advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

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

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

4. Advertising any textile fiber in such manner as to require disclosure of the information required by the Textile Fiber Products Identification Act and the Rules and Regulations thereunder without stating all parts of the required information in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence.

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

IN THE MATTER OF

ALIX OF MIAMI, INC., ET AL.

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

Docket C-306. Complaint, Jan. 25, 1963—Decision, Jan. 25, 1963

Consent order requiring a Miami, Fla., manufacturer of dresses, sportswear, and bathing suits to cease representing falsely that its products made of domestic fabrics were of foreign origin by affixing to them tags bearing the phrase "Fabric Imported from Italy".

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 Alix of Miami, Inc., a corporation, and Alix Schneidman, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that

a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Alix of Miami, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 2700 N.W. Fifth Avenue, in the city of Miami, State of Florida.

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

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, offering for sale, sale and distribution of dresses, sportswear, bathing suits and other articles of wearing apparel to wholesalers and retailers for resale to the public.

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

PAR. 4. Respondents for the purpose of inducing the purchase of certain of their items of wearing apparel have engaged in the practice of affixing thereto tags or labels bearing the following phrase "Fabric Imported from Italy" thereby representing that such items of wearing apparel were made of fabric manufactured in Italy. In truth and in fact, the items of wearing apparel were made of fabric manufactured in the United States and the fabric was not imported from Italy. Therefore, the aforesaid statement and representation was false, misleading and deceptive.

PAR. 5. By the aforesaid practice, respondents place in the hands of wholesalers and retailers the means and instrumentalities by and through which they may mislead the public as to the country of origin of the fabric of which said articles of wearing apparel are made.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchas-

ing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent, Alix of Miami, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2700 N.W. Fifth Avenue, in the city of Miami, State of Florida.

Respondent Alix Schneidman is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Alix of Miami, Inc., a corporation, and its officers, and Alix Schneidman, individually, and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in con-

nection with the offering for sale, sale or distribution of dresses, sportswear, bathing suits or any other article of wearing apparel, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that fabric manufactured in the United States is imported from Italy or otherwise misrepresenting the country of origin of fabric in any manner.

2. Furnishing any means or instrumentality to others whereby they may mislead or deceive the public as to any of the matters or things prohibited in Paragraph 1 hereof.

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

IN THE MATTER OF

CONSOLIDATED APPAREL CO. TRADING AS ROSENBERG'S ET AL.

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

Docket C-807. Jan. 25, 1963—Decision, Jan. 25, 1963

Consent order requiring Milwaukee, Wis., retailers of fur and textile fiber products to cease violating the Fur Products Labeling Act by failing to label fur products, labeling and invoicing them improperly, by advertising which failed to show when fur products were artificially colored and to disclose the country of origin of imported furs, and failing to keep adequate records as a basis for price and value claims; and to cease violating the Textile Fiber Products Identification Act by advertising textiles as "poplin" and "faille" without setting forth the required information as to fiber content, and advertising and branding as "New Fur Fabric Coats," products which contained no hair or fiber of a fur-bearing animal; and requiring them to comply with other provisions of both Acts.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the Textile Fiber Products Indentification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Consolidated Apparel Co., a corporation trading as Rosenberg's, and

Ada Levine and Edward Levine, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Consolidated Apparel Co., trading as Rosenberg's, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its office and principal place of business located at 2303 North Third, Milwaukee, Wis.

Individual respondents Ada Levine and Edward Levine are officers of the said corporate respondent and control, direct and formulate the acts, practices and policies of the said corporate respondent. Their office and principal place of business is the same as that of the said corporate respondent.

The corporate respondent and the individual respondents retail various commodities including textile fiber products and fur products.

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

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products that were not labeled with any of the information required under the said Act and said Rules and Regulations.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

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

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth illegibly on labels, in violation of Rule 28 of said Rules and Regulations.

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

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

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products that were not invoiced with any of the information required under the said Act and said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder inasmuch as required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely or deceptively advertised in that said fur products were not advertised as required under the provisions of Section 5(a) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Said advertisements were intended to aid, promote and assist, directly or indirectly in the sale and offering for sale of said fur products.

Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of the Milwaukee Journal, a newspaper published in the city of Milwaukee, State of Wisconsin.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements:

A. Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact, in violation of Section 5(a)(3) of the Fur Products Labeling Act.

B. Failed to disclose the name of the country of origin of the imported furs contained in the fur products, in violation of Section 5(a)(6) of the Fur Products Labeling Act.

PAR. 8. Respondents in advertising fur products for sale as aforesaid made claims and representations respecting prices and values of fur products. Said representations were of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act.

Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 10. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Said advertisements were used to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said textile fiber products.

Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of the Milwaukee Journal, a newspaper published in the city of Milwaukee, State of Wisconsin.

Among such falsely and deceptively advertised textile fiber prod-

ucts, but not limited thereto, were articles of wearing apparel which were described as "poplin" and "faille" without containing any of the aforesaid required information.

PAR. 12. In advertising textile fiber products for sale as aforesaid respondents falsely and deceptively advertised said textile fiber products in that the name or symbol of a fur-bearing animal was used in the advertisement of such products when said products or parts thereof in connection with which the name or symbol of a fur bearing animal was used, were not furs or fur products within the meaning of the Fur Products Labeling Act and did not contain the hair or fiber of a fur bearing animal, in violation of Section 4(g) of the Textile Fiber Products Identification Act and Rule 9 of the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively advertised textile fiber products, but not limited thereto, were articles of wearing apparel which were described as "new fur fabric coats".

PAR. 13. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name or amount of constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products which were described in advertisements as "New Fur Fabric Coats". By means of the said advertisements the said textile fiber products were represented, either directly or indirectly as containing the hair or fiber of a fur-bearing animal, when such was not the fact.

PAR. 14. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified with the information required under Section 4(b) of the Textile Fiber Products Identification Act and by the Rules and Regulations promulgated under the said Act.

PAR. 15. The acts and practices of respondents as set forth above in Paragraphs 10, 11, 12, 13 and 14 were, and are now, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with

violation of the Federal Trade Commission Act, the Fur Products Labeling Act, and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Consolidated Apparel Co., trading as Rosenberg's, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its office and principal place of business located at 2303 North Third, Milwaukee, Wisconsin.

Respondents Ada Levine and Edward Levine are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Consolidated Apparel Co., a corporation, trading as Rosenberg's or under any other trade name, and its officers, and Ada Levine, and Edward Levine, individually and as officers of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce of fur products; or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which are made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

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

2. Setting forth on labels affixed to fur products:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in illegible form.

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

B. Falsely or deceptively invoicing fur products by:

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

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

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

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

It is further ordered, That respondents Consolidated Apparel Co., a corporation, trading as Rosenberg's or under any other trade name, and its officers, and Ada Levine and Edward Levine, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other

device, in connection with the introduction, delivery for introduction, sale, advertising or offering for sale, in commerce, or in the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act do forthwith cease and desist from:

A. Falsely or deceptively advertising textile fiber products by:

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

2. Using any name, word, depiction, descriptive matter, or other symbol, which connotes or signifies a fur-bearing animal, unless such products or parts thereof in connection with which the names, words, depictions, descriptive matter or other symbols are used, are furs or fur products within the meaning of the Fur Products Labeling Act: *Provided, however*, That where a textile fiber product contains the hair or fiber of a fur-bearing animal, the name of such animal, in conjunction with the words "fiber", "hair", or "blend", may be used.

B. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of constituent fibers contained therein.

2. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products by representing, either directly or by implication, through

the use of such terms as "Fur Fabric" or any other terms which connote or imply the presence of a fiber, that any fiber not present in a textile fiber product is contained therein.

3. Failing to affix labels to such textile fiber products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

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

IN THE MATTER OF

NATIONAL DAIRY PRODUCTS CORPORATION

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

Docket 6651. Complaint, Oct. 16, 1956—Decision, Jan. 30, 1963

Consent order requiring the largest company in the dairy products industry in the United States, which by 1950 had acquired over 400 subsidiary concerns and become a nationwide organization, to divest itself within a period of 18 months of two dairy companies it acquired in 1954 in Wilmington, N.C., and Amarillo, Tex., respectively, and until Oct. 1, 1972, to refrain from acquiring any domestic manufacturer, processor, or seller of dairy products without prior approval of the Commission.

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 (U.S.C. Title 15, Sec. 45) and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent National Dairy Products Corporation hereinafter referred to as "National", is a corporation organized and existing under the laws of the State of Deleware, with its principal

office and place of business located at 260 Madison Avenue, New York 17, N.Y.

PAR. 2. National is a holding company and an operating company. National and its subsidiaries, which are either owned or controlled by National, are engaged principally in the purchase, manufacture, processing and distribution of dairy products throughout the United States, Canada, and many foreign countries. National is the largest company engaged in the dairy products industry in the United States. National and its subsidiaries are engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 3. A substantial portion of the growth of National and its subsidiaries has been through mergers and acquisitions. Beginning with 1924, National initiated a policy of expansion by acquiring a large number of concerns engaged in practically all branches of the dairy products industry. By 1950, prior to the time that Section 7 of the Clayton Act was amended, National had acquired over 400 concerns engaged in the purchase, manufacture, processing and distribution of fluid milk, ice cream, cheese, butter, and condensed and evaported milk. Primarily as a result of said acquisitions, National's net sales increased from $20,180,892 in 1924 to $906,641,022 in 1950. National followed a pattern of acquiring dairy concerns in selected localities, strengthening its position in these localities by additional acquisitions, branching out by acquiring companies in nearby localities, consolidating its local acquisitions into broad regional or district organizations, bringing into the fold leading companies in the major regions, and, by this steady pattern of encroachment, becoming a nationwide organization with a substantial share of the purchasing, manufacturing, processing and distribution of dairy products.

PAR. 4. National and its subsidiaries are primarily engaged in the purchase, manufacture, processing and distribution of a diversified line of dairy products. National's business is conducted through various product divisions, subsidiaries and affiliated companies.

National's Milk Divisions and Milk Processing and Distribution Subsidiaries process and sell milk, concentrated fresh milk, chocolate milk, buttermilk, cream, butter, eggs, cottage cheese, special milks, and other dairy products to both wholesale and retail accounts in the East, Midwest, South and District of Columbia.

National's Ice Cream Division and Subsidiaries manufacture and sell a diversified line of frozen desserts under numerous brand names in various parts of 33 States and the District of Columbia. The ice cream subsidiaries operate 194 plants located in 32 States and the District of Columbia.

National's Butter Division distributes and sells butter in New York,

Indiana, Tennessee, Illinois, Massachusetts, Alabama, Nebraska and Ohio. The butter subsidiaries operate 26 plants in 11 States, viz., Alabama, Illinois, Indiana, Kansas, Kentucky, Missouri, Nebraska, New York, Ohio, South Dakota and Tennessee.

Kraft Foods Company, a subsidiary, purchases, ages, imports, manufactures and processes cheese and cheese products which are sold throughout the United States and in practically all foreign countries. Kraft Foods Company also manufactures margarine, mayonnaise, salad oil, "Miracle Whip" and other salad dressings, and various other products used in the manufacture of foods and animal and poultry feeds.

Other products of National's subsidiaries include refined vegetable oils and their by-products, shell and frozen eggs, milk powder, malted milk, concentrated milk, condensed milk, ice cream mix, whey powder, caramel candy, mustard, casein, emulsifiers, stabilizing agents, and certain specialized products used in pharmaceuticals and for certain other industrial purposes.

Kraft Foods Company conducts an extensive national advertising program in connection with the sale of its products. National's trademark, "Sealtest", under which many of National's subsidiaries process and distribute dairy and other food products, is emphasized through national advertising and other promotional activities.

PAR. 5. National's net sales for all products increased from approximately $906 million in 1950 to $1,260 million in 1955, an increase of $354 million, or 39%.

National's fluid milk sales increased from approximately $272 million in 1950 to approximately $453 million in 1955, an increase of approximately $181 million, or 66%.

National's sales of frozen desserts increased from approximately $135 million in 1950 to approximately $201 million in 1955, an increase of approximately $66 million, or 48%.

A substantial portion of the aforesaid increases in sales resulted directly from the acquisitions hereinafter described.

PAR. 6. In a series of transactions beginning in January 1951, National and certain of its subsidiaries have acquired all or part of the stocks or assets of the following named corporations engaged in the purchase, manufacture, processing or distribution of dairy products. When used herein the term "dairy products" shall include one or any number of the following products: milk, cottage cheese, cream, ice cream, cheese, butter, powdered milk, ice cream mix, canned fresh milk, frozen desserts and evaporated milk. All of the acquired corporations at the time of the said acquisitions, in the regular course of business, either purchased, manufactured, processed or distributed

dairy products in and throughout the various States of the United States or purchased and received shipments of dairy products or equipment related to the manufacture, processing or distribution of dairy products from producers, suppliers, manufacturers or processors located throughout the United States. All of the acquired corporations, prior to and at the time of the acquisitions, were engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. Such acquisitions include the following:

1951

(1) Cokers Pedigreed Seed Co., Hartsville, S.C.

1952

(2) Spring Valley Butter Company, 2532 Penn St., Kansas City, Missouri.
(3) Versailles Farm Products Co., 6135 Manchester, St. Louis, Missouri.
(4) McCluer Cheese Co., Springfield, Missouri.
(5) Schlosser Bros., Inc., 705 E. Market St., Indianapolis, Indiana.
(6) Avon Dairy Inc., 630 Woodward Ave., Rochester, Michigan.
(7) Ballard Ice Cream Co., Inc., 315 No. Alabama Street, Indianapolis, Indiana.

1953

(8) Premier Industries, Inc., Second and Madison Streets, Covington, Kentucky.
(9) United Dairy Farms of Albany, Inc., 581 Livingston Ave., Albany 5, N.Y.
(10) Beale Dairy, Inc., 20–22 Mesmer St., Buffalo, N.Y.

1954

(11) White Ice Cream & Milk Co., Wilmington, N.C.
(12) Plains Creamery, Inc., Box 30, Amarillo, Texas.
(13) Ideal Pure Milk Co., Inc., 201 S.E. Eighth Street, Evansville, Indiana.
(14) Ak-Sar Ben Ice Cream Co., % Velvet-Rich Ice Cream Co., Irvington, Nebraska.
(15) Dairymen's League Cooperative Association, Inc., 100 Park Ave., New York, N.Y.
(16) Peoria Creamery Company, and Jacksonville Creamery Co., 521 S. Washington St., Peoria, Illinois.
(17) Smith & Cutbush, Inc., 61 Hyde Boulevard, Ballston Spa, N.Y.

1955

(18) Garden Farm Dairy, Inc., Box 363, Denver, Colorado.
(19) Indiana Condensed Milk Co., Inc., 320 N. Meridian Street, Indianapolis, Indiana.
(20) Mooo Shops, Inc., 1 Gateway Centre, Pittsburgh, Pa.

1956

(21) Beatrice Foods Co., Cadillac, Michigan.

PAR. 7. In a series of transactions beginning in January 1951, Na-

tional and certain of its subsidiaries acquired all or part of the assets of 18 dairy product concerns, located in 11 states, which were individually owned and were not corporations. Such acquisitions include the following:

(1) Dean Dairy, 834 Boston Post Road, Weston, Mass.
(2) Shelley Dairy Co., 330 South Pine St., Lima, Ohio.
(3) Bob E. Lewis, 1432 Charles St., Huntington, Ind.
(4) Arthur Carey, Huntington, Ind.
(5) Giles County Dairy Products Co., Pulaski, Tenn.
(6) Vincent J. and Ruth Snell, 182 E. Shore Drive, Whitmore Lake, Mich.
(7) Hirschman Dairy, Fifth and Summer Sts., Florence, N.J.
(8) Shamrock Creamery Co., Pontiac, Mich.
(9) Woy's Ice Cream, Everett, Pa.
(10) Pure Food Ice Cream Co., 119 Main St., LaCrosse, Wis.
(11) Shelbyville Pure Milk Co., N. Main St., Shelbyville, Tenn.
(12) Finis and Sadie Hunt, Clarksville, Tenn.
(13) Gaylord W. and Doris M. Green, 127 W. Summit St., Chelsea, Mich.
(14) Community Dairy Co., 695 Atlantic Ave., E. Rochester, N.Y.
(15) Imperial Dairy Products Co., Cohoes, N.Y.
(16) Irvington Dairy c/o Velvet-Rich Ice Cream Co., Irvington, Nebr.
(17) Jay F. Bowman, 735 East End Ave., Lancaster, Pa.
(18) Hilldale Dairy, Dubuque, Iowa.

PAR. 8. On June 5, 1952, National acquired the stock and assets of The Humko Company, Memphis, Tennessee.

The Humko Company was incorporated under the laws of Tennessee in 1935. Humko was engaged in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

Humko refines, processes and sells to the margarine, salad oil and salad dressing industries edible vegetable oils. It also produces and sells shortening for the use of the commercial baking industry and shortening and packaged salad oil for household use. The Humko Company's sales in 1951 totaled $71,187,159.

PAR. 9. National's great size and financial resources, in relation to that of its competitors, together with its product and geographical diversification, may give and have given National the power, in the course and conduct of its business, to do among other things the following:

(a) Expend substantial sums to make interest or noninterest bearing loans to customers and potential customers.

(b) Make loans of equipment and facilities in substantial amounts to its customers and potential customers.

(c) Sell equipment and facilities to customers and potential customers at prices that are substantially less than the market value of said equipment and facilities.

(d) Pay substantial sums in the form of rebates to customers and potential customers in advance of being earned.

(e) Make substantial payments to customers and potential customers in the form of gifts or gratuities.

(f) Expend substantial sums for performing service of value for its customers, e.g., repainting the customer's establishment.

(g) Charge favored customers and potential customers discriminatory prices.

(h) Expend substantial sums to promote its various brands through advertising and other promotions.

(i) Hire key employees of competitors eliminated through National's acquisitions.

(j) Enter into express or implied agreements or understandings with customers and potential customers which may have and do have the effect of excluding competitors.

PAR. 10. The acquisitions listed in Paragraphs 6 and 7, either individually or collectively, may have the effect of substantially lessening competition or tending to create a monopoly in the following ways, among others:

(a) Industry-wide concentration of the purchase, manufacture, processing or distribution of dairy products has been increased;

(b) Actual and potential competition between National and the acquired corporations in the purchase, manufacture, processing or distribution of dairy products may be or have been eliminated;

(c) The acquisitions by National may enhance National's competitive advantage in the purchase, manufacture, processing or distribution of dairy products to the detriment of actual or potential competition;

(d) The acquisitions provide National with additional facilities which National may utilize to extend practices identical or similar to those hereinbefore described in Paragraph 9 to the detriment of actual or potential competition;

(e) Competitive manufacturers, purchasers, processors or distributors of dairy products may be foreclosed from a substantial segment of the market in that National has eliminated the acquired corporations as potential suppliers or customers;

(f) Independent business concerns have been eliminated from the Dairy Products Industry;

(g) Actual and potential competition in the purchase, manufacture, processing or distribution of dairy products may be substantially lessened.

PAR. 11. In addition, the acquisition of the stock and assets of The Humko Company listed in Paragraph 8 herein, may have the effect of substantially lessening competition or tending to create a monopoly in the following ways, among others:

(a) Industry-wide concentration of the purchase, processing and sale of edible vegetable oils for the manufacture of margarine, salad oil and salad dressing has been increased;

(b) Actual and potential competition between National and The Humko Company in the processing and sale of shortening and salad oil has been eliminated;

(c) The acquisition of The Humko Company by National may enhance National's competitive advantage in the manufacturing, processing or distribution of margarine, salad oil and salad dressing to the detriment of actual or potential competition;

(d) Competitive manufacturers, processors or distributors of margarine, salad oil and salad dressing may be deprived of a source of supply of edible vegetable oil in that National may eliminate The Humko Company as a supplier or potential supplier;

(e) Actual and potential competition in the purchase, manufacture, processing or distribution of margarine, salad oil and salad dressing may be substantially lessened.

PAR. 12. The foregoing acquisitions alleged and set forth in Paragraphs 6 and 8 constitute a violation of Section 7 of the Clayton Act (15 U.S.C. Sec. 18).

PAR. 13. The constant and systematic elimination of actual and potential competitors and otherwise lessening of competition by the means of the acquisitions described in Paragraphs 6, 7, and 8 herein are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 14. The foregoing acquisitions, acts and practices, as hereinbefore alleged and set forth, constitute a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45).

ORDER WAIVING NOTICE AND ACCEPTING AGREEMENT CONTAINING ORDER TO CEASE AND DESIST

This matter having come before the Commission upon the hearing examiner's certification of the question whether the requirement of the Commission's Notice of July 14, 1961, requiring the filing of notice of intent to enter into a consent agreement, should be waived; and

It appearing that the failure of the respondent to file timely notice of its intention to dispose of the proceeding through entry of a con-

sent agreement is attributable to the then uncertain state of the law and was not for the purpose of delay:

It is ordered, That the filing of notice by the parties as prescribed under the Commission's published Notice of July 14, 1961, be, and it hereby is, waived.

And it further appearing that the agreement that has now been entered into affords an adequate basis for appropriate disposition of this proceeding and should be accepted, and that the Commission itself should initially decide this matter, and forthwith issue its decision and order:

The agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent is a corporation 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 260 Madison Avenue, in the city of New York, State of New York.

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

I

It is ordered, That respondent, National Dairy Products Corporation, within a period not exceeding 18 months after the service of this order upon respondent, shall divest itself absolutely, subject to the prior approval of the Commission, of:

A. The fluid milk business in the Counties of Craven, Pamlico, Carteret, Jones, Onslow, Duplin, Pender, New Hanover, Brunswick and Bladen, North Carolina, acquired by respondent as the result of its acquisition of the capital stock of White Ice Cream & Milk Company, a North Carolina corporation (hereinafter called "White"), comprising the fluid milk plant located in Wilmington, North Carolina, the branch milk distribution points described in Annex A attached hereto (p. 130), the machinery, trucks, and equipment of such fluid milk business so acquired and now owned by respondent and used in the operation of said fluid milk business as well as all trademarks and trade names so acquired, together with all additions, replacements and improvements heretofore made by respondent to such plant, branches, machinery, trucks and equipment so acquired and now owned by respondent and used in the operation of said fluid milk business (hereinafter called the "White fluid milk assets").

B. The fluid milk business in the Counties of Parmer, Castro, Swisher, Briscoe, Hall, Childress, Cottle, Collinsworth, Donley, Armstrong, Randall, Deaf Smith, Wheeler, Gray, Carson, Potter, Oldham,

Hemphill, Roberts, Hutchinson, Moore, Hartley, Dallam, Sherman, Hansford, Ochiltree, and Lipscomb, Texas, and in the Counties of Beaver, Harper, and Ellis, Oklahoma, acquired by respondent as the result of its acquisition of the capital stock of Plains Creamery, Inc., a Texas corporation (hereinafter called "Plains"), comprising the fluid milk plant located in Amarillo, Texas, the milk receiving and processing plant located at Arnett, Oklahoma, the branch milk distribution points described in Annex B attached hereto (p. 130), and the machinery, trucks and equipment of such fluid milk business so acquired and now owned by respondent and used in the operation of said fluid milk business as well as all trademarks and trade names so acquired, together with all additions, replacements and improvements heretofore made by respondent to such plants, branches, machinery, trucks and equipment so acquired and now owned by respondent and used in the operation of said fluid milk business (hereinafter called the "Plains fluid milk assets").

