963 | |
|---|---|---|
| | Sales | Ratio |
| Best & Co. | $406,283 | 2.8% |
| *New York Area* | | |
| Bloomingdale's | 209,200 | 0.1 |
| Bonwit Teller | 155,729 | 0.4 |
| Hahne & Co. | 63,413 | 0.4 |
| Martins | 46,116 | 0.6 |
| Peck & Peck | 129,519 | 0.5 |
| Plymouth Shops | 110,008 | 0.2 |
| Saks Fifth Avenue | 369,237 | 0.5 |
| Seymour Company | 8,354 | 0.4 |
| *Washington Area* | | |
| Casual Corner | 33,297 | 5.2 |
| Frank R. Jelleff | 29,366 | 0.3 |
| Woodward & Lothrop | 159,750 | 1.1 |

58. Of the nonfavored customers who testified in this proceeding, four were located in the New York area and four in the Washington, D.C., area. The New York area customers include Bob's Sports, Inc. and Parisette Fashions, Ltd., whose respective locations and operations have previously been described in paragraphs 42 and 52, *supra*. Bob's purchases from Evan-Picone, which were selected from its entire line, amounted to $8,337 in 1963. It did not receive from, nor was it offered any advertising allowances by, Evan-Picone (Tr. 1904–1905; CX 422–G). Parisette's purchases from Evan-Picone, which were selected from its entire line, ranged from $1200 to $1800. It was never offered any advertising allowances by Evan-Picone (Tr. 1848–1852).

[14] Figures based principally on respondent's records indicate the total to be $11,602. Evan-Picone's records indicate total advertising allowances to respondent of $11,402. This slight difference has no effect on the ratio figure in the table which follows.

59. Another New York area nonfavored customer is R. J. Goerke Co., a department store, with branches in Elizabeth and Plainfield, New Jersey. A number of its customers work in New York City and have charge accounts with respondent. Goerke's Plainfield store is located about two miles from one of respondent's branch stores. Goerke's annual sales are approximately $8,600,000 and its expenditures for advertising are approximately $28,000 (Tr. 1650–1654). In 1963 its purchases from Evan-Picone, which were made from the latter's entire line, amounted to $12,781 (CX 422–G). Goerke never received from, nor was offered any advertising allowances by, Evan-Picone. In 1962 and 1963 its sportswear buyer requested an advertising allowance from Evan-Picone, but was advised that the supplier did not have a cooperative advertising program. Goerke subsequently advertised one of Evan-Picone's products in a newspaper advertisement, but received no contribution from the supplier (Tr. 1663–1665, 1668–1669). The fourth New York area customer is Knitwear Shoppe, a ladies' specialty store located in Hackensack, New Jersey, about a mile from respondent's branch store in River Edge, New Jersey. Knitwear's sales volume in 1962 and 1963 was approximately $300,000 and its expenditures for advertising were between $5,000 and $6,000. Knitwear's purchases from Evan-Picone were $11,145 in 1963. Its purchases were selected from Evan-Picone's entire line. It was never offered by, nor did it receive any advertising allowances from, Evan-Picone. Knitwear periodically requested advertising allowances from Evan-Picone, but was advised that the supplier did not have any cooperative advertising program. Knitwear did use mail enclosures obtained from Evan-Picone, but it had to pay for these (Tr. 1758, 1766–1769, 1771–1779; CX 422–G).

60. Three of the Washington area nonfavored customers are Tweeds 'n Things, Raleigh's and Lady Hamilton, whose respective locations and operations have previously been described in paragraphs 33, 43 and 52, *supra*. Tweeds 'n Things' purchases from Evan-Picone amounted to $10,278 in 1963, on which it did not receive nor was it offered any advertising allowances. Prior to 1963 the store requested advertising allowances, but was advised that the supplier did not give out any advertising money (Tr. 2438; CX 422–G). Raleigh's purchases from Evan-Picone in 1963 were $46,118, on which it received no advertising allowances. Raleigh's advertised Evan-Picone products, by name, in both 1962 and 1963, but received no contributions from the supplier (CX 463, 464; Tr. 2813, 2815). Lady Hamilton's purchases from Evan-Picone in 1963 amounted to $6,750, on which it received no

advertising allowances. This customer displayed Evan-Picone merchandise in fashion shows conducted by it, but received no contribution toward the cost thereof (Tr. 2486, 2506, 2513). The fourth Washington-area nonfavored customer is Hayman's which operates a main store and four branches in Alexandria and Arlington, Virginia. Two of the stores are located within four miles of respondent's branch store in Arlington, Virginia. Hayman's sales were in excess of $1 million annually in 1962 and 1963, and it expended approximately $48,000 for advertising. The record does not disclose the volume of its purchases from Evan-Picone in 1963. However, it received no advertising allowances from the supplier although it periodically requested them (Tr. 3005–3012, 3015).

61. The record discloses that in 1963 five of the styles cooperatively advertised by respondent with Evan-Picone were sold to one or more of the above-named nonfavored customers. In each instance the merchandise was delivered to the nonfavored customers in reasonable proximity to the time it was delivered to and advertised by respondent. Illustrative of such transactions is that involving Style # 3209, which was advertised by respondent in its Fall Adult Catalog in 1963. Respondent purchased 341 garments of this style, receiving delivery thereof in June and August 1963. The same style was purchased by Goerke, Knitwear Shoppe, Raleigh, Tweeds 'n Things and Lady Hamilton. The quantities purchased by these customers varied from 3 to 23, and deliveries thereof were made at various times between June and September 1963 (CX 362).

(7) *Juniorite, Inc.*

62. Juniorite is a manufacturer of junior sportswear and dresses, which it sells under the brand names Juniorite and Miss Juniorite. Its office and showroom is located in New York City. Its garments are manufactured by contractors located in the States of Pennsylvania and New York, and are shipped to customers from a warehouse in New York State. Its annual sales in 1962 and 1963 were $7.5 to $9.5 million. Its products are sold to department stores and women's specialty shops throughout the United States. Sales are made from the showroom in New York and through traveling salesmen (Tr. 872–875, 935).

63. The Juniorite line is produced and sold on a seasonal basis, the principal seasons being spring, summer, fall, winter-holiday and trans-season (Tr. 927–928). It produces approximately 75 to 100 different styles, which vary according to fabric, pattern and trim, and range in price from $30 a dozen to $150 a dozen at whole-

sale. Its entire line is available to all of its customers, but no customer purchases the entire line. The average customer purchases 5 to 20 different styles. Respondent was one of its largest customers, in terms of both the number of styles and quantity of garments purchased (Tr. 875A, 894–895).

64. Juniorite advertises its products through its own institutional advertising and by cooperative advertising with customers. Its annual advertising expenditures are between 1% and 1.5% of its sales volume (Tr. 878–881). Prior to 1962 Juniorite had no formal cooperative advertising plan, but did participate in cooperative advertising with certain of its larger customers, including respondent. In 1962 it put into effect a formal plan under which it undertook to pay 50% (with certain stated exceptions) of the net cost of the customer's newspaper advertising devoted exclusively to Juniorite merchandise (or a lesser percentage if Juniorite was featured with other merchandise), not to exceed 3½% of the customer's purchases of Juniorite merchandise during the calendar year (CX 374; Tr. 880–882). Following the entry of a Commission consent order against Juniorite, this plan was superseded on July 1, 1963, by a similar plan which extended the program to national magazine advertising, in addition to newspaper advertising, and changed the base period for computing the 3½% to a semi-annual one (CX 375; Tr. 882). Both plans were in writing and were distributed to Juniorite's customers by its salesmen (CX 432 B–C; Tr. 887–888).

65. During 1962 and 1963 Juniorite engaged in cooperative advertising with respondent. Copies of Juniorite's cooperative advertising plans were sent to respondent along with Juniorite's other customers (Tr. 887–888, 921). However, most of the cooperative advertising with respondent was not pursuant to the plans, but involved participation in catalogs, brochures and other direct mail advertising, which were not covered by the plans. Arrangements for Juniorite's participation in such advertising were made by respondent's buyer handling Juniorite merchandise. The buyer generally approached Juniorite at the beginning of a season and requested it to participate in one of respondent's forthcoming catalogs or other advertisements. The buyer and a Juniorite representative would select a style or styles from Juniorite's line which would be appropriate for advertising, and the buyer would advise Juniorite what its cost of the portion of the advertisement devoted to its products would be. Occasionally, Juniorite would participate in a newspaper advertisement with respondent, the medium to be used and the amount of Juniorite's contribution

being determined by the buyer. Juniorite was not aware of what portion of the cost of the advertisements it was paying (Tr. 891–894).

66. Juniorite participated in 12 advertisements with respondent in 1962 and in 8 in 1963. With the exception of three contributions to newspaper advertisements in 1962, Juniorite's participation involved contributions to respondent's catalogs or other direct mail advertisements (CX 102 A–C). In the case of two of the newspaper advertisements in 1962, Juniorite's contribution amounted to approximately 100% of the space costs.[15] Juniorite's total contributions to respondent for advertising were $11,216 in 1962 and $9,050 in 1963. Of Juniorite's 48 customers in the New York and Washington areas as to which there is evidence in the record, 30 received no advertising allowances in 1962 or 1963. The ratios of allowances paid to respondent, 6.5% in 1962 and 5.8% in 1963, exceeded the 3.5% called for under Juniorite's plans and exceeded the ratio of allowances paid to all other customers in the New York and Washington areas as to which there is evidence in the record (CX 468 A–B). Set forth below is a table showing the ratios of advertising allowances to sales for those customers in the New York and Washington areas to whom Juniorite paid advertising allowances in either 1962 or 1963. [Page 457.]

67. Of the nonfavored customers who testified regarding this supplier, three are located in the New York area and one in the Washington area. The New York area customers include D. W. Rogers, and Knitwear Shoppe, whose respective locations and operations have previously been described in paragraphs 22 and 59, *supra*. Rogers' purchases from Juniorite amounted to $2,065 in 1962, and $1,016 in 1963 (CX 468–A). Although Rogers periodically advertised Juniorite merchandise, it was not offered any advertising allowances by this supplier (Tr. 1453). Knitwear Shoppe's purchases from Juniorite amounted to $572 in 1963, its 1962 volume being missing from Juniorite's records (CX 468–A). Knitwear received a copy of the Juniorite advertising program in May 1963, but did not advertise cooperatively with the supplier because it was too expensive (Tr. 1785–1786). The third New York area customer is Dorell Casuals, a ladies' sportswear shop located in Greenwich Village, New York. It serves customers from

[15] Juniorite's contribution of $1,820.80 to an advertisement in The New York Times was 100% of the space cost of such advertisement (CX 104). It also contributed $995.60 to an advertisement in the Herald Tribune, containing the same number of lines as the Times advertisement (CX 105). While the record does not indicate the space cost of the former advertisement, evidence of other advertisements in this paper indicate a rate of 65½¢ a line (CX 36, 47, 59, 358). On the basis of 1,480 lines, the total space cost would be $969.40.

Ratio of Allowances to Sales (Juniorite)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $171,654 | 6.5% | $154,830 | 5.8% [16] |
| *New York Area* | | | | |
| Abraham & Strauss | 32,635 | 0.8 | 70,065 | 0.5 |
| B. Altman | 64,979 | 5.6 | 96,944 | 2.6 |
| Bambergers | 42,512 | 0.7 | 38,099 | 0.0 |
| Bloomingdales | 76,044 | 0.6 | 64,645 | 1.9 |
| Bonwit Teller | 22,267 | 0.7 | 23,553 | 0.5 |
| Franklin Simon | 2,892 | 0.0 | 42,558 | 0.8 |
| Genungs | 11,513 | 0.9 | 29,040 | 0.0 |
| B. Gertz | 33,152 | 0.3 | 62,877 | 1.0 |
| Gimbels | 40,772 | 0.2 | 63,317 | 2.3 |
| Hahne & Co. | 10,831 | 2.3 | 12,111 | 0.8 |
| Lord & Taylor | 73,147 | 2.8 | 44,386 | 1.4 |
| Martins | 24,111 | 0.8 | 22,209 | 0.0 |
| Saks Fifth Avenue | 14,371 | 3.5 | 14,622 | 0.0 |
| Saks 34th Street | 15,248 | 2.6 | 5,472 | 1.6 |
| Sterns | 39,554 | 1.1 | 63,469 | 0.2 |
| *Washington Area* | | | | |
| Hecht Co. | 20,099 | 5.5 | 34,975 | 3.0 |
| S. Kann Sons Co. | 11,401 | 0.9 | 24,505 | 2.4 |
| Lansburgh's | 20,884 | 2.0 | 35,650 | 1.1 |

various parts of New York City and a number of its customers shop on Fifth Avenue. Dorell's annual sales volume in 1962 and 1963 was approximately $200,000. Its purchases from Juniorite amounted to $9,804 in 1963. While its 1962 record of purchases was missing from Juniorite's files, the amount was estimated to be between $4,000 and $5,000. Dorell does some direct mail advertising, but engages in no newspaper or magazine advertising because of the expense. It was never offered any advertising allowances by Juniorite, although it advertised the supplier's products in brochures (Tr. 2084–2101; CX 468–B).

68. The single Washington area customer to testify regarding this supplier is Style Shops, which operates ladies' sportswear stores in Fairfax and Falls Church, Virginia. The latter store is approximately five miles from respondent's Arlington branch. Style Shops' annual sales in 1962 and 1963 were between $200,000 and $256,000, and it spent $4,328 for advertising in 1962 and $2,013 in 1963. Style Shops' purchases from Juniorite amounted to $5,326 in 1962, the record containing no evidence as to the

[16] The above ratio figures are computed from Juniorite's records. Based on the figure of $8,250 in advertising allowances which respondent's records indicate it received in 1963, the above ratio figure would be 5.3%.

amount purchased in 1963. The store advertised Juniorite merchandise in its radio advertising, but received no advertising allowances from Juniorite, although it informed the latter's representative it was advertising such merchandise. Style Shops used bill enclosures supplied by Juniorite, but paid for these. While it received advertising mats from Juniorite for which there was no charge, it did not use such mats (Tr. 2577–2599, 2635, 2643).

69. The record discloses that in 1962 and 1963 four of the styles cooperatively advertised by respondent with Juniorite were sold to Dorell Casuals and/or D. W. Rogers. In each instance the merchandise was delivered to the nonfavored customer in reasonable proximity to the time it was delivered to and advertised by respondent. Illustrative of such transactions is that involving Style #511, which was advertised by respondent in January 1962 in its January Mailer and in The New York Times and the Herald Tribune (CX 102–A). Respondent purchased 445 garments, which were delivered in January and February 1962. Dorell Casuals purchased 298 garments of the same style number, taking delivery in each month from January to June (CX 364).

(8) *Lynne Manufacturing Company*

70. Lynne is a manufacturer of ladies' dresses, with an office and showroom located in New York City. Its products are sold under the brand name "Matti of Lynne." It operates a manufacturing plant in New York City and utilizes contractors in New York and New Jersey. Its products are sold to department stores and ladies' specialty shops throughout the United States. Shipments to customers are made from its plant in New York. Most sales are made from the showroom in New York. Its annual sales in 1962 and 1963 were approximately $2 million (Tr. 781–785).

71. Lynne's line is produced and sold on a seasonal basis, the principal seasons being spring, summer, fall, holiday and cruise. It produces approximately 70 different styles (varying according to fabric and design), of which only about 30 are sold in any quantity. Its entire line is available to all customers, but no customer purchases the entire line. The average customer purchases about 20 styles. Respondent generally purchased about 6 styles, but its volume of purchases was greater than that of other customers. The garments were generally manufactured after selections from samples had been made (Tr. 785–788, 795, 805–806, 809, 815–816).

72. Lynne does no institutional advertising and has no advertising budget. Such advertising as it does is principally co-

operative advertising with certain of its customers. Lynne had no formal cooperative advertising plan in 1962 or 1963. Advertising allowances were granted, on a selective basis, to individual customers requesting such allowances. The advertising medium to be used was suggested by the customer. The amount of the payment was not based on any formula such as the cost of the advertising or the amount of purchases. Lynne merely "played it by ear" (Tr. 792–794, 812, 824).

73. Respondent was Lynne's most important customer, accounting for approximately 15% of Lynne's volume. Lynne "relied principally on the Best & Company advertising to be our showcase" (Tr. 792, 795). Requests to participate in cooperative advertising with respondent originated with the latter's buyer handling Lynne merchandise. Most of the cooperative advertising with respondent involved the latter's catalogs or other direct mail advertising. The Lynne representative, being aware of when these booklets would be issued, would meet with the buyer to allow her to select those styles which she wanted to feature in a forthcoming booklet. The amount of Lynne's contribution was suggested by respondent's buyer or its sales promotion director. This was generally accepted by Lynne, although it might sometimes suggest a less expensive type of advertising. Lynne had no idea what proportion of the cost of the advertisements it was bearing, relying "mostly on faith" that it was paying a proper amount (Tr. 803). Its contributions were not related to the size of respondent's orders. Such orders were placed after the styles to be advertised had been selected. Respondent's purchases from Lynne were limited almost entirely to the styles which were to be advertised (Tr. 796–808).

74. In 1962 Lynne contributed to eight advertisements with respondent and in 1963 to nine. Most of these advertisements involved respondent's catalogs, brochures or other direct mail advertising. However, there were also several magazine advertisements (including Harper's Bazaar and Vogue) and three advertisements in The New York Times (CX 123 A–B). The record does not disclose what proportion of the cost of the magazine advertisements Lynne paid. However, its contributions to The New York Times advertisements amounted to two-thirds of respondent's costs on two of the advertisements and over three-fourths of the cost on a third (CX 134, 135, 138). According to the figures compiled from respondent's records, Lynne's total contributions to respondent's advertising amounted to $13,725 in 1962, and $17,777 in 1963 (CX 123 A–B). Lynne's own records indicate its contributions

were $14,850 in 1962, and $15,627 in 1963 (CX 429–A). With the exception of one customer in 1962, Lynne's contributions to respondent were proportionately higher than those paid to any other customer in the New York and Washington areas. Set forth below is a table comparing the ratio of advertising allowances to sales for all customers in the New York and Washington areas to whom Lynne paid any allowances in 1962 or 1963 (CX 429 A–F).

Ratio of Allowances to Sales (Lynne M'fg.)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $370,063 | 4.0% [17] | $235,725 | 6.6% [17] |
| *New York Area* | | | | |
| Bloomingdale's | 7,491 | 1.1 | 48,530 | 0.0 |
| Bonwit Teller | 24,713 | 3.6 | 13,275 | 0.0 |
| Hahne & Co. | 2,021 | 4.9 | 245 | 0.0 |
| Saks Fifth Avenue | 156,617 | 1.9 | 98,337 | 2.0 |
| *Washington Area* | | | | |
| Julius Garfinckel | 0 | 0.0 | 11,915 | 1.5 |

75. Of Lynne's 61 customers in the New York and Washington areas as to which there is evidence in the record, 56 received no advertising allowances in either 1962 or 1963. Of the nonfavored customers, 9 in 1962 and 15 in 1963 made purchases of $2,000 or more. The three largest of these made purchases ranging from about $10,000 to $80,000 (CX 429 A–F). Of the nonfavored customers who testified with respect to this supplier, one was located in the New York area and one in the Washington, D.C., area.

76. The New York area customer which received no advertising allowances from Lynne is Feller's, a women's specialty store in South Orange, New Jersey, located about two miles from respondent's branch store in East Orange. Feller's draws its customers principally from suburban Essex County, but has a number of customers who work and shop in Manhattan. Some of its customers have charge accounts at the Fifth Avenue stores, including respondent's. Feller's annual sales were approximately $500,000 in 1962 and 1963, and it spent about $7,500 for advertising (Tr. 1807–1815). Its purchases from Lynne were $2,823 in 1962, and $2,981 in 1963, which represented about 12 styles in Lynne's line (CX 429–B; Tr. 1830). Feller's was not offered any advertising allowances by Lynne. Had such allowances been made

[17] Based on the allowance figures compiled from respondent's records, the above ratios would be 3.7% for 1962 and 7.2% for 1963.

available to it, Feller's would have used them to advertise Lynne's products since it found that advertising increased its sales (Tr. 1817–1818, 1841).

77. The Washington area customer which received no advertising allowances from Lynne is Margy Betts, Inc., a ladies' specialty shop located in Alexandria, Virginia, about eight miles from respondent's branch store in Arlington. Betts draws its customers from the Washington metropolitan area, including some from Maryland. Its annual sales were between $150,000 and $200,000 in 1962 and 1963. It expended about $300 annually for advertising (Tr. 2965–2968, 2974, 2978). Betts' purchases from Lynne amounted to $2,534 in 1962, and $4,825 in 1963 (CX 429–A). It was never offered any advertising allowances by Lynne (Tr. 2970).

78. The record discloses that in 1962 and 1963, 18 of the styles cooperatively advertised by respondent with Lynne were sold to Feller's and/or Betts. In most instances the merchandise was delivered to the nonfavored customers in reasonable proximity to the time it was delivered to and advertised by respondent. Illustrative of such transactions is that involving Style # 601, which was advertised by respondent in both the College Mailer and Harper's Bazaar in August 1963. Respondent purchased 315 garments of this style number, receiving delivery thereof between August and October 1963. Feller's purchased 10 garments of this style number, receiving delivery in August and November, and Betts purchased 29 garments, receiving delivery in August and September (CX 365).

