

Complaint

71 F.T.C.

that the Commission should issue its Findings of Fact, Conclusions and Order consistent with said Opinion.

*Now therefore, it is hereby ordered,* That the initial decision and proposed order of the hearing examiner be and they hereby are set aside in their entirety;

*And it is further ordered,* That the attached Findings of Fact, Conclusions and Order be and they hereby are entered and issued by the Commission in final disposition of this proceeding.

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IN THE MATTER OF  
SURPRISE BRASSIERE CO., INC., ET AL.

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

*Docket 8584. Complaint, June 28, 1963—Decision, June 15, 1967.*

Order requiring a New York City manufacturer of brassieres, girdles and corselettes to cease discriminating among its customers in the payment of promotional allowances in violation of Section 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Surprise Brassiere Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 102 Madison Avenue, New York City, New York.

Samuel Dosik, an individual, is president of the above corporation and Eugene Newman, an individual, is secretary-treasurer of the same corporation. These individuals formulate, direct and control the policies, acts and practices of the above named corporate respondent.

PAR. 2. Respondents are now, and for many years past have been, engaged in the manufacture, sale and distribution of women's brassieres, girdles and corselettes with an annual gross

sales volume of approximately \$5,000,000. Respondents have factories located in Woodside and Germantown, New York and in Wharton, New Jersey. Respondents also have a warehouse located at Wharton, New Jersey, from which they make all shipments of their products. The respondents sell these products for resale at retail to many customers, such as department stores, women's specialty shops and dress shops, with places of business located in various cities throughout the United States.

PAR. 3. In the course and conduct of their business, respondents engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped their products or caused them to be transported from their principal places of business in the States of New York and New Jersey to customers located in the same and in other States of the United States and in the District of Columbia.

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

PAR. 5. During 1961, and for some time prior thereto, respondents offered to their customers a cooperative advertising plan under which they agreed to pay fifty percent of the cost of newspaper advertising which featured their merchandise not to exceed 5% of the customer's total purchases for a year, and the payments were to be made only if the customer conformed to certain conditions specified by respondents.

PAR. 6. Payments made by respondents pursuant to the cooperative advertising plan referred to in Paragraph Five were not made on proportionally equal terms to all of their customers competing in the resale and distribution of respondents' products because the terms and conditions of the agreement were such as to preclude some customers from accepting and enjoying the benefits to be derived from the plan.

Furthermore, payments made by respondents were not made on proportionally equal terms to all respondents' customers competing in the resale and distribution of their products because while the payment of advertising allowances to some customers

was made in accordance with the terms of the agreement, other competing customers were provided allowances above and beyond those provided for in the agreement.

PAR. 7. The acts and practices of the respondents, as alleged above, violate subsection (d) of Section 2 of the aforesaid Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13).

*Mr. Austin H. Forkner* and *Mr. Francis A. O'Brien* supporting the complaint.

*Mr. Maxwell E. Lopin*, New York, N.Y., for respondents (*Mr. Norman H. Grutman*, New York, N.Y., associated as trial counsel, and *Mr. Herman L. Wasserman*, New York, N.Y., on the briefs).<sup>1</sup>

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

MAY 27, 1966

CONTENTS

	<i>Page</i>
PRELIMINARY STATEMENT .....	871
FINDINGS OF FACT:	
I. Introduction .....	875
II. Respondents and Their Business .....	876
III. The Challenged Practices .....	877
IV. Surprise's Cooperative Advertising Program:	
The Published Plan .....	878
Advertising Allowances .....	878
Advertising Materials Furnished by Surprise .....	881
Publication to Customers .....	882
Special 100 Percent Allowances .....	883
V. The Surprise Program in Operation:	
The Actualities of Customer Participation .....	883
New Haven, Connecticut .....	884
Bridgeport, Connecticut .....	888
Newark, New Jersey .....	888
Philadelphia, Pennsylvania .....	889
Special 100 Percent Allowances .....	892
Other Deviations from Program .....	894
Limitation on Allowances .....	894
Maximum Size of Ads .....	896
VI. Legal Analysis of the Surprise Program:	
Availability .....	898
Notification of Customers .....	899
Practical Availability:	
1. Introduction .....	903

<sup>1</sup> Initially, respondents' counsel was the firm of Lopin & Jacobson, by Milton Jacobson, but Mr. Jacobson died in October 1964 (Tr. 849).

## FINDINGS OF FACT—Continued

	<i>Page</i>
2. Limitation to Newspaper Advertising.....	904
3. No Minimum—Purchase Requirement .....	908
4. Exclusionary Aspects .....	910
5. Other Sales Promotion Aids .....	911
6. Proportionalization .....	914
7. Conclusionary Finding .....	916
Special 100 Percent Allowances .....	916
Competition Among Customers .....	917
VII. Meeting Competition Defense:	
Introduction .....	918
Competitive Offers at Department Stores:	
New Haven, Connecticut .....	920
Bridgeport, Connecticut .....	923
Newark, New Jersey .....	925
Philadelphia, Pennsylvania .....	930
Summary Findings and Conclusions:	
Preliminary Statement .....	939
1. Legal Standards .....	940
2. Outline of Defensive Facts .....	941
3. Evaluation of Evidence .....	942
The Actualities of Competition .....	947
Ex Post Facto Rationalization .....	947
“Competitive Necessity” .....	949
1. The Competition Being Met .....	949
2. Threat of Loss or Damage .....	951
Prior Awareness of Individual Competitive Situations...	952
“Meeting” or “Beating” Competition .....	954
Lawfulness of Competitive Offers .....	954
Special 100 Percent Allowances .....	955
CONCLUSIONS OF LAW .....	956
ORDER .....	958

## PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission on June 28, 1963, and was duly served on respondents. By answer filed on August 5, 1963, counsel for respondents noted the death of respondent Samuel Dosik. Pursuant to a stipulation of counsel (Prehearing Conference, December 12, 1963, Tr. 10-11), the complaint was dismissed as to Samuel Dosik by Hearing Examiner Laughlin in an order filed January 29, 1964. Accordingly, unless otherwise indicated, the term “respondents,” as used herein, will not include respondent Samuel Dosik, now deceased.

The complaint charges respondents with violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman

Act, 15 U.S.C. § 13(d).<sup>2</sup> In substance, the complaint alleges that respondents have failed to make advertising allowances available to all competing customers on proportionally equal terms because (1) the terms and conditions of respondents' cooperative advertising plans precluded some customers from receiving allowances and (2) the advertising allowances granted by respondents to some customers were "above and beyond" the terms of these plans.

Respondents filed answer through counsel on August 5, 1963, admitting certain factual allegations of the complaint, denying any violation of law, and affirmatively alleging (1) that advertising allowances were available to all customers on proportionally equal terms and (2) that the challenged practices "were performed in good faith to meet competition \* \* \*."

After the prehearing conference on December 12, 1963, hearings for the reception of testimony and other evidence in support of the complaint were held in New York, New York, from June 16 to 19, 1964, and in Philadelphia, Pennsylvania, from June 22 to 24, 1964. Because of various exigencies, the hearings were recessed on June 24, 1964. The proceeding remained in suspense for more than a year because of the illness and death of respondents' original attorney (Mr. Jacobson) and the illness of Hearing Examiner Laughlin.

By order of the Director, Hearing Examiners, dated October 27, 1965, the present hearing examiner was designated to complete the proceeding. A conference in the nature of a further prehearing conference was held in Washington, D.C., on November 1, 1965.