C. The divestiture of the White fluid milk assets and the Plains fluid milk assets provided for in paragraphs A and B above shall be accomplished by respondent so as to divest each of the businesses as a going concern, capable of competing effectively in the areas involved.

D. Respondent, in divestitures under paragraphs A and B above, shall not sell or transfer, directly or indirectly, any of the White fluid milk assets or Plains fluid milk assets to anyone who, immediately following the respective divestitures, shall be a stockholder holding more than one-half of 1% of the outstanding stock of the respondent, an officer, director, representative, employee or agent or otherwise directly or indirectly connected with or under the control of the respondent.

E. Pending divestiture, respondent shall not make any changes in the plants, machinery, buildings, equipment or other property of whatever description which shall impair their present rate of capacity for the processing and sale of fluid milk, or their market value, unless said capacity or value is restored prior to divestiture.

II

Respondent shall divest itself of the White fluid milk assets and Plains fluid milk assets in the following manner and subject to the following conditions:

A. Beginning promptly after the date of service of this order upon respondent by the Commission, respondent shall make diligent efforts in good faith to sell the White fluid milk assets and the Plains fluid milk assets and shall continue such efforts to the end that the sale thereof shall be effected within the aforesaid period of 18 months.

Respondent shall submit to the Commission summaries of conversations of authorized representatives of respondent with potential purchasers or their representatives relating to the sale of such assets, and, subject to any legally recognized privilege, copies of all written communications pertaining to negotiations, offers to buy or indications of interest in the acquisition of the whole or a part of the assets in question, within 15 days after the termination of the calendar month in which the conversations occurred or the communications were sent or received by respondent.

B. If complete divestiture shall not have been accomplished within the aforesaid period of 18 months or any extension of said period which the Commission may grant, the Commission will give respondent notice and afford it an opportunity to be heard before the Commission issues any further order or orders which the Commission may deem appropriate.

C. For the protection of the purchaser or purchasers of the White fluid milk assets and the Plains fluid milk assets, respectively, respondent shall not sell processed fluid milk for a period of five years from the effective dates of the sale of such assets in or for the purpose of resale in the counties of North Carolina listed in Article IA of this order and in or for the purpose of resale in the counties in Texas and Oklahoma listed in Article IB of this order, respectively.

D. Within sixty days after divestiture of the White fluid milk assets or the Plains fluid milk assets, respondent shall file with the Commission a report in writing setting forth in detail the manner and form in which it shall have complied with the terms of this Order with respect thereto.

E. Respondent is not required by this Order to sell, license or in any way convey any rights to any of its trademarks or trade names, including "Sealtest", not acquired from White or Plains, respectively.

III

It is further ordered, That until October 1, 1972, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any domestic concern, corporate or noncorporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any state of the United States in the business of manufacturing, processing or selling at wholesale or on retail milk routes (a) fluid milk, (b) ice cream, ice milk, mellorine, sherbets or water ices, (c) natural or processed cheese, or (d) butter, without the prior approval of the Federal Trade Commission.

ANNEX A

BRANCH MILK DISTRIBUTION POINTS

Owned:

Branch	2500 Arendell St., Morehead City, N.C.
Branch	Court Street, Jacksonville, N.C.

ANNEX B

BRANCH MILK DISTRIBUTION POINTS

Owned:

Vacant	315 E. Atchison, Pampa, Texas.
Branch	125 S. Houston, Pampa, Texas.
Branch	832 North Weatherly, Borger, Texas.

Rented:

Branch	220 Conlon Street, Dalhart, Texas.
Branch	Highway 70 West, Muleshoe, Texas.

IN THE MATTER OF

THE BORDEN COMPANY

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

Docket 7129. Complaint, Apr. 22, 1958—Decision, Jan. 30, 1963

Order requiring the producer since 1892 of Borden brand evaporated milk and which since 1938 packed the same grade and quality of evaporated milk under private labels as under its own Borden brand, to cease discriminating in price between its customers buying the milk under the Borden label and those buying the product under private label.

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 the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C.A., Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, The Borden Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 350 Madison Avenue, New York 17, N.Y.

PAR. 2. The Borden Company is primarily an operating company engaged in a variety of enterprises. These enterprises include exten-

sive manufacture, processing, distribution and sale of dairy products throughout the United States. The Borden Company is and has been, at all times, referred to herein, one of the largest concerns in the dairy products industry.

Included among the aforesaid operations of The Borden Company is the manufacture, distribution and sale of evaporated milk. At all times referred to herein The Borden Company sold substantial quantities of evaporated milk to concerns engaged in the purchasing, distributing, wholesaling or retailing of food products. In 1956 its sales of evaporated milk were in excess of $30,000,000.

PAR. 3. In the course and conduct of its said business, The Borden Company has sold and distributed its evaporated milk to purchasers thereof located in States other than the State of origin of said product, and has caused such product, when sold, to be shipped and transported from its place of business in the State of origin to purchasers located in other States. There is now, and has been, a constant current of trade in commerce, as "commerce" is defined in the Clayton Act, in said product by respondent between and among the various States of the United States and the District of Columbia.

Said product is, and has been, sold and distributed for use, consumption and resale in the various States of the United States and the District of Columbia.

PAR. 4. The Borden Company, in the course and conduct of its said business is now, and at all times referred to herein has been, in substantial competition with others engaged in the manufacture, distribution and sale of evaporated milk in commerce between and among the various States of the United States and the District of Columbia.

Each and every one of The Borden Company's purchasers of evaporated milk are, and have been, in substantial competition with other of its purchasers of evaporated milk.

PAR. 5. During the period from January 1, 1956, to the present, The Borden Company, in the course and conduct of its business, has discriminated in price between different purchasers of its evaporated milk of like grade and quality by selling it to some of its purchasers at substantially lower prices than to other of its purchasers. An example of such discriminations in price is set out as follows:

Plants of The Borden Company engaged in the manufacture of canned evaporated milk are located at Albany, Oregon; Modesto, California; Ft. Scott, Kansas; Dixon, Illinois; New London, Wisconsin; Perrington, Michigan; Wellsboro, Pennsylvania; Lewisburg, Tennessee; and Chester, South Carolina. Each of the aforesaid plants manufactured and canned evaporated milk, some of which was offered

and sold generally as a "Borden"-labeled product to purchasers engaged in the purchasing, distributing, wholesaling or retailing of food products, and some of which was offered and sold as a buyer-labeled product to selected purchasers engaged in the purchasing, distributing, wholesaling or retailing of food products.

The Borden Company's pricing system for evaporated milk includes two pricing methods. "Borden"-label evaporated milk is priced on a uniform, delivered, one price basis, which includes the cost of delivery from the plant of manufacture to the purchaser. Buyer-label evaporated milk is priced on an f.o.b. plant basis. From January 1, 1956, to the present, the prices of both "Borden"-label and buyer-label evaporated milk have varied from time to time. Throughout the aforesaid period, however, buyer-label prices have been consistently and substantially lower than "Borden"-label prices. The aforesaid price differential is illustrated by prices in effect in July 1957, which were as follows:

Plant	Borden label (per case, tall 48's)	Buyer label (per case, tall 48's)	Price differential
Albany, Oreg	$6.45	$5.59	$0.86
Modesto, Calif	6.45	5.12	1.33
Ft. Scott, Kans	6.45	5.26	1.19
Dixon, Ill	6.45	5.25	1.20
New London, Wis	6.45	5.32	1.13
Perrington, Mich	6.45	5.42	1.03
Wellsboro, Pa	6.45	5.37	1.08
Lewisburg, Tenn	6.45	5.01	1.44
Chester, S.C	6.45	5.01	1.44

Only a small portion of the price differential hereinbefore referred to was attributable to cost of delivery of "Borden"-label evaporated milk from the plant of manufacture to the purchaser. From January 1, 1956, to the present, through the use of the sales method and pricing system hereinbefore described, The Borden Company made sales of buyer-label evaporated milk to selected customers at prices substantially less than the prices to other customers of "Borden"-label evaporated milk.

PAR 6. The effect of respondent's aforesaid discriminations in price between different purchasers of such products sold and purchased in the manner and method as above described may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, said favored purchasers, or with customers of either of them.

PAR. 7. The foregoing alleged discriminations in price made by respondent, The Borden Company, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. Raymond L. Hays, *Mr. Theodor P. von Brand*, and *Mr. Richard B. Smith* for the Commission.

Dewey, Ballantine, Bushby, Palmer & Wood, by *Mr. Kent V. Lukingbeal* and *Mr. John E. F. Wood*, of New York, N.Y., and *Mr. Cecil I. Crouse*, of New York, N.Y., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

DECEMBER 15, 1961

I. The Complaint

1. The complaint herein was issued on April 22, 1958, charging the respondent with discrimination in price between different purchasers of its evaporated milk of like grade and quality during the period from January 1, 1956, to the date of the complaint, by selling such milk to some of its purchasers at substantially lower prices than to others of its purchasers, in violation of § 2(a) of the Clayton Act as amended by the Robinson-Patman Act. The portions of the Clayton Act upon which the complaint is based provide as follows:

> Sec. 2(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; * * *.
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, * * *.

2. The complaint alleges that certain of respondent's plants manufactured and canned evaporated milk, some of which was sold as a "Borden-labeled" product to purchasers engaged in the wholesaling or retailing of food products, and some of which was sold under the

purchaser's label as a "buyer-labeled" product to certain other "selected" purchasers who were also engaged in the wholesale or retail distribution of food products. The amount of such sales in 1956 is alleged to exceed $30,000,000.

3. The complaint alleges further that two different pricing systems were employed by the respondent in the sale of such evaporated milk. On one hand, the Borden-labeled evaporated milk was sold throughout the United States at a uniform delivered price, which included the cost of the milk and the cost of transportation thereof from respondent's plant to the purchaser. On the other hand, the buyer-labeled evaporated milk was sold on an f.o.b.-plant basis, which did not include the cost of transportation from the respondent's plant to the purchaser. The complaint further alleges that from January 1, 1956, to April 22, 1958, the date of the complaint, the price of the buyer-labeled evaporated milk has been consistently and substantially lower than the price of the Borden-labeled evaporated milk, a difference varying, during July 1957, from 86¢ to $1.44 per case. The complaint avers further that only a small portion of such price differential was attributable to the cost of delivering the Borden-labeled evaporated milk. The complaint concludes that the effect of such discrimination in price may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and its purchasers are engaged, or to injure, destroy or prevent competition with respondent, with respondent's favored purchasers, or with customers of either of them.

II. The Answer

4. The respondent, although denying in its answer various particular allegations of the complaint, admits that it is one of the larger corporations in the United States engaged in the dairy industry; that it sells and distributes its products in interstate commerce; and that it maintains a different pricing system for its Borden brand milk, as distinguished from its buyer-labeled evaporated milk.

5. Respondent particularly declares that its prices have been consistently low to meet equally low prices of competitors, and that the prices of its two lines of evaporated milk did not differ more than the difference in cost thereof. In conclusion, respondent denies that its pricing practices in the sale of evaporated milk have resulted in any injury to competition, or that such practices are in violation of the provisions of § 2(a) of the Clayton Act, as amended.

III. Hearings and Proposed Findings

6. Hearings for the reception of evidence in support of the case-in-chief, in defense, in rebuttal, and in surrebuttal were held intermit-

tently from September 22, 1958, to and including July 11, 1961. Consideration has been given to the entire record herein, including proposed findings as to the facts, proposed conclusions, and written arguments in support thereof. Each of those proposals which has been accepted has been, in substance, incorporated into this initial decision. All proposals not so incorporated are hereby rejected.

IV. The Issues

7. The controlling issues herein, arising from the pleadings, the evidence and the relevant provisions of the Clayton Act, are as follows:

a. During the period of time contemplated in the complaint, was the evaporated milk sold by respondent under its own label, and that sold by it under the labels of purchasers, of "like grade and quality"?

b. If respondent did in fact sell evaporated milk of "like grade and quality" under both its own label and the labels of its purchasers, did respondent discriminate in price between the purchasers of Borden-labeled milk and purchasers of private-labeled milk?

c. If respondent did so discriminate in price between purchasers of its evaporated milk "of like grade and quality", is there a reasonable probability that the result of "* * * such discrimination may be substantially to lessen competition, or tend to create a monopoly in any line of commerce"?

d. If the record shows, *prima facie*, that the respondent has discriminated in price in its sales of evaporated milk of like grade and quality, and by such discrimination has tended to injure competition or create a monopoly, has respondent successfully sustained its "* * * burden of rebutting the *prima facie* case thus made" by justifying its price discrimination by proving that such difference in price was consequent to "only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such [evaporated milk] was to such purchasers sold or delivered"?

V. Identity of the Respondent

8. The respondent, The Borden Company, is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, New York 17, N.Y.

VI. Respondent's Business in General, And Its Evaporated Milk Business in Particular

9. The respondent is engaged in the manufacture, processing, distribution and sale of an extensive variety of food, dairy and chemical

products in the United States and abroad. Its total sales in 1957 amounted to $931,220,662. The only product with which we are here concerned is evaporated milk. Substantial quantities of this product have been shipped from respondent's various plants to purchasers thereof located in States other than the States of manufacture. In 1956 respondent's sales of evaporated milk exceeded $30,000,000.

10. Evaporated milk has been produced by the respondent by evaporating whole milk to approximately one-half its original volume; adding Vitamin D and certain minerals as a stabilizing agent to prevent curdling; putting such mixture in cans, and sterilizing it. This product has most frequently been packed by the respondent in 14½-ounce cans, 48 cans to a case. These cases are called "tall 48s". Respondent also packs evaporated milk in 6-ounce cans, 96 cans to the case, referred to as "small 96s". When these 6-ounce cans are packed 48 to a case, it is referred to as "small 48s". Other sizes of canned evaporated milk are also produced for the confectionery industry.

VII. Respondent's "Borden Brand" Prices and Sales

11. Respondent has been producing Borden brand evaporated milk since 1892, and selling it, in competition with Pet and Carnation, the other two large producers of evaporated milk in this country, on a delivered-price basis, with the same prices prevailing throughout the United States. The respondent, like its two chief competitors, has continued selling its Borden brand evaporated milk in the same manner, without change, throughout the period of time included in the complaint. The respondent's carload and pool-car delivered prices for Borden brand evaporated milk during this time were as follows:

	Per case tall 48's
January 1, 1956, to May 14, 1956	$6.05
May 15, 1956 to March 29, 1957	6.30
March 30, 1957, to November 18, 1957	6.45
November 19, 1957 to March 31, 1958	6.60

12. The less-than-carload prices throughout this period of time were 5¢ higher per case of tall 48s. The terms of sale have included a cash discount of 2% if paid within 10 days after sale, and a swell allowance of 1/10 of 1% to cover damaged goods sold to retail buyers. Such sales of Borden brand evaporated milk were made principally to wholesalers or jobbers, and to chain stores.

VIII. Respondent's Private-Brand Prices and Sales

13. In about 1938, the respondent began packing its evaporated milk under the private labels of the purchasers as well as under its own Borden brand. During the period of time with which we are con-

cerned, January 1, 1956, to March 31, 1958, the prices of such milk were determined by a pricing formula applicable to all of respondent's private-label customers. This formula included the cost of the buyer's label, the cost of hauling the milk from the dairy farm to respondent's plant, the average monthly cost of the milk, and, finally, a factor referred to as "COTM", or "Cost Other Than Milk", which included the cost of additives such as Vitamin D, the cost of cans, the plant processing, overhead cost, and a gross margin or profit factor. The respondent's private-label prices determined in accordance with the foregoing formula, sometimes referred to as the "Cost plus pricing formula", were net f.o.b. plant. No cash or other discount was allowed the purchaser of private-label milk, and all purchasers buying from the sale plant at or about the same time paid the same price. These prices, however, varied from one to another of respondent's plants, and from month to month in conformance with the changing price of milk paid to the farmers. A further factor of variation was respondent's periodic revision of its gross margin of profit, which was reviewed approximately every 6 months, and adjusted to the changing conditions of respondent's general operation.

IX. Commodities of Like Grade and Quality

14. Counsel supporting the complaint contends that all of respondent's evaporated milk, whether sold under private labels or under the Borden label, is of like grade and quality. The respondent insists, however, that because the uncontroverted evidence shows that Borden brand evaporated milk commanded a substantially higher market price than its private-label evaporated milk, such variously labeled milk is not of "like grade and quality."

15. The evidence shows that there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices.

16. Of necessity, all of respondent's milk retained the same physical composition when it was labeled and sold, as when it was canned, and no magic of the marketplace thereafter changed that simple fact. Fidelity to the record, in our opinion, compels the conclusion that re-

spondent's evaporated milk, regardless of how it was labeled or at what price it may have been sold, either at respondent's plant or in the marketplace, was milk of "like grade and quality" within the meaning of § 2(a) of the Clayton Act as amended. This conclusion accords, we think, with the Commission's past interpretation of the phrase "like grade and quality". See: *Goodyear Tire & Rubber Company*, 22 F.T.C. 232 (1936), reversed on other grounds, 101 F. 2d 620 [3 S. & D. 63] (1939).

X. Survey of Consumer Selection of Evaporated Milk Brands

17. There was received in evidence as respondent's Exhibit 89 the results of a house-to-house survey conducted for the respondent by National Analysts, Inc., entitled "Study of Consumer Selection of Evaporated Milk Brands". The survey was conducted in those geographical areas where the bulk of Borden brand evaporated milk had been sold during the previous years. The purpose of the survey, as stated in the report thereof, was to determine (1) the proportion of consumers using evaporated milk who would buy Borden Brand evaporated milk in preference to an unknown private-label brand, even though the private-label brand sold for from 1 cent to 5 cents per can less than the Borden brand; and (2) to ascertain each consumer's reasons for buying the particular brand purchased.

18. Of the 3,952 housewives interviewed, 2,200 were deemed eligible for the survey in the sense of having purchased evaporated milk within the past two months. Of the 2,220 interviewed, 1,951, or 87.9 percent were represented to have purchased from the interviewer either a can of Borden brand evaporated milk, or a can of an unknown private label brand. Of the 1,951 housewives who purchased milk from the interviewer, 1,403, or 72 percent, purchased Borden brand, and 548, or 28 percent, purchased a private-label brand. Prior to the purchase, however, each housewife was presented with a set of kitchen cutlery as compensation for her cooperation in granting the interview. She was then asked to select and purchase her preference of the Borden brand milk and the unknown private-label brand milk, which latter brand was priced from 1 cent to 5 cents less per can than the Borden brand. After the purchase was completed, the interviewer returned the purchase money to the housewife, and the milk became a gift.

19. Each housewife was then asked the reason for her selection. Typical of the answers received were:

[Borden Brand] seems to be a lot creamier than other evaporated milks.

[Borden Brand] doesn't have a can taste.

I have never had any [Borden Brand] sour like I have other kinds.

Well, we've used other brands and we like Borden's the best. We like the flavor better.

[Borden Brand] is a heavier milk and you could tell in your coffee when the milk is cheaper because it's too thin. * * * [Borden Brand] has a good thick texture.

[Borden Brand] is more flavorsome than some other brands—that have an unpleasant taste.

* * * I like Borden's because I feel they are more sanitary in the handling and preparing of their milk.

I don't think [Borden Brand] has that thickness that some canned milks have—that canny taste.

The cheaper ones are watery. Borden's is the best evaporated milk to whip that I know of.

My mother used to use Borden's and she liked it.

I like Borden's powder milk better than any kind of powdered milk so I am sure the evaporated would be good.

I've heard the name Borden's a long time * * *.

* * * [Borden Brand] has been on the market for forty years so it must be good.

20. To the extent that the reasons given by the housewives for their preference involve a comparison, expressed or implied, of Borden brand with an unknown brand, we regard their reasons as worthless. A valid comparison cannot, of course, be made between the known and the unknown. Furthermore, the survey does not prove, nor tend to prove, that Borden brand and Borden's private-label brands are of a different grade or quality of evaporated milk.

21. The survey does tend to prove, however, that Borden brand evaporated milk is a well-known and widely distributed product, which is preferred to unknown brands by a substantial number of housewives, even though the Borden brand costs 1¢ to 5¢ per can more. This conclusion is supported in substance by the testimony of the retail merchants in North Carolina who testified in this proceeding.