(9) *Majestic Specialties, Inc.*

79. Majestic is a manufacturer of ladies' sportswear coordinates, including blouses, skirts, sweaters, jackets, shorts and pants. It maintains an office and showroom in New York City, and an office in Jersey City. Its products are manufactured by contractors located in various parts of the country, including Pennsylvania, Ohio, Kentucky, and New York. The garments manufactured for it are shipped to customers either from its office in Jersey City or from a distribution warehouse in Cleveland, Ohio. Its products are sold to department stores and women's specialty shops throughout the United States. Most of its sales are made by road salesmen, although it does some selling at its showroom in New York. Its annual sales in 1962 and 1963 were in excess of $15 million (Tr. 1057–1060).

80. The Majestic line is produced and sold on a seasonal basis, the principal seasons being spring, summer, fall and holiday. The company produces 200 to 250 different styles each season, such styles varying with the type of garment, pattern, fabric or design. Majestic's garments range in price from $3.95 to $25.00 at retail. Its entire line is available to all of its customers. However, most customers limit their purchases to between 40% and 80% of the line (Tr. 1061–1063, 1074, 1076, 1081).

81. In 1962 and 1963 Majestic engaged in its own institutional or "direct" advertising, and in cooperative advertising with customers. Its advertising budget was between 1½ to 2½% of its sales volume. It did not have a formal cooperative advertising plan at the time, but followed a practice of engaging in cooperative advertising with so-called "key" accounts in major marketing areas throughout the country. It paid one-half the cost of advertising its products by these customers, up to 2 or 2½% of their purchases from it. In the New York City area, it paid a somewhat higher percentage to its key accounts because no salesmen's commissions were involved in selling to these stores (Tr. 1063–1067). In addition to contributing toward cooperative advertising to selected customers, Majestic made available to its customers generally, advertising mats and, on occasion, statement enclosures and other forms for promoting the sale of its merchandise (Tr. 1068). There was no charge for the mats, but the statement enclosures were generally paid for by the customer (Tr. 1090–1091, 1097).

82. Respondent was one of Majestic's so-called "key" accounts in the New York area. Respondent ranked among Majestic's top half-dozen volume accounts (Tr. 1068–1068A). It engaged in substantial cooperative advertising with respondent in 1962 and 1963, involving principally contributions to respondent's direct mail advertising, but also including a number of contributions to advertisements in newspapers (mainly, The New York Times) and some combination advertisements in mailers and fashion magazines. Arrangements to participate in cooperative advertising with respondent were made with respondent's buyer purchasing Majestic's merchandise. The buyer would select from Majestic's entire line the merchandise which she wished to advertise, subject to Majestic's approval, and would advise Majestic as to the medium in which the particular style or styles would be advertised and as to the amount of Majestic's expected contribution. In the case of respondent's direct mail advertising, the amount of Majestic's contribution was a flat amount and Majestic was not advised what portion of the cost of the advertisement it was paying.

However, based on past experience Majestic was pretty much aware of the approximate amount of the contribution expected. In the case of newspaper advertisements, Majestic's contribution was based on the linage cost (CX 1068A–1073). Majestic understood, in its negotiations with respondent, that "if we didn't cooperate in the cost of a booklet or magazine promotion, we could not be included in the particular promotion involved" (Tr. 1087). Since "the bulk of the merchandise purchased by Best was done on a basis of its being used in some sort of promotion," Majestic was aware that if it did not participate in a promotion there would be a substantial decline in respondent's purchases during that period (Tr. 1087–1089).

83. Majestic participated in 23 cooperative advertisements with respondent in 1962 and in 13 advertisements in 1963, the total amount of its advertising payments to respondent being $32,528 and $24,655, respectively (CX 141 A–E).[18] Of Majestic's 121 customers in the New York and Washington areas as to which there is evidence in the record, 101 received no advertising allowances in 1962 or 1963. At least 88 of the nonfavored customers made purchases from Majestic of $2,000 or more. Three of these made purchases of between $27,000 and $96,000. The proportion of advertising allowances paid to respondent by Majestic exceeded that paid to all other customers in the New York and Washington areas. Set forth below is a table comparing the ratio of advertising allowances to sales for all customers in the New York and Washington areas who received a contribution from Majestic in 1962 or 1963 (CX 437 A–M). [Page 464.]

84. Of the nonfavored customers who testified regarding this supplier, six are located in the New York area and four in the Washington area. The New York area customers include Feller's, Goerke, Rogers, and Trencher, whose respective locations and operations have been previously described in paragraphs 76, 59, 22, and 29, *supra*. Feller's purchases from Majestic were $1,288 in 1962 and $2,882 in 1963 (CX 437–C). It was never offered any advertising allowances by Majestic (Tr. 1817). Goerke's purchases from Majestic were $27,298 in 1962 and $24,251 in 1963 (CX 437–E). It was not offered any advertising allowances by Majestic during 1962 or 1963, although it requested them on a number of occasions and frequently mentioned Majestic's name in its advertising (Tr. 1662, 1671–1674). Rogers' purchases from Majestic were $3,597, and $3,336 in 1962 and 1963, respectively

[18] The figures compiled from respondent's and Majestic's records are in accord, except for a minor difference of $8 in 1963.

Ratio of Advertising Allowances to Sales (Majestic)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $364,142 | 8.9% | $331,897 | 7.4% |
| *New York Area* | | | | |
| Abraham & Strauss | 74,821 | 0.4 | 85,702 | 0.0 |
| B. Altman | 83,249 | 0.8 | 104,055 | 0.0 |
| Bambergers | 65,731 | 0.1 | 119,458 | 0.3 |
| Bloomingdales | 65,332 | 0.2 | 121,290 | 0.4 |
| Gerdor Corp. | 41,647 | 0.4 | 47,112 | 0.3 |
| B. Gertz | 65,641 | 0.3 | 39,860 | 0.1 |
| Levine Bromley | 31,557 | 0.4 | 33,247 | 0.3 |
| Liptons | 9,496 | 0.0 | 24,103 | 0.1 |
| Lord & Taylor | 425,304 | 6.6 | 476,291 | 6.0 |
| Macy's | 100,782 | 1.1 | 96,471 | 0.1 |
| Martins | 21,598 | 0.9 | 51,613 | 0.7 |
| Plymouth Shops | 57,406 | 0.3 | 136,141 | 0.3 |
| Presars Lingerie | 7,382 | 0.0 | 8,159 | 1.4 |
| Ronnie Lynn | 6,669 | 0.7 | 4,141 | 0.0 |
| Saks Fifth Avenue | 54,326 | 0.9 | 42,599 | 0.5 |
| Wanamakers | 6,402 | 0.8 | 6,979 | 0.0 |
| *Washington Area* | | | | |
| Joseph Harris | 54,934 | 0.9 | 55,064 | 0.0 |
| Lansburgh's | 41,740 | 0.7 | 39,975 | 0.0 |
| Woodward & Lothrop | 121,398 | 1.6 | 118,895 | 1.1 |

(CX 437–H). It purchased between one-quarter and one-half of the styles in Majestic's line. It was not offered any advertising allowances by Majestic during the period in question, although it featured Majestic's name and products in advertising. Rogers did avail itself of advertising mats supplied by Majestic (Tr. 1457–1458). Trencher's purchases from Majestic were $3,061 in 1962 and $4,446 in 1963 (CX 437–J). It was not offered any advertising allowance by Majestic during this period, although it advertised the supplier's name and products (Tr. 2327, 2346, 3051).

85. Among the nonfavored retailers not previously referred to is Cardinal Shops, Inc., a women's specialty store, located in Valley Stream, New York, about 10 minutes drive by automobile from respondent's branch store in Garden City. Cardinal's annual sales were approximately $400,000 in 1962 and 1963, and it expended about $3,500 for advertising (Tr. 2143–2146). Its purchases from Majestic were $5,480 in 1962 and $6,988 in 1963 (CX 437–B). It was never offered any advertising allowances by Majestic, but would have considered using such allowances had

they been offered. Cardinal did cooperatively advertise with other suppliers which offered it advertising allowances. It received no mats, mailers or sales aids from Majestic (Tr. 2165–2174). The last of the New York area nonfavored customers is L. Diamond Company, a ladies' specialty store located in Orange, New Jersey, about seven blocks from respondent's branch store in East Orange. Diamond's annual sales were about $200,000 during the period in issue, and it expended about $2,000 for advertising (Tr. 1610–1619). Diamond's purchases from Majestic were $7,207 in 1962 and $9,978 in 1963 (CX 437–B). It was never offered any advertising allowances by Majestic. On one occasion Diamond sought a contribution from Majestic toward a cooperative advertisement in a Christmas shopper, but was advised that Majestic didn't "do anything like that." Diamond has used Majestic's name in advertising but has received no contributions therefor (Tr. 1617, 1623–1628).

86. Among the nonfavored customers in the Washington area is Raleigh Haberdasher, whose operations have previously been described in paragraph 43, *supra*. Raleigh's purchases from Majestic were $7,924 in 1962, and $9,434 in 1963 (CX 437–L). It was not offered any advertising allowances by Majestic (Tr. 2807, 2813). Another Washington area nonfavored customer is Dana Robins, Inc., which operated ladies' specialty stores in Arlington, Virginia, and on Connecticut Avenue in the District of Columbia. Robins' Washington, D.C., store drew its customers from the District of Columbia and an adjacent area in Maryland. Its Arlington store was about ⅗ miles from respondent's branch store in Arlington. Robins' annual sales volume was $300,000–$400,000, and its advertising expenditures were about 3% of this amount. Its purchases from Majestic amounted to $3,178 in 1962 and $4,656 in 1963, on which it received no advertising allowances, although it requested them from Majestic (Tr. 2530–2549, 2564; CX 437–L). A third nonfavored customer is Haber & Company, which operates a ladies' apparel store in the District of Columbia under the name Leeds. Its annual sales were about $300,000 during the period in question. It advertised in Washington newspapers and by direct mail. Its purchases from Majestic (including purchases for three other stores outside the Washington area) amounted to approximately $50,000, on which it received no advertising allowances, although it requested them (Tr. 2717–2724, 2733–2739, 2745). The last of the Washington area customers is Worth's, Inc., which operates a women's and men's apparel store in Rockville, Maryland, a few miles north of re-

spondent's store in Washington. Worth's annual sales of women's apparel were $121,000 in 1962 and $160,000 in 1963. Its expenditures for advertising were between $6,400 and $7,000, of which three-fourths was for women's wear. Worth's purchases from Majestic were $3,877 in 1962, and $6,095 in 1963, on which it was not offered any advertising allowances by Majestic (Tr. 2981–2986; CX 437–M).

87. The record discloses that in 1962 and 1963 over 50 of the styles which were cooperatively advertised by respondent with Majestic were sold to one or more of the above-mentioned nonfavored customers. In most instances the merchandise was delivered to such customers in reasonable proximity to the time such styles were delivered to and advertised by respondent. Illustrative of such transactions is that involving Style #4030, which was advertised by respondent in August 1963 in its College Mailer and in Glamour magazine. Respondent purchased 650 garments of this style, which were delivered in July, August and October 1963. A number of the nonfavored customers purchased quantities ranging from 6 to 24, taking delivery in August 1963. Among the nonfavored customers purchasing this style were Trencher, Goerke, Diamond, Dana Robins, and Worth's (CX 366).

(10) *Monet Jewelers*

87A. Monet Jewelers is a division of Monocraft Products Co., Inc., with its main office and showroom located in New York City. It is a manufacturer of costume jewelry, including necklaces, bracelets, charms, earrings and pins, which it sells under the brand name "Monet." Its manufacturing plant is located in Providence, Rhode Island. Its products are sold to department stores, women's specialty shops and jewelry stores throughout the United States. Shipments to customers are generally made from the plant in Providence. Sales to customers are made through road salesmen and from the showroom in New York. Monet's annual sales in 1962 and 1963 were approximately $3 million (Tr. 371–378).

87B. Many of Monet's products are produced and sold on a seasonal basis. The principal season is fall, which includes merchandise produced for Christmas. There is also a lesser spring line and a very small summer line. Monet produces about 50 different items in its line. None of its customers purchases the entire line, but most purchase about 30 items. The prices of the different items in Monet's line range from about $1.50 to $25.00 at retail (Tr. 378, 432, 475, 494).

88. Monet engages in both institutional and cooperative advertising. Its advertising expenditures are planned at the beginning of each season. In 1962 and 1963 its annual expenditures for advertising were between $130,000 and $140,000, of which 10–15% was for cooperative advertising. Monet had no formal cooperative advertising plan in 1962 and 1963. Requests for cooperative advertising allowances received from customers were considered on an individual basis. Such proposals were generally built around "some kind of promotion" suggested by the customer (Tr. 492). Monet would accede to the request if it thought it would help sell its merchandise. However, it preferred to rely on its own institutional advertising in so-called "fashion publications" such as The New York Sunday Times Magazine section and the New Yorker Magazine (Tr. 397–403, 480, 492–494). In addition to engaging in institutional and cooperative advertising, Monet made available to all of its customers advertising mats, photographs, display racks, and other sales aids (Tr. 420, 472).

89. From time to time in 1962 and 1963 Monet engaged in cooperative advertising with respondent, which it considered an above average or "exceptional" account (Tr. 406, 473). While respondent's purchases involved a lesser number of styles than those purchased by other customers, its volume of purchases in those styles were much larger than the total purchases of most other customers. Respondent's purchases from Monet revolved principally around the styles which were advertised by respondent (Tr. 414–415, 473). Monet's participation in cooperative advertising with respondent resulted from requests received from the latter's jewelry buyer. The buyer would select a group of styles which she thought lent themselves to the type of advertising she had in mind, and would advise Monet as to the medium in which she intended to advertise them and as to the amount of the contribution desired from Monet. Generally, Monet participated when requested to do so, although it might sometimes try to cut down on the amount of space it was requested to take and the amount of its contribution. Monet was not aware of what part of the cost of a particular advertisement it was contributing to (Tr. 408–409, 414–418, 492).

90. Monet contributed to three cooperative advertisements with respondent in each of the years 1962 and 1963. With the exception of an advertisement in The New York Times in 1963, these involved contributions to respondent's catalogs, brochures or other direct mail advertising. In two instances the direct mail advertising was combined with an advertisement in Glamour Magazine. According

to the figures compiled from respondent's records, Monet's total advertising payments to respondent were $2,550 in 1962 and $1,100 in 1963 (CX 188 A–B). Monet's own records indicate total advertising payments to respondent of $2,250 in 1962, and $1,600 in 1963 (CX 415 A–B). Monet's payments to respondent were proportionally higher than those made to any other customer in the New York and Washington area. Set forth below is a table comparing the ratio of advertising allowances to sales for all customers in the New York and Washington areas to whom Monet paid any allowances in 1962 or 1963.

Ratio of Allowances to Sales (Monet)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $17,007 | 13.2% [19] | $9,345 | 17.1% [19] |
| *New York Area* | | | | |
| Arnold Constable | 26,384 | 1.9 | 23,325 | 2.1 |
| B. Altman | 27,230 | 5.5 | 15,341 | 4.0 |
| Bonwit Teller | 33,140 | 8.2 | 27,050 | 0.7 |
| De Pinna | 10,187 | 5.3 | 6,131 | 6.5 |
| Lord & Taylor | 45,767 | 11.9 | 38,435 | 5.6 |
| Martin's | 20,499 | 0.5 | 21,047 | 0.5 |
| *Washington Area* | | | | |
| Woodward & Lothrop | 48,554 | 1.3 | 47,200 | 0.3 |

91. Of Monet's 46 customers in the New York and Washington areas as to which there is evidence in the record, 39 received no advertising allowances in either 1962 or 1963. Of these nonfavored customers, 16 in 1962, and 14 in 1963 made purchases of $2,000 or more from Monet. The purchases of the three largest of these were between $5,145 and $41,448. Of the nonfavored customers who testified with respect to this supplier, five were located in the New York area and three in the Washington area.

92. The New York area customers include A. G. Fields, whose location and operations have been previously described in paragraph 21, *supra*. Fields' purchases from Monet amounted to $3,735 in 1962, and $5,017 in 1963 (CX 415–A). Fields' purchases were selected from Monet's entire line exhibited in its showroom. Monet never offered Fields any allowances to advertise its products. Fields did advertise cooperatively with suppliers who made allowances available to it (Tr. 1991–1992).

93. The largest of the New York area customers to testify is Plymouth Shops, Inc., which operates 20 stores in the New York

[19] Based on the figures compiled from respondent's records, the above ratios would be 15.0% in 1962, and 11.8% in 1963.

metropolitan area, selling ladies' apparel and accessories. One of the stores is located on Fifth Avenue, between 52nd and 53rd Streets in Manhattan, about one block from respondent's main store on Fifth Avenue. Plymouth also operates several other stores in the nearby midtown Manhattan area. It also operates a store in Paramus, New Jersey, where one of respondent's branch stores is located. Another store is located in Westchester County, New York, where respondent operates a branch store, and in Suffolk County, New York, adjacent to Nassau County where respondent's Garden City branch store is located. Plymouth's sales volume in 1962 and 1963 was approximately $8 million, and it expended approximately $60,000 for advertising. It advertised weekly in The New York Sunday Times and almost daily in the New York World Telegram (Tr. 2350–2355, 2392–2394). Plymouth's purchases from Monet amounted to $12,787 in 1962, and $15,546 in 1963, making it a comparable customer to respondent in volume of purchases (CX 415–A). Plymouth's buyer generally purchased 40 different items a year and selected them from Monet's entire line. Monet did not offer Plymouth Shops any advertising allowances in either 1962 or 1963. However, in 1964 when the Plymouth buyer requested a cooperative advertising allowance from Monet, she received one (Tr. 2357–2358).

94. Another of the New York area nonfavored customers is H. N. Drew, Ltd., of White Plains, New York, which sells gloves, handbags, and costume jewelry. Drew's store is located about one block from respondent's branch store in White Plains. Its sales volume was approximately $200,000 in 1962 and 1963 (Tr. 2176–2179). Drew's purchases from Monet amounted to $4,416 in 1962 and $5,145 in 1963 (CX 415–B). It was never offered any advertising allowances by Monet. On one occasion when Drew's owner was trying to organize an advertising program, he talked to Monet's salesman about receiving advertising allowances and was advised that Monet had no participation program. Drew did receive photographs and other counter display material from Monet (Tr. 2182–2184, 2188).

95. Another New York area nonfavored customer is Jewels by Duboff, which operates a group of jewelry stores in New York City under four corporate names. One of these stores is located on 50th Street in Manhattan, about a block from respondent's main store. Another store is located on Fifth Avenue near 42nd Street, and a third store (operated under the name DuBarry Jewel Box) was located on 42nd Street near Fifth Avenue. Duboff's advertising program consists primarily of window displays since, as a rela-

tively small retailer, it cannot afford to advertise in newspapers regularly (Tr. 2259–2270, 2276). Duboff's purchases from Monet amounted to $3,414 in 1962, and $1,527 in 1963 (CX 415–A). Duboff was never offered any advertising allowances by Monet. On a number of occasions it requested allowances for window displays to advertise Monet merchandise, but these requests were declined until 1964, when it received a stand for displaying bracelets (Tr. 2275–2276, 2293).

96. The last of the New York area nonfavored customers is Levy Brothers, which operates department stores in Elizabeth, and Clifton, New Jersey, selling ladies' apparel and accessories. The Elizabeth store is about ten miles from respondent's branch store in Watchung, New Jersey, and the Clifton store is about 12 miles from respondent's branch store in Paramus. Levy's sales volume was approximately $5 million in 1962 and 1963. Its annual expenditures for advertising were approximately $100,000, approximately 30% of which was for ladies' apparel and accessories (Tr. 2221–2235). Levy's purchases from Monet in 1962 and 1963 were between $6,000 and $7,000. It never received any advertising allowances from Monet, although its buyer requested them on a number of occasions (Tr. 2241–2244).

97. The largest of the Washington area nonfavored retailers, in terms of volume of purchases from Monet, was Frank R. Jelleff, Inc., which sells women's apparel and accessories. Its main store is located in the District of Columbia and it operates five branch stores in the Washington metropolitan area. One of its branch stores, in Chevy Chase, Maryland, is located about a mile north of respondent's store in the District of Columbia. Another branch store is in Arlington, Virginia, about four miles from respondent's branch store in Arlington. Jelleff's annual sales are in excess of $10 million, its actual sales figures not being revealed for the record. Its expenditures for advertising were around $350,000, which included advertisements in Washington newspapers and in its own brochures and other direct mailing pieces. Over 130,000 copies of its brochures are mailed to its customer list (Tr. 2650–2659, 2689–2691). Jelleff's purchases from Monet were comparable to respondent's, amounting to $12,630 in 1962, and $11, 531 in 1963 (CX 415–A). Jelleff was not offered any advertising allowances by Monet, although it requested such allowances and advertised Monet products from time to time (Tr. 2675–2676; CX 462).

98. Another Washington area nonfavored customer is S. Kann Sons Co., a department store located in the District of Columbia.

Kann's also operates a branch store in Arlington, Virginia, about a mile and a half from respondent's branch store in Arlington. Kann's sales in 1962 and 1963 were approximately $20 million, and it expended approximately $750,000 for advertising (Tr. 2907–2911). Kann's purchases from Monet amounted to $3,806 in 1962, and $4,617 in 1963 (CX 415–A). It purchased approximately one-half the items in Monet's line. Kann's periodically advertised Monet products and requested advertising allowances from the supplier but was not offered any (Tr. 2915–2919).

