7. Engaging in any act or practice, the purpose or effect of which is to effectuate any understanding, agreement or combination prohibited herein.

8. Placing in effect or carrying out any act, practice, policy or method, prohibited by any provision or part of this order, through respondent Board or any other instrumentality, agent, agency, medium of representative.

It is further ordered, That respondents 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

RONZONE'S OF LAS VEGAS, 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-316. Complaint, Feb. 28, 1963—Decision, Feb. 28, 1963

Consent order requiring Las Vegas, Nev., retail furriers to cease violating the Fur Products Labeling Act by failing to disclose in newspaper advertising the names of animals producing certain furs and when fur products contained artificially colored or cheap or waste fur, and to describe as "natural" fur which was not bleached or dyed; by representing falsely in such advertising that purchasers of furs received on consignment might "Save 20% to 50% on Famous Brands . . . Special purchase . . .", etc.; by affixing labels bearing fictitious prices to fur products; by failing to maintain adequate records as a basis for price and value claims; and by failing in other respects to comply with requirements of the Act.

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 Ronzone's of Las Vegas, Inc., a corporation, and its officers, and Richard J. Ronzone and Peder R. Rasmussen, individually and as officers of said corporation, and as copartners trading as Nevada Fur Service, 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 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 Ronzone's of Las Vegas, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada.

Individual respondents Richard J. Ronzone and Peder R. Rasmussen are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of corporate respondent, Ronzone's of Las Vegas, Inc., including those hereinafter set forth.

Individual respondents Richard J. Ronzone and Peder R. Rasmussen are also copartners trading as Nevada Fur Service.

Respondents are retailers of fur products and have their office and principal place of business at 418 Fremont Street, Las Vegas, Nevada.

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 labels affixed thereto represented prices of fur products as having been reduced from regular or usual prices 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, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. 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 under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed:

1. To show the true animal name of the fur used in the fur product.

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

3. To show that the fur product was composed in whole or substantial 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 in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) 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) The term "Dyed Broadtail-processed Lamb" was not set forth in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(c) The term "natural" was not used to describe fur products that were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(d) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on invoices with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

PAR. 6. 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 aforesaid but not limited thereto, were advertisements of respondents, which appeared in issues of the Las Vegas Review Journal, a newspaper published in the city of Las Vegas, State of Nevada.

Among such false and deceptive advertisements of fur products, but not limited thereto, were advertisements which:

(a) Failed to disclose the name or names of the animal or animals that produced the fur contained in the fur product as set forth in the Fur Products Name Guide, in violation of Section 5(a)(1) of the Fur Products Labeling Act.

(b) 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.

(c) Failed to disclose that fur products were composed in whole or in substantial part of paws, tails, bellies or waste fur, when such was the fact, in violation of Section 5(a) (4) of the Fur Products Labeling Act.

PAR. 7. Respondents by means of the advertisements referred to in Paragraph 6 and other advertisements of similar import and meaning not specifically referred to herein, falsely and deceptively advertised their fur products in that:

(a) Fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored were not described as "natural" as required by Rule 19 of said Rules and Regulations.

(b) Information required under Section 5(a) 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.

PAR. 8. By means of the advertisements referred to in Paragraph 6 and other advertisements of similar import and meaning not specifically referred to herein, respondents represented prices of fur products as having been reduced from regular or usual prices and the amount of such reductions constituted savings to the purchasers, 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 afforded to the purchasers, in violation of Section 5(a) (5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 9. Respondents by means of the advertisements referred to in Paragraph 6 and other advertisements of similar import and meaning not specifically referred to herein, falsely and deceptively advertised fur products, in violation of Section 5(a) (5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder by representing directly or by implication, through such statements as:

> Save 20% to 50% on Famous Brands . . .
> Special purchase of Luxurious Designer
> Mink—H-B-K Sovereign Furs

That respondents by means of a special purchase obtained special price concessions from a supplier of fur products and was able to offer the said fur products for sale to the purchasing public at prices reduced from the regular or usual prices of such products.

The aforesaid representations were false, misleading and deceptive in that respondents did not make special purchases of the fur products offered for sale but received such products on consignment and savings were not available to purchasers of said products as respresented.

PAR. 10. By means of the advertisements referred to in Paragraph 6 and other advertisements of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised their fur products in that said advertisements represented through percentage savings claims such as "Save 20% to 50% on Famous Brands" that prices of fur products were reduced in direct proportion to the percentage of the savings stated when said savings were not available in violation of Section 5(a) (5) of the Fur Products Labeling Act.

PAR. 11. Respondents further falsely and deceptively advertised fur products by representing prices of fur products on labels affixed to fur products as having been reduced from regular or usual prices, 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 respondent in the recent regular course of business, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder.

PAR. 12. 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 respresentations 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. 13. 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 Ronzone's of Las Vegas, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 418 Fremont Street, in the city of Las Vegas, State of Nevada.

Respondents Richard J. Ronzone and Peder R. Rasmussen are officers of said corporation and their address is the same as that of said corporation.

Respondents Richard J. Ronzone and Peder R. Rasmussen are also copartners trading as Nevada Fur Service.

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, Ronzone's of Las Vegas, Inc., a corporation, and its officers, and Richard J. Ronzone and Peder R. Rasmussen, individually and as officers of said corporation and as copartners trading as Nevada Fur Service or under any other trade name, 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:

A. Misbranding fur products by falsely or deceptively labeling or otherwise identifying such products as to the regular prices thereof by any representation that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise so represented was usually and customarily sold at retail by the respondents unless such merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

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. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

3. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the term "Dyed Lamb".

4. Failing to describe fur products as natural when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

5. Failing to set forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to each section of fur products composed of two or more sections containing different animal furs.

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:

1. Fails to set forth all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Fails to describe fur products as natural when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

3. Sets forth information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

4. Represents 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.

5. Misrepresents directly or by implication that savings are available to purchasers of respondents' fur products due to special purchases.

6. Misrepresents through percentage savings claims that prices of fur products are reduced in direct proportion to the percentage of savings stated.

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

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 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

MEYER M. SPILLMAN TRADING AS SPILLMAN FUR CO.

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

Docket C-317. Complaint, Feb. 28, 1963—Decision, Feb. 28, 1963

Consent order requiring a retail furrier in San Antonio, Tex., to cease violating the Fur Products Labeling Act by failing to disclose on labels and invoices when fur products contained artificially colored fur and the country of origin of imported furs and to describe as "Natural" furs which were not bleached or dyed; failing to show on labels the name of the manufacturer, etc., and to indicate when fur was used or "Second-hand"; substituting nonconforming labels for those affixed by manufacturers or distributors; and failing in other respects to comply with advertising, labeling and invoicing requirements.

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 Meyer M. Spillman, an individual trading as Spillman Fur Co., hereinafter referred to as respondent, has violated the provisions of said Acts 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 Meyer M. Spillman is an individual trading as Spillman Fur Co. Said respondent is a retail furrier with his office and principal place of business located at 1816 North Main Avenue, San Antonio, Texas.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is 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 has 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 with labels which failed:

1. To show that the fur product contained or was composed of used fur when such was the fact.

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

3. To show the name, or other identification issued and registered by the Commission of one or more of the persons who manufactured such fur products for introduction into commerce, introduced them into commerce, advertised or offered them for sale, in commerce, or transported or distributed them in commerce.

4. To show the country of origin of the imported furs used in the fur product.

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:

1. 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.

2. The term "Natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored in violation of Rule 19(g) of said Rules and Regulations.

3. The disclosure "Second-hand" in the manner required, was not set forth on labels, in violation of Rule 23 of said Rules and Regulations.

4. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

5. 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 misbranded in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified with respect to the name or other identification issued and registered by the Commission of one or more of the persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 6. 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 under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed:

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

2. To show the country of origin of the imported furs used in the fur product.

PAR. 7. 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 in the following respects:

1. The term "Natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

2. Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

3. Information required under Section 5(b) (1) 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.

PAR. 8. Respondent has sold, advertised, offered for sale and processed fur products which have been shipped and received in commerce, and has misbranded said fur products by substituting for labels affixed to such fur products, by manufacturers or distributors pursuant to Section 4 of the Fur Products Labeling Act, labels which did not conform to the requirements of said Section 4, in violation of Section 3(e) of said Act.

PAR. 9. The aforesaid acts and practices of respondent, 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 respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent 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 Meyer M. Spillman is an individual trading as Spillman Fur Co., and has his office and principal place of business at 1816 North Main Avenue, San Antonio, Texas.

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

ORDER

It is ordered, That Meyer M. Spillman, an individual trading as Spillman Fur Co., or under any other name, and respondent's 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. Setting forth on labels affixed to fur products information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

C. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, in the required sequence.

D. Failing to use the term "Natural" to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

E. Failing to disclose that fur products contain or are composed of "Second-Hand Used Fur", when a fur product has been used or worn by an ultimate consumer and is subsequently marketed in its original, reconditioned, or rebuilt form with or without the addition of any furs or used furs.

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

G. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce.

2. Falsely or deceptively invoicing fur products by:

A. 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.

B. Failing to use the term "Natural" to describe a fur product which is not pointed, bleached, dyed, tip-dyed, or otherwise artifically colored.

C. Failing to set forth the item number or mark assigned to a fur product.

D. Setting, forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

It is further ordered, That respondent in connection with the selling, offering for sale, or processing fur products which have been shipped or received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

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

IN THE MATTER OF

PANAT JEWELRY CO., INC., ET AL.

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

Docket 8311. Complaint, Mar. 13, 1961—Decision, Mar. 7, 1963

Order requiring three corporations in New York City, Jersey City, N.J., and Stamford, Conn., respectively, distributors of cologne and toilet water which they purchased from drug and department stores and rebottled and sold, to cease their practice of offering and selling cologne and toilet water in purse-size flaconettes, primarily used as containers for perfume, without disclosing conspicuously on the bottles and packages that the contents were cologne and toilet water.

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 Panat Jewelry Co., Inc., a corporation, and Nathan Jachter, individually and as an officer of said corporation, and Spejac, Inc., a corporation, and Nathan Jachter and Nathan Spergel, individually and as officers of said corporation, and G & N Manufacturing Corporation, a corporation, and Ben Jachter, Lee Hirsch and Phillip Schneider, individually and as stockholders in 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 Panat Jewelry Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business located at 135 Fifth Avenue, New York, New York.

Respondent Spejac, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its main office and principal place of business located at 135 Fifth Avenue, New York, New York.

G & N Manufacturing Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its main office and principal place of business located at 29 Cardinal Road, Stamford, Connecticut.

Individual respondent Nathan Jachter is an officer of both corporate respondents Panat Jewelry, Inc., and Spejac, Inc.

Individual respondent Nathan Spergel is an officer of the corporate respondent Spejac, Inc.

Individual respondents Ben Jachter, Lee Hirsch and Phillip Schneider are stockholders of the corporate respondent G & N Manufacturing Corporation.

Individual respondents, in their capacities as officers and stockholders of said corporate respondents, formulate, direct and control the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents in which they are officers or stockholders.

Par. 2. Respondents are now and for some time last past have been engaged in the advertising, offering for sale, sale or distribution of rebottled cologne and toilet water at wholesale to wholesalers and distributors, who in turn resell at retail to the purchasing 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 States of New York and Connecticut to purchasers thereof located in various other States of the United States and in the District of Columbia, 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 are now, and for some time last past have been, offering for sale, selling and distributing their said products consisting of toilet waters or colognes in bottles of the size and dimension that are known in the perfume, toilet water and cologne industry as "purse size flaconettes" which, because of their size and dimensions, have become associated in the minds of the purchasing public as containing perfume rather than cologne or toilet water.

PAR. 5. There is a well-recognized distinction between perfume and toilet water or cologne. Because toilet water or cologne is essentially a diluted perfume, toilet water or cologne is much less costly and does not retain its fragrance as long a time as does perfume.

PAR. 6. By the aforesaid practice, respondents place in the hands of retailers means and instrumentalities by and through which they mislead the purchasing public into the erroneous and mistaken belief that their rebottled toilet water and cologne are perfume.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have been and are in substantial competition in commerce, with corporations, firms and individuals in the sale of perfume.

PAR. 8. The use by respondents of the aforesaid "purse size flaconettes" in the sale of toilet water or cologne has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said "purse size flaconettes" contain perfume and into the purchase of substantial quantities of respondents' products by reason of such mistaken and erroneous belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR 9. 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 and deceptive acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

Mr. Frederick McManus supporting the complaint.
Mr. Matthew L. Salonger, of New York, N.Y., counsel for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

JUNE 15, 1962

This proceeding was commenced by the issuance of a complaint on March 13, 1961, charging the aboved-named corporate respondents and the individual respondents, their officers and stockholders, with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act by selling rebottled toilet waters and colognes in purse-size flaconettes which because of their size are associated by the purchasing public with perfume and therefore have the capacity and tendency to mislead the purchasing public into the erroneous and mistaken belief that such flaconettes contain perfume.

Upon being served with the complaint, respondents appeared by counsel and filed a joint answer admitting the essential jurisdictional allegations of the complaint, but denied the specific charges contained therein. In due course, hearings were held at which testimony and other evidence were offered in support of the complaint and in opposition to the specific allegations set forth therein.

After both parties had concluded their cases, respondents made a motion to dismiss the complaint which was taken under advisement and will be disposed of in the order issued below. Proposed findings of fact and conclusions of law were timely submitted by counsel in support of the complaint. Respondents' proposed findings of fact and conclusions of law were filed 10 days late.

Consideration has been given to the proposed findings of fact and conclusions of law submitted, and all proposed findings of fact not hereinafter specifically adopted are rejected. Based upon the entire record and his observation of the witnesses, the hearing examiner makes the following findings as to the facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

1. Respondent, Panat Jewelry Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business

located at 135 Fifth Avenue, New York, New York. Panat Jewelry Co., Inc., engages in the rebottling and selling of colognes, in purse-size flaconettes, but is not presently and for approximately the last 2 years has not been rebottling cologne in such flaconettes.

2. Respondent, Spejac, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its last known main office and principal place of business located at Jersey City, New Jersey. Spejac, Inc., engages in the rebottling and selling of colognes, in purse-size flaconettes, but is not presently and for approximately the last 2 years has not been in active operation. Although steps have been initiated by its officers to surrender its charter, no evidence of formal dissolution of the corporation was presented.

3. Respondent, G & N Manufacturing Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its main office and principal place of business located at 29 Cardinal Road, Stamford, Connecticut. G & N Manufacturing Corporation engages in the rebottling and selling of colognes in purse-size flaconettes, but is not presently in active operation. Although steps also have been taken by its officers to surrender its charter, no evidence of formal dissolution of the corporation was presented.

4. Individual respondent Nathan Jachter is an officer of both corporate respondents Panat Jewelry Co., Inc., and Spejac, Inc.

Individual respondent Nathan Spergel is an officer of the corporate respondent Spejac, Inc., but is presently employed by Capital Trading Corporation, broker-dealers in securities.

Individual respondents Ben Jachter, Lee Hirsch and Phillip Schneider are stockholders of the corporate respondent G & N Manufacturing Corporation.

5. Individual respondents, in their capacities as officers and stockholders of said corporate respondents, formulate, direct and control the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents in which they are officers or stockholders.

6. Although respondents by their answer and in their proposed findings admit that they are now and for some time last past have been engaged in the advertising, offering for sale, sale or distribution of rebottled cologne and toilet water at wholesale to wholesalers and distributors, who in turn resell at retail to the purchasing public, the uncontradicted testimony of their officers as heretofore found shows that they have not engaged in these activities for approximately 2

years. However, in view of the ultimate disposition of this matter by the hearing examiner, it is not necessary to resolve this conflict of evidentiary fact in the record.

7. Similarly, in their answer and proposed findings, respondents admit that in the course and conduct of their business, they now cause, and for some time last past have caused, their said products, when sold, to be shipped from their places of business in the States of New York, New Jersey and Connecticut to purchasers thereof located in various other States of the United States and in the District of Columbia, 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. Again the uncontradicated testimony of their officers shows they have not engaged in these activities for approximately 2 years, but in view of the ultimate disposition of this matter by the hearing examiner it is unnecessary to resolve this conflict.

8. Respondents have been engaged in the practice of purchasing, from drug and department stores, cologne and toilet water manufactured by leading manufacturers of perfume and kindred products. These manufacturers were Chanel, Lanvin, Dana and Evyan. This toilet water and/or cologne were rebottled by respondents in small containers known as purse-size flaconettes, with a capacity of one dram or less.

9. Chanel, Lanvin, Dana and Evyan sell their colognes and toilet waters in 2-, 4-, 8-, 16- and 32-ounce containers. Faberge, Inc., and others sell a small percentage of their colognes and toilet waters in less than 2-ounce bottles; for example, several ½-ounce bottles of cologne and toilet water were placed in the record as exhibits by respondents. Chanel, Lanvin, Dana and Evyan commonly sell their perfumes in 1 dram (⅛ ounce), ¼-, ½-, 1-, and 2-ounce bottles, but also package their perfumes in 4-, 8-, 16- and 32-ounce bottles.

10. There is a marked difference between cologne and toilet water on the one hand and perfume on the other. Perfume is much more expensive than cologne or toilet water.

The retail price of "Arpege" perfume and other perfumes of Lanvin-Parfums, Inc., are from $4 for ⅛ ounce (1 dram) to $500 for 32 ounces. The retail prices of "Arpege, Eau de Lanvin" and other colognes of Lanvin-Parfums, Inc., vary from $3 for 2 ounces to $32.50 for 32 ounces.

Chanel, Inc.'s perfume prices range from $5 for the ⅛ ounce (1 dram) size to $300 for the largest size. The prices for their colognes range from $3.50 for 2 ounces to $15.

Evyan Perfumes, Inc.'s prices for their "White Shoulders" perfume range from \$2.75 for 1 dram to \$35 for 2 ounces. The prices for their "White Shoulders" cologne range from \$2.75 for 2 ounces to \$9.50 for 8 ounces.

11. There is a valid basis for the substantial difference in price between perfume and toilet water or cologne. Perfume is an alcoholic solution of essential oils and aromatics in a high concentration. Toilet water or cologne is a very much diluted form of perfume, neither of which contains all of the expensive and valuable essential oils that are contained in perfume. In toilet water or cologne some of the expensive ingredients of perfume are replaced by less expensive ones.

12. Through the use of 1-dram size bottles or purse-size flaconettes exclusively in the sale of perfume by Lanvin-Parfums, Inc., Chanel, Inc., and Evyan Perfumes, Inc., and the limited use of such small containers by other manufacturers for toilet water and cologne; such purse-size flaconettes unless clearly and conspicuously marked otherwise have become associated in the minds of a substantial number of the purchasing public with containers for perfume.

13. Six typical packages of respondents' rebottled products were placed in evidence by counsel in support of the complaint. The exhibits, both on the outer package or box and on the flaconette, are clearly and conspicuously inscribed as follows:

CX-3: Box, 2¼ x 3½ inches with a look through window ¾ x 1¾ inches, inscribed:

Top: CHANEL
NO. 5
Upper Half: EAU de
COLOGNE
Lower Half: PURSE
SIZE
FLACONETTE
Bottom: Rebottled From The Genuine Product
(smaller print) Wholly Independent Of Chanel By Spejac, Inc., Jersey City, N.J. 1 Dram.

CX-4: Flaconette, 2¼ x ¾ inches contained and clearly visible in CX-3, inscribed:

Top: CHANEL NO. 5
Eau de Cologne (slightly smaller type)
Middle: REBOTTLED
FROM THE
GENUINE PRODUCT
by
SPEJAC, INC.
WHOLLY INDEPENDENT
OF CHANEL
Bottom: JERSEY CITY, N.J. 1 DRAM.

CX–5: Box, $2\frac{1}{4} \times 3\frac{1}{2}$ inches with a look through window $\frac{3}{4} \times 1\frac{3}{4}$ inches, inscribed:

Top: LANVIN'S
Upper Half: MY SIN
Middle: EAU de
LANVIN
Lower Half: PURSE
SIZE
FLACONETTE

Bottom: Rebottled From The Genuine Product
(smaller print) Wholly Independent Of Lanvin By Spejac, Inc., Jersey City, N.J. 1 Dram.

CX–6: Flaconette, $2\frac{1}{4} \times \frac{3}{4}$ inches contained and clearly visible in CX–5, inscribed:

Top: LANVIN'S
MY SIN
Eau de Lanvin (slightly smaller type)
Middle: REBOTTLED
FROM THE
GENUINE PRODUCT
Lower Half: BY
SPEJAC, INC.
WHOLLY INDEPENDENT
OF LANVIN

Bottom: JERSEY CITY, N.J. 1 DRAM.

CX–7: Box, $2\frac{1}{4} \times 3\frac{1}{2}$ inches with a look through window $\frac{3}{4} \times 1\frac{3}{4}$ inches, inscribed:

Top: REBOTTLED
DANA'S
TABU
Middle: COLOGNE
Lower Half: PURSE
SIZE
FLACONETTE

Bottom: Rebottled From The Genuine Product
(smaller print) Wholly Independent Of Dana, Paris, New York By G. & N. MFG. Corp., Stamford, Conn. 1 Dram.

CX-8: Flaconette, $2\frac{1}{4} \times \frac{3}{4}$ inches contained and clearly visible in CX-7, inscribed:

Top: REBOTTLED
DANA'S
TABU
COLOGNE
Middle: REBOTTLED FROM THE
GENUINE PRODUCT BY
G. & N. MFG. CORP.
WHOLLY INDEPENDENT
OF DANA

Bottom: STAMFORD, CONN. 1 DRAM.

CX–11: Box 2¼ x 3½ inches with a look through window ¾ x 1¾ inches, inscribed:

Top: REBOTTLED
LANVIN'S
ARPEGE

Upper Half: Eau de
LANVIN

Lower Half: PURSE
SIZE
FLACONETTE

Bottom: Rebottled From The Genuine Product (smaller print) Wholly Independent Of Lanvin By G. & N. Mfg. Corp., Stamford, Conn. 1 Dram.

CX–12: Flaconette, 2¼ x ¾ inches contained and clearly visible in CX–11, inscribed:

Top: REBOTTLED
LANVIN'S
ARPEGE
EAU DE LANVIN

Middle: REBOTTLED FROM THE
GENUINE PRODUCT BY
G. & N. MFG. CORP.
WHOLLY INDEPENDENT
OF LANVIN

Bottom: STAMFORD, CONN. 1 DRAM.

CX–9: Box 4½ x 2 inches with clear plastic cover revealing three small boxes, inscribed:

ON PLASTIC COVER

At Left:
WORLD'S MOST
FAMOUS
COLOGNES

At Right in
Large Print:
TRIO

Lower Left: Rebottled
Chanel No. 5

Lower Middle: Rebottled
Lanvin's
Arpege

Lower Right: Rebottled
Evyan's
White Shoulders
Satinglide

ON BASE OF BOX IMMEDIATELY BELOW EACH SMALLER BOX

Left Side: Chanel
No. 5
Eau de Cologne

Middle: Lanvin's
Arpege
Eau de Lanvin

Right Side: Evyan's
White Shoulders
Satinglide

Across Bottom: Rebottled From The Original By G. & N. Mfg. Corp., Stamford, Conn.

ON BOTTOM OF BOX

Left Side	Middle	Right Side
Rebottled Chanel No. 5 Eau de Cologne	Rebottled Lanvin's Arpege Eau de Lanvin	Rebottled Evyan's White Shoulders Satinglide
Rebottled from the Genuine Product Wholly Independent of Chanel By: G. & N. Mfg. Corp. Stamford, Conn. ½ Dram	Rebottled from the Genuine Product Wholly Independent of Lanvin By: G. & N. Mfg. Corp. Stamford, Conn. ½ Dram	Rebottled from the Genuine Product Wholly Independent of Evyan By: G. & N. Mfg. Corp. Stamford, Conn. ½ Dram

CX–10: Box 4½ x 2 inches with clear plastic cover revealing three small boxes, inscribed:

ON PLASTIC COVER

At Left:	CHANEL NO. 5 Eau de Cologne
Middle:	Lanvin's ARPEGE Eau de Lanvin
Right:	Evyan's WHITE SHOULDERS Satinglide
Lower Right:	TRIO

Lower Left: Rebottled From The Original Product (small print) G. & N. Mfg. Corp., Stamford, Conn.

ON BASE OF BOX IMMEDIATELY BELOW EACH SMALLER BOX

Left Side	Middle	Right Side
Chanel No. 5 Eau de Cologne	Lanvin's Arpege Eau de Lanvin	Evyan's White Shoulders Satinglide

Across Bottom: Rebottled From The Original By G. & N. Mfg. Corp., Stamford, Conn.

ON BOTTOM SIDE OF THE BOX

Left Side	Middle	Right Side
Rebottled Chanel No. 5 Eau de Cologne	Rebottled Lanvin's Arpege Eau de Lanvin	Rebottled Evyan's White Shoulders Satinglide
Rebottled from the Genuine Product Wholly Independent of Chanel By: G. & N. Mfg. Corp. Stamford, Conn. ½ Dram	Rebottled from the Genuine Product Wholly Independent of Lanvin By: G. & N. Mfg. Corp. Stamford, Conn. ½ Dram	Rebottled from the Genuine Product Wholly Independent of Evyan's By: G. & N. Mfg. Corp. Stamford, Conn. ½ Dram

14. The size of the printed inscriptions set forth hereinabove when considered in relation to the size of the bottles or flaconettes are as large as the limited space will permit. Considered generally such inscriptions, particularly the words "Cologne", "Eau de Cologne" and "Eau de Lanvin", are clear, legible and distinct.

15. Respondents use the same precise nomenclature and terminology on their rebottled products to identify them as the original bottler inscribes on its product. The respondents as well as the original bottler's well-known nomenclature or brand labels are as follows:

CX-3 and CX-4: Channel No. 5, Eau de Cologne.
CX-5 and CX-6: Lanvin's My Sin, Eau de Lanvin.
CX-7 and CX-8: Dana's Tabu, Cologne.
CX-9: Chanel No. 5, Eau de Cologne.
  Lanvin's Arpege, Eau de Lanvin.
  Evyan's White Shoulders, Satinglide.
CX-10: Chanel No. 5, Eau de Cologne.
  Lanvin's Arpege, Eau de Lanvin.
  Evyan's White Shoulders, Satinglide.
CX-11 and CX-12: Lanvin's Arpege, Eau de Lanvin.

16. As heretofore found, respondents use the same nomenclature on their products as employed by the original bottlers; respondents clearly and conspicuously state on both the outer package and the flaconette that such products are "Cologne", "Eau de Cologne" or "Eau de Lanvin",[1] and respondents state clearly and conspicuously on their products that they are rebottled from the genuine product. Therefore, the examiner finds that the respondents' flaconettes as inscribed do not have the capacity or tendency to mislead the purchasing public into the erroneous or mistaken belief that such purse-size flaconettes contain perfume.

17. In the conduct of their business, at the times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents. Their annual sales of purse-size flaconettes were in excess of $50,000.

DISCUSSION

There is no dispute over the basic facts in this matter. Counsel supporting the complaint apparently attaches little or no significance to the inscriptions clearly and conspicuously printed on respondents' flaconettes and packages, since he proposed no findings in respect thereto and failed to comment thereon. Rather, counsel supporting the complaint in his proposed findings seems to place sole reliance on the fact that respondents use dram-size bottles or purse-size flaconettes

[1] Evyan's White Shoulders, Satinglide, although not employing these generic terms is boxed with two other products employing these terms and the cover of the box is clearly marked "World's Most Famous Colognes". See CX-9 and CX-10.

which are ordinarily associated in the minds of the purchasing public with containers for perfume and consequently concludes that the practices of respondents are misleading, deceptive, etc.

In strange contrast to the position taken in his proposed findings of fact, counsel supporting the complaint proposes an order which in pertinent part would require respondents to cease and desist from:

2. Offering for sale or selling cologne or toilet water in bottles having the size and appearance of bottles commonly used for perfume, *without clearly and conspicuously stating on said bottles or in immediate connection and conjunction therewith that such products are cologne or toilet water.* [Italic supplied]

3. Using the name of any brand of perfume to describe cologne or toilet water, *without clearly and conspicuously stating in immediate connection and conjunction therewith that such products are cologne or toilet water.* [Italic supplied.]

The very order proposed by counsel supporting the complaint permits the use of dram-size bottles or flaconettes which are commonly used for perfume if they are clearly and conspicuously marked cologne or toilet water. The order as proposed is similar if not identical with recent Commission orders. See *Colognes, Inc., et al.*, Docket No. 8310 [59 F.T.C. 872], October 23, 1961; *Spencer Gifts, Inc., et al.*, Docket No. 8097 [59 F.T.C. 451], September 12, 1961.

The sole issue, therefore, in this proceeding is whether respondents clearly and conspicuously state on or in connection with their product that it is cologne or toilet water. Neither party addressed themselves to this issue, although specifically requested to do so at the close of the hearing by the examiner.

The very terminology used in this case was the subject of discussion in the opinion of the Commission in the *Spencer Gifts, Inc.*, case, *supra*. In this connection Commissioner Kern noted:

Also, the words "Eau de Lanvin" and "Eau de Cologne" were inserted on the pictures of the packages shown in the offer. However, the printing is so faint and small as to be practically indiscernible and thus cannot be considered adequate notice that the products were colognes.

It is reasonable to infer from the foregoing that had the printing been larger and more distinct, the words "Eau de Cologne" and "Eau de Lanvin" would have been considered adequate notice. An examination of respondents' products demonstrates that they are not only clearly and conspicuously marked "Cologne", "Eau de Cologne" or "Eau de Lanvin" on both the flaconette and outer box, but also contain the legend that they are "rebottled from the genuine product". Respondents' practices as found are not deceptive or misleading and would not even constitute a violation of the very order proposed by counsel in support of the complaint in this proceeding.

CONCLUSION

The Hearing Examiner concludes that the allegations of the complaint have not been sustained.

ORDER

Accordingly, it is ordered that the complaint in this matter be, and hereby is, dismissed.

OPINION OF THE COMMISSION

JANUARY 7, 1963

By Dixon, *Commissioner:*

The complaint in this matter charges respondents with distributing rebottled cologne and toilet water in a manner that has the capacity and tendency to mislead members of the purchasing public into the mistaken belief that they are buying perfume. In his initial decision, the hearing examiner held that the allegations were not sustained by the evidence and ordered dismissal of the complaint. The matter is before the Commission upon exceptions to the initial decision filed by counsel supporting the complaint.

Respondents purchase the colognes and toilet water of leading perfume manufacturers from drug and department stores and rebottle and sell the same in small containers known in the trade as "purse-size flaconettes." These flaconettes have a capacity of one dram (one-eighth of an ounce) or less and have been primarily sold and used as containers for perfume. The hearing examiner, on the basis of the exclusive use of these small containers for perfume by certain manufacturers of perfume and colognes and the limited use of such containers for colognes by other manufacturers, properly found that such purse-size flaconettes, unless clearly and conspicuously marked otherwise, have become associated in the minds of a substantial number of the purchasing public with containers for perfume. However, on the issue of adequate marking, the hearing examiner, in dismissing the complaint, concluded that an examination of respondents' products "demonstrates that they are not only clearly and conspicuously marked 'Cologne,' 'Eau de Cologne' or 'Eau de Lanvin' on both the flaconette and outer box, but also contain the legend that they are 'rebottled from the genuine product.' "

We do not understand the relevance to the hearing examiner's ruling of the fact that the flaconette and outer box contain the legend "rebottled from the genuine product." This would not aid the purchaser in identifying the nature of the product. Furthermore, although we agree that respondents, in order to overcome the deceptive appearance of the product, must clearly and conspicuously disclose that their product is cologne or toilet water, we cannot concur in his finding that respondents in all instances have done this. The hearing examiner's finding fails to take into account two exhibits in the record (Respondents' Exhibits 10 and 12), which are the boxes in which one type of toilet water is packaged for the consumer. Each box states only:

Rebottled
EVYAN'S
White Shoulders

Satinglide

Purse
Size
Flaconette

Rebottled from the genuine product
wholly independent of EVYAN by
G. & N. Mfg. Corp., Stamford, Conn. 1 dram

Moreover, the hearing examiner has erred in finding that both of the physical exhibits, Commission Exhibits 9 and 10, which are combination packages of three brands of cologne and toilet water, including Evyan's White Shoulders Satinglide, are marked "World's Most Famous Colognes." On the contrary, no such legend or its equivalent appears on Commission Exhibit 10.

The Commission is of the opinion that "Satinglide," Evyan's trade name for its toilet water, is not sufficient disclosure of the fact that the product is toilet water so as to counteract the tendency of the flaconettes to mislead the purchaser into thinking that he or she is purchasing perfume.[1]

Other boxes and flaconettes in the record state the ingredients therein as being "Chanel No. 5, Eau de Cologne," "Lanvin's My Sin, Eau de Lanvin," "Lanvin's Arpege, Eau de Lanvin," and "Dana's Tabu, Cologne." [2] In passing upon the adequacy of the disclosures, the hearing examiner classifies the label "Eau de Lanvin" in the same category as "Cologne" or "Eau de Cologne." This treatment can be justified only on the assumption that the purchasing public is fully acquainted with the nomenclature of Lanvin's products or is fully aware that the words "eau de" are used to denote toilet water as opposed to perfume. The hearing examiner advances no grounds of record in support of such assumptions and, indeed, none exist. More-

[1] The tendency to deceive is increased if the purchaser, although not aware that "White Shoulders Satinglide" is the name for Evyan's toilet water, is familiar enough with Evyan's products to know that it has a perfume designated "White Shoulders."

[2] It was established during the hearing that the three corporate respondents each distributed flaconettes identical to those placed in record.

over, such assumptions are negated and the tendency of "Eau de Lanvin" flaconettes to deceive some purchasers is strengthened in those instances when they are sold in combination with "Chanel No. 5, Eau de Cologne." The juxtaposition of the term "Eau de Cologne" with "Eau de Lanvin" may well suggest to the uninformed purchasers that the latter is different from the former and is the Lanvin perfume which is usually bottled in such a manner.

The hearing examiner, in holding that the words "Eau de Lanvin" constitute adequate disclosure, infers from certain language of the Commission's opinion in *Spencer Gifts, Inc.*, Docket No. 8097 [59 F.T.C. 451, 448] (1961), that the Commission would have considered these words to constitute adequate disclosure. In the portion of the opinion relied upon, the Commission was passing on the issue of whether the labels on pictures of the products in advertising material were sufficiently legible to constitute adequate disclosure. The opinion did not answer the question of whether the words "Eau de Lanvin," if sufficiently legible, would in themselves constitute adequate disclosure that toilet water rather than perfume was contained in the flaconettes.

There is a statement in the initial decision that the evidence is conflicting as to whether the respondents have discontinued the practice of rebottling cologne and toilet water in purse-size flaconettes. Be that as it may, we wish to dispel any suggestion that the record unequivocally indicates that there is no likelihood of recurrence. Nathan Jachter, president of Panat Jewelry Company, in response to the question of whether the company intended to resume the practices in question, testified: "I don't know." Nor was evidence offered by any of the other respondents that the practices have been discontinued with no intent to resume. We therefore believe that an order to cease and desist is required in the public interest.

As charged in the complaint, the evidence clearly establishes the responsibility of respondents Nathan Jachter and Nathan Spergel in their official capacities for the practices described herein. Accordingly, both of these respondents will be named in our order as officers of their respective corporations. However, there is a lack of sufficient proof that respondents Ben Jachter, Lee Hirsch, and Phillip Schneider, in their capacities as stockholders in the G & N Manufacturing Corporation, formulated, directed and controlled the acts and practices of said corporation. The complaint will be dismissed as to these persons.

In view of the foregoing, the exceptions of counsel supporting the complaint are sustained. The initial decision is set aside and we are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

FINDINGS AS TO THE FACTS, CONCLUSION AND PROPOSED FINAL ORDER

JANUARY 7, 1963

The Federal Trade Commission issued its complaint against the above-named respondents on March 13, 1961, charging them with violation of the Federal Trade Commission Act in connection with their sale of cologne and toilet water in containers which, because of their size, allegedly are associated by the purchasing public with perfume, thereby misleading the purchasing public into the erroneous and mistaken belief that such products are perfumes. In their answer, respondents deny the charges. Hearings were held before the hearing examiner and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed June 15, 1962, the hearing examiner found that the charges had not been sustained by the evidence and ordered that the complaint be dismissed.

Counsel supporting the complaint filed exceptions to said initial decision and the Commission, after considering said exceptions and the entire record, has determined that the exceptions should be sustained and that the initial decision should be vacated and set aside. The Commission further finds that the proceeding is in the public interest and now makes its findings as to the facts, conclusion drawn therefrom and order to cease and desist which, together with the accompanying opinion, shall be in lieu of the findings, conclusion and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Panat Jewelry Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business located at 135 Fifth Avenue, New York, New York.

Respondent, Spejac, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its last known main office and principal place of business located at Jersey City, New Jersey.

Respondent, G & N Manufacturing Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its main office and principal place of business located at 29 Cardinal Road, Stamford, Connecticut.

2. Individual respondent Nathan Jachter is an officer of both corporate respondents, Panat Jewelry Co., Inc., and Spejac, Inc.

Individual respondent Ben Jachter, brother of Nathan Jachter, is a stockholder and past president of corporate respondent G & N Manufacturing Corporation.

Individual respondent Nathan Spergel is an officer of corporate respondent Spejac, Inc., and has served as manager of corporate respondent Panat Jewelry Co., Inc.

Individual respondents Lee Hirsch and Phillip Schneider are stockholders of the corporate respondent G & N Manufacturing Corporation. Lee Hirsch is currently employed by Panat Jewelry Co., Inc.

3. Individual respondents Nathan Jachter and Nathan Spergel, in their official capacities, formulate, direct and control the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. Their addresses are the same as those of the corporate respondents in which they are officers. The proof fails to establish that Ben Jachter, Lee Hirsch, and Phillip Schneider formulate, direct and control the acts and practices of the corporate respondent in which they are stockholders. As used hereinafter, the word "respondents" will be deemed to include only the corporate respondents and Nathan Jachter and Nathan Spergel in their official capacities.

4. Respondents have engaged in the practice of purchasing, from drug and department stores, cologne and toilet water manufactured by leading manufacturers of perfume and kindred products. These colognes and toilet waters were rebottled by respondents in small containers known in the trade as purse-size flaconettes, with a capacity of one dram or less.

5. Respondents have engaged in the advertising, offering for sale, sale or distribution of rebottled cologne and toilet water at wholesale to wholesalers and distributors, who in turn resell at retail to the purchasing public.

6. Respondents for some time last past have caused their said products, when sold, to be shipped from their places of business in the States of New York, New Jersey, and Connecticut to purchasers thereof located in various other States of the United States and in the District of Columbia, 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.

7. Although officers of the corporate respondents testified that they have not engaged in the above activities for approximately 2 years, there is no evidence indicating that said practices have been discontinued with no likelihood of resumption.

8. In the conduct of their businesses, at the times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms, and individuals in the sale of merchandise of the

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same general kind and nature as that sold by respondents. Respondents' annual sales of purse-size flaconettes were in excess of $50,000.

9. Lanvin-Parfums, Inc., Chanel, Inc., Evyan Perfumes, Inc., and Dana Perfumes Corp., sell their colognes and toilet waters in 2-, 4-, 8-, 16- and 32-ounce containers. Faberge, Inc., and others sell a small percentage of their colognes and toilet waters in less than 2-ounce bottles. Chanel, Lanvin, Dana, and Evyan commonly sell their perfumes in 1-dram (1/8-ounce), 1/4-, 1/2-, 1-, and 2-ounce bottles, but also package their perfumes in 4-, 8-, 16-, and 32-ounce bottles.

10. There is a marked difference between cologne and toilet water on the one hand and perfume on the other. Perfume is an alcoholic solution of essential oils and aromatics in a high concentration. Perfume is compounded to last longer than cologne or toilet water. Toilet water and cologne are highly diluted forms of perfume, and some of the expensive ingredients of perfume are replaced by less expensive ones.

11. Perfume is much more expensive than cologne or toilet water.

The retail prices of "Arpege" perfume and other perfumes of Lanvin-Parfums, Inc., are from $4 for 1/8 ounce (1-dram) to $500 for 32 ounces. The retail prices for its colognes vary from $3 for 2 ounces to $32.50 for 32 ounces.

Chanel, Inc.'s perfume prices range from $5 for the 1/8-ounce (1-dram) size to $300 for the largest size. The prices for its colognes range from $3.50 for 2 ounces to $15.

Evyan Perfumes, Inc.'s prices for its "White Shoulders" perfume range from $2.75 for 1 dram to $35 for 2 ounces. The prices for its "White Shoulders" cologne range from $2.75 for 2 ounces to $9.50 for 8 ounces. The price for "White Shoulders Satinglide" toilet water is $5 for 16 ounces.

12. Lanvin-Parfums, Inc., Chanel, Inc., and Evyan Perfumes, Inc., use purse-size flaconettes with a capacity of one dram or less, only for perfume. Through such use, these flaconettes have become associated in the minds of a substantial number of the purchasing public with containers for the perfume of these manufacturers.

13. Although various examples of respondent's products which are in the record as physical exhibits are labeled so as to disclose the fact that the product is cologne, e.g., those marked "Chanel No. 5, Eau de Cologne" and "Dana's Tabu, Cologne," other examples in the record do not adequately disclose the nature of the product. The designations "Lanvin's My Sin, Eau de Lanvin," "Lanvin's Arpege, Eau de Lanvin," and "Evyan's White Shoulders Satinglide," without further identification, on respondents' purse-size flaconettes and the boxes used to package them, do not constitute adequate notice that said products are cologne or toilet water. The use by respondents of purse-size flac-

onettes in the sale of said products has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said purse-size flaconettes contain perfume.

14. By offering for sale, selling and distributing certain of their colognes and toilet waters in purse-size flaconettes without clearly and conspicuously disclosing thereon the true nature of their products, respondents place in the hands of retailers means and instrumentalities by and through which they may mislead the purchasing public into the erroneous and mistaken belief that their rebottled colognes and toilet waters are perfume.

CONCLUSION

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of respondents, as herein found, are to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

PROPOSED FINAL ORDER

It is ordered, That respondents, Panat Jewelry Co., Inc., a corporation, and its officers, and Nathan Jachter, as an officer of said corporation, and Spejac, Inc., a corporation, and its officers, and Nathan Jachter and Nathan Spergel, as officers of said corporation, and G & N Manufacturing Corporation, a corporation, and its officers, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of cologne or toilet water in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, or selling, cologne or toilet water in bottles having the size and appearance of bottles customarily and usually used for perfume, without disclosing that such products are cologne or toilet water on the bottles and on the front or face of the box or other container in which such bottles are packaged, with such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the bottles or containers.

2. Furnishing or otherwise placing in the hands of retailers or dealers in such products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

ORDER PROVIDING FOR THE FILING OF OBJECTIONS TO PROPOSED ORDER AND REPLY

JANUARY 7, 1963

The Commission having rendered its decision in this proceeding, granting complaint counsel's appeal, vacating and setting aside the initial decision and making its own findings as to the facts, conclusion and proposed order in lieu of findings as to the facts, conclusion and order contained in the initial decision; and

The Commission having determined that the aforesaid proposed order is subject to § 4.22(c) of the Commission's Rules of Practice:

It is ordered, That respondents may, within twenty (20) days after service upon them of this order, file with the Commission their objections to the provisions of the aforesaid proposed order, a statement of their reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision.

It is further ordered, That counsel supporting the complaint may, within ten (10) days after service of such objections upon him, file a statement in reply thereto, supporting the proposed order.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Ben Jachter, Lee Hirsch, and Phillip Schneider.

FINAL ORDER

MARCH 7, 1963

The Commission on January 7, 1963, having issued its order providing for the filing of objections by respondents to the proposed order of the Commission; and

Respondents having been served with the aforementioned proposed order and not having filed objections within the time granted in the Commission's order of January 7, 1963; and

The Commission having determined that its proposed order to cease and desist should be entered as the final order of the Commission:

It is ordered, That respondents, Panat Jewelry Co., Inc., a corporation, and its officers, and Nathan Jachter, as an officer of said corporation, and Spejac, Inc., a corporation, and its officers, and Nathan Jachter and Nathan Spergel, as officers of said corporation, and G & N Manufacturing Corporation, a corporation, and its officers, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of cologne or toilet water in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, or selling, cologne or toilet water in bottles having the size and appearance of bottles customarily and usually used for perfume, without disclosing that such products are cologne or toilet water on the bottles and on the front or face of the box or other container in which such bottles are packaged, with such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the bottles or containers.

2. Furnishing or otherwise placing in the hands of retailers or dealers in such products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

It is further ordered, That respondents 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 set forth herein.

IN THE MATTER OF

ROSENBAUM & HOCHBERG, 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-318. Complaint, Mar. 8, 1963—Decision, Mar. 8, 1963

Consent order requiring New York City manufacturers of fur garments, to cease violating the Fur Products Labeling Act by labeling and invoicing fur products as "natural" when they were artificially colored, and failing to disclose that the fur contained therein was bleached or dyed; failing to use the term "natural" on labels where appropriate; and failing in other respects to comply with labeling and invoicing requirements.

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 Rosenbaum & Hochberg, Inc., a corporation and Tobias Rosenbaum and Irving Hochberg, individually and as officers of said corporate respondent, 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 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 Rosenbaum & Hochberg, 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 352 Seventh Avenue, in the city of New York, State of New York.

Proposed individual respondents Tobias Rosenbaum and Irving Hochberg are officers of said corporation and they formulate, direct and control the policies, acts and practices of said corporation and their address is the same as that of said corporation.

Respondents are manufacturers of fur garments selling to jobbers, department stores and specialty shops throughout the United States.

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, manufacture for 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 manufactured for sale, 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 falsely and deceptively labeled or otherwise falsely and deceptively identified in that said fur products were described on labels as natural when in truth and in fact such fur products were pointed, bleached, dyed, tip-dyed, or otherwise artificially colored 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 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 to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored when such was the fact.

PAR. 5. 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. The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

B. Required item numbers or marks were not set forth on labels in violation of Rule 40 of said Rules and Regulations.

PAR. 6. 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 under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed to disclose that the fur contained in the fur product was bleached, dyed or otherwise artificially colored when such was the fact.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in that respondents set forth on invoices pertaining to fur products that said fur products were natural when in truth and in fact such fur products were pointed, bleached, dyed, tip-dyed, or otherwise artificially colored in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 8. 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 in that required item numbers or marks were not set forth on invoices in violation of Rule 40 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.

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, Rosenbaum & Hochberg, 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 352 Seventh Avenue, in the city of New York, State of New York.

Respondents Tobias Rosenbaum and Irving Hochberg 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 Rosenbaum & Hochberg, Inc., a corporation and its officers, and Tobias Rosenbaum and Irving Hochberg, 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, manufacture for introduction, 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, manufacture for 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. Falsely or deceptively labeling or otherwise identifying fur products as natural when such fur products are pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

B. 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.

C. Failing to set forth on labels the term "Natural" where such fur or fur product is not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

2. Falsely or deceptively invoicing fur products by:

A. 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.

B. Describing fur products on invoices pertaining thereto as natural when such fur products are pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

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

NIC KUEHN, 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-319. Complaint, Mar. 8, 1963—Decision, Mar. 8, 1963

Consent order requiring manufacturers and retailers of fur products in St. Joseph, Mo., to cease violating the Fur Products Labeling Act by removing the labels required to be affixed to fur products prior to ultimate sale, and by attaching nonconforming labels; by labeling such products with fictitious prices represented thereby as the regular retail prices; by advertisements in newspapers representing prices of fur products falsely as reduced from usual prices which were in fact fictitious, and as "½ Price"; and by failing to maintain adequate records as a basis for price and value claims.

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 Nic Kuehn, Inc., a corporation, and Curt E. Kuehn, individually and as an officer 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 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 Nic Kuehn, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its office and principal place of business located at 716 Francis Street, St. Joseph, Missouri.

Respondent Curt E. Kuehn is an officer of Nic Kuehn, Inc. He directs, controls and formulates the acts, practices and policies of Nic Kuehn, Inc. His office and principal place of business is the same as that of Nic Kuehn, Inc.

Respondents are manufacturers and retailers of 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 manufacture for 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 manufactured for sale, 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. Respondents have removed or caused or participated in the removal of, prior to the time certain fur products were sold and delivered to the ultimate consumer, labels required by the Fur Products Labeling Act to be affixed to such products, in violation of Section 3(d) of said Act and the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur products were misbranded in that 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 business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were falsely and 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 St. Joseph, Missouri News Press, a newspaper published in the city of St. Joseph, State of Missouri.

PAR. 6. By means of the advertisements referred to in Paragraph 5, and other advertisements of similar import and meaning not specifically referred to herein, respondents represented prices of fur products as having been reduced from regular or usual prices and the amount of such reductions constituted savings to the purchasers, where the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise were usually sold by respondents in the recent regular course of business and the represented savings were thereby not afforded to the purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder.

PAR. 7. In advertising fur products for sale as aforesaid respondents represented through such statements as "½ Price" that prices of fur products were reduced in direct proportion to the percentage of savings stated when in fact such prices were not reduced to afford purchasers of respondents' fur products the percentage of savings stated in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 8. The 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 subsection (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. Respondents have sold, advertised, offered for sale and processed fur products which have been shipped and received in commerce, and have misbranded said fur products by substituting for the labels affixed to such fur products, by manufacturers or distributors pursuant to Section 4 of the Fur Products Labeling Act, labels which did not conform to the requirements of said Section 4, in violation of Section 3(e) of said Act.

PAR. 10. 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 Nic Kuehn, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its office and principal place of business located at 716 Francis Street, St. Joseph, Missouri.

Respondent Curt E. Kuehn is an officer of Nic Kuehn, Inc., 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 Nic Kuehn, Inc., a corporation, and its officers, and Curt E. Kuehn, individually and as an officer of Nic Kuehn, Inc., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for 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, manufacture for sale, advertising, offering for sale, transportation or distribution, of any fur product which has been 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. Removing or causing or participating in the removal of, prior to the time fur products are sold and delivered to the ultimate consumer, labels required by the Fur Products Labeling Act to be affixed to such products.

2. Misbranding fur products by falsely and deceptively labeling or otherwise identifying such products as to the regular prices thereof by representing directly or by implication that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise was usually and customarily sold at retail by the respondents unless such merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

3. Falsely and 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, 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.

B. Misrepresents in any manner that savings are available to purchasers of respondents' fur products.

C. Represents directly or by implication through percentage savings claims that prices of fur products are reduced to afford purchasers of respondents' fur products the percentage of savings stated when the prices of such fur products are not reduced to afford the percentage of savings stated.

4. 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 Nic Kuehn, Inc., a corporation, and its officers, and Curt E. Kuehn, individually and as an officer of Nic Kuehn, Inc., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

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

MARTIN-MARIETTA CORPORATION

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

Docket 8280. Complaint, Jan. 27, 1961—Decision, Mar. 12, 1963*

Consent order requiring one of the largest domestic producers of concrete pipe, cement, lime, construction aggregates, and a variety of other products, which had in the 20 years since its organization in 1930 already acquired 20 concerns, to divest itself absolutely within 2 years of properties acquired in or since 1953, including 60 concrete pipe plants and businesses, two lime plants, and 13 crushed stone, sand and gravel quarries, plants or quarry sites, and in such manner as to establish the properties as going concerns and effective competitors; and to desist for 10 years from acquiring any concrete, lime or construction aggregates corporation and for 7 years any cement producer, both within specified territories.

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 stating its charges as follows:

PARAGRAPH 1. (a) Respondent American-Marietta Company,** hereinafter sometimes referred to as American-Marietta, is a corporation

*Reported as amended on Feb. 6, 1963 by adding Par. 4(a)(5).

**Martin-Marietta Corporation substituted for American-Marietta Company by hearing examiner's order of April 4, 1962.

doing business under and by virtue of the laws of the State of Illinois. Respondent's executive offices are located at 101 East Ontario Street, Chicago 11, Illinois.

(b) American-Marietta is now, and for several years last past has been, directly and indirectly, engaged in the manufacture and sale of concrete sewer pipe, concrete pressure pipe, and other concrete pipe products. American-Marietta is now, and for several years last past has been, one of the largest manufacturers, if not the largest manufacturer, of concrete pipe in the United States.

(c) American-Marietta manufactures, in the approximately 100 plants of its Concrete Products Division, reinforced concrete sewer and culvert pipe, prestressed concrete bridge decks, concrete construction components, irrigation pipe, and machinery relating to concrete pipe. The principal product of this group is reinforced concrete sewer and culvert pipe, of which American-Marietta is one of the Nation's leading producers.

(d) American-Marietta is one or the Nation's substantial producers of cement. Said product is manufactured by American-Marietta's Standard Lime and Cement Company, Dragon Cement Company, Southern Cement Company and Dewey Cement Company Divisions, in six plants located in West Virginia, Pennsylvania, Maine, Alabama, Oklahoma and Iowa. American-Marietta is among the Nation's 10 largest cement producers in terms of plant capacity. Most of American-Marietta's raw materials requirements for these operations can be met from reserves owned by the company.

(e) American-Marietta is engaged in the manufacture of lime and other limestone products, including chemical, metallurgical and hydrated lime, magnesite and dead burned dolomite. Production is carried on by respondent's Southern Cement Company Division and the Standard Lime and Cement Company Division, in 10 plants located in Illinois, Michigan, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Alabama. American-Marietta is one of the largest producers of lime in the United States.

(f) American-Marietta is one of the Nation's largest suppliers of adhesives and resins to the plywood, hardboard and paper industries; a leading manufacturer of industrial finishes and chemical coatings; one of the largest producers of maintenance paints; one of the world's leading producers and technical developers of sulfur and vat dyes, one of the Nation's leading producers of printing inks; and the Nation's largest manufacturer of sponge and dust mops. Respondent's Master Builders Division, the world's largest producer of admixtures for concrete manufactures Pozzolith a patented product which is essential in the manufacturers' specifications for numerous important construction projects. Respondent also produces and sells a number of other products, including metal powders, metal pigments, metallic abrasives, grinding machinery and dust collecting equipment, sealants, electrical fittings and accessories, brick and tile, and construction aggregates such as sand, gravel and crushed stone.

(g) American-Marietta has become one of the two hundred largest industrial companies in the United States. Net sales of American-Marietta and subsidiaries in the year ended November 30, 1959, reached a record $323,648,000, which represented a 6,000% increase over its net sales of $5,297,146 reported in fiscal 1942. American-Marietta's net income rose to a peak of $24,028,000 in fiscal 1959, increasing 14,000% over net income of $169,362 in fiscal 1942. Total assets of American-Marietta and consolidated subsidiaries amounted to $287,843,766 on November 30, 1959.

(h) A substantial portion of the aforesaid increase in sales and a substantial portion of these total assets are attributable to the acquisitions hereinafter described. In the 20 years following its incorporation in 1930 respondent acquired 20 concerns for a total combined consideration of approximately $13 million. Since the 1950 amendment of Section 7 of the Clayton Act, however, the rate of acquisitions by American-Marietta accelerated; during this period, respondent has acquired the stock or assets of over 70 corporations at a cost of over $250 million.

(i) American-Marietta and its subsidiaries are now, and have been for several years last past, engaged in commerce, as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

PAR. 2. The manufacture and sale of concrete pipe and other concrete products were undertaken by American-Marietta in about May 1953, with the acquisition of Lamar Pipe & Tile Company, a Michigan corporation, which was one of the largest, if not the largest, concrete pipe producers in that State. In a series of transactions, beginning in 1953, American-Marietta has acquired, directly or indirectly, all or part of the stock or assets of numerous corporations, including competitors, engaged in the production of concrete pipe, concrete sewer pipe and concrete pressure pipe in various geographical areas of the United States. All of these 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, among others, the following:

(1) In July 1953 American-Marietta acquired Concrete Products Co. of America, a Pennsylvania corporation, one of the largest, if not the largest, concrete pipe manufacturers in Pennsylvania.

(2) In September 1953 American-Marietta acquired Universal Concrete Pipe Company, an Ohio corporation, thereby making respondent the country's largest

producer of concrete sewer pipe, with 32 plants strategically located from coast to coast.

(3) In December 1954 American-Marietta acquired Concrete Conduit Company, a California corporation which was one of the leading producers in concrete pipe in that State.

(4) In January 1956 American-Marietta acquired Tellyer Concrete Pipe Company, a California corporation with plants in California, New Mexico and Texas.

(5) In March 1956 American-Marietta acquired Mid-West Concrete Pipe Co., an Illinois corporation.

(6) In May 1956 American-Marietta acquired Atlantic Concrete Pipe Company, a New York corporation.

(7) In September 1956 American-Marietta acquired Parkersburg Concrete Products Co., a West Virginia corporation.

(8) In April 1957 American-Marietta acquired Hayman Concrete Pipe Company, a Delaware corporation.

(9) In April 1957 American-Marietta acquired Platte Valley Cement Tile Manufacturing Company, a Nebraska corporation, one of the leading manufacturers of concrete pipe in Nebraska.

(10) In May 1957 American-Marietta acquired Kansas City Concrete Pipe Company, a Missouri corporation.

(11) In May 1957 American-Marietta acquired Sibley Cement Company, an Iowa corporation.

(12) In June 1957 American-Marietta acquired Western Concrete Pipe Company, a Colorado corporation.

(13) In September 1957 American-Marietta acquired Sherman Concrete Pipe Co., Jacksonville, Florida.

(14) In September 1957 American-Marietta acquired Massey Concrete Products Company, a Delaware corporation.

(15) In October 1957 American-Marietta acquired White Pipe Company, a Texas corporation.

(16) In December 1957 American-Marietta acquired Empire State Concrete Pipe Company, a New York corporation; American Concrete Pipe Company, Inc., a New Jersey corporation; and American Concrete Pipe Company, Inc., a New York corporation.

(17) In December 1957 American-Marietta acquired Mid-South Concrete Pipe Company, a Tennessee corporation, and its wholly owned subsidiary Osceola Tile and Culvert Company, an Arkansas corporation.

(18) In December 1957 American-Marietta acquired Indiana Lock-Joint Concrete Pipe Company, an Indiana corporation, thereby becoming one of the largest concrete pipe producers in that State.

(19) In March 1958 American-Marietta acquired Sherman Concrete Pipe Company of Knoxville, Inc., a Tennessee corporation, and Sherman Concrete Pipe Company of Johnson City, Inc., a Tennessee corporation. These acquisitions, together with those described in Paragraph 2(b)(17) above, made respondent one of the leading producers of concrete pipe in Tennessee.

(20) In March 1958 American-Marietta acquired Lake View Concrete Tile Company, an Iowa corporation.

(21) In June 1958 American-Marietta acquired Valley Concrete Pipe & Products Company, a California corporation.

(22) In June 1958 American-Marietta acquired Carolina Concrete Pipe Company, Inc., a North Carolina corporation, thereby becoming one of the largest,

749-537—67——54

if not the largest, concrete pipe producers in North Carolina and South Carolina.

(23) In June 1958 American-Marietta acquired Nevada Concrete Pipe Company, a Nevada corporation.

(24) In January 1959 American-Marietta acquired Collins Concrete and Steel Pipe Company, an Oregon corporation.

(25) In January 1959 American-Marietta acquired Hammonds, Inc., and Vermont Concrete Pipe Corp., subsidiary of Hammond's Inc., Windsor, Vermont.

(26) In March 1959 American-Marietta acquired Thomas Concrete Pipe Co., an Oklahoma corporation, the largest producer of concrete pipe in Oklahoma.

(27) In November 1959 American-Marietta acquired Seattle Concrete Pipe Company, Inc., Seattle, Washington.

(28) In December 1959 American-Marietta acquired Spokane Concrete Pipe Co., Inc., Spokane, Washington.

(29) In December 1959 American-Marietta acquired Arey Pipe & Construction Co., a Texas corporation.

PAR. 3. The effect of the aforesaid acquisitions by the respondent, individually and collectively, may be substantially to lessen competition or to tend to create a monopoly in (1) the concrete pipe industry as a whole, (2) the production and sale of concrete sewer pipe, and (3) the production and sale of concrete pressure pipe in various sections of the country, in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

1. The corporations listed in Paragraph 2 above have been or may be permanently eliminated as independent competitive factors.