XI. Differences in Price Between Borden Brand and Private-Label Brand Evaporated Milk

22. Numerous invoices in the record show that during the period of time included in the complaint, the f.o.b. price of respondent's private-label evaporated milk at its various plants was consistently and substantially lower than the delivered price of respondent's Borden brand evaporated milk. The transactions evidenced by these invoices occurred at one or another of respondent's nine plants, located, respectively, at Fort Scott, Kansas; Wellsboro, Pennsylvania; Modesto, California; Albany, Oregon; Dixon, Illinois; New London, Wisconsin; Perrinton, Michigan; Lewisburg, Tennessee; and Chester, South Carolina. The prices of Borden brand and private-label brand evaporated milk prevailing at three of respondent's plants during the time involved illustrate the differences in price, as follows:

CHESTER, S.C., PLANT

[Per case]

	Delivered price, Borden brand milk	F.o.b. price private-label milk
1957—June	$6. 45	$4. 8942
July	6. 45	4. 9051
August	6. 45	4. 9210
September	6. 45	4. 8660
October	6. 45	4. 8166
November	6. 45	4. 9361
December	6. 60	4. 9741
1958—January	6. 60	5. 0227
February	6. 60	5. 0289
March	6. 60	4. 9436

LEWISBURG, TENN., PLANT

	Delivered price, Borden brand milk	F.o.d price private-label milk
1956—August	6. 30	$4. 7363
September	6. 30	4. 81988
Do	6. 30	4. 8321
October	6. 30	4. 7718
Do	6. 30	4. 8418
November	6. 30	4. 7411
Do	6. 30	4. 8211
Do	6. 30	4. 8311
1957—January	6. 30	4. 9837
Do	6. 30	5. 0737
February	6. 30	5. 0478
Do	6. 30	4. 9628
Do	6. 30	5. 0578
March	6. 30	4. 9766
Do	6. 30	4. 8966
Do	6. 30	4. 9666
Do	6. 30	4. 9866
Do	6. 30	5. 0566
April	6. 45	4. 8742
Do	6. 45	4. 9542
May	6. 45	4. 8389
Do	6. 45	4. 9189
June	6. 45	4. 8749
July	6. 45	4. 9232
Do	6. 45	4. 8332
August	6. 45	4. 8327
September	6. 45	4. 8744
October	6. 45	4. 9738
November	6. 45	4. 966
December	6. 60	4. 999
1958—January	6. 60	5. 0273
February	6. 60	5. 0072
March	6. 60	4. 9436
Do	6. 60	4. 9188

FORT SCOTT, KANS., PLANT

1956—July	$6.30	$5.0625
August	6.30	5.0606
September	6.30	4.9749
Do	6.30	5.0241
Do	6.30	5.05866
October	6.30	5.0037
Do	6.30	5.0567
Do	6.30	5.0877
November	6.30	5.1146
Do	6.30	5.1716
Do	6.30	5.1986
December	6.30	5.1258
Do	6.30	5.1828
Do	6.30	5.2098
1957—January	6.30	5.2431
Do	6.30	5.3001
Do	6.30	5.2759
Do	6.30	5.3271
March	6.30	5.0874
Do	6.30	5.1444
Do	6.30	5.2244
Do	6.30	5.1714
Do	6.30	5.2514
April	6.45	5.1512
Do	6.45	5.2082
Do	6.45	5.2352
May	6.45	5.1295
Do	6.45	5.1865
Do	6.45	5.2135
June	6.45	5.1256
Do	6.45	5.1966
July	6.45	5.1822
Do	6.45	5.1832
Do	6.45	5.1122
August	6.45	5.2077
Do	6.45	5.2757
September	6.45	5.2229
Do	6.45	5.2959
October	6.45	5.2737
Do	6.45	5.3455
Do	6.45	5.2725
November	6.45	5.3245
Do	6.45	5.3995
Do	6.45	4.966
1958—February	6.60	5.2509
Do	6.60	5.3249

23. Respondent contends that the differences in price cited above are not comparable because they do not include such factors as the delivery cost of the Borden brand milk, as well as many other factors which they contend are included in the price of that brand, and which are not included in the price of Borden's private-label evaporated milk. Counsel supporting the complaint contend, however, that it is not necessary to adjust the price of the private-label milk and the Borden-label delivered price, in order to make them comparable for the purpose of showing a price differential under the Clayton Act. Counsel

quoted from the opinion of the Supreme Court in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 [6 S.&D. 817, 826] (1960), as follows:

* * * it is only by equating price discrimination with price differentiation that Section 2(a) can be administered as Congress intended. As we read that provision, it proscribes price differences, subject to certain defined defenses, where the effect of the differences "may be substantially to lessen competition * * *." In other words, the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we read to other conditions into the law by means of the non-directive price "discriminate in price" * * *.

24. Although counsel admits that the Supreme Court was not therein adjudicating the same problem of determining whether prices had to be adjusted to make them comparable prior to determining price differential or discrimination within the meaning of the Clayton Act, they nevertheless contend that the above language clearly indicates that price discrimination means mathematical difference between the two prices, without considering those factors which may be offered in a cost-justification defense by respondent. We believe that counsel supporting the complaint are correct in their contention; and, accordingly, we find that the differences in price, as herein shown, are *prima facie* price discrimination within the intent and meaning of the Clayton Act.

25. It remains to be determined, however, whether such price differences resulted in a substantial lessening of competition, thus violating the law, or whether such differences in price between respondent's Borden brand evaporated milk and respondent's private-brand evaporated milk have been justified by respondent, as due allowances for differences in the cost of manufacture, sale or delivery of such milk.

XII. Business Lost and Gained by Respondent

26. As previously stated, respondent has been selling private-labeled evaporated milk since about 1938, using its f.o.b.-plant pricing formula. In the 18 months preceding the period of time covered by the complaint, respondent lost the business of Safeway in the Northwestern and Rocky Mountain States, in the amount of approximately 200,000 cases a year. According to respondent's representative, this business was acquired by Pet and Carnation, who, because they had plants in that area while respondent did not, were able to offer Safeway a better price.

27. In the first few months of 1956, the respondent also lost additional business, amounting to 33,000 to 35,000 cases of evaporated milk, to Pet in the El Paso, Texas, area, which that representative of respondent again attributed to a lower price resulting from the more

convenient location of Pet's plants in that area. During the remainder of the period covered by the complaint, respondent lost additional private-label business in the amount of about 20,000 cases, based upon its sales for the preceding 12 months, to unknown competitors in the Midwest area.

28. About July of 1955, Producers Creamery of Springfield, Missouri, discontinued the sale of private-label evaporated milk. Three of its customers, namely, Topco Associates, Central Retailer-Owned Grocers, and Hill Stores Company (hereinafter referred to as Topco, CROG and Hillco) asked the respondent to supply them with private-label milk. In the negotiations which followed, respondent agreed not only to supply these "orphaned" customers of Producers Creamery with evaporated milk for their Southwest area, but to supply CROG and Topco in a number of other areas. Respondent also agreed to supply Hillco from respondent's plant in Birmingham, Alabama.

29. Thereafter, respondent commenced the packing of evaporated milk at four additional plants, at which it had formerly packed only Borden brand milk: Dixon, Illinois; New London, Wisconsin; Perrinton, Michigan; and Lewisburg, Tennessee. In 1957, respondent received additional requests from other new customers to pack milk under their private labels, and as a result, in May 1957, it began canning private-label evaporated milk at its Chester, South Carolina, plant.

30. The evidence shows that all of these new private-label purchasers came to the respondent of their own accord, and were not solicited by the respondent; that respondent dealt with them in the same manner in which it had dealt with its previous private-label customers; and that respondent made no distinction between large and small accounts. Respondent's private-label prices were in each instance determined by the use of its cost-plus pricing formula.

31. In determining the amount of the gross margin to be included in the price of private-label evaporated milk, Witness Barry, production merchandising manager for the Borden Company, testified that the respondent followed the same practice which it had followed in the past, of selling at the highest possible price, so as to obtain the maximum amount of profit, and yet not at a price so high as to create an undue risk of losing the business to other private-label canners.

XIII. Midwest Competitors of The Borden Company

32. Representatives of seven relatively small canners of evaporated milk located in the Midwest, including Ohio, Indiana, Illinois, Michigan, Iowa, Missouri and Kansas, testified in support of the com-

plaint. Although each of these seven milk canners sold evaporated milk both under their own labels and under private labels, by far the larger percentage of their evaporated-milk business consisted of the sale of private-label milk. None of them advertised or sold their product on a national level, and all of them sold their private-label evaporated milk, with minor exceptions, on a delivered-price basis. None of these canners had plants east or south of the Ohio River or south of the Missouri-Arkansas state line. In fact, no evaporated-milk producers at all had plants in the Eastern or Southern areas, other than the respondent and its two largest competitors, Pet and Carnation.

a. Page Milk Company

33. The testimony of Mr. George B. Page, president of the Page Milk Company, shows that his company canned evaporated milk at plants located in Merrill, Wisconsin, and Coffeyville, Kansas. The milk produced at the Wisconsin plant was shipped principally to customers in the metropolitan east, whereas the Kansas plant served the area west of the Mississippi River. The annual sales volume of the Page Milk Company from 1950 through 1957 was:

	Cases
1950	701,100
1951	647,705
1952	687,858
1953	761,168
1954	714,318
1955	720,884
1956	726,443
1957	735,803

34. During the period covered by the complaint, the Page Milk Company lost to the respondent sales of about 3,650 cases of evaporated milk, based upon the volume of sales for the previous 12 months. The purchaser was the Kimbell Grocery Company, Fort Worth, Texas, with six locations in Texas and New Mexico. The date of Kimbell's last order to Page was February 3, 1958, and the purchase price on that order was $6.03 per case of tall 48s, including delivery, with a 2% cash discount. Kimbell's first order from respondent was dated March 14, 1958, and shows a price of $5.44 per case of tall 48s, f.o.b. respondent's plant, with a label charge of 9¢ per case, and a swell allowance of 1%.

35. The record does not show specifically what private-label business was gained by Page during the period covered by the complaint, but it does show a gain of 9,360 cases of tall 48s evaporated milk in 1957 over 1956. This gain more than balances the loss to Borden

that the Page Milk Company sustained during that same period. Mr. Page testified, however, as follows:

* * * The entry of the Borden Company into the private-label business and the manner in which they have been operating has placed a severe competitive pressure on the entire unadvertised brand of private-label milk structure and that has, in my opinion, largely been felt in the way of a lowered market price with which we must contend.

b. United Dairy Company

36. Mr. Jack D. Anderson, vice president and general manager of the United Dairy Company (hereinafter referred to as United Dairy), testified that his company had evaporated-milk plants located at Barnesville, Lodi and Waterford, Ohio, and that its principal sales territory consisted of the Northeastern States east of Ohio, and extending as far south as Virginia and West Virginia. United Dairy's annual domestic sales volume of evaporated milk during the years 1950 to 1957, inclusive, was:

	Cases
1950	754, 666
1951	610, 171
1952	641, 862
1953	636, 945
1954	738, 315
1955	887, 651
1956	1, 041, 041
1957	958, 373

37. During 1956 United Dairy lost two accounts, Penn Fruit Company, Philadelphia, Pennsylvania, and Brockton Public Markets, Brockton, Massachusetts, which had totaled 8,990 cases of evaporated milk over the previous 12 months, to Topco, which was purchasing from the respondent. During 1957 United Dairy lost the Central Retailer-Owned Grocers account, with an annual volume of 3,425 cases, to the respondent. United Dairy's total 1957 sales of 958,373 cases, although less than its 1956 sales of 1,041,041 cases still constituted its second-highest annual volume for the 8-year period from 1950 through 1957; and the 3,425 cases lost to the respondent were only a small portion of its total drop of 82,668 cases in sales during 1957. The record does not disclose the reason for all of this decrease in sales. Three of the four accounts lost by United Dairy to the respondent or customers of the respondent were, however, located considerably closer to the respondent's plants than to United Dairy's plants.

38. Witness Anderson complains particularly of the competition of respondent since 1956, as follows:

The competition has forced our prices down from the level we had previous to that and some of the competition has been selling on a different basis. On an f.o.b. basis and it is made highly competitive because of those factors.

c. Westerville Creamery Company

39. Mr. William L. Johnson, president and general manager of Westerville Creamery Company (hereinafter referred to as Westerville), testified that his company produced evaporated milk, fluid milk, powdered milk, cottage cheese and ice cream, and that it had an evaporated-milk plant located in Covington, Ohio, from which it sold products in the Eastern section of the United States, from Maine to Florida. The company's annual sales of evaporated milk for the years 1950 through 1957 were:

1950	641,981
1951	597,171
1952	455,127
1953	571,574
1954	656,745
1955	701,847
1956	593,739
1957	589,242

40. The record shows that Westerville lost five accounts in 1956, with an annual volume aggregating 102,931 cases, approximately the amount by which that company's 1956 sales volume declined as compared with its 1955 volume, as shown by the table above. None of those accounts were lost to the respondent. In fact, Mr. Johnson testified that Westerville was not in competition with the respondent until the following year, 1957. In that year, however, Westerville lost six accounts, which subsequently began purchasing from respondent's customer Biddle. This loss involved a volume of approximately 38,462 cases per year. Mr. Johnson blamed this downward trend in his company's sales of evaporated milk upon the respondent's competition.

41. In fairness, however, it must be observed that such a trend started before the respondent gained any of Westerville's customers, and that Westerville's loss of business in 1956, which was not attributable to respondent or its customers, was nearly three times as much as the volume of the business lost to respondent's customer in 1957. Examination of the above table shows that Westerville's annual volume of sales has fluctuated considerably from year to year since 1950.

d. Gehl's Guernsey Farms

42. Mr. Paul Gehl, vice president of Gehl's Guernsey Farms (hereinafter referred to as Gehl's), testified that his company produced fluid milk, ice cream, condensed milk of various kinds, and powdered milk, as well as evaporated milk, at its plant located at Germantown, Wisconsin, with a sales territory principally in the Eastern United States, consisting of an area east of the Mississippi and north of the

Ohio River. Gehl's annual sales volume of evaporated milk for the years 1950 through 1957 was:

	Cases
1950	155,417
1951	154,293
1952	138,124
1953	84,735
1954	119,395
1955	108,924
1956	168,479
1957	285,544

43. In 1956, Gehl's lost to the respondent business amounting to 4,077 cases of evaporated milk. During the same year, however, Gehl's had a 55% increase in its sales volume, from 108,924 cases in 1955 to 168,479 cases in 1956. During 1957 Gehl lost to the respondent an account amounting to 21,357 cases a year. Despite that loss, Gehl had gained in volume of sales from 168,479 cases in 1956 to 285,544 cases in 1957.

44. With respect to all the business lost by Gehl to the respondent, it should be observed that the respondent's plants were substantially closer to the location of the accounts lost by Gehl than was Gehl's plant at Germantown, Wisconsin. Dixie Home Stores in Greenville, South Carolina, which accounted for 80% of the volume involved in this loss by Gehl to the respondent's customer, was at least 600 miles from Gehl's plant in Wisconsin, but only 70 miles from respondent's plant at Chester, South Carolina.

e. Dairyland Cooperative Association

45. Mr. John E. DeMaster, a sales official of Dairyland Cooperative Association (hereinafter referred to as Dairyland), testified that his organization had one evaporated-milk plant located at Juneau, Wisconsin. Dairyland was described as a cooperative engaged in the processing of raw milk into butter, powdered milk, and cheese, as well as evaporated milk. He defined its sales area rather vaguely as "the central states east of the Mississippi". Dairyland's sales of evaporated milk from 1950 through 1956 were:

	Cases
1950	38,754
1951	334,131
1952	173,346
1953	17,423
1954	28,799
1955	25,766
1956	49,404

46. In 1956, Dairyland lost to the respondent eight accounts amounting to approximately 22,320 cases of evaporated milk. As to seven

of these accounts, the respondent's plant was substantially closer to the customer's location than was Dairyland's plant in Wisconsin. There was one exception, Kline's Supply Markets, St. Paul, Minnesota, which was approximately the same distance from both suppliers' plants. Mr. DeMaster stated, with deference to the lost business of Dairyland, that "* * * we paid practically the same price for milk that they did, and naturally it is Pittsburgh and to the east where they would have a freight advantage, which was okay. It was one of those things; that is the way it was; it could not be helped."

47. When asked specifically how he accounted for the loss to his company of sales of evaporated milk from 1950 through 1957, Witness DeMaster again placed primary responsibility for the decrease upon his geographical location relative to the competitors and buyers located in the East. He specifically named the Westerville and Defiance milk-producing organizations as competitors in the Ohio area; and he did not blame the respondent for the loss to his own company of this evaporated milk business, or for its going out of business in 1957.

f. Defiance Milk Products Company

48. Mr. William A. Diehl, president of Defiance Milk Products Company (hereinafter referred to as Defiance), testified that his company produced evaporated milk at its plant at Defiance, Ohio, and sold it principally in the Eastern part of the United States north of Norfolk, Virginia. His company's annual sales of evaporated milk for the years 1951 through 1957 were:

	Cases
1951	623, 248
1952	646, 869
1953	692, 978
1954	738, 880
1955	739, 886
1956	699, 953
1957	694, 166

49. The record shows that Defiance lost the sale of 2,400 cases of evaporated milk to the respondent in 1956. That loss was, however, only a small percentage of Defiance's total loss of such sales during 1956, at which time, Mr. Diehl stated, respondent had not yet become a factor in the private-label evaporated milk field.

50. In 1957 Defiance lost the sale of 70,406 cases of evaporatd milk to customers of the respondent, including two Colonial Stores located, respectively, at Norfolk, Virginia, and Raleigh, North Carolina; but in the same year Defiance gained from some unknown source or sources a larger volume of sales than it lost to these customers. The two Colonial Store accounts, which represented approximately two-thirds of that loss of business, were located hundreds of miles closer to the

respondent's supplying plant at Chester, South Carolina, than to Defiance's plant at Defiance, Ohio. Mr. Diehl's testimony reveals that he was thoroughly aware of the importance of plant location in relation to the plant's market, and that he was considering acquiring equipment for packing evaporated milk at a newly acquired plant at Jonesboro, Tennesse.

g. Nashville Milk Company

51. Mr. Diehl further testified that he was also president of the Nashville Milk Company (hereinafter referred to as Nashville), a wholly owned subsidiary of Defiance. He explained that Nashville's plant which produced evaporated milk was at Nashville, Illinois, and that it sold that product in the Southeastern part of the United States, in the area south of Norfolk, Virginia, and east of Knoxville, Tennessee. Nashville's annual sales volume for the years 1951 through 1957 was:

	Cases
1951	56,070
1952	87,283
1953	99,204
1954	125,489
1955	132,863
1956	150,645
1957	158,811

52. During 1956 Nashville lost the sale of 2,100 cases of evaporated milk to the respondent, and during 1957 that loss was increased by 62,940 cases. From the fact, however, that Nashville's sales volume increased by 13% in 1956 over 1955, and by another 5½% in 1957 over 1956 despite its losses of sales to the respondent, it is apparent that Nashville gained from some source a volume of sales more than equal to that lost to customers of the respondent. Its sales volume in 1957 was the highest in its entire history.

XIV. Relationship Between Respondent's Prices of Evaporated Milk and Competitors' Loss of Business

53. Counsel supporting the complaint has requested a finding which emphasizes the respondent's size and the favorable geographical locations of its plants as compared to its Midwest competitors, as follows:

An important factor leading to the competitive disparity between Borden and the smaller independent evaporated milk packer was that in the period January 1956 through March 1958, Borden had nine evaporated milk plants in contrast to its smaller competitors with one, two or three plants. This gave Borden greater flexibility to take advantage of favorable freight rates and thus to compete on more favorable terms than its smaller competitors in a wider area.

54. The record warrants the requested finding of fact, which we here adopt. In fact, the record shows that of the 241,815 cases of evaporated milk, the sale of which was gained by the respondent from its Midwest competitors during the period covered by the complaint, as to at least 208,170 cases, or approximately 86%, the respondent had a clear freight advantage over its Midwest competitors. This advantage was, of course, due to respondent's more convenient locations. In considering this factor, it should be remembered that a similar geographical advantage on the part of other competitors caused the respondent to lose sales of evaporated milk in the Northwest area of the United States during the 18 months' period preceding the period covered by the complaint.

55. Four of respondent's Midwest competitors, namely, Page, United, Gehl's and Nashville, had increased volumes of sales both in 1956 and in 1957, as compared with their sales in 1955. The only two of the seven competitors who, in 1957, had a smaller volume of sales than in 1955 had, in fact, suffered their major decline in sales in 1956, at a time when the respondent was not regarded by them as a competitor.

56. The market share data of evaporated milk for the entire United States, as compiled by the Department of Agriculture in pounds and converted by the Department's recommended formula into cases of "talls", shows the individual sales of evaporated milk by respondent and its Midwest competitors, for the years 1955 through 1957, as follows:

MARKET SHARE DATA (TALL CASE BASIS)

	1955		1956		1957	
	Sales volume	Market share	Sales volume	Market share	Sales volume	Market share
Total industry	52,804,598	*Percent* 100	51,862,069	*Percent* 100	50,566,667	*Percent* 100
Packers on whom evidence was introduced:						
Page Milk Co.	720,884	1.4	726,443	1.4	735,803	1.5
United Dairy Co.	887,651	1.7	1,041,041	2.0	958,373	1.9
Westerville Creamery Co.	701,847	1.3	593,739	1.1	589,242	1.2
Gehl Guernsey Farms	108,924	.2	168,479	.3	285,544	.6
Dairyland Cooperative	25,766	.05	49,404	.1	(1)	(1)
Defiance Milk Co.	739,886	1.4	699,593	1.4	694,166	1.4
Nashville Milk Co.	132,863	.3	150,645	.3	158,811	.3
Total	3,317,821	6.3	3,429,704	6.6	3,421,939	6.8
The Borden Company	5,235,852	9.9	5,010,205	9.7	5,419,108	10.7

[1] None—Discontinued evaporated-milk production in April 1957.

57. The above chart shows that respondent's market-share increase during the years in question was less than 1%, and that the market-share changes of its Midwest competitors were also slight.

58. The evidence shows that respondent's private-label prices during the period in question were computed in accordance with its former practice, including a gross-margin-of-profit factor which was never less than 15¢ per case, and ranged as high as 35¢ per case. The lowest profit markin, 15¢ per case, was at its Modesto plant, and there is no evidence that respondent obtained any private-label business from other packers at that plant. The respondent's plants to which most of such business came were located at Lewisburg, Tennessee; Chester, South Carolina; and Wellsboro, Pennsylvania. It was at those plants that the respondent set the highest gross margin during the complaint period. Moreover, there is no evidence, and no basis for any inference, that the respondent acted, at any time during the period covered by the complaint, with any purpose of harming or eliminating any competitor, or with any vindictive or predatory motive.

59. It appears to us that the present controversy, as interpreted by counsel supporting the complaint, has arisen because of three competitive advantages which have been acquired by the respondent during its many years in business, namely: its size, the location of its plants, and its consequent ability to sell private-label evaporated milk profitably on an f.o.b. basis. Counsel supporting the complaint contends:

> Even if the testifying competitors had not lost any business to the Respondent, actual substantial injury to competition would have to be inferred from the fact that Respondent's discriminatory pricing, coupled with the competitive advantages stemming from its size* and advantageously located evaporated milk plants, has effectively foreclosed the independent packer group from selling to certain of the most desirable private label accounts with great potential volume; for Respondent has been able to negotiate agreements covering the sale of private label milk to certain large buying organizations on a permanent basis for periods of indefinite duration covering all or most of the private label requirements of such customers.

60. From the above statement, it appears that counsel supporting the complaint would have us find injury to competition because of three factors, namely:

a. The "competitive advantage [of the respondent] from its size", resulting in respondent's ability to supply a larger demand for evaporated milk from a single customer than could its competitors;

b. The advantage of lower transportation cost inherent in the geographical location of respondent's plants nearer to the Eastern markets than those of its Midwestern competitors; and

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*The testimony of Mr. Page at R. 264–5 documents the difficulty with which the small packer is faced in selling to large scale accounts, for this testimony indicates that Page in early 1956 could supply only a portion of the Winn-Dixie business when this account expressed its interest in purchasing private label from Page for its entire operation.

c. Respondent's use of a pricing formula in selling private-label evaporated milk f.o.b. plant instead of at a delivered price, which was advantageous to respondent's customers as well as to respondent because of the location of its plants.

61. These competitive advantages which counsel supporting the complaint would have us condemn as unlawful are the accumulated benefits of that private initiative, industry and business acumen which our system of free enterprise is designed to foster and reward.

62. If a supplier is to be penalized because its size enables it to negotiate and fulfill contracts for a product in larger amounts than its competitors can produce, then the efficient conduct of a business, and its resultant growth, have become legal detriments.

63. If a supplier be forbidden to pass on to its customers a saving in transportation costs, made possible by the fact that its plant is more advantageously located than those of its competitors, then the supplier is, in effect, required to add to its selling price a "phantom freight"—a charge equal to the difference between its cost of transportation and that of its less conveniently located competitor.