99. The last of the Washington area customers is Raleigh Haberdasher, whose location and operations have been previously described in paragraph 43, *supra*. Raleigh's purchases from Monet amounted to $2,913 in 1962, and $1,800 in 1963 (CX 415–A). It was never offered any advertising allowances by Monet (Tr. 2808, 2812–2814).

100. The record establishes that in 1962 and 1963 eight of the styles which were cooperatively advertised by respondent with Monet were sold to one or more of the above-named nonfavored customers. In most instances the merchandise was delivered to the nonfavored customers in reasonable proximity to the time when it was delivered to and advertised by respondent. Illustrative of such transactions is that involving Style #1621, which was advertised by respondent in its College Mailer in July 1962, and in a Monogram folder in October 1962. Respondent purchased 732 pieces of this style number, which were delivered in June, August, October, and November 1962. Jelleff's purchased 31 pieces of such style, which were delivered in October 1962. Kann's purchased 17 pieces which were delivered in June and November 1962 (CX 367).

(11) *Pan American Barter Co., Inc.*

101. Pan American is an importer and distributor of watches and clocks. Its main office and showroom is located in New York City. Its products are imported from Switzerland, Germany and France. Some are purchased completely assembled and some are assembled in the United States. Pan American sells its products under the brand name "Sheffield" to department stores, specialty stores and jewelry stores throughout the United States. Sales are made mainly by road salesmen, but some sales are made at its showroom in New York. Pan American's annual sales volume in 1962 and 1963 was approximately $6–7 million (Tr. 3197–3204).

102. Pan American's products are sold on a seasonal basis, the three main seasons being spring, summer–fall, and winter. It sells

between 200 and 300 styles in a given season. Many of the styles are carried over from one season to another. All of its styles are available to all customers. Respondent purchases about 100 of the styles sold by Pan American. The average customer purchases 15 to 20 different styles. Pan American's products retail at from $10.95 to $30.00 (Tr. 3243–3244, 3246, 3250).

103. During 1962 and 1963 Pan American expended between $200,000 and $300,000 for advertising its products. It engaged in both institutional and cooperative advertising (Tr. 3205–3206). Since at least 1963 Pan American has had a formal cooperative advertising plan pursuant to which it has offered to participate, "on a 50–50 basis," in newspaper advertising with its customers, its share being limited to "5% of the dealer's net purchases of active Sheffield models at regular prices" during a six-month base period. The plan was limited to "advertising in daily, weekly or Sunday newspapers" and specifically excluded advertising in "shopping newspapers, catalogs, direct mail, display pieces or other forms of advertising" (CX 373–A). Pan American had a cooperative advertising plan prior to the written plan which went into effect in 1963, but the record is unclear as to whether it was in writing. It was, however, based on a similar formula, *i.e.*, "50 percent of the ad up to 5 percent of the purchases of the customer" (Tr. 3208–3210). Although there was also some uncertainty as to how and whether these plans were communicated to customers, the examiner is satisfied that at least the 1963 plan was communicated to Pan American's customers.[20] In addition to its contributions for cooperative advertising, Pan American supplied its customers with mats, counter displays and other sales aids. These aids were available to all of its customers, including respondent (Tr. 3254, 3262).

104. Pan American has engaged in cooperative advertising with respondent since 1954. Arrangements for participating in cooperative advertising were made with respondent's buyer and/or sales promotion director. Pan American regularly participated in respondent's catalogs or other direct mailers, and frequently cooperated in newspaper advertising with respondent. It was also approached by respondent to participate in magazine advertising. Except for certain newspaper advertising, the advertising medium

[20] The Pan American official who testified was a most reluctant witness, whose original appearance had to be postponed. He was uncertain how the plan was communicated to customers, but "imagine[d] that the salesmen would have had a copy of the plan" (Tr. 3210). The notice attached to the plan was addressed "To All Dealers," and several of the retailers who testified had been notified that Pan American had a cooperative advertising plan (Tr. 2254, 2888–2889; CX 373–B).

to be used was suggested by respondent. The styles to be advertised were mutually selected by Best and Pan American. Pan American was expected to pay one-half the space cost of newspaper advertisements, except for advertisements in The New York Times in which it was expected to pay the entire cost of the advertisement. In the case of magazine advertisements, Pan American's contribution was a flat amount fixed by respondent. In only rare instances did Pan American decline to participate in cooperative advertising when requested to do so by respondent (Tr. 3215, 3220–3241, 3252–3253).

105. Pan American participated in 41 cooperative advertisements with respondent in 1962, and in 42 advertisements in 1963. Most of these involved newspaper advertisements, but 10 in 1962, and 12 in 1963, involved contributions to respondent's catalogs, brochures or other direct mail advertising (CX 195 A–J). Pan American's contributions to newspaper advertisements in papers other than The New York Times were generally 50% of the space cost, except for one advertisement in the Herald Tribune to which its contribution was 66⅔% (CX 197, 204, 212, 225, 230, 232, 233, 238, 240, 246, 251, 255, 258, 261). In the case of The New York

Ratio of Allowances to Sales (Pan American)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $153,325 | 22.2% [21] | $165,477 | 19.3% [21] |
| *New York Area* | | | | |
| Abraham & Strauss | 20,976 | 1.1 | 30,030 | 0.0 |
| B. Altman | 9,306 | 4.7 | 4,711 | 10.1 |
| Arnold Constable | 6,547 | 0.2 | 3,172 | 0.0 |
| Bloomingdales | 18,841 | 5.5 | 19,932 | 2.7 |
| Franklin Simon | 6,343 | 0.0 | 8,786 | 1.2 |
| Genungs | 8,172 | 0.0 | 12,334 | 1.2 |
| B. Gertz | 13,526 | 3.7 | 14,614 | 2.7 |
| Letwinger Jewelers | 977 | 9.7 | 1,424 | 3.4 |
| Lord & Taylor | 18,328 | 1.1 | 7,319 | 2.7 |
| Macy's | 13,440 | 0.0 | 9,437 | 3.2 |
| Martins | 13,889 | 3.9 | 11,260 | 7.2 |
| Plymouth Shops | 52,300 | 0.0 | 61,716 | 1.8 |
| Saks Fifth Avenue | 53,118 | 2.5 | 42,310 | 0.5 |
| *Washington Area* | | | | |
| Fairfax Dist. Co. | 2,581 | 1.6 | 45,611 | 0.9 |
| Treasure Trove | 3,507 | 0.0 | 4,565 | 2.1 |
| Woodward & Lothrop | 11,107 | 4.8 | 11,133 | 1.5 |

[21] Figures compiled from respondent's records indicate the receipt of advertising allowances from Pan American of $32,833 in 1962 and $29,713 in 1963. Using these figures, instead of Pan American's figures, the above ratios would be 21.4% and 18.0%, respectively.

Times, Pan American's contributions were generally 100% of the space and typography costs, except that in the daily edition they were 50% (CX 198–231, 239, 242, 245, 254, 257–272). Pan American's total payments of advertising allowances to respondent were $34,090 in 1962, and $31,890 in 1963. Its total payments to respondent were substantially higher, proportionately, than those paid to any other customer in the New York and Washington area. Set forth [p. 473] is a table comparing the ratio of advertising allowances to sales for all customers in the New York and Washington areas to whom Pan American paid any advertising allowances in 1962 or 1963 (CX 43 A–H).

106. Of Pan American's 79 customers in the New York and Washington areas as to which there is evidence in the record, 53 received no advertising allowances from it in either 1962 or 1963. Of these nonfavored customers, 14 in 1962 and 19 in 1963 made purchases from Pan American of $2,000 or more. The purchases of the three largest of these were between $8,700 and $19,000 (CX 438 A–H). Of the nonfavored customers who testified with respect to this supplier, three were located in the New York area and four in the Washington, D.C., area.

107. The three nonfavored customers in the New York area include Levy Brothers, H. N. Drew and Jewels by Duboff, whose respective locations and operations have been previously described in paragraphs 96, 94 and 95, *supra*. The record does not disclose the total amount of Levy's purchases from Pan American. However, it does appear that it received advertising allowances of 5% from Pan American (Tr. 2247). While it was not a wholly nonfavored customer, its allowances were less than a fourth of those paid to respondent. Drew's purchases from Pan American were $5,166 in 1962 and $6,354 in 1963 (CX 438–F). Although it made request therefor, it was not paid any advertising allowances by Pan American (Tr. 2179–2182). Duboff's purchases from Pan American were $3,048 in 1962 and $8,440 in 1963 (CX 438–B). It was not offered any advertising allowances by Pan American (Tr. 2278—2280).

108. The Washington area customers include Jelleff's, Lady Hamilton and Hayman's, whose respective locations and operations have been previously described in paragraphs 97, 52 and 60, *supra*. Jelleff's generally purchased about two-thirds of Pan American's line. Its purchases from Pan American amounted to $3,326 in 1962, and $3,504 in 1963 (CX 438–F). It was not offered any advertising allowances by Pan American (Tr. 2677–2678). Lady Hamilton's purchases from Pan American amounted to $642 in

1962 and $975 in 1963 (CX 438–G). It was not offered any advertising allowances by Pan American (Tr. 2486–2487, 2497, 2506). Hayman's purchases from Pan American were $624 in 1962 and $564 in 1963 (CX 438–G). It was not offered any advertising allowances by Pan American (Tr. 3014).

109. The last of the Washington area customers is Treasure Trove, which operates a jewelry and gift shop in downtown Washington, and also operates the jewelry concession at the L. Frank store, a ladies' specialty shop located in downtown Washington. It draws its customers from the entire Washington metropolitan area, including the Maryland and Virginia suburbs. Treasure Trove's annual sales were approximately $100,000 at its own location, and $60,000 at the L. Frank location. It expended between $300 and $500 for advertising at the L. Frank location (Tr. 2882–2887). Treasure Trove's purchases from Pan American were $3,507 in 1962, and $4,565 in 1963 (CX 438–H). Treasure Trove became aware of Pan American's cooperative advertising program sometime in 1963, when it received a copy of the plan. In the latter part of 1963 it requested and received an allowance to advertise certain of Pan American's products. Although it understood it could obtain allowances of up to 5% of its purchases, Treasure Trove only sought to advertise on one occasion in 1963, and Pan American contributed one-half the cost of the advertisement, which amounted to 2.1% of Treasure Trove's purchases in that year (Tr. 2888–2889).

109A. The record establishes that in 1962 and 1963, 40 of the styles cooperatively advertised by respondent with Pan American were sold to one or more of the above-mentioned nonfavored customers. In most instances the merchandise was delivered to the nonfavored customers in reasonable proximity to the time when it was delivered to and advertised by respondent. Illustrative of such transactions is that involving Style #40/6159, which was advertised by respondent in The New York Times in March and April 1962, in the New York Herald Tribune in May 1962, and in respondent's Fall and Winter Catalog 1962 (CX 195 A–C). Respondent purchased 494 pieces of this style during the year, taking delivery on various dates throughout the year, including March through June and August through December. Drew purchased 18 pieces of this style, on which it took delivery in February, June and August 1962. Duboff purchased 12 pieces, taking delivery from May to August. Jelleff's purchased 12 pieces, taking delivery in February and May. Lady Hamilton purchased

2, taking delivery in October. Hayman's purchased 4, taking delivery in November 1962 (CX 368).

(12) *Rabiner & Jontow, Inc.*

110. Rabiner & Jontow (now known as Abbe Rabiner, Inc.) is a manufacturer of women's coats and suits, which it sells under the brand name "Bardley." Its annual sales are between $3½ and $5 million. Its office and showroom is located in New York City, and its manufacturing plant is in Newark, New Jersey. Its products are sold to department stores and women's specialty stores throughout the United States. Sales to customers are made by road salesmen and at the showroom. All shipments to customers are made from the manufacturing plant in New Jersey. Shipments to respondent are made to its main store in New York City (Tr. 571–574, 636).

111. Rabiner & Jontow's products are produced and sold on a seasonal basis, the two principal seasons being spring and fall. It produces approximately 70 styles each season, which range in price from $70 to $135 at retail. Some styles are carried over from one season to another with minor modifications, but most styles are new. Its garments are produced in different sizes, from junior to misses. It is unusual for one customer to purchase all of its styles. The average customer purchases 30 to 40 styles. Selections by customers are made from its entire line (Tr. 575, 613, 624–626, 632).

112. Rabiner & Jontow engages in both institutional and cooperative advertising. Its advertising expenditures are around $50,000 annually. It has no formal cooperative advertising plan. Cooperative advertising allowances are granted, on a selective basis, to certain of its customers requesting such allowances. The decision to enter into cooperative advertising with particular customers depends on a number of factors, including the quality of the store, the personality of the individual involved, and whether the supplier regards it as being to its advantage to participate (Tr. 577–581, 589–596, 1139). In addition to the granting of cooperative advertising allowances to selected customers, Rabiner & Jontow also supplies many of its customers with various sales aids, including advertising mats and window displays. These are available to its customers generally (Tr. 633, 642).

113. For a number of years Rabiner & Jontow has engaged in cooperative advertising with respondent, which is its largest customer. Arrangements for the granting of cooperative advertising allowances were made with respondent's buyers and with the

director of sales promotions. Rabiner & Jontow was familiar with respondent's direct mail advertising program and participated in it on a regular basis. On some occasions this involved joint participation in a mailer and an advertisement in a fashion magazine. The styles to be featured were mutually selected by the representatives of respondent and Rabiner & Jontow. The latter was advised as to, or anticipated, the advertising medium to be used, and was informed as to the amount of the contribution expected from it. It was not aware of what portion of a particular advertisement it was paying for. Rabiner & Jontow generally participated in cooperative advertising with respondent, when requested to do so, because of the substantial quantities of purchases made by respondent of the styles which were to be advertised (Tr. 582–587, 589–606, 610–612, 1128, 1141–1142).

114. Rabiner & Jontow participated in at least 12 cooperative advertisements with respondent in 1962, and in 16 advertisements in 1963 (CX 274 A–D). Most of these involved advertisements in one of respondent's direct mailers, or combination advertisements in a mailer and a fashion magazine. However, there were also some separate advertisements in newspapers and magazines. In most of the latter instances Rabiner & Jontow contributed one-half the cost of such advertisement. In at least one instance, however, it paid the entire space and typography costs (CX 279–A). The total amount of the advertising allowances paid by Rabiner & Jontow to respondent was $29,330 in 1962, and $29,737 in 1963 (CX 439–A).[22] Its payments to respondent were proportionately higher than those paid to any other customer in the New York and Washington area as to which there is evidence in the record.

Ratio of Allowances to Sales (Rabiner & Jontow)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $641,024 | 4.6% | $584,019 | 5.1% |
| *New York Area* | | | | |
| B. Altman | [23] | | [24] | |
| Bonwit Teller | 86,522 | 0.6 | [24] | |
| Lord & Taylor | 104,041 | 4.4 | [24] | |
| *Washington Area* | | | | |
| Goldrings | 22,204 | 0.2 | [24] | |
| Woodward & Lothrop | 15,895 | 2.0 | [24] | |

[22] Although the figures compiled from respondent's records indicate the receipt of advertising allowances from Rabiner & Jontow in an amount approximately $1,500 to $2,000 less than the above figures, it was stipulated that the above figures are correct (Tr. 1871–1872).

[23] Sales records not available. Received advertising allowances of $172 in 1962.

[24] Records of sales and allowances to these customers not available for 1963.

Set forth [p. 477] is a table comparing the advertising allowances paid to respondent in 1962 and 1963 with those paid other customers in the New York and Washington areas who received advertising allowances (CX 439 A–B).

115. Of Rabiner & Jontow's 16 customers in the New York and Washington areas as to which there is evidence in the record, 11 received no advertising allowances in either 1962 or 1963. Of these nonfavored customers, there were 3 in 1962 and 7 in 1963 who made purchases from Rabiner & Jontow of $2,000 or more. The purchases of the three largest of these ranged from $2,226 to $9,026 (CX 439 A–B). Of the nonfavored customers who testified regarding this supplier, two were located in the New York area and three were located in the Washington, D.C., area.

116. One of the nonfavored customers in the New York area is Jenny Banta, Inc., which operates a ladies' specialty shop in Ridgewood, New Jersey, about four miles from respondent's branch store in Hackensack. A large percentage of Banta's customers shop in New York, and a number have charge accounts with respondent and other Fifth Avenue stores. Banta's sales are approximately $1 million and it expends about 3% of sales for advertising. It advertises in local New Jersey papers and engages in direct mail advertising (Tr. 1525–1533). Banta's purchases from Rabiner & Jontow in 1963 amounted to $9,026 (CX 439–A). It made its purchases from Rabiner & Jontow's entire line, selecting about one-third of the items in the line. Banta's was never offered any advertising allowances by Rabiner & Jontow (Tr. 1534). It periodically featured Rabiner & Jontow's suits in its advertising. However, since it had been advised by the supplier that it "would hurt him with Best & Company," Banta did not use the Rabiner & Jontow name in its advertising and removed the supplier's label from the garments purchased from it (Tr. 1535–1537, 1554–1557). Banta did not receive any advertising mats or display material from Rabiner & Jontow, except for a swatch card. Banta sought to obtain a direct mailing piece featuring Rabiner & Jontow garments, but was advised that it could not obtain the mailer because it was a mailer which had been supplied to respondent (Tr. 1537–1539, 1565–1567, 1573–1577). As a result of Rabiner & Jontow's restrictive policy in allowing Banta to use its name and labels, Banta made no purchases from the supplier in 1962. However, since it did not have another comparable line of coats and suits, Banta resumed purchases from Rabiner & Jontow in 1963 (Tr. 1582).

117. The second New York area nonfavored customer is Chancy d'Elia, which operates a retail establishment in Greenwich, Connecticut, carrying ladies' apparel and accessories. D'Elia is located about seven miles from respondent's branch store at Stamford, Connecticut. Some of its customers commute to New York to shop and some have charge accounts with respondent. D'Elia's total sales were between $475,000 and $480,000 in 1962 and 1963, and it expended between $3,200 and $3,500 for advertising. The store advertised in local newspapers and direct mailers purchased from its suppliers (Tr. 2046–2051). D'Elia's purchases from Rabiner & Jontow were $2,226 in 1962, and $1,091 in 1963 (CX 439–A). It was never offered any advertising allowances by Rabiner & Jontow. On one occasion it sought to purchase a direct mailer from Rabiner & Jontow, copies of which had been supplied to respondent and another large Fifth Avenue store, but was advised that the mailer was not available to it (Tr. 2053–2055, 2061).

118. One of the Washington area nonfavored customers is Raleigh Haberdasher, whose location and operations have been previously described in paragraph 43, *supra*. Raleigh's purchases from Rabiner & Jontow amounted to $518 in 1962, and $2,380 in 1963 (CX 439–B). It was not offered any advertising allowances by Rabiner & Jontow (Tr. 2813–2814). Another of the Washington area nonfavored customers is Jane Dawson Smith Company, which operates a ladies' apparel shop on Connecticut Avenue in the District of Columbia, drawing its customers from the Greater Washington area. Smith's is located about 10 minutes' drive by automobile from respondent's store on Wisconsin Avenue. The store's sales volume was approximately $125,000 in each of the years 1962 and 1963, and it spent about $2,000 for advertising (Tr. 2775–2781). Its purchases from Rabiner & Jontow were $349 in 1962, and $986 in 1963 (CX 439–A). It was never offered any advertising allowances by Rabiner & Jontow, although it featured Rabiner & Jontow products in its direct mail advertising (Tr. 2782—2783, 2796).

119. The third Washington area retailer to testify is Margy Betts, Inc., which operates a ladies' apparel store in Alexandria, Virginia, about eight miles from respondent's branch store in Arlington. Some of its customers have charge accounts with respondent. Betts' annual sales were approximately $150,000 in 1962 and 1963. It did some advertising in local newspapers and in a Christmas catalog. Its purchases from Rabiner & Jontow were approximately $1,000 in each of the years 1962 and 1963.

It was never offered any advertising allowances by Rabiner & Jontow (Tr. 2965–2970).

120. The record contains none of Rabiner & Jontow's invoices. Accordingly, it is not possible to determine whether any of the above-named nonfavored customers purchased styles which were identical to those sold to, and cooperatively advertised by, respondent.

(13) *Ronay, Inc.*

121. Ronay is a manufacturer of women's handbags, with its office and showroom located in New York City. Its products are sold under the brand name "Ronay." Its manufacturing plant is located in Long Island City, New York. Ronay's annual sales were between $2 million and $3 million in 1962 and 1963. Its products are sold to department stores and specialty shops located throughout the United States. All merchandise is shipped to its customers from its factory in Long Island City. Except for about 5% of its sales which are made from its New York City showroom, Ronay's sales are made by road salesmen (Tr. 500–504).

122. Ronay's products are produced and sold on a seasonal basis, the principal seasons being spring, early-fall, and holiday-fall. It produces 50 to 70 styles each season, which sell from $10 to $30 at retail. Styles vary in material and design, and are affected by styles in wearing apparel. None of the styles is confined to any one customer. The number of styles purchased by customers varies. Respondent generally purchased 15 to 20 styles (Tr. 504–507, 525–529, 554).

123. Ronay engages in both institutional and cooperative advertising. Its annual advertising expenditures are between $10,000 and $15,000. Ronay had no formal cooperative advertising program in 1962 or 1963 (Tr. 513–517). As one of its officials described it, "[w]e play it by ear" (Tr. 516). It endeavored to spend as little as possible for cooperative advertising and to use its expenditures "to the best advantage that we could for the stores we were doing the most amount of business with" (Tr. 517). It didn't propose any advertising program to its customers, but waited for the customers to come to it with a proposal (Tr. 517, 550).

