tion of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF

J. C. PENNEY COMPANY, INC.

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

Docket C-2350. Complaint, Feb. 2, 1973—Decision, Feb. 2, 1973.

Consent order requiring the nation's second largest retailing organization located in New York City, among other things to cease representing that certain of their merchandise, including mattress pads and covers, sheets, pillow cases and protectors, are flame retardant or have been treated with a flame retardant finish.

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 J. C. Penney Company, Inc., a corporation, sometimes hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent J. C. Penney Company, Inc., is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware with its offices and principal place of business at 1301 Avenue of the Americas, New York, New York.

Respondent is the second largest retailing organization in the nation and operates approximately 1,700 retail stores throughout 49 states and Puerto Rico. It also offers merchandise for sale through mail order catalogs and catalog desks. The circulation

of respondent's mail order catalog is several million copies per issue, is published at least two times a year, and is mailed to customers throughout the United States.

PAR. 2. Respondent in the course and conduct of its business has been, and is now, engaged in the sale, advertising and offering for sale in commerce of merchandise it ships or causes to be shipped, when sold, from the States of Georgia and Wisconsin and other states to purchasers located throughout the country and maintains and has maintained a course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent's volume of business in the retail sale of general merchandise is and has been substantial. Among such merchandise so sold and shipped are mattress pads and other products.

PAR. 3. Respondent is now, and at all times mentioned herein, has been in substantial competition in commerce with other corporations, firms and individuals engaged in the sale and distribution of mattress pads.

PAR. 4. In the course and conduct of its business in commerce, and for the purpose of inducing the purchase of said mattress pads, respondent has made representations in advertisements, in its mail order catalog circulated throughout the United States and in packaging and labeling with respect to the flame retardant characteristics of said product.

Typical and illustrative of the statements and representations in said advertising and packaging, are the following:

FLAME RETARDANT FITTED MATTRESS PAD AND COVER
THE COTTON FABRIC AND THE FOAM BACK WILL NOT SUPPORT FLAMES

Resists flare!

Resists flame!

Both the cotton top and foam backing are treated for total fire retardancy.

Give yourself and your family the added protection of this flame retardant mattress pad.

THE FLAME RETARDANCY LASTS FOR THE LIFE OF THE PAD
A Penn Prest Flame-Retardant Mattress Pad. Cotton top and foam back are both fire retardant and will not support flame. Stays flame retardant for the life of the product. Diamond stitching binds polyurathane foam back to smooth white cotton top.

THE FLAME RETARDANCY LASTS FOR A MINIMUM OF 25 WASHINGS

LIGHTED MATCHES BURN OUT

All J. C. Penney advertisements of this mattress pad contain a drawing of a lighted cigarette shown on the mattress pad. Immediately beneath the drawing the claim is made "Resists flame!"

PAR. 5. Through the use of the aforesaid statements and representations and others of similar import and meaning, published in five successive J. C. Penney mail order catalogs and in other advertising material, representations have been made directly or by implication:

a) That the entire mattress pad had been treated with a flame retardant chemical.

b) That the entire pad would retard and resist flames.

c) That the flame retardancy lasts for the life of the pad under any conditions of laundering.

d) That the flame retardancy lasts for a minimum of 25 washings.

e) That a lighted cigarette is a flame.

f) That a flame retardant cotton top, quilt-stitched to a flame retardant polyurathane foam backing, will retard and resist flames.

g) That the treated pad provides complete protection against the hazards caused by flames.

PAR. 6. In truth and in fact:

a) The entire mattress pad had not been treated with a flame retardant chemical.

b) The entire pad will not retard and resist flames.

c) The flame retardancy of the pad will not last for the life of the pad under any conditions of laundering.

d) The flame retardancy does not last for a minimum of 25 washings.

e) A lighted cigarette is not a flame.

f) A flame retardant cotton top, quilt-stitched to a flame retardant polyurathane foam will not retard and resist flames.

g) The treated pads do not provide complete protection against the hazards caused by flames.

PAR. 7. Respondent furthermore has failed to disclose in its packaging, labeling and advertising of said product, material and relevant facts related to the proper laundering of said product necessary to preserve the flame retardant finish. Respondent has failed to provide clear and conspicuous warnings to prospective purchasers and purchasers of said product that the use of

chlorine bleach, soap, and hot water temperatures will negate the effect of the flame retardant chemicals in the cotton top and polyurathane foam backing of the pad.

The failure to disclose said material facts leads the consumer to believe that the representations being made are true and complete. Such failure to disclose material facts is unfair, and false, misleading and deceptive, and constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, acts and practices and its failure to disclose material facts, as set forth in Paragraphs Four through Seven above, has had, and now has, the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that such statements and representations were and are true and complete, and into the purchase of substantial quantities of said products.

PAR. 9. The aforesaid acts and practices of respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and

having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34 (b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent J. C. Penney Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1301 Avenue of the Americas, New York, New York.

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

ORDER

It is ordered, That respondent J. C. Penney Company, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale and distribution of mattress pads, mattress covers, sheets, pillow cases and pillow protectors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or indirectly that said products are flame retardant, or have been treated with a flame retardant finish, and from utilizing any words or depictions of similar import or meaning in connection therewith, unless all uncovered or exposed parts (except sewing threads) will retard and resist flame, flare and smouldering, or have been treated with a finish which will retard and resist flame, flare and smouldering.

It is further ordered, That in all instances where respondent represents said products to be flame retardant or treated with a flame retardant finish, that warnings be provided in or on the packaging in immediate conjunction with said representations and in type or lettering of equal size and conspicuousness, and on a label affixed to the products securely and with sufficient permanency to remain in a conspicuous, clear and plainly legible

condition, of any danger from flammability which may result if these products be dry cleaned or washed by other than the recommended means or in excess of a stated number of times.

It is further ordered, That respondent make every reasonable effort to immediately notify in writing all of its customers who have purchased or to whom have been delivered the mattress pad which gave rise to this complaint to alert them to the fact that the top, bottom and skirt portions of such pad had been treated with a flame retardant chemical, but that the binding tape portion, which joins the top of the pad to the skirt portion, may have not in some cases have been so treated; therefore, purchasers should not expect complete protection against all types of flames.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed changes in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all personnel of respondent responsible for the preparation, creation, production or publication of advertising, packaging or labeling of all products covered by this order.

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

IN THE MATTER OF

PEPSICO, INC.

Docket 8903. Interlocutory Order, Feb. 7, 1973.