64. Furthermore, if a supplier is to be penalized for selling its product at a lower price f.o.b. its plant, instead of adding thereto the cost of transportation to the customer's plant and selling at a higher delivered price, the supplier's right to conduct its business in the manner it deems most practical is abrogated, and its customers are thereby deprived of the legitimate saving in cost which they might otherwise obtain by electing to take delivery at the supplier's plant. Such an edict would injure both the respondent and its customers, by depriving them of what would appear to be a basic right of free business enterprise.

65. We conclude that the above-described contentions are beyond both the allegations of the complaint and the theory upon which it is predicated. We conclude further that all the above factors, whether considered separately or collectively, constitute lawful commercial advantages of the corporate respondent. Furthermore, we conclude that respondent has made only lawful use of such lawful advantages, and that the resulting effect upon the sales of its Midwest competitors has been only that of the normal give-and-take of healthy competition inherent in the free-enterprise system. Such competition is not unlawful.

XV. Possible Injury to Competition Between Wholesaler Customers of the Respondent

66. The record contains evidence of only ten transactions wherein a purchaser of respondent's private-label evaporated milk was

shown to have paid a lower price than that paid by a competing customer purchasing respondent's Borden brand evaporated milk.

67. Counsel supporting the complaint questioned a small group of wholesaler purchasers, who were all from North or South Carolina, relative to their interest in buying private-label evaporated milk in addition to their purchases of Borden brand evaporated milk. In his interrogation of these witnesses, he did not ascertain whether they knew of the business requirements involved in the purchase of respondent's private-label milk, which were rather complicated, as distinguished from the simple purchase of Borden brand evaporated milk. These witnesses were asked hypothetical questions, of which the following is typical:

> Q. Well, Mr. McFeely, in February as in March you were paying $6.60 a case for Borden brand evaporated milk. Using the month of March 1958, as a basis, would you have been interested in buying out of Spartanburg, with a shipment from Chester, South Carolina, private-label evaporated milk packed by the Borden Company at a price of $5 to $5.25 per case for talls?

68. We believe that the phrasing of this question implied to the witness that the conditions of the purchase of Borden brand evaporated milk at $6.60 per case, or of private-label evaporated milk packed by the same company at $5 or $5.25 per case, were otherwise substantially the same. In each case, the witness gave an affirmative response. The record shows that the terms and conditions upon which respondent sold its private-label evaported milk differed materially from the simpler purchase of Borden brand milk. Those differing terms and conditions may be summarized as follows:

Private-label evaporated milk	*Broden brand evaporated milk*
No cash discount.	2 percent cash discount.
All orders sent to Respondent's headquarters in New York and filled through Respondent's plant nearest the purchaser.	Orders handled locally and filled from nearest plant or from Respondent's warehouse.
Price f.o.b. Respondent's plant.	Price delivered to customer.
Variable increase in cost of transportation on less-than-carload shipments.	5 cents per case additional on less-than-carload shipments.
Varying cost of designing and printing private labels.	No charge for labels.
Must be arranged for well in advance; purchaser obligated to pay for all milk packed under his private label.	Can be bought in any quantity at any time without prearrangement.
No advertising or services furnished by Borden on private-label milk.	Purchaser benefited by Respondent's advertising and services.

69. Since the record does not show that the witnesses who answered the hypothetical question in the affirmative were aware of all of the

above conditions, we cannot assume, without further evidence, that they understood all the considerations involved in contracting for respondent's private-label evaporated milk. Accordingly, their response to the hypothetical question proves no more than that each of the witnesses was interested in paying less for evaporated milk.

70. Wholesaler McFeely, under cross-examination, admitted that in order for him to be interested in the purchase of private-label evaporated milk, he would have to be able to buy it for $1.50 to $2 per case less than he was paying for Borden brand. It should be observed in this connection that respondent was not offering its private-label milk for that much less than its Borden brand milk.

71. One purchaser talked with a broker concerning the possible purchase of a private-label brand from the respondent, and was told by the broker that he did not know the requirements for such a purchase. There is, however, no evidence that any purchaser was, for any reason, denied the right to buy private-label evaporated milk from the respondent.

72. We must conclude that there has been no substantial injury to competition affecting respondent's wholesaler customers purchasing Borden brand evaporated milk, in their competition with respondent's wholesaler customers who also purchased respondent's private-label evaporated milk.

XVI. Possible Injury to Competition Between Retailer Customers of the Respondent

73. Seven retailers in South Carolina were called as witnesses by counsel supporting the complaint. Each testified that he carried Borden brand evaporated milk in his usual course of business, as well as Pet and Carnation. Each recognized that there existed a strong consumer demand for Borden brand evaporated milk, and that it commanded a higher price than unadvertised brands. All regarded the handling of evaporated milk as an unprofitable part of their retail grocery business, but necessary because of the continuing consumer demand therefor. One witness stated:

> Well, [Borden brand evaporated milk] is a must item * * * Well, you have got to handle [Borden brand] to satisfy the customers.

Another witness testified, similarly:

> Well, [Borden brand evaporated milk] is essential in the grocery business and it's one of the items that we feel like we handle more or less just to have something the housewife needs. Several other items in that same category, you know.

74. They described their mark-up on Borden brand evaporated milk as ranging from 23 to 84¢ per case. They did not, in general, regard

this as sufficient to cover overhead expenses. The testifying retailers purchased Borden brand evaporated milk from a wholesaler who had, in 1957, offered them the Miss Virginia brand, a private-label evaporated milk produced by the respondent. Witness Shumpert testified that he commenced purchasing Miss Virginia evaporated milk about a month after it had been offered him. Witness Power's testimony shows that he waited approximately 18 months after such offer, or until about 2 weeks prior to the time of his testimony, before commencing to purchase the Miss Virginia brand evaporated milk. Retailer witness Caughman testified that he waited until about a year after the first offer before commencing to purchase. Witness Cromer testified that he waited almost a year before buying Miss Virginia milk. Witnesses Charles and Coleman, at the time of their testimony, had not purchased Miss Virginia evaporated milk. Witness Wrenn, who operated both as a wholesaler and as a retailer, at various times carried evaporated milk packed under various private labels, which he purchased from railroad salvage. He never requested the respondent or any other packer to produce a private label for him.

75. On one hand, the retailers described some customers as "price conscious," who were "shopping around for cheap milk." On the other hand, they described other customers as being "name-conscious" and demanding the advertised brands, without particular regard for the differences in price. A typical example of such testimony is:

A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them don't want anything except Pet.

Q. They don't care what price——

A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else.

From such testimony we must conclude that there was in the South Carolina area a persistent demand among a substantial number of purchasers for Borden brand evaporated milk, without particular regard to price.

XVII. Conclusion as to Effect of Price Differences Upon Competition

76. We must conclude that the differences in price between respondent's Borden brand evaporated milk and its private-label evaporated milk have not substantially lessened competition, nor is there any reasonable probability of such danger to competition in the future. The complaint herein should, therefore, be dismissed.

XVIII. Cost Justification

a. Purpose and Preparation

77. After counsel supporting the complaint had rested his case-in-chief, counsel for the respondent offered in evidence an analysis based upon the records of the Borden Company for the calendar year 1957, pertaining to the production, distribution and sale of Borden brand evaporated milk and Borden's private-label evaporated milk. The purpose of that analysis was to determine the difference between the price received by the respondent for its product under each type of label, and the relative difference in cost of manufacture, sale and delivery thereof resulting from the different methods or quantities involved in the sale or delivery of the product under the different labels.

78. The analysis was prepared in 1959 by Edward M. Darcey of the accounting firm of Haskins & Sells of New York City. Mr. Darcey, who had supervised the regular audits of the respondent's accounts since 1953, was shown to have a detailed familiarity with respondent's accounting system. Mr. Darcey was advised both in the preparation of his analysis and in its execution by Dr. Herbert F. Taggart, professor of accounting of the University of Michigan, and Chairman of the Advisory Committee on Cost Justification which was appointed by the Federal Trade Commission in 1953 to review and analyze all aspects of the cost proviso of the Clayton Act.

79. All the documentary materials underlying the analysis were made available to the Commission's staff, and Mr. Melvin Steele, Assistant Chief Accountant of the Accounting Division, Bureau of Investigation, of the Federal Trade Commission, and another of the Commission's accountants examined them in New York during 5 weeks in February and March 1960. At the end of their study, and as a result of conferences between Mr. Steele and Mr. Darcey, three minor changes were made in the report, the effect of which was to reduce the difference in cost between Borden brand and Borden's private-label brands by about 1¢ per case. As so modified, the cost analysis was received in evidence as respondent's Exhibit 76.

b. Production Methods

80. Before examining a summary of that exhibit and the cost analysis which it contains, we should review certain important factors. In 1957 respondent produced evaporated milk at nine plants variously located in California, Oregon, Wisconsin, Michigan, Illinois, Kansas, Tennessee, South Carolina and Pennsylvania. Each of those plants packed private-label as well as Borden brand evaporated milk, with no difference in the manufacturing process up to the point of affixing labels. Thereafter, Borden brand and the private-label brands were

handled differently. Borden brand evaporated milk was packed in printed cartons bearing the Borden name, whereas private-label milk was packed either in printed cartons bearing a private label, or in plain cartons on which a private-label identification was stenciled.

c. Marketing Methods—Borden Brand

81. In 1957 Borden brand evaporated milk was sold in various States across the country at a uniform delivered price. Substantial inventories of Borden brand evaporated milk were carried in three types of storage facilities: (1) at the plants which produced the milk; (2) at about 15 reserve warehouses located between the plants and the places where it was expected that the evaporated milk would be sold; and (3) at about 100 local consignment warehouses. Carload shipments were made from the plants and reserve warehouses direct to customers, and also to consignment warehouses. Orders for less-than-carload quantities were generally filled from the consignment warehouses. All customers were offered a 2% cash discount for payment within 10 days, and retail customers were offered a 1/10 of 1% "swell allowance" in lieu of credit for or replacement of goods found to be in unsalable condition. Orders for Borden brand evaporated milk were solicited by brokers, and, in some of the larger cities, by respondent's jobbing salesmen. Both brokers and jobbing salesmen handled, in addition to Borden brand evaporated milk, all of the other Borden brand food products manufactured and sold through respondent's Food Products Division, including Starlac, Eagle brand condensed milk and instant coffee. Orders for the delivery of Borden brand evaporated milk direct from a producing plant or reserve warehouse were generally forwarded to the respondent's New York office of its Food Products Division, which in turn forwarded them to the appropriate shipping point; while orders for delivery from a consignment warehouse were processed in the field.

82. Respondent's Food Products Division maintained a staff of field representatives, whose primary duty was to call upon retailers to assist them in promoting sales of Borden products to consumers. These field representatives operated in all areas, regardless of whether orders were solicited by brokers or by respondent's jobber salesmen. The work of the field representatives included such activities as arranging displays and display space, and inspecting code datings on Borden brand evaporated milk to insure that the older milk was sold first in order to prevent its remaining too long on the retailer's shelves. This service was not performed in every store carrying Borden brand evaporated milk. The field representatives were furnished sales promotion material designed to direct consumers' attention to Borden brand products, and to encourage the retailer to devote additional or

special effort to the promotion of those products. While the sales representatives were responsible for the promotion of all Borden brand food products, they devoted special attention to Borden brand evaporated milk, which was the leading product of the Food Products Division.

83. Advertising of the Borden name and of the Borden brand products was financed through a budget administered at the Borden Company level, and, as to particular food products, at the level of the Food Products Division, which maintained a separate budget account for each individual product. The Borden brand evaporated milk also carried on the label coupons which were redeemable by consumers for merchandise, in the manner of trade stamps.

d. Marketing Methods—Private-Label Brands

84. In 1957, private-label evaporated milk was sold from the Borden Company's plants, and inventories of such milk were maintained only at those plants. Orders for private-label milk were sent direct to the New York office of respondent's Food Products Division, which thereafter forwarded them to the plant nearest the customer. Prices were f.o.b. plant, and were determined each month for each plant. Respondent did not advertise its private-label milk, and such milk carried no reference to the Borden name. Furthermore, the purchasers of such private-label milk were forbidden by respondent to use the Borden name, in any way, in the distribution and sale of the product. No field services were performed by respondent in connection with private-label evaporated milk.

e. Cost Analysis Prepared on a Nationwide Basis

85. In the opinion of Mr. Darcey and Dr. Taggart, the cost analysis which they prepared was necessarily predicated upon respondent's production and sales of evaporated milk throughout the United States. In their opinion, the relative costs of Borden brand evaporated milk, and of private-label evaporated milk, could be correctly determined only by considering the overall expenses incurred by respondent in producing and selling such milk at all the various locations in which respondent sold its milk. As previously stated, respondent's cost of producing its Borden brand and private-label brand evaporated milk was the same until the labels were applied. Each item of expense thereafter, such as labels and cartons, freight, storage, advertising, and so on, for all respondent's plants was averaged, both for Borden brand milk and for private-label milk, on a nationwide basis, and that average compared with the average selling price of the respective products.

86. On that basis, respondent determined that the difference between its selling price per case of Borden brand evaporated milk and its average selling price per case of private-label evaporated milk had been more than justified by an excess of $0.1780 per case in the average cost thereof.

f. Summary of Cost Analysis

87. Respondent's summary of the cost analysis contained in respondent's Exhibit 76 varies from that exhibit in several respects so infinitesimal that they have been disregarded. That summary is as follows:

RESPONDENT'S COST ANALYSIS, 1957

	Average per case		
	Borden brand	Private label	Difference
Gross sales	$6. 4046	$5. 1743	$1. 2303
Less sales deductions:			
Damaged goods	. 0112	. 0027	. 0085
Cash discount offered	. 1279	----------	. 1279
Net sales	6. 2655	5. 1716	1. 0939
Costs:			
Labels and cartons	. 1789	. 1376	. 0413
Primary freight	. 3684	. 0188	. 3496
Secondary freight	. 0112	----------	. 0112
Reserve storage	. 0690	----------	. 0690
Consignment storage	. 0305	----------	. 0305
Investment cost	. 0972	. 0568	. 0404
Premium label redemption	. 2316	----------	. 2316
Advertising	. 1247	----------	. 1247
Sales department	. 3163	. 0009	. 3154
Brokers' commissions	. 0427	----------	. 0427
Promotion department	. 0189	. 0123	. 0066
Clerical	. 0151	. 0062	. 0089
Total	1. 5045	. 2326	1. 2719

Difference in cost	$1. 2719
Difference in price	1. 0939
Excess of cost difference over price difference	0. 1780

XIX. Cost Study Prepared, and Presented in Rebuttal, by Mr. Melvin C. Steele

a. Cost Failure of $0.4025 Per Case

88. Counsel supporting the complaint recalled Mr. Melvin C. Steele, who testified that he had prepared a memorandum reviewing respond-

ent's cost analysis as presented in respondent's Exhibit 76, and a cost study of his own, which he described as follows:

* * * A summary has been prepared of the price differences and the cost differences between the sale and distribution of Borden brand and private-label evaporated milk by the respondent during the year 1957. The sales were limited to shipments from the respondent's Chester, S.C., and Lewisburg, Tenn., processing plants. The summary shows a net price difference, after deducting damaged goods and cash discount, of $1.4181 per case while the total cost difference was $1.0156 which indicated a cost failure of $0.4025 per case. The respondent's cost study showed a cost difference over price difference of $0.1891 per case.

Mr. Steele's memorandum containing the above summarization was received in evidence as Commission's Exhibit 5479.

b. Choice of Two Plants as Basis for Cost Study

89. Mr. Steele's testimony revealed that he was directed by counsel supporting the complaint to make this cost study, and to limit it to the cost data pertaining to respondent's Chester, South Carolina, and Lewisburg, Tennessee, plants only, the two plants at which respondent's private-label evaporated milk had been sold in 1957 at the lowest prices. Although Mr. Steele testified that the basing of his study upon two plants only was a proper method under "the circumstances", the exact nature of "the circumstances" was never satisfactorily explained. He also testified that the respondent's nationwide cost analysis was not proper cost accounting, but the reason for that conclusion was likewise never made clear.

90. We must observe that during the precomplaint investigation of respondent's price structure, prior to this proceeding, Mr. Steele, in a memorandum based upon data furnished him by the respondent on a national basis, expressed the opinion that respondent's price difference was justified by its costs. At that time he made no suggestion that a study should have been made on the basis of only two of respondent's plants, rather than upon a national basis including all of respondent's nine plants.

91. Mr. Steele, in his computation of the 2-plant analysis, took into account a particular amount of freight cost incurred by the respondent in shipping 1,200 cases of Borden brand milk from Chester, South Carolina, to Colonial Stores in Norfolk, Virginia, on November 18, 1957. The amount of that freight cost was 21¢ per case. None of the accountants questioned these facts. On the same day, however, the respondent also shipped to the same customer in the same city, from the respondent's plant in Dixon, Illinois, 800 cases of Borden brand milk, on which the freight cost, also readily ascertainable from the respondent's records, was 47¢ per case, or 26¢ per case greater than, and more than twice as much as, the freight on the above-mentioned

shipment from the respondent's plant in Chester, South Carolina. Mr. Steele did not take the latter freight cost into account in his analysis. While the figure which Mr. Steele did use, the 21¢ per case on the shipment from the Chester plant, was mathematically accurate, his exclusion of the other, and much higher, figure of freight cost on the shipment from the Dixon plant necessarily means that, as to business done by the respondent with that customer in Norfolk, Virginia, Mr. Steele's analysis does not reflect the respondent's full cost.

92. Counsel supporting the complaint contend that they did not offer Mr. Steele's cost study in evidence "to show a correct cost-justification defense, but merely to show the distortion resulting from the respondent's broad overall averaging in respondent's Exhibit 76 by the contrast with a two-plant average." The two-plant study presented by counsel supporting the complaint does, as they suggest, show a distortion, but we believe that the distortion is in the two-plant study itself.

c. Corrected Cost Failure Reduced to $0.2673

93. During cross-examination Mr. Steele discovered several errors in his cost study, all of which were adverse to the respondent, and, when corrected by Mr. Steele, showed the cost failure indicated by his two-plant study to be only $0.2673 per case, instead of $0.4025 as originally stated. This correction reduced the unjustified remainder of the difference in price by $0.1352 per case. Mr. Steele's corrected summarization was received in evidence as respondent's Exhibit 114.

d. Conclusion as to Two-Plant Cost Study

94. We believe that, in a greater or lesser degree, every accounting datum, no matter how precisely determinable in isolation, is meaningful in this proceeding only if considered in relation to all of the other cost and price data. So believing, we conclude that the two-plant cost study in question does not constitute an adequate basis for a cost-justification study, nor an effective rebuttal of respondent's cost-justification defense.

XX. Items of Cost in Respondent's Analysis in Dispute Between Accountants

a. Investment Cost of $0.0404 per case

95. As we have previously observed, respondent, in order to have its Borden brand evaporated milk available for immediate delivery throughout the country, maintained a substantial inventory thereof in all its plants, reserve warehouses and consignment warehouses. As to private-label evaporated milk, however, respondent maintained in storage at the plant of its production only a supply sufficient to fill the

orders of its private-label customers which it had already received. This difference in the method of storage in the process of sale and delivery of the Borden brand and private-label milk resulted in a substantially higher investment by the respondent in its Borden brand milk than in its private-label milk.

96. Respondent, in its cost-justification analysis, concludes that the money invested in both Borden brand and private-label evaporated milk during the time it was held in storage, valued at the rate of 8%, resulted in an average cost of $0.0835 per case for the storage of Borden brand milk, and an average cost of $0.0257 per case for private-label milk.

97. Mr. Steele did not question the respondent's figures as to the money invested, nor that this constituted a real cost to the respondent; nor did he question the soundness of the aforesaid 8% rate of interest adopted for purposes of the calculation. He did state, however, that it was not "acceptable as an element of cost for the reason that it is considered to be a payment for the use of capital and not a cost of production and distribution." In his oral testimony, Mr. Steele cited the *Thompson's Products* case, 55 F.T.C. 1252 (1959), in support of his position. In that case, the issue in question involved a claim of a "cost item" computed on the basis of profit, which is an issue quite different from that herein raised. The Commission, in its opinion in the *Thompson's Products* case, stated that "the return rate factor or element here claimed is thus entirely outside the sphere of actual cost differences." In our present case, however, the cost factor is not based upon profit, but is a legitimate element of actual expense which must be borne by the respondent in distributing and selling its product. The respondent, in the regular course of its business, continually incurs this real cost, which must be taken into account if its cost figures are to reflect its actual expenses.

98. Accordingly, we conclude that the difference of $0.0404 per case in investment cost between respondent's Borden brand milk and its private-label milk was properly included by respondent in its cost analysis as one element of the difference in price between Borden brand and private-label milk.

b. Premium Label Redemption Cost of $0.0069 Per Case

99. Contained in the label of Borden brand evaporated milk was a premium coupon which was redeemable for merchandise. The premiums were redeemable by Premium Associates, Inc., a corporation in which respondent held 25% of the stock. This corporation served not only the respondent, but other corporate stockholders, and also nonstockholders, who wished to avail themselves of such premium-redemption coupons and service. The redemption cost of the respond-

ent's Borden brand coupons consisted of regular monthly payments by respondent to Premium Associates, Inc., based upon the number of coupons redeemed during the preceding month, and a payment for special offers. In addition, the respondent also allocated to its coupon redemption account the amount of an adjustment which was made at the end of the year to the reserve fund maintained to provide for redemption in future years of premium coupons issued in 1957.

100. The facts show that Premium Associates, Inc., has never paid any dividends to its stockholders; that it endeavors to operate on a break-even policy; and that its net income of $71,757 earned in 1957 was not distributed to its stockholders, but retained by the corporation as a reserve fund. Respondent had nothing to credit to its coupon-redemption account from the earnings of Premium Associates, Inc., in 1957. Mr. Steele contends, however, that the total amount of the premium cost, as shown in respondent's cost analysis, should be reduced by respondent's 25% share of the net income of Premium Associates, Inc., for 1957.

101. We believe that because the respondent did not technically, legally, or actually receive any income from its investment in Premium Associates, Inc., in 1957, it would be improper to reduce the cost of the premium-label redemption, as shown in respondent's cost analysis, by any such amount as suggested by Mr. Steele.

c. Advertising Cost of $0.0059 Per Case

102. The respondent's costs in respect to Borden brand advertising, as determined by its accountants, were $0.1247 per case. This amount was determined on the basis of an estimate made administratively at respondent's top-management level. Mr. Steele challenged the soundness of that determination as arbitrary. In lieu thereof, he would make the determination by computing a percentage of respondent's total sales dollars chargeable to Borden brand milk for the year 1957. In our opinion, Mr. Steele's method of calculating, the advertising cost of Borden brand milk is sounder than respondent's method. Accordingly, the amount of respondent's advertising cost charged to Borden brand evaporated milk will be reduced by $0.0059 per case, resulting in an advertising cost for Borden brand milk of $0.1188 per case instead of $0.1250, as shown in respondent's cost analysis.

d. Brokers' Commission Cost of $0.0159 Per Case

103. As stated in respondent's cost analysis, "* * * Brokers performed the function of selling the Division's [Borden's Food Products Division] advertised products to wholesalers and chains in those areas where the Division did not have its own jobbing salesmen." The brokers were paid a commission of 5¢ per case on the sale by them of

Borden brand evaporated milk. The total brokerage paid in 1957 for the sale of Borden brand evaporated milk was $170,151.48. This amount represents an average of $0.0394 per case of Borden brand evaporated milk sold in that year. In addition the respondent paid brokers at the rate of 2½¢ per case on some sales of private-label evaporated milk, although the facts show that no substantial service was rendered by them to respondent in promoting such sales. Respondent contends that this brokerage payment constituted, in effect, an additional brokerage cost chargeable to Borden brand evaporated milk. Mr. Steele contends, however, that because the brokerage was not paid on all private-label milk sales, and because the amount of the brokerage varied directly with the sale of private-label evaporated milk, the brokerage so paid should be considered as an additional cost applicable to private-label evaporated milk.