124. During 1962 and 1963 Ronay engaged in cooperative advertising with respondent, which was one of its largest customers and had been buying from Ronay since the latter entered the handbag business (Tr. 518–519, 547–548). Substantially all of the cooperative advertising with respondent involved respond-

ent's catalogs, brochures or other direct mail advertising. Arrangements for Ronay's participation in such advertising were made with respondent's handbag buyer. In advance of the issuance of a particular catalog or other direct mailer, the buyer would advise Ronay that she "needed 'X' amount of bags for 'X' amount of pages or 'X' amount of bags for one page" (Tr. 521). Ronay would then submit samples of bags which it thought would be appropriate. The buyer would select the bag or bags, if any, which she wished to advertise, and advise Ronay as to the amount of the contribution expected from it. Such contribution was generally around $250, with no breakdown in the items comprising the cost of the advertisement (Tr. 522–526, 546–548). Although there were some occasions when Ronay elected not to participate, for financial reasons, it generally participated in cooperative advertising with respondent when requested to do so because of the substantial orders it received of the advertised bags and because it wished "[t]o do business" (Tr. 549, 525). Ronay could not have afforded to grant advertising allowances to all of its customers on the same percentage basis as those granted to respondent because of its financial condition in 1962 and 1963 (Tr. 530). Ronay did not supply its customers with advertising mats or other sales aids (Tr. 535).

125. In 1962 Ronay contributed to three advertisements with respondent and in 1963 to five advertisements. All of these involved respondent's catalogs, brochures or other direct mailers. The total amount of such advertising allowances paid to respondent was $700 in 1962 and $1,525 in 1963 (CX 303 A–B). There were several other customers which received proportionally higher advertising allowances from Ronay in 1962 or 1963, but most of the customers as to which there is evidence in the record received proportionally lower advertising allowances or received no allowances at all from Ronay. Set forth below is a table comparing the ratio of advertising allowances to sales for all customers in the New York and Washington areas to whom Ronay paid any advertising allowances in 1962 or 1963 (CX 419 A–I). [Page 482.]

126. Of Ronay's 82 customers in the New York and Washington areas as to which there is evidence in the record, 68 received no advertising allowances in 1962 and 1963. Of these wholly nonfavored customers, 22 in 1962, and 23 in 1963 made purchases from Ronay of $2,000 or more. The three largest of these made purchases ranging from $10,640 to $34,700. Of the nonfavored customers who testified with respect to this supplier, four were

Ratio of Allowances to Sales (Ronay)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $44,321 | 1.6% | $59,683 | 2.6% |
| *New York Area* | | | | |
| B. Altman | 20,022 | 1.6 | 3,729 | 0.0 |
| Arnold Constable | 5,884 | 2.1 | 1,547 | 0.0 |
| Bambergers | 7,599 | 0.0 | 6,309 | 1.2 |
| Bergdorf Goodman | 3,884 | 9.0 | 2,971 | 3.4 |
| Bonwit Teller | 45,610 | 1.9 | 48,972 | 3.3 |
| De Pinna | 6,968 | 0.0 | 4,166 | 1.2 |
| Gimbel Bros. | 17,910 | 1.1 | 9,104 | 0.0 |
| Henri Bendel | 928 | 2.7 | 622 | 0.0 |
| Lord & Taylor | 49,789 | 1.0 | 58,507 | 0.4 |
| Plymouth Shops | 1,881 | 0.0 | 15,758 | 0.8 |
| Saks Fifth Avenue | 30,810 | 0.0 | 41,912 | 1.2 |
| *Washington Area* | | | | |
| Hecht Co. | 1,026 | 0.0 | 6,116 | 1.6 |
| Jelleff | 4,564 | 0.0 | 4,425 | 1.7 |
| Woodward & Lothrop | 6,025 | 0.0 | 9,356 | 2.3 |

located in the New York area and three in the Washington, D.C., area.

127. The New York area nonfavored customers include Fields, Goerke, Parisette, and Plymouth Shops, whose respective locations and operations have been previously described in paragraphs 21, 59, 51 and 93, *supra*. Fields' purchases from Ronay were $442 in 1962, and $899 in 1963 (CX 419–C). Fields was never offered any advertising allowances by Ronay (Tr. 1996). Goerke's purchases from Ronay were $1,595 in 1962 and $502 in 1963 (CX 419–D). It was never offered any advertising allowances by Ronay, although it made a request for such allowances (Tr. 2120). Parisette's purchases from Ronay were $1,493 in 1963 (CX 419–F). It was not offered any advertising allowances by Ronay (Tr. 1868). Plymouth Shop's purchases from Ronay were $1,881 in 1962 and $15,758 in 1963 (CX 419–F). It received no advertising allowance in 1962 and was offered one allowance in 1963, amounting to 0.8% of its purchases in that year (Tr. 2363).

128. The Washington area nonfavored customers include Raleigh Haberdasher and Jelleff's, whose respective locations and operations have been previously described in paragraphs 43 and 97, *supra*. Raleigh's purchases from Ronay were $1,197 in 1962, and $864 in 1963 (CX 419–I). It was not offered any advertising allowances by Ronay (Tr. 2813–2814). Jelleff's purchases were

$4,564 in 1962, and $4,425 in 1963 (CX 419–H). Jelleff's was not offered any advertising allowances by Ronay in 1962. However, in 1963 it did receive an advertising allowance, after requesting a contribution toward a Christmas booklet (Tr. 2661–2664). The latter allowance was 1.7% of its purchases from Ronay in that year, and was proportionally smaller than the amount granted to respondent. The last of the Washington area customers is Norment's, Inc., which operates a ladies' apparel shop on Connecticut Avenue in the District of Columbia. Norment's draws its customers from the entire Washington metropolitan area. Its annual sales are in excess of $100,000 and its advertising expenditures are about $2,000 (Tr. 2701–2704). Norment's purchases from Ronay were $1,477 in 1962 and $1,190 in 1963 (CX 419–I). It was not offered any advertising allowances by Ronay (Tr. 2705).

129. The record establishes that in 1962 and 1963 four of the styles cooperatively advertised by respondent with Ronay was sold to one or more of the above-mentioned nonfavored customers. In most instances the merchandise was delivered to the nonfavored customer in reasonable proximity to the time when it was delivered to and advertised by respondent. Illustrative of such transactions is that involving Style #555, which was advertised by respondent in a mailer in May 1963. Respondent purchased 1,163 bags of this style number, taking delivery at various times during the year, including the months of April through July. The same style was sold to Fields, Plymouth, Parisette, Goerke, Jelleff and Raleigh, in quantities varying from three to 120. Deliveries to these customers were made at various times, including the months of April, May and/or July (CX 369).

(14) *Serbin, Inc.*

130. Serbin is a manufacturer of women's apparel, including dresses, sportswear and coordinates, which it sells under the brand names "Serbin" and "Muriel Ryan." Its executive office is located in Miami, Florida, and it maintains a showroom in New York City. In 1962 and 1963 it operated manufacturing plants in Fayetteville, Tennessee, and Miami, Florida. Its annual sales were approximately $7 million. Its products are sold to department stores and women's specialty stores throughout the United States, and are shipped from its manufacturing plants. Sales are made at its showroom in New York and by road salesmen (Tr. 1148–1150).

131. Serbin's products are produced and sold on a seasonal basis, the principal seasons being spring and summer. It produces

about 20 basic styles but, due to differences in material, its garments bear approximately 200 different style numbers. Its garments are produced in junior and misses sizes. They range in price from $11.95 to $45.00 at retail. Serbin's entire line is available to all of its customers. The average customer purchases about 15 of the 20 basic styles produced by Serbin. Respondent generally purchases at least 15 styles, mainly in junior sizes (Tr. 1149, 1151, 1169–1170, 1176).

132. Serbin engages in both institutional and cooperative advertising. In 1962 and 1963 its annual expenditures for advertising were between $250,000 and $300,000. Less than 10% of this was for cooperative advertising. Serbin had no formal cooperative advertising program in 1962 and 1963. From time to time, when it wished to feature a special group of garments, it would offer various of its customers an advertising allowance of a certain amount (*e.g.*, 75¢) per garment. Otherwise, Serbin's cooperative advertising involved advertising in magazines, newspapers and direct mailers with selected customers. In addition, Serbin made available to all of its customers, including respondent, advertising mats, window displays and other sales aids (Tr. 1154–1155, 1164, 1185–1187, 1191).

133. During 1962 and 1963 Serbin participated in cooperative advertising with respondent, which was one of its more substantial customers. For the most part, this involved participation in one of respondent's catalogs, brochures or other direct mailers. In a few instances it involved special promotions in magazines, in which part of Serbin's contribution was obtained from a textile finishing firm. Serbin was familiar with respondent's direct mail advertising program, having participated in it in the past. In anticipation of the issuance by respondent of one of its direct mail booklets, Serbin would exhibit various garments to the appropriate buyer, and sometimes to respondent's sales production director, for possible inclusion in a forthcoming booklet. If the buyer approved the style or styles suggested, they would be included in the publication. The amount to be paid by Serbin was pretty much the same, from year to year, its contribution being so much per garment featured in the publication, with the cost for color publications being somewhat higher than for black and white. Respondent never inquired whether Serbin had a cooperative advertising program. The bulk of the merchandise sold to respondent by Serbin consisted of garments which were cooperatively advertised with respondent (Tr. 1155–1170, 1183–1184).

134. Serbin participated in ten cooperative advertisements with respondent in 1962, and in eight advertisements in 1963. Except for two magazine advertisements in 1962, and three in 1963, these involved participation in one of respondent's direct mail publications. Serbin paid the entire space cost of the magazine advertisements, except for the contribution of a textile finishing firm (Tr. 1161–1162). The total amount of the advertising allowances paid to respondent by Serbin was $22,550 in 1962, and $27,225 in 1963 (CX 312A–B). Except for two other customers in 1962, Serbin's payments to respondent were proportionally higher than those paid to any other customer in the New York and Washington area. Set forth below is a table comparing the ratio of advertising allowances paid to respondent, with those paid to other customers in the New York and Washington areas who received advertising allowances from Serbin in either 1962 or 1963 (CX 440 A–G).

Ratio of Allowances to Sales (Serbin)

| | 1962 | | 1963 | |
|---|---|---|---|---|
| | Sales | Ratio | Sales | Ratio |
| Best & Co. | $141,791 | 15.9% | $92,192 | 29.5% |
| *New York Area* | | | | |
| Abraham & Strauss | 9,146 | 5.5 | 5,919 | 0.0 |
| B. Altman | 9,344 | 0.0 | 17,369 | 1.4 |
| Arnold Constable | 6,558 | 7.6 | 2,626 | 0.0 |
| L. Bamberger | 2,251 | 22.2 | 0 | 0.0 |
| Gimbel Bros. | 4,143 | 29.3 | 541 | 0.0 |
| Hahne Co. | 13,756 | 1.6 | 11,988 | 0.0 |
| Lane Bryant | 13,180 | 0.8 | 14,264 | 0.0 |
| R. H. Macy | 21,706 | 2.3 | 2,935 | 0.0 |
| Saks Fifth Avenue | 110,558 | 6.2 | 70,421 | 2.4 |
| *Washington Area* | | | | |
| Woodward & Lothrop | 16,813 | 8.6 | 13,045 | 0.0 |

135. Of Serbin's 64 customers in the New York and Washington areas as to which there is evidence in the record, 54 received no advertising allowances in 1962 and 1963. Of the nonfavored customers, 23 made purchases from Serbin of $2,000 or more in each of the years 1962 and 1963. The purchases of the three largest of these ranged from $7,112 to $14,351. Of the nonfavored customers who testified regarding this supplier, three were located in the New York area and one in the Washington area.

136. The New York area nonfavored customers include Bob's Sports, Chancy d'Elia, and Trencher, whose respective locations

and operations have been previously described in paragraphs 42, 117 and 29, *supra*. Bob's purchases from Serbin amounted to $420 in 1963, on which it does not appear to have been offered any advertising allowances (Tr. 1910; CX 440–E). Chancy d'Elia's purchases from Serbin amounted to $4,020 in 1962, and $2,592 in 1963, on which it was not offered any advertising allowances. The store was, however, supplied with mailing pieces by Serbin, without charge. Within the past year or two d'Elia began to receive offers of advertising allowances from Serbin (Tr. 2052–2053; CX 440–E). Trencher's purchases from Serbin amounted to $3,783 in 1962 and $3,281 in 1963 (CX 440–B). It was not offered any advertising allowances by Serbin until some time in 1965. Trencher has availed itself of the advertising allowances recently offered to it (Tr. 2310–2312).

137. The Washington area nonfavored retailer is Style Shops, whose location and operations have been previously described in paragraph 68, *supra*. Style Shops' purchases from Serbin amounted to $4,137 in 1962, and $4,557 in 1963 (CX 440–E). It was never offered any advertising allowances by Serbin, although the latter's garments were displayed in fashion shows conducted by Style Shops, and Serbin's name was listed on an electric display sign operated by the retailer. Style Shops did receive mail enclosures from Serbin, for which it paid a fee. It also received advertising mats and display material, but did not use these (Tr. 2588, 2592–2593, 2598–2599, 2643).

138. The record discloses that in 1962 and 1963 seven of the styles cooperatively advertised by respondent with Serbin were sold to one or more of the above-named nonfavored customers. In some instances the merchandise was delivered to such customers in reasonable proximity to the time when these styles were delivered to and advertised by respondent. Illustrative of such transactions is that involving Style #1128, which was advertised by respondent in Glamour magazine in January 1963. Respondent purchased 516 garments of this style, taking delivery in November 1962. In 1963 it purchased an additional 34 garments of this style, which were delivered in April 1963. Style Shops purchased six garments of this style, and received delivery in January 1963 (CX 370).

(15) *Susan Thomas, Inc.*

139. Susan Thomas is a manufacturer of women's apparel, including dresses and sportswear coordinates. Its sportswear is sold under the brand name "Susan Thomas" and its dresses under

the brand name "Adele Martin." Its volume of sales in 1963 was approximately $10 million. Its office and showroom is located in New York City. It has no manufacturing plant of its own, except for a facility in New York in which the garments are cut. After being cut, the garments are shipped to sewing contractors located in New York, Pennsylvania and other states. The completed garments are returned from the contractors' plants to Susan Thomas' facility in New York for inspection, assembling into coordinate ensembles and shipment to customers. Its products are sold to department stores and ladies' apparel shops throughout the United States. Sales are made both from the New York showroom and by road salesmen, the latter accounting for approximately 65% of sales (Tr. 1119, 1204–1207, 1240).

140. Susan Thomas' garments are produced and sold on a seasonal basis, the principal seasons being spring, summer, transition, fall, holiday and travel. It produces approximately 36 styles, which vary according to fabric content or the design of the garment. There are also distinct differences between the Susan Thomas and the Adele Martin lines. Its garments sell from $25 to $75 at retail. None of the line is confined to any particular customer. The average customer purchases 14 to 30 different styles. Respondent usually purchases about 20 styles (Tr. 1203, 1207–1208, 1224–1225).

141. Susan Thomas expended approximately $150,000 for advertising during 1963, the preponderant portion of which was spent for cooperative advertising. The company did not have a formal, printed cooperative advertising program which it distributed to its customers generally. However, it had several programs for engaging in cooperative advertising with various of its customers. One of these included the furnishing of mail enclosures to selected customer in various markets, in connection with which the supplier undertook to pay 50% of the space cost of any advertising by the customer (not in excess of a stated amount), in which the garments included in the mail enclosure were featured. This program usually involved a large store in a particular city which was willing to make an early commitment for purchase of the garments to be featured. Where Susan Thomas had more than one large customer in a particular city, it would endeavor to furnish each one with a different enclosure, featuring a different group of styles. Another program involved the supplying of advertising mats to customers at a cost of $1, and an undertaking by Susan Thomas to reimburse the customer, to the extent of $5, upon submission by the customer of two copies of an advertise-

ment in a local newspaper. This generally involved the smaller customers who did not advertise in the large city newspapers. In addition, Susan Thomas made contributions to individual customers, mainly the larger "fashion stores," which requested contributions for their own cooperative advertising programs when they came in to view the line early in the season (Tr. 1200–1202, 1214–1217, 1239, 1244–1246, 1253–1255, 1258, 1272).

142. During 1963 Susan Thomas engaged in cooperative advertising with respondent, which was among its top volume customers. Some of the advertising involved Susan Thomas' mail enclosure program, under which respondent undertook to advertise certain styles in the mail enclosures supplied to it by the manufacturer, on an exclusive basis in the New York area. In a number of instances Susan Thomas participated in respondent's own direct mail advertising program, or in newspaper or magazine advertising. For the most part, respondent took the initiative in requesting Susan Thomas to participate in cooperative advertising. The appropriate buyer would select a style or styles from Susan Thomas' line which she wished advertised, and would advise the supplier of the amount of the contribution she desired. The Susan Thomas representative was generally familiar with such advertising and the cost thereof, from prior experience. In the case of respondent's own direct mail advertising, the medium to be used was selected by respondent. In newspaper and magazine advertisements, the medium to be used was sometimes selected by respondent and sometimes by the supplier. The latter was not provided with a breakdown of its share of the cost of direct mail advertising, and it did not know what portion of the cost it was assuming. In the case of magazine and newspaper advertising, it would generally be requested to pay a specified percentage of the cost (Tr. 1218–1224, 1258, 1263–1266).

143. In 1963 Susan Thomas participated in 17 advertisements with respondent. Nine of these involved respondent's catalogs, brochures or other direct mail advertising. The balance involved mainly advertising in the New Yorker magazine or other fashion magazines (CX 331 A–B). The total amount of the advertising allowances paid to respondent by Susan Thomas in 1963 was $16,021. Except for four stores in the New York area, Susan Thomas' advertising payments to respondent were proportionally higher than those paid to any other customer in the New York and Washington areas as to which there is evidence in the record. Set forth below is a table comparing the ratio of advertising allowances paid to respondent with those paid to other customers in the New

York area who received advertising allowances from Susan Thomas in 1963 (CX 442 A–E).

Ratio of Allowances to Sales (Susan Thomas)

| | 1963 | |
|---|---|---|
| | Sales | Ratio |
| Best & Co. | $630,227 | 2.5% [25] |
| *New York Area* | | |
| Abraham & Strauss | 40,918 | 0.4 |
| B. Altman | 143,880 | 1.6 |
| Bambergers | 30,980 | 0.6 |
| Bergdorf Goodman | 5,988 | 5.9 |
| Bloomingdales | 40,662 | 0.6 |
| Bonwit Teller | 112,739 | 4.3 |
| Hahne & Co. | 30,939 | 0.8 |
| Lord & Taylor | 73,479 | 4.8 |
| Peck & Peck | 492,559 | 3.1 |
| Plymouth Shops | 102,004 | 2.5 |
| Saks Fifth Avenue | 360,787 | 0.9 |

144. Of 98 New York area customers (other than respondent) as to which there is evidence in the record, 87 received no advertising allowances from Susan Thomas in 1963. Of the nonfavored customers, 44 made purchases from Susan Thomas of $2,000 or more. The purchases of the three largest of these ranged from $14,887 to $19,808. Of the nonfavored customers who testified, two were located in the New York area and six in the Washington, D. C., area.

145. The New York area customers include Jenny Banta, and Knitwear Shoppe, whose respective locations and operations have been previously described in paragraphs 116 and 59, *supra*. Banta's purchases from Susan Thomas in 1963 were $10,157 (CX 442–C). It purchased both the Adele Martin and Susan Thomas lines. Both lines were periodically advertised by the store, but it received no advertising allowances from Susan Thomas, nor were any advertising mats made available to it (Tr. 1586–1589, 1592, 1595, 1601). Knitwear Shoppe's purchases from Susan Thomas in 1963 amounted to $7,409 (CX 442–C). The store advertised the Susan Thomas' name and products, but was never offered any advertising allowances except for a $5 contribution in 1962 or 1963, which it declined as "too petty" since it paid around $70 for an advertisement (Tr. 1780–1782; CX 458).

[25] Figures compiled from respondent's records indicate the receipt of advertising allowances from Susan Thomas of $15,136, as compared to the figure of $16,021 indicated by Susan Thomas' records. If the former figure were used, the above ratio would be 2.4%.

146. The Washington area nonfavored customers include Haber, Lady Hamilton, Dana Robins, Tweeds 'n Things, Raleigh and Hayman's, whose respective locations and operations have been previously described in paragraphs 84, 52, 33, 43 and 60, *supra*. Haber's purchases from Susan Thomas were between $7,000 and $8,000 in 1963. Although it requested advertising allowances from Susan Thomas, it was only offered a $5 contribution (after payment of $1 for the advertising mat). The cost of advertising by Haber ranged from $40 to $300. It purchased mailers from Susan Thomas, but was not permitted to send these out to its customers in the Washington, D. C. area if one of the larger stores was using them. Susan Thomas also supplied the store with counter displays for which there was no charge (Tr. 2726–2731, 2739–2745, 2747). Lady Hamilton's annual purchases from Susan Thomas were between $4,000 and $6,000, on which it was not offered any advertising allowances, except for a recent offer to pay $5 toward newspaper advertisements. The store purchased mail enclosures from Susan Thomas (Tr. 2487, 2497, 2501–2502, 2510–2511, 2515). Dana Robins' annual purchases from Susan Thomas were approximately $1,000. It was not offered any advertising allowances by Susan Thomas, although it was permitted to purchase Susan Thomas mail enclosures (Tr. 2535, 2545–2546, 2549, 2561). Tweeds 'n Things' purchases from Susan Thomas in 1963 were $13,692, and included both the Susan Thomas and Adele Martin lines. It was not offered any advertising allowances by Susan Thomas, although it requested a contribution for an advertisement in the New Yorker magazine. The supplier did offer to supply it with advertising mats, which it did not use (Tr. 2451–2453, 2461, 2467). Raleigh's purchases of Susan Thomas products were approximately $20,000 in 1962 and 1963. It spent approximately $1,000 in 1962 and $2,000 in 1963 in advertising such products. In 1962 it received no contributions from the supplier. However, in 1963 it received a contribution of $350, which was 50% of the cost of one advertisement, after requesting it from Susan Thomas (Tr. 2809, 2819–2822). Although Hayman's purchased from Susan Thomas in 1962 and 1963, the volume of its purchases does not appear from the record. It did not receive any advertising allowances from the supplier during this period, although it made request therefor in connection with sending out a Susan Thomas mail enclosure (Tr. 3012, 3017–3018).

