

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

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

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

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

#### G. Wagner Products

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

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

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

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

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

<sup>57</sup> Finding 255.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

\* CX 634A-D

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

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

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

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

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

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

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

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

274. Wagner participated with the Gibson stores, in 1972 and 1973, in advertising in Gibson tabloids which were directed at the ultimate consumers<sup>59</sup> (Hornick 3171, 3174, 3176, 3254). Wagner paid \$500.00, by check dated May 3, 1973, [109]to the Gibson Products Corp. for advertising in the April 1972 Gibson tabloid<sup>60</sup> (CX 633A-F. See also Hornick 3179-80, 3186, 3187, 3190). The tabloid payment to Gibson Products Company was not based upon a percentage of total sales (Hornick 3198). Moreover, it was in addition to the show fee payments made in 1973 (Hornick 3200, 3232).

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

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

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

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

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

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

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

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

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

San Antonio, Texas: Aladdin/Lite N Easy Blue Mist/Carpet Sweeper A (Gibson - 3/30/73, 8/29/73; White Stores<sup>61</sup> - 2/6/73, 3/14/73, 5/18/73, 6/13/73, 8/20/73, 4/25/73, 12/5/73, 3/8/74).

#### H. Farber Brothers

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

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

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

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

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

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

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

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

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

<sup>61</sup> White Stores function at the retail level of operations (Finding 369).

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

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

Show	Number of Booths	Rate Per Booth	Amount of Payment	Form of Payment	Payee	
Aug. 16-22, 1969	3		\$675.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 1127, 1104A
Nov. 3-7, 1969	2		500.00	Check	"	CX 1126, 1103A
Feb. 14-18, 1970	1		250.00	Check	Ideal Travel Agency	CX 1125, 1102A
May 4-8, 1970	1		250.00	Check	"	CX 1124, 1101A
Aug. 17-21, 1970	2		500.00	Check	Ideal Travel Agency 519 Gibson St. Seagoville, Texas	CX 1123, 1100A
Aug. 16-20, 1971	1		275.00	Check	Ideal Travel Agency	CX 1121, 1097A
Nov. 1-5, 1971	2		550.00	Check	"	CX 1122, 1096A
Aug. 14-18, 1972	1		350.00	Check	"	CX 1118; Farber 1129
Feb. 10-14, 1973	1		350.00	Check	H.R. Gibson	CX 1116, 1095; Farber 1132
May 14-18, 1973	1		350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 1115, 1094; Farber 1132
Aug. 13-17, 1973	1		350.00	Check	"	CX 1114, 1093A; Farber 1132
Nov. 5-9, 1973	3		1,050.00	Check	H.R. Gibson, Sr.	CX 1113, 1092; Farber 1132
Feb. 8-12, 1975	1		350.00	Check	H.R. Gibson, Sr. 517 Gibson Seagoville, Texas	CX 1108, 1088; Farber 1138
May 12-16, 1975	1		350.00	Check	H.R. Gibson, Sr.	CX 1107, 1087; Farber 1138
Aug. 4-8, 1975	1		350.00	Check	H.R. Gibson, Sr. 1266 E. Ledbetter Dr. Dallas, Texas	CX 1106, 1086A; Farber 1138

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

297. Farber manufactures approximately 14 to 15 different grades

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

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

Fayetteville, Ark. - carpet roll (Gibson 3/11/74; Wal-Mart<sup>61a</sup> - 1/4/74).

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

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

#### I. Armstrong Environmental Industries

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

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

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

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

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

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

<sup>61a</sup> Wal-Mart and TG & Y function at the retail level of operations (Finding 369).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

J. Unitron

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[127]327. In 1968, Bobby Regeon traveled to California in response to Unitron's invitation to see its new mobile showroom which it wanted to use in the Gibson Trade Show. Regeon requested a five percent special compensation on the total gross volume done with all Gibson stores<sup>62</sup> (Kern 2805-08).

Unitron discussed the special allowance with Regeon in light of its desires to develop its business relationship with Gibson Discount stores and obtain Gibson assistance in promoting the advertisement and sale of Unitron products (Kern 2806-07). Subsequently, Unitron agreed to make payments, beginning in 1969, based on two and one-half percent of adjusted gross sales<sup>63</sup> to all Gibson stores<sup>64</sup> (Kern 2808).

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

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

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

<sup>64</sup> The two and one-half percent payments, which were above and beyond normal discounts and allowances, did not go to Gibson retail stores; consequently, these payments did not appear on the face of the invoices (Kern 2865, 2972).

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

(Continued)

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

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

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

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

Amount	Date of Payment	Form of Payment	Payee	Percentage of Total Sales	Period for Which Payment Was Made	Description of Payment	
\$ 877.42	7/3/69	Check		2 1/2%	Second quarter of 1969	Allowance of 2 1/2% on the second quarter sales to Gibson stores as per agreement	CX 812
\$1,029.32	12/26/72	Check	Gibson Products Co., 519 Gibson St., Seagrville, Texas	2%	January-September 1972	Payment of the rebate fundastors	CX 83X Kern 2855-54 2917
\$ 392.55				2%	January-March 1972	2% of sales to Gibson Products for Jan. - March 1972	CX 828;

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

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

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

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

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

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

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

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

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

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

334. Unitron made available to all of its customers, including Gibson stores, a standard promotional program, which consisted of a ten percent discount<sup>67</sup> given to any customer merely for the asking. The discount was variously designated as a sales promotion, advertising allowance or freight allowance, depending on what use the customer applied it to (Kern 2808-10, 2966). The show fee payment to Gibson, Sr. was over and above that program.

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

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

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

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

337. The tabulations in the record, summarizing Unitron sales in 1970 and 1971, show the following contemporaneous transactions which involve sales of goods of like grade and quality<sup>68</sup> to competing customers (CX 835A-M):<sup>69</sup>

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

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

#### K. Comfort Products, Inc.

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

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

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

<sup>70</sup> Handy Dan Hardware functions at the retail level of operations (Finding 368).

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

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