104. We believe that Mr. Steele's analysis of this problem is correct, and, accordingly, we conclude that the brokerage cost charged by the respondent entirely to Borden brand milk should be charged in part to private-label milk, and that the broker's commission cost of Borden brand milk in respondent's cost analysis should therefore be reduced by $0.0159 per case, the cost of brokerage paid on private-label milk, changing the Borden brand brokerage cost from $0.0427 per case to $0.0189 per case.

e. Sales Department Cost of $0.0247 Per Case

105. Mr. Steele did not question the accuracy of the respondent's determination of the amount spent by it to maintain its sales department. He did not question the necessity or soundness of making an allocation thereof between Borden brand evaporated milk on the one hand, and the other Borden food products on the other hand. The dispute between the accountants relates solely to the formula which should be used in determining that allocation. The respondent's accountants used as a basis for their calculation all dollar sales, allocating to Borden brand evaporated milk that proportion of the total unallocated Sales Department expense which the dollar sales of Borden brand evaporated milk bore to the total sales of all Borden's food products. That proportion was 44.0206%. Mr. Steele contends, however, that this calculation should be based upon the gross profits on Borden brand evaporated-milk sales compared with the sales of other Borden brand food products, with the result that he claims the percentage of sales expense to be charged to Borden brand evaporated milk should be 40.10%.

106. The managing officials showed by their testimony that the touchstone by which they were guided in allocating their sales-department expense consisted of cases sold and sales dollars received. In our

opinion, this method of calculation is correct, because cost is properly an element in the calculation of profit, not profit in the calculation of cost. Accordingly, we conclude that the correct amount of sales-department cost to be properly charged to Borden brand evaporated milk is $0.3163 per case.

XXI. Conclusion as to Cost Justification

107. In our opinion, the respondent's cost analysis, as hereinabove modified, constitutes full justification for the differences in price between Borden brand evaporated milk and respondent's private-label evaporated milk, within the intent and meaning of § 2(a) of the Clayton Act. It is therefore accepted as an adequate cost-justification defense against the allegations of the complaint herein.

XXII. Summary Conclusion

108. The acts and practices of the respondent, as herein found, are not in violation of § 2(a) of the Clayton Act as amended.

Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

Opinion of the Commission

NOVEMBER 28, 1962

By Dixon, *Commissioner:*

Respondent has been charged with violating Section 2(a) of the Clayton Act, as amended, by discriminating in price between its customers buying evaporated milk under the Borden label and those buying such product under private label. The hearing examiner, in his initial decision filed December 15, 1961, held that no price discrimination in violation of the Act was established because there was no showing of substantially lessened competition or a reasonable probability of such danger to competition in the future. He further held that respondent had fully cost justified the price differences shown. The examiner dismissed the complaint.

Both parties have appealed. Counsel supporting the complaint challenges the holding that there was a failure to prove competitive injury as prescribed in the Act and from the holding that respondent had successfully cost justified the price differences. They request that respondent be found to be in violation of Section 2(a) and that an appropriate order to cease and desist be issued. Respondent, in its appeal, mainly contests the examiner's finding and conclusion

that evaporated milk under its Borden's brand and private label are commodities "of like grade and quality".

The Borden Company is engaged in the manufacture and sale of a wide variety of food, dairy, and chemical products in the United States and abroad. Its total sales in 1957 were $931,220,662. The commodity involved in this proceeding is evaporated milk, a product made from whole fresh milk by processing, which includes evaporation, homogenization, and the addition of vitamins and certain minerals. Respondent manufactures and sells evaporated milk in commerce in substantial quantities. In 1954, its sales of the product exceeded $30,000,000. Respondent's plants for producing evaporated milk during the period covered by the complaint were located at Fort Scott, Kansas; Wellsboro, Pennsylvania; Modesto, California; Albany, Oregon; Dixon, Illinois; New London, Wisconsin; Perrinton, Michigan; Lewisbury, Tennessee; and Chester, South Carolina.

Packers of evaporated milk consist of those who sell under nationally advertised brands, *i.e.*, respondent, Pet Milk Company, and the Carnation Company; chain stores and their subsidiaries which pack only for their respective organizations under their own brands, *e.g.*, The Kroger Company; and the smaller packers who produce mainly under labels owned and controlled by their customers. Packers in this latter category in the Midwest, some of whom testified in the proceeding, include:

Page Milk Company, Merrill, Wisconsin;
United Dairy Company, Barnesville, Ohio;
United Milk Company, Cleveland, Ohio;
Defiance Milk Products Company, Defiance, Ohio;
Westerville Creamery Company; Westerville, Ohio;
Gehl Guernsey Farms, Milwaukee, Wisconsin;
Edwardsville Milk Company, Edwardsville, Illinois;
Consolidated Badger Cooperative, Shawano, Wisconsin.

These concerns were all in competition with Borden in the sale of evaporated milk in the period covered by the complaint. These and other packers in the Midwest will hereinafter sometimes be referred to as the Midwest competitors.

I. "Like Grade and Quality"

As an essential element in a Section 2(a) matter, there must be a showing that the commodities involved in the price discrimination are "of like grade and quality." [1] Respondent concedes in its brief that

[1] Section 2(a) reads in pertinent part:
"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * *."

physically, at the point of manufacture, the two products (the Borden brand and the private label) were alike. It argues, however, that in the market place they were unlike, *i.e.*, the one (Borden brand) could command a higher price than the other (private label), and, therefore, they were not of like grade and quality within the meaning of the statute.

The Commission in a number of prior proceedings has held that goods which are the same in all respects except labels are comparable goods for the purpose of Section 2, or goods of like grade and quality. In *The Goodyear Tire & Rubber Company*, 22 F.T.C. 232 (1936), *reversed* on other grounds 101 F. 2d 620 [3 S. & D. 63] (6th Cir. 1939), a pre-Robinson-Patman Act proceeding, the Commission held, in effect, that corresponding grades of Sears, Roebuck & Co. private label tires and Goodyear's own brands of tires were comparable in grade and quality.[2] Under the Clayton Act, as amended by the Robinson-Patman Act, the Commission in *United States Rubber Co., et al.*, 28 F.T.C. 1489 (1939), a matter involving tires, and *United States Rubber Co.*, 46 F.T.C. 998 (1950), a matter involving canvas shoes, prohibited discriminatory price differentials between sellers' brands and customers' private labels. In these cases the Commission disregarded brand differences and found the products to be of like grade and quality. Similarly, in *Page Dairy Co.*, 50 F.T.C. 395 (1953), different label markings were held to be without significance. See also, the Trade Practice Rules for the Steel Bobby Pin and Steel Hair Pin Manufacturing Industry (1957) (Rule 11, Section II, Example No. 4) in which, under the example, brand differences are disregarded.

There have been some court decisions as to the meaning of the phrase "like grade and quality", but these do not deal with the precise issue now before us, *i.e.*, whether the label difference alone renders the goods unlike and outside the scope of the Act. The court cases include *Bruce's Juices, Inc.* v. *American Can Co.*, 87 F. Supp. 985, 987 (S.D. Fla. 1949), *aff'd* 187 F. 2d 919, 924 (5th Cir. 1951), *modified* 190 F. 2d 73 (5th Cir. 1951) (District Court upheld on holding the different sized cans were of like grade and quality); *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 [6 S. & D. 439] (2d Cir. 1958) (rejection of a broad "relevant market" test for determining "like grade and quality"); *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 [6 S. & D. 91] (8th Cir. 1956), *reviewed on other grounds* 355 U.S. 411 [6 S. & D. 382] (1958) (noninterchange-

[2] Under old Clayton Act Section 2, the provision for price differentials reflecting differences in "grade" or "quality" was a defensive proviso. In the Act as amended, the provision "like grade and quality" was placed in the definitional text of the statute.

able items in a line of automotive parts sufficiently comparable for price regulation).

The legislative history leaves little doubt that Congress intended that brand distinctions be disregarded under the "like grade and quality" requirement. The Commission's *The Goodyear Tire & Rubber Company* case, *supra*, was noted in a Committee report.[3] At one point in the consideration of the legislation, there was a move to amend the bill by inserting "and brands" after the words "commodities of like grade and quality." This proposal was branded by the draftsman of the Patman bill, as " a specious suggestion that would destroy entirely the efficacy of the bill against large buyers."[4] Congress could have required a distinction for brands. It did not.

Respondent, interestingly, does not contend in its argument, that all brand differences result in goods of unlike or different grade and quality. Clearly, the basic aims of the Act could be too easily thwarted if merely changing a label would nullify the application of the statute. Respondent argues, instead, that a distinction should be made between differing situations, as follows:

(a) the situation where the brand name is not shown to represent any significant added value being sold by the manufacturer, and

(b) the situation where, as is asserted in the present case, the manufacturer's well-known brand name has a very substantial and thoroughly demonstrated commercial significance.

Respondent has cited no controlling authority or persuasive support of any nature for such interpretation. We believe it to be more reasonable, considering the objectives of the legislation, to interpret the phrase so as not to exclude the application of the Act in cases where the only distinction is in the label. In this connection, the Attorney General's Report has this to say in part:

> The majority of this Committee, however, recommends that the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test * * *. [T]he Committee majority believes that abandonment of a physical test of grade and quality in favor of a marketing comparison of intrinsically identical goods might not only enmesh the administrators of the statute in complex economic investigations for every price discrimination charge, but also could encourage easy evasion of the statute through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute

[3] H. Rept. No. 2287, 74th Cong., 2d sess., 4. The report refers to the case as support for the view that the granting of preferences was not confined to any one line of industry or distribution. The report states that the Commission found in the *Goodyear* case that "* * * at no time did it [Goodyear Tire & Rubber Co.] offer its own dealers prices on Goodyear brands of tires which were comparable to prices at which respondent was selling tires of equal and comparable quality to Sears, Roebuck & Co."

[4] Hearings Before a Subcommittee of the House Committee on the Judiciary, on Bills to Amend the Clayton Act, 74th Cong., 2d sess., 421, 469 (1936).

at differential prices * * *. (Report of the Attorney General's National Committee to Study the Antitrust Laws, 158 (1955).[5]

This we believe is a sound analysis. In our view, the discriminatory price transactions should first be subject to scrutiny under the statute; the market factors which may dictate that there will be different prices between the seller's brand and private label can then be considered in connection with the provisions of Section 2. For example, if cost savings are involved, these can be raised in connection with a cost defense. Thus, economic factors may be considered, but the price relationship between different brands of intrinsically like goods remains subject to the terms of the statute.

We believe the examiner correctly decided this issue. The Borden brand and the private label evaporated milk are commodities of like grade and quality. Respondent's contention that the examiner erred in his holding on the question is rejected.

II. Price Discrimination

A price discrimination under Section 2 is merely a price difference. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 [6 S. & D. 817] (1960). The examiner found a price discrimination within the meaning of the statute. Respondent appears to challenge this finding in its contention that no difference in comparable prices has been shown. Respondent claims that to make the prices comparable it is necessary to deduct from the Borden brand price, net of the delivery factor, the value of the Borden brand name, and that when this is done the Borden brand price is less than the private label price.

We have held that the products are of like grade and quality and, thus, the initial determination as to whether a mere difference in price exists is concerned only with whether respondent has charged a higher net price to one customer than it has charged another. The net price is the price after deducting discounts, rebates and allowances. In this case, it is clear that there is such a price difference. The examiner was correct in his holding on the question.

III. Competitive Effects

The complaint charges that respondent's price discrimination resulted in prescribed adverse effects upon competition in several lines

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[5] In *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, 49 [6 S. & D. 100] (8th Cir. 1956), the court adopted the statement in the Attorney General's Report at page 157 that "The like grade and quality concept * * * was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute."

of commerce, including the line in which respondent is engaged (the primary line). We will first analyze the proof herein on the alleged competitive injury at the primary level.

It must be emphasized that Section 2(a) of the Clayton Act, as amended, which prohibits price discriminations whose "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *" does *not* require a finding that the discriminations in price *in fact* have had an adverse effect on competition. *Corn Products Refining Co., et al.* v. *Federal Trade Commission*, 324 U.S. 726 [4 S. & D. 331] (1945); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46 [4 S. & D. 716] (1948). "The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co., supra*, at 738 [4 S. & D. 340]. Accordingly, it is not essential that the record show actual injury. We will consider this matter on the basis of whether there has been a showing that respondent's price discrimination may have, or will likely have, any adverse competitive effects.

The record reveals that the evaporated milk industry has suffered a decline in sales and that a large number of companies have in recent years gone out of this business. Market share data, as found by the examiner, shows the total industry sales volume (on tall case basis) as follows:

Year:	*Cases sold*
1955	52,804,598
1956	51,862,069
1957	50,666,667

The concerns which have discontinued the production of evaporated milk since 1950 include the following:

Dairyland Cooperative Association (Dairyland Cooperative), Juneau, Wisconsin (discontinued April 1957);
Amboy Milk Company, Amboy, Illinois (discontinued early in 1958);
Dean Milk Company (discontinued 1955 or 1956);
Fort Dodge Creamery Company;
Rochester Dairy Company, Rochester, Minnesota (discontinued 1954 or 1955);
Hillpoint Creamery Company, Reedsburg, Wisconsin;
Dairyland Distributors Cooperative, Watertown, Wisconsin;
Producers Creamery, Springfield, Missouri (discontinued in 1956);
Reich McJunkin, Meadville, Pennsylvania;
Wilson Milk Company, Indianapolis, Indiana.

Also, between 1956 and 1958, Consolidated Badger Cooperative restricted its evaported milk operation to Wisconsin and the upper part of Michigan. The record shows that there have been no new concerns going into the evaporated milk business.

The 1957 sales volumes of the Midwest competitors who testified in this proceeding were as follows:

Company	*1957 sales volume (tall case basis)*
Page Milk Company	735,803
United Dairy Company	958,373
Westerville Creamery Company	589,242
Gehl Guernsey Farms	285,544
Defiance Milk Products Company	694,166
Nashville Milk Company	158,811
Dairyland Cooperative (discontinued in 1956)	-------

By way of comparison, the sales volume of respondent (tall case basis) for 1957 was 5,419,108.

The facts concerning respondent's expansion into the private label evaporated milk field and the impact upon the Midwest competitors (as reflected by specific losses of accounts to respondent) is not in any substantial dispute. About July 1955, Producers Creamery of Springfield, Missouri, discontinued the sale of private label evaporated milk and three of its customers, Topco Associates, Central Retailer-Owned Grocers, and Hills Stores Company, thereafter arranged with respondent to supply them with such milk. Respondent subsequently expanded its private label operations to plants previously producing only Borden label and also began serving other additional accounts.

As a direct consequence, Midwest competitors lost accounts and sales to respondent.[6] The number of cases lost cannot be figured exactly because it is impossible to know with certainty how much a given account would have purchased. However, based on purchases for the prior twelve months when such accounts were customers, some estimate of the lost sales can be made. Respondent has figured the total loss to be 241,815 cases, a figure which the examiner accepted. Counsel supporting the complaint claims a higher loss figure of about 287,000 cases. The figures in either case do not show the full impact of respondent's pricing practices on competition because they reflect only the initial losses. The fact is that these were not just temporary losses. Arrangements with buying organizations, such as Topco Associates, were of a long-term nature to supply all or a large part of

[6] In certain instances sales were lost to respondent indirectly. Some of the lost customers switching to respondent's private label evaporated milk made their purchases of this product through Biddle Purchasing Company, of New York City, an organization which performs a buying service for wholesale grocers.

the purchaser's needs. For all practical purposes, the accounts were lost permanently.

Using data which respondent apparently does not dispute, the sales losses for individual Midwest competitors were as follows for the period covered by the complaint:

Competitors:	*Cases lost to respondent*
Page	3,650
United	14,168
Westerville	38,397
Gehl	25,434
Dairyland	22,320
Defiance	72,806
Nashville	65,040
Total	241,815

Examples of specific accounts lost are as follows:

Competitors	*Accounts lost*
Page	Kimbell Grocery Co., Fort Worth, Texas;
United	The Penn Fruit Co., Philadelphia, Pennsylvania;
	Brockton Public Markets, Brockton, Massachusetts;
Westerville	Colonial Stores, Thomasville, Georgia;
	Thomas & Howard Co., Columbia, South Carolina;
Gehl	Central Retailer Owned Grocers, Chicago, Illinois;
	Dixie Home Stores, Greenville, South Carolina;
Dairyland	The Penn Fruit Co., Philadelphia, Pennsylvania;
	Klein's Supermarket, St. Paul, Minnesota;
Defiance	Central Retailer Owned Grocers, Chicago, Illinois;
	Colonial Stores, Raleigh, North Carolina;
Nashville	Central Retailer Owned Grocers, Chicago, Illinois;
	Colonial Stores, Thomasville, Georgia;
	Winn Dixie, Tampa, Florida.

Thus, the immediate effect of respondent's expansion into the private label evaporated milk area was to attract accounts away from competitors. Such lost accounts were large and important purchasers. The loss of business was substantial, particularly for certain of the competitors. For instance, Dairyland Cooperative, which subsequently discontinued evaporated milk production, lost the Topco Associates' account in 1956 to respondent. The total purchases by this account in 1956 were $22,320, while Dairyland Cooperative's total evaporated milk sales in 1956 were only 49,404 cases. The loss was about one-half its sales for the period.

Witness DeMaster testified that the reason for Dairyland Cooperative's decline in sales and eventual discontinuance of business was the freight rate advantage of plants to the East. However, it was not until the time that respondent expanded in the private label field, applied its discriminatory prices and took a substantial share of the

firm's business that it finally discontinued production of the product. Although other factors apparently were involved, we believe that the record supports a finding that respondent's price structure to an important extent led to Dairyland Cooperative's discontinuance.

The entry and expansion of respondent in the private label field and its pricing methods has put severe pressure on its Midwest competitors. Mr. Page, of Page Dairy Company, testified:

> * * * The entry of the Borden Company into the private label business and the manner in which they have been operating has placed a severe competitive pressure on the entire unadvertised brand of private label milk structure and that has, in my opinion, largely been felt in the way, as far as we are concerned, has largely been felt in the way of a lowered market price with which we must contend.

Mr. Anderson, of United Dairy Company, referred to the same situation in his testimony as follows:

> The competition has forced our prices down from the level we had previous to that and some of the competition has been selling on a different basis, on an f.o.b. basis and it is made highly competitive because of those factors.

Respondent in denying that its pricing practices have injured competition, points especially to the fact that certain of the testifying competitors gained in sales volume in the period covered by the complaint. At least part of these increases was obtained from other Midwest companies which had ceased operations. Witness Page, of Page Milk Company, testified that he attributed the increase of his company principally to trade that had previously been handled by Producers Creamery of Cabool, Missouri, which company went out of business. Witness Anderson, of United Dairy Company, testified that the increase of that company was accounted for by additional business from former customers of Wilson Milk Company obtained when that company sold its evaporated milk business to Dean Milk Company, in Chicago. Witness Diehl, of Defiance Milk Products Company, testified that increases for both Defiance and Nashville Milk Company (a subsidiary) were in part due to business gained from evaporated milk plants that had gone out of business. To a considerable extent, therefore, the increases were mere windfalls and cannot be expected to reoccur on a regular basis. Sooner or later the full effect of respondent's discriminatory price structure can be expected to take its full toll.

It undoubtedly is a factor to be considered in this matter, although not a crucial one, that plants in the Midwest were disadvantaged as to the Eastern and Southeastern markets over plants located in the East and Southeast because of increased freight costs. Indicative of this is the difficulty which Dairyland Cooperative had in competing for markets in the East. The examiner, it is noted, placed considerable stress on respondent's asserted freight advantage as a factor in his finding of

a lack of competitive injury. On this subject, the examiner found that as to 86% of the sales gained by respondent from the Midwest competitors, respondent had a clear freight advantage over these competitors due to more convenient plant locations.

The inference which the examiner seems to draw is that it was the freight advantage which enabled respondent to capture accounts from Midwest competitors, not the price discrimination. There is no good record support for any such finding or inference. The instances cited by the examiner are isolated examples and there is no clear over-all picture in the record as to the extent or the significance of possible freight advantages which respondent might have had over competitors. We note that even the examiner does not attempt to explain all the losses as being due to plant location advantage. Moreover, it is clear from the record, based on facts shown and the reasonable inferences to be drawn therefrom, that plant location advantage, if an element in the switching of customers, was only one of several considerations, and that another important element was the lower (discriminatory) prices on the private label product compared to Borden brand. In any event, we are here concerned more with the losses which may subsequently occur, and clearly, respondent with its discriminatory price structure has an effective device to obtain accounts from its smaller competitors.

This record does not show a complete market picture for the evaporated milk industry, but it does sufficiently develop the competitive situation as between respondent and the Midwest competitors. Respondent by comparison to these competitors is a large and powerful concern. It has broad resources in that it sells a wide variety of food products both at home and abroad. Moreover, it sales of evaporated milk are principally under Borden brand, whereas the testifying competitors generally indicated that their evaporated milk sales were mostly private label. In other words, the testifying competitors were considerably more dependent upon private label evaporated milk sales than the respondent.

Respondent's prestige and power in the market is illustrated by the fact, as the examiner found, that private label customers came to respondent seeking a source of supply.

On the other hand, the Midwest competitors are small companies with relatively small sales volumes of evaporated milk compared to the sales of respondent. They maintain a rather precarious hold in the market place. As we have seen, sales for evaporated milk diminished in the period disclosed by the record. Since 1950, at least ten concerns, mostly in the Midwest, have discontinued production of evaporated milk. There are no new concerns coming into the business.

Under such circumstances, little is needed to shift the competitive

balance. Respondent came into the market using a discriminatory pricing structure. This has put a severe strain on the smaller competitors as some of them testified. In fact, the discontinuance of Dairyland Cooperative is tied to respondent's expansion in the field and its use of discriminatory prices. The testifying Midwest competitors all lost accounts to the respondent and it appears that the shift of business has been permanent.

In this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely. This is enough to satisfy the injury requirement of the Act.

We conclude that the effect of respondent's discriminatory pricing may be substantially to lessen or to injure, destroy or prevent competition with respondent, *i.e.*, there is a likelihood of substantial competitive injury in the primary line.