Although respondents conceded, in effect, that the original hearing examiner was "unavailable" within the meaning of Section 5(c) of the Administrative Procedure Act (5 U.S.C. § 1004(c)) and Rule 3.21(c) of the Commission's Rules of Practice for Adjudicative Proceedings (Tr. 849-51), they orally presented a motion to void and commence the proceedings *de novo* (Tr. 851-58). Respondents filed a written motion to the same effect on November 5, 1965, and complaint counsel filed answer in opposition on November 12, 1965. For reasons stated on the rec-

<sup>2</sup> Section 2(d) provides "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

ord on November 18, 1965 (Tr. 1351-68), the examiner denied the motion "without prejudice to the rights of the respondents to request the recall of specific witnesses for such further cross examination or other examination as may be appropriate" (Tr. 1365-66). On December 15, 1965, the respondents withdrew their motion for a trial *de novo*, stating that they were "content for the determination of this case to be made by the Hearing Examiner on the basis of the evidence which he has heard before him by witnesses viva voce, as well as such information or such conclusions as he may derive from an examination of the testimony which was taken before the Hearing Examiner undertook the further processing of this matter" (Tr. 2562).

Meanwhile, hearings were resumed in New York, New York, on November 15, 1965, and the case-in-chief in support of the complaint was rested on November 17, 1965 (Tr. 1155). Defense hearings were then held in New York, New York, November 17-19, 1965; November 29-December 3, 1965; December 6-9, 1965; and on December 15, 1965. Rebuttal hearings followed in New York, New York, on December 16, 1965, and in Philadelphia, Pennsylvania, on December 17, 1965, and the record was closed for the reception of evidence.

In support of their case-in-chief, complaint counsel offered the testimony of two officials of the corporate respondent (Eugene Newman, vice president and secretary, and Cecile Cohen, director of publicity, public relations, and advertising) and of representatives of 19 of respondents' customers located in New Haven and Bridgeport, Connecticut; Newark, New Jersey; and Philadelphia, Pennsylvania, encompassing some 1,142 pages of transcript. In addition, complaint counsel offered 969 exhibits, principally invoices and advertising claims.

In their defense, respondents offered the testimony of five sales representatives or sales officials, together with the testimony of seven competitors, encompassing some 1,315 pages of transcript (Tr. 1251-2566). In addition, respondents offered 32 documentary exhibits.

In rebuttal, complaint counsel offered the testimony of four of respondents' customers, encompassing some 294 pages of transcript (Tr. 2567-2861). Thus, there were 23 days of hearings, resulting in a transcript of 2,861 pages, and approximately 1,000 documentary exhibits.

The holding of hearings in New York and Philadelphia was authorized by Commission order dated March 13, 1964.

At the hearings, testimony and other evidence were offered in

support of and in opposition to the allegations of the complaint. Such testimony and evidence were duly recorded and filed in the office of the Commission.

The parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and counsel for respondents. Replies or exceptions also were filed by counsel for both parties.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings, conclusions, and order filed by both parties, as well as their respective replies, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of such review and his observation of those witnesses who testified after he was assigned to the case, makes findings of fact, enters his resulting conclusions, and issues an appropriate order.

By order dated January 4, 1966, the Commission extended to April 18, 1966, the time for filing this initial decision. In essence, that action took account of an extension of time granted the parties, at respondents' request, for filing their proposed findings and related submittals. Initially, the parties were granted until February 17, 1966, for filing their proposals and briefs, with exceptions or replies due on February 28, 1966. Subsequently, on motion of respondents and without objection by complaint counsel, the time for filing proposed findings and supporting briefs was extended to March 3, 1966, and the time for filing reply briefs to March 23, 1966. The additional time was sought by respondents' counsel because of difficulties occasioned by the transit strike in New York City during January 1966, and also personal problems resulting from the illness of his wife. Because of the additional time thus granted the parties, the examiner requested, and was granted by Commission order dated April 14, 1966, an additional extension of time to May 18, 1966, for filing this initial decision. This was later extended to May 27, 1966.

As required by Section 3.21 (b) (1) of the Commission's Rules of Practice, the findings of fact include references to principal

supporting items in the record. Such references to testimony and exhibits are thus intended to comply with that Rule and to serve as convenient guides to the principal items of evidence supporting the findings of fact, but those record references do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record.

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

CB .....	Memorandum of Law (Brief) filed by Complaint Counsel. <sup>3</sup>
CPF .....	Proposed Findings, etc., of Complaint Counsel. <sup>3</sup>
CR .....	Complaint Counsel's Answer (Reply) to Respondents' Proposed Findings, etc. <sup>3</sup>
CX .....	Commission exhibits.
Guides .....	Guides For Advertising Allowances and Other Merchandising Payments and Services (May 19, 1960).
p. ....	page.
pp. ....	pages.
Par. ....	Paragraph.
RB .....	Respondents' Brief. <sup>4</sup>
RPF .....	Respondents' Proposed Findings, etc. <sup>4</sup>
RR .....	Respondents' Reply to Complaint Counsel's Proposed Findings, etc. <sup>4</sup>
RX .....	Respondents' exhibits.
Tr. ....	Transcript. <sup>5</sup>

Counsel supporting the complaint may be variously referred to as complaint counsel, Government counsel, or the Government, and witnesses called by Government counsel may be referred to as Government witnesses.

## FINDINGS OF FACT

### I. INTRODUCTION

Before setting forth the findings regarding Surprise Brassiere Co., Inc., and its practices, brief reference should be made to the time period involved in this proceeding.

<sup>3</sup> References to the submittals of complaint counsel are to *page* numbers—for example, CPF 21.

<sup>4</sup> References to the submittals of respondents' counsel are to page numbers—for example, RPF 21.

<sup>5</sup> Sometimes, references to testimony cite the name of the witness and the transcript page number without the abbreviation Tr.—for example, Newman 16.

Paragraph Four of the complaint charges generally that Surprise Brassiere Co., Inc. (usually referred to herein as "Surprise"), failed to make allowances available to all competing customers on proportionally equal terms. Paragraph Five specifically refers to the Surprise cooperative advertising plan in effect during 1961 "and for some time prior thereto \* \* \*." Paragraph Six then challenges the cooperative advertising plan in effect during that period.

Counsel for Surprise interpreted the complaint as dealing only with practices engaged in through 1961 and objected to the reception of evidence relating to any subsequent period (Tr. 101); but Hearing Examiner Laughlin overruled the objection (Tr. 102), and received evidence dealing with practices in 1962 and 1963.

Thus, even though, technically, the complaint might have been construed as embracing practices only through 1961, it now is deemed amended to include practices engaged in during 1962 and 1963. (Sec. 3.7, Rules of Practice for Adjudicative Proceedings (August 1963); see *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1548 (1956).)

In ruling that occurrences subsequent to 1961 were within the scope of the proceeding, Examiner Laughlin granted a request by respondents that their Answer be deemed amended to deny any violations during 1962 and 1963 (Tr. 102-03).

## II. RESPONDENTS AND THEIR BUSINESS <sup>6</sup>

Respondent Surprise Brassiere Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 102 Madison Avenue, New York, New York.

Respondent Samuel Dosik, until his death, was president of respondent Surprise Brassiere Co., Inc. As president, he formulated, directed, and controlled the policies, acts, and practices of Surprise (Cohen 976).