Rejection of respondent's offer of settlement and returning case to adjudication for further proceeding under Part 3 of the Commission's Procedures and Rules of Practice.

ORDER

By order of December 1, 1972 [81 F.T.C. 1047] the Commission withdrew this matter from adjudication pursuant to Section

2.34(d) of the Commission's Rules of Practice in order that consent negotiations might be conducted with a view to entry of a consent order. The Commission has considered respondent's offer of settlement, has determined to reject the offer and to return the matter to formal adjudicative status. Accordingly,

It is ordered, That the matter be, and it hereby is, returned to adjudication for further proceeding under Part 3 of the Commission's Procedures and Rules of Practice.

Commissioners Dixon and MacIntyre do not concur and would have accepted the offer of settlement.

IN THE MATTER OF

JOE MARKS, TRADING AS HOME IMPROVEMENT CENTER

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS

Docket C-2351. Complaint, Feb. 7, 1973—Decision, Feb. 7, 1973.

Consent order requiring an Akron, Ohio, seller and distributor of residential aluminum siding products, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Joe Marks, an individual, trading and doing business as Home Improvement Center, hereinafter referred to as respondent, has violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Joe Marks is an individual trading and doing business as Home Improvement Center, with his

office and principal place of business located at 3290 South Main Street, Akron, Ohio.

PAR. 2. Respondent is now, and for sometime last past has been, engaged in the advertising, offering for sale, sale and distribution of residential aluminum sliding products and other home improvement products to the general public and in the installation thereof.

PAR. 3. In the ordinary course and conduct of his business as aforesaid, respondent regularly arranges for the extension of consumer credit or offers to extend or arrange for the extension of such credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course of business as aforesaid, and in connection with his credit sales, as "credit sale" is defined in Regulation Z, has caused, and is causing, customers to execute a binding order, hereinafter referred to as the "Order Contract," and one or more confession of judgment (cognovit) notes for the purchase and installation of residential aluminum siding products and other home improvements to the residence of the customer. Respondent does not provide these customers with any other consumer credit cost disclosures.

By and through the use of the order contract and cognovit note, respondent:

(1) Fails, in some instances, to disclose the "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as prescribed by Section 226.8(c)(3) of Regulation Z.

(2) Fails, in some instances, to disclose the "amount financed" to describe the amount of credit extended, as prescribed by Section 226.8(c)(7) of Regulation Z.

(3) Fails, in some instances, to disclose the "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as prescribed by Section 226.8(c)(8)(i) of Regulation Z.

(4) Fails, in some instances, to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

(5) Fails, in some instances, to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as prescribed by Section 226.8(b) (2) of Regulation Z.

(6) Fails, in some instances, to disclose the number, amount, and due dates or periods of payments scheduled to repay the indebtedness, as prescribed by Section 226.8(b) (3) of Regulation Z.

(7) Fails to rescribe the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as prescribed by Section 226.8(b) (5) of Regulation Z.

PAR. 5. By the aforesaid failure to make disclosures, respondent has failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failure to comply with Regulation Z constitutes violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should

issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Joe Marks is an individual trading and doing business as Home Improvement Center, with his office and place of business located at 3290 South Main Street, Akron, Ohio. Respondent is now, and for sometime last past has been, engaged in the advertising, offering for sale, sale and distribution of residential aluminum siding products and other home improvement products to the general public and in the installation thereof.

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

ORDER

It is ordered, That respondent Joe Marks, an individual trading and doing business as Home Improvement Center, or any other name or names, his successors and assigns, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with any extension or offer to extend or arrange for the extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 C.F.R. Section 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C., 1601. *et seq.*), do forthwith cease and desist from:

(1) Failing to disclose the "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as prescribed by Section 226.8(c)(3) of Regulation Z.

(2) Failing to disclose the "amount financed" to describe the amount of credit extended, as prescribed by Section 226.8(c)(7) of Regulation Z.

(3) Failing to disclose the "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as prescribed by Section 226.8(c)(8)(i) of Regulation Z.

(4) Failing to disclose the sum of the cash price, all

charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

(5) Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as prescribed by Section 226.8(b)(2) of Regulation Z.

(6) Failing to disclose the number, amount, and due dates or periods of payments scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

(7) Failing to describe the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as prescribed by Section 226.8(b)(5) of Regulation Z.

(8) Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, in the manner, form, and amount required by Section 226.6, Section 226.7, Section 226.8, Section 226.9, and Section 226.10 of Regulation Z.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent's business organization such as incorporation, partnership, or sale, resultant in the emergence of a new business organization, or any other change in the business organization which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon him of this order, file with the Com-

mission a report in writing setting forth, in detail, the manner and form in which he has complied with the order to cease and desist contained herein.

IN THE MATTER OF

ALTERMAN FOODS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND THE CLAYTON ACT, SEC. 7

Docket 8844. Complaint, May 26, 1971—Decision, Feb. 12, 1973.

Order requiring an Atlanta, Georgia, wholesaler and retailer of groceries and household products, among other things to cease inducing and receiving discriminatory promotional allowances and services from its suppliers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Alterman Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office located at 933 Lee Street, S.W., Atlanta, Georgia.

PAR. 2. Respondent is now and for many years has been engaged in the business of selling groceries and household products to the public at retail, and wholesale to retail grocers and institutional customers. Respondent, through its wholly-owned subsidiary corporations, operates a chain of retail grocery stores under the name Big Apple Super Markets, selling a great variety of food, grocery and non-edible household products. There are presently seventy retail grocery stores composing respondent's chain, which stores are located in the States of Georgia and Alabama. Respondent, through its wholesale division, sells to approximately three hundred seventy-five independent grocers who are members of its voluntary cooperative organization using the name ABC

Food Stores. Respondent's institutional division sells to such concerns as restaurants, hospitals and clubs.

In the course of its business, respondent purchases food, grocery and non-edible household products of many types from a large number of manufacturers, suppliers and handlers of such products. Respondent's sales of its products are substantial, exceeding $133,000,000 annually.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases for resale a great variety of products from a large number of suppliers located throughout the United States. Respondent causes these products, when purchased by it, to be transported from the places of manufacture or purchase to its stores or warehouses located in the States of Georgia and Alabama for resale to the consuming public.

Respondent resells the products it purchases to retail grocers located in Alabama and Georgia and causes these products to be transported from its warehouse in Atlanta, Georgia, to stores located in Georgia and Alabama.