There is also a showing in the record that the effect of the discrimination may be to lessen or to injure, destroy or prevent competition with customers of the person who granted the discrimination. This would be competition with respondent's wholesale customers and with its retail customers. In *Federal Trade Commission* v. *Morton Salt Co.*, *supra*, it was sufficient to justify a finding of the prescribed effect that some merchants had to pay more for like goods than their competitors.

Here the differences in prices to customers, including competing customers, is well documented by the evidence. The following are examples:

Customer	Date	Borden brand delivered price	Private label f.o.b. price
Hartley Grocery, Columbia, S.C. (wholesaler)	7/18/57	6.45	----------
Biddle Purchasing Co. at Thomas & Howard, Columbia, S.C. (wholesaler)	7/18/57	----------	[1] 4.9051
Rawl Distributing Co., Columbia, S.C. (wholesaler)	7/ 8/57	6.45	----------
Rawl Distributing Co., Columbia, S.C.	3/ 4/58	6.60	----------
Biddle Purchasing Co. at Thomas & Howard, Columbia, S.C.	2/ 4/58	----------	5.0289
Piggly Wiggly Carolina Co., Inc., Columbia, S.C. (chain retailer)	1/10/58	----------	5.0227
	3/ 7/58	----------	4.9436

[1] The record shows that in July 1957, Thomas & Howard of Chester, South Carolina, the purchasing affiliate of the Thomas & Howard organization, on one order paid Biddle Purchasing Co. $5.04 per case and billed the order to Thomas & Howard of Columbia, South Carolina, at a $.17 per case markup to cover cost of labels and handling for a total of $5.21 per case.

The testimony from wholesalers as well as retailers disclosed the extremely low or nonexistent profit margins on evaporated milk. In most instances, wholesalers and retailers testified that evaporated milk was handled for accommodation to customers and not for profit. In fact, evaporated milk is used as a loss leader which indicates that discriminatory prices made it difficult for the unfavored customers to compete not only because of higher prices on that item but because it would tend to draw away customers for other products as well. Wholesale and retail witnesses testified to the effect that a lower price from the producer, such as the price on respondent's private label goods, would have been of great value in improving profit margins and assisting in meeting the competition on this item. The following is illustrative of pertinent testimony on the subject:

Woodrow W. Power, Power Food Store, Inc., Columbia, South Carolina (retailer):

Q. Now, you mentioned a short while ago, Mr. Power, you are in competition with various other stores in your vicinity like Piggly-Wiggly, A&P, Colonial and the like. Now, I assume that you follow their sales advertising policies and their merchandising policies?

A. Yes.

Q. Have you found them advertising private label milk at a price less than that charged by you for brand label?

A. Yes.

Q. Or for any evaporated milk which you handle?

A. Yes.

Q. Have you found that you could meet that prices that is charged by them?

A. No, sir, I can't buy it that cheap.

Q. Well, if you were able to obtain the private label evaporated milk from Hartley or Merchants at a price say of $5.25, $5.30, would you be interested in it?

A. Yes.

Daniel Shumpert, Shumpert Food Sales, West Columbia, South Carolina (retailer):

Q. Why do you say a nickel or a dime would have been of help? In other words, any differential of a cost of a nickel or a dime for private label.

A. It puts me in a position to meet competition prices more. The lower I can buy the cheaper I can sell it.

Harold A. McFeely, R. P. Turney & Company, Greer, South Carolina (wholesale grocery):

Q. Well, is the explanation you have just made, does it apply to the reason or the reason why you would have been interested in the private label evaporated milk? Just exactly why would the private label have been important to you?

A. I sell government agencies, state and local county quite a bit of merchandise for their chain gang camps and prisons and I have never been able to get that business due to the fact that I had only advertised brands to quote on and in checking at the offices I find that this milk under this label in one particular case has been getting the business for a year or so.

Q. Do you remember the name on the label?

A. I couldn't touch it. Yes. Red and White, put out by Thomas & Howard is a brand I see in Greenville now in the County Home and various different institutions and it is sold to them on the basis of what you said a few minutes ago, $5.25 or $5.30, this milk is sold at 25 to 30 cents a case profit and when I quoted $6.60 I did not receive any business and I was out of line over a dollar per case. So if I had secured the business at $6.60 it wouldn't have meant anything, but if I had had the private label milk I could have competed in the market and would have been able to get the business with that price.

It has been shown, in short, that some purchasers have paid less than their competitors for purchases of like goods from respondent and that difference is, in the circumstances, substantial. We conclude, therefore, that the effect of respondent's price descrimination may be substantially to lessen or to injure, destroy or prevent competition with respondent's customers.

We hold that the examiner erred in his determination that the record failed to show competitive injury as prescribed under Section 2(a) of the amended Clayton Act.

IV. Cost Justification Defense

Respondent has sought to cost justify the price discrimination at issue in this proceeding.[7] It has introduced into the record a cost study which the examiner after some modification, has accepted as full justification for the challenged differences in price.

A summary of respondent's cost study as it appears in the initial decision is as follows:

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[7] The proviso in Section 2(a) relating to cost justification reads: *"Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:".

Respondent's Cost Analysis, 1957

[Average per case]

	Borden brand	Private label	Difference
Gross sales	$6. 4046	$5. 1743	$1. 2303
Less Sales Deductions: Damaged Goods	. 0112	. 0027	. 0085
Cash Discount Offered	. 1279	----------	. 1279
Net Sales	6. 2655	5. 1716	1. 0939
Costs:			
Labels and Cartons	. 1789	. 1376	. 0413
Primary Freight	. 3684	. 0188	. 3496
Secondary Freight	. 0112	----------	. 0112
Reserve Storage	. 0690	----------	. 0690
Consignment Storage	. 0305	----------	. 0305
Investment Cost	. 0972	. 0568	. 0404
Premium Label Redemption	. 2316	----------	. 2316
Advertising	. 1247	----------	. 1247
Sales Department	. 3163	. 0009	. 3154
Brokers' Commissions	. 0427	----------	. 0427
Promotion Department	. 0189	. 0123	. 0066
Clerical	. 0151	. 0062	. 0089
Total	1. 5045	. 2326	1. 2719
Difference in Cost	----------	----------	1. 2719
Difference in Price	----------	----------	1. 0939
Excess of cost difference over price difference	----------	----------	. 1780

The figure on this table which respondent seeks to cost justify is the average price difference per case of $1.0939. For the year 1957, this is the difference between the average price per case for Borden brand of $6.2655 and the average price per case for private label of $5.1716. The total cost figures shown on the table are the average cost per case for the Borden brand and the average cost per case for the private label for 1957. The average cost difference shown by the study is $1.2719, which exceeds the average price difference of $1.0939 by 0.1780.

This study is inadequate and unacceptable because of the use of broad averaging. In addition, respondent has listed certain items as expense items which cannot properly be used for cost justification under the Robinson-Patman Act.

Broad averaging in the study has resulted in distortions in prices as well as costs. The price discrimination charged in this proceeding is concerned with various particular markets and specific transactions. For instance, in the plant area of Chester, South Carolina, in 1957, while Borden brand purchasers such as Rawl Distributing Company, Columbia, South Carolina, and Associated Grocers Mutual of Carolina, Charlotte, North Carolina, were paying prices at different times of $6.45 and $6.60 per case, private label purchasers, with whom the

Borden brand purchasers or their customers competed, were paying the lower prices such as $4.8942 per case in June, $4.9051 per case in July, $4.9210 in August, and so on. The price competition which the Borden brand customers faced was not the average private label price for 1957 of $5.1716 but rather the lower actual prices above mentioned. The use of broad averages may show an apparent justification on the average, but it levels the extremes and ignores specific markets or transactions where the greater differences may result in the lessening of competition.

Not all averaging is objectionable. For instance, in *Sylvania Electric Products, Inc., et al.*, 51 F.T.C. 282 (1954), the Commission, in connection with radio receiving tubes, approved a cost study which compared the aggregate price difference with the aggregate cost difference on the entire complement of tubes sold by the respondent. In that case, the lack of uniformity in the price spread was held to be of no competitive significance. That is not the case here. The competitive significance is illustrated by the above example involving the plant area of Chester, South Carolina.

A question of averaging costs for customer classes was recently considered by the Supreme Court of the United States in *United States* v. *Borden Co.*, 370 U.S. 460 (1962). There the court accepted the principle that some grouping is permissible in connection with cost justification under the proviso in Section 2(a). It further stated, however, that this is not to say that price differentials can be justified on the basis of arbitrary classifications or even classifications which are representative of the numerical majority of the individual members. The court said: "A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific member." (Footnote omitted.) *United States* v. *Borden Co.*, *supra*, at 469; cf. *Champion Spark Club Co.*, 50 F.T.C. 30, 43 (1953); *Standard Oil Company*, 41 F.T.C. 263, 276–277 (1945), *reversed* on other grounds, 233 F. 2d 649 [6 S. & D. 6] (7th Cir. 1956); *International Salt Co., et al.*, 49 F.T.C. 138, 153–155; *Thompson Products, Inc.*, 55 F.T.C. 1252, 1264 (1959); Advisory Committee on Cost Justification Report to the Federal Trade Commission (F.T.C. Mimeo. 8, 1956).

In the *Borden* case, the court rejected the cost defense because of the failure of the appellee to show sufficient homogeneity in the classifications. The cost defense in this proceeding is defective for a like reason. Respondent failed to use any customer classification in its study despite the fact that it sells to a wide variety of customer groups, e.g., chain retailers, wholesalers, cooperatives and other subgroups, among which its costs differed.

An example would be the differences in selling expenses between jobbers and retailers. Salesmen calling on jobbers were described by one witness as largely order takers. This is in contrast to the many promotional services performed by salesmen calling on retailers.

To take another example, the difference claimed for Sales Department expense between Borden brand and private label is $0.3163, a figure which alone considerably exceeds the claimed excess justification of $0.1780. However, these expenses were not the same for all customers. There were three distinct groups so far as the Sales Department expense was concerned: those where no salesmen called (e.g., small stores doing under $200,000 annually); stores where salesmen's activities were restricted (some chains would not allow salesmen to do any stock arranging); and those where the salesmen performed the full range of in-store service activities such as building floor displays and arranging the stock.

For the Sales Department expense, therefore, the costs, if any, were incurred in different amounts for the different groups of customers, and the use of an average figure created a substantial distortion in the cost study. Average cost figures were likewise used for such items as labels, storage and freight, and, as to these, it appears that such costs would vary among different customers. Accordingly, it was incorrect for the purpose of the cost study to average all such costs together without distinctions as to the customer groups.

Respondent's cost study fails for other reasons. For instance, it claims an "Investment Cost" difference of $0.0404 per case. Respondent apparently kept larger inventories of Borden brand evaporated milk than of the private label. In its analysis, it concludes that the money invested at 8% resulted in an inventory cost of $0.0835 per case for Borden brand and an inventory cost of $0.0257 per case for private label.[8] The fallacy in this position is that the so-called "Investment Cost" is not an actual, incurred cost at all; it amounts to a return on capital investment. Accordingly, this item is rejected for cost justification purposes. Cf. *Thompson Products, Inc.*, 55 F.T.C. 1252, 1265–1266 (1959).

Another item of cost claimed by respondent is the brokers' commission. This item is also rejected. In our view a savings in cost resulting from the elimination of brokers' commissions are not allowable cost savings under Section 2(a). Cf. *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 171 N. 18 [6 S. & D. 800] (1960).

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[8] The cost analysis set forth above refers to "Investment Costs" of $0.0972 and $0.0568 for Borden brand and private label, respectively. These figures include claimed additional amounts for investment in accounts receivable. The figures for investment in inventories alone are $0.0835 for Borden brand and $0.0257 for private label.

We conclude that respondent's cost analysis is inadequate to cost justify its discriminatory prices and that the examiner erred in his conclusion that respondent had shown full cost justification.

The hearing examiner erred in dismissing the complaint. The record fully supports a finding of price discrimination in violation of Section 2(a) of the Clayton Act, as amended, and an order to cease and desist the practice should be entered. It is necessary, therefore, to consider the form of such cease and desist order.

V. Form of Order

While this matter involves primary line injury to competition (as well as injury to competition with respondent's customers), it was not a geographic price difference which resulted in such injury. Rather, it was the different prices quoted for the like products sold under the Borden brand and under private label without regard to geography. Thus, the type of order which would regulate the relationship of prices geographically does not appear to be necessary in this case to correct the violation found. To put it another way, the price discrimination found is not the result of differences in price which may exist between plant locations such as those in the South and those in the Midwest. It results from the price discriminations occurring between brands in each market where private label is sold in competition with Borden brand. To eliminate such price discrimination so far as it is not justified will put the Midwest competitors on an equal competitive footing in regard to the sale of private label. An effective order to prevent such price discrimination between Borden brand and private label customers will remove the cause of the adverse competitive effects in the primary line as found herein. It will also prevent the injury to competition in the lines of commerce in which respondent's customers are engaged. In the circumstances of this case, we do not believe it necessary to enter an order of any broader scope.

There are readily recognizable actual cost differences between Borden brand and private label which will justify differences in price. We have previously outlined the principles to be employed in determining the differences which may be so justified. It will be necessary for respondent, if it chooses to rely on cost justification, to first classify its customers in groups of reasonable homogeneity and to base its differences in price on the cost savings for each such group.

The prohibition we will enter in this case will order respondent in connection with the sale of food products in commerce to cease and desist from discriminating in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher prices or with a customer of the purchaser paying the higher prices.

Respondent's appeal is denied and the appeal of counsel supporting the complaint is granted. The initial decision of the hearing examiner is vacated and set aside and we are issuing our own findings, conclusions and proposed order to cease and desist in lieu thereof.

Commissioner Elman dissented to the decision herein and Commissioners Anderson and Higginbotham did not participate in the decision herein.

Findings as to the Facts, Conclusions, and Proposed Order
November 28, 1962

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U.S.C., Sec. 13), the Federal Trade Commission on April 22, 1958, issued and subsequently served upon respondent its complaint in this proceeding, charging said respondent with violation of subsection (a) of Section 2 of the Clayton Act, as amended. Respondent's answer to the complaint was filed June 23, 1958. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. The hearing examiner, in his initial decision filed December 15, 1961, held that the acts and practices of the respondent, as found in his initial decision, were not in violation of the law as charged and he accordingly ordered the complaint dismissed. Counsel supporting the complaint and respondent have filed cross-appeals.

The Commission having considered said appeals and the briefs and oral argument in support thereof and in opposition thereto, and the entire record herein, and having granted the appeal of counsel supporting the complaint and denied the respondent's appeal, and having vacated and set aside the initial decision, now makes this its findings as to the facts, conclusions drawn therefrom and proposed order, which, together with the accompanying opinion, shall

be in lieu of the findings, conclusions and order contained in the said initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, The Borden Company, is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, New York 17, New York.

2. The respondent is engaged in the manufacture, processing, distribution and sale of an extensive variety of food, dairy and chemical products in the United States and abroad. Its total sales in 1957 amounted to $931,220,662. The only product with which we are here concerned is evaporated milk. Substantial quantities of this product have been shipped from respondent's various plants to purchasers thereof located in states other than the states of manufacture. In 1956, respondent's sales of evaporated milk exceeded $30,000,000.

3. Respondent has been producing and selling Borden brand evaporated milk since 1892. The respondent's carload and pool-car delivered prices for Borden brand evaporated milk during the period of time included in the complaint were as follows:

	Per case tall 48s
January 1, 1956, to May 14, 1956	$6.05
May 15, 1956, to March 29, 1957	6.30
March 30, 1957, to November 18, 1957	6.45
November 19, 1957, to March 31, 1958	6.60

The less-than-carload prices throughout this period of time were 5 cents higher per case of tall 48s. The terms of sale have included a cash discount of 2 percent if paid within 10 days after sale, and a swell allowance of one-tenth of 1 percent to cover damaged goods sold to retail buyers. Such sales of Borden brand evaporated milk were made principally to wholesalers or jobbers, and to chainstores.

4. In about 1938, the respondent began packing its evaporated milk under the private labels of the purchasers as well as under its own Borden brand. During the period of time with which we are concerned, January 1, 1956, to March 31, 1958, the prices of such milk were determined by a pricing formula applicable to all of respondent's private label customers. This formula included the cost of the buyer's label, the cost of hauling the milk from the dairy farm to respondent's plant, the average monthly cost of the milk, and, finally, a factor referred to as "COTM," or "Cost Other Than Milk," which included the cost of additives such as Vitamin D, the cost of cans, the plant processing, overhead cost, and a gross margin or profit factor. The

respondent's private label prices determined in accordance with the foregoing formula, sometimes referred to as the "Cost plus pricing formula," were net f.o.b. plant. No cash or other discount was allowed the purchaser of private label milk, and all purchasers buying from the sale plant at or about the same time paid the same price. These prices, however, varied from one to another of respondent's plants, and from month to month in conformance with the changing price of milk paid to the farmers. A further factor of variation was respondent's periodic revision of its gross margin of profit, which was reviewed approximately every six months, and adjusted to the changing conditions of respondent's general operation.

5. In the course and conduct of its aforesaid business, respondent has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

6. The evidence shows that there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices. Respondent's evaporated milk, regardless of how it was labeled or at what price it may have been sold, either at respondent's plant or in the market place, was milk of "like grade and quality" within the meaning of Section 2(a) of the Clayton Act, as amended.

7. Numerous invoices in the record showing sales to different customers disclose that during the period of time included in the complaint, the f.o.b. price of respondent's private label evaporated milk at its various plants was consistently and substantially lower than the delivered price of respondent's Borden brand evaporated milk. The transactions evidenced by these invoices occurred at one or another of respondent's nine plants, located, respectively, at Fort Scott, Kansas; Wellsboro, Pennsylvania; Modesto, California; Albany, Oregon; Dixon, Illinois; New London, Wisconsin; Perrinton, Michigan; Lewisburg, Tennessee; and Chester, South Carolina. The prices of Borden brand and private label brand evaporated milk prevailing at two of respondent's plants during the time involved illustrate the differences in price, as follows:

130 Findings

Chester, South Carolina, plant

	Delivered price, Borden brand milk (per case)	F.o.b. price, private label milk (per case)
1957:		
June	$6.45	$4.8942
July	6.45	4.9051
August	6.45	4.9210
September	6.45	4.8660
October	6.45	4.8166
November	6.45	4.9361
December	6.60	4.9741
1958:		
January	6.60	5.0227
February	6.60	5.0289
March	6.60	4.9436

Lewisburg, Tennessee, plant

	Delivered price, Borden brand milk (per case)	F.o.b. price, private label milk (per case)
1956:		
August	$6.30	$4.7363
September	6.30	4.81988
	6.30	4.8321
October	6.30	4.7718
	6.30	4.8418
November	6.30	4.7411
	6.30	4.8211
	6.30	4.8311
1957:		
January	6.30	4.9837
	6.30	5.0737
February	6.30	5.0478
	6.30	4.9628
	6.30	5.0578
March	6.30	4.9766
	6.30	4.8966
	6.30	4.9666
	6.30	4.9866
	6.30	5.0566
April	6.45	4.8742
	6.45	4.9542
May	6.45	4.8389
	6.45	4.9189
June	6.45	4.8749
July	6.45	4.9232
	6.45	4.8332
August	6.45	4.8327
September	6.45	4.8744
October	6.45	4.9738
November	6.45	4.966
December	6.60	4.999
1958:		
January	6.60	5.0273
February	6.60	5.0072
March	6.60	4.9436
	6.60	4.9188

The record shows that these differentials are not accounted for by differences in the cost of transportation arising from the f.o.b. deliveries and the destination deliveries.

8. It is found that respondent, while engaged in commerce and in the course of such commerce, discriminated in price between different purchasers of commodities of like grade and quality.

9. Representatives of seven relatively small canners of evaporated milk located in the Midwest testified in support of the complaint. Although each of these seven milk canners sold evaporated milk both under their own labels and under private labels, by far the larger percentage of their evaporated milk business consisted of the sale of private label milk. None of them advertised or sold their product on a national level, and all of them sold their private label evaporated milk, with minor exceptions, on a delivered-price basis. These companies all competed with respondent in the sale of evaporated milk. These and other Midwestern competitors will sometimes hereinafter be referred to as the Midwest competitors.

10. These testifying Midwest competitors and their plant locations are as follows:

Company and Plant Locations

Page Milk Company, Merrill, Wisconsin, and Coffeyville, Kansas (Page).
United Dairy Company, Barnesville, Lodi and Waterford, Ohio (United).
Westerville Creamery Company, Covington, Ohio (Westerville).
Gehl Guernsey Farms, Germantown, Wisconsin (Gehl).
Dairyland Cooperative Association, Juneau, Wisconsin (Dairyland).
Defiance Milk Products Company, Defiance, Ohio (Defiance).
Nashville Milk Company, Nashville, Ohio, a wholly owned subsidiary of Defiance (Nashville).

11. Sales volumes on a tall can basis for the testifying Midwest competitors individually and for the respondent for the years 1955–1957 were as follows:

Packer	1955	1956	1957
Page	720, 884	726, 443	735, 803
United	887, 651	1, 041, 041	958, 373
Westerville	701, 847	593, 739	589, 242
Gehl	108, 924	168, 479	285, 544
Dairyland	25, 766	49, 404	*None
Defiance	739, 886	699, 953	694, 166
Nashville	132, 863	150, 645	158, 811
Respondent	5, 235, 852	5, 010, 205	5, 419, 108

*Discontinued evaporated-milk production in April 1957.

United States Department of Agriculture Dairy Statistics in the record show supply and distribution (which approximates total commercial sales) of canned evaporated milk in the United States as follows:

[In millions of pounds]

1950	2,720	1953	2,407	1956	2,257
1951	2,456	1954	2,362	1957	2,204
1952	2,406	1955	2,297		

On the basis of 43½ pounds to the tall case, the total sales volumes in tall cases for the most recent three years of those mentioned were: 1955, 52,804,598; 1956, 51,862,069; 1957, 50,666,667.

12. The record also reveals that in recent years a number of companies have gone out of the evaporated milk business. The concerns which have discontinued the production of evaporated milk since 1950 include the following:

Dairyland Cooperative Association (Dairyland Cooperative), Juneau, Wisconsin (discontinued April 1957).
Amboy Milk Company, Amboy, Illinois (discontinued early in 1958).
Dean Milk Company (discontinued 1955 or 1956).
Fort Dodge Creamery Company.
Rochester Dairy Company, Rochester, Minnesota (discontinued 1954 or 1955).
Hillpoint Creamery Company, Reedsburg, Wisconsin.
Dairyland Distributors Cooperative, Watertown, Wisconsin.
Producers Creamery, Springfield, Missouri (discontinued in 1956).
Reich McJunkin, Meadville, Pennsylvania.
Wilson Milk Company, Indianapolis, Indiana.

Also, between 1956 and 1958, Consolidated Badger Cooperative restricted its evaporated milk operation to Wisconsin and the upper part of Michigan. There have been no new concerns going into the evaporated milk business.