Respondent Eugene Newman was secretary-treasurer of Surprise from at least 1960 to about June 1963, when he became vice president and secretary (Tr. 16). His responsibilities have extended only to purchasing and production (Tr. 788). There is no evidence that he participated in the formulation, direction, or control of cooperative advertising policies or practices, and com-

<sup>6</sup> Most of the basic facts about respondents and their business are essentially undisputed. Unless otherwise indicated, the findings in this Section II are based on admissions in respondents' Answer.

plaint counsel have proposed no finding of individual liability on the part of Newman (CPF 4). Accordingly, the complaint against him in his individual capacity is being dismissed but he will be bound in whatever official capacity he may act on behalf of Surprise. Unless otherwise indicated, the term "respondent" refers hereafter only to Surprise.

Surprise has been, and is now, engaged in the manufacture, sale, and distribution of women's brassieres, girdles, and corselets. These products have been, and are, sold, for resale at retail, to many customers, such as department stores, women's specialty shops, and dress shops, with places of business located in various states of the United States.

The business of Surprise has been and is substantial, with annual gross sales approximating \$4 million (Gold 1256).

Surprise owns a factory in Woodside, New York, and ships merchandise from that factory and from factories (not owned by Surprise) located in Germantown, New York, and Wharton, New Jersey, to customers in other States of the United States.

In the course and conduct of its business, Surprise has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended. It has shipped its products or caused them to be transported from its principal place of business and from factories in the States of New York and New Jersey to customers located in other States of the United States and in the District of Columbia.

### III. THE CHALLENGED PRACTICES

In the course and conduct of its business in commerce during the period 1960-63, Surprise engaged in cooperative advertising in a manner alleged to violate Section 2(d) of the Clayton Act, as amended.

The practices of respondent Surprise are attacked on the following grounds (Complaint; CPF 1, 3; CB 2-4):

1. Its advertising allowance program<sup>7</sup> has not been "available" to all competing customers because it has not been made known to all such customers.

2. The program has not been "available" to some customers because its terms and conditions have precluded them from receiving allowances, and they have not been offered suitable alternatives or substitutes on proportionally equal terms.

<sup>7</sup> For purposes of this discussion, it is considered that Surprise had basically the same program from 1960 to 1963, although the allowance rate was modified in mid-1962 (see *infra*, pp. 878-879, 882).

3. Surprise has deviated from its program by granting some customers allowances "above and beyond" its announced terms.

Surprise's position (RPF 5-9; RB 10-12, 18-20) is (1) that its program has been "available" to all competing customers; (2) that suitable alternative or substitute promotional assistance has been offered to customers who did not receive advertising allowances; and (3) that deviations from the program—that is, allowances "above and beyond" its terms—were the result of meeting in good faith the advertising allowance payments and offers of competitors.

The findings that follow in Section IV outline the Surprise program and its manner of publication. Thereafter Section V describes the program in operation, shows the deviations from its terms, and develops the facts respecting alternative promotional assistance. Section VI analyzes the program and its operation in the light of the applicable law. And, finally, Section VII considers Surprise's "meeting competition" defense.

#### IV. SURPRISE'S COOPERATIVE ADVERTISING PROGRAM

##### *The Published Plan*

There is no dispute that under its published cooperative advertising programs in the period 1960-63, Surprise offered to its customers promotional assistance of two types:

(1) Payment of a stated percentage of the customer's local newspaper advertising; and

(2) Furnishing of in-store or point-of-sale advertising material, together with statement enclosures or "stuffers" designed primarily for mailing to customers or prospective customers of the store.<sup>8</sup>

##### *Advertising Allowances*

During the years 1960, 1961 and the first half of 1962, the plan called for Surprise to pay 50 percent of a customer's cost of advertising its products in local newspapers, provided the

<sup>8</sup> In addition, Surprise offered to all customers free mats. This constitutes a service that does not clearly fit into either of the categories set forth above, but it is basically auxiliary to the newspaper advertising allowance. A mat is a cardboard-like (papier-mache) cast of an actual ad, which is used by newspapers to cast the plate from which the ad is printed (Cohen 1009, 1013). These mats could be used by customers for newspaper advertising without any additional art or production cost. Generally, they were used only by the smaller stores which engaged in newspaper advertising. Large stores, with their own art and production departments, ordinarily did not make direct use of the mats. They did, however, frequently use the mat proofs for copy and layout ideas (Cohen 1009, 1085). It does not appear that the offer or furnishing of advertising mats is in issue here, but see *infra*, p. 880.

total annual payment did not exceed 5 percent of the customer's yearly purchases (Respondents' Answer, Par. 5; Cohen 94-5, 97-8; CXs 1 and 2).<sup>9</sup> (The record establishes, however, that from 1960 to mid-1962, some customers were granted allowances of 75 percent (*infra*, p. 883).

The 50 percent plan remained in effect until the middle of 1962, when it was modified to provide for 75 percent allowances, with the annual total again limited to 5 percent of the customer's yearly purchases (Cohen 99-100; CX 16; Respondents' Answer (Par. 5) dates the change in 1961, but this evidently was a typographical error).

Since about June 1962, Surprise has required customers, to be eligible for 75 percent allowances, to execute cooperative advertising agreements that scheduled in advance the date and size of ads, the newspapers in which they are to appear, and the garments to be advertised (Cohen 988-89, Rubin 1694; for example, CXs 7, 8, 12, 187, 188). Despite respondent's denial (RPF 33, RR 3), there is evidence that if a customer ran an unscheduled ad, the 75 percent allowance was not available and the customer was allowed only 50 percent (Velardi 237, Rubin 1694).

As far as the record shows, such a contract requirement did not exist before mid-1962 (Cohen 988-89).<sup>10</sup>

In the cooperative advertising agreements used subsequently to the mid-1962 change of rate, Surprise agreed to pay "75% of actual space devoted to SURPRISE garments in accredited newspapers, (based on the store's lowest earned rate), up to an amount *not to exceed 5% of annual purchases.*" The agreement further specified that it

is limited to advertising in accredited newspapers only, (shown in Standard Rate & Data). It does not cover shopping newspapers, neighborhood publications, souvenir programs, radio, television, circulars, billboards, theatre programs, special editions, supplements, catalogues or other non-eligible media. (CXs 7, 8, 12, 187, 188.)

It appears that the media limitation spelled out in such contracts was in effect prior to 1962 (Cohen 988-89).

No evidence was adduced concerning the contents of the Stand-

<sup>9</sup> The limitation to 5 percent of annual purchases was not included in the statement published in the 1960-61 and 1961-62 price lists (CXs 1 and 2) and quoted *infra*, p. 882, but there appears to be no dispute that Surprise had such a policy—a policy that was not, however, always followed (p. 894, *infra*).

<sup>10</sup> It may be only coincidental that some of the customers who were granted 75 percent allowances before that became the uniform percentage had scheduled ads in advance pursuant to agreement (CXs 3-6, 9-11, 13 A, 14 A, 15 A, 186).

ard Rate & Data publication referred to in the contracts. It is inferred that it provides information regarding circulation, advertising rates, etc. But the record is silent as to what newspapers are included or excluded.

Surprise did not require ads to be of any minimum size to be eligible for allowances, and the size of the ad depended largely on the amount of money the customer had to spend on advertising, as well as the amount of purchases from Surprise. For small retailers who did not have their own art and production departments, Surprise provided ad mats that measured 21 column inches, or approximately 300 lines. (Cohen 96, 994-95; CPF 6.)

Despite their recognition that the program imposed no minimum size requirement for cooperative advertising (CPF 6), complaint counsel have assumed that it was necessary for smaller customers to utilize the Surprise mats in order to receive payment (CPF 27; CR 17). Since the smallest mat measured 21 inches, complaint counsel contend that Surprise, in effect, imposed a minimum lineage requirement (CR 17).