2. Actual or potential competition between respondent and the corporations hereinbefore named has been or may be substantially decreased or eliminated.

3. Respondent's competitive position has been materially improved, or may be materially improved, to the actual or potential detriment of competition.

4. Respondent has become better able to inhibit entry by new producers.

5. Concentration in production and sale has been or may be substantially increased.

6. The cumulative effect of the respondent's acquisitions described in Paragraph 2 above, may be substantially to lessen competition or to tend to create a monopoly in the production and sale of concrete pipe, concrete sewer pipe and concrete pressure pipe nationwide or in certain sections of the country.

7. The foregoing acquisitions give respondent the added facilities, market, geographic position and power to actually and potentially dominate the markets in the areas in which it operates and in which the aforesaid corporations operated or might have operated, in addition to enhancing the position it enjoyed prior to the acquisitions.

PAR. 4. As a result of the acquisitions hereinafter described, American-Marietta has become one of the Nation's largest producers of cement, and a major producer and marketer in the lime and construction aggregates industries.

(a) The cement acquisitions by respondent include among others:

(1) In November 1954, respondent acquired 78% of the common stock of Standard Lime and Stone Company, hereinafter sometimes referred to as Standard, a Maryland corporation, for a total consideration of about $20,515,000. At the time of this acquisition by respondent and for several years prior thereto, Standard was a substantial producer of cement, limestone, and lime, and the largest cement produced in West Virginia.

(2) In November 1955 American-Marietta acquired the assets and business of Southern Cement Company, a Delaware corporation, for a total consideration of about $14,773,000. Southern Cement Company is now, and was at the time of its acquisition by respondent, a major producer of cement and lime with two plants in Alabama, one at Roberta and another at Birmingham.

(3) In September 1956 American-Marietta acquired the assets and business of Dragon Cement Company, Inc., a Maine corporation, for a total consideration of approximately $28,456,000. Dragon operated the only cement plant in New England, at Thomaston, Maine, and another cement plant at Northampton, Pennsylvania.

(4) In February 1960 American-Marietta acquired the assets and business of Dewey Portland Cement Company, a Delaware corporation, in exchange for 1,471,709 common shares of American-Marietta. Total assets of Dewey Portland Cement Company, hereinafter sometimes referred to as Dewey, were $30,420,798 on December 31, 1959. Dewey operated two cement plants, one at Davenport (Linwood), Iowa, and another at Dewey, Oklahoma. Dewey also had under construction or in operation a cement plant at Tulsa, Oklahoma.

(5) In September 1962 Martin-Marietta acquired the stock and business of Aetna Portland Cement Company, a Maine corporation, for approximately $13,000,000. Aetna operated a cement plant at Bay City, Michigan.

(b) In very recent years, respondent has greatly increased its operations in the production and marketing of construction aggregrates such as sand, gravel and crushed stone. American-Marietta has become a major factor in these industries through the acquisition of the following companies among others:

(1) Prior to 1959 American-Marietta had already established itself in the field of construction aggregates. The Standard acquisition of 1954 described above gained for respondent a position as a substantial producer of crushed limestone. In the following year, respondent acquired Whiterock Quarries Inc., a Pennsylvania corporation, a producer of crushed stone. The 1956 Dragon acquisition described above

brought to respondent an affiliated company, Alliance Sand Co., Inc., a producer of crushed sandstone.

(2) In April 1959 American-Marietta acquired the two largest rock-crushing firms in the Southeastern United States, Superior Stone Company and Bryan Rock and Sand Company, North Carolina corporations, for a total consideration of approximately $30 million. In September of the same year, respondent acquired Buchanan Stone Company, a North Carolina corporation, thereby strengthening its already dominant position in this area.

(3) In August of 1959 American-Marietta acquired, for about $8 million, the largest producers and suppliers of sand, gravel and stone in Iowa, Concrete Materials Company and Concrete Materials and Construction Company, both Iowa corporations. In February 1960 respondent acquired the assets of Beu Limestone Company, an Iowa corporation, and of Dewey, described above, two of the largest limestone producers in Iowa. Respondent thereby strengthened its already dominant position in this area.

(4) American-Marietta has thus acquired extensive sand, gravel and crushed stone quarries in several sections of the country. Its Superior Stone Company and Concrete Materials Company Divisions alone operate about 60 quarries in Virginia, North Carolina, South Carolina, Georgia, Iowa, Missouri and Kansas. In addition, respondent has acquired numerous quarries in other sections of the country including, among others, the June 1960 acquisition of the assets of Fry Coal and Stone Company, a Pennsylvania corporation, for a total consideration of about $3,740,000.

(c) American-Marietta is now one of the largest producers of lime on the open market in the United States. This position was attained as a result of the following acquisitions, among others:

(1) The Standard acquisition, described in Paragraph 4(a)(1) above, obtained for respondent control of one of the Nation's largest producers of lime. Standard's plants are located in Tennessee, Virginia, West Virginia, Ohio, Michigan and Illinois.

(2) The acquisition of Southern Cement Company, described in Paragraph 4(a)(2) above, added to respondent's lime interests another important producer and marketer of lime, the largest in Alabama.

(3) In January 1956 American-Marietta further strengthened its position in the lime industry, and more particularly in and adjacent to Alabama, by the acquisition of Keystone Lime Works, Inc., which operated a lime plant at Keystone, Alabama.

(d) Prior to and at the time of their acquisition by American-Marietta, each of the corporations hereinbefore named in Paragraph 4(a) to (c), inclusive, was engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 5. The effect of the aforesaid acquisitions named in paragraph

4(a) and (b) may be substantially to lessen competition or to tend to create a monopoly in (1) the concrete pipe industry as a whole, (2) the production and sale of concrete sewer pipe, and (3) the production and sale of concrete pressure pipe, in various sections of the country in contravention of Section 7 of the Clayton Act in the following ways, among others:

(1) By tending to reduce the actual or potential competition from producers of such pipe who are not, directly or indirectly, integrated or affiliated with producers of cement or construction aggregates such as sand, gravel, and crushed stone.

(2) By tending to set into motion integration or affiliation, either directly or indirectly, by and between other producers of such pipe, other producers of cement, and other producers of construction aggregates.

(3) By tending to inhibit or prevent entry of new producers or sellers of such pipe in those sections of the country where respondent's production of such pipe is or may be served by the producers of cement or construction aggregates listed in Paragraph 4(a) and (b).

(4) By tending to enhance respondent's already dominant position in the production and sale of such pipe.

PAR. 6. The effect of the acquisitions described in Paragraph 4(a) may be substantially to lessen competition or tend to create a monopoly in the production and sale of cement in various sections of the country in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

(1) Each of the listed cement companies has been eliminated as an independent competitive factor in the production and sale of cement.

(2) The listed companies may be wholly or partially eliminated as suppliers of cement to purchasers including respondent's competitors, who use cement in the production of concrete pipe and other concrete products.

(3) Actual or potential competition between respondent and the listed companies and among the listed companies has been or may be eliminated.

(4) Actual or potential competition generally in the production and sale of cement may be substantially lessened.

(5) Entry of new cement producers may be inhibited or prevented, and competition therein substantially lessened, by respondent's integration of the production of cement, construction aggregates, concrete pipe and other concrete products within the control of a single corporation.

(6) The historic pattern in the cement industry has been one of concerted activities to devise means and measures to do away with

competition within the industry. Concentration of productive capacity has facilitated and may further facilitate such concerted activities. The acquisitions described in Paragraph 4(a) have resulted in an increase and may result in a further increase in concentration in the production and sale of cement generally and in certain sections of the country. Against this anticompetitive pattern in the industry, the increase in concentration as a result of the acquisitions described above constitutes or may constitute a detriment to competition.

PAR. 7. The effect of the acquisitions described in Paragraph 4(b) may be substantially to lessen competition or tend to create a monopoly in the production and sale of construction aggregates and of those particular construction aggregates produced and sold by each of the corporations listed in Paragraph 4(b), in the following ways, among others:

(1) Each of the listed companies has been eliminated as an independent competitive factor.

(2) The listed companies may be wholly or partially eliminated as suppliers of construction aggregates to purchasers, including respondent's competitors, who use such aggregates in the production of concrete pipe and other concrete products.

(3) Actual or potential competition between respondent and the listed companies and among the listed companies has been or may be eliminated.

(4) Entry of new construction aggregates producers may be inhibited or prevented, and competition therein substantially lessened, by respondent's integration of the production of cement, construction aggregates, concrete pipe and other concrete products within the control of a single corporation.

(5) There has been an increase and may be a further increase in concentration in the production and sale of construction aggregates in certain sections of the country.

(6) Respondent has become one of the most important, if not the dominant factor, in the construction aggregates industry in North Carolina or in parts thereof, and in Iowa or in parts thereof, to the actual and potential detriment of competition.

PAR. 8. The effect of the acquisitions described in Paragraph 4(c) may be substantially to lessen competition or tend to create a monopoly in the production and sale of lime in various sections of the country in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

(1) Each of the listed lime companies has been eliminated as an independent competitive factor in the production and sale of lime.

(2) Actual and potential competition between respondent and

Southern has been or may be eliminated in the production and sale of lime in every area in which they competed or might have competed.

(3) Actual or potential competition between respondent and the listed companies and among the listed companies in the production and sale of lime has been or may be eliminated.

(4) Actual or potential competition generally in the production and sale of lime may be substantially lessened.

(5) The acquisitions described in Paragraph 4(c) have resulted in an increase and may result in a further increase in concentration in the production and sale of lime generally and in certain sections of the country. Against this anticompetitive pattern in the industry, the increase in concentration as a result of the acquisitions described above constitutes or may constitute a detriment to competition.

PAR. 9. All of the foregoing acquisitions alleged and set forth hereinabove constitute a violation of Section 7 of the Clayton Act, as amended.

PAR. 10. The constant and systematic eliminations of actual and potential competitors by means of the acquisitions described above are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

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 consent 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 which has now been entered into affords an adequate basis for appropriate disposition of this proceeding and should be accepted; that the Commission itself should initially decide this matter, and forthwith issue its decision and order; and that the misspelling of the word "subsidiaries" in the agreement, being clearly a typographical error, should be corrected:

The agreement, as corrected, 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 Maryland with its executive

office and principal place of business located at 350 Park Avenue, in the city of New York, State of New York.

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

ORDER

It is ordered, That Martin-Mariettta Corporation within a period not exceeding twenty-four (24) months after the service upon it of this order, unless extended, shall divest itself absolutely, in good faith, and to purchasers approved by the Federal Trade Commission, of the following listed plants, properties and assets, including, but not limited to, all machinery, equipment, raw material reserves, trade names, contract rights, trademarks and good will, connected therewith or a part thereof:

I

Concrete pipe plants and businesses at the following locations:

Grand Rapids, Michigan
Jackson, Michigan
Saginaw, Michigan
Pottstown, Pa.
Parkersburg, W. Va.
Azusa (Irwindale), Calif.
Binghamton, New York
Bridgeville, Pa.
Clarksburg, W. Va.
Columbus, Ohio
Dania, Florida
Decatur, Alabama
Dothan, Alabama
Kenvil, New Jersey
Louisville, Kentucky
New Martinsville, W. Va.
Norristown, Pa.
Fremont, Nebraska
Scottsbluff, Nebraska
Riverside, Missouri
Sibley, Iowa
Denver, Colorado
Jacksonville, Florida
Birmingham, Alabama
Melbourne, Kentucky
Littlefield, Texas
Chelsea (Memphis), Tenn.
President Is., Tenn.
Lafayette, Indiana
Lake View, Iowa
Chico, California
Yuba City, Calif.
Charlotte, N.C.
Columbia, S.C.
Ocala, Florida
Rochester, New York
St. Petersburg, Florida
Syracuse, New York
Tampa, Florida
Calipatria, California
Colton, California
Dover, Delaware
Phoenix, Arizona
Albuquerque, New Mexico
Farmington, New Mexico
El Paso, Texas
Healdsburg, California

Hicksville, New York	Oklahoma City, Okla.
Lilesville, N.C.	(11th St. & Lillard Park)
Sparks, Nevada	Spokane, Washington
Portland, Oregon	Seattle, Washington
Windsor, Vermont	Fairbanks, Alaska
Lawton, Oklahoma	Anchorage, Alaska
Ada, Oklahoma	Pampa, Texas

The above listed plants were acquired, or were replacements for plants acquired, as a result of the acquisition of the following corporations and businesses, and constituted their principal assets:

(1) Lamar Pipe and Tile Company, a Michigan corporation;

(2) Concrete Products Co. of America, a Pennsylvania corporation;

(3) Universal Concrete Pipe Company, an Ohio corporation;

(4) Concrete Conduit Company, a California corporation;

(5) Tellyer Concrete Pipe Company, a California corporation;

(6) Mid-West Concrete Pipe Co., an Illinois corporation;

(7) Atlantic Concrete Pipe Company, a New York corporation;

(8) Parkersburg Concrete Products Co., a West Virginia corporation;

(9) Hayman Concrete Pipe Company, a Delaware corporation;

(10) Platte Valley Cement Tile Manufacturing Company, a Nebraska corporation;

(11) Kansas City Concrete Pipe Company, a Missouri corporation;

(12) Sibley Cement Company, an Iowa corporation;

(13) Western Concrete Pipe Company, a Colorado corporation;

(14) Sherman Concrete Pipe Co., Jacksonville, Florida;

(15) Massey Concrete Products Company, a Delaware corporation;

(16) White Pipe Company, a Texas corporation;

(17) American Concrete Pipe Company, Inc., a New York corporation and American Concrete Pipe Company, Inc., a New Jersey corporation;

(18) Mid-South Concrete Pipe Company, a Tennessee corporation, and its wholly owned subsidiary Osceola Tile and Culvert Company, an Arkansas corporation;

(19) Indiana Lock-Joint Concrete Pipe Company, an Indiana corporation;

(20) Lake View Concrete Tile Company, an Iowa corporation;

(21) Valley Concrete Pipe & Products Company, a California corporation;

(22) Carolina Concrete Pipe Company, Inc., a North Carolina corporation;

(23) Nevada Concrete Pipe Company, a Nevada corporation;

(24) Collins Concrete and Steel Pipe Company, an Oregon corporation;

(25) Hammond's Inc., a Vermont corporation, and its subsidiary, Vermont Concrete Pipe Corp., a Vermont corporation;

(26) Thomas Concrete Pipe Co., an Oklahoma corporation;

(27) Seattle Concrete Pipe Company, Inc., a Washington corporation;

(28) Arey Pipe & Construction Co., a Texas corporation;

(29) Spokane Concrete Pipe Co., Inc., a Washington corporation.

II

Lime plants at the following locations:

Knoxville, Tennessee
Kimballton, Virginia

The above plants were acquired as a result of the acquisition of the stock of the Standard Lime and Stone Company, a Maryland corporation.

III

Aggregates (crushed stone, sand and gravel) quarries, plants, or quarry sites, at the following locations:

Aberdeen, North Carolina
Elm City, North Carolina
Garysburg, North Carolina
Goldsboro, North Carolina
Linden, North Carolina
Neverson, North Carolina
Crab Tree, North Carolina
Rolesville, North Carolina

West End, North Carolina
Greystone, North Carolina
Greensboro, North Carolina
Le Grand, Iowa
Waterloo, Iowa

The above listed quarries, plants and quarry sites, were acquired as a result of the acquisition of the following corporations and businesses, and constituted their principal assets:

(1) Bryan Rock and Sand Company, a North Carolina corporation;

(2) Buchanan Stone Company, Inc., a North Carolina corporation;

(3) Beu Limestone Company, an Iowa corporation;

(4) Northwestern Quarry Joint Venture, a company doing business in Iowa.

It is further ordered, That pending divestiture, respondent shall not make any changes in any of the machinery, buildings, equipment or other property of whatever description, of any of the listed plants, quarries or businesses, which shall impair their market value or present capacity for the production and for the sale of concrete pipe, lime, or aggregates (crushed stone, sand and gravel), or any other products they may be producing or selling, unless such market value or capacity is restored prior to divestiture.

It is further ordered, That the Martin-Marietta Corporation, in carrying out the divestitures above ordered, do so in such manner as to establish, insofar as possible, the above listed plants and properties as going concerns and effective competitors in the manufacture and sale of concrete pipe and aggregates (crushed stone, sand and gravel), and in the case of the lime plants, as a going concern or concerns, and as an effective competitor or competitors, in the production and sale of lime.

It is further ordered, That, for a period of ten (10) years from the date of service upon it of this order, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, any part of the share capital or other assets of any corporation engaged in the production and sale of concrete pipe, lime, or aggregates (crushed stone, sand and gravel), in the following geographic areas: (a) with respect to concrete pipe, anywhere in the United States; (b) with respect to lime, anywhere east of the Mississippi River; (c) with respect to aggregates, anywhere in the States of North Carolina and

Iowa, and in the counties of the States of Virginia, South Carolina, Georgia, Kansas and Missouri listed below:

Virginia
Pittsylvania
Albemarle
Nelson
Buckingham
Fluvanna
Effingham
Evans
Liberty
Bryan
Chatham
McIntosh
Johnson
Coffee
Osage
Shawnee
Jefferson
Leavenworth
Elk
Louisa
Orange
Madison
Greene
Georgia
Columbia
McDuffie
Richmond
Jefferson
Burke
Emanuel
Jenkins
Screven
Candler
Bulloch
Missouri
Worth
Gentry
Nodaway
South Carolina
York
Lancaster
Edgefield
Aiken
Kansas
Franklin
Douglas
Chautauqua
Cowley
Butler
Greenwood
Sumner
Sedgwick
Harvey
Marion
Chase
Lyon
Jackson
Pottawat-omie
Wabaunsee
Morris
Geary
Riley

It is further ordered, That, for a period of seven (7) years from the date of service upon it of this order, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, any part of the share capital or other assets of any corporation engaged in commerce, as "commerce" is defined in the Clayton Act, and in the production and sale of cement, anywhere in the States of the United States east of the eastern border of the States of Idaho, Utah and Arizona: *Provided, however*, That nothing in this paragraph implies that any acquisition of a cement producing plant in the United States by Martin-Marietta Corporation west of the aforementioned line would be lawful.

It is further ordered, That respondent shall, within three months from the date of service upon it of this Order, submit in writing to the Federal Trade Commission its plan for carrying out the provisions of this Order, which shall include provision for submitting periodic compliance reports, subject to Commission approval.

Commissioner MacIntyre not concurring.

IN THE MATTER OF

E. P. SORENSEN, d/b/a BELDEN SCHOOL OF NURSING

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

Docket C-320. Complaint, Mar. 15, 1963—Decision, Mar. 15, 1963

Consent order requiring a Chicago individual, engaged in selling a correspondence course, to cease representing falsely in advertising in nationally circulated magazines, circulars, form letters, etc., that persons completing his course would become proficient auxiliary nurses, qualified to secure employment with hospitals and similar institutions.

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 E. P. Sorensen, an individual doing business as Belden School of Nursing, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent E. P. Sorensen is an individual doing business as Belden School of Nursing with his principal office and place of business located at 2525 Sheffield Avenue, Chicago, Illinois.

PAR. 2. Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of a correspondence course of instruction in auxiliary nursing. As used hereinafter the terms "auxiliary nursing" and "auxiliary nurse" shall mean or refer to all of those persons working in the nursing field below the level of licensed practical nurse and include the job titles of unlicensed practical nurse, nursing aides, hospital attendants, doctor's office nurse, baby nurse, nurse companion, and other similar titles.

PAR. 3. In the course and conduct of his said business, respondent now causes and for some time last past has caused his said correspondence course, when sold, to be shipped from his place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said correspondence course in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, at all times mentioned herein, the respondent has been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of instruction in auxiliary nursing.

PAR. 5. In the course and conduct of his business, respondent has disseminated and caused the dissemination of advertisements and other promotional material describing and extolling his said course of instruction, by the United States mail and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in nationally circulated magazines, brochures, circulars and form letters, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of his said course of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. By means of statements contained in said advertisements and promotional material disseminated as aforesaid, the respondent has represented, directly or by implication:

1. That persons completing respondent's said correspondence course of instruction in auxiliary nursing will thereby have become and will thereby be proficient and competent in the performance of the duties and functions of an auxiliary nurse.

2. That persons completing respondent's said correspondence course of instruction in auxiliary nursing will thereby have become and will thereby be an auxiliary nurse.

3. That persons completing respondent's said correspondence course of instruction in auxiliary nursing will thereby have become and will thereby be qualified and enabled to secure employment as an auxiliary nurse on general or private duty with hospitals, sanatoriums, institutions, individuals or similar or related places of employment.

PAR. 7. In truth and in fact:

1. Persons completing respondent's said correspondence course of instruction in auxiliary nursing will not thereby have become and will not thereby be proficient or competent in the performance of the duties and functions of an auxiliary nurse.

2. Persons completing respondent's said correspondence course of instruction in auxiliary nursing will not thereby have become and will not thereby be an auxiliary nurse.

3. Persons completing respondent's said correspondence course of instruction in auxiliary nursing will not thereby have become and will not thereby be qualified and enabled to secure employment as an auxiliary nurse on general or private duty with hospitals, sanatoriums, institutions, individuals, or similar or related places of employment.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 8. The use by respondent 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 said correspondence course from the respondent by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's 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 respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent 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 E. P. Sorensen is an individual doing business as Belden School of Nursing with his office and principal place of business located at 2525 Sheffield Avenue, in the city of Chicago, State of Illinois.

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

ORDER

It is ordered, That respondent E. P. Sorensen, an individual, doing business under the name of Belden School of Nursing, or any other trade name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of correspondence courses in auxiliary nursing including practical nursing and nurse's aide or any similar or related course of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That persons completing said courses of instruction will thereby have become and will thereby be proficient and competent in the performance of the duties and functions of an auxiliary nurse including a practical nurse and a nurse's aide.
2. That persons completing said courses of instruction will thereby have become and will thereby be an auxiliary nurse including a practical nurse and a nurse's aide.
3. That persons completing said courses of instruction will thereby have become and will thereby be qualified and enabled to secure employment as an auxiliary nurse including a practical nurse and a nurse's aide on general or private duty with hospitals, sanatoriums, institutions, individuals, or similar or related places of employment.

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

IN THE MATTER OF

FORSTER MFG. CO., INC., ET AL.

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

Docket 7207. Complaint, July 23, 1958—Decision, Mar. 18, 1963*

Order requiring a Farmington, Maine, manufacturer of some 25 woodenware products—including meat skewers, ice cream spoons, and clothespins—which it sold to chainstores, meat packing plants, and other users as well as to many independent wholesalers, to cease violating Sec. 2(a) of the Clayton Act by selling its products to some purchasers at lower prices than it sold them to competing buyers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been since February 1,

*Reported as amended June 30, 1959.

1955, and are now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph 1. Forster Mfg. Co., Inc., hereinafter referred to as respondent corporation, is a corporation organized, existing and doing business under the laws of the State of Maine, with its principal office and place of business located at 79 Main Street, Farmington, Maine.

Par. 2. Respondent Theodore R. Hodgkins is an individual who is president, a director and the majority stockholder of respondent corporation, with his principal office and place of business located at 79 Main Street, Farmington, Maine. He is responsible for the acts and practices herein alleged to be unlawful.

Par. 3. For a number of years in the past, respondent corporation has been, and now is, the dominant manufacturer and nationwide seller of a line of about 25 products made out of wood consisting of clothespins, toothpicks, eating utensils, ice cream sticks, skewers and similar products, hereinafter referred to as "woodenware products." Net sales of woodenware products by the respondent during 1957 exceeded $6.7 million dollars and net sales of skewers in 1957 were $221,835.

Par. 4. Respondent corporation sells its woodenware products directly to many chainstores, meat packing plants and other users of its products and also to many independent wholesalers which resell such products to all types of stores, packing plants and other users.

Par. 5. Respondent corporation is now, and for many years past, has been engaged in commerce as defined in the Clayton Act in that it ships woodenware products from the state of manufacture to purchasers located in other States of the United States and, in so doing, is also in competition with other manufacturers and sellers of similar products and with resellers of its own products.

Par. 6. Respondent corporation, in the course and conduct of its business is now, and since February 1, 1955, has been, in each of several trade areas, directly or indirectly discriminating in price between purchasers of its woodenware products of like grade and quality by selling such products at higher prices to some purchasers than it sells them to various favored purchasers, many of the favored purchasers being in competition with nonfavored purchasers.

Specific woodenware products with respect to which such discriminations have occurred are: meat skewers, toothpicks, clothespins, tongue depressors, ice cream sticks, spoons, cocktail forks and cocktail spears.*

Par. 7. Wooden meat skewers constitute a substantial part of the

*Paragraph added by amendment of June 30, 1959.

corporate respondent's business and are sold by it directly to meat packing plants and chainstores owning their own packing plants and also to wholesalers which resell them to similar stores, packing plants and other users competitively engaged with each other. During the period covered by this complaint respondent corporation has been the dominant manufacturer and seller of wooden meat skewers in the United States, there being only two other small manufacturers. Presently, respondent corporation manufactures about 90% of the skewers sold in the United States. Prior to March 1, 1956, one of the competitive manufacturers did not engage extensively in the sale of skewers and other woodenware products on the open market, but supplied 80% of its production of woodenware products to respondent corporation in the form of meat skewers.

PAR. 8. During the period February 1, 1955, through March 17, 1958, respondent corporation sold skewers at various delivered prices in different areas of the United States, all of which prices were discriminatory in that respondent corporation charged some customers higher prices than the prices it charged to their competitors in the same areas for skewers of like grade and quality. Respondent corporation also discriminated in prices because it sold skewers of like grade and quality at lower net delivered prices to meat packers which either own stock in, control or are members of an organization named Manufacturers Co-operative Association, Inc., of Chicago, Illinois, which meat packers are in competition with respondent corporation's nonfavored meat packer customers paying higher delivered prices to respondent corporation for skewers of like grade and quality in the same areas of the country. Respondent corporation accomplishes this particular discrimination by treating Manufacturers Co-operative Association, Inc., as an independent wholesaler and granting to it the usual wholesaler's discount in connection with the sales of skewers delivered directly to its meat packer owners or members. For example, the tabulation below shows respondent corporation's various discriminatory delivered prices for customers in the Chicago, Illinois, area on one type of skewer (#1001) at its unit price per case.

Period in which list prices were in effect	List price [paid by nonfavored direct purchasers]	Manufacturers Cooperative Association	Armour & Cudahy	Wilson	Safeway & A&P
Feb. 1, 1955–June 7, 1956	$10.00	$9.50	$9.30	$10.00	$9.68
June 8, 1956–Dec. 31, 1956	8.00	7.60	8.00	8.00	7.68
Jan. 2, 1956–Feb. 13, 1957	6.90	6.56	6.90	6.90	6.90
Feb. 14, 1957–Sept. 4, 1957	8.50	[1] 8.08	6.90	8.50	8.50
Sept. 4, 1957–Mar. 17, 1958	8.50	7.20	6.90	8.50	8.50

[1] $7.20 after 3/21/57.

PAR. 9. Respondent corporation's said prices which became effective January 2, 1957, and September 4, 1957, were below its cost of manufacture and sale.

PAR. 10. The effect of respondent corporation's aforesaid discriminations in price between these different purchasers of its said products may be substantially to lessen, injure, destroy, or prevent competition between respondent corporation and competing manufacturers and sellers of said products, between and among respondent corporation's favored and nonfavored customers, and between and among customers of respondent corporation's favored and nonfavored customers; or tend to create a monopoly in the lines of commerce in which respondent and its favored purchasers are engaged. The effect of respondent corporation's discriminations in price in the sale of meat skewers has resulted in a tendency toward monopoly in the respondent corporation in the manufacture and sale of wooden meat skewers. An additional effect of the discriminatory pricing practices of respondent corporation, as alleged herein, is that the competitor referred to in Paragraph 7 above, which formerly supplied skewers to respondent and which also sold skewers and other woodenware products on the open market, has been forced out of the woodenware products manufacturing business altogether by respondent corporation.

PAR. 11. The foregoing acts and practices of the respondents violate Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

Mr. John F. McCarty for the Commission.

Mr. Richard A. Tilden, of New York, N.Y., for individual respondent; and *Mr. Joseph B. Campbell*, of Augusta, Maine, for corporate respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

FEBRUARY 2, 1962

INDEX

INDEX—Continued

PRELIMINARY STATEMENT

The Commission, on July 23, 1958, issued a complaint against the respondents charging the corporate respondent with discriminating in price between purchasers of its woodenware products of like grade and quality by selling such products at higher prices to some purchasers than it sells said products to various favored purchasers, many of the favored purchasers being in competition with unfavored purchasers in violation of Section 2(a) of the Clayton Act as amended. The individual respondent Hodgkins is alleged to be responsible for the acts and practices alleged to be unlawful.

The original complaint lists wooden meat skewers and "other woodenware products", consisting of clothespins, toothpicks, eating utensils and ice cream sticks as the products involved in the proceeding. It is alleged in Paragraph 7 of the complaint that during the period covered by the complaint respondent corporation had been the dominant manufacturer and seller of wooden meat skewers in the United States and, at the time of the issuance of the complaint, manufactured about 90% of the skewers sold in the United States. It is further alleged in this connection that prior to March 1, 1956, one of the respondents' competitors supplied 80% of its production of woodenware products in the form of meat skewers.

It is specifically charged in Paragraph 8 that during the period from February 1, 1955, through March 17, 1958, respondent sold skewers at various delivered prices in different areas of the United States to meat packers and also to wholesalers who resold them to stores and small packing plants and other users competitively engaged with each other, all of which prices were discriminatory in that respondent corporation charged some customers higher prices than the prices it charged to their competitors in the same areas for skewers of like grade and quality. As an example of such discrimination, it was specifically alleged that respondent corporation discriminated in prices by selling skewers of like grade and quality at lower net delivered prices to meat packers which either owned stock in, controlled or were members of the Manufacturers Cooperative Association, Inc., of Chicago, Illinois, when said packers were in competition with nonfavored meat packer customers who paid said respondent higher delivered prices for skewers of like grade and quality in the same areas of the country. This, it is alleged, is accomplished by granting to said Manufacturers Cooperative Association, Inc., the usual wholesalers discount on skewers sold to it but delivered to its meat packer owners or members.

In Paragraph 9 it is alleged that the prices at which respondent sold its said skewers were in some instances below cost of manufacture and sale.

It is alleged in Paragraph 10 that the effect of the aforesaid discriminations in price may be to substantially lessen, injure or destroy competition between respondent corporation and competing manufacturers and sellers of said products also between and among respondent corporation's favored and nonfavored customers. It is also alleged that the effect of said discrimination was to tend to create a monopoly in the lines of commerce in which respondent corporation and its favored purchasers were engaged in the manufacture and sale of wooden meat skewers and further, that a competitor who had, prior to March 1, 1956, been a principal supplier of respondent corporation, had been forced out of the woodenware products manufacturing business.

On June 30, 1959, after some testimony had been taken in the case before the original hearing examiner, the complaint was amended (upon motion of counsel in support of the complaint) by inserting at the end of paragraph six thereof, as follows:

Specific woodenware products with respect to which such discriminations have occurred are: meat skewers, toothpicks, clothespins, tongue depressors, ice cream sticks, spoons, cocktail forks and cocktail spears.

Respondents denied the material allegations of the complaint with respect to the discrimination and the effect of same, except that it was admitted by respondent corporation that it sold wooden meat skewers to meat packers, chainstores, and wholesalers; that it sold such skewers to the Manufacturers Cooperative Association, Inc., as an independent wholesaler and granted to it the usual wholesaler's discount. The answer of respondent Hodgkins was to the same general effect.

Respondent corporation, in answer to the amended complaint, affirmatively stated that

any price charged by it to purchasers of its woodenware which was lower than the price it charged to other purchasers of its woodenware of like grade and qualities was either made in good faith to meet an equally low price of a competitor or represents a differential in price which makes only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods and quantities in which such woodenware was to such purchaser sold.

Respondent Hodgkins made a similar answer to the amended complaint.

Further testimony was taken in support of the allegations of the complaint, as amended, during the Year 1959. Counsel in support of the complaint rested his case-in-chief on December 3, 1959, and respondents were given until February 1, 1960, to file motions to strike and Commission's counsel was given until March 1, 1960, to answer said motions.

On March 1, 1960, counsel for the respondents filed their motion to dismiss and alternative motion to strike certain portions of the record. On March 31, 1960, counsel in support of the complaint filed his reply to respondents' motion to dismiss and to strike. On May 17, 1960, the hearing examiner entered his order denying in part respondents' motion to dismiss and alternative motion to strike. This order denied said motion with respect to the allegations of the complaint "(1) relating to Ice Cream Sticks as to the primary level of competition and the secondary level of competition; (2) relating to Clothespins as to the primary level only; (3) relating to Spoons as to the primary level only; and (4) relating to Skewers as to the primary level only." It was further ordered that ruling on that portion of said motion relating to cocktail forks, toothpicks, and tongue blades be reserved until the conclusion of the case and that no evidence would be received in opposition to the allegations of the complaint as to said items.

Thereafter, testimony was taken in opposition to the allegations of the complaint beginning in July 1960, and continuing in October 1960. On November 1, 1960, an adjournment was taken *sine die* with 10 days' notice, principally to give an opportunity for counsel for the respondents to make an investigation to determine whether or not it would be necessary to present further testimony. The examiner retired on December 2, 1960, and returned to the Commission on May 1, 1961 to complete this and two other cases. Further testimony was then taken in opposition to the allegations of the complaint during May, June, and August 1961. On August 23, 1961, counsel for respondents rested their case-in-chief. Surrebuttal testimony was taken in Washington, D.C., on September 29, 1961, at which time adjournment was taken to reconvene on notice from the examiner, based upon information he was to receive from counsel in support of the complaint by October 13, 1961, as to whether he desired to take further testimony. If no further testimony was taken, counsel were given until November 20, 1961, to file their proposed findings. On October 12, 1961, counsel for the Commission and counsel for respondents entered into a stipulation of certain facts, which was received in evidence by the examiner on October 20, 1961. On November 13, 1961, upon motion of counsel for respondents agreed to by counsel for the Commission, an order was entered by the hearing examiner for good cause shown extending the time for filing proposed findings to December 22, 1961.

Oral argument was had upon the proposed findings on January 23, 1962, at which time counsel in support of the complaint opposed counsel for respondents' motion to dismiss the allegations of the complaint relating to cocktail forks, toothpicks, and tongue blades, which motion had been renewed by counsel for respondents at the time of the filing of proposed findings. Pursuant to the ruling of the hearing examiner on May 17, 1960, no testimony was presented by counsel for the respondents in opposition to these allegations of the complaint as amended.

Consideration has been given to the proposed findings and all the reliable probative and substantial evidence in the record upon all material issues of fact, law or discretion. Each of those proposed findings which has been accepted has been in substance incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected.

The hearing examiner, being of the opinion that the allegations of the complaint as amended with respect to some of the items of woodenware products manufactured and sold by respondents have been proven by substantial and reliable evidence, and that the Commission should take remedial action with respect thereto, appropriate findings as to the facts and conclusions are hereinafter set forth.

FINDINGS AS TO THE FACTS

I. Description of Respondents

1. Respondent, Forster Mfg. Co., Inc., sometimes hereinafter referred to as "Forster", is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business located at 79 Main Street, Farmington, Maine. Respondent corporation is now, and has been for many years, engaged in the business of manufacturing and selling a line of woodenware products, including meat skewers, clothespins, ice cream sticks, tongue depressors, toothpicks, and ice cream wooden spoons. The total sales of said woodenware products by respondent during the year 1957 exceeded $6,000,000.

2. Respondent corporation sells its said woodenware products directly to chainstores, large packing plants and dairy companies and to independent wholesalers who resell such products to all types of retail stores, small packing plants, small ice cream plants, and other users. Said respondent corporation ships said woodenware products from the State of manufacture to purchasers thereof located in other States of the United States, and in so doing is in competition with other manufacturers and wholesalers of similar products and with resellers of its own products.

3. Individual respondent Theodore R. Hodgkins is the majority stockholder of respondent corporation and is its President and a Director, and is primarily responsible for the acts and practices found to be unlawful in this proceeding.

II. As to Round Clothespins

1. *The Price Discrimination*

In the course and conduct of its said business, respondent corporation in July and August 1957 sold its World Fair brand of round clothespins in the city of Pittsburgh, Pennsylvania, and surrounding metropolitan area at discriminatory prices to 17 of its customers in that area by furnishing one case of clothespins free with each 10 cases purchased by such customers.

Forster had been selling round clothespins in the Pittsburgh, Pennsylvania, area for a number of years, and had approximately 70% of the total sales of that product in that area. Its principal domestic competitor there at that time was the Diamond Gardner Corporation with factories in Maine. Another smaller manufacturer of round clothespins, Penley Bros. of Paris, Maine, attempted to sell its product for the first time to the trade in the Pittsburgh area in May and June of 1957 through a broker at prices which were identical with prices charged by respondent. It was successful in making one sale of 10 cases in May to the Irwin Wholesale Grocery Company in Irwin, Pennsylvania, and furnished said customer with one case of clothespins as salesmen's samples. Also on June 4, 1957, Penley sold 30 cases of round clothespins to Fayette Feed Company of Charleroi, Pennsylvania, a wholesaler, furnishing 3 cases of samples, and on June 24, 1957, Penley sold 20 cases to Louis Caplan Grocery Company of Embridge, Pennsylvania, 2 cases being given free to this retail dealer, but not as samples, as this was a retail dealer. One other sale of round clothespins was made by Penley to a customer in the Pittsburgh area in July, one in August, and another in September 1957, but in making such sales Penley did not furnish any free cases of clothespins. In fact, Penley turned down an offer from Louis Caplan with a 10% "off-list" on July 29, 1957 (CX 331). On August 1, 1957, the Penley broker notified Penley that the main competition in the territory was offering one case free with 10 (CX 332).

Forster sold clothespins in the Pittsburgh area through the National Brokerage Company, which reported to sales officials of Forster, in a letter dated June 28, 1957, that Penley was offering one case free with 10, following which Forster's sales official in charge of clothespins made a trip to Pittsburgh on or about July 10, 1957, and conferred with the broker and visited a number of customers. Some of these customers informed him that Forster's prices were out of line, and that competitors were offering one case free with 10, but only one customer mentioned Penley as the competitor. The record does not indicate that this customer was ever called upon by the Penley broker. As a result of the information obtained, Forster's official in charge of clothespins authorized the Pittsburgh broker to furnish one case free in sales of round clothespins to all customers in the Pittsburgh area. This arrangement was confirmed by letter to the broker dated July 12, 1957. Thereafter, respondent went after business aggressively and made sales to 17 of its customers, allowing one case of round clothespins free with every 10 cases sold. A total of 198 cases of round clothespins were given away in that manner.

2. *The Effect of the Price Discrimination*

The effect of the aforesaid discriminatory low price by Forster to the 17 customers in the Pittsburgh area may be substantially to lessen competition and to create a monopoly in the sale of round clothespins in the Pittsburgh metropolitan area in that one competitor, Penley, was unable to make substantial sales during July and August and the remainder of the year 1957. Also, the volume of sales of round clothespins of another competitor, Diamond Gardner Corporation, substantially declined in 1957 partly because some of its customers had purchased from Forster their season's supply during July and August at the discriminatory prices. Forster was thereby able to maintain its dominant position in the Pittsburgh area.

3. *The Price Discrimination Not Made in Good Faith to Meet Low Price of Competition*

The furnishing of one case of clothespins free with every 10 sold by Forster, as hereinbefore described, was not made in good faith to meet "an equally low price" of a competitor. It is admitted by the representative of the National Brokerage Company, who testified in this case, as well as Forster's official in charge of clothespin sales, that the offer of one case free with 10 sold, was made regardless of whether the particular customer had or had not received any specific offer from Penley or anyone else. Forster's sales official and the Pittsburgh broker "concluded" that the Penley offer was available to all respondent's customers in the Pittsburgh market area, but they could not identify anyone who had told them so, although they had been "led to believe" so by one customer. This is not sufficient evidence of a competitive low price quotation to justify the respondent corporation to take the discriminatory action it did in this instance by furnishing one case free with every 10 sold throughout the Pittsburgh market area.

III. As to Wooden Ice Cream Spoons

1. *The Price Discrimination*

Respondent corporation, in the course and conduct of its business, sold wrapped 3″ wooden ice cream spoons, No. 112, in strips of 12, to a large consumer of such product, namely, the Sealtest Southern Dairies Division of National Dairy Products Corporation (sometimes hereinafter referred to as "Sealtest"), at lower prices than it sold wrapped wooden ice cream spoons of like grade and quality to the Melvern Fussell Ice Cream Company in the Washington, D.C., metropolitan area and the Richmond and Norfolk, Virginia, metropolitan areas during the 1958 season, beginning on or about January 1, 1958. During that time, Forster sold its said wooden ice cream spoons to Sealtest in the Washington, D.C., Richmond and Norfolk, Virginia, areas at 7½% discount off the list price. Said discount was in addition to the usual quantity discounts granted to all customers. During the same time, it sold the same product at full list price to the Melvern Fussell Ice Cream Company, a competitor of Sealtest in the same areas.

Forster also sold similar wooden spoons to Pet Dairy Products Company for use in the southeastern part of the United States, including the metropolitan areas of Chattanooga and Greenville, Tennessee; Charlotte, North Carolina; and Birmingham and Union Spring, Alabama, at prices lower than it sold said product to local ice cream manufacturing companies located in those areas during the 1958 season beginning on or about January 1, 1958. During said period of time, Forster sold its said product to Pet delivered in said areas at 5% plus 5% discount off the list price. Said discounts were in addition to the usual quantity discounts to all customers. During the same period of time, it sold to competing ice cream plants in said areas at full list price.

2. *The Effect of the Price Discrimination*

The effect of said discriminatory prices may be substantially to lessen competition or to tend to create a monopoly in the sale of flat 3″ wooden ice cream spoons by the respondent corporation in the southeastern part of the United States. The purchasing agent of the Pet Dairy Products Company switched his 1958 purchases of said products from a competitor, Oval Wood Dish Corporation (sometimes referred to herein as "OWD"), to Forster because of the lower price Forster made in negotiations which took place in December 1957. The business thus lost by OWD was approximately 6% of that company's total annual sales of wooden ice cream spoons.

The Oval Wood Dish Corporation has its factories in Tupper Lake and Potsdam, New York. It had been selling wooden ice cream spoons to the Pet Dairy Products Company (sometimes hereinafter referred to as "Pet") since World War II, 1941, and to the National Dairy Products Corporation since about 1933. As was customary, in the fall of 1957, OWD entered into a contract with the Pet Dairy Products Company which has its main office in Johnson City, Tennessee, for Pet's 1958 requirements of wooden ice cream spoons. On November 14, 1957, OWD received three purchase orders from Pet with shipping dates in 1958, part of the shipments to go to Greenville, Tennessee, another to Charlotte, North Carolina, and a third one to Richmond, Virginia. The shipments to Charlotte, North Carolina, and Greenville, Tennessee, were at the price of $1.20 per thousand less 4%—5%—2% which gave a net price of $1.07 per thousand. The shipment to Richmond, Virginia, was billed at $1.17 per thousand less 4%—5%—2%, or a net price of $1.05 per thousand (CX 262, 263, and 264). On November 19, 1957, OWD, in a letter to Pet, acknowledged the receipt of the orders (CX 265). On December 5, 1957, Forster, in a letter to Pet Dairy Products Company, made a special price on the Pet requirements of wooden ice cream spoons in Zones 2 and 3, which included most of the southeastern part of the United States, the basic price in Zone 3 covering shipments to Charlotte, North Carolina, and Greenville, Tennessee, at $1.20 per thousand less 4%—5%—5%, or a net price of $1.04 per thousand, and in Zone 2 covering shipments to Richmond and Norfolk, Virginia, at a list price of $1.17 per thousand less 4%—5%—5%, or a net cost of $1.02 per thousand. These prices did not include a 2% discount for cash. On December 11, 1957, Pet sent a telegram to OWD cancelling the three orders hereinbefore mentioned to Greenville, Tennessee; Charlotte, North Carolina; and Richmond, Virginia (CX 266). On December 20, 1957, OWD acknowledged said telegram and the cancellation of the orders with the following comment:

> Naturally, we feel quite disturbed over the cancellation of these orders after they have been received, booked and partly produced and I know that you can sympathize with our thinking. After continually serving a good customer, like yourselves, for over ten years, we most certainly hate to lose the business to cut price competition. (CX 267)

The following table illustrates the results of the price reduction on wooden spoons by Forster in December 1957:

PET DAIRY PRODUCTS COMPANY

Purchases of Three Inch Wooden Spoons from Forster Manufacturing Co. and Oval Wood Dish Corp. for the Years 1957 and 1958 in Charlotte, N.C., Richmond, Va., and Greenville, Tenn.

1957

	Quantity (in M)		Net amount		Average net cost per M	
	Forster	Oval wood	Forster	Oval wood	Forster	Oval wood
Charlotte, N.C.	--------	5, 022	--------	$5, 563	--------	1. 108
Richmond, Va.	--------	3, 013	--------	3, 383	--------	1. 123
Greenville, Tenn.	--------	5, 519	--------	6, 133	--------	1. 111
	--------	13, 554	--------	$15, 079	--------	1. 113

1958

	Quantity (in M)		Net amount		Average net cost per M	
	Forster	Oval wood	Forster	Oval wood	Forster	Oval wood
Charlotte, N.C.	4, 027	--------	$4, 101	--------	1. 019	--------
Richmond, Va.	5, 034	--------	4, 999	--------	. 993	--------
Greenville, Tenn.	4, 027	1, 501	4, 103	$1, 694	1. 019	1. 129
	13, 088	1, 501	$13, 203	$1, 694	1. 009	1. 129

Source CX 284–285.

Primary line injury was also sustained by Mulco Products, Inc. (sometimes hereinafter referred to as "Mulco"), which had theretofore sold wooden ice cream spoons to Sealtest. Mulco was forced to meet the discriminatory low price of Forster, having been told by the purchasing agent of Sealtest to "get his house in order", and that his price was out of line. Mulco reduced its price, although not to the low price at which Forster was selling to Sealtest, and was able thereby to maintain a portion of the business at the lower price in 1957. During the 1958 season, Mulco continued to sell at $1.14 per M, whereas the respondent sold said product at $1.08 per M. During the year 1958, Mulco sales in the Washington, D.C., and Norfolk and Richmond, Virginia, areas were substantially reduced from the preceding year, whereas the Forster sales far exceeded the Mulco sales in those two areas where Forster sold at discriminatory prices. The following table sets forth the decline in the volume of sales sustained by Mulco in the 1958 season compared with the 1957 season in the cities directly involved, as hereinbefore described (CX 276):

	1957	*1958*
Norfolk	1,820,160	875,520
Richmond	967,680	449,280
Washington	3,303,840	511,920
Birmingham	1,774,080	714,240

3. *The Price Discrimination Not Made in Good Faith to Meet Low Price of Competition*

The said price discriminations hereinbefore found in the sale of wooden ice cream spoons by Forster were not made in good faith to meet an equally low price of a competitor. The record contains no evidence to support such a defense. In fact, it contains a stipulation that certain testimony offered by counsel for the respondents with respect to the competitive conditions in the industry at the time the sales were made by Forster at the discriminatory low prices in 1958 hereinbefore described were not offered as a meeting-competition justification under Section 2(b) of the Clayton Act, and shall not be considered for that purpose. It was stipulated further that (Tr. 3277):

The basic purpose of the offer—aside from what I just stated—is on the issue of injury to competition * * * Basically, the argument is that we are entitled to show the competitive situation which existed at or about the time the lower offers were made to Pet and Sealtest, and the reasons why these offers had to be made.

The record contains considerable evidence admitted over objections of counsel for the Commission set forth in respondents' proposed findings tending to show a price war was on during 1957 and 1958 involving other manufacturers of wooden ice cream spoons and other ice cream companies as to which no finding is made as it is not considered to be relevant to the issues in this case.

IV. As to Skewers

1. *The Price Discrimination*

Respondent corporation was by far the largest distributor of wooden meat skewers for use by meat packers and retail dealers in meat throughout the United States at the time the complaint was issued. Meat skewers are usually made in four sizes, the most popular being 11/64"x4½" (described as No. 1001 in the Forster price list). Other sizes are ⅜"x8" (described as No. 1031); ¼"x5½" (described as No. 1016); and ⅜"x10" (described as No. 1033). For a number of years, Forster had its skewers manufactured by Farmington Dowel Products Company (sometimes hereinafter referred to as "Farmington") following the destruction of its own skewer factory by fire in 1947. Forster sold these skewers directly to large meat packers and through brokers to small packers and paper jobbers. Farmington at that time was a proprietorship established many years before, owned by a man named Clyde Barrows, who sold out to Mr. Herbert D. Norton who worked for Mr. Barrows and who organized the business into a corporation in September 1952, and continued to supply skewers to Forster. Mr. Herbert D. Norton, because of illness, was succeeded in the operation of the business by his son, Mr. Richard T. Norton, who took over in 1954. The arrangement between Farmington and Forster was continued without any formal agreement after Mr. Norton took over the business of Farmington. At the time of the takeover, it is estimated that 70% of the Farmington sales was to Forster. This percentage varied and was continuously reduced thereafter. One important direct sale customer of Farmington for skewers at that time was a large meat packer, Swift & Company.

Relations between Forster and Farmington became strained following a letter from Forster to Farmington in May 1954, reducing the price to Farmington on skewers ostensibly to meet competition. During the period of time from 1954 until February 1958 when Farmington finally went out of business in order to make up for loss of sales to Forster, it sought to sell skewers to the trade through brokers and other woodenware manufacturers who sold principally to small packers, paper companies, and other distributors and users. Beginning in February 1955 when Farmington's inventory of lumber was at its peak, the cancellation of orders for 3,000 cases of skewers and the loss of an order for another item, known as "Apple Sticks", usually placed each year by Forster in the summer, resulted in a loss of 20% of the volume of business by Farmington and it was compelled to seek to sell more of its products through brokers. These brokers were located generally in Boston, New York, Chicago, and one in Los Angeles, California. They were instructed to and generally sold the Farmington skewers at list prices furnished them by Farmington except where they had to meet the competition of Forster. In the summer of 1955 and the spring of 1956, respondent Hodgkins complained to Mr. Richard Norton of Farmington that these brokers had been selling the Farmington skewers at discounts from the list, and he demanded that Farmington discontinue selling skewers through the brokers and threatened that, if it did not, he (Hodgkins) would cut the price 20% to the trade, which he did on June 8, 1956, after making further complaints to Mr. Norton about the low prices quoted by the brokers selling Farmington skewers. Farmington continued to sell at list prices through its brokers until September 1956, when it cut its prices, and in retaliation Forster issued a price list on January 2, 1957, to all of its accounts, cutting the price drastically and substantially below the Farmington prices. This price cut remained in effect until February 14, 1957, when Forster discontinued the low price and increased the prices on all of its sizes, which increase remained in effect generally throughout the remainder of the year, except for certain instances which will be hereinafter discussed.

Mr. Hodgkins complained particularly of the activities of Lion Beef of New York City, also known as Lion Packaging Products Co., Inc., and S. G. Nullet, Inc. Lion sold principally to meat packers and Nullet sold principally to paper jobbers. There was received in evidence a tabulation of sales of this firm "off-list" for the period 1955 to 1956 (RX 151 A–B), subject to being connected up by testimony that some representative of Forster had tried to sell these various concerns and was compelled to cut their prices because of the Nullet prices (Tr. 2568). This was never done so no consideration should be given this exhibit. Furthermore, respondents' proposed finding 190 based on this exhibit is rejected. Another exhibit (RX 159 A–U), being invoices showing sales "off-list" by Lion to MCA, from March 28 to May 24, 1956, has little probative value on the issue of price discrimination in 1956 because all the transactions were previous to June 8, 1956, when Forster made the 20% cut in skewer prices across the board—no discrimination was involved.

Mrs. Alma Nullet, who testified for the Nullet Company, insisted Nullet always followed the Forster price list and was authorized by Farmington to only meet the Forster prices. Nullet's sales of skewers declined from approximately $15,419 in 1957 to $2,162 in 1958 (Tr. 2574). Mrs. Nullet attributed the decline in sales of skewers from 1957 to 1958 to the lack of a supplier (Tr. 2602–2603), Farmington Dowel having gone out of business.

During the years 1956 and 1957, Forster sold skewers of like grade and quality to Armour & Company at prices lower than to competing smaller packers, as follows:

(1) 1956—4 sales below list totalling 28 cases (CX 40).
(2) 1957—41 sales below list totalling 698 cases (CX 40, CX 114, CX 191, RX 150).
(3) 1958—21 sales below list totalling 289 cases (CX 40, CX 114, CX 191).

For illustration, reference is made to the prices at which skewer No. 1001 was sold by Forster to Armour & Company, and to other packers in the Chicago area. To Armour, in May 1956, the price per case was $9.30; in July 1956, $7.80 and $7.70; from January to August 1957, $6.90. Forster sales of the same skewers to Kroger Company from February 1957, to February 1958, per case, was $8.50; to Pfaelzer Bros. Co. from February 1957, to January 1958, per case, was $8.50; and to Fred Oppenheimer Co. in October 1957, per case, was $8.50.

The Forster price quotations given in the foregoing paragraph are typical of the price discriminations, inasmuch as the $6.90 price per case to Armour in January 1957 was a delivered price at any point east of Denver in the United States.

Respondent corporation sold all sizes of its skewers to the Manufacturers Cooperative Association (sometimes hereinafter referred to as "MCA"), which is a cooperative buying agency for a number of small meat packers, with its principal office in Chicago, Illinois. Respondent corporation, during the years 1956, 1957 and 1958, sold said skewers to the MCA at 5% less than it charged other packers located in the same areas as members of the MCA.

The following tabular statement sets forth the volume of Forster sales of skewers to the MCA:

(1) 1956—2 sales each for 1 case at 5% off list (CX 38).
(2) 1957—141 sales 5% below list totalling 1,493 cases (CX 38, CX 77, CX 194, CX 300).
(3) 1958—24 sales below list totalling 203 cases of which 8 sales totalling 161 cases were made at list less 5% (CX 38, CX 194).

Respondent corporation sold a full line of its skewers to Phil Hantover, Inc., of Kansas City, Missouri, at 5% less off-list, similar to the discount made to MCA and for the same purpose. Phil Hantover, Inc., does a distributing business to the meat packing trade through the Middle West, Southwest and Northwest, covering approximately 22 States in its operation, and it is in competition in the sale of skewers with respondent corporation, MCA, and several jobbers buying from other manufacturers. The following tabular statement sets forth the volume of Forster sales at discriminatory prices to Phil Hantover, Inc.:

(1) 1956—22 sales at 5% off list totalling 139 cases (CX 39).
(2) 1957—18 sales at 5% off list totalling 381 cases (CX 39, CX 192).
(3) 1958—5 sales at 5% off list totalling 187 cases (CX 39, CX 192).

The sales of skewers to other small packers in the same areas in all instances were at higher prices. For example, Forster sales to the Superior Packing Company in Kansas City, Missouri-Kansas, of skewer No. 1001 were at $8.50 per case in August and December 1957, and also to the Burnett Meat Company in the same territory during the period from May 1957 to February 1958.

Respondent corporation in 1957 also made substantial sales of similar sizes of skewers to the following packers at list prices without discounts, other than usual quantity discounts, at the same time it was selling to Armour & Company, MCA and Phil Hantover, Inc., as here-

749-537—67——56

inbefore indicated: Wilson & Company in several cities, Pfaelzer Bros. Co., Hubbard Packing Company, Cee Bee Packing Company, H. Graver Company, Wimp Packing Co., Siegel-Weller Packing Co., all in Chicago, Illinois, American Packing Company, Royal Packing Company and Union Packing Company in St. Louis, Missouri, and Kansas City Dressed Beef Co., Central Packing Company and Burnett Meat Co. in Kansas City, Missouri-Kansas.

Respondent corporation in 1958 also sold skewer No. 1001 to Enterprise, Inc., of Dallas, Texas, at a price lower than it sold this size skewer to other customers in the Texas area. In this instance, the granting of the discount was for the avowed purpose of obtaining a customer from one of respondent corporation's competitors, the Morgan Lumber Company of Jackson, Tennessee. The following is an excerpt from a letter, dated May 22, 1958, from Forster's sales manager to a salesman (RX 3-G):

I was glad to hear that Enterprise, Dallas, now looks on us favorably. Attached is a copy of the current price list issued by the Morgan Lumber Company of Jackson, Tennessee. You will note that their prices on hickory skewers are much higher than our prices on white birch skewers. However, on their gumwood skewers, which are available at times and are weaker and inferior to our white birch skewers, the price of $.80/M f.o.b. Jackson may be slightly less on a delivered basis than our published price. If this is a factor and you are unable to satisfy the customer on paying the slight difference in price for a better skewer, we shall be glad to consider meeting the price of $.80/M f.o.b. Jackson, Tennessee.

Subsequently, an order was taken for the No. 1001 skewer on this basis from Enterprise, Inc.

2. *The Effect of the Price Discrimination*

The effect of the discriminations in price made by respondent corporation in the sale of skewers to Armour & Company, MCA, Phil Hantover, Inc., as hereinbefore described and set forth, may be substantially to lessen competition or to create a monopoly in the sale of skewers or to injure, destroy or prevent competition with the respondent corporation by other skewer manufacturers or distributors.

In 1957, there were seven manufacturers or sellers of skewers in the United States, of which only Forster and Farmington manufactured a full line of all sizes of skewers. Hardwood Products Company, a woodenware manufacturer located at Guilford, Maine, manufactured three small sizes of skewers. Its factory was destroyed by fire in 1958. Most of its sales were to paper jobbers through brokers. Skewers were a small part of the business of Hardwood Products, but they handled them to complete their line of woodenware products. Another manufacturer was the Morgan Lumber Company of Jackson, Tennessee, which made two small sizes of skewers and was one of the suppliers of Armour & Company in 1957 and 1958. Diamond Gardner Corporation made two small sizes of skewers, one of which corresponded to Forster's No. 1001. Another small manufacturer of skewers was Chester Ranger of Canton, Maine, who was a very minor factor in the industry until Farmington went out of business, when its sales increased quite substantially in 1958. For instance, Chester Ranger's sales of the most popular size, $^{11}\!/_{64}$'' x 4½'', No. 1001 in the Forster line, in 1957 were approximately 1,500,000 whereas in 1958 it had increased to 23,197,500 (CX 185). It went out of business during that year.

Farmington did not start to sell to Armour & Company direct until August 1956, and from September to December 1956, its sales increased until during the month of December 1956, its sales to Armour & Company exceeded those of Forster. However, because of the drastic price cut by Forster in January 1957, Farmington made no sales to Armour in that month. During the year 1957, the total sales by Farmington to Armour amounted to $4,113, and by Forster, $14,804. Forster had been and still was the principal source of supply of skewers to Armour. The following table indicates the relative percentage of the suppliers of Armour during the years 1957, 1958 and 1959:

Skewer Purchases by Armour & Co., 1957–59 [1]

	1957	1958	1959
Forster	$14, 804. 00	$17, 289. 00	$22, 245. 00
Farmington	4, 111. 16	195. 07	None
Morgan	5, 471. 00	5, 726. 00	4, 895. 00

[1] Wood Specialty Co. (Britton) and Collins Distributing Company are not considered because the transcript indicates that Britton and Collins were doing an insignificant amount of business in 1957 (Tr. 2003 and 2208; Tr. 1263-4; RX 160; RX 161).

Sources: Testimony of Armour's Purchasing Agent, Betz (Tr. 2008-9) and CX 318, except for Farmington's figures which are from RX 16.

Another small distributor of skewers in 1957 and 1958 was the Solon Manufacturing Company of Solon, Maine, which manufactured a limited number of woodenware items. This firm did not manufacture skewers, but during 1957 and 1958 bought from Farmington and Chester Ranger, and in 1959 was buying from Forster. The total sales of this firm in 1957, in three sizes, including the popular $^{11}\!/_{64}$'' x 4½'' size, were approximately 300 cases, or a value of approximately $4,000.

Mulco Products, a woodenware manufacturer with a plant located at Milford, Delaware, and Indian Head, Maryland, during 1957 purchased skewers from Farmington and resold them, along with their other woodenware products, to round out their line. Since the Spring of 1958, it has been buying skewers from the Wallace Corporation which is now affiliated with Forster. During 1957 and 1958, it sold skewers principally to paper jobbers, who resold them to confectioners and other dealers. This company apparently abided by the Farmington price list when it sold skewers purchased from Farmington.

There is some evidence in the record to the effect that at the time Forster sold skewers at $6.90 per case beginning in January and throughout 1957, such sales were below cost. The competitors of Forster could not meet such low prices and stay in business. One official of Diamond Gardner, a competitor of Forster, testified that its volume of sales of skewers declined in all sizes in 1957 and 1958 due to its inability to meet the cut prices of Forster and make a profit (Tr. 1054–56). This decline is illustrated in the following table (CX 188 D–F):

Diamond Gardner Skewer Sales

Units in thousands

Size	1956	1957	1958
4½" x 11/64"	12,610	10,290	7,580
5½" x 15/65"	4,808	4,712	3,256
All other	16,576	15,626	11,301
Total	33,994	30,628	22,137

Certainly, the low prices at which Forster sold its skewers during the 3-week period from January 2, 1957, to February 14, 1957, were below cost and such prices had an injurious effect upon the business of its competitors. However, such low prices were not discriminatory prices, in that Forster quoted those prices throughout the territory east of Denver. Counsel in support of the complaint contend that this price cut, as well as the price cut of June 8, 1956, which was also throughout the same territory, were evidence of a predatory intent on the part of Forster toward Farmington, and indicate a tendency to monopoly on the part of Forster. While it is recognized that these two price cuts were very effective in obtaining business for Forster and are evidence of predatory intent on its part, it is not necessary to rely upon such evidence. There is sufficient evidence found in the discriminatory prices quoted to large customers, such as Armour, MCA, and Hantover, during 1957 particularly to meet the requirements of Section 2(a) of the Clayton Act as to adverse effect upon competition. Even though it cannot be concluded that the discriminatory prices were the only cause of the demise of Farmington, the finding is made that such discriminatory prices were a contributing cause. The Farmington Dowel Company closed its doors in February 1958, after sustaining a loss for the 6-month period ending March 31, 1957, of $17,000 (CX 98–L); a total loss for the year ending October 1, 1957, of approximately $21,000 (CX 99–C) and a loss of $9,097.94 for the 4-month period ending January 31, 1958 (CX 102–C). The total deficit, as of January 31, 1958, in the Farmington surplus account amounted to approximately $29,000 (CX 102–C). Farmington's total assets at that time were approximately $52,000 and current liabilities of approximately $43,000 (CX 102–B).

The total skewer sales of Farmington in the fiscal year ending September 30, 1953, amounted to approximately $209,000; in 1954, $244,000 (CX 95–C); in 1955, $228,000 (CX 95–D); in 1956, $217,000 (CX 97–D) and in 1957, $150,000 (CX 98–D). In the calendar year 1954, the volume of sales by Farmington to Forster was approximately $138,000; in 1955, $99,000; in 1956, $33,000 (CX 110–A); no sales in succeeding years (CX 111–A).

Further evidence of a "tendency toward monopoly" by respondents in the skewer market is apparent from Forster's predominant position in that market in 1957. During that year, Forster's sales of some 159,438,000 skewers (CX 94 and CX 1) were more than the total sales of all the other five skewer manufacturers in the country in the aggregate and represented more than twice the sales of Farmington, its principal competitor (62,000,000) (CX 113, Tr. 1249–1250), which company and at least one other competitor, C. H. Ranger, Inc., have since gone out of business. Forster's second largest competitor, Diamond Gardner Corporation, with total sales of 30,628,000 skewers in 1957 (CX 188–E), represented less than one-fifth the number of skewers sold by Forster during that year, and the combined sales of the three other competitive manufacturers of skewers were even less (CX 185; CX 173; Tr. 2053).

Forster's competitive position improved substantially after Farmington went out of business in February 1958. First, it was able to take over the Swift and Solon accounts. Second, it was able to advance the price of all sizes of skewers in March 1958, a sample of such advance is set forth in the following table:

Comparison of Skewer Prices in Zone I (CX 8 A–D & CX 9 A–D)

Size	*September 1957*	*March 1958*
1001	$ 8.20	$ 8.90
1016	14.50	15.00
1031	8.90	9.10
1033	8.20	8.31

Third, total Forster sales of skewers of all sizes increased substantially (CX 94):

From 1957—Total of 159,438,000
To 1958—Total of 171,481,000

3. *The Price Discrimination Not Made to Meet a Low Price of a Competitor*

(a) *As to Sales to Armour & Co.* It is contended by counsel for respondents that the below-list sales of size No. 1001 skewer by Forster to Armour & Company in 1956 and 1957 were made in good faith to meet lower prices offered by one of Forster's competitors. For instance, it is claimed that the Forster price of $9.30 to Armour in May 1956, was granted to meet a lower offer by a small competitor, Wood Specialty Company of a price of $8.40, on April 2, 1956, and sales at that price on May 15, May 18 and May 22, 1956. There is no evidence, however, that this offer of Wood Specialty Company, which is in evidence as Respondent's Exhibit No. 26, was known to Forster. Nor is there any evidence to indicate that the sales made at the $8.40 price in May 1956, were known to Forster at the time that the lower price was quoted to Armour.

With respect to the remainder of the year 1956, Mr. Richards, Sales Manager for Forster in an interoffice memorandum to one of the Forster salesmen on October 24, 1956, referring to a conversation the salesman had with Mr. Betz, Purchasing Agent for Armour & Co., with respect to prices of skewers stated:

> * * * I haven't heard of any better prices than ours on skewers generally. I believe that Farmington Dowel Products is quoting an East and West Zone price which was the old East and West Zone price which we had less a 20% discount. As compared with our current prices based on each warehouse area, this gives them a higher price in most markets with a slight price advantage in a few of the markets in the extreme west end of the East Zone. Perhaps that was what Mr. Betz was referring to that our prices were out of line at some points. We will definitely maintain competitive prices but have to have something a little more tangible to work on before we could give them anything definite on it. * * * (CX 79)

In a rough draft of a memorandum prepared by the witness Richards in December 1956, he recorded prices on three sizes of skewers in principal cities where deliveries were made on sales to Armour & Co., comparing price quotations of Farmington and Forster in three zones, the East Zone, Central Zone, and West Zone and another zone marked "Revised 2".

There is set forth below a reproduction of a portion of this memorandum relating to Item No. 1001, which was the principal size sold to Armour & Co. (CX 81–C).

	#1001	F.D.P.	Less 20%	Forster		
				Now	Revised 2	Or
3	Oklahoma City	1.04	0.83	0.82	0.82	East Zone 0.80
2	Omaha	1.00	.80	.82	.80	Central 0.83
2	Cedar Rapids, Iowa	1.00	.80	.82	.80	
4	Los Angeles	1.10	.88	.90	.88	West 0.88
2	Albert Lea, Minn	1.00	.80	.82	.80	
2	Memphis, Tenn	1.00	.80	.78	.78	
2	Kansas City, Mo	1.00	.80	.82	.80	

It will be noted from the foregoing tabulation that Farmington's prices were higher than Forster's prices in some places; lower in others, and the same in others. By way of explanation of the preparation of this exhibit, Mr. Richards testified that Armour & Co., had indicated lower prices had been quoted by competitors and that as a result, Armour & Co., would buy less from Forster. Based upon the foregoing evidence the finding is made that Forster was not justified from a competitive standpoint in putting into effect its drastic cut of January 2, 1957, to $0.69 in the eastern zones.

With respect to the discriminatory prices admittedly made by Forster to Armour, beginning April 10, 1957, and continuing until March 28, 1958, of $6.90 east of Denver and $7.50 west of Denver, it is contended by counsel for the respondents that these prices were identical with the Forster prices in effect during the period January 2, 1957, to February 14, 1957, and that they resulted from a letter from Forster to Armour dated March 21, 1957, after a series of discussions between Armour's buyer, a Mr. Betz, and the sales representative of Forster. An important exhibit offered by counsel for respondents to support this contention is an original longhand memorandum (RX 15) made by witness Betz some time prior to March 11, 1957, when he wrote his letter to Forster (RX 14), in which he stated that the volume of business formerly extended to Forster

will be sharply reduced because of the introduction of these new prices. As we have mentioned in conversation and correspondence, competition is becoming very keen, and in view of interesting offers made by your competition, we feel that the volume of orders from Armour and Company will be considerably reduced.

According to the original memorandum, which Mr. Betz testified he made and which was the basis for the letter just quoted from, the price quotations originally received and recorded by him on the skewer size corresponding to No. 1001 in the New England States were as follows:

Forster	$0.82
Mulco	.82
F. D. (Farmington Dowel)	.77
W. S. (Wood Specialty)	.70

A pencil line has been drawn through the Forster bid of $0.82, and a pencil figure $0.69 put in place of it, and a pen line is drawn through the figure $0.70 for the W. S. price, and $0.68 written in pen in place of it. It is contended by counsel for the respondents that the Forster bid of $0.69 per thousand or $6.90 per case on this size of skewers to Armour & Company was to meet a lower price of $0.68 per thousand or $6.80 per case. This contention is not accepted. It is quite apparent from an examination of this exhibit that Forster's $0.69 price did not meet the lowest competitive price of $0.70, but was one cent less. The witness who prepared this exhibit, Mr. Betz, testified that it was prepared by him some time in 1957, prior to the letter written to Forster, dated March 11, 1957 (RX 14), and that the pencil notations indicated new prices that were extended (Tr. 2033), one by Forster and one by Wood Specialty (Tr. 2038). He testified further that he purchased a small quantity from Wood Specialty (Tr. 2038). The record shows that on March 4, 1957, Armour purchased No. 1001 size skewers from Wood Specialty at $0.70 per thousand on an order dated February 20, 1957 (RX 160). The first and only purchase order at $0.68 was dated May 24, 1957 (RX 161). This witness also indicated in his testimony that it was the low price quoted by Wood Specialty, as well as by Farmington, that prompted him to write the letter of March 11, 1957, to Forster (Tr. 2044–5). Mr. Betz also insisted in his testimony that he did not inform Forster of the low prices of the competitors that he had in his possession (Tr. 2046). The record contains a letter dated March 21, 1957, from Forster to Armour & Company in reply to RX 14, attention of Mr. Betz (CX 316), setting forth new prices effective the date of the letter. This is the letter that gives the quotation of $0.69 per thousand on item No. 1001. Similar lower quotations were made on other sizes. Mr. Betz testified that he switched a substantial portion of his skewer business to Forster on the basis of that letter (Tr. 2048–9). The record shows that on that date, it was the lowest quotation Armour had received. In view of the foregoing, the finding is made that the lower off-list price granted to Armour & Company by Forster was not made in good faith to meet an equally low price of a competitor.

(b) *As to Sales to MCA.* The principal competitor of respondent corporation in selling skewers to the MCA was the Farmington Dowel

Products Company. It is contended by counsel for respondents that the discriminatory prices at which respondent corporation sold to MCA in 1956 were made in good faith to meet lower prices of Lion Packaging Products Co., a broker representing Farmington. The record contains some invoices of sales by Lion in March 1956, some of which are at the same price as Forster sold in May 1956, and some at a slightly lower price. However, there is no evidence in the record to indicate that Forster was aware of the quotations or the prices at which Lion Packaging Products Co. was selling to MCA. It appears from other exhibits in the record that the 5% discount allowed MCA had been allowed by Forster over a period of years, and the explanation given by respondent Hodgkins in his testimony was that this lower price was allowed to MCA because "they perform a much different service for us than a jobber" (Tr. 105). A representative of MCA testified that the practice of allowing a 5% discount in the purchase of skewers from the respondent corporation had existed for a number of years prior to 1956. In view of this testimony, the defense that the discounts allowed MCA were made in good faith to meet the equally low price of a competitor is rejected.

(c) *As to Sales to Phil Hantover.* There is no contention in the proposed findings that the discounts allowed to Phil Hantover, Inc., were made to meet an equally low price of a competitor. However, it is contended:

78. The 5% discount off list shown by the record to have been granted to MCA [Finding 66, par. a(1) and (3)] and Phil Hantover (Finding 66, par. d) was in effect a jobbing discount which was retained as profit by MCA and Phil Hantover, Inc. (Stone 1936, Hantover 1970).

In view of the foregoing, the finding is made that the lower price granted by Forster in the 5% discount from list to Phil Hantover, Inc., was not made in good faith to meet an equally low price of a competitor.

The most effective evidence in the record which defeats the claim of good faith to meet an equally low price of a competitor of Forster as a defense for their discriminations in price, is found in what may be described as the predatory intent of respondents to drive Farmington out of business, particularly during 1956 and 1957. As hereinbefore stated, in May 1954, Forster, in a letter to Farmington, announced a price cut in the purchase of skewers for the ostensible purpose of meeting competition, but no comparable price cut in the sale of these skewers by Forster took place. In the spring of 1956, respondent Hodgkins, in telephone calls to Mr. Richard Norton of Farmington, threatened to cut prices on all skewers if Mr. Norton did not drop the brokers that he was selling through at that time. This threat was followed by a substantial cut in price (from $9.50 to $7.50 per case on item No. 1001; CX 1, CX 3), on June 8, 1956. According to Mr. Norton, respondent Hodgkins definitely threatened to put him out of business if he did not drop the brokers (Tr. 486). Although this threat is denied by respondent Hodgkins, the examiner is inclined to believe the testimony of Mr. Norton, because of respondent Hodgkins' evasiveness and lack of frankness in discussing the Joe Lowe transaction with respect to furnishing a free carload of ice cream sticks as hereinafter discussed. Further threats of other officials of respondent corporation were made in December 1956, prior to the drastic cut in the price of skewers on January 2, 1957, at which time the price of the No. 1001 skewer was cut from $7.50 to $6.90 per case. The evidence is quite clear that Farmington did not meet the Forster price cut of June 8, 1956, until September 1956, and that Farmington did not drop its price at any time in 1957 to the low Forster price of $6.90 on that particular item.

Additional evidence of predatory intent is also found in the two attempts of respondent Hodgkins to purchase the business of Farmington from Mr. Norton, the last in January 1958, shortly before Farmington closed its doors; and also in the attempt of respondent Hodgkins to get control of mortgages which were held on the Farmington property by an attorney in Farmington, a Mr. Holman. Respondent Hodgkins contacted him in an attempt to purchase the mortgages in December 1956, and again a few months later, to see whether or not Mr. Holman would find out from Mr. Norton if he would sell out (Tr. 819–824).

V. As to Chopped Ice Cream Sticks

1. *The Price Discrimination*

One of the products manufactured and sold by Forster is an item used by ice cream manufacturers as part of a package sold to the public, such as "Eskimo Pie", "Popsickle", etc. Forster manufactures an item known as a "Chopped Ice Cream Stick", which is of the proper size and dimension to be used in automatic machines by the ice cream manufacturers. It sells principally to distributors, who, in turn, sell to the ice cream companies. The record contains one instance where Forster sold its No. 307 banded ice cream sticks to a distributor, D.C.A. Food Industries, Inc., in New York City, at a price higher than it sold the same item to a competitor, Joe Lowe Corporation, New York City. It appears that for the season extending from October 1957 through September 1958, Forster sold 30 carloads of these ice cream sticks to Joe Lowe Corporation and delivered one carload free. This amounted to 3.22% discount, in addition to the other carload discounts granted to Joe Lowe Corporation and other competing purchasers. The dollar value of this additional discount was approximately $8,379 (CX 338–A).

Other manufacturers of chopped ice cream sticks also selling to Joe Lowe Corporation were the Hardwood Products Company, Diamond Gardner Corporation, and Solon Manufacturing Company. Representatives of these manufacturers testified in this proceeding, and each testified that other manufacturers had offered a lower price to Joe Lowe Corporation.

The respondent Hodgkins and his assistant both denied allowing the free carload of ice cream sticks as a discount in price, insisting that they were given to Joe Lowe Corporation to replace substandard sticks which Forster had previously sold to Joe Lowe Corporation. On the other hand, the purchasing agent of Joe Lowe Corporation testified that the free carload of ice cream sticks received from Forster had nothing to do with substandard or defective goods previously shipped, but was strictly a price adjustment. In addition to the chopped sticks which Joe Lowe Corporation purchased from Forster, Hardwood, Diamond Gardner, and Solon, Joe Lowe Corporation purchased a molded stick from Diamond Gardner which is more expensive than the chopped stick. The chopped ice cream sticks purchased from Hardwood, Diamond Gardner, Solon, and Forster were all of the same grade and quality, made of white birch, but the Solon stick was purchased for $0.06 per thousand less than the Forster and Hardwood price. He testified with respect to the sticks in the Fall of 1957, as follows (Tr. 1351–52):

In negotiating with all of the stick companies, including Forster, we agreed on an eighty-one-cent-per-thousand price. All of the manufacturers named agreed on an eighty-one-cent price.

* * * * * * *

Of course, when we wrote up the purchase order they asked if we would have any objection if they wrote up the order at the list price at that time, ninety-eight cents, less ten and five, which figures to 83.8 cents. We didn't care how they invoiced us, just as long as we paid the eighty-one cents. They agreed to furnish us with the difference between 81 and 83.8 cents in free goods at the end of the season, or, in some cases, at the beginning of the season.

This witness testified, and invoices support his testimony, that Hardwood sold chopped ice cream sticks of the size being used by Joe Lowe Corporation at $0.81 per thousand; that they were billed at $0.98 less 10% and 5% discount and free goods equivalent to 2.8 cents to compensate for the difference between $0.81 and $0.838, and that the Diamond Gardner Corporation, another supplier, had the same arrangement and they furnished the free chopped sticks in October 1958, rather than in the spring, the free sticks amounting to 551 cases.

2. *The Effect of the Price Discrimination*

The total volume of Forster banded chopped ice cream sticks sold to Joe Lowe Corporation increased from 240,000,000 in 1957 to 310,000,000 in 1958; the number of such sticks sold by Solon increased from 460,000,000 to 494,000,000; the Hardwood volume increased from 340,000,000 to 476,000,000; the Diamond Gardner, from 63,000,000 to 150,000,000; and the molded stick volume sold by Diamond Gardner declined from 1,500,000,000 to 1,400,000,000 (CX 212). 1957 was the first year that Hardwood sold ice cream sticks to Joe Lowe. In view of the foregoing statistics, it is found that there is no tendency to monopoly in Forster as a result of the discriminatory price to Joe Lowe. It is also found that there is no tendency substantially to restrain trade in the sale of chopped ice cream sticks between Forster and its competitors in this industry.

When Joe Lowe Corporation resold the sticks which it purchased, as hereinbefore described, they were sold in a unit consisting of a thousand bags with a thousand sticks. Units containing the Forster and Hardwood sticks were sold for a higher price than the units containing the Solon sticks, and the units containing the molded sticks were sold at a still higher price.

The D.C.A. Food Industries competes with Joe Lowe Corporation and a number of other corporations in the sale of its units of supplies to ice cream manufacturers to produce stick confections and which contain as component parts the ice cream sticks. It is estimated that the cost of the ice cream sticks was 12% of the cost of the whole unit that was sold to the ice cream manufacturers. The price paid by this firm to Forster for ice cream sticks did not include the extra 3% discount corresponding to the free carload of ice cream sticks that Joe Lowe Corporation received, and this extra discount of 3.2% would be sufficient to influence the purchasing agent of D.C.A. to shift from one source of supply to another (Tr. 990; 1026). D.C.A. bought 900 cases of ice cream sticks from Forster in 1958, delivery having been made in May, at a price of $0.8378 per thousand (CX 187–A). On the basis of the difference between 83.78 cents and 81 cents, or 2.7 cents per thousand, the premium paid by D.C.A. amounted to $243. Assuming further that D.C.A. paid the same price that Joe Lowe Corporation did for its ice cream sticks, the difference of 2.7 cents per thousand would amout to less than $\frac{8}{10}$ of 1% of the selling price of the units containing 2,000 sticks. Furthermore, a price reduction by D.C.A. of 2.7 cents on its one thousand stick unit would not have made any difference in price to the public and the ability of D.C.A. to compete with Joe Lowe Corporation, according to an official of D.C.A. (Tr. 1014–1015). In view of the foregoing facts, it is found that the injury sustained by D.C.A. as a result of the free carload of sticks to Joe Lowe was *de minimis*.

3. *The Defense of Cost Justification*

An attempt was made by counsel for the respondents to cost justify the 3.22% difference in price to Joe Lowe Corporation and D.C.A. (RX 153). The price discrimination which the exhibit seeks to justify was in the form of the free carload of said ice cream sticks which were shipped by respondents to the said Joe Lowe Corporation in December 1957 (CX 217) and which amounted to an additional discount of approximately 3.2% over and above the other discounts granted Joe Lowe on its purchase of the 30,000 cases of ice cream sticks. This additional 3.2% discount amounted to $8,379, the charge which respondents made to Joe Lowe for each thousand cases delivered to Joe Lowe during that period of time (Tr. 2746–2747).

There is no evidence in the record to indicate that at the time respondents granted Joe Lowe the additional discount of 3.2% it was based on an alleged cost justification. In fact, respondents admit that the calculations included in the exhibits which were prepared in an attempt to cost justify the discriminatory price differential granted Joe Lowe were not made in advance of the execution of the contract with Joe Lowe (Tr. 2655). This fact alone raises a question as to the validity of these exhibits and whether their *ex post facto* preparation should be regarded as having been made in "good faith".

Although respondents attempt to justify the discriminatory price granted Joe Lowe on the basis of an advance commitment by Joe Lowe to purchase a year's supply of sticks and accept delivery throughout the entire year, including their "off-season" or winter months, respondents indicated that it had not been their policy to offer special inducements for "off-season" or advance purchases. (Tr. 2706–09)

Respondents' Exhibit 153 A–E is based largely upon hypothetical theories and arbitrary assumptions and in some instances do not employ sound accounting and statistical principles. Five items of cost are claimed on which respondents contend they made savings due to Lowe's "off-season" purchases, namely (RX 153 D–E):

Interest	$2,051.98
Handling	609.90
Storage charges	1,930.86
Rail car loading	42.51
Insurance	195.33
	$4,830.58

Even assuming that these alleged savings in cost to the respondents are taken at their face value, which for reasons stated below they cannot be, respondents admit in Proposed Findings 272–273 that such savings are substantially less than the differential in price charged Joe Lowe and the respondents' other customers, namely $8,379.

The principal defects in respondents' cost study are that many of the costs purported to have been saved by respondents were not incurred. For example, respondents admit that the rail car loading charge should be excluded since no sticks were shipped by rail (Tr. 3322), and at least some of the handling and storage charges should be excluded for the reason that the amounts shown in Respondents' Exhibit 153–E were based on charges at the Galt Block Warehouse, a public warehouse at Portland, Maine, while some of the sticks were shipped from other points (Tr. 3321). In fact, it is questionable if any handling or storage charges should be included since respondents' inventory reports indicate excess storage capacity in respondents' own warehouse or at its mill at Strong, Maine (Tr. 3326–7).

The largest item of claimed savings in respondents' cost study is $2,051.98 for interest, (RX 153–D) which is based on the hypothetical theory that this amount of interest would have been payable on bank loans if respondents had manufactured the sticks, warehoused them, and delivered them to Lowe in the same ratio as sticks were delivered to respondents' other customers during the "off-season". Aside from this being an assumption based upon an assumption, it is highly questionable if this item of purported interest saving is allowable in a cost justification study of this nature, since the Commission has already ruled in the *Thompson Products Case*, 55 F.T.C. 1252 (1959) that a return on investment is not allowable. Even if such interest savings were held to be allowable, the amount thereof shown in Respondents' Exhibit 153–D is substantially overstated, for the reason that respondents have based their computation on the selling price per case ranging from $7.83 to $7.96, rather than the respondents' admitted cost price per case of $5.50 (Tr. 2743–4) which is the maximum that could be claimed.

This same principle would apply with respect to respondents' claimed saving on insurance, respondents having based their computation for this item on the "market value" (Tr. 2694) of $7.80 per case rather than the cost price per case of $5.50.

It is evident from the above that even if the purported items of savings included in RX 153 A–E were allowed, they are substantially overstated and would fail by a substantial amount to justify the discriminatory price allowed their favored customer, Joe Lowe.

Respondents' cost justification defense as evidenced by its exhibits 153 A–E is therefore rejected.

VI. As to Toothpicks, Tongue Depressors or Blades, Cocktail Forks, and Cocktail Spears

It will be recalled that counsel for the respondents, on March 1, 1960, filed a motion to dismiss and an alternative motion to strike the complaint, and that, on May 17, 1960, the hearing examiner reserved until the conclusion of the case ruling on that portion of said motion relating to cocktail forks, toothpicks, and tongue blades. Neither counsel filed proposed findings with respect to such items, but counsel for respondents renewed its said motion at the time it filed its proposed findings and complaint counsel opposed this motion at the time of the oral argument. It, therefore, becomes necessary for the examiner to make a finding with respect to these products.

A. *Tongue Blades*

The record contains evidence of the following sales of tongue blades:

(1) Order from Bellevue Surgical Supply Co. of Reading, Pa., of item 805 at $7.75 and of item 800 at $6.75 on January 28, 1958 (CX 64).

(2) Order from A. G. Verdolyack of Kalamazoo, Michigan, for item 800 at $8.25 on February 10, 1958, less 12% (CX 65).

(3) Sale at list prices to "Detroit First Aid" and Frank W. Kerr Co. in Detroit, Michigan, on February 24, 1958, May 5, 1958, May 29, 1958, and June 17, 1958 (CX 92).

(4) Sales at 12% discount to A. S. Verdolyack in Atlanta, Cincinnati, Indianapolis, and Montgomery, Alabama (CX 92).

List prices at the time of the above sales were $9.10 for item 805 and $8.25 for item 800 (CX 11).

There is no evidence of effect on competition at the primary level and very little at the secondary level. It appears that only two customers paid a lower price than to other customers, and there is nothing to show that they were in competition with each other or with any of Forster's customers.

B. *Cocktail Forks and Spears*

The record shows only three sales of cocktail forks, as follows:

(1) Sale by Wallace to Diamond Paper Co. of New Orleans, La., on October 14, 1958, at $5.50 less 10% (CX 199).

(2) Sale by Wallace to Diamond Paper Co. on May 17, 1958, at $5.50 less 10% (CX 157).

(3) Sale by Forster to H. G. Mooney Company, Newark, N.J., on June 5, 1958, of 5½ inch forks at $5.50 less 5% (CX 59).

The record also shows that Forster's list price for 5½ inch forks on February 1, 1955, was $5.30 (CX 1), but contains no evidence as to the price list in effect on May 17, 1958, June 5, 1958 or October 14, 1958, when the above sales were made.

There is no evidence in the record, as to effect upon competition at either the primary level or the secondary level.

C. *Toothpicks*

The record shows two sales to Safeway at Landover, Maryland, on May 8, 1958, and May 26, 1958, of a number of items including flat toothpicks. Such sales were both made at list prices and a quantity discount of 2½% was granted (CX 62 and 63).

The quantity discount was allowed on shipments of 2,000 lbs. The total weight of toothpicks, hors d'oeuvre picks, clothespins and skewers combined could be used in qualifying for the quantity discount (CX 21 and 24).

The only other sales of toothpicks disclosed by the record were as follows:

(1) Sales by Wallace Corp. to Diamond Paper Co. of New Orleans on May 17, 1958, and November 10, 1958, at list less 10% (CX 157 and 199).

(2) Four sales at list to various wholesale grocers in the Pittsburgh area during the period from July 11 to August 9, 1957 (CX 174, 179, 181, 182).

The only other reference to toothpicks contained in the record was a statement made in a memorandum dated January 25, 1956, from Lovejoy to Oshel to the effect that Forster gave Kresge a 5% discount on 15,000 pound stop-off cars to its warehouse on clothespins and toothpicks.

There is no evidence of effect upon competition at either the primary level or the secondary level.

In view of the foregoing condition of the record with respect to toothpicks, tongue depressors or blades, cocktail forks, and cocktail spears, the finding is that the allegations of the complaint with respect to them have not been sustained by the evidence, and the motion to dismiss the complaint as to these items will be sustained.

CONCLUSIONS

It is concluded that the major allegations of the complaint with respect to meat skewers have been proven by substantial, reliable evidence in the record except as to the effect of the discrimination upon the secondary line. Likewise, it is concluded that the allegations with respect to round clothespins and wooden ice cream spoons have been sustained by substantial, reliable evidence in the record, except as to the effect of the discrimination upon the secondary line. However, the record does not contain sufficient, reliable evidence to support the allegations involving the other woodenware products named in the amended complaint, namely toothpicks, ice cream sticks, tongue blades, cocktail forks, and cocktail spears.

It is further concluded that the respondents, in the sale and distribution of meat skewers, as herein found, under the circumstances disclosed with respect to their relation to their competitors, particularly with the Farmington Dowel Products Company, have violated Section 2(a) of the Clayton Act as amended because of the tendency the discrimination in price in the sale of meat skewers has had upon competitors in the sale of that product, particularly, Farmington Dowel Products Company. The facts in this case are quite similar to those in the *Maryland Baking Co.* case, 243 F. 2d 716 [6 S. & D. 260], in that the respondents engaged in severe discriminatory price cuts to drive a competitor out of business. In that case, the Federal Trade Commission found that the Maryland Baking Co. had engaged in price discrimination in violation of Section 2(a) of the Clayton Act as amended by cutting the price on a particular type of ice cream cone 25% in the Baltimore, Maryland, area in which a small competitor operated, while maintaining higher prices in other areas where Maryland Baking Co. operated but the small competitor did not. The Court commented that there was evidence in that case that

> the price cut was initiated for the purpose of driving the competitor out of business and that it deprived the competitor of its normal channel of distribution through jobbers with the loss to the competitor of about half of its volume of business in the product in question.

In the present case, this predatory intent so often referred to in complaint counsel's proposed findings and oral argument, although not necessary to establish violation of Section 2(a) of the Clayton Act as a result of discriminatory prices, carries considerable weight in determining food faith of the respondents, along with the sales of an item below cost, in determining a price policy which they claim was to meet an equally low price of a competitor, a recognized defense under the statute. From the time that respondent Hodgkins, in May 1954, compelled Farmington to reduce its prices in selling to Forster for the ostensible purpose of meeting competition until Farmington closed its doors in February 1958, respondent Hodgkins pursued a relentless and ruthless policy in competing with Farmington. To begin with, when Forster notified Farmington of cancellation of orders for 3,000 cases of skewers in the winter of 1954–1955, respondent Hodgkins knew very well that the loss of this amount of skewer business would put

Farmington in a position of having to seek other markets, and then, when Farmington did try to increase its sales of skewers elsewhere through other outlets, respondent Hodgkins, during the summer of 1956, cut the price to the trade, threatening to run Farmington out of business and on January 2, 1957, cut the price below cost, which price cut remained in effect as to all customers until February 14, 1957, when the price was restored to a somewhat higher level; but continuing throughout that year, discriminatory prices were allowed to large outlets, such as Armour, MCA, and Hantover, with the result which respondent Hodgkins well knew—that for Farmington, with this loss of business and its inability to compete at the ridiculously low discriminatory prices, the end was inevitable. Further evidence to support the predatory intent theory is found in the attempt of respondent Hodgkins to buy Farmington out and, failing in that, to buy up the mortgages held by third parties in Farmington, as the only purpose of such moves would be to eliminate Farmington as a competitor. The contentions of counsel for the respondents that the Farmington loss of profits and eventual business failure were brought about by a combination of factors unrelated to the sales below list prices shown to have been made by Forster are rejected in toto.

With respect to the other items, in each instance it is believed there is sufficient evidence to warrant the conclusion that the necessary effect of the price discriminations disclosed by the record was to injure competition in the communities where the respondents and their competitors did business in the commodities sold. There is not sufficient evidence, however, of any secondary line injury in any of the cases.

With respect to the sale of round clothespins in the Pittsburgh, Pennsylvania area, the record shows that Forster was able to keep a new competitor from entering that market by resorting to the policy of giving one case free with 10 sold in the entire market. Although the record contains only this one instance of such a practice in the sale of round clothespins, it is believed that in this instance there is sufficient evidence to warrant the conclusion that respondents violated Section 2(a) of the Clayton Act as amended in the Pittsburgh, Pennsylvania area, in the primary line. It is contended by counsel for the respondents that there was no price discrimination in the sale of round clothespins in the Pittsburgh market, since the one case free in the purchase of 10 applied to all customers sold in that area. However, this contention is not sound in the light of the decision of the Court in the *Maryland Baking* case, *supra*, which was decided on April 8, 1957, since it is quite apparent that Forster sold the round clothespins in other areas throughout the United States at list price at the time it made this special allowance in the Pittsburgh market area. As a matter of fact, the record shows one sale in that area to a chainstore in Youngstown, Ohio, Loblaw, at list price, this sale having been made through the buying office of the chainstore in Buffalo, New York.

The Court in the *Maryland Baking* case approved an order of the Federal Trade Commission which required Maryland Baking Co., which was found to be discriminating in price by selling to the trade in the Baltimore, Maryland area at prices lower than it sold elsewhere in the United States, to cease and desist from discriminating in price of ice cream cones of like grade and quality by selling said product to

any purchaser at a price which is lower than the price charged any other purchaser engaged in the same line of commerce, where such lower price undercuts the price at which the purchaser charged the lower price may purchase ice cream cones of like grade and quality from another seller.

The Court interpreted that order to forbid discrimination in price within any area in the United States in which the company was doing business, but not to require uniform prices throughout the country, nor to forbid the company's making prices in good faith to meet competition. It is believed that a similar order should be entered in this case with respect to all woodenware products, which would include round clothespins.

With respect to wooden ice cream spoons, the activities of Forster in the sale of this product appear to be mostly to large customers in Eastern Metropolitan areas, particularly along the Atlantic Seaboard where these customers have substantial outlets. It is believed that there is sufficient evidence of adverse effect upon competitors in those markets on this commodity to warrant the conclusion that Section 2(a) of the Clayton Act has been violated in the primary line. Forster took a substantial share of the business of Sealtest Southern Dairies and Pet Dairy Products Company away from two of its smaller competitors, O.W.D. and Mulco by discriminatory prices.

With respect to chopped ice cream sticks, although the respondent Hodgkins attempted to cover up the discriminatory price transaction with Joe Lowe Corporation, claiming that the free carload of sticks was to reimburse Joe Lowe for defective sticks when it was actually a cut in price, it is believed that there is not sufficient evidence of an adverse effect upon competition to warrant the conclusion that Section 2(a) of the Clayton Act has been violated. The other competitors, who were selling to Joe Lowe, continued to sell to him in even larger quantities than Forster. Furthermore, the adverse effect of the one instance of selling at a higher price to a competitor of Joe Lowe was "de minimis". The difference in price on the quantity bought amounted to only $243, hardly enough to warrant the conclusion that this secondary line competitor had sustained injury contemplated by Congress in determining the violation of the statute in the secondary line.

In accordance with the foregoing findings and conclusions, the following order is entered:

ORDER

It is ordered, That respondent Forster Mfg. Co., Inc., a corporation, and its officers and the individual respondent Theodore R. Hodgkins, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution in commerce of woodenware products, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality:

1. By selling woodenware products to any purchaser at a price which is lower than the price charged any other purchaser engaged in the same line of commerce where such lower price undercuts the price at which the said purchaser charged the lower price may purchase said products of like grade and quality from another seller.
2. By selling said products to any wholesaler at net prices lower than the net prices charged any other wholesaler located in the same market area for said products of like grade and quality.
3. By selling said products to Manufacturers Cooperative Association at lower net prices than the net prices charged to meat packers in competition with the members of said Manufacturers Cooperative Association for said products of like grade and quality.
4. By selling said products to any organization at a discount that is passed along to members or owners of such an organization where such members or owners are in competition with purchasers paying higher net prices for said products of like grade and quality.

OPINION OF THE COMMISSION

JANUARY 3, 1963

By DIXON, *Commissioner:*

Respondents appeal from the hearing examiner's initial decision holding that in the sale of their "woodenware" products, they have discriminated in price in violation of Section 2(a) of the Clayton Act, as amended.

Forster Manufacturing Company, Inc., the corporate respondent, is a Maine corporation having its principal office and place of business at Farmington, Maine. It manufactures at its Maine plants more than a score of woodenware products and sells them to customers located in various other States. In 1957 its total sales of such products exceeded $6 million. Among the products manufactured by respondent Forster are the following items: meat skewers, ice cream spoons, clothespins, toothpicks, tongue depressors, ice cream sticks, cocktail forks, and cocktail spears. The complaint, as amended, charged discriminatory sales of woodenware products in general, and of those eight items in particular. It further charged that the effect of those discriminatory sales might be to substantially injure competition or tend to create a monopoly at all of the various levels of competition, including the primary, secondary, and tertiary levels.

It was charged that the individual respondent—Theodore R. Hodgkins, president of Forster—was, in effect, the moving force behind the alleged violations.

The hearing examiner found that respondents had in fact discriminated in price in their sales of all eight of the products enumerated above. However, on the second element of a 2(a) violation—injury to competition—he found adverse competitive effects only at the primary level, and only in regard to respondents' discriminatory sales of three of the products—skewers, ice cream spoons, and clothespins.

On this appeal, respondents contend that the examiner erred (1) in finding "discrimination" in their sales of one of the products—clothespins; (2) in finding that the discriminations in the sales of the three products—skewers, ice cream spoons, and clothespin—might have the effect of injuring competition at the primary level; (3) in failing to find that their discriminatory sales of two of the products—skewers and clothespins—were made in good faith to meet the equally low prices of competitors under Section 2(b) of the Act; (4) in rejecting certain of respondents' proposed findings of fact; and (5) in making the order unduly broad.

I

In his initial decision, the hearing examiner found that respondents discriminated in the sales of their products in that they sold to the following customers at prices that were lower than the prices respondents contemporaneously charged other buyers:

A. *Skewers*

1. Armour & Co., Chicago, Illinois, received lower prices than other buyers (e.g., Armour paid $6.90 per case for respondents' skewers at

a time when Pfaelzer Bros. Co., another meat packer, was paying $8.50).

2. Manufacturers Cooperative Association (MCA), Chicago, Illinois, a packer's "buying group," received a 5% discount from the price being paid by other buyers.

3. Phil Hantover, Inc., Kansas City, Missouri, a distributor, received a similar 5% discount.

4. Enterprise, Inc., Dallas, Texas, a distributor, received a "special" lower price.

B. *Ice Cream Spoons*

1. Sealtest Dairies Division of National Dairy Products Corporation (Sealtest) received a discount of 5% plus 5%.

2. Pet Dairy Products (Pet) received a 5% plus 2½% discount.

C. *Clothespins*

Buyers located in Pittsburgh, Pennsylvania, and a contiguous territory radiating for some 30 or more miles from downtown Pittsburgh received, during a period of a few months in 1957, a discount of approximately 10% that was not given to buyers located in other parts of the country. This was accomplished by giving Pittsburgh purchasers one case of clothespins free with every 10 cases purchased.

This finding of "territorial" discrimination in clothespin sales is contested by respondents on this appeal. Their contenton is that, while the record shows that buyers in the Pittsburgh market received the free goods deal, it fails to show that buyers located in other areas did *not* receive a similar concession. On this point, respondents do not allege that buyers in other parts of the country in fact received this deal; they merely argue that, whatever the facts may be, counsel supporting the complaint failed to *prove* that a "higher" price was charged other customers. During oral argument on proposed findings, counsel for respondents stated with commendable candor that he was "merely raising a technical lack of proof in the case, and I don't think it is material * * *."[1] We think this characterization is unduly generous. "Technical" or not, the statute very plainly requires at least two sales, one at a "high" price and one at a "low" price.

Respondents err, however, in asserting that there was no evidence of a "high" price. The examiner found: "As a matter of fact, the record shows one sale * * * to a chainstore in Youngstown, Ohio (to a customer named Loblaw), at list price, this sale having been made through the buying office of the chainstore in Buffalo, New York."[2] A tabulation of respondents' invoices[3] supports the finding that this

[1] Tr. 3413.
[2] Initial decision, p. 887.
[3] CX 54.

buyer paid the full list price, sans any free goods, while the Pittsburgh purchasers were enjoying the 10% lower price.

Respondents' further argument that a single transaction involving less than $100 is *de minimis* confuses the first element of a prima facie case—"discrimination"—with the second—injury to competition. The former is established by nothing more than a showing that a sale has been made to two buyers, and that one of the buyers paid more than the other. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 [6 S. & D. 817] (1960). Further, since this case involves competitive injury at the primary level only, it is the volume of sales made at the "low" price, not at the "high" price, that is the object of the inquiry in determining the probable effects of the discrimination. Approximately 2,000 cases, valued at more than $10,000, were sold at this discriminatory "low" price.

D. *Chopped Ice Cream Sticks, Toothpicks, Tongue Depressors, Cocktail Forks, and Cocktail Spears*

Joe Lowe Corporation, a New York City distributor, received a discount of 3.22% not given to one of its competitors. This was accomplished by giving one free carload (valued at approximately $8,379) in conjunction with its purchase of 30 carloads. However, the examiner found no probability of competitive injury in regard to this transaction.[4] A similar finding was made in regard to respondents' discrimination in the sale of toothpicks, tongue depressors, cocktail forks, and cocktail spears.[5]

II

Respondents remind us that the statute proscribes injury to "competition," not merely injury to "competitors." They quote the following from the 10th Circuit's opinion in *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 954 (1959): "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." The quoted sentence, however, was qualified by these further words: "But as a necessary incident thereto, it (antitrust legislation) is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, *surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor.*" (Emphasis added.)

As a part of their argument on this point, respondents emphasize that, in the order of antitrust values, robust competition between com-

[4] Initial decision, pp. 880–881.
[5] *Id.*, pp. 883–884.

peting sellers ranks high, and that it is the great purpose of the antitrust laws to encourage, not discourage, the efforts of sellers to wrest business from their competitors. With the principle itself we are in firm agreement. But in its application to the facts in this case respondents go too far. Price competition is indeed encouraged by the antitrust laws, but business competition, like competition in any other activity, must be conducted within the framework of a set of rules, else it tends to degenerate into mayhem. That is what happened in this case.

A. *Skewers*

In 1957, the skewer manufacturers in the United States, and their respective shares of the market, were as follows:

Company	*Approximate Market Share*
Forster (respondent)[6]	58%
Farmington[7]	22%
Diamond[8]	11%
Morgan[9]	7%
Ranger[10]	1%
Hardwood[11]	1%

Of these skewer manufacturers, only respondent and Farmington made a full line, *i.e.*, all sizes. And Farmington was the only substantial manufacturer that engaged exclusively, or almost exclusively, in the manufacture of skewers.[12] Farmington, therefore, was respondent's only serious competiter in the skewer field. In February of 1958, Farmington closed its doors.

Since respondents argue that this case is predicated solely upon the somewhat dramatic fact of the death of its principal competitor in the skewer business, we deem it necessary to review in some detail the events that culminated in the closing of Farmington's doors in 1958. A number of these events—such as respondents' across-the-board (and hence nondiscriminatory) price cutting—although obviously contributing causes in Farmington's business failure, are not cognizable under

[6] In dollars, respondent's 1957 sales of skewers amounted to approximately $225,000. Tr. 56.

[7] Farmington Dowel Products Company.

[8] Diamond Gardner Corporation (now Diamond National Corporation).

[9] Morgan Lumber Company. This figure—7%—is an approximation based on its 1958 sales. Tr. 2053.

[10] C. H. Ranger, Inc. (The owner subsequently—1958—sold out to, and now works for, respondent Forster. Tr. 2338–2339.)

[11] Hardwood Products Company.

[12] Farmington made a few other items, *i.e.*, "apple sticks," but skewers constituted at least 90% of its total production. Tr. 602.

Section 2(a) of the amended Clayton Act.[13] Their effects, therefore, are not a proper consideration in determining whether or not that statute has been violated. However, those events strongly suggest that respondents, in the formulation of their pricing policies, were motivated by an *intent* to destroy their competitor, Farmington. And, while such a predatory intent is not a necessary element in a price discrimination case, it is certainly relevant in determining whether or not the discriminations in question may have the *effect* of substantially injuring competition. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 [6 S. & D. 817] (1960); *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 120 (1954); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 956 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 716, 718 [6 S. & D. 260] (4th Cir. 1957); *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929), *cert. denied*, 279 U.S. 858.

In 1947, respondent Forster's skewer plant burned down and, rather than rebuild at that time, it commenced buying its skewer requirements from its competitor, Farmington. At that time, Farmington was a proprietorship owned by a Mr. Clyde Barrows. In September of 1952, Barrows, aged and in ill health, sold out to one of his employees, Mr. Herbert Norton, who then incorporated the business. Respondents were then purchasing about 70% of Farmington's total production. The supplier-customer relationship between Farmington and respondents continued as before.

In 1954, Herbert Norton became ill and his son, Richard Norton, took over the operation of the business. At that time, respondents' purchases of skewers from Farmington were more than half of Farmington's total production. The latter had no sales organization of its own. (The rest of its production was disposed of by direct sales to an English concern, Heaps, Ltd., of Liverpool, England; a large domestic user, Swift & Co.; and a couple of distributors.) In dollars, Farmington's total sales in 1954 were approximately $244,000. Of

[13] The two price cuts in question, one put into effect on June 8, 1956, and the other put into effect on January 2, 1957, dropped respondents' skewer prices drastically. For example, prior to the first cut, skewer #1001 sold for $9.50 per case in one area. The first price cut dropped it to $7.50, and the second cut plunged it to $6.90, the latter being a below-cost price. However, both of those prices were "list" prices, *i.e.*, they were published to the trade and were extended to all buyers alike. Hence they were not "discriminatory" within the meaning of Section 2(a). (The complaint in the instant case does not charge a violation of Section 5 of the Federal Trade Commission Act. See *E. B. Muller and Co.* v. *Federal Trade Commission*, 142 F. 2d 511 [4 S. & D. 151] (6th Cir. 1944).) However, as will be brought out in some detail later, respondents gave discriminatory discounts from their "list" prices to favored customers *before*, *during*, and *after* the general price cuts. See CX 39, showing that Phil Hantover, a favored customer, bought skewer #1001 on January 8, 1957, for $6.56, which is even lower than the below-cost "list" price of $6.90.

this total, some $138,000, or more than 50%, represented sales to respondents.[14]

The first strain in the relationship between Farmington and respondents occurred almost immediately after young Norton took over the Farmington business from his father. On May 19, 1954, Hodgkins, the individual respondent, wrote to Farmington stating that, because of competition in the market for skewers, respondent had to have a reduction of 10% to 15% in the price it was then paying Farmington. Later, however, it was discovered that respondents had not reduced their resale prices, but had, in fact, *increased* prices on some items. This was the beginning of the squeeze.

The next phase commenced the following year, in February of 1955. At that particular time, when Farmington had on hand a peak inventory of lumber (a fact well known to respondent Hodgkins), respondents cancelled without warning orders for 3,000 cases of skewers and for another item known as "apple sticks." These cancellations resulted in a loss to Farmington of some 20% of its total business. When Norton of Farmington called to inquire about the reason for the cancellation, the reply of respondent Hodgkins was: "If I want it (Farmington) to make a profit, it will; if I don't, it won't." [15]

Thereafter, respondent Forster, having resumed its own production of skewers (on some items, as early as 1952), started decreasing its orders to Farmington. Its purchases from Farmington fell from approximately $138,000 in 1954 to $99,000 in 1955, and to $33,000 in 1956, ceasing altogether in the spring of that year. In an effort to offset its dwindling sales to respondents, Farmington began acquiring other outlets for its skewers. It increased its sales through distributors (sometimes called "brokers" in the trade, although they took title to the goods), and, later, began selling directly to other large users (such as Armour & Company). All of this new activity on the part of Farmington transformed it into an active competitor of respondents, rather than a mere supplier.

Respondents, although they now urge us to adopt a construction of the Clayton Act that would approve a powerful seller's wielding of the "power of the 'deep pocket' * * * to undercut and ravage the less affluent competition" [16] as a symptom of nothing more than virile competition, showed a marked lack of enthusiasm for the price competition introduced into the skewer industry by Farmington's new distributors. In the spring of 1956, after Farmington had set up its distributor

[14] Initial decision, p. 873.

[15] Tr. 483.

[16] *Reynolds Metals Co. v. Federal Trade Commission,* 309 F. 2d 223, [7 S. & D. 527] (D.C. Cir., September 27, 1962).

organization and thus recovered from the loss of respondents' patronage,[17] respondent Hodgkins called several times accusing Norton of permitting his distributors to cut prices, and demanding that he *stop selling to them.* Respondents' position apparently was that, while they wouldn't buy Farmington's skewers themselves, they wouldn't allow anyone else to buy them either! The culmination of those phone calls from respondent Hodgkins was one in which he delivered this ultimatum to Norton:

I am going to call you back in two days, and if you have not dropped those brokers, I will cut prices on all skewers. *Don't try to follow me* with these cuts, because I have sold skewers for ten cents a thousand in the past and I can and will again, and *that will be the end of you.*[18]

Respondent Hodgkins called back 2 days later for Norton's answer. When the latter refused to give up his distributors, Hodgkins said:

That is all right. Beginning in June, 1956, I am making a 20 percent cut on all skewers. *Don't try to follow me. If you do, we will put you out of business.*[19]

This was no idle threat. Respondents thereafter made two price cuts that finally set a price below their own costs. The first occurred on June 8, 1956, shortly after the conversation noted above. The magnitude of the cut is illustrated by the fact that the price for respondent's skewer #1001 fell from $9.50 per case to $7.50.[20] The second and last of respondents' price cuts plummeted their price to the below-cost figure of $6.90.[21]

Farmington did not immediately "follow" respondents on that first price cut of June 8, 1956. Its net profits, however, fell from an all-time high position reached during the 8-month period ended on May 31, 1956,[22] to a net loss for the 12-month period ended September 30, 1956.[23] In that month Farmington and its distributors began meeting respondents' lower prices.

At this point, respondent Hodgkins tried to buy Farmington out. He approached Norton directly with an offer,[24] but was turned down. He then went to a local attorney who held mortgages on the Farmington property, trying to buy the mortgages and, later, trying to get that attorney to persuade Norton to sell out. Respondent Hodgkins denied all of these efforts to buy out Farmington.[25] His testimony,

[17] Norton testified that he was able to sell his skewers to his new distributors at higher prices than respondents had been paying for them. Tr. 799.
[18] Tr. 486 (emphasis added).
[19] Tr. 486 (emphasis added).
[20] Delivered in New England area. CX 1, 3.
[21] CX 6.
[22] Approximately $13,000. Tr. 799; CX 97–H.
[23] Approximately $2,000. CX 97–D.
[24] Tr. 520–522.
[25] Tr. 2172–2174, 2440–2445.

however, was so thoroughly contradicted by the disinterested attorney in question that it must be deemed unworthy of belief.[26]

Respondents replied to these rebuffs with the final price cut of January 2, 1957. On that date, Forster issued a new price list [27] that dropped the price of the skewer mentioned above (and other sizes proportionally) from $7.50 to $6.90. We think the evidence offered by counsel supporting the complaint establishes that this price was below respondents' own costs.[28] It remained in effect for some 6 weeks—until a new price list [29] was issued on February 13, 1957. The new list raised the price of the #1001 skewer to $8.20, which was retained until after Farmington went out of business in February 1958. Thereafter, respondents raised the price to $8.90 on March 17, 1958, and to $9.00 on November 10, 1958.[30]

As previously noted, none of these price changes were discriminatory, inasmuch as all of them were accomplished by changes in list prices and were therefore available to all customers alike. They are related here to show (1) the intent respondents entertained when they conceived their pricing practices,[31] and (2) the business context in which the sales were made that *were* discriminatory. In the latter connection, it should be noted that the price discriminations condemned by the examiner completely bracketed, in point of time, the nondiscriminatory price cuts. Thus, at least three favored customers received discriminatory prices *before* the across-the-board cuts were made; two of them, MCA and Hantover, received 5% discriminatory price discounts *during* the period when those cuts were in effect (i.e., Hantover received a discount of 5% from the below-cost "list" price of $6.90); and several received discriminatory prices *after* respondents had partially restored their list prices (i.e., Armour was paying the

[26] Tr. 819–821.

[27] CX 6.

[28] CX 206–211; tr. 1270, *et seq.*

[29] CX 7.

[30] CX 37.

[31] Express declarations of predatory intent—such as respondent Hodgkins' statement that "we will put you out of business"—are of course the most convincing evidence of such an intent. Even without such direct evidence, however, predatory intent could have been reasonably inferred from respondents' below-cost selling. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 [6 S. & D. 817] (1960). It is said that such predatory pricing is "foreign to any legitimate commercial competition," *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929), *cert. denied*, 279 U.S. 858, and that it "inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength." *Report of the Attorney General's National Committee to Study the Antitrust Laws* 165 (1955). Similarly, an attempt to buy out a competitor in such a context as this supports the inference that it was motivated not so much by a desire to acquire commercial assets as to be rid of troublesome competition.

below-cost price of $6.90 long after the "list" price available to nonfavored buyers had been raised to $8.20).[32]

There can be no doubt, of course, that the nondiscriminatory price reductions played a part in the business failure of Farmington. But they were not the sole cause. The price *discriminations* were large enough that, even if respondents' "list" prices had only matched Farmington's selling prices, those discriminations would have been sufficient to divert or retain the large buyers who received them. The record is clear that the volume of skewers purchased by those favored customers was not insubstantial. Thus, between its first direct sale to MCA on May 7, 1956, and the end of that year, Farmington sold that purchaser $11,724.62 worth of skewers, as compared to respondents' sales to that customer of $8,748.97. In 1957, MCA bought $11,214.47 worth from respondents and only $4,901.45 from Farmington. The next year, 1958, Farmington went out of business (in February), while respondents sold MCA $10,930.25 worth of skewers.

Similarly, Farmington lost the Armour business to respondents. Beginning its direct sales to Armour in August 1956, Farmington had succeeded, by December of that year, in surpassing respondents in sales to that buyer (in that month, Farmington sold Armour $1,382, as compared to respondents' $843). The next month—January 1957—respondents plunged their "list" prices below-cost, e.g., to $6.90, with the result that their sales to Armour rose to $1,929, and Farmington's fell to zero. On February 13, respondents raised their "list" price from $6.90 to $8.20. Armour paid this $8.20 list price until March 21. On that date respondents, while continuing to sell to nonfavored buyers at the "list" price of $8.20, dropped the price to Armour only back to the below-cost figure of $6.90. The result was that respondents' sales to Armour totaled $14,804 in 1957, as compared to Farmington's $4,111.16. The bulk of this diversion to respondents is therefore attributable to that discriminatory price. Indeed, the Armour buyer testified that he switched a substantial part of the Armour skewer business to respondents on the basis of that discriminatory price.[33] Farmington, having gone out of business in February of 1958, sold Armour only $195.07 worth of skewers in that year, as compared to respondents' $17,289 (75% of Armour's total skewer purchases). The following year, 1959, with Farmington no longer in business, respondents sold Armour $22,245 (82% of Armour's total purchases).

[32] See tabulations of respondents' sales to MCA (CX 38), Phil Hantover (CX 39), and Armour (CX 40).
[33] Tr. 2048–2049.

Another of respondents' favored customers—Phil Hantover—made only one purchase from Farmington, that one being in 1957. Respondents' sales to Hantover were: $8,097.40 in 1956; $9,355.78 in 1957; and $10,814.55 in 1958. Throughout this period, that customer received a discriminatory discount of 5% from respondents' "list" prices, including the lists that were in effect before, during, and after the two across-the-board cuts. A Hantover representative testified that a price difference of 4% to 5% would be sufficient to make him change his source of supply.[34]

Respondents contend, however, that when Farmington began selling skewers to these buyers directly and through new middlemen, it was aggressively taking "their" (respondents') customers. But this was necessarily so since Farmington, up to the time when respondents resumed making their own skewers, had been selling more than half of its production to respondents who, in turn, had been reselling the Farmington skewers to the trade. It can hardly be said that a distributor handling most of its manufacturer's total production can start its own manufacturing operation, cease buying from its former supplier, and then claim an exclusive right to continue selling to customers it had formerly supplied with that manufacturer's goods. But even if we consider Farmington a new entrant in the market aggressively attempting to take away respondents' largest customers, this does not give respondents a license to ward that competitor off by means of price discriminations. The statute makes it just as unlawful to use price discrimination to "prevent" competition as to "injure" or "destroy" it.[35]

Respondents further contend that the proximate cause of the demise of their largest competitor, Farmington, was not their discriminations but no less than thirteen sins this company allegedly committed against the principles of good business practice.[36] They place particular emphasis on the transfer of the management of Farmington in 1954 from the elder to the younger Norton, arguing that its business failure was primarily caused by the latter's youth (he was 28 years old when he took over in 1954) and his alleged inexperience in the skewer business. On the latter point, they note that he did not devote his full energies to the business, but continued to hold, during the period 1954 until the

[34] Tr. 1965.

[35] Section 2(a) declares it unlawful to discriminate in price "where the effect of such discrimination may be * * * to injure, destroy, or *prevent* competition with any person who * * * grants * * * such discrimination * * *." 15 U.S.C. 13(a). (Emphasis added.) A similar rule prevails under the Sherman Act. Thus, "the antitrust laws are as much violated by the prevention of competition as by its destruction." *United States* v. *Griffith*, 334 U.S. 100, 107 (1948). See also *North Texas Producers Assn.* v. *Young*, 1962 Trade Cases Par. 70,456 (5th Cir. 1962).

[36] Respondents' brief, p. 13.

company's failure in February 1958, a full-time job as a fabric buyer with the Hathaway Shirt Company in a town located some 35 miles from the Farmington skewer factory. They also criticize his "dependence upon one customer—respondents" as an outlet for as much as 70% of his production. The flaw in respondents' argument here, however, is the fact that, under young Norton's management, the company reached the highest profit-earning point in the company's history.[37] Indeed, it seems plain enough that it was Norton's success at getting customers and making money, not his failure, that prompted respondents' predatory pricing. We have no doubt that, as found by the hearing examiner, the discriminations in favor of MCA, Hantover, and especially Armour, by diverting those important customers to respondents, "were a contributing cause"[38] in the demise of Farmington.

Nor was Farmington the only skewer manufacturer who felt the effects of respondents' predatory and discriminatory pricing. As noted above, the 1957 national sales figures indicated that respondents had some 58% of the market; Farmington, 22%; Diamond Gardner, 11%; Morgan Lumber, 7%; and Ranger and Hardwood, two very small producers, about 1% each. When Farmington went out of business in February of 1958 and thus gave up the business it had left (in units, its 1957 share had been 62 million), one of those small sellers had a sudden increase in sales. This was Ranger, whose sales of the most popular size skewer jumped from a 1957 figure of 1,500,000 to 23,197,000 in 1958. Interestingly enough, however, Ranger subsequently sold out to respondents, and its former owner, Chester Ranger, went to work for them.[39] Diamond Gardner, although its 1957 skewer sales were only one-fifth those of respondents, was the third largest producer in that year and became the second largest when Farmington went out of business. Its sales have been falling steadily, from 33,994,000 in 1956, to 30,628,000 in 1957, to 22,137,000 in 1958. Respondents, on the other hand, have gained in volume. Their skewer sales rose from 159,438,000 in 1957 to 171,481,000 in 1958. In over-all sales, they showed a net dollar increase of $364,993, with some $200,000 available for transfer into surplus.[40] Perhaps more significant, however, is the fact that, since the closing of Farmington's doors in 1958, respondents have twice raised their prices. Thus, on March 17, 1958 (the month following Farmington's exit), they raised their price from $8.20 to $8.90, and on November 10, 1958, they raised it to $9.00.[41]

[37] Tr. 799. As noted, this was the 8-month period which ended on May 31, 1956, shortly before respondents made their first price cut.

[38] Initial decision, pp. 872–873.

[39] Tr. 2338–2339.

[40] CX 67, 68

[41] CX 37.

We think the record in this case makes it abundantly clear that the closing of the doors of Farmington and Ranger, and the steady loss of sales volume by Diamond Gardner can only result in a substantial lessening of competition between respondents and their competitors in the manufacture and sale of skewers, and in a tendency toward monopoly on the part of respondents in that line of commerce. And we think it equally clear that respondents' discriminatory prices to the favored customers mentioned herein have been a substantial factor in bringing about those results.

B. *Ice Cream Spoons*

Respondents vigorously contend that, even if predatory intent is found in their discriminations in the sale of skewers, it would be wholly improper to read that same motivation into their other discriminations. Accordingly, they urge us to consider the question of probable injury to competition in those other products without putting predatory intent into the scales.

This contention must be rejected for two reasons: first, the record contains evidence of predatory intent in respondents' discriminatory sales of another product—ice cream spoons; and, second, the individual respondent, Theodore Hodgkins, being the corporate respondent's sole pricing authority, was personally responsible for the discriminatory sales of all of the products involved herein. On the latter point, we would be naive indeed if we assumed that a man capable of conceiving and executing a predatory plan to destroy his major competitor in one product would approach his pricing problems in another line in a spirit of fair and lawful competition. The motives that drive men are not water spigots that, with a turn of the wrist, can be made to run hot or cold. We think Hodgkins pursued his pricing policies in regard to his other products with the same predatory intent that led him to destroy Farmington, his competitor in the skewer field.

As noted above, the hearing examiner found that respondents, by means of a discriminatory price, succeeded in taking the Sealtest account from a competitor, Mulco Products, Inc. (Mulco), and the Pet account from another competitor, Oval Wood Dish Corporation (OWD).

Pet had been buying from OWD since approximately 1941, placing orders in the fall of each year for its ice cream spoon requirements for the following year. As was customary, OWD and Pet entered into such a contract in the fall of 1957 for Pet's 1958 requirements. In accordance with this contract, OWD received from Pet on November 14, 1957, three purchase orders calling for the shipment of spoons to three different Pet plant locations on three different dates in 1958. On two of the orders, the OWD price was $1.07 per thousand, and on the other, $1.05 (because of different delivery points).

By offering Pet a discount of 5% plus 5% from the price other buyers were paying, or net prices of $1.04 and $1.02,[42] respondents caused Pet to cancel the orders already placed with OWD. The result was that respondents got $13,203 worth of business from Pet in 1958, and OWD, whose sales to Pet in 1957 had totaled $15,079, fell to $1,694 in 1958.[43]

Hodgkins, the individual respondent, personally authorized his salesman to offer Pet an initial cut of 2½% from his price to other customers,[44] and, in view of his absolute control over pricing matters,[45] it is a fair inference that he directed each of the additional cuts to Pet that culminated in the final 5% plus 5% that swung the business.

The other favored buyer of spoons, Sealtest, was similarly won for the 1958 season by offers of increasingly large discounts. Mulco, one of respondents' competitors, had been selling to Sealtest for more than 25 years. Respondents first tried to get the Sealtest business for 1958 with a 5% discount. When that failed, another 2½% was added, bringing the price to $1.08 per thousand. Sealtest then advised Mulco to "get his house in order," that his price was out of line. Mulco reduced its price to $1.14, but did not see fit to completely meet respondents' low price. The result was that, while it was able to retain some of Sealtest's business that year, its sales to that buyer fell from the 1957 total of 7.8 million spoons to 2.5 million in 1958, a decline of about $6,042 at the $1.14 price it charged Sealtest in 1958.

The predatory nature of this discriminatory price is demonstrated by the testimony of the Forster salesman who handled those accounts:

A * * * What was said was this * * *. If we don't get it (the business) at the price I had to offer the different ice cream manufacturers, if we lose it, *the company that did get it wouldn't make any profit on it*. So that is the answer. That is exactly what they told me.

Q Who told you that?

A Well, there is only one man up there that can say anything and that is Ted Hodgkins.[46]

Respondents advance several reasons as to why they think OWD's loss of the Pet business, and Mulco's loss of the Sealtest business, raises no probability of a substantial lessening of competition. Their pri-

[42] Initial decision, pp. 863–864.
[43] *Id.*, p. 865.
[44] Tr. 1844.
[45] "Listen, I can't move until I get the order from Ted Hodgkins, who is president of the company." Tr. 1810. See also tr. 1841, 3295.
[46] Tr. 1841. (Emphasis added.)

mary contention in this regard is that the injury to "competition" contemplated by the statute means not merely the diversion of business from one seller to another, but a loss of such a magnitude that the losing competitor becomes "unable to compete effectively in the future." They state:

If the loss of the particular sale reduced the seller's total sales volume to a point where its unit costs were increased so much that it could not thereafter sell profitably at prices which are competitive or if the loss of the potential profits on a particular sale put the seller in financial difficulties, it would be clear that such seller's ability to compete would be impaired.[47]

In the ice cream spoon phase of the case, they assert that OWD and Mulco each sold more spoons in 1958 than respondents; [48] that respondents' sales actually declined in 1958; and that both of those competitors were themselves engaged in cutting prices to get the business of *other* buyers, *i.e.*, there was a general "price war" going on. As an illustration of the latter contention, respondents state that, while they succeeded in getting the Pet business from OWD in 1958, that competitor had taken from respondents the Borden business that year and, moreover, succeeded in taking back from respondents the Pet account itself in the following year, 1959. It is argued that all of this affirmatively proves that competition in the wooden spoon industry has remained vigorous and unimpaired.

Aside from the question of the factual accuracy of respondents' argument in regard to the Borden account,[49] they attach too much significance to sales volume in this particular product. A representative of Mulco testified that, although the number of units sold had increased, "there was a tremendous drop in dollars for the same number of units." [50] Similarly, a representative of OWD testified that not only was its unsuccessful bid for the Pet business in 1958 a below-cost figure,[51] but that it sustained a net loss from its 1957 and 1958 sales of ice cream spoons. As the court said in *H. J. Heinz Co.* v. *Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452, 464 (S.D.N.Y. 1960): "The fact

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[47] Respondents' brief, p. 4.

[48] Total sales by all three companies were 641 million, with respondents' share being 180 million or 28%.

[49] Borden had been buying in prior years from both OWD and respondents. Counsel supporting the complaint contended that respondents tried to take the entire account in 1958 with a lower price, and that OWD, in order to defend itself from respondents' price raid and keep Borden's business, had to accept a substantially lower price that year. In fact, counsel supporting the complaint sought to bring this out in his affirmative case on the theory that OWD had been injured in the amount of some $8,000 as a result of having to cut its prices to Borden to meet respondents' discriminatory offer. Brief of counsel supporting the complaint, p. 16; tr. 1547–1548. Respondents' counsel objected to this evidence, and the hearing examiner rejected it, limiting counsel supporting the complaint to the making of an offer of proof. Tr. 1547–1548.

[50] Tr. 2995–2996.

[51] Tr. 1559–1561.

that there was a substantial increase in the total volume of baby food sales at the lower prices has little relevance in assessing injury to competition when, according to the plaintiff, each jar sold resulted in further loss of money."[52] The first test of competitive health, as every businessman knows, lies in the over-all profit picture. Sales volume in a single product is thus only one factor to be considered in determining the effects of price discriminations.

It should be noted that respondents' "price war" argument is addressed not to any issue of meeting competition under Section 2(b) (no such defense is asserted in regard to the wooden spoon discriminations), but solely to the question of injury to competition. The nub of their contention is that such injury is less likely in a competitive situation where all of the sellers are vigorously cutting each other's prices and the various buyers, responding to these offers and counter-offers, are see-sawing back and forth from one seller to another. This competitive tug of war, if we understand respondents' argument correctly, has the effect of toughening-up the contestants, making them more resistant to business losses, and thus better able to absorb blows that might otherwise stagger them. Thus, the urchin with knuckles skinned from a punch he has just landed on an opponent is less likely to be seriously injured by a return blow than is a Little Lord Fauntleroy who has never known the joys of sand-lot fisticuffs.

While we are prepared to concede the validity of this argument in the field of athletics, we would hesitate to extend it too far into the area of commercial rivalry. Here, for example, respondents are asserting that a price discrimination of 5% plus 5% that took some $13,000 worth of business from one competitor, and a price discrimination of 5% plus 2½% that took approximately $6,000 worth from another, does not raise a probability of injury to competition because those competitors, in their sales to *other* buyers, have been shaving their profit margin and selling at less-than-list prices.

We are unable to appreciate the logic of this argument. "Price wars," *i.e.*, intense price rivalry, always tend to push prices downward toward actual costs, and thus to reduce profit margins. Indeed, it is this characteristic of genuine competition that constitutes its principal social value and makes it the object of the special concern reflected in the various antitrust laws. It is a fundamental assumption of economic theory, and a commonplace observation in practice, that the

[52] This is not to say, however, that volume losses have no significance at all in such situations. Thus, respondents make the frivolous argument that, since OWD conceded that its offer to Pet was a below-cost price, respondents' own taking of the Pet business with a still lower price was a benefit, not a detriment, to OWD! This would mean that, once prices are driven below cost, taking all of a competitor's customers, and thus putting him out of business entirely, would be a favor to him.

more intense the competition, the lower are prices and profits. But it seems equally obvious that as profit margins descend—even if the competition that drives them down is fair and lawful—each dollar, whether of profit or loss, becomes increasingly significant. Indeed, the very test of the substantiality of a price discrimination is its size *in relation to the profit margins* of the parties allegedly affected by it. This is well established where secondary line injury is involved: "From substantiality in relation to operating margin, the Commission can infer an effect on profits." Edwards, *The Price Discrimination Law* 234 (1959). Thus it has been held that even price "differentials of small amounts were important" when "purchasers * * * sold in a market where competition was keen" and thus "operated on small profit margins." *E. Edelmann & Co.*, v. *Federal Trade Commission*, 239 F. 2d 152, 154, 155 [6 S. & D. 113] (7th Cir. 1956). *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 255 [6 S. & D. 107] (7th Cir. 1957).

We see no reason why different considerations should apply when primary line injury is involved. Surely a competitor already weakened by price warfare and operating on a narrow margin of profit—or in the red—is more susceptible to injury from price discriminations aimed at taking away his largest customers than is a company that has been enjoying high profits on sales to all other customers. Hence we conclude that a price war heightens, not lessens, the probability that a discrimination will injure competing sellers.

In this connection, it should be noted that respondents misconceive the nature of the competitive effects contemplated by Section 2(a). Their proposed test—that the proscribed injury is absent unless there has been an "impairment" of the ability of the competitors to continue the fight—would be more appropriate in a Sherman Act case, if anywhere. This test of "impairment of ability to compete," which apparently means a crippling or permanently disabling of competitors, would necessarily look only to results that have already come to pass, and thus could never be satisfied until the damage had already been done. Section 2(a), however, "does not require a finding that the discriminations in price have in fact had an adverse effect on competition. 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.* v. *Federal Trade Commission*, 324 U.S. 726, 738 [4 S. & D. 331] (1945). (Emphasis added.) See also *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46 [4 S. & D. 716] (1948). Hence the fact that competitors of these respondents have "survived this body blow"[53] by cutting their own prices to other customers and thus making up for the volume lost to respondents, or by cutting their prices to the lost customer in a subsequent year in order to regain his patronage, proves only that those competitors are still alive at the present time, not that they can remain so if respondents' discriminations are permitted to continue indefinitely. Such efforts to survive[54] should not be mistaken for "healthy competition." Below-cost competition is never healthy; it means that the competitive struggle has shifted from a test of efficiency to one of financial staying power—the brute force of the long purse.[55] Here respondents have taken business from their competitors not by fair and lawful competition, but by means of a discriminatory price deliberately set at a point where "if we lost it, the company that did get it wouldn't make any profit on it." We think the conclusion is inescapable that such discriminations, if continued unabated, will surely result in injury to competition between respondents and their competitors.

C. *Clothespins*

There is also a reasonable probability that competition between respondents and their competitors in the clothespin market may be injured unless respondents are restrained from continuing their "territorial" discriminations. As noted above, these discriminations, which consisted of giving Pittsburgh customers one case of clothespins free with each 10 cases purchased (*i.e.*, a price discount of approximately 10%), had been preceded by a small competitor's sales on similar terms. However, respondents did not merely "meet" this competition (a matter discussed hereafter). Whereas the competitor, Penley Brothers, had extended its free goods deal to only 3 customers in the Pittsburgh market, giving only 6 cases free in conjunction with the sale of 60 cases (for a total of approximately $300[56]), respondents extended the same offer to every buyer in that market, giving to 17 other purchasers (none of whom had received the equally low Penley offer) a total of 198 cases of free clothespins.[57] Thus, respondents sold about 2,000 cases at the discriminatory price, for an aggregate dollar figure of approximately $10,000. This is hardly *de minimis*.

Respondents already had about 70% of the Pittsburgh clothespin market. Aside from Penley itself, their only other domestic compet-

[53] "What you are saying is that if this competitor, if it survived this body blow, there is no violation of law?" Hearing Examiner Haycraft, tr. 3357.

[54] A representative of OWD testified that his company lost approximately $35,000 in the wooden spoon aspect of its business in each of the years 1957 and 1958.

[55] "The competitive advantage would then be with the interstate combines, not by reason of their skills and efficiency but because of their strength and ability to wage price wars." *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1954).

[56] CX 184–A.

[57] CX 54 summarizes a number of these transactions. See also CX 174–183.

itor was Diamond Gardner, the company discussed above in connection with respondents' discriminations in the skewer industry. Respondents contend that Diamond, a large company, could not have been injured by the discriminations in Pittsburgh because only one of the 17 customers to whom they gave free goods was a "regular" Diamond customer, and the only sale respondents made to that customer was a single 200-case order valued at about $715. However, several others of the 17 favored customers of respondents had bought from Diamond in preceding years, all of them were "desirable" customers, and all were regularly solicited by Diamond. The record indicates that Diamond's sales in that market area fell from 2,837 cases in 1956 to 1,910 cases in 1957.[58] Although a Diamond representative testified that there had been a decline in the company's sales in other areas as well as in Pittsburgh, he conceded that a 10% discount would be sufficient to cause a customer to switch from one supplier to another:

Q What would be the effect if that (10% price cut) were continued for a long period of time in that market?

A It would definitely squeeze you out of the market.[59]

Further, the witness testified that clothespins are a "very substantial" part of Diamond's business.[60]

Respondents contend further that their free goods deal didn't last long enough to hurt either Penley or Diamond (less than 2 months). It appears, however, that some of the 17 customers "stocked up" on clothespins while the 10% discount was being given, thus extending its effects beyond the relatively short period when sales were actually being made on that basis.[61]

Respondents assert that Penley made "a substantial increase in 1958 in sales," concluding that: "It is apparent that Penley was able to break into the market despite the discriminatory prices of respondents."[62] At another point in their brief, respondents state: "* * * Penley continued to sell thereafter in increasing volume (CX 184)."[63] The cited exhibit, however, shows that, while Penley sold 60 cases under the free goods deal in May and June, 1957, for a total of $318.50 (giving away six cases) it sold only 55 cases during the remainder of 1957 and only 59 cases during the entire year of 1958. We hardly think this illustrates that Penley "was able to break into the market." As noted earlier, Section 2(a) proscribes not only discriminations that injure or destroy competition, but those that "prevent" it as

[58] Tr. 2413.
[59] *Ibid.*
[60] Tr. 1077.
[61] Tr. 1089, 2418–2421.
[62] Respondents' brief, pp. 25–26.
[63] *Id.*, p. 7.

well.[64] "It is as unlawful to prevent a person from engaging in business as it is to drive him out of business." [65]

D. *Chopped Ice Cream Sticks, Toothpicks, Tongue Depressors, Cocktail Forks, and Cocktail Spears*

On this appeal counsel supporting the complaint does not contest the hearing examiner's finding that the record fails to show a probability of competitive injury, either primary or secondary, in regard to the discriminatory sales of chopped ice cream sticks, toothpicks, tongue depressors, cocktail forks, and cocktail spears. We agree that the proof is inadequate here.

III

Respondents do not contend that they have sustained their burden of proving that the discriminatory sales of wooden ice cream spoons to Pet and Sealtest were made to meet the equally low price of a competitor under Section 2(b). They do, however, advance this defense in regard to the discriminations found by the examiner in the sale of skewers and clothespins.

A. *Skewers*

The skewer sales found by the examiner to be unlawful under Section 2(a), *i.e.*, those that may cause injury to respondents' competitors, involved lower prices to Armour, MCA (the buying group), and Hantover (a distributor). Respondents' position in regard to their Section 2(b) defense of the skewer case against them is stated as follows:

> While respondents do not contend that the record contains sufficient evidence to justify every single sale of skewers at below-list prices as having been made to meet competitors' prices, they do contend that there is more than adequate evidence to justify *most* of such sales and to support the conclusion that respondents acted in good faith in an effort to maintain their accustomed portion of the market in a highly competitive situation.[66]

First, the 2(b) defense is plainly inapplicable to respondents' discriminatory sales of skewers to MCA and Hantover. Both of those customers had been receiving a discriminatory 5% discount not accorded to other buyers *prior to* the competitive prices pointed to by respondents. According to respondents, this discount was given to those two customers because they perform a different "function" than

[64] See note 35, *supra*.

[65] *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960).

[66] Respondents' brief, p. 32. (Emphasis added.)

that performed by other buyers who are required to pay a higher price.[67] They argued, however, that these discriminations should also be excused under Section 2(b) because the record shows that, *although unknown to respondents at the time*, other sellers, competitors of respondents, were selling to those favored buyers at prices that were, in some instances, as low as or even slightly lower than respondents' discriminatory prices.

We do not agree. Section 2(b) provides that a seller, even though he has discriminated in price, and even though that discrimination has caused injury to competition, may be fully pardoned by the law if he can come forward and affirmatively prove that the discriminatory sale was "made *in good faith to meet* an equally low price of a competitor * * *." (Emphasis added.) We think the emphasized words place two requirements on the seller who would avail himself of the defense. First, the seller, in making the defended sale, must have acted for the purpose of meeting a competitor's equally low price. The phrase "made * * * to meet" can mean no less. And surely there can be no doubt that *foreknowledge* of an equally low competitive price is essential before a seller can discriminate for the express *purpose* of meeting that price.

Secondly, a discriminator seeking to avail himself of the Section 2(b) defense must not only have had in mind the meeting of a competitor's equally low price, but that purpose must have been conceived in "good faith." In this connection, it must be noted that Section 2(b) deals not only with tangible, objective facts, but with a state of mind as well. Thus, the mere fact that a competitor *has* sold to a buyer at a particular price does not, standing alone, excuse a discrimination made to "meet" it. This principle is fully established by the holding in *Staley* [68] that, although the discriminator's low prices were *in fact* no lower than those of its competitor the Section 2(b) defense was not available because the competitor's price was an illegal one. The illegality of the competitor's price did not, of course, affect its objective

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[67] In fact, respondents contend that their lower prices to those two customers should not be considered "discriminatory" because, they argue, those buyers are in a separate "functional classification" than the buyers who paid the higher price, and thus *don't compete* with the nonfavored buyers. Respondents' brief, p. 14, *et seq.* The fault in this argument, of course, is that price "discrimination" is a mere "price difference," and thus can exist independently of "the alien factor of competition among" those buyers who pay the high price and those who pay the low one. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 546 [6 S. & D. 817] (1960). Again respondents are trying to read into the word "discriminate" the other element of a 2(a) offense, injury to competition. But even on that issue there is no requirement of competition between the favored and nonfavored buyers unless it is *secondary* line injury that is involved. Where, as here, *primary* line injury is the issue, the only competition that is relevant is that between the discriminator and *his* competitors, *i.e.*, other sellers. *Ibid.*

[68] *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 759 [4 S. & D. 346] (1945).

existence; but, that illegality, combined with the fact that the discriminator knew or should have known that it was illegal, defeated the claim of "good faith." We conclude that Section 2(b) contemplates a deliberate, purposeful price discrimination designed specifically to meet a competitor's equally low price, together with "good faith" in taking that action, and that these requirements presuppose that the seller, prior to the discrimination, has knowledge of the equally low price he purports to be meeting. It does not sanction the fortuitous meeting of competition that occurs when a seller discriminates and then, in hindsight, points to the fact, previously unknown to him, that another seller was also selling to the favored buyer at the same price.

In connection with respondents' discriminations in favor of MCA and Hantover, it is worthy of note that these were of a systematic character, *i.e.*, a flat 5% discount from respondents' "list" price, granted over a long period of time (several years). They did not vary to meet sporadic and fluctuating concessions granted by the other sellers, but were granted as a matter of course, irrespective of what other sellers were offering. "(A) lowered price is within § 2(b) only if it is made in response to an individual competitive demand, and not as a part of the seller's pricing system * * *." *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F. 2d 674, 677 [6 S. & D. 553] (2d Cir. 1959), citing *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 721–726 [4 S. & D. 676] (1948), and *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746 [4 S. & D. 346] (1945).

Respondents' discriminations in favor of Armour can fare no better under Section 2(b). While the prices accorded to this buyer were individually negotiated and followed no systematic pattern, respondents have failed to show that any of the discriminatory sales listed by the hearing examiner [69] were made for the purpose of meeting an equally low price of a competitor.

Respondents contend that the four discriminatory sales made to Armour in 1956 were all "preceded" by sales at even lower prices by competitors.[70] But here again, as in their discriminations in favor of MCA and Hantover, there was no showing that, when respondents granted these special prices to Armour, they had any knowledge of the prices being charged Armour by their competitors. In the absence of such knowledge, it is impossible to find that respondents' discriminatory sales were made "in good faith to meet an equally low price of a competitor."

[69] Initial decision, p. 868.
[70] Respondents' brief, p. 33.

Turning to the discriminatory sales made to Armour in 1957 and 1958, it appears that the Armour buyer wrote to respondents in March 1957 advising them that, because of "interesting offers" Armour had received from competitors of respondents, they could expect to get less of Armour's business in the future.[71] Respondents' representatives testified that the Armour buyer had told them that the price needed for respondents to "be competitive" was the list price they had been charging in January and February 1957—the below-cost price of \$6.90.[72] By letter to Armour of March 21, 1957,[73] respondents dropped the price (to Armour only) once more to \$6.90.

Aside from the question of whether or not a letter speaking of "interesting offers" from other sellers is sufficient to "lead a reasonable and prudent person to believe" that a competitor had in fact offered a lower price, *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, *supra*, 324 U.S. at 758–759, respondents have failed to prove that they knew the *amount* of the competitive price they believed they were meeting. As noted above, respondents' representatives testified that the Armour buyer told them they would have to go back to the \$6.90 figure in order to "be competitive," but the Armour buyer himself testified flatly that he had *not* told respondents the prices being quoted by their competitors.[74] It is plain that respondents, being informed of nothing more than that some competitor was offering a large customer a lower price than their own then-current price of \$8.20, lashed out with a price they knew no competitor could match and stay in business, the below-cost price of \$6.90. Such a price is wholly inconsistent with a claim that it was conceived in "good faith to meet an equally low price of a competitor."

While we are persuaded that respondents' claim of "good faith" under Section 2(b) is defeated by the two factors mentioned above—lack of knowledge of the amount of the lower price they thought they were "meeting" and the quoting, in response to an unknown competitive price, of a figure they knew was below their own costs—we agree with the hearing examiner that, *in fact*, respondents did not merely meet competition, but beat it, when they lowered their price to Armour to \$6.90 on March 21, 1957.[75]

[71] RX 14.
[72] Tr. 2849–59, 3052.
[73] RX 316.
[74] Tr. 2046.
[75] The factual dispute on this point revolved around a handwritten memorandum (RX 15), a paper on which the Armour buyer had contemporaneously recorded (for his own use) the price quotations he had received from the various skewer sellers. Farmington's offer was shown as \$7.70; Mulco's (a distributor), as \$8.20; Forster's (respondent), first as \$8.20, and later as \$6.90; and Wood Specialty's (another distributor), first as \$7. and later as \$6.80. (The changes in the quotations of these two sellers were indicated by a line drawn through the original quotation, and the interlineation of the new price.) The author of this document testified that he had changed the Forster notation after

B. *Clothespins*

The clothespin situation presents a somewhat novel question under Section 2(b). As noted above, the discrimination here was "territorial" in nature, involving sales in Pittsburgh, Pennsylvania, and a contiguous area radiating some 30 or more miles from downtown Pittsburgh, at a price that was approximately 10% less than respondents were charging in other areas of the country.

Prior to May 1957, buyers in Pittsburgh were apparently paying the same price for clothespins as buyers located elsewhere. In that month, a small manufacturer of clothespins—Penley Bros., of Paris, Maine—entered the Pittsburgh market for the first time. At that time, respondents had about 70% of that local clothespin market, and Diamond Gardner was their only substantial competitor. Penley, the new entrant, in an effort to get some of the business from these well-entrenched competitors, sold 10 cases to a single customer on May 13, 1957, giving that customer one case "free."[76] The next month—June 1957—Penley made two more sales on the same basis. Thus, on June 4 it sold 30 cases, giving three cases free, and on June 24, it sold 20 cases, giving two free. The examiner concluded that the free cases given by Penley with the first two sales were "salesmen's samples," and that only the third transaction involved a price concession (this third purchaser was a retailer having no salesmen).[77] In the view we take of this phase of the case, it makes no difference whether this distinction between salesmen's samples and price concessions is correct or not. The fact remains that Penley gave away no free goods after June 24, 1957, and that the total quantity given away was six cases. The finality of Penley's discontinuance of the free goods deal is evi-

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receipt of a letter of March 21, 1957 (CX 316) extending the new price of $6.90. However, he could not testify as to whether Wood Specialty's change from $7 to $6.80 had been made before or after that date.

The examiner found that the lower Wood Specialty offer was not made to Armour until after respondents extended their discriminatory price of $6.90; that the lowest price available to Armour on that date was Wood Specialty's earlier offer of $7; and that respondents' $6.90 price therefore "beat" all competitive offers. First, the Armour buyer had testified that respondents' $6.90 offer caused him to switch a substantial part of his business to them. Tr. 2048–2049. Further, as noted by the examiner, Wood Specialty had made no actual *sales* to Armour for less than $7 prior to March 21, and its one and only sale to that buyer at the $6.80 figure occurred on May 24, 1957—some 2 months after respondents established their discriminatory price of $6.90. We think it a fair inference that, if Wood Specialty's $6.80 price had been available to Armour during those 2 months, it would have been used. (Respondents suggest that "Armour may have had an ample supply and needed no further skewers until such date." Respondents' brief, p. 36. However, Armour's "need" for skewers is amply demonstrated by the fact that it *did* buy skewers during that 2-month period—from respondents, and at their "higher" price of $6.90. CX 40.)

[76] CX 184–A.

[77] Initial decision, p. 861.

denced by the fact that, about a month later—on July 29, 1957—it turned down an offer from a buyer who sought a 10% price concession.[78]

In the meantime, however, respondents had gotten wind of the newcomer in the market, and of the free goods deal it had offered. By letter of June 28, 1957, their broker reported the matter to respondents. On or about July 10, 1957, one of respondents' sales officials went from Maine to Pittsburgh to "investigate." Several customers told respondents about a free goods deal being offered by a competing seller, but only one of the buyers contacted by respondents' sales official named Penley as the competitor who was selling on that basis, and apparently none of the buyers contacted had either bought from Penley or received an offer from it. On July 12, 1957, by letter to its broker, respondents authorized it to "meet" Penley's competition, *i.e.*, give one case free with each 10 cases sold. Thereafter, 17 customers in the Pittsburgh area were given a total of 198 cases of clothespins free.[79] *None of those 17 customers had bought from Penley, or received an offer from Penley.* Respondents, having concluded from their investigation that the Penley offer was generally "available" throughout the Pittsburgh area, "met" that price with an area-wide cut. Respondents' representative testified as follows:

A If the record shows it, we did. We didn't except anyone when we made the offer to the market. That was the offer. We didn't except anyone.

Q You made the offer regardless of whether or not any particular prospective customer had or had not received any specific offer from Penley or anybody else as to one free case with ten?

A I said that before.

Q That's correct?

A That's correct.[80]

We have been cited no case, and we know of none, in which the Section 2(b) defense has been held to excuse a price discrimination in favor of a customer who had not *individually* received, prior to the discriminatory sale, an equally low price quotation from a competitor of the discriminator. It should be noted at the outset that this problem is entirely different from the "new customer—old customer" question involved in *Sunshine Biscuits, Inc.* v. *Federal Trade Commission*, 306 F. 2d 48 [7 S. & D. 507] (7th Cir. 1962). There *Sunshine* gained certain new customers by offering them a price that, while it merely matched the price they were then paying their regular suppliers, was less than the price *Sunshine* was then charging *its* regular customers. Because it was given only to the new customers and not to the old ones, the price was discriminatory. The court held, however, that the protection of Section 2(b) was not lost simply because

[78] CX 331.
[79] CX 54, 174–183.
[80] Tr. 2936–2937.

Sunshine had acquired new customers as a result of its meeting competition; the fact remained that *each* of the buyers to whom *Sunshine* offered the low price was already purchasing at that identical price from his regular supplier.

In the instant situation, respondents extended a 10% lower price to 17 customers who had not, individually, either bought at such a low price or been offered that price by *any* seller. Respondents contend that their action was nonetheless merely a meeting of competition, basing this contention, as noted, on the alleged "availability" of the Penley offer throughout the Pittsburgh marketing area.

This problem was scouted in *National Utilities of Gainesville, Inc.* v. *General Gas Corp.*, 1959 Trade Cases Par. 69,447 (DC Ga. 1959). There, as here, small competitors had engaged in sporadic price cutting to selected customers, and the defendant, a much larger seller, "becoming tired of the struggle *customer by customer*, declared war with a drastic price reduction over the area in which plaintiff competes." (Emphasis added.) The defendant there, defending its area-wide price cut as a meeting of competition, was able to identify only "twelve to fifteen customers who have received and are receiving the benefit of price cuts from defendants' competitors * * *." As the district court said:

(I)t appears that defendant, in order to meet price cuts that are offered from time to time on a customer basis by its competitors, has announced a general price cut over the entire Gainesville and Athens areas * * *, offering to sell its LP gas at prices with which General's competitors can not meet and survive.

Finding that this area-wide price reduction threatened irreparable injury to a smaller competitor (the plaintiff), the district court granted a temporary injuction requiring the defendant to restore its prices to the level existing before it made the general cut.

On appeal, the Fifth Circuit,[81] questioning the district court's finding of irreparable injury to the plaintiff, vacated the injunction, and remanded the case to the district court with instructions that, if the lower court still believed injunctive relief was necessary, the injunction should be made equally applicable to both the plaintiff and the defendant, *i.e.*, prohibit price cutting by both or neither.

In its opinion, however, the Court of Appeals expressed some doubt as to the premise that competition can only be "met" on a customer-by-customer basis:

If it is ultimately proved that in making this price reduction over the whole area the appellant did no more than meet the lowest price of competitors in major parts of the trade area, we think there is considerable doubt whether this would

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[81] *General Gas Corp.* v. *National Utilities of Gainesville, Inc.*, 271 F. 2d 820 (5th Cir. 1959), 1959 Trade Cases Par. 69,533.

afford a proper basis for granting either injunction or damages. We do not, however, decide this on this appeal * * *.

We think the instant case provides a clear basis for resolving those doubts in favor of the interpretation advanced by the district court. At the outset it should be noted that the statute "places emphasis on *individual competitive situations*, rather than upon a general system of competition."[82] This emphasis upon "individual competitive situations" springs from a recognition of the fact that discriminations defended under Section 2(b) have already been shown to be injurious to competition,[83] and from the obvious public interest in preventing "unwarranted discriminations in price."[84] In this connection, respondents make the ingenious argument that their extension of the lower price to *all* buyers in the Pittsburgh area, rather than merely to the three who had actually received Penley's lower offer, was designed to avoid "discriminating" between their own customers in that local area. They feared that, if they merely met the lower price accorded to the three specific buyers, secondary line injury might be sustained by other buyers who compete with those three.

In view of the widespread and, indeed, predatory price discriminations respondents have practiced habitually in the past, their protestations in this regard must bear the suspicion that they represent merely another instance of the Devil quoting Scripture.

But we think the argument is fallacious as a matter of logic and common sense. Contrary to their implied premise, such an area-wide meeting of competition does not minimize the probability of secondary line competitive injury. Had respondents met Penley's competition by simply extending an equally low "counteroffer"[85] to those three buyers who had actually received Penley's low "offer," or price, they could not have possibly caused any *additional* secondary line injury. Since those three purchasers were *already* buying at a 10% lower price (from Penley) than their competitors were having to pay, the nonfavored buyers were *already* suffering all the injury a 10% price disadvantage was capable of inflicting. A counteroffer by respondents to those three buyers, while it might induce them to change suppliers,

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[82] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 753 [4 S. & D. 346] (1945). (Emphasis added.)

[83] Since injury to competition is a part of the *prima facie* case, a showing on this element must be made before any necessity arises for a presentation of the affirmative defense accorded to the accused seller under 2(b).

[84] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759 [4 S. & D. 346] (1945).

[85] "(T)he seller is protected, under § 2(b), in making a *counteroffer* provided the seller proves that its *counteroffer* is made to meet in good faith its competitor's equally low price." *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 244 [5 S. &. D. 221] (1951) (emphasis added).

would not increase the price advantage of the favored three, nor the disadvantage of the others, by one iota.

The same is true when we turn to primary line injury. When a seller acquires customers by offering them a lower price, he has deprived their regular supplier of their patronage. A "counteroffer" to those specific customers from a third seller offering that same low price, even if it succeeded in inducing those buyers to switch suppliers a second time, could add nothing to the injury already sustained by their original supplier. Whether the buyer stays with the seller that made the first "offer" of a lower price, or switches to the next seller who makes an equivalent "counteroffer," the fact still remains that the original supplier loses the customer. Whether it is to the one or the other does not affect its degree. Thus a counteroffer that simply matches someone else's offer, and is restricted to those particular buyers who have in fact received that offer, adds nothing to the sum total of primary line injury.

Respondents' area-wide "meeting" of competition, on the other hand, widened the impact area and increased the likelihood of competitive injury not only at the primary level, but at the secondary level as well. As to the latter, even if respondents communicated the offer to sell at the 10% lower price to every buyer located within an arbitrary perimeter surrounding the Pittsburgh marketing area, there would always remain the likelihood that a few buyers located on one side of the "zone" line would compete with buyers located on the other side. To bring all these in, and thus avoid discrimination and competitive injury, respondents would have to continue widening the circle of favored customers, perhaps until they encountered some natural physical barrier (such as a mountain range) to protect the nonfavored from the favored buyers.

Turning to the primary level, it is too obvious to require discussion that respondents' extension of the discriminatory 10% price reduction to 17 customers who had *not* received the Penley offer increased the probability that other sellers of clothespins—respondents' own competitors—would suffer losses in sales volume. Injury at the primary level can be expected to increase in direct proportion to the number of customers receiving the spurious "counteroffer."

In this connection we think it highly significant that Penley, whose prices respondents were "meetings," was a very small producer, incapable of sustained selling at the introductory prices used in its attempt to gain entry to the Pittsburgh market. Its lack of power to continue selling at 10% off is evidenced by the fact that, after only three such sales (total value of $318.50 [86]), it affirmatively refused to

[86] CX 184–A.

accept another order except at full list price. If respondents' contentions were to prevail, "offers" by a seller wholly incapable of delivering more than an insignificant volume of goods at the low price would provide an ambitious competitor having substantial market power (such as the 70% of the market enjoyed by these respondents) with an excuse to "meet that price on a massive, area-wide scale, and thus cripple not only the small competitor who furnished the provocation, but more substantial competitors as well. We think a seller contemplating the "meeting" of a competitive price must consider the size and strength of the competitor whose price he is meeting, and tailor his counteroffer to the scope of that offer. Thus, if a seller extends his counteroffer beyond what he has reason to believe are the limits of the competitor's ability to perform, we think the seller's "good faith" in making an equally low counteroffer would be subject to grave doubt. It is important, therefore, that the seller relying on Section 2(b) ascertain in advance not only the price he purports to be meeting, but the identity of the competitor who is allegedly offering it.

Respondents contend that, because of buyer reluctance to reveal the amount of competitive offers and the names of bidders who make them, a requirement of knowledge as to the price to be met and the identity of the competitor offering it would impose an unreasonable burden on the seller seeking to avail itself of the Section 2(b) defense. We agree that purchasing agents might possibly *prefer* to maintain an air of mystery about the offers they've received from competing sellers. There has always been the buyer who "loved to 'sweat' the salesman. He would tell each that a competitor had quoted a lower figure, and let the poor anguished soul guess, at his peril, whether or not the buyer was telling the truth, which he usually wasn't." [87] But this is not proof that, if the seller refused to guess at the "interesting offers" allegedly received from unnamed competitors, the buyer would not overcome his reluctance and give facts. We have nothing but respondents' words for the proposition that a buyer will abandon his regular supplier and take on a new one rather than divulge the name and quotation of the latter. Common sense suggests that buyers, when confronted with the fact that sellers are constrained by law to treat all buyers fairly until the buyer seeking a favored price cites chapter and verse about alleged competitive offers, will yield to the law's requirements, thus encouraging fair and above-board competition.

We conclude that when respondents extended their 10% lower price to 17 customers who had not received an equally low offer from their

[87] Randall, *Folklore of Management* 101 (Mentor, 1959).

competitor, Penley, they were not within the protection of Section 2(b).

IV

Respondents contend that the examiner erred in rejecting certain of respondents' proposed findings of fact.[88] We see no merit in this contention. The examiner, in his initial decision, is not required to make findings on every peripheral issue raised in the proceedings, but to make "findings and conclusions, with the reasons or basis therefor, upon all the *material* issues of fact, law, or discretion presented by the record * * *." [89] The hearing examiner's findings dealt fully with all material issues raised by the pleadings. We believe that those he rejected were either immaterial or lacking in record support.

V

Respondents assert that the scope of the order entered by the hearing examiner is unduly broad in that it (1) "extends to all woodenware products sold by respondents, notwithstanding the fact that the hearing examiner found illegal price discrimination only in connection with three such products;" (2) contains several prohibitions of the so-called secondary line type, whereas a likelihood of competitive injury was found to exist only in primary line competition; [90] and (3) fails to make the primary line prohibition applicable "only where the purchaser obtaining the lower price is in direct competition with the purchaser charged the higher price." [91]

The latter contention is patently without merit. As the Supreme Court said in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 546 [6 S. & D. 817] (1960):

> The existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse effect upon secondary-line competition, but it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned. Since, as we have indicated, an independent and important goal of § 2(a) is to extend protection to competitors of the discriminating seller, the limitation of that protection by the alien factor of competition among purchasers would constitute a debilitating graft upon the statute.

Such a limitation would also constitute a "debilitating graft" upon our order.

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[88] Respondents' brief, p. 41.

[89] Federal Trade Commission's Rules of Practice, Procedures and Organization, Sec. 4.19(b). (Emphasis added.)

[90] Respondent's brief, p. 38.

[91] *Id.*, 57.

Similarly, respondents' contention that our order should be limited to those of their products that happen to move through the same "channels of distribution" as those employed in selling the three products involved in the sales found violative of Section 2(a) is unsound. An order to cease and desist does not punish for past conduct; it seeks merely to restrain those acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past."[92] Since it is the unlawful *practice* that is the object of our order, not the sale of a particular product or the channels of its distribution, a violation of law in connection with the sale of only one product is sufficient basis for the entry of an order prohibiting that type of conduct in connection with the sale of all of the offender's products.[93]

Those who would have us exercise our discretion in their favor by excluding from an order some of their products must bear the burden of persuading us that those products are so thoroughly distinguishable from those involved in the past violations that, even if disposed to continue the violations in sales of the latter products, they would be lacking in either the capacity or the inclination to do so in connection with sales of the former. In this regard, the mere fact that some of respondents' other products are not bought by the same customers that buy the three products involved in the instant violations is wholly irrelevant. As we said in our recent *Transogram* opinion:

> The argument * * * that the order should apply only to publications of jobber customers is untenable. The distinctive feature in this case is the mode of advertising, not the class of customer by whom that advertising facility was provided. There is no basis, either in logic or in the record, for supposing that an offer by, say, a retail customer, or group of retail customers, to furnish respondents with space in an advertising catalogue would have been turned down on the ground that it came from retailers rather than from jobbers.[94]

There is nothing here to indicate that these respondents, having engaged in discriminatory pricing for the predatory purpose of destroying competitors in more than one of their woodenware products, will not carry this proclivity for illegal pricing into their marketing of other products. In this connection, we think the identity and authority of the individuals who plan, execute, or authorize the illegal

[92] *National Labor Relations Board* v. *Express Publishing Co.,* 312 U.S. 426, 435. See also *Transogram, Inc.,* Docket 7978, Opinion of the Commission [61 F.T.C. 629, 701] issued September 19, 1962.

[93] *Niresk Industries, Inc.* v. *Federal Trade Commission,* 278 F. 2d 337, 343 [6 S. & D. 727] (7th Cir. 1960); *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968, 971 [3 S. & D. 392] (3d Cir. 1941); *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321, 330 [4 S. & D. 117] (7th Cir. 1944), *cert. denied,* 323, U.S. 730.

[94] *Transogram, Inc.,* Docket 7978, Opinion of the Commission [61 F.T.C. 629, 702] issued September 19, 1962.

practices furnish a more helpful guide in determining the scope of the order than the product involved or its channels of distribution. Thus, in our recent *Quaker Oats* decision [95] the order was limited to "cat food," rather than extending to all of the company's products, because the individual that authorized the violation (the head of the company's cat food division) exercised an unusual degree of autonomy in his operation of that separate division, and had no authority in regard to the products produced by the company's other divisions. Indeed, in that case, which involved an unlawful promotional allowance granted at the solicitation of a retailer-customer, the customer that induced the violation by the head of the cat food division had been previously "turned down cold" on that unlawful plan when he first presented it to another division of the respondent company. In that unique fact situation, we were persuaded that there was no likelihood of that practice being followed in the future by other divisions of the company that market products other than cat food.

In contrast to the above situation where the individual who authorized the violation had authority over only one product, the individual respondent here—Hodgkins—is the sole pricing authority at his company,[96] and thus personally responsible for the discriminations found to be unlawful herein. This fact alone would be more than sufficient to require an order covering all of the products sold by the company. But when the predatory intent of this respondent is added to the scales, the need for such a broad order becomes imperative.

We are not unmindful, of course, of the Supreme Court's recent suggestion that, because of the finality that now attaches to our Clayton Act orders, they should be framed with as much precision as possible.[97] But the number of products to be covered by the order raises no issue of "precision." It could hardly be claimed, for example, that an order embracing "all" of a respondent's products was less precise than one covering three named products. Only if a respondent was unaware of the products it handled could it entertain any doubts or uncertainties as to the order's coverage in this regard. Any possibility of vagueness or uncertainty lies not in the product coverage of

[95] *Quaker Oats Co.,* Docket 8119 [60 F.T.C. 798, 820] decided April 25, 1962.

[96] "Well, there is only one man up there that can say anything and that is Ted Hodgkins." Tr. 1841. See also tr. 1810, 1844, 3295.

[97] "The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *Federal Trade Commission* v. *Henry Broch & Co.,* 368 U.S. 360, 367–368 [7 S. & D. 305] (1962).

our orders, but in their description of the *practice* prohibited. Respondents herein will surely have no doubt in understanding the practice prohibited by this order.

In this connection, we think the order entered by the examiner should be strengthened by eliminating two uncertain and debilitating qualifications. Paragraph 1 prohibits respondents from:

> * * * selling woodenware products to any purchaser at a price which is lower than the price charged any other purchaser *engaged in the same line of commerce where such lower price undercuts the price at which the said purchaser charged the lower price may purchase said products of like grade and quality from another seller.*[98]

The phrase "engaged in the same line of commerce," as it has been used in some of our orders in the past, referred to "functional" similarity among buyers. It was designed to limit the prohibition to price differentials between buyers belonging to the same functional classification, e.g., between two retailers or between two wholesalers, and not between a wholesaler on the one hand, and a retailer on the other.[99] The rationale, of course, was that (1) secondary line injury is not likely to result from such a differential because a wholesaler doesn't ordinarily compete with a retailer in the resale of the goods, and (2) a price differential that favors a wholesaler over a retailer is presumably based on cost savings that would justify it under Section 2(a).

Neither of these propositions, however, even if generally true,[100] support that qualification here. Price "discrimination," being merely a price "difference," occurs whenever one buyer pays more than another, regardless of the functional classifications those two buyers are given. And in a primary line case, secondary line injury (and thus competition among the favored and nonfavored buyers) is wholly irrelevant. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, *supra*, 363 U.S. at 546. Since primary line injury can result from a discrimination that favors one buyer over another even though they do not compete, we see no reason to believe that we can prevent such injury here by merely prohibiting these respondents from discriminat-

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[98] Initial decision, p. 888.

[99] That phrase was never intended, of course, to have *geographical* significance, *i.e.*, it would not exempt a discrimination involving a lower price to, say, a jobber located in Philadelphia, Pennsylvania, than to a jobber located in Washington, D.C. If interpreted as granting such an exemption, this "same line of commerce" language would, in a primary line "territorial" discrimination case, *e.g.*, the instant case, or *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 716 [6 S. & D. 260] (4th Cir. 1957), modifying and affirming 52 F.T.C. 1679 (1956), expressly permit the very thing found unlawful.

[100] Secondary line injury can result from price differentials between a wholesaler and a retailer if it is the retailer, not the wholesaler, that is getting the low price. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55 [4 S. & D. 729] (1948), where the Supreme Court approved a provision in our order prohibiting sales "to any retailer at a price lower than that charged a wholesaler whose customers compete with the retailer."

ing among those of their buyers who happen to belong to the same functional classification. Even if it be assumed that the functional labels are not "ambiguous" but "follow real functional differences," *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475 [5 S. & D. 393] (1952), these respondents could still oppress their competitors with drastic price cuts in a selected "territory," or to a single buyer-classification, or even to selected members of a particular buyer-classification, by the simple technique of selling "direct" to these while selling only through "middlemen" to the others. For example, respondents sell their skewers "direct" to certain large meat packers (such as Armour) who are "users" (consumers). Respondents also sell skewers to distributors, or wholesalers, who, in turn, resell to "users" (smaller meat packers). Since the large direct-buying "users" are not "engaged in the same line of commerce" as the distributors, the order, if so qualified, would not prohibit respondents from capturing and holding specific "user" accounts (e.g., Armour) with a price that was, say, 50% lower than the price charged the distributors, notwithstanding the fact that this might destroy the remaining competition in the production of skewers.

There is of course the remaining factor of presumed cost savings in selling to one class of customers as compared with selling to another. This, however, is wholly taken care of by the fact that the various defenses accorded to sellers by the Act—including cost justification under Section 2(a) and the right to meet competition under Section 2(b)—"are necessarily implicit in every order issued under the authority of the Act, just as if the order set them out *in extenso*." *Federal Trade Commission* v. *Ruberoid Co.*, *supra*, at 476. No matter how we word our order, therefore, these respondents could always vary their prices as between a "user" and a distributor, or, for that matter, between one "user" and another, where the differential was based on genuine cost differences recognized by the statute, or where it was necessary in order to meet a lower price offered to a particular buyer by one of their competitors.

Further, we regard as unnecessary and undesirable the additional qualification included in the emphasized portion of the examiner's order quoted above, *i.e.*, the part which prohibits price discriminations only "where such lower price undercuts the price at which the said purchaser charged the lower price may purchase said products of like grade and quality from another seller." This language was proposed by the Commission, and accepted by the court, in *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 714 [6 S. & D. 260] (4th Cir. 1957), to meet an objection that an order not so qualified would have the effect of putting that respondent's "prices in a strait jacket throughout the country, so that it may not vary them in various localities even though no discrimination may be involved." *Id.*, 719.

After careful consideration of all the factors involved, we are of the opinion that the qualification in question is wholly unnecessary to preserve any legitimate interests of these respondents. Indeed, we think it permits results not compatible with the purposes of the statute.

As we have noted above, and as the court itself noted in *Maryland Baking Co.*, *supra*, at 718–719, the right to discriminate in order to meet lower competitive prices is implicit in all price discrimination orders. Therefore, insofar as the language in question purports to preserve to respondents this right, it is entirely superfluous. But it gives more than Section 2(b) affords, in that it prohibits only those discriminations that "undercut" the price at which the favored customer "may purchase" from other sellers. This phraseology leaves uncertain the very practice we have found unlawful in the clothespin aspect of the instant case.

As we discussed above in considerable detail, we construe Section 2(b) as protecting customer-by-customer, but not areawide, meeting of competition. We have held that, while respondents would have been within the protection of Section 2(b) if they had merely made an equally low "counteroffer" to three specific buyers in the Pittsburgh market area who had received a 10% lower price from a competitor, they went outside the scope of that defense when they extended that price to 17 other customers, none of whom had received such an offer from any of respondents' competitors. In so ruling we rejected respondents' argument that the competitor's sales to the three customers at the lower price made it automatically "available" to every other buyer located in the Pittsburgh area. Yet, if we now prohibit only those discriminations that undercut the price at which the favored buyers "may purchase" from a competitor of respondents, it would doubtless be contended that a single competitive sale at a lower price in any given market area would thereby establish its "availability" to the hundreds of other buyers in that area (*i.e.*, that all of those other buyers "may purchase" at the lower price). This interpretation, of course, would ignore the fact that those other buyers can only purchase at that price *if* they learn of its existence; *if* the competitor in question is willing to sell to all would-be buyers at the lower price; and *if* that competitor is physically large enough to supply the requirements of all such would-be purchasers. Hence we would regard this interpretation as erroneous. But in the interest of precision, we think the order should be corrected to remove all uncertainty.

For the foregoing reasons, paragraph 1 of the order entered by the hearing examiner will be amended to eliminate these qualifications. As amended, the order will prohibit respondents from selling their woodenware products to any purchaser at a price which is higher than the price charged any other purchaser "where respondents, at the time, are selling in two or more trading areas and in the trading area in which such products are sold at the lower price are in competition with any other seller who then and thereafter enjoyed a substantially smaller volume of sales of woodenware products than the total volume of sales enjoyed by respondents." Since the object of a primary line order is to assure Section 2(a)'s "protection to competitors of the discriminating seller," *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, *supra*, 363 U.S. at 546 [6 S. & D. 817], any further qualification would be inconsistent with the public interest inherent in achieving that "independent and important goal" of the statute. *Ibid.* This order will not, as feared by respondents, require them to charge a single, uniform price throughout the country. Price variations would not violate the order if (1) respondents had no weaker competitors in the area where the favored buyer was located; (2) the lower price could be cost justified; or (3) the lower price had been offered to the favored customer in good faith for the purpose of meeting an equally low price offered to that particular purchaser by a competitor of respondents.

There is merit, however, in respondents' further contention that the order entered by the hearing examiner goes too far in prohibiting discriminations involving the likelihood of secondary line injury. Since the violations found herein are predicated solely upon primary line injury, with an express finding that the proof was inadequate to show a probability of injury at the secondary level, we are constrained to hold that those prohibitions go beyond the scope of the record, and must be stricken.

The initial decision and order as supplemented and modified to conform to the views expressed in this opinion will be adopted as the decision of the Commission.

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

Dissenting Opinion

JANUARY 3, 1963

By Elman, *Commissioner:*

Although the record in this proceeding might support a finding that respondents engaged in predatory pricing practices, in violation of Section 5 of the Federal Trade Commission Act, the complaint was drawn not under that provision but under Section 2(a) of the Robinson-Patman Act. The majority, apparently reluctant to forego an order against such respondents, reaches broad conclusions of violation of Section 2(a) which the record does not support. The opinion fails to mention substantial evidence of record that contradicts in large part its findings of probable competitive injury caused by respondents' price differentials, and reflects an extreme interpretation of Section 2(a) that could not have been intended by Congress and is not likely to withstand judicial review.

"Throwing the book" at a respondent who has engaged in reprehensible conduct is a temptation to be guarded against. For it involves the danger that in the process the book itself may be damaged. One may hope that the true meaning and significance of the opinion in this case, concurred in by only two members of the Commission, will not be misunderstood. I trust, also, that the order here, which restricts respondents' freedom to compete to a wholly unjustifiable degree, will not be regarded as a precedent for future "primary-line injury" orders.

Opinion on Respondents' Exceptions to the Proposed Final Order

MARCH 18, 1963

By DIXON, *Commissioner:*

On January 3, 1963, the Commission, with one member dissenting, concluded that respondents had engaged in discriminatory pricing in violation of Section 2(a) of the amended Clayton Act and issued a proposed order to cease and desist. Pursuant to the Commission's Rule 4.22(c), respondents have filed their objections to that proposed order and counsel supporting the complaint has filed his reply thereto.

Our proposed order would prohibit respondents from discriminating in the price of goods of like grade and quality:

> By selling woodenware products to any purchaser at a price which is higher than the price charged any other purchaser where respondents, at the time, are selling in two or more trading areas and in the trading area in which such products are sold at the lower price are in competition with any other seller who then and thereafter enjoyed a substantially smaller volume of sales of woodenware products than the total volume of sales enjoyed by respondents.

Respondents contend that this order is "vague and ambiguous" and that it is "unduly restrictive." On the first point, they point to four terms they find vague: (1) "trading area," (2) "competition," (3) "then and thereafter," and (4) "substantially." Their second contention—that the order is "unduly restrictive"—is based principally on their argument that it requires them to sell their products at a single, uniform price throughout the United States.

The latter point was specifically dealt with in our opinion: "This order will not, as feared by respondents, require them to charge a single, uniform price throughout the country. Price variations would not violate the order if (1) respondents had no weaker competitors in the area where the favored buyer was located; (2) the lower price could be cost justified; or (3) the lower price had been offered to the favored customer in good faith for the purpose of meeting an equally low price offered to that particular purchaser by a competitor of respondents." (P. 923.)

Respondents answer, however, that neither of these possibilities can be of any practical benefit to them. As to the second and third—the right to discriminate where the differential can be "cost justified" under Section 2(a), and the right to discriminate in order to "meet competition" under Section 2(b)—respondents argue that, because of the practical difficulties in proving them, they are more illusory than real. To this contention we can only say that, even if we agreed with it (which we most emphatically do not), the Congress, and not this Commission, would be the appropriate body to hear it. In fact, these defenses afford a wide area of flexibility in pricing.

Respondents' contention that they can derive no practical benefit from that part of our order which prohibits discriminations only in those areas where they have "weaker" competitors is actually based on their misinterpretation of the terms mentioned above. Hence their objections to the alleged restrictiveness of the order and to its "ambiguity" can be dealt with together.

The term "trading area" refers, of course, to a geographical market for a particular product, a concept that is so well known in antitrust and trade law as to need no discussion. Respondents apparently had no difficulty in marking out the boundaries between their Pittsburgh and Buffalo clothespin "trading areas" when they virtually drove a smaller manufacturer of clothespins out of Pittsburgh with a discriminatory price that was 10% lower to Pittsburgh buyers than to their Buffalo customers.

Similarly, the word "competition," as used in the order, refers to competition between respondents and another seller of the same woodenware product in the same geographical "trading area." Respondents would not, as they fear, be prohibited from selling toothpicks in Kokomo at a lower price than they charge in New York City if, in fact, there is no one else who sells toothpicks in Kokomo in competition with them. A firm selling some other woodenware product in that trading area obviously would not be a "competitor" within the meaning of this order. In other words, it is designed to prohibit respondents from selling a particular woodenware product at two different prices in a particular geographical trading area, or in two different trading areas, when, in the trading area where the discrimination occurred, or where the sale at the lower price was made, there is another seller who, in addition to another qualification discussed below, competes with respondents in the sale of that product in that trading area.

Respondents' objections to the terms "then and thereafter" and "substantially" are particularly misplaced. Here the order has been carefully tailored to fit the particular facts of the case. Respondents, having demonstrated a capacity and an inclination to use low, discriminatory prices to force smaller competitors into bankruptcy or to persuade them that withdrawal from a particular market is the better part of valor, are simply being prohibited from continuing that very same practice. We could have accomplished this surely and effectively by simply prohibiting them from "discriminating in price by selling [such product] to any purchaser at prices lower than those granted other purchasers where respondent[s], in the sale of such product, [are] in competition with any other "seller." *Page Dairy Co.*, 50 F.T.C. 395, 399 (1953). Under such an order, the only question, once a discrimination has been shown, is whether or not there was a competitor—any competitor—on the scene to be hurt. The prior violation of the Act, including both the discrimination *and* the actual or probable injury to competing sellers, raises a presumption that a violation of the order, *i.e.*, a repetition of the offense, will have the same injurious effect on competing sellers. By the use of the words respondents now object to, we have departed from this more certain method of preventing future violations, and have embarked on something of an experiment to see if we can reach the desired end while interfering as little as possible with respondents' price "flexibility." Thus our order, rather than simply assuming that any competitor on the scene of a price discrimination will be injured, attempts to exclude from its coverage those competitive situations in which the probability of such injury does not appear too great, and to focus it, instead, solely on those situations where injury is almost certain. Accordingly, respondents are prohibited from discriminating in price only where they "are in competition with any other seller who then and thereafter enjoyed a substantially smaller volume of sales of woodenware products than the total volume of sales enjoyed by respondents."

This qualification seems to us to be both clear and fair. The competitor whom respondents must consider before they grant a discriminatory price is to be identified by the simplest criteria we know—total sales volumes in woodenware products. These respondents, as manufacturers of some 25 woodenware products, could not fail to know which members of their industry are "substantially" smaller than themselves, and which are their equal or larger. The word "substantially" is not a novel term in the antitrust field. It is used here, as it generally is, to avoid disputes over mathematical niceties. We have no hesitation in saying, however, in response to respondents' direct query, that we would consider a 10% volume superiority on respondents' part a substantial edge in strength and one that would thus make the order applicable.

Volume of sales in all woodenware products, rather than in sales of the specific product involved in a discriminatory sale, or in sales of that particular product in a specific trading area, was chosen as the criteria of competitive strength because of the peculiar facts in the case. In selling at least one of their woodenware products at prices that were not only discriminatory but below cost, respondents demonstrated a willingness to use profits derived from the sale of their other 24 woodenware products to finance a discriminatory "price war" in a single product. Hence a small manufacturer who made only one product, although it might have, say, more than 50% of the market for that product in a single trading area (or even nationally), would nonetheless be unequipped to resist a prolonged, discriminatory seige by respondents.

Nor does the term "then and thereafter" have any sinister meaning. On the contrary, it is designed as a benefit to respondents, not as an added stringency. In order to violate the order, they must charge a lower price to a buyer in a trading area where they have a competitor who is not only "then" (at or about the time of the discriminatory sale) smaller than respondents (in terms of total woodenware sales volume) but who, in the interval of time between the discrimination and the bringing of enforcement proceedings by the Commission ("thereafter") *remained* smaller than respondents. If that competitior should happen to wax prosperous during that interval and come to equal or surpass respondents in sales volume, the order assumes that the discrimination caused no competitive harm.

Respondents' suggestion that the instant order is punitive in nature—that it attempts to destroy them in retaliation for their destruction of one of their competitors—is unworthy of discussion.

Respondents' objections to the proposed order issued with the decision of the Commission in this proceeding on January 3, 1963, are rejected. It will be adopted as the final order of the Commission.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter, and Commissioner Elman dissented.

Final Order

Pursuant to the Commission's order of January 3, 1963, respondents having filed objections to the proposed order to cease and desist in this proceeding, a proposed alternative order, and reasons in support thereof; and counsel in support of the complaint having filed a reply in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having determined that respondents' objections to the proposed final order are without merit and that said order should be entered as the final order of the Commission:

It is ordered, That respondent Forster Mfg. Co., Inc., a corporation, and its officers and the individual respondent Theodore R. Hodgkins, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution in commerce of woodenware products, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality:

> By selling woodenware products to any purchaser at a price which is higher than the price charged any other purchaser where respondents, at the time, are selling in two or more trading areas and in the trading area in which such products are sold at the lower price are in competition with any other seller who then and thereafter enjoyed a substantially smaller volume of sales of woodenware products than the total volume of sales enjoyed by respondents.

It is further ordered, That the respondents' objections to the proposed order be, and they hereby are, denied.

It is further ordered, That the hearing examiner's initial decision, as supplemented and modified by the Commission's opinion of January 3, 1963, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Forster Mfg. Co., Inc., and Theodore R. Hodgkins, 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 set forth herein.

By the Commission, Commissioner Anderson not participating for the reason that he did not hear oral argument, Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office, and Commissioner Elman dissenting.