13. When respondent expanded its operations and sales in the private label evaporated milk field beginning about 1956, Midwest competitors began to lose customers and sales to respondent. In certain instances, sales were lost to respondent indirectly. Some of the lost customers switching to respondent's private label evaporated milk made their purchases of the product through Biddle Purchasing Company, New York City, an organization which performs a buying service for wholesale grocers. A partial list of specific accounts lost includes:

Competitors:	*Account lost*
Page	Kembell Grocery Co., Fort Worth, Texas.
United	The Penn Fruit Co., Philadelphia, Pennsylvania.
	Brockton Public Markets, Brockton, Massachusetts.
Westerville	Colonial Stores, Thomasville, Georgia.
	Thomas & Howard Co., Columbia, South Carolina.
Gehl	Central Retailer Owned Grocers, Chicago, Illinois.
	Dixie Home Stores, Greenville, South Carolina.
Dairyland	The Penn Fruit Co., Philadelphia, Pennsylvania.
	Klein's Supermarket, St. Paul, Minnesota.
Defiance	Central Retailer Owned Grocers, Chicago, Illinois.
	Colonial Stores, Raleigh, North Carolina.
Nashville	Central Retailer Owned Grocers, Chicago, Illinois.
	Colonial Stores, Thomasville, Georgia.
	Winn Dixie, Tampa, Florida, and others for various of the above competitors.

14. The full amounts of the losses by Midwest competitors to respondent can only be estimated based on the prior purchases of each lost account. By so doing, the estimated loss was at least 241,815 cases, and the actual loss may well have been higher. The sales losses were as follows for each testifying Midwest competitor:

Competitor:	*Cases lost to respondent*
Page	3,650
United	14,168
Westerville	38,397
Gehl	25,434
Dairyland	22,320
Defiance	72,806
Nashville	65,040
Total	241,815

15. The loss of business was substantial, particularly for some of the competitors. For instance, Dairyland Cooperative, which subsequently discontinued evaporated milk production, lost the Topco Associates' account in 1956 to respondent. The total purchases through this account in 1956 were $22,320. Dairyland Cooperative's total evaporated milk sales in 1956 were only 49,404 cases. The loss was about one-half its sales for the period. Witness DeMaster testified that Dairyland Cooperative's decline in sales and eventual discontinuance of business was due to the freight rate advantage of plants to the East. However, it was not until the time that respondent expanded in the private label field, applied its discriminatory prices and took a substantial share of the firm's business that it finally discontinued production of the product. Although other factors apparently were involved, the finding is that respondent's price structure to a significant extent led to Dairyland's discontinuance.

16. The entry and expansion of respondent in the private label field and its pricing methods has put severe pressure on its Midwest competitors. Mr. Page, of Page Dairy Company, testified:

* * * The entry of the Borden Company into the private label business and the manner in which they have been operating has placed a severe competitive pressure on the entire unadvertised brand of private label milk structure and that has, in my opinion, largely been felt in the way, as far as we are concerned, has largely been felt in the way of a lowered market price with which we must contend.

Mr. Anderson, of United Dairy Company, referred to the same situation in his testimony as follows:

The competition has forced our prices down from the level we had previous to that and some of the competition has been selling on a different basis, on an f.o.b. basis and it is made highly competitive because of those factors.

17. Certain of the testifying competitors gained in sales volume in the period covered by the complaint. At least part of these increases, however, was obtained from other Midwest companies which had ceased operations. Witness Page, of Page Dairy Company, testified that he attributed the increase of his company principally to trade that had previously been handled by Producers Creamery of Cabool, Missouri, which company went out of business. Witness Anderson, of United Dairy Company, testified that the increase of that company was accounted for by additional business received from former customers of Wilson Milk Company obtained when that company sold its evaporated milk business to Dean Milk Company, of Chicago. Witness Diehl, of Defiance Milk Products Co., testified that increases for both Defiance and Nashville Milk Company (a subsidiary) were in part due to business gained from evaporated milk plants that had gone out of business. To a considerable extent, therefore, the increases were mere windfalls and cannot be expected to reoccur on a regular basis. Sooner or later the full effect of respondent's discriminatory price structure can be expected to take its full toll.

18. It undoubtedly is a factor to be considered in this matter, although not a crucial one, that plants in the Midwest were disadvantaged as to the Eastern and Southeastern markets over plants located in the East and Southeast because of increased freight costs. Indicative of this is the difficulty which Dairyland Cooperative had in competing for markets in the East. However, there is no clear over-all picture in the record as to the extent or the significance of possible freight advantages which respondent might have had over competitors. It is clear from the record, based on facts shown and the reasonable inferences to be drawn therefrom, that plant location advantage, if an element in the switching of customers to respondent, was only one of several considerations, and that another important element was the

lower (discriminatory) prices on the private label product compared to Borden brand.

19. This record does not show a complete market picture for the evaporated milk industry, but it does develop the competitive situation as between respondent and the Midwest competitors. Respondent by comparison to these competitors is a large and powerful concern. It has broad resources in that it sells a wide variety of food products both at home and abroad. Moreover, its sales of evaporated milk are principally under Borden brand, whereas the testifying competitors generally indicated that their evaporated milk sales were mostly private label. In other words, the testifying competitors were considerably more dependent upon private label evaporated milk sales than the respondent.

20. Respondent's prestige and power in the market is illustrated by the fact that private label customers came to respondent seeking a source of supply. On the other hand, the Midwest competitors are small companies with relatively small sales volumes of evaporated milk compared to the sales of respondent. They maintain a rather precarious hold in the market place. As we have seen, sales for evaporated milk diminished in the period disclosed by the record. Since 1950, at least ten concerns, mostly in the Midwest, have discontinued production of evaporated milk. There are no new concerns coming into the business. Under such circumstances, little is needed to shift the competitive balance. Respondent came into the market using a discriminatory pricing structure. This has put a severe strain on the smaller competitors as some of them testified. In fact, the discontinuance of Dairyland Cooperative is tied to respondent's expansion in the field and its use of discriminatory prices. The testifying Midwest competitors all lost accounts to the respondent and it appears that the shift of business has been permanent.

21. In this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely. This is enough to satisfy the injury requirement of the Act. We find and conclude that the effect of respondent's discriminatory pricing may be substantially to lessen or to injure, destroy or prevent competition with respondent, i.e., there is a likelihood or a reasonable probability of substantial competitive injury in the primary line.

22. There is also a showing in the record that the effect of the discrimination may be substantially to lessen or to injure, destroy or prevent competition with customers of the person who granted the discrimination. This would be competition with respondent's whole-

sale customers and with its retail customers. The differences in prices to customers, including competing customers, is well documented by the evidence. The following are examples:

Customer	Date	Borden brand delivered price	Private label f.o.b. price*
Hartley Grocery, Columbia, S.C. (wholesaler)	July 18, 1957	6.45	----------
Biddle Purchasing Co., at Thomas & Howard, Columbia, S.C. (wholesaler)	July 18, 1957	----------	**4.9051
Rawl Distributing Co., Columbia, S.C. (wholesaler)	July 8, 1957	6.45	----------
Rawl Distributing Co., Columbia, S.C.	Mar. 4, 1958	6.60	----------
Biddle Purchasing Co., at Thomas & Howard, Columbia, S.C.	Feb. 4, 1958	----------	5.0289
Piggly Wiggly Carolina Co., Inc., Columbia, S.C. (chain retailer).	Jan. 10, 1958	----------	5.0227
	Mar. 7, 1958	----------	4.9436

*Prices do not include cost of labels.

**The purchase in this instance was made by Thomas & Howard, Chester, S.C., for Chester & Howard at Columbia, S.C., through the Biddle Purchasing Co Biddle was paid $5.04 per case and] Thomas & Howard, Columbia, S.C., was billed by its affiliate at a $0.17 per case markup to cover cost of labels and handling for a total of $5.21 per case.

23. The testimony from wholesalers as well as retailers disclosed the extremely low or nonexistent profit margins on evaporated milk. In most instances, wholesalers and retailers testified that evaporated milk was handled for accommodation to customers and not for profit. In fact, evaporated milk is used as a loss leader which indicates that discriminatory prices made it difficult for the unfavored customers to compete not only because of higher prices on that item but because it would tend to draw away customers for other products as well. Wholesale and retail witnesses testified to the effect that a lower price from the producer, such as the price on respondent's private label goods, would have been of great value in improving profit margins and assisting in meeting the competition on this item. The following is illustrative of pertinent testimony on the subject:

Woodrow W. Power, Power Food Store, Inc., Columbia, South Carolina (retailer) (R. 454):

Q. Now, you mentioned a short while ago, Mr. Power, you are in competition with various other stores in your vicinity like Piggley Wiggley, A&P, Colonial and the like. Now, I assume that you follow their sales advertising policies and their merchandising policies?

A. Yes.

Q. Have you found them advertising private label milk at a price less than that charged by you for brand label?

A. Yes.

Q. Or for any evaporated milk which you handle?

A. Yes.

Q. Have you found that you could meet that price that is charged by them?

A. No, sir, I can't buy it that cheap.

Q. Well, if you were able to obtain the private label evaporated milk from Hartley or Merchants at a price say of $5.25, $5.30, would you be interested in it?

A. Yes.

Daniel Shumpert, Shumpert Food Sales, West Columbia, South Carolina (retailer) (R. 473):

Q. Why do you say a nickel or a dime would have been of help? In other words, any differential of a cost of a nickel or a dime for private label.

A. It puts me in a position to meet competition prices more. The lower I can buy the cheaper I can sell it.

Harold A. McFeely, R. P. Turney & Company, Greer, South Carolina (wholesale grocery) (R. 563, 564):

Q. Well, is the explanation you have just made, does it apply to the reason or the reason why you would have been interested in the private label evaporated milk? Just exactly why would the private label have been important to you?

A. I sell government agencies, state and local county quite a bit of merchandise for their chain gang camps and prisons and I have never been able to get that business due to the fact that I had only advertised brands to quote on and in checking at the offices I find that this milk under this label in one particular case has been getting the business for a year or so.

Q. Do you remember the name on the label?

A. I couldn't touch it. Yes, Red and White, put out by Thomas & Howard is a brand I see in Greenville now in the County Home and various different institutions and it is sold to them on the basis of what you said a few minutes ago, $5.25 or $5.30, this milk is sold at 25 to 30 cents a case profit and when I quoted $6.60 I did not receive any business and I was out of line over a dollar per case. So if I had secured the business at $6.60 it wouldn't have meant anything, but if I had had the private label milk I could have competed in the market and would have been able to get the business with that price.

24. It has been shown, in short, that some purchasers have paid less than their competitors for purchases of like goods from respondent and that the difference is, in the circumstances, substantial. We find and conclude, therefore, that the effect of respondent's price discrimination may be substantially to lessen or two injure, destroy or prevent competition with respondent's customers.

25. Respondent has submitted a cost study in an attempt to cost justify the price discrimination case shown pursuant to the cost proviso in Section 2(a). The finding is that respondent's cost study is inadequate and unacceptable primarily because of the broad averaging employed. It is also found that the alleged items of expense appearing as "Investment Cost" and "Brokers' Commissions" were improperly listed as costs for the purpose of cost justification under the amended Clayton Act.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The acts and practices of the respondent, as herein found, violate subsection (a) of Section 2 of the Clayton Act, as amended.

PROPOSED ORDER

It is ordered, That respondent, The Borden Company, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality by selling to any purchaser at a price higher than the price charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

The term "price" as used in this order means the net price after all discounts, including cash discount, rebates or other allowances, including damaged goods allowance, have been deducted.

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

Commissioner Elman dissenting and Commissioners Anderson and Higginbotham not participating.

Opinion on Respondent's Objections to Proposed Order

JANUARY 30, 1963

Respondent, as provided in the Commission's order issued November 28, 1962, has filed its objections to the Commission's proposed order, a statement of its supporting reasons and its alternative form of order. Counsel supporting the complaint has filed a reply thereto, and respondent has also filed a further statement.

Respondent first requests that the Commission delete "food products" and substitute "evaporated milk." Evaporated milk, as the record shows, is but one of a number of food products manufactured and sold by respondent. Respondent sells food items such as Borden's Malted Milk, Borden's None-Such Mince Meat, Borden's Instant Hot Chocolate, Borden's Instant Coffee and Borden's Starlac (a powdered milk product), to name just a few. Borden's line of food products also includes items in the dairy field such as cheese, ice cream and fluid milk and other special products such as infant foods. Since the same or a

similar price discrimination practice could be used as well for such other products, the order, to be effective, was made to include all "food products." See *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 343 [6 S. & D. 727] (7th Cir. 1960), *cert. denied* 364 U.S. 883; *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480 [7 S. & D. 583] (2d Cir. 1962), 31 L.W. 2284. Respondent's request to narrow the order to cover only evaporated milk is rejected.

Respondent suggests the inclusion in the order of the following words: "in any case where (a) the lower price undercuts the price at which the purchaser buying at such lower price may buy from another seller, and (b) the lower price has not been offered to the purchaser buying at the higher price." This modification is rejected as inappropriate in light of the facts in this case and the type of order issued.

Respondent lastly requests that the following definition be included in the order: "The term 'purchaser' as used in this order means the person to whom the respondent sells and from whom the respondent receives payment." It asserts that this suggested modification is for the purpose of clarifying a claimed ambiguity as to the meaning of the proposed order. The order as written covers price discriminations where the purchaser paying the higher price or his customer competes with the purchaser paying the lower price.

We believe this order is clear and explicit in its application to the facts of this case. In the instance respondent mentions as resulting in the asserted ambiguity, the Commission found that wholesaler Thomas & Howard purchased the shipment in question through Biddle Purchasing Company. An order defining purchaser as requested could be interpreted as excluding the actual purchaser where payment is made through an agent or representative. That would be an inappropriate result. If a question should arise in the future as to the relationship between respondent and a party from which it receives payment for the shipment of goods, the matter can best be resolved under regular compliance procedures upon the basis of the facts shown in the particular instance. We, therefore, reject the respondent's request for defining purchaser in the order.

Commissioner Elman dissented to the decision herein and Commissioners Anderson and Higginbotham did not participate in the decision herein.

Final Order

Respondent having filed, pursuant to the Commission's order of November 28, 1962, objections to the Commission's proposed order in this proceeding, reasons in support thereof, and a proposed alternative order, complaint counsel having filed a reply to the objections and respondent having filed a further statement with respect thereto; and

The Commission, for the reasons stated in the accompanying opinion, having rejected respondent's objections and having further determined that its proposed order to cease and desist should be issued as the final order of the Commission:

It is ordered, That respondent, The Borden Company, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality by selling to any purchaser at a price higher than the price charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

The term "price" as used in this order means the net price after all discounts, including cash discount, rebates or other allowances, including damaged goods allowance, have been deducted.

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

Commissioner Elman dissenting and Commissioners Anderson and Higginbotham not participating.

IN THE MATTER OF

L & M INTERNATIONAL, INC., ET AL.

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

Docket 8488. Complaint, June 4, 1962—Decision, Feb. 5, 1963

Order requiring St. Louis mail order distributors of electrical appliances, small tools, and other household items, to cease making such deceptive pricing and savings claims in newspaper and magazine advertising and in their catalog as, for example, "Giant 12-inch Automatic Electric Skillet Reg. $39.95—$9.95", when $39.95 was not the regular retail price and customers did not save the difference between the two figures; and "Giant Plastic Sheet 1¢ * * * when you buy another * * * for 99¢" when they did not offer two sheets for the price of one plus one cent.

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 L & M International, Inc., a corporation, and Marcus Rosenfeld and Leon Rosenfeld and Isadore Rosenfeld, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Marcus Rosenfeld, Leon Rosenfeld and Isadore Rosenfeld have been continuously engaged in the business hereinafter described since its inception. Initially the business was conducted by them as partners trading as L & M Company. The partnership was succeeded by L & M International, Inc., a corporation, organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 415 North Eighth Street, in the city of St. Louis, State of Missouri. It does business as L & M Company.

Respondents Marcus Rosenfeld, Leon Rosenfeld and Isadore Rosenfeld are officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various household items, including home electrical appliances and small tools. Respondents sell by mail directly to the public.

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

PAR. 4. In the course and conduct of their business as aforesaid, respondents have made statements in newspapers and magazines of national circulation and in their catalog respecting the prices of certain of their products of which the following are typical:

GIANT 12-INCH AUTOMATIC ELECTRIC SKILLET
Reg. $39.95—$9.95

GIANT PLASTIC SHEET 1¢—Others charge $1.00 for 9 x 12 (108 sq. ft.) tough, transparent plastic sheet, but our price is only One Cent each when you buy another same size and exactly the same quality sheet for 99¢

PAR. 5. Through the use of the aforesaid statements respondents represented directly or indirectly:

1. That the price designated "Reg." was respondents' usual and customary retail price in the recent, regular course of business of the automatic electric skillet and that savings afforded to purchasers in the purchase of that item amounted to the difference between $39.95 and $9.95.

2. That two plastic sheets of the same size and quality may be purchased for respondents' established price of 99¢ for one of such plastic sheets, plus one cent.

PAR. 6. Said statements and representations are false, misleading and deceptive. In truth and in fact:

1. The "Reg." price of $39.95 is not the respondents' usual and customary retail price in the recent, regular course of business of the electric skillet, and savings amounting to the difference between $39.95 and $9.95 are not afforded to purchasers.

2. Respondents' established price of one of said plastic sheets is not 99¢ but is a lower price and respondents are not offering two of said plastic sheets for the usual price of one, plus one cent.

PAR. 7. Respondents have made statements in advertisements in connection with offering their merchandise for sale, such as: "We guarantee to please you—or your money cheerfully refunded", "Satisfaction guaranteed or your money cheerfully refunded", "Satisfaction guaranteed or your money cheerfully refunded in 10 days", thereby representing directly or indirectly that the purchase price, when requested by a customer, would be refunded voluntarily and within ten days.

PAR. 8. Said statements and representations were false, misleading and deceptive. In truth and in fact, said respondents in certain instances failed and neglected to refund the purchase price to customers when requested, and frequently such refunds were made only after the Better Business Bureau or Post Office Department had made inquiries of said respondents at the instance of customers regarding respondents' failure to honor their refund guarantee.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of household items of the same general kind and nature as those sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said state-

ments and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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

Mr. Charles W. O'Connell supporting the complaint.

Mr. Selden Blumenfeld, of *Blumenfeld, Abrams & Daniel*, of St. Louis, Mo., for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

NOVEMBER 16, 1962

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on June 4, 1962, issued its complaint charging L & M International, Inc., a corporation, and Marcus Rosenfeld, Leon Rosenfeld and Isadore Rosenfeld, individually and as officers of said corporation, with violation of Section 5 of the Federal Trade Commission Act.

The complaint alleges respondents to have been engaged for some time last past in the interstate sale by mail directly to the public of various household items, including home electrical appliances and small tools. It is further alleged that respondents advertised said products in a catalog as well as newspapers and magazines of national circulation and that in such advertisements and contrary to the facts, respondents represented that the purchase prices being therein offered were lower than the respondents' regular, usual and customary higher prices for such products in the recent regular course of business, and that the difference between the said lower prices and the said higher prices shown, would be a savings in such monetary amounts to the purchaser of such products. It was also alleged that respondents in said advertisements made false, misleading and deceptive guarantee statements and representations as to purchase price refunds given to dissatisfied customers.

Joint answer to the complaint was filed on June 18, 1962, by respondents Marcus Rosenfeld and Leon Rosenfeld which in effect admits all the material allegations of the complaint except those directed to the alleged guarantee misrepresentations in Paragraphs 7 and 8 of the complaint which were denied. Said answer also denies

respondent Isadore Rosenfeld to have participated in the formulation, direction and control of the policies, acts and practices of the corporate respondent, L & M International, Inc., but admits that respondents Marcus and Leon Rosenfeld formulated, directed and controlled the policies, acts and practices of said corporate respondent. Answer and affidavit by respondent Isadore Rosenfeld that he never had any active connection with the corporate respondent, and that he had no knowledge of the matters pleaded in the complaint, and asking that the complaint be dismissed as to him was filed herein on July 2, 1962.

No answer was filed by the corporate respondent, L & M International, Inc., and it is accordingly in default and subject to the provisions of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, Part 4, Section 4.5(c).

Following a prehearing conference held on August 8, 1962, and made part of the public record herein by agreement of both counsel, counsel for respondents submitted an affidavit dated September 12, 1962, by respondent Marcus Rosenfeld together with a second affidavit and attachments thereto also by respondent Marcus Rosenfeld and dated September 12, 1962.

The first affidavit recites that respondent Isadore Rosenfeld was elected an officer and director of the corporate respondent L & M International, Inc., in his absence, and that he attended no meetings from such first meeting of the shareholders and directors of said respondent corporation until his resignation as an officer and director on November 30, 1961. This first affidavit further recites that respondent Isadore Rosenfeld transacted no business for the respondent corporation, had nothing whatsoever to do with the establishment of its methods of doing business, and still further, that on or about April 27, 1962, the said respondent corporation made an assignment for the benefit of its creditors and has transacted no business since said date.

The second affidavit by respondent Marcus Rosenfeld summarizes various attachments to said affidavit consisting of a typewritten compilation and numerous photostat copies of cancelled bank check statements by the First National Bank of St. Louis, Missouri, entitled L & M Company Refund Account. This affidavit shows the total number and the total dollar amount of purchase price refunds made to customers during the calendar years 1960, 1961 and the first 4 months of 1962, and discloses that during such time period 16,987 refunds totaling $69,191.66 were made by said corporate respondent.

Based on the foregoing, counsel supporting the complaint filed a motion to dismiss the complaint as to respondent Isadore Rosenfeld and to dismiss Paragraphs 7 and 8 of the complaint alleging refund guarantee misrepresentations. Said motion states that the evidence on

which the charges of the complaint in such respect were based is not sufficient to prevail over the opposing evidence since available and proposed to be offered by respondents.

In conjunction with said motion, counsel supporting the complaint and counsel for respondents executed and submitted a stipulation to be made a part of the record herein in lieu of evidence in support of and opposition to the complaint. Said stipulation sets forth the facts and conclusions as to which both counsel are in agreement and states that the hearing examiner may proceed thereon to make findings of fact and conclusions without the necessity of counsel filing proposed findings, briefs, or presentation of argument. The stipulation also contains an agreed upon proposed order to cease and desist which parallels the proposed order to cease and desist contained in the complaint with the exception of the dismissal of respondent Isadore Rosenfeld and paragraph 7 and 8 of the complaint.

By order of the hearing examiner dated November 5, 1962, it was directed that the first affidavit of respondent Marcus Rosenfeld dated September 12, 1962; the second affidavit by said respondent with attachments also of the same date; and the stipulation executed on October 3, 1962, between counsel supporting the complaint and counsel for respondents be filed of record herein. The motion of counsel supporting the complaint entitled Motion to Dismiss Complaint as to One of the Respondents and as to Certain of the Charges Therein was reserved for final disposition in the initial decision herein.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondents Marcus Rosenfeld and Leon Rosenfeld have been continuously engaged in the business hereinafter described since its inception. Initially the business was conducted by them as partners trading as L & M Company. The partnership was succeeded by L & M International, Inc., a corporation, organized existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 415 North Eighth Street, in the city of St. Louis, State of Missouri. It does business as L & M Company.