The examiner recognizes that there is testimony subject to that interpretation (Cohen 96-97, 994-95). But when read in context, it does not support a finding that Surprise mats had to be used, and it specifically recognizes that the ad size might be smaller than the mat. The fact that one customer did not understand that he could reduce the size of the ad (Katsoff 180-81, 200-01) does not prove that Surprise required the mats to be used without reduction.

Agreements used during and since 1962 have purported to limit the size of ads to 600 lines or 42 inches (CXs 3-12, 13 A, 14 A, 15 A, 186-88; but see *infra*, p. 896).

The advertising allowances available under the Surprise cooperative advertising plans were not predicated upon the purchase of any specific style or line of Surprise products, or upon any minimum order—except to the extent that the limitation of allowances to 5 percent of annual purchases required purchases in such volume as to make advertising money realistically available.

In the usual case, the customer and the Surprise salesman mutually agreed on those Surprise garments that would be advertised (Cohen 1022; see also Velardi 236, Knopp 363-64, Connors 559-60, Feir 582, Spitzer 799-800).

Advertising allowance payments have been made by allowing customers to take deductions from merchandise invoices (Cohen 1000).

*Advertising Materials Furnished by Surprise*

The in-store or point-of-sale materials offered under the Surprise program (Cohen 1007-14) included:

Glossies, or glossy print photographs of garments, about 8½ x 11 inches in size, which are intended for display in the windows or fitting rooms of stores.

Window cards, window streamers or banners, and counter cards, which depict Surprise garments and show the style numbers and suggested retail prices.

Bra, girdle, and corselet forms, commonly known as bust forms, intended for use in displaying the garments in store windows or in the store itself.<sup>11</sup>

In a somewhat different category are so-called statement enclosures, imprinted with the store name. These enclosures depict the Surprise garments and indicate the size range and prices. Retailers either hand them out or mail them to customers or prospective customers.

The layout and copy ideas referred to in the cooperative advertising plan are proofs of the advertising mats prepared by Surprise and may be used by any customer as suggestions for advertising formats and textual material.

The record establishes that the in-store or point-of-sale materials were furnished to customers free of charge.

The cost to Surprise for these various materials was listed as follows:

Statement enclosures—\$5-\$6 per thousand;

Bust forms—\$5 to \$20 each, depending on length; and

Mats—approximately \$2 each. (Cohen 1086, 1088, 1099, 1100.)

Neither in theory nor in practice, as far as the record shows, was there any minimum purchase requirement as a prerequisite to the furnishing of display materials, nor was there any limitation on the amount of such materials to be furnished to any customer. Although it was indicated that there might be some restrictions on the distribution of bust forms because of their cost (Sanders 1548; *cf.* Cohen 1089), the record discloses no instance where a customer was refused bust forms in any quantity requested.

Like the advertising mats, the in-store displays were available to all customers—those who advertised and those who did not (Cohen 1008-12; Popkave 1812, 1851; Rubin 1691-92; James

<sup>11</sup> Bust forms were not specifically mentioned in the published program but might be considered embraced in the term "displays." See *infra*, p. 882.

2592-93). But the record as a whole indicates that the in-store displays were used primarily by smaller, non-advertising stores and were only minimally used by the department stores (CPF 44-45; cf. RPF 8, RR 25-28). Respondent takes a somewhat anomalous position regarding the bust forms, contending that because they were not specifically mentioned in the published program, they constituted true alternatives available to non-advertising customers.

Several customers testified that the display materials and statement enclosures were not offered as, and in their opinion did not constitute, substitutes for advertising or alternatives "in lieu of" newspaper advertising. (See, for example, H. Katsoff 158; I. Katsoff 207-08; Tyson 254-58; Rechtman 569, 571; Toll 643, 649-51; Gilbert 677-78.)

#### *Publication to Customers*

The plan in effect from 1960 to mid-1962 was published in price lists as follows:

*Cooperative advertising*—we pay 50% of retailer's local newspaper advertising and provide stores with attractive FREE mats, glossies, displays, window banners, statement enclosures, layout and copy ideas.

That legend appeared on the inside front cover of the price lists for 1960-61 and 1961-62 (CXs 1 and 2).

In the 1962-63 price list (CX 16), the policy and the statement were modified as follows:

*Cooperative advertising*—we pay 75% of retailer's local newspaper advertising (limited to 5% of annual purchases) and provide stores with attractive FREE mats, glossies, displays, window banners, statement enclosures, layout, and copy ideas.

The price lists in effect during 1960-63 were mailed or otherwise supplied to all active accounts (Cohen 94, 983-84, 1080-83, 1095, 1098; Sanders 1374-76, 1545-46; Rubin 1606-07, 1615, 1619-21, 1624, 1687-89; Popkave 1809-10, 1847), and most of the customers who testified did receive them. The record contains testimony indicating that two customers did not receive the 1960-61 price list. (Katsoff 157, 166, 168, 170, 174, 186; Toll 642, 647-48; see also Paskow 331-32; but cf. Rubin 1606-08; Popkave 1809-10, 1847-49.)

On the basis of the record as a whole, it is found that receipt by customers of the Surprise price lists did not necessarily result in actual knowledge on their part of the advertising allowance plan published in such price lists. Many customers, both

large and small, were not aware that the plan was so published and relied on salesmen for such information. It is further found that Surprise salesmen aggressively promoted the advertising allowance program in dealing with department stores. But despite a more casual approach in dealing with proprietors of smaller stores and, perhaps, occasional failure to mention the subject at all, it cannot be said there was any concealment. (CPF 41-43 and CR 22-26; cf. RPF 8-9.)

#### *Special 100 Percent Allowances*

In addition to the advertising allowances specified in the cooperative advertising plans published in CXs 1, 2, and 16, it also was the practice of Surprise during 1960-63 to grant 100 percent allowances (1) in special promotions featuring garments new to the Surprise line; (2) on request to customers opening a new store or a new foundation garment department; and (3) to match the participation of others in omnibus advertisements (involving the participation of two or more manufacturers) (Cohen 991-92).

Surprise customers were not advised in writing that such allowances were available, but respondent contends that customers were apprised of it by salesmen (Cohen 1028-29).

The subject of 100 percent allowances is treated in more detail *infra*, pp. 892-894, 955-956; see also pp. 916-917.

### V. THE SURPRISE PROGRAM IN OPERATION

#### *The Actualities of Customer Participation*

It is undisputed that during the period 1960 to mid-1962, when Surprise's announced allowance was 50 percent, department store customers received 75 percent while competing customers received only 50 percent.<sup>12</sup> Accordingly, there is no necessity for detailed findings regarding the 75 percent allowances, except to determine whether those discriminations are excused under the "meeting competition" defense provided by Section 2(b) of the Clayton Act, as amended. For findings on that subject, see *infra*, p. 918.

<sup>12</sup> Complaint counsel have shown in tabular form the allowances actually granted by Surprise during 1960-63 to customers in four cities (CPF 9-22). Surprise does not dispute the accuracy of the tabulations except to the extent that the tabulations omit some department store allowances that respondent contends, without adequate record support, were at the 50 percent rate. This contention relates to the meeting competition defense and is discussed under that heading, *infra*, p. 918. Unless otherwise indicated, those proposed findings are adopted, but in view of the lack of any real dispute on the subject, no useful purpose would be served by reproducing them here. The examiner has simply summarized the tabulations and added certain supplementary and explanatory material.