In addition, respondent disseminates advertising in commerce and receives payments in commerce from suppliers for advertising and promotional services and facilities.

PAR. 4. In the course and conduct of its business in commerce, respondent is now and has been in competition with other corporations, persons, firms and partnerships in the purchase, sale and distribution of food, grocery and non-edible household products.

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1956, respondent has knowingly induced and received, or received, from some of its suppliers the payment of something of value to or for respondent's benefit as compensation or in consideration for services or facilities furnished by or through respondent in connection with respondent's offering for sale, or sale, of products sold to respondent by many of its suppliers. Respondent knew or should have known that such payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers, including retail customers who do not purchase directly from such suppliers, who compete with respondent in the sale and distribution of such supplier's products.

PAR. 6. For example, each year during April or May, respondent

holds a food show at which products of its suppliers are displayed. For the past several years, shows were held on May 22, 1966; April 23, 1967; May 19, 1968; and May 24, 1969.

The food shows conducted by respondent are attended by Big Apple Super Market employees, ABC Food Store members and their employees and customers of the institutional division.

Respondent solicits most, if not all, of its suppliers to pay it for renting a booth at the food show. The amount which respondent charged for a booth at the 1966 and 1967 shows was $350. In 1968 and 1969, the cost to a supplier for a booth at the food show was $375.

Participating suppliers are encouraged to advertise in respondent's food show catalogs. At the food show, suppliers are also encouraged to solicit orders from retail grocers who purchase the suppliers' products from respondent.

A substantial number of respondent's suppliers participated in the food shows. Respondent received from participating suppliers in excess of $100,000 each year for its 1966, 1967, 1968 and 1969 food shows.

In addition to the special payments received for its annual food shows, respondent has also knowingly induced and received, or received, other discriminatory promotional payments and allowances in the regular course of its business during the years in question.

PAR. 7. In the course and conduct of its business in commerce, and particularly since 1956, respondent has knowingly induced and received, or received, from some of its suppliers the furnishing of services or facilities connected with respondent's offering for sale, or resale, of such products so purchased when respondent knew or should have known that such services or facilities were not made available by such suppliers on proportionally equal terms to all other customers, including retailer customers who do not purchase directly from such suppliers, who compete with respondent in the resale and distribution of such suppliers' products.

PAR. 8. For example, during respondent's annual food shows, agents, employees or representatives of suppliers performed valuable services such as staffing the booths rented by suppliers from respondent and demonstrating the suppliers' products therein. In addition to the furnishing of such valuable manpower, other services performed by some of the suppliers which

aided respondent in the resale of the suppliers' products included the donation of door prizes, free samples and free orders given away at the show.

PAR. 9. Typical of the suppliers who participated in, and paid for a booth at, respondent's food shows at least once during the years 1966 through 1969 were the following:

Sweet Sue Kitchens, Inc.,
Athens, Alabama.
Martha White, Inc.,
Nashville, Tennessee.
S. T. Jerrell Company,
Birmingham, Alabama.
Interstate Bakeries Corporation,
Birmingham, Alabama.
Bernardin, Inc.,
Evansville, Indiana.
Airkem, Inc.,
Carlstadt, New Jersey.

PAR. 10. Many of respondent's suppliers who participated in respondent's food shows for the years 1966, 1967, 1968 and 1969 did not offer and otherwise make available to all their customers competing with respondent in the sale and distribution of their respective products payments, allowances, services, or other things of value, for advertising, display, or other promotional services or facilities on terms proportionally equal to those granted respondent.

When respondent induced and received, or received, said payments, allowances or services from its suppliers, respondent knew or should have known that it was inducing and receiving, or receiving payments, allowances, services or facilities from its suppliers which the suppliers were not offering and otherwise making available on proportionally equal terms to all their other customers, including retailer customers who do not purchase directly from such suppliers, who were competing with respondent in the sale and distribution of such suppliers' products.

PAR. 11. The acts and practices of respondent, as herein alleged, are all to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45).

Mr. Lee S. Dewey and *Mr. John H. Bedford* supporting the complaint.

Arnall, Golden & Gregory, Atlanta, Georgia, by *Mr. Cleburne E. Gregory, Jr.,* and *Mr. Allen I. Hirsch* for respondent.

INITIAL DECISION BY THEODOR P. VON BRAND, HEARING EXAMINER
APRIL 17, 1972

PRELIMINARY STATEMENT

On May 26, 1971, the Federal Trade Commission issued its complaint against Alterman Foods, Inc. (Alterman), charging it with having violated Section 5 of the Federal Trade Commission Act. In essence the complaint alleges that Alterman violated the law by knowingly inducing and receiving, or receiving, from some of its suppliers discriminatory advertising or promotional payments not made available on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such products. In addition, the complaint alleges essentially that Alterman violated the law by inducing and receiving, or receiving, from some of its suppliers the discriminatory furnishing of services or facilities in connection with respondent's offering for sale or resale of such products when it knew or should have known that such services or facilities were not made available on proportionally equal terms to its competitors. In short, the complaint alleges as a practical matter that respondent violated the Federal Trade Commission Act by inducing certain of its suppliers to violate Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

Primarily, the charges of illegality and the evidence developed in the record pertain to the participation by certain of Alterman's suppliers in respondent's food shows in the period 1966–1969 involving payments of booth rentals and services such as staffing of the exhibit booths during the show.

A prehearing conference was held on August 19 and 20, 1971. Hearings for the presentation of testimony and other evidence by both sides were held in Atlanta, Georgia, commencing on January 4, 1972, and concluding on January 20, 1972, when the record was closed.

This matter is now before the hearing examiner for final consideration on the complaint, answer, evidence, and the proposed findings of fact, conclusions, and briefs filed by counsel for the respondent and counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having

considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT [1]

I. The Respondent and its Business

A. *A General Survey*

1. Alterman Foods, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office located at 933 Lee Street, S.W., Atlanta, Georgia. (Admitted in Answer.)

2. Respondent at all times pertaining hereto has been engaged in the business of selling groceries and household products to the public at retail and to retail grocers and institutional customers at wholesale. Presently, there are 74 retail grocery stores composing respondent's chain. These stores are located in the States of Georgia, Alabama, and Tennessee. Alterman through its wholesale division sells to approximately 375 independent grocers who are members of its voluntary cooperative organization using the name A.B.C. Food Stores. Respondent's institutional division sells to such concerns as restaurants, hospitals, clubs, hotels, and various governmental institutions. (Admitted in Answer; Findings 6–15 [pp. 304–08 herein] *infra.*)

3. Respondent has purchased for resale a great variety of products from a large number of suppliers located throughout the United States. Respondent has caused these products, when purchased by it, to be transported from the places of manufacture or purchase to its stores in the States of Georgia and Alabama and to its warehouse in Georgia for resale to the consuming public.