147. The record discloses that in 1963 seven of the styles which were cooperatively advertised by respondent with Susan Thomas were sold to one or more of the above-mentioned nonfavored

customers. In a number of instances deliveries were made to one of the nonfavored customers in reasonable proximity to the time when such styles were delivered to and advertised by respondent. Illustrative of such transactions is that involving Style #493, which was advertised by respondent in the New Yorker magazine in December 1963. Respondent purchased 199 garments of this style number which were delivered in October 1963. The same style was sold to Knitwear Shoppe and Jenny Banta, which purchased four and seven garments, respectively, and took delivery in October or October and November (CX 371).

(16) *Vendome, Ltd.*

148. Vendome is a manufacturer of high-style, couturier-type costume jewelry, including pearls, rings, metal jewelry, beads and imitation stones. It is a subsidiary of Coro, Inc. Its office and showroom is located in New York City, and its manufacturing plant in Providence, Rhode Island. Its products are sold under the brand name "Vendome," to department stores and specialty shops throughout the United States. Most of its products are shipped from the factory in Providence. Orders for its products are placed mainly at its showroom, with only minimum sales by road salesmen (Tr. 701–704).

149. Vendome's products are produced and sold on a seasonal basis, the main selling periods being January, June, September and November, when it brings out its new lines. Vendome produces about 400 different items, which are available to all of its customers. About 5 to 10% of the items are carried over from season to season, with the rest being substantially new items. The average customer purchases from 200 to 300 items. Respondent purchased about 20 to 25% of Vendome's line, as compared to 50–75% for the average customer. However, the volume of purchases by respondent was much greater than the average customer. Vendome's products range in price from $5 to $35 at retail (Tr. 705, 723–725, 733A, 760).

150. Vendome engaged in both institutional and cooperative advertising in 1962 and 1963. Its institutional advertising involved principally advertising in fashion magazines of national circulation featuring Vendome's name and products. Its cooperative advertising with customers involved both mass media and the customers' direct mail advertising. Vendome had no formal cooperative advertising plan. In some instances it paid the entire cost of cooperative advertisements and in others it paid one-half the cost thereof. Vendome's salesmen were authorized to tell customers

who wished to do cooperative advertising of newly introduced products that the supplier would pay 50% of the cost of advertising such products in newspapers. Such offers were initially made to selected customers in particular areas. Sometime in 1963 or thereafter, the salesmen were authorized to extend such offers to other customers. Vendome also supplied customers with sales aids such as window displays and fixtures. These were available to Vendome's customers generally, although they might be initiated on a trial basis with individual customers. Vendome also performed trunk showings of newly introduced products for individual customers in particular areas (Tr. 712–716, 718, 730–732, 736–737, 741–742, 747, 754, 766).

151. Vendome engaged in cooperative advertising with respondent in 1962 and 1963. It considered respondent an important customer and used respondent to launch its new lines in the New York area through cooperative advertising. Unlike other customers in the area to whom Vendome would contribute a maximum of 50% of the cost of a newspaper advertisement, Vendome paid respondent 100% of the cost of newspaper advertising featuring newly introduced Vendome products. Vendome also permitted respondent to advertise such products in advance of other customers in the area. This was one of the express conditions of the arrangements made with respondent. In addition to cooperative advertising in newspapers involving newly introduced products Vendome periodically participated in respondent's direct mail advertising program. Arrangements for cooperative advertising with respondent were made with the jewelry buyer and with respondent's sales promotion director. In the case of new products, Vendome would generally approach respondent with a proposal to advertise the product. In other instances, respondent's buyer usually approached Vendome about participating in cooperative advertising, indicating what products she wished to advertise, the advertising medium to be used and what Vendome's share of the cost would be. There was little room for negotiation of Vendome's share of the cost. Vendome usually participated when requested to do so (Tr. 717–723, 726–733A, 735–742, 745–746, 767).

152. Vendome participated in five cooperative advertisements with respondent in 1962, and in six advertisements in 1963 (CX 348 A–B). All but one of the 1962 advertisements involved participation in respondent's direct mail advertising program. The one exception involved an advertisement in The New York Times, the cost of which was paid entirely by Vendome (CX 349). Two of the 1963 transactions involved participation in respondent's direct

mail advertising program, and the balance involved participation in advertisements in either The New York Times or the New York Herald Tribune (CX 356–359). In two of the latter transactions, Vendome paid the entire cost of the advertisement and in one it paid 56%.

153. Vendome's net sales to respondent in 1962 and 1963 were $19,689, and $20,321, respectively (CX 423–B, 424–A). Its total advertising payments to respondent in those years were $4,394.50, and $4,393 (CX 348 A–B). Thus, the ratio of its advertising payments to sales was 22.3% in 1962, and 21.6% in 1963. While the record discloses the amount of Vendome's sales to other customers in the New York and Washington areas, it is incomplete with respect to the advertising allowances paid to such customers (CX 425; Tr. 3140). Accordingly, it is not possible to make findings as to the ratio of advertising payments to sales with respect to all other customers in the New York and Washington areas who may have received advertising allowances in 1962 or 1963. However, since several of the New York and Washington area customers testified with respect to this supplier, it is possible to determine the extent of the advertising allowances paid to such individual customers.

154. Vendome's New York area customers include Fields, Duboff, Levy Brothers, and Plymouth Shops, whose respective locations and operations have been previously described in paragraphs 21, 95, 96 and 93, *supra*. Vendome's net sales to Fields were $4,898 in 1962, and $4,859 in 1963 (CX 423–B, 424 A–B). Vendome never offered Fields any advertising allowances. However, in 1963, the Fields' buyer requested an allowance toward a Christmas catalog and the Vendome salesman agreed to make a contribution (Tr. 1993–1994; CX 460). Vendome's net sales to Duboff were $3,602 in 1962, and $2,422 in 1963 (CX 423–B, 424–A). Duboff received a single contribution from Vendome in 1962 or 1963, after requesting one to defray the cost of a window display in its Fifth Avenue store featuring Vendome merchandise. The contribution amounted to 50% of the cost of the display (Tr. 2273–2274). Vendome's net sales to Levy Brothers were $1,934 in 1962, and $1,835 in 1963 (CX 423–N, 424–I). Levy Brothers, which had been purchasing from Vendome for a number of years, was never offered an advertising allowance by Vendome. However, in September 1963 it requested a contribution toward on advertisement and received an allowance of 50% of the cost (Tr. 2238–2240). Vendome's net sales to Plymouth Shops were $7,516 in 1962, and $9,543 in 1963 (CX 423–D, 424–C). In 1962 Plymouth

Shops requested and received an advertising allowance of $150, which was 50% of the cost of an advertisement featuring Vendome merchandise. Vendome made advertising mats available to Plymouth Shops but the retailer did not use them (Tr. 2360–2362, 2377).

155. The last of the New York area retailers is Cardinal Shops, Inc., which operates a ladies' apparel shop in Valley Stream, Long Island, New York, about ten minutes' drive by automobile from respondent's branch store in Garden City. Cardinal Shops' annual sales in 1962 and 1963 were about $400,000 and its expenditures for advertising about $3,500 (Tr. 2143–2146). Its purchases from Vendome were approximately $3,700 in 1962, and $2,220 in 1963 (CX 423–J, 424–J). Cardinal Shops received an allowance from Vendome for the first time in 1962 or 1963. The allowance was 50% of the cost of an advertisement of Vendome merchandise. Vendome also made advertising mats available to Cardinal Shops and supplied the retailer with display racks (Tr. 2147–2148, 2153).

156. The Washington area retailers who testified regarding this supplier are Jelleff's and Kann's, whose respective locations and operations have been previously described in paragraphs 97 and 98, *supra*. Jelleff's net purchases from Vendome were $20,946 in 1962 and $20,480 in 1963 (CX 423–H, 424–H). It received a contribution from Vendome in December 1963, amounting to 50% of the cost of an advertisement of the supplier's products (Tr. 2680–2682; CX 425, 462). Kann's net purchases from Vendome amounted to $1,009 in 1962 and $1,445 in 1963 (CX 423–H, 424–H). In September 1963 it advertised Vendome products in a Washington newspaper and received an allowance amounting to 50% of the cost of the advertisement (Tr. 2912–2913; CX 425).

157. The record discloses that over 35 of the styles on which respondent received advertising allowances from Vendome were sold to one or more of the above-named retailers. In a number of instances the merchandise was delivered to such customers in reasonable proximity to the time when such styles were delivered to and advertised by respondent. Illustrative of such transactions is that involving Style #876/69, which was advertised by respondent in The New York Times on September 15, 1963 (CX 356). The same style was purchased by Plymouth Shops, Duboff, Levy Brothers, Jelleff's and Kann's. Respondent purchased 110 pieces of this style number, taking delivery in September, October and November. The other-named retailers purchased 4 to 18 pieces, taking delivery in either August or in August and September 1963.

D. *The Knowing Inducement or Receipt*

158. As is often the case where scienter is a necessary element of the offense, there is little direct evidence as to respondent's knowledge concerning the fact that it was receiving preferential treatment from its suppliers in the payment of advertising allowances. Complaint counsel rely principally on circumstantial evidence to prove that respondent possessed the type of knowledge contemplated by the statute. They endeavored to show that (a) respondent was generally the instigator of the payment of advertising allowances by its suppliers, with respondent usually selecting the advertising media to be used and the styles to be advertised, (b) the amount and nature of the suppliers' contributions were frequently such that respondent knew or should have known that proportionally equal payments were not being made available to competitors, and (c) in some instances the payments to respondent were in addition to a supplier's regular advertising plan of which respondent had, or should have had, knowledge (CPF, Vol. I, pp. 70–103). Respondent endeavored to counter this evidence by showing that (a) the suppliers themselves frequently initiated the advertising programs which resulted in the payments made to respondent, with the suppliers selecting the media to be used and the styles to be advertised, (b) there was no pressure applied and no threats were made to obtain such payments, (c) respondent was under the impression that similar payments were being made to other Fifth Avenue stores which it regarded as being its competition, and (d) it was not concerned with whether such payments were being made to the smaller stores since it did not consider them to be competitors (RB, pp. 18–23).

159. Before commenting on the conflicting evidence, brief reference should be made to the witnesses relied upon by opposing counsel. Complaint counsel rely mainly on the testimony of the representatives of the 16 suppliers, and three of respondent's former buyers. Respondent relies, in part, on the testimony elicited on cross-examination from the same supplier witnesses, and on the testimony of three of its own officials. In connection with the testimony of the supplier witnesses, it should be noted that, in a number of instances, they were reluctant witnesses. Two of them, Rabiner & Jontow, and Pan American Barter Company, did not appear when they were scheduled to testify and arrangements had to be made for their later appearance. Since the suppliers were being asked to testify to acts which were, in effect, violations of Section 2(d) of the Clayton Act on their part, and were

further asked to give testimony which might be adverse to one of their best customers, their reluctance can be readily appreciated. The readiness of certain of them to volunteer information in response to the leading questions of respondent's counsel on cross-examination was in sharp contrast to the evasiveness, lapses of memory and circumlocution of some of the same witnesses on direct examination. Respondent's former buyers, although obviously reluctant to get involved in the proceeding, impressed the examiner as generally objective and worthy of credit. While respondent's officials appeared for the most part to be objective, in some respects they tended to shade their testimony in the light of their natural interest in the outcome of the proceeding. To a large extent, their testimony and that of respondent's former buyers were in substantial accord. In those instances where there is a conflict between the testimony of the two groups, the examiner has generally accepted the testimony of the former buyers as more worthy of credit. With these preliminary observations, the examiner turns to a consideration of the evidence bearing on the issue of knowing inducement.

160. The credible testimony in the record, including that of a number of the suppliers, several of respondent's former buyers and its own officials, establishes that the advertising allowances here involved were, in large part, the result of cooperative advertising programs which were initiated and carried forward by respondent. There is no dispute as to the fact that respondent had a regular, year-round cooperative advertising program. In the category of direct mail advertising, it had (a) two children's catalogs, issued in the spring and fall, (b) four adult catalogs, issued to coincide with the four main seasons of the year, and (c) seven brochures, issued at regular intervals throughout the year. In addition, it periodically engaged in cooperative advertising in newspapers and magazines. These programs were planned months or weeks in advance, depending on the amount of time required to put together a particular program. At the heart of each program was the assigning of quotas among the buyers of the different departments for meeting the cost of the advertisements. The buyers were expected to, and did, solicit their respective suppliers for contributions in order to meet their assigned quotas (Tr. 3156–3163, 3166–3169, 3172–3178, 3182, 3280–3287, 3304, 1019–1021, 1031–1033, 1292–1299, 1309, 2403).

161. While it may be as respondent contends, that individual suppliers would sometimes approach a buyer to suggest certain styles for cooperative advertising, the suppliers were generally

familiar with respondent's recurrent advertising programs, having participated in them in the past, and in taking the initiative they were merely anticipating the call of respondent's buyer (Tr. 601–602, 797–798, 1183–1184, 1353–1355).[26] For the most part, the suppliers waited to be solicited by respondent's buyers. The styles to be advertised, the medium to be used in advertising and the amount of the suppliers' contributions were largely determined by respondent's buyer or by higher officials within its organization, with a minimum of opportunity for negotiation by the suppliers. While, on occasion, a supplier might seek to cut the contribution by taking less space in the advertisement, the principal decision on his part was whether to participate or not (Tr. 414–415, 418, 517, 521–523, 663–670, 722–723, 796–798, 891–893, 1018–1019, 1024, 1055, 1070–1072, 1219–1220, 1224, 1292–1294, 1711, 1714–1715, 3234, 3297–3298, 3304, 3324). Considering the magnitude and regularity of respondent's cooperative advertising programs, it seems evident that it would have to take the initiative in implementing most of these programs and could not depend, to any substantial extent, on the volunteer offerings of its suppliers.

162. Aside from the question of who initiated the cooperative advertising programs with the suppliers, respondent contends that the participation of the suppliers was wholly voluntary and that there was no coercion or pressure brought to bear on them to secure their participation. In fact, it suggests that the suppliers "were literally overjoyed that respondent would accept their allowances," citing the testimony of one supplier who stated that he was "happy that [respondent] took my ads and took my money" (RB, p. 19). Respondent further suggests that there was no reason to bring pressure on suppliers since, as its advertising manager testified: "We have so much offered to us by manufacturers in the way of money * * * that the problem is holding it down. * * * And our buyers are instructed they are

[26] While for the most part the initiative of the suppliers merely involved the suggesting of certain styles for inclusion in a forthcoming advertisement, one of them (Rabiner & Jontow) testified that it initiated "many, if not most, of the programs with Best and Company" (Tr. 599). Respondent was this supplier's best customer and its president was one of the most reluctant Government witnesses. His testimony was characterized by considerable circumlocution, evasion and contradiction. His testimony about initiating "many, if not most, of the [advertising] programs" with respondent was at variance with that given by him in another proceeding brought against his company, in which he testified that he "pretty much" limited cooperative advertising to those customers who solicited him (Tr. 592). The evidence as to the programs in which his company participated discloses that most of it involved respondent's regular direct mail advertising with multiple suppliers, and not individual programs with this supplier (CX 274 A–D). According to the testimony of one of the buyers who purchased from this supplier, she would generally call upon her suppliers to invite their participation in advertising (Tr. 1291–1293).

not to buy advertising moneys, but they are to buy merchandise. Co-op advertising is a secondary issue to the issue of buying the correct merchandise * * *." (RPF No. 46.)

163. While some of the suppliers did testify (mainly in response to leading questions on cross-examination) that respondent did not threaten to discontinue purchasing from them if they did not participate in cooperative advertising, or that no pressure was applied to secure their participation, and a few even volunteered that they were "delighted" or "happy" to participate, the examiner does not regard such testimony as controlling on the issue of whether the participation of the suppliers was voluntary (Tr. 1758, 818, 928, 1128, 1184, 1370, 1422, 3252).[27] Respondent was one of the largest customers of most of the suppliers (Tr. 518, 582, 717, 795, 886, 1068A, 1218, 1351, 1403, 1708, 3213). Its purchases were largely concentrated around merchandise which it advertised (Tr. 415, 806, 822–823, 1052–1053, 1087, 1128, 1317, 1325). The buyers were expected by respondent's management to fulfill their alloted quotas for cooperative advertising. If they could not secure a contribution from a particular manufacturer, it would generally be excluded from the advertisement, and the buyer would select another manufacturer making a comparable line for inclusion in the program (Tr. 1025, 1087, 1298, 3168, 3288). In the light of these economic facts of life, no overt pressure was necessary. Most manufacturers who were requested to do so generally participated in cooperative advertising with respondent (Tr. 492, 549, 687, 1087–1088, 1142, 1305, 1729, 2402).

164. The lack of need for a customer occupying respondent's economic position to practice the more vulgar forms of coercion in order to secure the participation of its suppliers in cooperative advertising was attested to by several of its suppliers. While most of them merely answered "No," when asked on cross-examination if respondent ever threatened to cease buying from them if they did not participate in cooperative advertising, several were more frank in their responses. One of these, after responding in the negative to the question of whether any threats had been made to cease purchasing, gave the following enlightening explanation (Tr. 484):

> Let me qualify that a little. There is some pressure on the manufacturer. If a customer asks you, you try to please that customer. If you don't please the customer, maybe you are not in such favor with her. I am not saying that this

[27] One of those who volunteered that he was "delighted" to be part of respondent's cooperative advertising program (Tr. 592) was the president of Rabiner & Jontow, whose testimony has previously been alluded to, *supra*, at 497, n. 26.

would happen with Best and Company or anybody else, but this is the attitude that a manufacturer may feel.

Another supplier, when asked, "did anybody at Best tell you that if you don't work on a cooperative advertisement with Best they are not going to deal with you or make a purchase from you," gave the following response (Tr. 1087) :

Well, it was generally understood that if we didn't cooperate in the cost of a booklet or magazine promotion, we could not be included in the particular promotion involved.

The same supplier indicated that when it did not participate in cooperative advertising at times, respondent made no purchases from it (Tr. 1088). A third supplier, when asked why he submitted samples in response to a request by the buyer to participate in cooperative advertising, answered (Tr. 549) : "To do business."

165. The fact that respondent may have had more cooperative advertising money offered to it than it could use is, in the opinion of the examiner, largely irrelevant, in the light of the facts concerning the nature of respondent's cooperative advertising program. It certainly does not establish the voluntary character of the participation of respondent's suppliers in cooperative advertising. In the light of the evidence in the record, it seems evident that many of the suppliers in the market must have become aware of the fact that cooperative advertising was part of the warp and woof of respondent's method of doing business, and the fact that it was almost a condition precedent to doing business with respondent that a supplier contribute to respondent's advertising programs. It is not surprising, therefore, that respondent had so many offers from suppliers seeking to curry its favor.[28] While undoubtedly such suppliers would have to offer suitable merchandise, the examiner does not accept the testimony of respondent's advertising manager that the obtaining of contributions to "co-op advertising is a secondary issue" (Tr. 3175). The examiner finds more in accord with the realities of the situation the testimony of respondent's former buyer who, previous to being employed by respondent, had been a buyer for another Fifth Avenue store. She compared the two operations as follows (Tr. 1306–1307) :

I was freer to select merchandise that I believed in, that I thought was fashion, that was news, and that was typical Saks Fifth Avenue, not with the thought of whether I was going to get money toward advertising this mer-

[28] Such offers came particularly from untried manufacturers who were trying to gain access to respondent's business (Tr. 1305).

chandise or not; but because I thought it was right for Saks. The other way [respondent's] was a bit foreign to me.

* * * * * * *

Advertising was the first thought [at respondent's] and the reason it had to be the first thought was because, again I say, the buyers had certain figures to make each month, sales figures, I am speaking of. If you didn't do the same amount of advertising as you did the year before, nine chances out of ten you wouldn't meet your figures.

166. To a large extent respondent's cooperative advertising programs were tailored to meet its own requirements, and the contributions of suppliers were not readily susceptible of being proportionalized among other customers. The direct mail advertising program purported to be based on the suppliers contributing 50% of the cost of the catalogs, brochures, and other direct mailers (Tr. 3287). However, the suppliers themselves were never informed, and had no idea, as to what portion of the cost of such advertisements they were defraying. They took it "mostly on faith" that they were paying a proper part of the cost thereof (Tr. 803, 418–419, 524, 610–611, 671, 734–740, 892, 1071–1073, 1220–1223, 1416, 1713–1714, 3234). In the case of advertisements in newspapers or magazines, a number of the participating suppliers did understand that they were assuming a certain percentage of the cost of such advertisements, although some of them were unsure as to what the percentage was (Tr. 671, 1073, 1223, 1416, 3232).