In this section of the decision, therefore, only brief reference is made to the 75 percent allowances.

Emphasis is placed, instead, on the treatment of other customers, so as to provide a factual basis for answers to the following questions:

(1) Was the Surprise program "available" to them in the sense that it was or could have been known by them?

(2) Did its terms and conditions preclude some customers from receiving allowances?

(3) If so, were they offered suitable alternatives or substitutes on proportionally equal terms?

Findings are here made also as to the existence of competition between favored and non-favored customers.

Findings relating to each of four cities follow:

*New Haven, Connecticut*

1. Department Stores

In New Haven, Connecticut, two customers consistently received from Surprise advertising allowances of 75 percent beginning in 1960, while three others received only 50 percent—two of them receiving only 50 percent even after Surprise raised the rate to 75 percent in mid-1962.

*The Edw. Malley Co.*—One of the favored customers was The Edw. Malley Co., a downtown department store. From March 25, 1960, to May 15, 1963, it received allowances of 75 percent, with one exception. The exception was for an omnibus ad of June 1, 1960, of which Surprise paid 50 percent.<sup>13</sup> (CPF 9; CXs 19-32.)

*Shartenberg's*—The other favored customer was Shartenberg's, another downtown department store, which went out of business, apparently in mid-1962 (CX 166 E).<sup>14</sup> Shartenberg's had received two 75 percent allowances in 1960 and one in 1961 (CPF 10; CXs 34-36).<sup>15</sup>

2. Other Advertising Customers

*The Outlet Millinery Company*—Among the unfavored customers was The Outlet Millinery Company.<sup>16</sup> It received only 50

<sup>13</sup> For discussion of the significance apparently attached to this exception by Surprise, as well as the claim of another 50 percent allowance on June 2, 1960 (RPF 10, RR 4), see *infra*, pp. 920-921. Malley also received a 100 percent allowance subsequent to May 1963 (see *infra*, p. 892).

<sup>14</sup> Testimony that Shartenberg's went out of business in 1963 (Rubin 1632) apparently is in error (see RPF 24).

<sup>15</sup> For discussion of Surprise's claim of 50 percent allowances in 1960-62, see *infra*, pp. 921-922.

<sup>16</sup> Outlet had stores in New Haven and Bridgeport, as well as in Hartford and New Britain. The evidence relates only to the New Haven and Bridgeport stores.

percent until Surprise raised the rate generally to 75 percent (CPF 11; CXs 52, 54, 56, 58, 59; RXs 1-3).

Other unfavored customers included Vee Bee Corset Shop, a downtown specialty store, which received two 50 percent allowances in 1961 and one 50 percent allowance in 1963 (CPF 10; CXs 39 A-40 B, 213-14, 217 A-B, 220-21, 223); and The Hosiery & Lingerie Shop, Inc., a small downtown shop, which received a 50 percent allowance in May 1963 (CPF 10; CX 41). Further findings as to these last two customers are as follows:

*Vee Bee Corset Shop*—There is evidence that Vee Bee Corset Shop received at least one 75 percent allowance after the rate change in 1962 (Velardi 236, Rubin 1615-16, 1693, 1713).<sup>17</sup>

The fact that Vee Bee received 75 percent in 1962 is significant in determining whether the 50 percent allowance it received in 1963 (after Surprise began offering 75 percent generally) was a further actionable discrimination. All of the circumstances (Velardi 235-37; Rubin 1615-16, 1693-96, 1713-16) suggest that the 1963 allowance of 50 percent was pursuant to the advance-arrangements policy (*supra*, p. 879). This requirement of advance scheduling on the basis of a contract was not published and, as far as the record shows, was not uniformly enforced. The existence of such a policy is denied (RR 3-4), leaving Surprise with no explanation of the discriminatory 50 percent payment to Vee Bee in 1963 other than the untenable suggestion that the store elected to take 50 percent rather than 75 percent.

When this discrimination is coupled with similar instances in the case of The Hosiery & Lingerie Shop, Inc. (*infra*), and Harriet's Corsetry (*infra*, pp. 890-891), the excuse of mistake or misunderstanding does not ring true.

*The Hosiery & Lingerie Shop, Inc.*—From 1959 through 1963, the purchases of this store entitled it to advertising allowances from Surprise ranging between \$19 and \$48 (CX 163 A-E), but it did not cooperatively advertise with Surprise until 1963. Until the rate was changed to 75 percent, it never was offered more than 50 percent. And although David Tyson, the coproprietor, was sure that he had received the 1962-63 price list (as well as earlier ones) and knew that the cooperative advertising plan was contained in it (Tr. 247-48), he had accepted without objection a 50 percent payment for an ad run in May 1963 (CX 41; Tr. 249-50; Rubin 1623).

<sup>17</sup> Surprise's contention (RPF 32, RR 4) that the allowances of \$49.50 on September 2, 1962, and October 28, 1962, shown by CX 165 H were at the 75 percent rate, is not supported by the record.

Tyson had failed to note the rate change to 75 percent in the 1962-63 price list (Tr. 251), and despite the testimony of the salesman Rubin that he told Tyson about it (Tr. 1621), Tyson understood the rate was still 50 percent. He did not recall that the Surprise salesman ever offered more than 50 percent (Tr. 248-50).

Rubin's explanation that this account got only 50 percent because the volume of purchases did not permit a higher payment (Tr. 1696-97, 1734), is unfounded. Whether the 5 percent limitation is applied to 1962 or 1963 purchases, Hosiery & Lingerie was entitled in 1963 to an advertising allowance of \$47 or \$48 (CX 163 E), which would have covered 75 percent of the ad cost of \$59.40 (CX 41).

Tyson did not understand when he was asked whether Surprise ever offered any alternatives to cooperative advertising; but when he was asked whether substitutes were offered, he stated that the store got statement enclosures on request and also advertising mats, counter cards, glossies, and bust forms (Tr. 254-55; see also Rubin 1622-23, 1691).

The witness said that counter cards and glossies were not a substitute for cooperative advertising but that the store wanted them.

The store advertises its major lines, but Surprise has never been a major line (Tr. 255, 246-47).

### 3. Non-Advertising Customers

Two other New Haven customers, Kay's Corset Shop and Figure Fashions, received no advertising allowances from Surprise. Their proprietors explained, in substance, that the nature of their operations was such that they could not economically afford to engage in cooperative newspaper advertising (Tr. 157-58, H. Katsoff 178, 180-81; I. Katsoff 207; see also Rubin 1611, 1699-1700). They testified that they never had been offered an allowance greater than 50 percent (Tr. 182-83, 185, 190, 206-07, 210, 212). Although both had received the 1962-63 price list, neither was aware that it specified a 75 percent allowance (Tr. 184-85, 205, 210-11), but the Kay's witness knew that the Surprise cooperative advertising plan was in the 1961-62 price list (Tr. 162).

Other findings concerning these two accounts follow:

*Kay's Corset Shop*—During 1959-61, Kay's purchases from Surprise would have entitled it to advertising allowances of \$12 or \$13. On the basis of 1962 purchases, its 1962 allowance could have been \$23 (CX 164 A-B). The advertising rate of the New

Haven Register was \$3.60 per column inch (Tr. 158). Thus, a small advertisement was not out of the question, particularly with Surprise paying 75 percent of the cost. However, the proprietor, Harold Katsoff, commented that an ad so small as to be inconsequential on the page would be a waste of money; if it was under a certain size, it would not pay him to run the ad (Tr. 199), but he failed to specify any minimum size.