Respondent has resold the products it purchased to retail grocers located in Alabama and Georgia and has caused these products to be transported from its warehouse in Atlanta, Georgia, to stores located in Georgia and Alabama.

[1] References to the record are made in parentheses, and certain abbreviations are used as follows:

CPF—Proposed Findings of counsel supporting the complaint.

RPF—Proposed Findings of counsel for respondent.

CX—Commission Exhibit

RX—Respondent Exhibit

Tr.—Transcript page.

References to the proposed findings of counsel are to page numbers, preceded by one of the abbreviations listed above. References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, M. Alterman 197.

In addition, respondent has disseminated advertisements in commerce and has received payments in commerce from suppliers for advertising and promotional services and facilities. (Admitted in Answer.)

4. In the course and conduct of its business in commerce, respondent is now and has been in competition with other corporations, persons, firms, and partnerships in the purchase, sale, and distribution of food, grocery, and non-edible household products. (Admitted in Answer.)

5. According to Alterman's Annual Report for 1967, respondent has experienced steady growth and progress since its beginning (CX 13–E). This is reflected by Alterman's sales figures in the record showing a steady growth in sales from $45,839,962 in 1959 to $127,574,803 in 1967 (CX 215–H). At the time complaint issued respondent's sales exceeded $133 million annually. (Admitted in Answer.)

The record documents the following breakdown of Alterman's transactions with respect to its Big Apple stores, its institutional division, and the A.B.C. stores:

	1966	*1967*	*1968*	*1969*
Big Apple Stores	$63,453,065	$67,471,124	$71,672,612	$74,317,577
Institutional Division	89,735	67,654	63,814	57,994
A.B.C. Stores	12,590,733	13,994,801	15,066,617	15,207,040
Total Sales	$76,133,533	$81,533,579	$86,799,043	$89,582,611

(RX 36)

B. *Alterman's Wholesale Operation*

6. The Alterman wholesale division sells to independent merchants—the A.B.C. Food Stores, a voluntary cooperative. This program began in 1955 (D. Alterman 32–34).

According to Alterman's 1966 Annual Report, the wholesale division selling to the A.B.C. stores added substantially to the overall profit picture and at that time was growing at an annual rate of 8 to 9 percent (CX 12–F). The 1967 Annual Report states that the A.B.C. wholesale division for that period "experienced an especially good year," its sales increasing "in the same dynamic manner which has characterized this division since its inception." (CX 13–E) This expansion continued in the fiscal year ending April 26, 1969, with sales "at an all time high." (CX 216–F)

7. Under the contract between Alterman and the A.B.C. stores, respondent agrees, among other things, to sell to the members of its voluntary group certain items at wholesale cost, to furnish

other merchandise at the lowest operational and competitive costs, to furnish a weekly bulletin pertaining to such information as price or special promotions, to secure for the retail members additional discounts, to aid the retailer in store planning, supervision, and advertising, and to issue rebate checks every 6 months based on the members cooperation and the volume of purchases. The A.B.C. stores in consideration for such services agree to concentrate as nearly as possible all their purchases through the A.B.C. warehouse, to buy a minimum order of $500 a week, to pay dues and service charges, and to make payment for merchandise under the conditions specified. (RX 8).

8. At the time Alterman formed the voluntary group, A.B.C. stores, "there were no wholesale grocers per se in the city of Atlanta" and there still are no firms that perform this type of service, with the exception of Associated Grocers Co-op, Inc. (A.G.), a retailer-owned cooperative (D. Alterman 32). In the period 1966–69 only A.G. and Alterman's A.B.C. group could have provided a complete wholesale line to independent retailers (Nash 605; Wicks 807; Gantt 934).

9. Alterman, in connection with the operation of its voluntary group, performs the function of a wholesaler.

C. *The Retail Operation*

10. Retail store operations are the principal duty of Max Alterman, a vice-president of respondent, which operates its retail stores under the names of Big Apple, K-Mart, Food Town, and Food Giant (M. Alterman 191–92).

There were 63 Big Apple stores in 1966; 65, in 1967; 66, in 1968; and 67, in 1969 (RX 1–E). Most of the Big Apple stores are separately incorporated and are operated as separate corporations (C. H. Sheperd 311). They are wholly-owned subsidiaries of respondent, Alterman Foods, Inc. (D. Alterman 38, 100). Two Big Apple stores were incorporated as part of respondent Alterman Foods, Inc., and this was the case in the period 1966–69 (C. H. Sheperd 311; RX 1–A). The subsidiary Big Apple corporations file independent tax returns and give dividends when profits permit (C. H. Sheperd 312).

The K-Mart, Food Giant, and Food Town stores are discount operations (M. Alterman 192; C. H. Sheperd 338). In the case of the twelve K-Mart stores, Alterman owns the food section, and in most instances it leases the space from K-Mart (M. Alterman 192). The record shows further that six or seven of the

Food Giant supermarkets operated by respondent are a part of Alterman Foods (C. H. Sheperd 338).

11. In a review of Alterman's operations, respondent's 1967 Annual Report described its retail business as follows:

Your company is presently operating sixty-five modern, congenial, and efficient retail outlets in Georgia and Alabama. Each Big Apple offers appealing selections of fresh meat and produce, frozen foods, diary, dry groceries, and non-food items. Our stores pride themselves on offering to the consumer a selection of more than 12,000 items, a supply ample to satisfy the desires of the most discriminating shopper. In addition, Big Apple stores give trading stamps. Your company also operates five K-Mart Food stores in greater Atlanta * * * * (emphasis supplied) (CX 13–G).

According to the same report respondent's wholesale division supplies the A.B.C. stores "from the same warehouse that serves our own Big Apple and K-Mart units" (*ibid*).