2. Respondents Marcus Rosenfeld and Leon Rosenfeld are officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the corporate respondent including the

acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent. Affidavits of record herein by respondents Marcus Rosenfeld and Isadore Rosenfeld show that respondent Isadore Rosenfeld until his resignation on November 30, 1961, was but a nominal officer and director of respondent L & M International, Inc., and at no time participated in the formulation, direction and control of its policies, acts and practices, or transacted any business for said corporate respondent. The order herein will on such basis provide for the dismissal of the complaint as to respondent Isadore Rosenfeld. Reference to respondents hereinafter shall mean respondents Marcus Rosenfeld, Leon Rosenfeld and the corporate respondent L & M International, Inc.

3. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various household items, including home electrical appliances and small tools. Respondents sell by mail directly to the public.

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

5. In the course and conduct of their business as aforesaid, respondents have made statements in newspapers and magazines of national circulation and in their catalog respecting the prices of certain of their products of which the following are typical:

GIANT 12-INCH AUTOMATIC ELECTRIC SKILLET
Reg. $39.95 — $9.95
GIANT PLASTIC SHEET 1¢—others charge $1.00 for 9x12 (108 sq. ft.) tough, transparent plastic sheet, but our price is only One Cent each when you buy another same size and exactly the same quality sheet for 99¢.

6. Through the use of the aforesaid statements respondents represented directly or indirectly:

a. That the price designated "Reg." was respondents' usual and customary retail price in the recent, regular course of business of the automatic electric skillet and that savings afforded to purchasers in the purchase of that item amounted to the difference between $39.95 and $9.95.

b. That two plastic sheets of the same size and quality may be purchased for respondents' established price of 99¢ for one of such plastic sheets, plus one cent.

7. Said statements and representations are false, misleading and deceptive. In truth and in fact:

a. The "Reg." price of $39.95 is not the respondents' usual and customary retail price in the recent, regular course of business of the electric skillet, and savings amounting to the difference between $39.95 and $9.95 are not afforded to purchasers.

b. Respondents' established price of one of said plastic sheets is not 99¢ but is a lower price and respondents are not offering two of said plastic sheets for the usual price of one, plus one cent.

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

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

10. Affidavits of record herein by respondent Marcus Rosenfeld, disclose the corporate respondent to have maintained a refund account in the First National Bank of St. Louis, Missouri and to have made 16,987 refunds to customers totaling $69,191.66 during 1960, 1961, and the first 4 months of 1962. This evidence further shows the corporate respondent to have made an assignment for the benefit of creditors on April 27, 1962, and to have transacted no business from such date. No countervailing evidence having been offered, the allegations in Paragraph 7 and Paragraph 8 of the complaint as to refund guarantee misrepresentations are without record support and the order herein will on such basis provide for the dismissal of the charges contained in Paragraphs 7 and 8 of the complaint without prejudice.

CONCLUSIONS

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

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

3. The aforesaid acts and practices of respondents, as hereinbefore found and set forth in Paragraphs 1 through 9 of the Findings of Fact, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts

and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That L & M International, Inc., a corporation, and its officers, and Marcus Rosenfeld and Leon Rosenfeld, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication that any amount is respondents' usual and customary retail price of merchandise when it is in excess of the price at which such merchandise has been usually and customarily sold by respondents at retail in the recent, regular course of business.

2. Using the word "Reg." or any other term of similar import or meaning to describe or refer to the retail price of merchandise when such amount is in excess of the price at which the merchandise has been usually and customarily sold by respondents in the recent, regular course of business.

3. Representing, through the device of a one cent sale, or in any other manner, that two units of respondents' merchandise may be purchased for the price of one unit, plus one cent, or other amount, when the price of one unit of said merchandise is in excess of the price at which it is usually and customarily sold by respondents.

4. Representing, directly or by implication that any savings are afforded from respondents' usual and customary retail prices in the purchase of merchandise unless the price at which it is offered is lower than the price at which it has been sold by respondents in the recent, regular course of business.

5. Misrepresenting in any manner the savings available to purchasers of respondents' merchandise, or the amount by which the price of merchandise has been reduced from the price at which it is customarily sold by respondents in the usual course of their business.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Isadore Rosenfeld.

It is further ordered, That the charges in Paragraph 7 and Paragraph 8 of the complaint be, and they hereby are, dismissed without prejudice.

FINAL ORDER

The Commission by its order of December 26, 1962, having placed this case on its docket for review; and

The Commission now having concluded that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed November 16, 1962, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents L & M International, Inc., a corporation, and Marcus Rosenfeld and Leon Rosenfeld shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

KLEAR VISION CONTACT LENS SPECIALISTS, INC., ET AL.

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

Docket C-308. Complaint, Feb. 6, 1963—Decision, Feb. 6, 1963

Consent order requiring New York City manufacturers of their so-called "Vent-Air Contact Lenses" to cease misrepresenting in advertising the simplicity and accuracy of fitting individuals with contact lenses through use of their "Corneascope" and "Photo-Matic Test", and representing falsely that only their contact lenses permitted exchange of air under the lens and that they provided carefree vision, as in the order below in detail set forth.

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 Klear Vision Contact Lens Specialists, Inc., a corporation, and Lawrence Lewison and Shirley Lewison, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Klear Vision Contact Lens Specialists, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business located at 7 West 44th Street, New York, N.Y.

Lawrence Lewison is president and treasurer and Shirley Lewison is vice president and secretary of the corporate respondent. These individuals direct, formulate and control the acts, practices and policies of the corporate respondent including those hereinafter referred to. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, sale and distribution of contact lenses under the name of Vent-Air Contact Lenses. Contact lenses are designed to correct errors and deficiencies in the vision of the wearer, and are devices, as "device" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents cause the said devices, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices; and has disseminated, and caused the dissemination of, advertisements concerning said devices by various means, including but not limited to the aforesaid media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

1. With reference to an instrument designated by respondents as a "Corneascope,"

(a) Old method measurement with outdated instruments measured only 25% of the lens area, leaving the remaining area to be determined by guess or trial and error methods.

(b) New Photo-Matic Method measures the entire lens area with precision and accuracy never before accomplished. Leaves no room for errors or guess work * * * insures a perfect fitting lens!

(c) Just as simple as taking your picture!

(d) Exclusive Vent-Air Photo-matic Test answers your opinion * * * *Can I Wear Contact Lenses?* No *ifs, ands* or *maybes* Vent-Air's amazing new Corneascope available only in vent-air offices gives you the answer in 60 seconds!

(e) Now for the first time in contact lens history Vent-Air's unique Corneascope answers the question you want answered most * * * and does it immediately! No more doubts, dilemmas or indecisions! The simple 60-second Photo-Matic Test lets you know definitely if you're suitable for contact lenses!

(f) Determine your suitability for contact lenses in 60 seconds.

(g) Precisely calculate with 100% accuracy the measurement of the eye.

(h) Insure a perfect fitting lens.

(i) It's as simple as having your picture taken. No molds are made, no trial wearings are needed, nothing touches the eye, there is no discomfort or inconvenience.

(j) It's amazing * * * fast * * * sure.

2. With reference to contact lenses designated by respondents as "Vent-Airs".

CAREFREE VISION IS JUST A WINK AWAY * * * with exclusive Vent-Airs * * *

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication:

1. (a) That the instrument designated as a Corneascope can determine whether an individual can wear contact lenses.

(b) That the "Photo-Matic Test" or "New Photo-Matic Method" alone can determine whether an individual is suitable for contact lenses.

(c) That the use of the Corneascope insures a perfect fitting lens.

(d) That, through the use of the Corneascope, fitting a person with contact lenses is as simple as taking a picture.

(e) That, through the use of the Corneascope, an individual's suitability for contact lenses can be determined in 60 seconds.

(f) That measurement of the eye is precisely calculated with 100% accuracy by the Corneascope.

(g) That by fitting contact lenses through use of the Corneascope no trial wearing of lenses is needed and nothing touches the eye.

(h) That there is no discomfort or inconvenience in fitting contact lenses if the Corneascope is used.

2. That only Vent-Air lenses permit exchange of air under the lens.

3. That Vent-Air lenses provide carefree vision.

Par. 7. In truth and in fact:

1. (a) Respondent's instrument designated as a Corneascope, used alone, cannot determine whether an individual can wear contact lenses.

(b) The "Photo-Matic Test" or "New Photo-matic Method" alone will not determine whether an individual is suitable for contact lenses.

(c) Use of the Corneascope will not insure a perfect fitting lens.

(d) Fitting a person with contact lenses with or without the use of the Corneascope is not as simple as taking a picture.

(e) Through use of the Corneascope, an individual's suitability for contact lenses cannot be determined in 60 seconds.

(f) Respondents' use of the Corneascope will not precisely calculate with 100% accuracy the measurement of the eye.

(g) Fitting of contact lenses through use of the Corneascope does not eliminate the trial wearing of contact lenses or touching of the eye by the lens. All contact lenses, including the Vent-Air, touch the eye.

(h) Fitting of contact lenses through use of the Corneascope does not eliminate all discomfort or inconvenience. Practically all persons will experience some discomfort when first wearing respondents' lenses, and in a significant number of cases discomfort will be prolonged.

2. Exchange of air under contact lenses is not limited to Vent-Air lenses since others also permit exchange of air.

3. Vent-Air lenses will not provide carefree vision.

Therefore, the advertisements referred to in Paragraph 5 were and are misleading in material respects and constituted, and now constitute, "false advertisements", as that term is defined in the Federal Trade Commission Act.

Par. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Decision and Order

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

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

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

1. Respondent Klear Vision Contact Lens Specialists, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 7 West 44th Street, in the city of New York, State of New York.

Respondents Lawrence Lewison and Shirley Lewison are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Klear Vision Contact Lens Specialists, Inc., a corporation, and its officers, and Lawrence Lewison and Shirley Lewison, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of contact lenses do forthwith cease and desist from directly or indirectly:

A. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents directly or by implication:

1. That through the use of the instrument designated as a Corneascope or any other device of similar design, construction or utility, irrespective of the designation applied thereto:

(a) It can be determined whether an individual can wear contact lenses;

(b) The "Photo-Matic Test" or "New Photo-Matic Method" alone can determine whether an individual is suitable for contact lenses;

(c) A perfect fitting of contact lenses is insured;

(d) Fitting a person with contact lenses is as simple as taking a picture;

(e) An individual's suitability for contact lenses can be determined in 60 seconds or other period of time;

(f) Measurement of the eye is precisely calculated with 100% accuracy;

(g) No trial wearing of lenses is needed or that nothing touches the eye;

(h) There is no discomfort or inconvenience in fitting contact lenses.

2. That only respondents' contact lenses permit exchange of air under the lens.

3. That respondents' Vent-Air contact lenses provide carefree vision.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 hereof.

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

IN THE MATTER OF

FRANCKOWIAK'S, INC., ET AL.

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

Docket C-309. Complaint, Feb. 6, 1963—Decision, Feb. 6, 1963

Consent order requiring a retail furrier in South Bend, Ind., to cease violating the Fur Products Labeling Act by failing to disclose on labels when fur products contained artificially colored, cheap, or waste fur; by representing falsely in invoicing, labeling, and newspaper advertising that prices of fur products had been reduced from regular prices which were, in fact, fictitious; and by advertising falsely that furs from its regular stock were purchased from an overstocked furrier who needed to raise money.

(b) The "Photo-Matic Test" or "New Photo-Matic Method" alone can determine whether an individual is suitable for contact lenses;

(c) A perfect fitting of contact lenses is insured;

(d) Fitting a person with contact lenses is as simple as taking a picture;

(e) An individual's suitability for contact lenses can be determined in 60 seconds or other period of time;

(f) Measurement of the eye is precisely calculated with 100% accuracy;

(g) No trial wearing of lenses is needed or that nothing touches the eye;

(h) There is no discomfort or inconvenience in fitting contact lenses.

2. That only respondents' contact lenses permit exchange of air under the lens.

3. That respondents' Vent-Air contact lenses provide carefree vision.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 hereof.

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

IN THE MATTER OF

FRANCKOWIAK'S, INC., ET AL.

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

Docket C-309. Complaint, Feb. 6, 1963—Decision, Feb. 6, 1963

Consent order requiring a retail furrier in South Bend, Ind., to cease violating the Fur Products Labeling Act by failing to disclose on labels when fur products contained artificially colored, cheap, or waste fur; by representing falsely in invoicing, labeling, and newspaper advertising that prices of fur products had been reduced from regular prices which were, in fact, fictitious; and by advertising falsely that furs from its regular stock were purchased from an overstocked furrier who needed to raise money.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Franckowiak's, Inc., a corporation, and Lucien Franckowiak and Rose Marie Franckowiak, individually and as officers of said corporate respondent, hereinafter referred to as respondents, have violated the provisions of said Act and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Franckowiak's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana.

Individual respondents Lucien Franckowiak and Rose Marie Franckowiak are officers of the corporate respondent. Said individual respondents cooperate in formulating, directing and controlling the acts, policies and practices of the corporate respondent including the acts and practices hereinafter referred to.

Respondents are in the business of retailing fur products. All respondents have their office and principal place of business located at 314 North Michigan Street, South Bend, Ind.

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

PAR. 3. Certain of said fur products were misbranded in that the labels affixed thereto contained fictitious prices and misrepresented the regular retail selling prices of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which the respondents usually and regularly sold such fur products in the recent regular course of its business in violation of Section 4(1) of the Fur Products Labeling Act.

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

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

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

2. To show that the fur product was composed in whole or in substanital part of paws, tails, bellies, or waste fur, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by respondents in that respondents represented on invoices that prices of fur products had been reduced from regular or usual prices and that the amount of such reductions constituted savings to purchasers of respondents' products when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and no savings were thereby offered to the purchaser, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 6. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that said products were not advertised in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder.

Said advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said products.

Among and included in the advertisements as aforesaid but not limited thereto, were advertisements of respondents which appeared in the South Bend Tribune, a newspaper published in the city of South Bend, State of Indiana.

By means of said advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in those said advertisements by:

a. Representing prices of fur products as having been reduced from regular or usual prices and that the amount of said reductions constituted savings to producers of respondents' products when so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by the respondents in the recent regular course of business and no savings were thereby offered to the purchaser, in violation of Section 5(a)(5) and Rule 44(a) of the said Rules and Regulations.

b. Representing, directly or by implication that fur products offered for sale were purchased from a Fort Wayne furrier because of the need of said furrier to raise money and to dispose of overstocked merchandise when in fact many of such fur products were from the respondents' regular stock, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 7. Respondents, by means of the labels referred to in Paragraph 3 hereof and others of similar import and meaning, not specifically referred to herein, falsely and deceptively advertised fur products in that said labels contained fictitious prices and misrepresented the regular retail selling prices of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which the respondents regularly and usually sold such fur products in the recent regular course of business and no savings were thereby afforded to the purchaser, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under said Act.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Franckowiak's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 314 North Michigan Street, in the city of South Bend, State of Indiana.

Respondents Lucien Franckowiak and Rose Marie Franckowiak are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

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

1. Misbranding fur products by:

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

B. Representing on labels or other means of identification, directly or by implication, that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise so labeled or otherwise identified was usually and customarily sold at retail by the respondents unless such said merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

2. Falsely or deceptively invoicing fur products by representing on invoices, directly or by implication that any price when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise so invoiced or otherwise identified was usually and customarily sold at retail by the respondents unless such said merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

3. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or

notice which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

A. Represents, directly or by implication, contrary to fact, that fur products offered for sale were acquired as the result of the financial distress of a supplier or third party or that such fur products were otherwise acquired as a result of a situation more advantageous to respondents than was the case.

B. Represents, directly or by implication, that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

C. Misrepresents in any manner the savings available to purchasers of respondents' products.

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

IN THE MATTER OF

C.D.I. LABORATORIES INC., ET AL.

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

Docket C-310. Complaint, Feb. 7, 1963—Decision, Feb. 7, 1963

Consent order requiring New York City distributors of a calendar-slide birth control device designated "C. D. Indicator", to cease representing falsely in advertising, form letters, pamphlets, etc., that said device enabled a woman to ascertain her fertile or sterile days with certainty, that it was sold at a reduced or special price for a limited time, that they had offices in foreign countries, and that according to articles in medical journals, etc., the reliability of the Ogino-Knaus method of birth control had been scientifically proven in clinical studies; and to cease using the word "Laboratories" in their corporate name.

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 C.D.I. Laboratories Inc., a corporation, and Ronald C. Sheff, individually and as an officer of said corporation, hereinafter referred to as respondents, have

violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent C.D.I. Laboratories Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1100 Avenue of the Americas, in the city of New York, State of New York.

Respondent Ronald C. Sheff is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of a calendar-slide device designated "C.D. Indicator", to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing sales of their calendar-slide device designated "C.D. Indicator", respondents have made certain statements and representations in advertisements, form letters and pamphlets, and by other media, of which the following are typical:

HOW MARRIED WOMEN CAN PLAN FOR MOTHERHOOD—Why let needless worries and anxieties rob you of marital bliss? Now you can find greater satisfaction—learn how to avoid old risks and fears with a scientific calculator that simply, accurately determines for you personally the days of each month when you can and cannot conceive.

* * * * * * *

CDI LABORATORIES, Inc.

Simply turn the dial to the date when menstruation begins, and read the actual days when conception is possible. * * * You cannot go wrong * * * it is completely fool-proof.

FOR THE BRIDE-TO-BE—a worry-free and rapturous honeymoon! to avoid conception during your early days of marriage, plan your wedding during a period of sterility. Your C.D. Indicator will show you when—in seconds.

FOR THE NEWLYWED—marital happiness without fear! By knowing in advance your fertile and sterile days, you control conception until you are ready for Motherhood! The C.D. Indicator lets you enjoy a full and natural sex life!

FOR THE MOTHER—give each child the best possible start in life by planning for it to suit your wishes, your health and your financial position. When

your family is adequate, the C.D. Indicator will relieve you of unnecessary fears and anxiety.

MEDICALLY TESTED—SCIENTIFICALLY PROVED—By Over 79,000 Women in Clinical Studies

* * * * * * *

Says Dr. Leo J. Latz in his book (page 76) "* * * we can confidently say that millions of cohabitations, during most varied menstrual cycles, and under the greatest variety of circumstances, are evidence of the reliability of the Rhythm Method."

The authoritative, precise Journal of the American Medical Association offered further confirmation. Reports of the records of 15,924 cases showed the effectiveness of the Ogino-Knaus method.

Then another respected medical journal, "Clinical Medicine and Surgery," reported still more proof. A total of 2,200 cases were studied, upholding the Ogino-Knaus method.

The Illinois Medical Journal shows records of 11,222 studies during the "safe" period, again confirming the Ogino-Knaus method.

Even the official journal of the American College of Surgeons reports 725 carefully chartered instances of the use of the Rhythm Method.

While the present limited supply in the United States lasts you can actually buy a C.D. Indicator for the special low price shown on the enclosed order from [sic].

* * * * * * *

Of course, there's no way of knowing when manufacturing and importing costs may force the current price back up to the original price. Take advantage of the present low, low price while it still holds good.

C.D.I. Laboratories Inc. * * *
47 Lagerstrasse, Zurich, Switzerland
Australia
Belgium
Brazil
Ecuador
England
France
Haiti
Holland
Mexico
Monaco
New Zealand
Philippines
Portugal
South Africa
U.S.A.
Venezuela

(letterhead)

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

(1) That the C.D. Indicator enables a woman to ascertain the fertile and sterile days of her menstrual cycles with certainty.

(2) That the C.D. Indicator is sold at a reduced or special price and that said price is available for a limited time.

(3) That they have offices in countries other than in the United States of America.

(4) That according to articles in medical journals and other writings the reliability of the Ogino-Knaus method of birth control has been scientifically proven in clinical studies.

PAR. 6. In truth and in fact:

(1) The C.D. Indicator does not enable a woman to ascertain with certainty the fertile or sterile days of her menstrual cycles. There are a number of circumstances, conditions and minor disturbances such as a passing illness, a journey, an emotional strain, a fright and other external stimuli, that may advance or retard the ovulation and consequently vary the shortest and longest cycles of a woman who is normally reasonably regular; and though past records of periods may indicate virtual or reasonable regularity, physiological or psychological changes in a woman may cause an abrupt variance in the duration of her cycles. For these reasons, the readings of the C.D. Indicator would not be certain as regards any woman.

(2) The price at which the C.D. Indicator is usually and customarily sold is $9.90 when payment is made in full at time of purchase, or $10.90 if purchased on the installment plan, and said price is not a reduced or special price nor is said device being offered at said price for a limited time.

(3) The respondents do not have an office in any country outside of the United States of America, but have only one office which is located in the city of New York, State of New York.

(4) The references to articles in medical journals and other writings do not correctly reflect the full import of the articles or writing or the degree of acceptance of the Ogino-Knaus method of birth control by the authors. The articles and other writings do not establish that the reliability of the method has been scientifically proven in clinical tests. They indicate that select groups of normal, healthy women were carefully instructed in the use of the method and its limitations. Circumstances surrounding such supervised employment of the method are not comparable to those under which the C.D. Indicator is used.

Therefore, the statements and representations set forth in Paragraph 4 were, and are, false, misleading and deceptive.

PAR. 7. Through the use of the word "Laboratories" in their corporate name respondents have represented that they own and operate

a laboratory in connection with their said business. Such representation is false, misleading and deceptive in that said respondents do not own or operate a laboratory in connection with their said business.

PAR. 8. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of the respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent C.D.I. Laboratories Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business lo-

cated at 1100 Avenue of the Americas in the city of New York, State of New York.

Respondent Ronald C. Sheff is an officer of said corporation, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent C.D.I. Laboratories Inc., a corporation, and its officers, and respondent Ronald C. Sheff, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of a calendar-slide device designated "C.D. Indicator", or any similar calculating device, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That such device provides an unfailing system of birth spacing or that it enables a woman to ascertain her fertile or sterile days with certainty.

(b) That such device is sold at a reduced or special price when the price quoted is the usual or regular price at which such device is sold or that such device is being offered for a limited time at a stated price when such offer is not limited as to time.

(c) That they have an office or offices located in a place or places other than where they actually have such an office or offices.

2. Using a fragment or portion of an article, writing, or study which does not correctly reflect the results reported therein to represent that the reliability of the Ogino-Knaus method of birth control has been scientifically proven in clinical studies.

3. Using the word "laboratories", or any other word of similar import or meaning, as a part of or in connection with the respondents' corporate or trade name, or otherwise representing, directly or by implication, that respondents own or operate a laboratory unless and until such a laboratory is actually so owned and operated.

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