Katsoff said he did not use cooperative advertising in New Haven because it was "too expensive," even with a 50 percent reimbursement (Tr. 158). He could not afford to pay \$50 to advertise Surprise brassieres in New Haven (Tr. 198).

Katsoff assumed that he would have to use the mat furnished by Surprise. Since he could not afford to pay for an ad that size, and since he understood from the salesman Rubin that he might not be reimbursed if he cut the mat down, he did not advertise with Surprise at all (Tr. 180-81, 200-01). Rubin denied that he had made such a statement (Tr. 1610).

The salesman Rubin agreed in effect that Kay's was so small that it was not worthwhile for it to run an ad (Tr. 1611).

Katsoff said he was never offered anything as an alternative to cooperative advertising in the newspapers (Tr. 158). This exiguous testimony does not necessarily contradict Rubin's testimony that Kay's was offered, and it accepted, bust forms, glossies, window banners, and possibly stuffers (Tr. 1611-12, 1690).<sup>18</sup>

*Figure Fashions*—On the basis of purchases in 1959 and 1960, Figure Fashions would have been entitled to advertising allowances of \$10 to \$14. When purchases from Surprise dwindled to less than \$100 for each of the years 1961 and 1962, the entitlement would have been \$3 to \$5 (CX 162 A-B). The store went out of business in February 1963 (Tr. 203).

This account purchased some Surprise products but not the entire line. Its volume with Surprise was not high enough to warrant advertising Surprise products. It might have advertised if a higher percentage than 50 percent had been offered. The store *did* advertise in the New Haven Register weekly, but it was primarily concerned with products stocked to a greater extent than was the Surprise line (Tr. 203, 207). Compared to other lines, the Surprise line was not "enticing" to the proprietor, Irving Katsoff. It "didn't mean too much" to Katsoff (Tr. 215), and he agreed that his volume with Surprise was "inconsequential" (Tr. 220; see also Rubin 1612-16).

<sup>18</sup> The testimony of Katsoff and Rubin, however, conflicts on various other points. (Compare Tr. 157, 174 with Tr. 1606-08; Tr. 181, 184-85 with Tr. 1610-11.)

Irving Katsoff was "never aware of any alternative" to newspaper advertising (Tr. 206-07). He did get counter cards and glossies from Surprise (Tr. 208, 212), but he did not consider this an alternative to advertising (Tr. 208).

#### 4. Competition

Surprise customers in New Haven were in competition with one another (James 141-42, 150-51; H. Katsoff 159; I. Katsoff 207-08, 212, 215; Velardi 239-40; Tyson 255-56; see also CPF 29, 34).

##### *Bridgeport, Connecticut*

#### 1. The Howland Dry Goods Co. and The Outlet Millinery Company

In Bridgeport, Connecticut, The Howland Dry Goods Co. consistently received advertising allowances of 75 percent from 1960 to 1963 (CPF 12; CXs 42, 44, 46-50; Tr. 1153),<sup>19</sup> while The Outlet Millinery Company received only 50 percent until the latter part of 1962 when it too began receiving 75 percent (CPF 12-13; CXs 52, 53, 56, 57, 59; RXs 1, 2, 4).

#### 2. Competition

Outlet and Howland were competitors (Knopp 365-68, Ciro 1154; see also CPF 35).

##### *Newark, New Jersey*

#### 1. L. Bamberger & Co.

In the Newark, New Jersey, area, L. Bamberger & Co., a large downtown department store with seven suburban branches, received from Surprise advertising allowances of 75 percent or 100 percent during 1960-62 (CPF 14-15; CXs 64, 72, 73 A-81 B).

#### 2. Other Customers

During the same period, another department store, Hahne & Co., and the Helen Hirsh Specialty Shop were offered no more than 50 percent until the policy change in mid-1962.

*Hahne & Co.*—It is not clear whether the fact that Hahne & Co. did not engage in cooperative advertising with Surprise was due to disinterest or to a lack of knowledge concerning its availability. The store received all the Surprise price lists, but the

<sup>19</sup> Surprise contends that Howland also received some 50 percent allowances during this period; see *infra*, pp. 923-924.

foundation garments buyer simply was not aware that the cooperative advertising policy was there set forth (Drury 1119-20). The Surprise salesman Jack Brown testified that he offered the 50 percent arrangement to the store in 1960 and also may have offered statement enclosures (Tr. 1775-77).

Evidence respecting Hahne is significant only in establishing that no 75 percent offer was made to this account until the general policy change of mid-1962.

*Helen Hirsh*—The same finding is made as to Helen Hirsh (Tr. 331, 342, 356), despite complaint counsel's apparent reliance (CPF 41-43) on the testimony of its proprietor, Allen Paskow, to establish that the Surprise cooperative advertising plan was not available to this store. Paskow, who took over the business in June 1961, had received at least the 1962-63 price list but was not sure about the 1961-62 price list (Tr. 331-32). Until contacted as a witness, he had not been aware that the cooperative advertising plan was contained in the price list (Tr. 333).

Paskow further suggested that the Surprise salesman had failed to offer cooperative advertising. The fact is, however, that the store had cooperatively advertised with Surprise in 1960 and 1961, receiving 50 percent (CXs 83-85 B; CPF 15), and it had received 75 percent for a Surprise ad in 1963 (Tr. 342-44, 354-55; CX 181 H). The salesman, Jack Brown, testified that the Hirsh Shop also was furnished mats, bust forms, streamers, and window cards (Tr. 1775, 1778).

### 3. Competition

Hirsh and Hahne both competed in the resale of Surprise products with Bamberger's (Paskow 330, 333; Drury 1119, 1123; see also CPF 30, 36).

#### *Philadelphia, Pennsylvania*

##### 1. Department Stores

In Philadelphia, Pennsylvania, Surprise granted four department stores advertising allowances of at least 75 percent and sometimes 100 percent. These customers are:

Lit Brothers (CXs 86-93, 95-99, 358 A-B);

Gimbels (CXs 100-13, 115-18);

Strawbridge & Clothier (CXs 119-22; Tr. 459, 462, 465-69, 491); and

Snellenburgs (CXs 13-15, 17-18; RX 25 A-H).

(See generally CPF 16-20.)

## 2. Other Customers

During the same period that these department stores were receiving advertising allowances of 75 percent or better from Surprise, other competing customers in Philadelphia received or were offered advertising allowances of only 50 percent. These customers included:

Jean Spitzer Corsetiere, 3 ads in 1960; 1 in 1961 (CXs 125-28);

Besser's Corset Shop, 2 ads in 1960 (CX 133);

Harriet's Corsetry, 2 ads in 1962 (CXs 134 A-135 C);<sup>20</sup>

Jean Rose Corset Shop, 1 ad in 1960 (CX 136);

Goodman's Corset Shop, 1 ad in 1960; 3 in 1961; 2 in 1962 (CXs 137-42, 182 A-H; Tr. 726-30, 732-38);<sup>21</sup> and

Mary Anne Corset Shop, 4 ads in 1960; 2 in 1961; 1 in 1962 at 50 percent; and 3 in 1962 at 75 percent (CXs 144-52 B; RXs 5 A-6 C). (See generally CPF 20-22.)<sup>22</sup>

For lack of adequate evidentiary basis, the examiner has disregarded transactions with Madam Rosalie Shop (CX 175 A-C; CPF 25, 30-31; RPF 116)<sup>23</sup> and the Ort Shoppe (CX 177 A-B; compare CPF 25, 30-31 with Tr. 761, 763-72; see RPF 117-18).