This report further discloses:

We opened two new Big Apple stores and one K-Mart Food discount unit. In addition, several older, existing Big Apple stores were remodeled and enlarged, thereby enabling those units to more completely satisfy the demands of our most persuasive critic: the consumer. Two small, outdated units were closed, leaving a total of 63 stores in operation at year's end. Seven stores are planned for the coming fiscal year, five Big Apples and two K-Mart Food stores. Two of these units have already been opened since our year's end, and, judging from the overwhelming response of our customers, *it appears that these units will swiftly find an important place in the Alterman Foods organization.* (emphasis supplied) (CX 13–E)

12. According to Alterman's 1966 Annual Report respondent's "retail chain continues to expand at an annual rate of twelve to fourteen per cent." The same document indicates that respondent Alterman was responsible for the promotional and merchandising techniques employed in connection with its retail chain's operations. In this connection the report stated:

* * * All of the retail stores, with the exception of three K-Mart Grocery, give trading stamps. The Company has the S&H trading stamps franchise in the greater Atlanta area and certain other locations. King Korn trading stamps are given outside the S&H franchise area. While trading stamps have exceptional promotional value, management has not hesitated to use other promotional items, such as games of cash give-away and extensive, radio, T.V. and newspaper advertising to promote sales. (CX 12–F)

Alterman's annual reports for 1968 and 1969 similarly demonstrate a continuing expansion of respondent's retail chain operation (CX 215, 216).

13. Alterman has a standard contract with its subsidiary corporations operating supermarkets (RX 2–A–C). The agreement is signed in behalf of respondent by Isadore Alterman, chairman of respondent's board and "Read and Accepted" on behalf of the subsidiary corporation by Sam P. Alterman who is also a senior official of the respondent (CX 12–B, CX 13–B). The agreement provides that nothing therein shall constitute a partnership, joint venture, or agency between the parties but shall merely be deemed a management agreement (RX 2–C).

Alterman under the agreement is at its own cost to purchase for, sell, ship, and deliver to the subsidiary all merchandise required in the operation of its business except such merchandise as milk, bread, or meal that may be purchased locally. The contract further provides that respondent shall be under a similar obligation with respect to items such as store fixtures. In addition respondent is to provide remodeling or repair services with respect to the business premises of its subsidiaries at its net cost to them as well as the purchase of various types of business insurance for each subsidiary at cost.

Alterman under the terms of the agreement also agreed to place at the subsidiaries disposal and at Alterman's expense its own executive and administrative staffs "for guidance and counsel" as well as to furnish each subsidiary with "direct and indirect executive supervision and management service." Alterman further undertakes to furnish its retail subsidiaries with the services of a district supervisor to supervise the subsidiaries store managers and "integrate the operation of your store or stores as part of the 'Big Apple Super Markets' chain," check and supervise the subsidiaries inventories, and advise and assist in all merchandising and management problems (RX 2–A, B).

The contract further provides that Alterman will furnish the subsidiaries at respondent's expense with the services of its advertising department in planning, preparing, and executing consumer advertising programs. The agreement also obligates respondent at its own expense to furnish and maintain the subsidiaries accounting records.

Under the heading "Miscellaneous Facilities" the agreement obligates Alterman to provide warehousing and warehousing services as well as central office facilities of various kinds.

The subsidiaries under the terms of the agreement are required to repay the cost of merchandise, trade fixtures and equipment, remodeling and construction and in addition, among other

things, to pay an amount equal to 2½ percent of the subsidiaries gross sales for the furnishing of the services previously enumerated and to pay all the expenses of the stores except as specifically provided otherwise (RX 2–B, C).

14. Alterman's real estate subsidiary, the Altmo Realty Company, according to respondent's 1966 Annual Report, at that time owned various shopping centers that contained fourteen Big Apple stores (CX 12–H).

15. On the basis of the record as a whole, it is evident that respondent Alterman Foods, Inc., functions as a chain retailer in the operation of its Big Apple, Food Giant, and K-Mart stores, notwithstanding the fact that most of the Big Apple stores are wholly-owned subsidiaries. In any event, even in the case of the Big Apple stores two of these units were not separately incorporated in the relevant period. (Findings 10–14, *supra*)

II. The Food Show

16. The Alterman food show has been in existence since 1956. This is an annual event which runs approximately the same time each year in the period March through May. (D. Alterman 38–39) David Alterman, a senior vice-president in charge of respondent's wholesale division, is primarily responsible for the food show, which is under the jurisdiction of Alterman's wholesale division (D. Alterman 109; M. Alterman 205–06).

Generally, Alterman begins work on its food show in the preceding December with a kickoff meeting attended by Alterman officials, Mrs. Craft, director of the food show, and respondent's buyers to discuss the policies and procedures to be followed (D. Alterman 59, 121–22; M. Alterman 196). At these meetings there was no discussion as to whether Alterman's buyers should make inquiry of suppliers as to whether proportionately equal payments have been made available to respondent's competitors as a result of the suppliers participation in the food show (Craft 726; M. Alterman 196–97; G. Alterman 230). No Alterman official has mentioned that this should be done (Craft 726), and David Alterman, respondent's official in charge of the food show, has never advised Alterman's buyers to make such an inquiry (D. Alterman 47).

17. All of Alterman's suppliers are automatically invited by written invitation to participate in the food shows (D. Alterman 39–40; M. Alterman 197–98; CX 211–A). The invitations to par-

ticipate as a co-sponsor are drafted by David Alterman (D. Alterman 103). In pertinent part, the invitation to suppliers for the 1969 show stated:

* * * If you have not participated in the past, perhaps the fact that more than 120,000 cases of merchandise were sold at the show would influence your decision. (CX 211-A)

According to the attached brochure, the primary purpose of the show is "to expose suppliers' products to our own Big Apple employees, operators of our ABC co-op group, and institutional buyers" (CX 211-B). The brochure reinforces this point with the statement that "The ultimate goal of a sponsor in a show of this type is to sell as many products to as many buyers as possible." (CX 211-C)[2]

18. The Alterman show is put on for the institutional, independent and supermarket buyers, and it is attended by the A.B.C. Food Store members, their families, and their friends (D. Alterman 103, 67; M. Alterman 209); by Big Apple store managers, comanagers, employees, and their families (M. Alterman 209); and by the customers of the respondent's institutional division (D. Alterman 67). Personnel from respondent's K-Mart and Food Giant supermarkets also attend (M. Alterman 213). The suppliers are given tickets and may invite whomever they wish (D. Alterman 67).

19. At the food show only A.B.C. store members and institutional customers were entitled to buy the items displayed and sold at the booths (D. Alterman 77). Only the A.B.C. stores that placed orders were eligible to receive the free orders and rebates at the food show (D. Alterman 106-07; Stipulation attached to CX 221-A—H). Similarly, the prizes offered by suppliers at the show were available only to the A.B.C. members placing orders (Stipulation attached to CX 221-A—H).