167. With respect to respondent's direct mail advertising, where the suppliers were supposedly paying 50% of the cost, the figures of actual payments made disclose that such payments almost invariably involved amounts which were exact multiples of $100 or $50, in contrast to newspaper advertisements which generally involved odd amounts not following any discernible pattern (*e.g.*, $59.00, $229.25, or $327.50). It is inconceivable that the suppliers' putative 50% share of the cost of respondent's catalog advertising would invariably be aliquot multiples of $100 or $50. Since the record contains little or no evidence of respondent's actual costs of catalog advertising, it is difficult to determine the extent to which the suppliers' contributions exceeded 50% of respondent's costs. However, evidence with respect to a combined catalog-magazine promotion makes highly dubious respondent's claim that it was collecting 50%, or any other fixed percentage, of its costs from its suppliers. Respondent's "College Mailer" brochure issued in 1962 and 1963 consisted of a reprint of entire page advertisements appearing in Glamour, Mademoiselle, Vogue,

and Harper's Bazaar. Fourteen of the suppliers contributed to joint advertisements in the brochure and in one of the four magazines. Each supplier paid a fixed amount, depending on the amount of space its merchandise occupied. Thus, in 1963 a supplier whose advertisement occupied an entire page in one of the magazines and in the brochure paid $4,200, and a supplier with one-sixth of a page, $700 (CX 73–A, 192–A). While respondent's per-page costs in its brochure may have been identical, its space costs in the respective magazines differed. For example, the net space cost per page in Glamour magazine was $3,272, while the per-page cost in Mademoiselle was $2,465 (CX 401–C, 403–B; Tr. 958–959). Yet suppliers whose advertisements appeared in Mademoiselle and the College Mailer paid the same amount as suppliers whose advertisements appeared in Glamour and the College Mailer, despite a cost difference of over $800 between the two publications (CX 180–A, 249–A).[29]

168. In the case of newspaper and magazine advertising respondent's policy purportedly was to endeavor to obtain 50% of the cost thereof from the supplier (Tr. 3178–3179, 1021, 1301). However, there was a considerable disparity in the proportion of costs paid by different suppliers. While in most instances they did pay 50% of the cost of newspaper and magazine advertising, there were a number of instances where the supplier paid as much as 100% of advertising costs and others where they paid 25%, 33⅓%, and 66⅔%. In addition to differences among suppliers (which would present no difficulty in enabling particular suppliers to proportionalize their contributions among other customers), there were differences in the proportion of costs paid by a given supplier on different advertisements. Thus, the percentage of the cost of particular advertisements paid by Majestic varied from 100% to 66⅔% and 50% (CX 145, 162, 163). Pan American Barter Company paid 100% of the cost on some advertisements and 50% and 66⅔% on others (CX 198, 230, 269).[30] Rabiner & Jontow paid 100% of the cost of one advertisement, and 50% of

[29] Respondent suggests in its reply findings that the difference in costs may have been made up by additional costs in the publication of the mailer (RR, p. 28). However, respondent suggests no reason why the per-page costs of appearing in the mailer should be any higher for suppliers whose original ad appeared in Mademoiselle than for those whose ad appeared in Glamour.

[30] Respondent seeks to justify the payment by Pan American of the entire space cost of approximately 30 advertisements in the Sunday Times on the ground that the supplier considered such advertising as being "national" (*i.e.*, institutional) advertising, rather than as cooperative advertising (RR, pp. 23–24). Since respondent made the arrangements for these advertisements and they did not feature the name of any store other than respondent's, the examiner cannot accept the semantic distinction urged by respondent (Tr. 3222; CX 205).

the cost of others (CX 279, 278). In at least three instances Vendome paid 100% of the space cost of newspaper advertisements, while in one instance it paid 56% (CX 349, 356–358).

169. More important than the uncertainties in the percentage of respondent's advertising costs which the suppliers were asked to bear is the fact that, admittedly, the contributions of the suppliers bore no relationship to the amount of respondent's purchases from them (Tr. 3325). While it may be, as respondent contends, that it was generally understood respondent would make substantial purchases of the advertised merchandise, it admittedly made no commitment, at the time it obtained a supplier's concurrence to participate in an advertisement, that it would purchase any definite amount of the advertised merchandise or any other merchandise (RPF No. 43). The percentage which the supplier's contribution represented of the advertised merchandise or of the supplier's line generally could only be ascertained ex post facto, *i.e.*, after respondent's purchases for the season had been completed. Furthermore, the percentage which a supplier's contributions would represent of respondent's purchases from it would fluctuate from contribution to contribution and from purchase to purchase. Consequently, it would be impossible for the supplier, even if it were minded to do so, to offer its other customers (in competition with respondent), any allowance based on any definite percentage of their purchases from it.

170. A further factor cited by complaint counsel as indicative of the fact that respondent knew, or should have known, the advertising allowances being paid to it were not being made proportionally available to competitors is the size of some of the allowances in relation to respondent's purchases from these suppliers. While the record does not establish any precise standard for determining whether the size of the payments to respondent were abnormal, some idea of the normal limits of such allowances may be gotten from the percentage limitations on the allowances paid under the cooperative advertising plans of certain of the suppliers. Thus, under Bertlyn's plan advertising allowances could not exceed 2% of purchases. David Crystal's plan had a limit of 50¢ a garment which, on the basis of a minimum average wholesale price of $22.75 (CX 361), would be approximately 2%. The maximum percentage of the allowances now paid by Devonbrook is 2% (Tr. 1347). Juniorite's plan called for a maximum payment of 3½% of purchases. Majestic's payments to its key accounts ranged from 2 to 2½%. Pan American's plan provided for a maximum payment of 5% of purchases. While the ratio of the

payments to respondent by a number of the suppliers falls somewhat within the above percentage range (2 to 5%), in a number of instances the ratios were considerably higher than might be considered normal. Set forth below is a table reflecting some of the higher ratios of allowances to sales.

| Supplier | 1962 | 1963 |
|---|---|---|
| Bertlyn | 9.4% | 6.7% |
| Izod | 16.9 | — |
| Majestic | 8.9 | 7.4 |
| Monet | 13.2 | 17.1 |
| Pan American | 22.2 | 19.3 |
| Serbin | 15.9 | 29.5 |
| Vendome | 22.3 | 21.6 |

171. As a further indication of the fact that respondent possessed the requisite knowledge, complaint counsel cite the fact that respondent was aware various of the suppliers had regular cooperative advertising plans and that it was receiving allowances from them which were in addition to, or beyond, those provided for under these plans. Among these suppliers is Juniorite, which had a formal cooperative advertising plan in effect during at least part of 1962 and in 1963, pursuant to which it undertook to pay 50% of the cost of certain types of advertising, not to exceed 3½% of the customer's purchases of Juniorite merchandise. Although the plan was originally restricted to newspaper advertising and was later amended (in July 1963) to include magazine advertising, most of Juniorite's contributions to respondent were for direct mail advertising. While the plan called for a contribution of 50% of the cost of the advertising, the evidence establishes that in the case of at least two newspaper advertisements Juniorite paid the entire cost of the advertisements. Furthermore, while the plan called for a maximum payment of 3½% of the customer's purchases from Juniorite, the supplier's contribution to respondent amounted to 6.5% of its sales to respondent in 1962 and 5.8% in 1963. The record establishes that copies of at least the 1963 plan were sent out to all of Juniorite's customers, including respondent (Tr. 887–888, 921–922; CX 432). Copies of the plan were received by other customers who testified in this proceeding and there is no reason to believe that respondent did not also receive a copy (Tr. 1784–1785, 2945–2946, 2951; CX 459).

172. Another supplier with a cooperative advertising plan was Bertlyn. As previously noted, Bertlyn's policy was to contribute

one-half the cost of newspaper advertising by its customers, not to exceed 2% of the previous year's business with the customer. This plan had been in effect for a number of years prior to 1962 and 1963, and was made known to respondent (Tr. 1701, 1719). While the plan was limited to newspaper advertising, respondent received contributions for advertising in catalogs and brochures. Similarly, while payments under the plan were limited to 2% of the customer's purchases during the year, payments to respondent amounted to 9.4% of its purchases in 1962 and 6.7% in 1963.

173. A third supplier with a cooperative advertising plan was Pan American Barter Company. Although the supplier was reluctant to admit that respondent was supplied with a copy of the plan, the examiner is satisfied from the circumstances surrounding its issuance that respondent received a copy (see p. 472, n.20, *supra*). Despite the limitations in the plan that allowances would be paid only for newspaper advertising, and that the amount thereof could not exceed 50% of the cost of an advertisement and 5% of purchases, respondent received allowances for advertising in other media, and such allowances amounted to 100% of the cost of numerous newspaper advertisements and aggregated 22.2% of purchases in 1962 and 19.3% in 1963. There is some indication in the record that respondent may have also been aware of the David Crystal plan of paying one-half the cost of newspaper advertising, up to 50¢ a garment. Although the plan was allegedly communicated to customers by the supplier's salesmen and at least one of the nonfavored customers was familiar with it, the evidence as to the extent of the distribution of the plan is too inconclusive to permit the making of any definite finding that respondent was informed or knew of the plan (Tr. 1398–1400, 1409–1410).

174. Respondent pleads ignorance concerning the advertising programs and policies of its suppliers generally (RPF No. 52; RR, p. 27). Several of its witnesses testified that, while they suspected other Fifth Avenue stores were receiving advertising allowances from manufacturers because their advertisements featured the names or brands of particular manufacturers, they did not know, and were not interested in, what manufacturers were or were not offering to stores elsewhere since they did not regard the non-Fifth Avenue stores as competitors (Tr. 3305–3306, 3363–3364). They did acknowledge that they were aware a number of manufacturers in the garment industry had promulgated formal

cooperative advertising plans within the last year or so, but claimed a lack of knowledge with respect to the existence of such plans in the 1962–1963 time period (Tr. 3315–3317, 3378A).

175. Considering respondent's general sophistication in matters concerning the apparel industry and the readiness with which it became aware of the recent trend toward the widespread adoption of cooperative advertising plans by manufacturers in the garment industry, it seems reasonable to infer that it was also aware of the general unavailability of such allowances in 1962 and 1963, except to certain large customers. If nothing else had alerted respondent to this situation, the Commission's investigation of the industry (which was accompanied by numerous public releases) must have given it some inkling that all was not right with the industry, insofar as the payment and receipt of advertising allowances was concerned. Following the receipt of complaints from small apparel retailers and manufacturers, the Commission, in early 1961, addressed Orders to File Special Reports to some 232 of the Nation's leading buying offices, and chain, department and specialty stores (including respondent), requiring information as to the names of apparel suppliers who had granted them advertising allowances (see opinion *Abby Kent Co.*, Doc. C–328, Aug. 9, 1965 [68 F.T.C. 403]). In February 1962, similar orders were addressed to the 250 sellers who had granted allowances to the greatest number of buyers, and later orders were addressed to an additional 60 sellers. By May 1, 1963 [62 F.T.C. 1248], 163 consent orders had been issued against apparel manufacturers, requiring them to cease and desist from paying discriminatory advertising and promotional allowances. Additional consent orders were issued from time to time thereafter. Among the manufacturers against whom such orders were issued in 1963 were some of respondent's suppliers with respect to which testimony was offered in this proceeding.[31] Throughout this period respondent admittedly made no inquiry from its suppliers as to whether the payments it was receiving were being made available to others on proportionally equal terms. Its policy was one of complete disinterest in what these suppliers were doing with others, except for a few Fifth Avenue stores (Tr. 1035, 1319, 3378).

[31] Consent orders were issued and publicly announced on May 1, 1963, against the following suppliers: David Crystal, Haymaker, Juniorite, Lynne, and Majestic. In addition, a consent order was issued against Devonbrook and publicly announced on August 12, 1963. The May release announced that a number of other manufacturers, including Evan-Picone, Serbin and Susan Thomas, had declined to sign consent orders and that "appropriate action" would be taken respecting them.

CONCLUSIONS

1. As previously noted, respondent is charged in substance with having knowingly induced or received, from its suppliers, advertising allowances and payments which the latter were forbidden to make by Section 2(d) of the Clayton Act. As a prerequisite to sustaining the "knowing inducement" charge against respondent, it is necessary to first establish that one or more of the payments which it received were made in violation of Section 2(d) of the Clayton Act. In order to establish that any such payment was made in violation of Section 2(d) it must be shown that, (a) the supplier making the payment was "engaged in commerce," (b) the challenged payment was made "in the course of such commerce," (c) the payment was made in return for advertising services furnished by or through respondent "in connection with the handling, sale or offering for sale of any products or commodities" of the supplier, and (d) the supplier failed to make such payment "available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." Respondent contends that the evidence offered by complaint counsel fails to meet one or more of the requirements of a Section 2(d) violation, let alone that respondent knowingly induced or received any illegal payments. It also contends that the allowances which it received were cost justified, and that complaint counsel have failed to establish its competitors were adversely affected by such payments. These contentions will be hereafter considered in connection with determining whether the complaint has been sustained.

A. *Commerce*

2. Respondent contends that the "commerce" requirements of Section 2(d) have not been met because (a) the shipments to respondent by a number of the suppliers were made entirely from facilities located in New York State, and (b) all of the allowances given to respondent were negotiated and paid within New York State (RR, pp. 12–14). While a majority of the suppliers did make shipments to respondent from out-of-state plants or facilities, there were, as respondent notes, seven whose shipments to respondent were made entirely from plants or facilities located in New York State. This includes Ronay, whose products were entirely manufactured in, and shipped to respondent from, New York State, and Bertlyn, Devonbrook, Juniorite, Lynne, Pan American, and Susan Thomas, whose products were manufactured in whole or in part outside of New York State, but were shipped

to respondent's main store from the supplier's office or other facility in New York State. However, respondent's argument overlooks the fact that all of the suppliers sold and/or shipped their products to numerous other customers located throughout the United States and were therefore clearly "engaged in commerce," irrespective of whether their shipments to respondent were in commerce.

3. Respondent's second contention, that the alleged discriminatory transactions did not occur "in the course of" interstate commerce, suffers from the infirmity of focusing solely on the situs of the supplier's dealings with respondent. A discrimination in the payment of allowances may occur "in the course of" the supplier's business "in commerce," even though the arrangements for the allowances are made entirely within one state and shipment of the goods from the supplier to the customer takes place entirely within that state. It is now well established that discriminatory payments will be deemed to have been made "in the course of" commerce if the transaction with either the favored or the nonfavored customer occurs in commerce. *Corn Products Refining Co.* v. *FTC* 324 U.S. 726, 745 (1945); *Shreveport Macaroni Mfg. Co.* v. *FTC,* 321 F. 2d 404, 408–409 (5th Cir. 1963), *cert. denied,* 375 U.S. 971. There is abundant evidence here that sales and/or shipments "in commerce" were made by each of the suppliers to nonfavored competitors of respondent located in New Jersey, Connecticut, Washington, D.C., Maryland and Virginia.[32]

4. Furthermore, even if consideration were focused solely on the transaction between the suppliers and respondent, the statutory requirement would be met here. It is sufficient to establish that a discrimination occurred in the course of commerce if it "ran from one engaged in interstate commerce to [another] engaged in commerce," where it "favored [an] interstate chain in their whole business" and involved "the utilization of interstate mechanisms." "[O]nce that appears * * * [there is no] further requirement that the payment be made in connection with goods sold in interstate commerce." *Shreveport Marconi Mfg. Co.* v. *FTC, supra,* at 408. See also *J. H. Filbert, Inc.,* 54 F.T.C. 359, 369–371 (1957). In the instant proceeding respondent is an interstate chain, admittedly engaged in commerce, and was favored by the payments of its suppliers in its entire business, not merely in the portion thereof located in New York State. The suppliers

[32] The examiner will hereafter separately discuss respondent's contention as to whether such customers were in competition with it, and may therefore be considered to be nonfavored customers.

making the payments were themeslves engaged in commerce in their overall operations. While arrangements for the making of payments took place in New York State, the transactions were interstate in scope, since they contemplated the use of interstate media (newspapers, magazines and even respondent's direct mail advertising) for advertising the products purchased, and the advertising inured to the benefit of respondent's entire business.[33]

5. Assuming, arguendo, that it were necessary to show that the advertised merchandise was shipped in interstate commerce, this requirement is also met here, despite the fact that deliveries by suppliers were made to respondent's main store in New York, since the merchandise was delivered in obvious contemplation of the fact that substantial portions thereof would be reshipped by respondent to its branch stores in other States.[34] Such merchandise clearly remained "in the stream of commerce" until it reached its final destination in one of respondent's branch stores. *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 237 (1951); *Shreveport Macaroni Mfg. Co.* v. *FTC, supra*, at 408. It is concluded therefore that (a) each of the suppliers with respect to which evidence was offered in this proceeding was engaged in commerce, as "commerce" is defined in the Clayton Act, and (b) the payment of various advertising and promotional allowances to respondent by such suppliers, as hereinabove found, occurred in the course of such commerce.

B. *Like Grade and Quality*

6. Section 2(d) of the Clayton Act, unlike Section 2(a), does not specifically require that the discrimination between customers involve commodities "of like grade and quality." It merely prohibits the payment of advertising allowances, in connection with the sale of "any products or commodities" of the supplier, without making proportionally equal payments available to other customers competing "in the distribution of such products or commodities." However, the phrase "products or commodities," as used in Section 2(d), has been interpreted by the Commission and the courts as being similar in meaning to the phrase "commodities of like grade and quality" used in Section 2(a) of the Act. *Joseph A. Kaplan & Sons, Inc.*, Docket No. 7813 (1963) [63

[33] Respondent's catalogs and brochures were sent to customers all over the world. Respondent's mail order business was an important part of its operation (Tr. 2417, 3160).

[34] Advertised merchandise delivered to the New York store was regularly reshipped to the different branch stores. If it was to be advertised in the daily edition of The New York Times, it was delivered to at least the New York area stores, including those in New Jersey and Connecticut. If it was to be advertised in The Sunday Times, it was reshipped to all 20 branches. Merchandise advertised in catalogs was reshipped to all branches (Tr. 2416).

F.T.C. 308], *aff'd*, 347 F. 2d 785 (D.C. Cir. 1965); *Fred Meyer, Inc.*, Docket No. 7492 (1963) [63 F.T.C. 1], *aff'd*, 359 F. 2d 351 (9th Cir. 1966); *Tri-Valley Packing Ass'n.*, Docket Nos. 7225 and 7496 (1966) [70 F.T.C. 223].

7. Respondent contends that the issue of whether the products or commodities involved in the alleged discriminatory payments to it, were of "like grade and quality" to those sold to other customers, must be determined with reference to whether the transactions with its competitors involved styles which were identical to those sold to it. It is respondent's position that "different style numbers denote products of different grade and quality, and that an allowance granted to advertise a certain style number cannot be deemed illegal if it is not proven that a 'disfavored' retailer purchased the identical style number from the manufacturer" (RPF, p. 7). Complaint counsel have taken alternative positions on the question of whether the products or commodities here involved were of "like grade and quality." On the one hand they apparently recognize that, under some circumstances, each of a supplier's styles may be considered to constitute a product of different grade and quality. However, they also contend that under the facts of this case, each supplier's line of products as a whole may be considered to be of like grade and quality, for purposes of determining whether there has been any discrimination in the payment of advertising allowances (CPF, pp. 29–34; CR, p. 3). They rely, for support of the latter position, on the so-called "line of products" theory enunciated in the *Joseph Kaplan* and *Tri-Valley Packing Ass'n.* cases, *supra*, and in *Moog Industries* v. *FTC*, 238 F. 2d 43, 49–50 (8th Cir. 1956).

8. While complaint counsel consider the "line of products" theory as the more tenable one and, in support thereof, offered evidence of the total volume of sales made, and advertising allowances paid, by the various suppliers to respondent and other customers, irrespective of the styles involved in such transactions, they also offered in evidence numerous invoices showing sales of identical styles to respondent and its alleged competitors by all but three of the suppliers.[35] Since the record discloses that many of the nonfavored customers purchased styles identical to those cooperatively advertised by respondent, there is thus ample evidence, even under respondent's theory, that goods of a like grade and quality were involved in a number of the allegedly discriminatory transactions. However, in the opinion of the examiner,

[35] The only suppliers as to which no invoices showing the sale of identical styles was offered were Devonbrook, Haymaker, and Rabiner & Jontow.

the fragmented view of the issues resulting from the adoption of respondent's theory of "like grade and quality," is not justified under the facts of the case.

9. Respondent's position that a supplier's entire line of products cannot be considered to be of the same grade and quality, and that each style is a product of different grade and quality rests largely on the holding of the Second Circuit in *Atalanta Trading Corp.* v. *FTC*, 258 F. 2d 365, 368–369 (1958), where the court held that it could not "accept the Commission's expansive interpretation of Section 2(d), namely, that after showing a supplier has sold a general line of products in a given area and has granted allowances to only one customer, it is immaterial whether or not a product of like grade and quality to the one on which the allowance was made was ever sold to any other customer in the area." In that case the discriminatory allowances were paid in connection with advertising one of the supplier's pork products bearing the brand name "Unox," and the court held it was erroneous for the Commission to find that "the general field of pork products" was the proper product line for purposes of determining a violation of Section 2(d).

10. In the *Joseph A. Kaplan* case *supra*, relied upon by complaint counsel, the Commission distinguished the *Atalanta* case, and held that the supplier's entire line of shower curtains, rather than the particular pattern sold to the favored customer, was the proper product line for purposes of determining whether there was any discrimination in the payment of advertising allowances, stating:

> We have here a line of products promoted as a line, that is, the shower curtain line, and all of the items in this line are used for the same purpose. The fact that this case deals with such a unified line of goods clearly distinguishes the case from *Atalanta*.

In the *Tri-Valley Packing Ass'n.* case *supra*, the *Atalanta* decision relied upon by respondents was also distinguished as follows:

> The decision in *Atalanta* stressed the finding adopted by the Commission that the allowances were geared to specific products and the fact that the record failed to show anything to the contrary. * * * The cases are clearly distinguishable because here there is no question whatsoever that the allowance was given generally on all private label products purchased from Tri-Valley. Thus, having given the allowance to promote a general line, respondent was obligated to make it proportionally available to competing purchasers buying any item in that line.

11. Respondent contends that the cases relied upon by complaint counsel are clearly distinguishable from *Atalanta* and from the

instant situation because, in *Kaplan* the products were "promoted as a line," and in *Tri-Valley* the allowances were given "to promote a general line of products." In *Atalanta,* on the other hand, the Commission found that the allowances "were geared to specific products." Respondent argues that, like *Atalanta,* and unlike *Kaplan* and *Tri-Valley,* the allowances which it received were geared to, and paid to promote, specific styles and not the supplier's general line of products (RR, p. 17).

12. There is no question, as the court held in *Atalanta,* that a supplier has the right to limit his offering of advertising allowances to certain categories of the products sold by him and, when he does so properly, the product or products selected by him will be determinative of whether he has discriminated between customers in the offering of advertising allowances. The *Atalanta* decision merely reaffirms the principle enunciated in the Commission's earlier holding in *Henry Rosenfeld, Inc.,* 52 F.T.C. 1535, at 1545, that: "The law imposes no requirements that a seller give advertising allowances on all his products if he elects to accord them on one or more articles." However, as the Commission also held in *Henry Rosenfeld,* the supplier must "make [the allowances] available on proportionally equal terms to other resellers of that article or articles who compete with the recipients of the compensation." He may not, as the Commission held in *Joseph Kaplan,* "segregate a particular pattern in its line of [products] and decide that one purchaser out of a number of purchasers in a particular territory will receive an allowance for advertising on the particular pattern." A supplier who does so has, in effect, gerrymandered the product line so as to prevent competing customers from obtaining an opportunity to share in the supplier's payment of advertising allowances.

13. While the suppliers here did not expressly segregate their product lines by withholding, from other customers, the styles selected by respondent for advertising, they may be regarded as having done so, indirectly, by allowing respondent to determine the styles with respect to which the suppliers would have had to pay cooperative advertising allowances to other customers in order to comply with the mandate of Section 2(d), under respondent's theory of the case. The record establishes that there is considerable reluctance on the part of retailers to cooperatively advertise merchandise which is identical to that advertised by a competitor. In recognition of this reluctance, Susan Thomas and David Crystal advertised different groups of their products with different customers (Tr. 1257–1258, 1313–1314, 1390). Similarly,

respondent's own buyers would change the style numbers selected for cooperative advertising when they learned that a competitor had selected the same styles for advertising (Tr. 1295). To allow the style selections of a large customer to fix the "grade and quality" status of the products with respect to which other customers must be offered cooperative advertising allowances would be contrary to the basic purpose of the Robinson-Patman amendment to the Clayton Act "to curb and prohibit all devices by which large buyers gained preference over small ones by virtue of their greater purchasing power." *FTC* v. *Broch & Co.*, 363 U.S. 166, 168 (1960). It would also, as the Commission held in *Kaplan*, be "completely contrary to the [specific] purpose of Section 2(d) aimed at equality of opportunity for competing merchants" to participate in cooperative advertising, on a proportionally equal basis, with their larger competitors.

14. Respondent has sought to suggest that the selection of styles to be cooperatively advertised was, in many instances, the result of a decision by the supplier, or at least a joint decision by the supplier and itself (RR, pp. 15–17). However, it is clear from the record as a whole that, to the extent suppliers participated in the selection of styles for cooperative advertising, they did so in a frame of reference which was preordained and controlled by respondent (Tr. 3288–3289, 3297, 3182–3183, 1019, 1293; see also par. 161, *supra*). Since respondent's cooperative advertising program was, to a large extent, built around the advertising of specific styles of their suppliers, it is evident that any supplier who wished to participate would have to do so on the basis of the specific styles which respondent wished to advertise. Furthermore, it is clear that the matter of the selection of particular styles for advertising was merely a secondary and convenient vehicle for the obtaining of cooperative advertising money by respondent. The buyer made her selection from the supplier's entire line and if one group of styles was not available (as where a competitor had selected them for advertising), she would merely select another style or group of styles since "there was always enough in the line to select from" (Tr. 1295).

15. When left to their own devices, the general practice of most suppliers was to promote and advertise their products as a line. With a few exceptions, they exhibited their entire line of products to all customers and, while few customers selected all items in the line, the average customer generally purchased a good cross-section of the line. To the extent any of the suppliers had or now has some form of cooperative advertising program, it was not or

is not geared to the customer's advertising of any specific style within the supplier's line. Thus, the programs of Juniorite, Bertlyn, Pan American, David Crystal, Devonbrook and Majestic provide for payments based on a percentage of all purchases or on a per-garment basis, without regard to the amount of purchases of a particular style which might be featured in the advertising. Because of differences in customer tastes, it would be difficult for a supplier to gear any generally applicable cooperative advertising program to any specific style or narrow group of styles. The only evidence in the record of cooperative advertising allowances being geared to specific styles involves payments, like those made to respondent, in response to the solicitations of individual customers and not as part of any plan. It is, accordingly, the conclusion of the examiner that the proper line of products or commodities to be used in determining the issue of whether the suppliers offered respondent's competitors allowances on a proportionally equal basis is each supplier's entire line of products.

C. *Contemporaneousness*

16. Respondent contends that it is not only incumbent upon complaint counsel to establish that the suppliers sold identical styles to other customers, but to show that such styles were purchased "under comparable market conditions at approximately the same time," citing *Valley Plymouth* v. *Studebaker-Packard Corp.*, 219 F. Supp. 608, 610 (S.D. Cal., 1963). It is the contention of respondent that complaint counsel have failed to establish the sale of identical styles to respondent's competitors "under comparable market conditions at approximately the same time" as sales to it, because the evidence offered by them shows the date of delivery, and not the date of sale, of the merchandise. Respondent further argues that since the evidence establishes the allowances paid to it were mostly "beginning of the season" allowances, and that its purchase commitments were made in advance of most other customers, the suppliers were not, as the court held in the *Atalanta* case (258 F. 2d at 372), "irrevocably committed * * * to hold open the same promotional allowances to all other prospective purchasers" (RB, pp. 8–12).

17. Complaint counsel suggest that under the Commission's decision in the *Fred Meyer* case, as affirmed by the Ninth Circuit (359 F. 2d at 357), it is the date of "distribution" or shipment of the merchandise which controls, and not the date of purchase. They further argue that the evidence discloses the making of contemporaneous sales to respondent and its competitors since it

discloses deliveries of identical styles, during the same month, to respondent and a number of its competitors (CPF, Vol. I, pp. 36–39). Respondent rejoins that aside from the fact the date of purchase, rather than the date of delivery, is controlling, it is insufficient to show delivery during the same month since this may involve shipments after the merchandise was advertised by respondents (RR, pp. 20–21).

18. The argument between counsel regarding the date of delivery versus the date of purchase is, in the opinion of the examiner, largely irrelevant since it is of little moment, under the facts of this case, which date is accepted as controlling. The basic purpose of Section 2(d) is to insure equality of treatment to competing customers in the distribution of merchandise purchased from the same supplier. As the court held in the *Fred Meyer* case (at 357), "the time of purchase by different customers is only evidence bearing on the existence of that competition," *i.e.*, competition between the favored and nonfavored customers in the distribution of the supplier's products. There is no requirement that sales to two competing customers must have been made at the same time. As the court stated in *Fred Meyer*, citing *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F. 2d 916, 921 (5 Cir. 1962): "A substantial time interval indicates only that different prices [or allowances] might have been caused by different market conditions" (at 357). In situations like that in the *Atalanta* case cited by respondent involving, as the court noted in *Fred Meyer*, "isolated and non-recurring sales," a period of "several months before and after the sales to the favored customer" may be too long to consider the sales of similar products to other customers as being made under comparable market conditions. However, in situations involving "continuous sales of regularly promoted items," a difference of several months between sales to the favored and nonfavored customers would not give rise to any inference that the transactions were not comparable, in the absence of evidence showing a change in market conditions during the intervening period. *Joseph A. Kaplan, supra; Fred Meyer* v. *FTC, supra,* at 357, n.3. In the *Kaplan* case, sales of as much as three and one-half months apart were held sufficiently comparable to entitle the customers to equality of treatment.

19. There can be no doubt that the facts in the instant case fall within the framework of the *Kaplan* and *Meyer* cases, rather than the *Atalanta* case. There are involved here regular and recurring sales by the suppliers to most of the customers with respect to which evidence was offered. There are also involved fairly

regular contributions by most of the suppliers to the regular and recurrent cooperative advertising programs of respondent. There is nothing in the record to indicate that there were any significant differences in market conditions between the time of the transactions with respondent and, those with the nonfavored customers, irrespective of whether the transactions are compared in terms of the date of purchase or the date of delivery. For the most part, the nonfavored customers placed their orders as soon as the different lines were open each season.[36] This was generally the time when respondent placed its orders. While there may have been some instances where respondent anticipated the opening of the season in the placing of orders, this was done largely for its own convenience because of the amount of time required to prepare for some of its cooperative advertising programs (Tr. 1086, 1184). The differences in time which may have resulted between itself and its competitors, in the placing of orders would, in most instances, be a matter of weeks. There is nothing in the record to indicate that there was any significant change in market conditions during the intervening period. The situation here is wholly dissimilar to that in *Valley Plymouth* v. *Studebaker-Packard,* cited by respondent, involving an end-of-season price reduction on obsolete merchandise. All of the allowances granted to respondent involved in-season, current merchandise, and the purchases of the nonfavored customers, with rare exceptions, involved similar merchandise.

20. The foregoing discussion is based on the premise that each supplier's entire line of products may be considered to be an appropriate commodity or product line. However, even if the separate styles advertised by respondent are considered to be the appropriate product lines, the examiner's conclusions would be the same. As heretofore noted, there is abundant evidence in the record of the sale of identical styles to respondent and a number of the nonfavored customers. In many instances the merchandise was delivered to the nonfavored customers during the same month, or in the month preceding or succeeding that in which deliveries were made to respondent. Since the date of

[36] Respondent asserts that "many" of the testifying retailers waited until later in the season to place their orders, citing the testimony of seven out of the 37 retailers who testified (RPF No. 59). However, in four of the instances cited the testimony related to the placing of reorders and special orders, a practice in which retailers generally (including respondent) engage (Tr. 434, 525, 830). There is generally no change in price during the intervening period (Tr. 1863). In the three instances cited by respondent involving a delay in the placing of original orders, two involved a matter of a few weeks and one of these was due to the delay on the part of the supplier in setting up an appointment for the retailer to view the line (Tr. 2027, 2184).

delivery coincided, substantially, with the date of the invoicing of the merchandise to the customers, there is nothing to suggest that there were any significant changes in market conditions during the relatively short period of time which may have intervened between the date of sales to respondent and the date of sales of identical merchandise to the nonfavored customers. Even if the date of the placing of the purchase orders, rather than the date of invoicing, was regarded as controlling, the result would be the same. Evidence as to the dates of purchase orders was generally unavailable since most suppliers destroy such records within a relatively short time, retaining a record only of when the merchandise was invoiced. However, since there is a more or less definite time period which intervenes between the date of a purchase order and the date of delivery, it may be assumed that a substantially similar time relationship existed in the dates of purchase orders placed by different customers, as in the dates of the invoicing of the merchandise to them, even allowing for some variations in the dates of delivery to different customers. There is nothing in the record to suggest that there were any material changes in market conditions occurring between the dates of the placing of their respective purchase orders by respondent and the nonfavored customers.

21. While changes in market conditions could account for the occasional granting of allowances to a certain customer and the withholding of them from others, it is inconceivable that the steady, repeated and regular granting of allowances to a select group of customers over a period of years can be explicable in all, or in any significant number of, instances on the ground of changing market conditions. On the contrary, it is abundantly clear from the record that the reason for the granting of advertising allowances to respondent and a few other customers, and the withholding of such allowances from the bulk of the suppliers' customers, was not due to changes in market conditions, but to the conscious policy of many of such suppliers to grant advertising allowances only to respondent and certain other large customers requesting them. It is concluded, therefore, that the record amply establishes that sales to respondent and the nonfavored customers were generally made under comparable market conditions, and that respondent has failed to demonstrate that the failure of any of the suppliers to pay advertising allowances to any of the nonfavored customers was due to changes in market conditions resulting from differences in the time when such customers either ordered, purchased or received merchandise, as compared to the

time when respondent ordered, purchased or received similar merchandise.

D. *Competition*

22. In the early stages of this proceeding, respondent raised the issue whether it was in competition with many of the allegedly nonfavored customers (Prehearing Order No. 1, par. 5). It took the position that it was not in competition with the bulk of them because they were either not located in sufficient geographic proximity to one of its stores or were not the same type of "full service retail apparel specialty" shop as its stores (Tr. 11). It is not clear whether it has now abandoned this position in view of the evidence in the record with respect to the location and nature of the business of the nonfavored retailers who testified in this proceeding. In its brief it merely contends that none of the retailers who did *not* testify can be considered to be "disfavored" retailers, without indicating what its position is with respect to those who did testify (RB, p. 13). However, in its proposed findings it refers to the testimony of its own officials to the effect that respondent considered its competition to be only the "Fifth Avenue specialty stores such as Lord & Taylor and Saks Fifth Avenue and the larger department stores such as Bloomingdale and Gimbels" (RPF No. 52, p. 29). While not specifically contending that it was not in competition with other "disfavored" customers, it asserts that the "overwhelming majority [of them] * * * were small neighborhood stores" and notes that no witnesses were called "from any of the 'Fifth Avenue' retail specialty stores similar to respondent or from any of the large New York City department stores" (RPF No. 58, pp. 30–31).

23. Complaint counsel contend that the 37 retailers whose representatives testified (22 from the New York City area and 15 from the Washington, D.C., area) were all in competition with one or more of respondent's establishments located in those areas (CPF Vol. I, p. 40). They further contend that it does not follow other retailers were not in competition with respondent, merely because such retailers were not called to testify. They assert, in this connection, that in view of the testimony of many of the suppliers indicative of the nonavailability of cooperative advertising money to their customers generally, it may be inferred that there were "disfavored" customers other than those who testified (CR, p. 7).

24. The examiner agrees with complaint counsel that it does not follow there were no "disfavored" customers, other than

those who were called to testify. Considering the testimony of a number of the suppliers that cooperative advertising money was not available except to those customers who requested it, and the testimony of a number of the "testifying" retailers that they were not offered or were specifically refused cooperative advertising allowances by such suppliers, it may be inferred that there were other "disfavored" customers of these suppliers. Since the so-called "Table I" exhibits contain the locations of numerous other customers of these suppliers, and a number of such customers were located in the same areas as those who did testify, it may be inferred that a number of the nontestifying retailers were in competition with respondent and were discriminated against by the suppliers in the payment of advertising allowances. However, since there is ample evidence in the record with respect to the retailers who did testify, the examiner considers it unnecessary to make specific findings concerning the nontestifying retailers.

25. With respect to the testifying retailers, it is the conclusion of the examiner that substantially all of them were in competition with respondent and can all be considered to be "disfavored" customers. They were either located in the same community as one of respondent's stores or within easy riding distance of one of such stores. In many instances the customers of these stores listed respondent as one of the stores with which they had a charge account. Many of their customers read The New York Times and the so-called fashion magazines in which respondent advertised, and copies of such publications were on display in the stores of these retailers. They all carried merchandise similar to that carried by respondent, albeit in some instances in lesser variety or depth. To accept as legally valid the impression of respondent's officials that only certain Fifth Avenue stores and large department stores were in competition with respondent, would be to ignore the basic purpose of Section 2(d), which was to achieve for the smaller retailers the right to participate, on an equitable basis, in the advertising benefits conferred on their larger competitors. The provision in the statute that such benefits shall be made available "on a proportionally equal basis," recognizes that because of differences in the size of customers and the volume of their purchases, all customers may not be entitled to *identical* allowances. However, such differences in size and volume does not mean such establishments are not in competition, nor does it justify the failure to afford them any opportunity to receive advertising allowances.

E. *Proportionally Equal Treatment*

26. Respondent's contention with respect to an alleged failure of proof on the issue of the nonavailability of advertising allowances to other retailers, on proportionally equal terms, appears at first blush to be limited solely to the "disfavored" customers who did *not* testify (RPF No. 57, p. 30). However, its argument with respect to the nature of the responsibility imposed on a supplier by Section 2(d) and the factors which the Commission should weigh in determining whether there has been disparate treatment, suggests that it also questions whether the record is sufficient in this regard with respect to some, at least, of the testifying disfavored customers. Respondent contends that (1) under Section 2(d) a manufacturer need not pay advertising allowances to all of its customers, but may furnish some with promotional materials or services "of equivalent value," and (2) that the "relative ability of different customers to furnish the desired services and the relative value to the manufacturer of such services are relevant in determining proportional equality" (RB, pp. 14–15). In line with these supposedly valid legal propositions, respondent suggests complaint counsel may not have sustained the burden of proof on the issue of disparate treatment as to those retailers who received no advertising allowances because (a) they did little or no newspaper or catalog advertising, (b) the value of any services they might perform for the supplier would not be commensurate with those performed by respondent, (c) the quantities purchased by them were vastly smaller than those purchased by respondent, and (d) the value of promotional material made available by the manufacturers may have been equivalent to the allowances granted to respondent (RB 16–18).

27. Respondent's argument is based on an erroneous interpretation of both the law and the facts. It may be, as the Commission held in the case cited by respondent, *Sunbeam Corp.*, Doc. No. 7409 (1965) [67 F.T.C. 20], that a supplier may furnish promotional material and other services "in lieu of cooperative advertising credits" in order to comply with Section 2(d). However, this presupposes that the furnishing thereof is part of an overall plan in which the *customer*, and not the *supplier*, has the right of election, and in which the value of the promotional services offered is proportionally equal to the advertising payments. As the Commission held in *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, at 1050, *aff'd*, 301 F. 2d 499 (2d Cir. 1961), *cert. denied*, 309 U.S. 888, "the customer and not the

seller should decide what is or is not usable and suitable for him and should have the opportunity to select that feature of a plan which suits him best." In the *Sunbeam* case cited by respondent, the provision for the furnishing of promotional material, in lieu of advertising allowances, was part of a comprehensive plan in which the purchaser could select the option it desired. In the instant case the furnishing of promotional material or services, to the extent it was done, was not part of any plan or program in which the customer was given the right of election.[37] Furthermore, such services or material cannot be considered as a substitute for the payment of advertising allowances since, as in the *Exquisite Form Brassiere* case, they "were not offered in lieu of the advertising allowance but were available to customers receiving such allowance," including respondent (Tr. 420–421, 472, 642, 1068, 1191, 3254). The fact that the larger customers did not, as respondent emphasizes, generally choose to avail themselves of such promotional material or services is immaterial. Aside from other infirmities in respondent's position, the record here, unlike that in *Sunbeam*, fails to establish that the promotional material and services "were equivalent in value" to the advertising payments made to respondent.[38] In fact, in a number of instances the record discloses that the customers had to pay for such material or services (Tr. 1216, 1401, 1616–1617, 1779).

28. Respondent's further argument, based on the relative ability of other customers to furnish advertising services, and the relative value of the services rendered by respondent in comparison to its smaller competitors, is likewise without merit. In the first place, most of the customers did engage in newspaper advertising and some utilized catalogs, brochures and other direct mail advertising. The examiner is satisfied that there is a real likelihood even more of them would have utilized such advertising

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[37] While a number of the suppliers did supply display materials and render promotional services to their customers, in some instances this was done on a sporadic and unsystematic basis, and in other instances the record fails to establish that any materials or services were supplied to customers. Thus, there is little or no evidence that Devonbrook, Bertlyn or Ronay supplied promotional material or services. While Rabiner & Jontow claimed that it supplied mats and display material to its customers generally, several of its customers testified that they did not receive or were refused such material (Tr. 1540, 1565, 2053–2055, 2061). Vendome supplied customers with trunk showings on a selective basis, and it did not supply them with promotional material in 1962 or 1963 (Tr. 715, 754–755). Lynne's program consisted of supplying customers with copies of respondent's advertisements (Tr. 817).

[38] Respondent appears to suggest that complaint counsel had the burden of establishing the value of the promotional material and services (RB, p. 18). However, where it is shown that a supplier has made certain payments to a favored customer on a selective basis, the burden of establishing that the supplier offered other payments or services of equivalent value would shift to the party asserting that proposition. *Vanity Fair Paper Mills* v. *FTC*, 311 F. 2d 480, 486 (2d Cir. 1962).

media if they had been afforded the opportunity to do so, on a basis of proportional equality to respondent. Certainly it would frustrate the purpose of a statute intended to prevent "discrimination favoring large buyers over small" ones (*Sunbeam Corp., supra*), to compare the advertising program of a favored customer with that of its disadvantaged competitors. To do so would be to freeze the status quo of a basically discriminatory situation, to the disadvantage of those whom it was the basic purpose of the statute to protect.

29. Aside from the foregoing considerations, respondent's argument overlooks the fact that the decision in the selection of alternative allowances or services is, as noted in the cases above cited, that of the customer and not the supplier. As the Commission stated in *Fred Meyer*, "the concern of Section 2(d) is not so much with whether or not the supplier gets his money's worth from the customer who performs, but whether other customers who compete with the receiving buyer have an opportunity to perform those same services and to be paid on proportionally equal terms." The value of the services rendered by customers may sometimes be material where there is an issue raised as to whether the payments made are so disproportionate to the services rendered that the favored customer may be considered to have received an indirect price advantage. *Fred Meyer* v. *FTC, supra,* at 362; *Lever Bros.*, 50 F.T.C. 494, 511. However, where the record discloses a complete failure to offer advertising allowances to competitors of the favored customer, there is no need to determine the relative value of the services such customers could have rendered in comparison to those rendered by the favored customer.

30. There is abundant evidence in the record that most of the suppliers had no generally-announced cooperative advertising plans and paid advertising allowances, on an ad hoc basis, only to respondent and a relatively few other select customers who solicited such allowances. Included in this category are Haymaker, Izod, Devonbrook, Evan-Picone, Lynne, Monet, Rabiner & Jontow, Ronay and Serbin. Several of the other suppliers sometimes took the initiative in offering advertising allowances, but generally limited their offers to selective "key" or large-volume accounts. This includes Majestic, Susan Thomas and Vendome. None of the foregoing suppliers informed their other customers that similar allowances were available to them, on a proportionally equal basis. It is clear, therefore, that in such instances the allowances paid to respondent were not made "available" to its competitors, as the statute requires, irrespective of whether those competitors

solicited such payments or offered to perform advertising services. As the Commission stated in *Henry Rosenfeld, Inc.*, 52 F.T.C. at 1548, "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." Not only did the foregoing suppliers fail to affirmatively inform or otherwise offer promotional allowances or equivalent material to other customers competing with respondent, but the record discloses that, except for Devonbrook, Lynne and Serbin, they actually refused to grant such allowances or materials to one or more of respondent's competitors who requested them (see paragraphs 38, 44, 59–60, 84–86, 94–98, 116–117, 127, 146, *supra*).

31. While certain of the suppliers did have some type of plan for the payment of advertising allowances, the allowances paid to respondent exceeded those called for under these plans and respondent was permitted to utilize advertising media not provided for under the plans. Thus, payments made to respondent exceeded the 2% provided for under the Bertlyn plan, the 3½% provided for under the Juniorite plan, the 5% provided for under the Pan American plan, and the 50¢-per-garment provided for under the David Crystal plan. [39] Likewise, some of the payments to respondent exceeded the 50% of cost-of-advertising limitation provided for under the Juniorite and Pan American plans. Respondent also received advertising allowances for advertising in catalogs, brochures and mailers, despite the fact that the David Crystal, Bertlyn, and Pan American plans were limited to newspaper advertising, and the Juniorite plan to newspaper and magazine advertising. It is clear, therefore, that in the case of the foregoing four suppliers the allowances paid to respondent were not made available to respondent's competitors on a proportionally equal basis, since the payments to respondent were in addition to or exceeded those provided for under these plans. *Fred Meyer* v. *FTC*, 359 F. 2d at 360; *Exquisite Form Brassiere*, 57 F.T.C. at 1050. It is, accordingly, concluded that the 16 suppliers with respect to which evidence was offered made payment of advertising allowances to respondent which were not made available, on proportionally equal terms, to other customers

[39] Respondent notes that there were payments made to other customers which exceeded these plans (RR, p. 23). However the fact that the supplier compounded the offense with other customers is no defense.

competing with respondent in the resale of similar goods and commodities as those sold to respondent.

F. *The Knowing Inducement*

32. As is apparent from the foregoing discussion, the record amply establishes the making of payments to respondent which would have constituted violations of Section 2(d) of the Clayton Act if this were a proceeding against the suppliers making such payments. However, since this is a proceeding against respondent under Section 5 of the Federal Trade Commission Act, there is the further requirement of establishing that, as the complaint alleges, respondent "knew or should have known that such suppliers were not making available to their customers competing with respondent in the resale and distribution of such products such payments, allowances or other things of value on proportionally equal terms."

33. Respondent contends that the record fails to establish that it knew or should have known it was receiving illegal advertising allowances. Its position is based principally on the following facts which it contends are established by "the uncontradicted evidence" in the record, *viz*, that (1) the suppliers "very often solicited respondent to engage in cooperative advertising," (2) respondent did not know what allowances, if any, the suppliers were making to other customers, (3) the suppliers did not indicate that they were according respondent preferential treatment, (4) there is nothing in the record to indicate that the suppliers could not have paid other customers proportionally equal advertising allowances, (5) respondent "never coerced or pressured a manufacturer into granting an advertising allowance," and (6) respondent considered its competition to be the Fifth Avenue specialty shops and larger department stores, and was under the impression that such stores were receiving cooperative advertising allowances (RB, pp. 18–20).

34. Before discussing the legal requirements for establishing "knowing" inducement, it should be noted that the facts do not accord with respondent's version of the "uncontradicted evidence" in the record. Contrary to respondent's contention, (1) the solicitation of advertising allowances was done principally by respondent, with the instances in which a supplier took the initiative generally involving the supplier's anticipation of a call from one of respondent's buyers and the suggesting of a style which respondent might wish to consider for inclusion in one of respondent's forthcoming promotions (paragraph's 160 and 162, *supra*);

(2) as a minimum, respondent was aware of what allowances some of its suppliers were paying under generally-announced cooperative advertising plans, and that the payments being received by it exceeded and were beyond those permitted under the plans; (3) while the suppliers may not have expressly informed respondent it was receiving preferential treatment, its knowledge of industry conditions, including the fact that mainly the Fifth Avenue specialty shops and the larger department stores were receiving such allowances, the paucity of cooperative advertising by other establishments in the communities where its stores were located, and the Commission's industry-wide investigation of the payment of promotional allowances in the apparel industry, must have created some suspicion on its part that it was receiving preferential treatment; (4) at least one of the suppliers indicated that it could not have afforded to pay equivalent advertising allowances to other customers (Tr. 530), and the size of the allowances received from a number of other suppliers and the difficulty in proportionalizing some of them must have created some suspicion in respondent that such suppliers could not have paid similar allowances to their customers generally (paragraphs 166–170, *supra*); (5) while respondent may not have exerted any overt pressure on its suppliers to participate in its advertising programs, respondent's important position as a potential purchaser of their merchandise and the fact that its purchases were concentrated, to a large extent, around advertised merchandise, was sufficient to exert pressure upon its suppliers, as the testimony of some of them makes apparent (paragraphs 163–164, *supra*); and (6) the fact that respondent considered its competition to be only the Fifth Avenue specialty stores and certain large department stores is immaterial and is, moreover, unrealistic, at least with respect to its branch stores located in suburban communities.

35. The test of whether a buyer may be regarded as having knowingly induced or received discriminatory advertising allowances has been stated in *American News Co.* v. *FTC*, 300 F. 2d 104, 110 (2d Cir. 1962), *cert. denied*, 371 U.S. 824, as follows:

> The test of whether a buyer has knowledge that payments he induces and receives are illegal was laid down for cases brought under §2(f) by the Supreme Court in *Automatic Canteen Co. of America* v. *F.T.C.*, 346 U.S. 61. By analogy this test is applicable in these §5 proceedings. See *Grand Union Co.* v. *F.T.C.*, *supra*. Although knowledge must be proved, it need not be by direct evidence; circumstantial evidence, permitting the inference that petitioners knew, or in the exercise of normal care would have known, of the disproportionality of the payments is sufficient. *Automatic Canteen Co. of America* v. *F.T.C.*, *supra*, 346 U.S. 61, 80.

In the *American News* case, the court held that the Commission's finding of "knowing" inducement was amply supported where the evidence revealed that (a) the customer had a position of "near-dominance" in its field, (b) it insisted on allowances which were greatly in excess of those customarily paid, (c) its suppliers often resisted the requests for allowances on the ground that they would exceed those granted its competitors, and (d) no other customer received advertising allowances proportionally equal to those paid to the favored customer.

36. Respondent seeks to distinguish the facts here from those in the *American News* case, contending that (a) it was "in a fiercely competitive business and was hardly in a dominant position," (b) it did not insist on the payment of advertising allowances, but often turned them away, and (c) the suppliers "not only did not resist, but actually welcomed the opportunity to participate in respondent's advertising endeavors" (RB, p. 22). Respondent also seeks to distinguish *Fred Meyer* v. *FTC*, 359 F. 2d at 365–367, where the court sustained the Commission's finding of knowing inducement in a factual context in which (a) "pressure existed and was successfully applied" by the respondent, (b) the concessions obtained were unusually large, (c) the respondent maintained a "vigorous intelligence network" and regularly scrutinized the advertising of its competitors, (d) respondent was the possessor of "self-professed market power," and (d) respondent requested that the allowances be "exclusive" with it (*Id*, p. 23).

37. Respondent's effort to distinguish the holdings in *American News* and *Fred Meyer* is of dubious merit. While respondent's business may have been "fiercely competitive" vis-a-vis its own competitors, it enjoyed a position of market eminence vis-a-vis the many suppliers who were grappling for its custom. Similarly, although the record does not establish the existence of a "vigorous intelligence network," it certainly indicates that respondent possessed considerable sophistication and intelligence concerning competitive practices and conditions in the industry. Further parallels could be drawn to the cases cited, and respondent's factual distinctions could be further disputed. However, such an effort would not be fruitful since it is not a prerequisite to a finding of "knowing" inducement to demonstrate that all of the factual elements which were present in the *American News* and *Fred Meyer* cases exist here. Those cases are merely illustrative of factual situations in which knowledge could be properly inferred. The basic question in each case is whether, as stated in *American*

*News*, the customer "knew, or in the exercise of normal care would have known, of the disproportionality of the payments" or, as stated in slightly different language in *Giant Food, Inc.* v. *FTC*, 307 F. 2d 184, 187 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 910, the customer "possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to its competitors." It may be noted, in this connection, that in *Giant* the customer was not found to be dominant in its field, although it was a substantial chain. However, it was the originator of the advertising payments and such payments were in addition to those made under the suppliers' regular advertising programs. The customer's program was found to be "somewhat vague and general" in its terms, "thereby making it difficult for a supplier to formulate with any degree of certainty a program that would adequately satisfy its obligations in regard to Giant's competitors." In this context the customer's alleged lack of knowledge was held to be "culpable" (at 187).

38. In the opinion of the examiner, there is more than ample evidence here to establish that respondent had knowledge of the disproportionality of the payments made to it, or at least to demonstrate that any want of such knowledge on its part was "culpable." As heretofore found, it was clearly the instigator of the advertising programs (paragraphs 160–161, *supra*). The programs were set up on such a basis that it would be difficult for its suppliers to proportionalize them among other customers, particularly in the case of the catalog and other direct mail advertising programs (paragraphs 166–169, *supra*). In some instances the proportionate amount of the suppliers' contributions cannot be determined, either in terms of the cost of advertisements or the percentage of purchases. Even when it is possible to determine the proportionate amount of the contributions to respondent, suppliers who might desire to offer allowances to other customers on a proportionally equal basis could, in many instances, do so only after payments to, and purchases by, respondent had been completed (paragraph 169, *supra*).[40] The size of the allowances which respondent was receiving from a number of its suppliers must have aroused some suspicion on its part concerning the ability of the suppliers to make such allowances generally available (paragraph 170, *supra*). In the case of at least three

[40] In the *Fred Meyer* case the Commission held that Section 2(d) requires "not only that competing purchasers be offered an opportunity to receive proportionally equal payment for performing the same services, but that they must be offered that opportunity at the same time" (63 F.T.C. 61).

suppliers with cooperative advertising plans there can be no doubt that respondent was aware it was receiving payments which were in excess of, or beyond, those generally available (paragraphs 171–173, *supra*). From its general knowledge and awareness of industry conditions, it must have suspected that the bulk of the suppliers did not have any generally-applicable cooperative advertising plans (paragraphs 174–175, *supra*).

38A. While coercion is not a necessary element of the offense (*R. H. Macy & Co.*, 326 F. 2d 445, 447, 2d Cir. 1964), the existence of coercion is considered to "render the buyer's claimed lack of knowledge culpable." *Fred Meyer* v. *FTC, supra,* at 363. It is also clear from the *Fred Meyer* case that coercion need not be "overt," but may be inferred from the market power and circumstances of the request for allowances. While respondent may not have occupied a position of market dominance, it occupied a position of sufficient importance as a buyer of apparel and accessories that its requests for advertising allowances would be regarded by many suppliers as calling for a command performance, as indeed the record indicates they were (paragraphs 162–164, *supra*). Where a buyer occupying such a position initiates a series of long-range advertising programs, which are generally tailored to its requirements, and induces its suppliers to make regular payments to it, it has, as the Commission stated in *Fred Meyer* (quoting, in part, from the court of appeals in *Giant Food*), "possessed [itself] of 'information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to [his] competitors' " (63 F.T.C. 59). Not only did respondent make no such inquiry here but it appears to have studiously avoided doing so. Its ignorance, if there was any, was clearly culpable. It is concluded, therefore, that respondent knew or should have known that the advertising payments which it induced and received from its suppliers had not been made available by them on proportionally equal terms to its competitors.

### G. *Respondent's Defenses*

39. Respondent has raised certain defenses to this proceeding, the principal ones being (a) that the allowances paid to it were "cost justified" by reason of savings in costs of delivery and salesmen's commissions, and (b) that there has been no showing of competitive injury resulting from the granting of such allowances (RPF Nos. 76–78). Respondent is aware that such defenses have been held to be invalid, but has raised them "for the record" so

to speak, in order to "preserve its position in the event of an appeal or appeals" (RB, p. 24).

40. As respondent has noted, its defenses have been uniformly held to be invalid. In *Simplicity Pattern Co.* v. *FTC*, 360 U.S. 55, 67, the Supreme Court specifically held that the cost justification defense and the requirement for a showing of competitive injury, which are applicable in a Section 2(a) Clayton Act proceeding, do not apply to proceedings brought under subsections (c), (d) and (e) of that section. See also *Grand Union* v. *FTC*, 300 F. 2d 92, 99 (2d Cir. 1962), where the court of appeals held that there is no requirement for showing competitive injury in a Section 5 proceeding, based on the knowing inducement of discriminatory advertising allowances; and *Fred Meyer* v. *FTC*, *supra*, where the court of appeals sustained the Commission's holding that the cost justification defense was inapplicable and that there was no requirement for a showing of competitive injury in Section 5 cases charging a buyer with knowingly inducing discriminatory advertising allowances.

## FINAL CONCLUSIONS OF LAW

1. Respondent and each of the suppliers hereinbefore referred to were, and are, engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

2. In 1962 and 1963 said suppliers, in the course of their business in commerce, paid or contracted to pay to respondent various sums of money as compensation, or in consideration of, various advertising and promotional services performed or to be performed by respondent in connection with offering for sale certain products or commodities manufactured, sold, or offered for sale by such suppliers.

3. The aforesaid suppliers failed to make available such payments on proportionally equal terms to all other customers competing with respondent in the distribution of such products or commodities.

4. Respondent, in inducing or receiving the aforesaid advertising allowances or payments, knew or should have known that such suppliers were not making available to various of their other customers competing with respondent in the resale and distribution of such products such payments, allowances or other things of value on proportionally equal terms.

5. The acts and practices of respondent, as above found, are all to the prejudice of the public and constitute unfair methods of competition and unfair acts or practices within the intent and

meaning of, and in violation of, Section 5 of the Federal Trade Commission Act.

6. The Commission has jurisdiction over the subject matter of this proceeding and the respondent, and this proceeding is in the public interest.

## THE REMEDY

In view of the extensive, widespread and prolonged violations of law hereinabove found to have existed, it is the opinion of the examiner that the broadest possible order is required in order to effectively terminate the inducement by respondent, of all types of illegal promotional allowances, using all types of media. Since it also appears that, as a result of a recent reorganization, respondent's retail store operations are now conducted by respondent's subsidiary, Best & Co. Stores of Delaware Inc., it is the opinion of the examiner that the complaint should be, and hereby is, amended to include such corporation, and that such corporation should also be included in the order. In view of the prospect of a further transfer of respondent's retail store operations, appropriate provision should also be made for requiring respondent to insure compliance with this order by any successor or transferee.

## ORDER

*It is ordered,* That respondent Best & Co. Inc.,[41] a corporation, and respondent's subsidiary Best & Co. Stores of Delaware Inc., a corporation, and their officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale, do forthwith cease and desist from:

> Inducing and receiving, or receiving, anything of value from any supplier as compensation or in consideration for services or facilities furnished by or through respondent or its subsidiary in connection with the handling, sale or offering for sale of products purchased from such supplier, when respondent or its subsidiary knows or should know that such compensation or consideration is not being made available by such supplier on proportionally equal terms to all of its other customers competing with respondent or its subsidiary in the sale and distribution of such supplier's products.

[41] The name of respondent, as it appears in the complaint, erroneously contains a comma after the word "Co."

*It is further ordered,* That in the event respondent and/or its subsidiary merges with another corporation or transfers all or a substantial part of the business or assets of either to any other corporation or to any other person, respondent and/or its subsidiary shall require said successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order: *Provided,* That if respondent and/or its subsidiary, wishes to present to the Commission any reason why said order should not apply in its present form to said successor or transferee, respondent and/or its subsidiary shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

## OPINION OF THE COMMISSION

BY REILLY, *Commissioner:*

Respondent herein, a firm engaged in the sale at retail of wearing apparel and accessories thereto, has been charged in a complaint issued November 1, 1965, with violating Section 5 of the Federal Trade Commission Act by knowingly inducing or receiving from its suppliers, advertising and promotional allowances which were not made available on proportionally equal terms to such suppliers' other customers who competed with respondent in the sale and distribution of the suppliers' products. The hearing examiner has filed his initial decision holding that the allegations of the complaint were sustained by the evidence and has entered an order to cease and desist.

Respondent has filed a limited appeal from the examiner's initial decision, challenging only the scope and terms of the order to cease and desist, but specifically preserving the right to make certain legal arguments in the event it should appeal from the Commission's decision.

Respondent contends first of all that the examiner's order is too broad in that it would prohibit respondent from knowingly receiving discriminatory payments or allowances from any suppliers as compensation *for any and all services or facilities* furnished by or through respondent in connection with the handling, sale or offering for sale of such suppliers' products. Respondent points out in this connection that the Commission's evidence in this matter related exclusively to the alleged inducement and receipt by respondent of discriminatory payments in connection with direct mail, newspaper and magazine advertisements and promotions. Consequently, according to respondent, the order

should refer only to payments and allowances received for advertising or promotional services or facilities.

While recognizing that the Commission, in framing a cease and desist order, is not limited to prohibiting an illegal practice in the precise form in which it is found to have existed in the past, respondent argues that the Commission may not forbid practices which have not been proven to have been engaged in by respondent nor shown to be related to practices engaged in. We cannot say that this statement is wrong as a general principle of law, but we disagree with respondent's underlying premise that the order in this matter prohibits practices which are not related to proven unlawful conduct. The examiner has found that respondent engaged in "extensive, widespread and prolonged" violations of law and expressed the opinion that the broadest possible order is required to prevent respondent from inducing preferential treatment from its suppliers. Obviously he believed that if respondent would be unable to obtain discriminatory allowances for advertising or promotional services it would seek to obtain unlawful concessions in the form of payments for other services or facilities. Respondent's arguments that it has neither the ability nor the inclination to obtain discriminatory allowances are unconvincing. The appeal from this part of the order is therefore denied.

Respondent has also taken exception to that provision of the hearing examiner's order which would require it to obtain from any successor by merger or any transferee of all or substantially all of its assets an agreement to be bound by the terms of the order. We note in this connection that subsequent to the issuance of the complaint herein respondent transferred its retail store operations to a wholly owned subsidiary corporation. The hearing examiner, in anticipation of a further transfer of business by respondent, included the disputed provision for the purpose of insuring compliance with the order by any successor or transferee. We agree with respondent that such a provision is not required to bind parties who should be held liable under the order by reason of their relationship to respondent.[1] It will therefore be stricken.

[1] For example, on May 2, 1967, subsequent to the issuance of initial decision, respondent Best & Co. Inc., merged itself into Beco Industries Corporation, which it had previously organized as a wholly owned Delaware subsidiary. As a result of this merger, Beco Industries Corporation now owns all of the assets formerly owned by Best & Co. Inc., and the latter corporation has ceased to exist as a corporate entity. Respondent concedes in its brief, however, that because of the virtually complete identity between Best & Co. Inc., and Beco Industries Corporation that the latter should be named in and be bound by any cease and desist order which may ultimately be issued in this proceeding.

To the extent indicated herein, the appeal of respondent is granted; in all other respects it is denied. The initial decision, modified to conform with this opinion, will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision granting in part and denying in part the aforementioned appeal and directing modification of the initial decision:

*It is ordered,* That the following order be substituted for the order to cease and desist contained in the initial decision:

*It is ordered,* That respondent Beco Industries Corporation, a corporation, and respondent's subsidiary Beco Stores of Delaware Inc., a corporation, and their officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale, do forthwith cease and desist from:

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

*It is further ordered,* That the hearing examiner's initial decision, as modified hereby, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered,* That respondent and its subsidiary 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 the order to cease and desist contained herein.