Three other Philadelphia accounts require further findings, as follows:

*Harriet's Corsetry*—This account, also known as Harriet's Hosiery, is cited by complaint counsel in support of the allegation that some customers were not offered advertising allowances or were not informed of modifications in the Surprise advertising plan (CPF 26, 32). But the proprietor, Mrs. Harriet A. Gilbert, received the price lists announcing the cooperative advertising allowance plans in effect during 1960-63. She simply failed to take note of them. She relied on the salesman, but he made no offers in 1960 or 1961 (Tr. 668-71). According to the salesman Popkave, he offered Mrs. Gilbert cooperative advertising in 1961 (Tr. 1856).

Moreover, despite Mrs. Gilbert's initial statement that she didn't know the advertising plan was contained in the price lists (Tr. 669-70), cross-examination developed that she may have read the cooperative advertising statement at least by 1961 (Tr. 704-05),

<sup>20</sup> One ad was dated November 30, 1962, but the allowance was only 50 percent despite the change in rate to 75 percent.

<sup>21</sup> Apparently the Goodman shop received at least one 75 percent allowance in 1963 (Goodman 745-48).

<sup>22</sup> Respondent doubted that CX 133, relating to Besser's, and CX 136, relating to Jean Rose, were in evidence (RPF 119), but see Tr. 773.

<sup>23</sup> Except with regard to the 5 percent limitation; see *infra*, p. 896.

and that she had knowledge of Surprise advertising allowances from conversations with a salesman prior to 1960 (Tr. 709-10).

Nevertheless, there is no doubt that this shop was discriminated against, since it received only 50 percent allowances while its department store competitors received 75 percent. Oddly enough, this was true even after Surprise began offering 75 percent generally to its customers. For an ad published in November 1962, Harriet's asked and received only 50 percent (CX 134 A-B; Tr. 671, 675, 705-06). When she discovered she was entitled to 75 percent in the fall of 1963, she then deducted the additional 25 percent from an invoice (Tr. 671-74), and there has been no question raised concerning the deduction (Tr. 685, 712). The salesman Popkave had only a hazy memory of this incident, but dismissed it as a mistake or oversight involving some question about the submittal of tear sheets of the ad (Tr. 1825-28, 1856-61, 1864-65).

Mrs. Gilbert said that Surprise salesmen never offered her any alternatives or substitutes for cooperative advertising but did furnish display material (Tr. 677). This material was never offered "in lieu of" cooperative advertising (Tr. 678). She always found Surprise very cooperative in all sorts of displays (Tr. 718).

*Francine's Foundations*—This account did no cooperative advertising with Surprise in 1959-61 (CX 183 A-D; Tr. 641-42), but did receive \$66 in 1962, representing 75 percent of the cost of two ads in the Jewish Exponent (CX 183 A-E; Tr. 646-47). The Surprise purchases of this shop in 1959-61 entitled it to advertising allowances ranging from \$26 to \$37 (CX 183 A-E).

Mrs. Ada A. Toll, owner of Francine's, received Surprise price lists for 1961-62 and 1962-63, but she could not remember whether she received the 1960-61 price list (Tr. 642, 647-48).

It is evident from her testimony, however, that she was on notice concerning the availability of cooperative advertising from Surprise, and a 50 percent offer was made to her in 1961 (Tr. 655). She was not interested in cooperative advertising in 1960 but decided to take advantage of it in 1962 (Tr. 648). She said she believes in advertising "If you have enough money" and "if you do it enough" (Tr. 652).

Although Mrs. Toll first said that the Surprise salesmen did not offer her anything as an alternative to cooperative newspaper advertising (Tr. 642), she indicated on cross-examination some confusion as to what the question had meant (Tr. 646). She then acknowledged that the Surprise salesman discussed with her throwaways, bust forms, glossies, window displays, and possibly

streamers and inserts (Tr. 649-51; see also Popkave 1818-21, 1855-56). But Mrs. Toll indicated that the display materials were not represented to her by the salesman as alternatives to newspaper advertising (Tr. 657).

*Gertrude Rechtman*—Miss Rechtman who operates a Philadelphia store selling foundation garments, including the Surprise line, was not sure whether she had been offered cooperative advertising by Surprise. No inquiry was made concerning her receipt of price lists. She does no cooperative advertising and hence pays no attention to it (Tr. 568-69; see also Popkave 1816, 1853-54). Although she first said that Surprise had never offered her anything as an alternative to cooperative advertising in newspapers (Tr. 569), further questioning developed that she meant Surprise had never offered her money for other types of advertising, such as the direct mail advertising in which she engages. Surprise never offered to participate in the cost of her direct mailing, and she never asked them to (Tr. 571-72). She knew that Surprise had advertising inserts for letters, but she did not want them because she sends cards, not letters. She had been offered streamers, counter cards, and bust forms, but she was doubtful that they constituted advertising (Tr. 572; see also Popkave 1815-16, 1853-54).

Miss Rechtman's purchases from Surprise increased steadily from 1959 to 1962, so that her advertising allowance entitlement ranged from \$43 in 1959 to \$114 in 1962 (CX 176 A-F). Thus, it is obvious that she could have engaged in some newspaper advertising had she desired to do so. It also is true that she could have used the advertising allowance money for her direct mail advertising.

### 3. Competition

The customers of Surprise in the Philadelphia area were in competition with one another in the resale of Surprise products (Bierman 476, 499; Connors 557-58; Rechtman 570; Feir 608-09; Toll 644; Gilbert 680-81, 713-14, 717-18; Goodman 744-45; Spitzer 804-07; Carr 820; see also CPF 32-33, 37).

#### *Special 100 Percent Allowances*

Concerning 100 percent allowances (*supra*, p. 883), the record demonstrates that the only recipients were department stores:

Malley's, New Haven (James 138-40, 2594, 2596-97; Rubin 1603).

Bamberger's, Newark (CXs 64, 68, 71, 78; George 427-29; Brown 1764-66, 1787-88).<sup>24</sup>

Gimbels, Philadelphia (CXs 101, 110, 116; Feir 584-86, 597-98, 605, 635, 2814, 2817).

Lit Brothers, Philadelphia (CXs 88 A-C, 98 A-B; Connors 557).

Snellenburgs, Philadelphia (CX 17 B-C; RX 25 A-H).

(See generally CPF 14-19, 38-41; RPF 6-7; RR 18-22.)

These 100 percent allowances were primarily for the promotion of new merchandise, but some involved the opening of new stores or new departments, and also omnibus ads.

Despite testimony that these 100 percent allowances were offered uniformly to all accounts (Cohen 992, 1028-29; Sanders 1424-26, 1541-43; see also Rubin 1603, 1682-85, 1711-12), there is no evidence that Surprise paid such an allowance to any customers other than the five department stores listed.

Except for Malley's buyer, there was no testimony by any retailer-witness in New Haven specifically relating to 100 percent allowances, but there is basis for an inference that no such offers were made to the stores competing with Malley's. The testimony of the salesman, Rubin, regarding such offers (Tr. 1682-85, 1711-12, 1730-31) is not convincing, and it does not establish that such offers were made on proportionally equal terms.

In Newark, neither Hirsh nor Hahne received any 100 percent allowances, and the record contains no evidence that they were ever offered such an allowance (*cf.* Brown 1775-77, 1792-95, 1797-99).

Similarly, in Philadelphia, not a single customer competing with Gimbels, Lit Brothers and Snellenburgs received any 100 percent allowances, and all indications point to a failure on the part of Surprise to make such an offer.