In those instances when an A.B.C. store makes a purchase at the show the order is put in a container from which the drawing for free merchandise is made. After the drawing, the other orders are then turned over by the supplier to the Alterman employees who, in turn, fill the orders for the individual A.B.C. stores which made the purchases (D. Alterman 75-76).

In the case of rebates or display allowances given on the orders purchased at the show, these are passed on to the A.B.C. stores

[2] Essentially the invitations to suppliers for the period 1966-1969 appear substantially the same (Cf. CX 9-A—L (1968) and CX 1-M (1966), CX 5-D (1967).) (D. Alterman 42)

and not retained by Alterman (D. Alterman 107). In fact all display allowances or rebates are passed on to the A.B.C. stores by respondent. The entitlement to such allowances is recorded electronically, and every 6 months Alterman sends each A.B.C. member so entitled a check (D. Alterman 101–02).

20. Respondent gave away approximately 12,000—15,000 tickets for the 1967 and 1968 shows (D. Alterman 67),[3] and Alterman's food show coordinator estimated that approximately 10,000 to 12,000 people attended this event in 1968 and 1969 (Craft 728).

The consuming public as such is not invited to respondent's food show and that event is not advertised to the public (Craft 756; D. Alterman 103–04). It is a wholesale promotion directed to the personnel of respondent's chain stores, the A.B.C. stores, and Alterman's institutional customers (Findings 17–19, *supra*), and it is not a promotion directed to the consumer (May 865–66;[4] Bergman 514; Brown 591, 593). The food show is therefore not a service or facility furnished by respondent in connection

[3] Mrs. Craft, the food show coordinator, estimated that approximately 25,000 tickets were distributed for the 1968 show (Tr. 731). There is no documentary evidence in the record on the basis of which this conflict could be resolved.

[4] Although numerous guests attend the food show, this event is not directed to them as consumers, as a wholesaler witness testified:

Q. Let me ask you—Food Shows, speaking of Food Shows in general, would you being experienced in the business and having been in the business for 21 years, would you consider a Food Show a promotion to the retail stores or would you consider it as an event for the consumer public?

A. For the retail stores.

* * * * * * *

Q. Right, so it wouldn't be a promotion to the public, out on the streets coming in?

A. No.

* * * * * * *

Q. My question is, any time you have 10 to 15 thousand, for example, potential consumers for an event and they can see your product on the consumer level, would this be of value to the product?

A. If a consumer, yes, but I can't answer that the way I think it needs to be answered. The only way a consumer is going to see the product is when it is exposed to the public and a Food Show is not for the Consumer.

Q. That is definitely a retail sales function as you mentioned, but are people who are at a Food Show, are they potential consumers of the product themselves?

A. The people at the food show are the retailers. They are buying the merchandise to put on their shelves to get to the consumer, yes.

Q. Yes, and are these individuals potential consumers in that they might buy the product themselves, is this correct?

A. For their own personal use?

Q. For their own personal use.

A. No, I don't think so. (May 864–66)

with Alterman's offering for sale or resale at retail to the consumer of the products featured at this event.

21. The record as a whole compels the finding that as far as Alterman's retail operation is concerned, the food show and the suppliers' services furnished in connection therewith were in the nature of a sales presentation to respondent's chain store personnel. The promotion, as it pertains to Alterman's retail operation, therefore, was designed to facilitate the original sale by the supplier to respondent rather than the latter's offering for sale or resale of the products featured (Findings 17–20, *supra*).

22. The supplier's cost of participation was a rental of $350 for a booth in the 1966 and 1967 shows that rose to $375 in 1968 and 1969 (D. Alterman 66, 107). However, a supplier could rent less than a full booth (D. Alterman 66).

Alterman realized the following amounts as gross income from booth rentals in the years in question $106,400 (1966), $110,950 (1967), $112,875 (1968), and $117,000 (1969) (CX 223).

Taking into consideration only direct expenditures for such items as rent, food, entertainment, etc., and excluding indirect costs which may also be allocable to the food show program, Alterman realized the following profits from booth rentals at this promotion: $85,360 (1966), $88,510 (1967), $85,152 (1968), and $89,195 (1969) (CX 223, CX 14–B—H, CX 217–A—D, CX 218–A—D).

No firm finding can be made as to the nature and extent of the indirect costs properly allocable to the Alterman food show. The testimony of respondent's controller on the point was inconclusive. In any event, on the basis of his testimony, taking the position most favorable to respondent, the food show profit from booth rentals would be at a minimum an average figure of $25,000 to $30,000 (C. H. Sheperd 324).

III. Respondent's Competitors

23. Associated Grocers Co-op, Inc., is a retailer-owned cooperative which performs the functions of buying for and selling to its members who are independent retail grocers. It also advertises collectively and gives its members managerial assistance and guidance (Maziar 943). The purpose of this organization is to facilitate competition by its members in this day of chain stores and large corporations (Maziar 961). Its membership is diversified, ranging from convenience stores to supermarkets. The

majority of the members however are one-store operations (Maziar 945).

In order to join A.G., an independent grocer pays a $50 entrance fee and purchases capital stock in the amount of $4,000. In 1966, a service fee of $5 a week also went into effect (Maziar 944–45). A.G. retains a certain percentage of the profits, and the balance is returned to the members on the basis of their purchases. Some of the retained profits are used for income tax payments and the remainder is put into the cooperative's surplus which would be distributed to the members in the case of dissolution (Maziar 962). Even where A.G. retains the profits, they are still considered the assets of the individual stockholder-members (Maziar 963).

In the case of the following suppliers; namely, Cumberland, Airwick, Riviana, Sweet Sue, and Bernardin, their advertising and promotional offers were made directly to A.G. headquarters rather than to the individual members (Maziar 946–47).

A.G. headquarters is the "customer" of the suppliers under consideration here that competes with Alterman at the retail level, except in those instances when the cooperative's members buy direct. In the case of "store door" sales direct to the A.G. members, they are the customers that compete with respondent at retail. (See Guide for advertising allowances and other merchandising payments and services, 16 C.F.R. Section 240.3(b) (1971), Example 2.)

A.G. was not created as a wholesaler to drum up wholesale business. It was organized because the member retailers needed to buy as a group (Maziar 965). Although A.G. does have a cash and carry wholesale operation that will sell to nonmembers of the cooperative, this has only a limited stock and it is not in competition with Alterman (Maziar 974–75).[5] Moreover, the competition between A.G. and Alterman for securing membership of independent grocers in respondent's voluntary A.B.C. group or the cooperative is marginal (Maziar 949).[6] Even to the extent that such competition exists, it is not equivalent to demonstrat-

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[5] Jack Maziar, general manager and secretary of A.G. testified:

Q. Would you say your cash and carry section competes with Alterman wholesale?

A. I wouldn't think so. (Tr. 974–75)

Nor does the record show whether A.G.'s cash and carry operation sold the products of those suppliers under consideration here.

[6] In this connection, Mr. Maziar testified:

Q. All right, sir. Is there competition between A.G. and Alterman for membership of independent grocers?

A. To some degree, not too much. (Tr. 949)

ing competition in the resale of the products under consideration here at the wholesale level.

24. A&P, a retail grocery chain, competes with other chains in the Atlanta area, including Big Apple and A.G. (Jones 920).

25. May & Company of Georgia, Inc. (May & Co.), a nonfood wholesaler, also known in the grocery trade as a rack jobber, competed with Alterman in resale of the products of the Cumberland Manufacturing Company to the A.B.C. stores (May 831, 847, 862; J. Sheperd 771).

IV. Participating Supplier

Complaint counsel rely on respondent's transactions with seven suppliers in the period 1966–69 to establish the allegations of the complaint. The facts of record pertinent thereto are set forth below.

A. *Airwick*

26. Airwick Industries, Inc. (Airwick), of Carlstadt, New Jersey, is a manufacturer of chemical specialties for the consumer trade such as air fresheners. In 1969, this manufacturer sold its products in the Atlanta area through a food broker, Clanton Sales, Inc., to Alterman, A&P, and A.G. (Vogt 538–40; CX 35).

27. Airwick has two regular promotions a year in the spring and in the fall, usually at 50 cents a case, and this policy was in effect in 1969 (Vogt 542, 546–48; CX 31, 32, 33).

For the first quarter of 1969, Airwick offered a 50 cent a case allowance on Airwick Liquid 5½ oz. and 8¼ oz.; 75 cents a case on "On Guard" 6½ oz.; $1.50 a case on "On Guard" 12 oz.; and 50 cents a case on Airwick Spray 7½ oz. According to the terms of the offer, such allowances could be deducted from the invoice or set up for a bill-back. "Acceptable trade performance" for such allowances could take the form of newspaper advertising, feature pricing, offshelf display, shelf talker, store survey, or store distribution (CX 31).

The fall promotion dated August 15, 1969, pertained to Airwick Natural Spray and Liquid. No performance was required to receive this allowance, although it was hoped that the customers would furnish performance on a voluntary basis. The reason for making performance voluntary was that Airwick did not feel it had the capability to check on performance as required by FTC rulings (CXs 32, 33).

In addition, there was an opening or introductory offer on Airwick Solid 12/5 oz. of $1.50 a case offered in the Atlanta area in 1969 (Vogt 549–51; CX 34) and payments thereunder were made to A&P, A.G., and Alterman (Vogt 551; CX 35-A—B). Under the terms of the offer Airwick offered the customer $1.50 a case for a 60-day period from the date of his first invoice (Vogt 552). This introductory offer was a price reduction and no performance was required (Vogt 570).

With the exception of the introductory allowance, the first quarter and the fall promotion in 1969 were the only promotional offers made to A&P and A.G. These offers were available to all customers, including Alterman (Vogt 548, 552–53).

28. Over and above the foregoing programs, Airwick which had participated in the three or four years preceding 1969 also participated in Alterman's food show in that year paying $187.50 for half a booth. The products displayed at this show were liquid, aerosol, and solid Airwick (Vogt 553, 562–63; CX 22, CX 35-A—B; Swanson 472).

Airwick's 1969 food show booth was set up, manned, and dismantled by personnel of Airwick's broker (Swanson 470–71).

Airwick as a result of such participation and payment for the food show made no attempt to make proportionately equal offers available to Alterman's competitors (Swanson 472; Vogt 553). Airwick has a policy of not participating in food shows and does not usually take part in such events (Vogt 562). However, on occasion brokers urge Airwick to enter food shows even when the supplier has made it clear that it does not want to participate. Such a situation occurred in 1969 when Airwick was approached by its broker on this subject (*ibid*).

29. Alterman competed in the sale of Airwick products with A&P and A.G. at the retail level (Maziar 953; Jones 920; CX 35).

In the case of respondent's retail operation, the food show and the related services constituted essentially a sales presentation of the products of Airwick to the personnel of its chain stores designed to facilitate Alterman's own purchases from the supplier (Findings 17–21, *supra*).

The food show, which was a wholesale promotion, was not a service or facility furnished by Alterman in connection with its offering for sale or resale of Airwick's products at the retail level. Similarly, the services of the supplier in manning the booth

were not a service or facility furnished in connection with respondent's sale or offering for sale at the retail level to the consumer (Findings 17–20, *supra*). Since the discriminatory food show payment and related services were not in connection with the offering for sale or resale at retail, which is the functional level of distribution involved here, the discrimination is not cognizable under the allegations of the complaint.

B. *Bernardin, Inc.*

30. Bernardin Inc. (Bernardin) of Evansville, Indiana, manufactures home canning caps and lids for home preservation jars which it sells to the grocery trade (Bergman 494–95). In 1969, Bernardin made all its sales through brokers who were also responsible for communicating promotional offers to the customers of this supplier (Bergman 496).

In 1969, Bernardin made sales in the Atlanta area to Alterman, A.G., and A&P's Atlanta Division in the second and third quarters of that year (CX 77).

31. Alterman's total gross purchases from Bernardin for 1969 were in the amount of $12,104.80. On such gross purchases, it received from Bernardin $370 in the form of a standard merchandising allowance, $605.24 in the form of a 5 percent trade discount, and $556.48 as a 5 percent bill-back on net purchases. In addition, the respondent received a $375 payment for rental of a full booth at its 1969 Food Show which was 3.1 percent of its gross purchases for the year (CX 77).

A&P's total gross purchases from Bernardin after returns [7] were $12,373.52. On those purchases it received, after making allowance for returns, $381.70 for Bernardin's standard merchandising allowance and a trade discount in the amount of $866.16 after returns, which was 7 percent of gross purchases. Unlike Alterman, A&P did not receive a bill-back allowance (CX 77).

In 1969, the purchases of A.G. from Bernardin totaled $9,585.58 after returns. After making allowance for returns it received a standard merchandising allowance of $288.75 in that year as well as trade discount of $479.28 which was 5 percent of gross purchases. It did not receive a bill-back of 5 percent on net purchases (CX 77).

The trade discount granted to all three customers—5 percent in the case of Alterman and A.G. and 7 percent in the case of

[7] In the amount of $1,883.92.

A&P is not granted for services performed and is a price discount or reduction (Bergman 517). Similarly, the 5 percent billback granted to Alterman by Bernardin was not reimbursement for performance furnished but was a price discount to meet competition (*ibid*).

The standard merchandising allowance received by all three customers was offered to the trade by Bernardin's price list of January 17, 1969, and was available to all customers. The "merchandising allowance is a per case allowance which is passed on to all customers with no proof of performance required." (Bergman 500; CX 69–C) According to Bernardin's sales manager, "When they [the customers] purchase it it goes to the retailer and by their putting it on the shelf we consider this as merchandising the product." (Bergman 500) The allowance in question since no performance was required or requested has the characteristics of a price reduction rather than that of a reimbursement for services furnished by the customer.

In view of the foregoing and in view of Mr. Bergman's testimony that no offers other than those appearing on its price list (CX 69 C and D) were made to A.G. and A&P in 1969 (Tr. 502–03), the record supports the inference that Bernardin made no promotional offers other than price reductions to these customers in the year in question.

32. Accordingly, in 1969, the only promotional payment, as opposed to price reductions made and offered by Bernardin in the case of the three customers in question, was the food show payment of $375 to respondent.

Bernardin, as a result of participating in the 1969 Food Show did not make proportinately equal offers to competitors of Alterman (Bergman 513; Swanson 472). While Bernardin would have considered participating in other shows of this nature, this willingness was not affirmatively announced to the trade (Bergman 513–14).

33. Alterman competed in the sale of Bernardin products with A&P and A.G. at the retail level (Maziar 953; Jones 920; CX 77).

In the case of respondent's retail operation, the food show and the related services constituted essentially a sales presentation of the products of Bernardin to the personnel of its chain stores designed to facilitate Alterman's own purchases from the supplier (Findings 17–21 *supra*).

The food show, which was a wholesale promotion, was not a

service or facility furnished by Alterman in connection with its offering for sale or resale of Bernardin's products at the retail level. Similarly, the supplier's services furnished in connection with manning the booth were not services furnished in connection with respondent's sale or offering for sale of Bernardin products at the retail level to the consumer (Findings 17–20 *supra*). Since the discriminatory food show payment and the related services furnished by the supplier were not in connection with the offering for sale or resale at the retail level which is the functional level of distribution involved here, the discrimination is not cognizable under the allegations of the complaint.

C. *Sweet Sue Kitchens, Inc.*

34. Sweet Sue Kitchens, Inc. (Sweet Sue), of Athens, Alabama, is a manufacturer of canned chicken and other meat products that in 1968 sold its products in the Atlanta area exclusively through its broker, Foods Unlimited, Incorporated (Shepard 153, 155). Among Sweet Sue's customers in the Atlanta area in 1968 were the A&P's Atlanta Division, A.G., and respondent (CX 64–A—B).

35. In 1968, the promotional offers of Sweet Sue consisted of a program of introductory allowances dated January 2, 1968 at 50 cents or 25 cents a case for certain products for one order only (CX 59);[8] a 50 cents off-invoice allowance for barbeque chicken for all orders taken effective May 6, 1968 through June 21, 1968 (CX 60); and the fall program for products promoted during the promotional period of deliveries from September 15, 1968 and delivered by November 11, 1968 (CX 62–63; H. Shepard 155–59). These promotions, according to the supplier's sales manager, were offered to all the trade in 1968 and no other offers were made to A&P and A.G. (H. Shepard 159).

The record shows that in 1968, Alterman purchased 4,013 cases from Sweet Sue for $37,488.45. On these purchases respondent received from Sweet Sue promotional payments in the form of bill-backs amounting to $1,504.50 on purchases of 3,009 cases of Sweet Sue products for promotional services at a rate of 50 cents a case. This allowance on Alterman's purchases in the first three quarters of the year constituted 4.01 percent

[8] The record is not entirely clear as to whether such introductory offers were promotional payments or price reductions. As Sweet Sue's sales manager testified this apparently depends on how the customer uses it (Tr. 165–66).

of respondent's purchases for the entire year from Sweet Sue (CX 65).

In the second quarter of 1968, Alterman received a bill-back allowance of $500 on purchases of 1,000 cases of Sweet Sue's products constituting 5.53 percent of respondent's purchases in that quarter. In addition, respondent received in the second quarter a payment of $375 for rental of a booth at Alterman's 1968 Food Show. Combined, Alterman's food show payment and the bill-back allowance comprised 9.67 percent of respondent's purchases in this quarter (CX 65).

Under respondent's bill-back arrangement with Sweet Sue, Alterman was to receive 50 cents a case on all items purchased during a quarter, in return for an undertaking to advertise the supplier's products once in a quarter (H. Shepard 160). The agreement had its inception in 1966 at a meeting between Sweet Sue and Alterman officials and was put into effect with respondent's first order thereafter (H. Shepard 161–62).

A&P in 1968 purchased 3,426 cases of the Sweet Sue products for a total dollar amount of $17,404.65. The only allowance received by A&P in that year was $256.25 in the first quarter in the form of an off-invoice allowance amounting to 5.44 percent of A&P's purchases for that quarter or 1.47 percent of the chain's purchases for the year (CX 65).

Sweet Sue's sales manager testified that A&P was recompensed at a rate of 25 cents a case as opposed to Alterman's 50 cents a case because respondent was buying in larger packs (H. Shepard 174; Mallon 449–50).[9]

A.G. purchased 6,053 cases of the Sweet Sue products in 1968 for a total dollar amount of $31,031.05. This customer for the year in question received promotional allowances in the amount of $444.35 in the form of off-invoice allowances and bill-backs or 1.43 percent of A.G.'s total purchases for the year. The comparable percentages for the allowances received by this customer in the first, second, and fourth quarters were 4.73 percent, 1.36 percent, and 1.01 percent, respectively (CX 65).

36. Sweet Sue's payments to Alterman under the bill-back arrangement of 50 cents a case, unrestricted by the time and product limitations inherent in the offers to all the trade in 1968, were discriminatory.

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[9] The record shows that Alterman was buying cases of 24/24 oz. chicken and dumplings while A&P was purchasing the 12/24 oz. pack (CX 65–A—B).