Francine's Foundations, for example, moved in May 1960, but it received no 100 percent allowance for a new store opening or for any other promotional purpose (Toll 638-39). Moreover, there is specific testimony that Surprise never offered 100 percent allowances to Harriet's Corsetry (Gilbert 675-76, 688, 700-01) or to Jean Spitzer (Spitzer 804).

Significantly, the Surprise salesman who called on the small

<sup>24</sup> In objecting to the proposed findings of complaint counsel, respondent explains a 100 percent allowance to Bamberger's in May 1962 (CX 78) as connected with the opening of a new store (RR 21). Although the exhibit bears an unidentified handwritten notation "new store," and the Surprise salesman Brown relied on that notation in so testifying (Tr. 1787; but see Tr. 1765), the buyer for Bamberger's specifically testified that the payment exemplified by CX 78 was not for a new store opening (George 428-29). The record leaves unexplained why Surprise paid only 75 percent for another Bamberger's ad (in a different newspaper) advertising the same item on the same day (CX 81 A).

stores in Philadelphia testified that although some of his customers purchased the same styles on which Gimbels and Lit Brothers received 100 percent allowances for ads, he did not offer the small stores 100 percent allowances (Popkave 1843-44; *cf.* Popkave 1861-62; Sanders 1540-41; Brown 1788, 1792).

In defending its practices regarding 100 percent allowances in the Philadelphia area, Surprise relies (RPF 114) on an ad published at its expense on November 17, 1963 (RX 7) which listed the names of various stores carrying the Surprise line (Popkave 1828-42). But this ad—apparently the only one of its kind (Tr. 1844)—is hardly equivalent to the department store ads for which Surprise paid 100 percent. In fact, the Surprise salesman said it was not “on a cooperative basis” (Popkave 1817). There is no showing of proportional equality.

Small stores listed in the ad include Francine's, Gertrude Rechtman, Mary Anne Corset Shop, and Jean Spitzer Corsetiere. Harriet's Corsetry was not included.

Participation in the ad was contingent on the purchase of a minimum quantity of merchandise, the exact extent of which was not established (Popkave 1837-42; Rubin 1683).

Surprise's explanation that the stores which did not receive 100 percent allowances were unwilling to promote new items in return for such allowances (RR 18-19, 22), is not supported by the record.

#### *Other Deviations from Program*

##### *Limitation on Allowances*

The record shows that Surprise purported to have a policy of limiting advertising granted in any calendar year to an amount not exceeding 5 percent of purchases (Cohen 995-1000). It was not until the price list of 1962-63 (CX 16), which was issued in mid-1962, that this limitation was published to the trade; but it appears that such a limitation may have been generally known (Cohen 95, 995; Gilbert 702).<sup>25</sup> In any event, both parties agree that the allowances granted by Surprise are properly measured against such a limitation.

<sup>25</sup> Certain of Surprise's contract forms for cooperative advertising suggest some flexibility with respect to the 5 percent limitation. Thus, the so-called “Two-Ad Agreement” exemplified by CX 3 states that “We reserve the right to limit our share of the expenditure under this agreement to 5% of purchases within the calendar year \* \* \*.” The wording suggests that such a limitation may not have been uniformly applied.

The limitation was more firmly stated in the 1962-63 price list (CX 16), which offered payment of “75% of retailer's local newspaper advertising (limited to 5% of annual purchases) \* \* \*”, and in the “Cooperative Advertising Agreement” form (CX 7) apparently put into use in mid-1962, which specified payments of 75 percent “up to an amount *not to exceed 5% of annual purchases.*”

There is vigorous disagreement, however, concerning (1) the allowances properly included in the annual total and (2) the proper measure of annual purchases to be used as a base for the application of the 5 percent limitation (CPF 23-25, 33-37; CR 14-17; RPF 6-7 and 10-117, *passim*; RR 7-11).

The examiner rejects the contention of Surprise (RPF 6-7) that 100 percent allowances for new store openings, promotion of new products, and omnibus ads should not be included in the total advertising allowances for a given year (see, for example, RPF 68a-c). All the allowances granted are properly subject to the statutory test. The reasoning advanced to support Surprise's contrary thesis is so fallacious as to require no extended comment (see CR 14-15). In addition to deleting numerous 100 percent advertising allowances granted department store customers on its erroneous exclusionary theory, Surprise, in its Proposed Findings, has deleted numerous other allowances in violation of the principle it purports to espouse (see CR 14-17).

As for the base year to be used in computing the limitation, there is no real dispute that until mid-1962, Surprise's policy was to measure its advertising allowances in a given year against 5 percent of the customer's purchases during the prior year (Cohen 996).

Beginning in 1962, Surprise started figuring the 5 percent limitation on a different basis. Since mid-1962, the maximum allowance for the first six months of the calendar year has been computed on the basis of one-half of total purchases during the previous calendar year, and the allowance for the second six months has been figured on the basis of the purchases during the first six months (Cohen 996-1000).

Whichever system Surprise used, it is apparent that the intent was to limit its advertising allowances to 5 percent of current annual sales, with sales during a preceding period used "only as a gauge or guide" (RR 8). A Surprise official testified that if the 5 percent maximum was exceeded, an adjustment was made in the succeeding year (Cohen 1084-85), but the record is barren of any showing of such adjustments (see CR 13-14).

A tabulation by complaint counsel (CPF 23-25) shows the percentage of advertising allowances measured against sales during the previous calendar year. This tabulation demonstrates that some customers received allowances in excess of 5 percent. Surprise complains that the comparison is improper and that the 5 percent computation should be made on the basis of sales during the year contemporaneous with the allowances (RR 7-10). But

when all the allowances are included, a shift in the base year does not change the overall net result. It does, of course, raise the percentage in some instances and lower it in others. The important fact is that under either system of computation, some customers received allowances greater than 5 percent.

A sampling of the alternate tabulations, showing instances in which one system or the other yields an allowance exceeding 5 percent, follows:

Place	Customers	Allowance year	Percent of ad allowances measured against purchases	
			For prior year	For same year
New Haven, Conn. ....	The Edw. Malley Co. ....	1961	5.2	4.1
Bridgeport, Conn. ....	The Howland Dry Goods Co. ....	1962	6.5	4.8
Newark, N.J. ....	Helen Hirsh ....	1960	7.6	3.1
Philadelphia, Pa. ....	Strawbridge & Clothier ....	1961	5.5	5.5
		1960	13.7	9.4
	Gimbels ..... }	1961	10.0	9.2
		1962	9.7	7.3
	Lit Brothers ..... }	1962	5.8	4.9
	Snellenburgs ..... }	1961	8.7	9.9
		1962	8.7	11.3
	Madam Rosalie ..... }	1962	9.1	10.3
	Francine's Foundations .... }	1962	9.0	5.5
	Harriet's Corsetry ..... }	1962	5.8	4.5

(See CPF 23-25 and exhibits there cited; cf. RPF 10, 33, 64, 67-68c, 85-86, 95, 101-2, 113-16; RR 7-11.)

Thus, it is beyond dispute that Surprise failed to adhere to its own terms and discriminated among competing customers in applying or disregarding the 5 percent limitation on annual allowances. It may be noted in passing that this discrimination favored not only department store customers, but also some of Surprise's smaller customers.

#### *Maximum Size of Ads*

The published program (CXs 1, 2, 16) imposed no limitation on the size of advertisements, but contract forms specified a maximum size of 600 lines or 42 inches (CXs 3-12, 13 A, 14 A, 15 A, 186-88).

In the face of the contract limitation, the record shows that the maximum was exceeded on several occasions: