

Syllabus

IN THE MATTER OF

BADGER-BRODHEAD CHEESE COMPANY, KRAFT-PHENIX CHEESE CORPORATION, NATIONAL DAIRY PRODUCTS CORPORATION, THE BORDEN COMPANY, J. S. HOFFMAN AND COMPANY, AND TRIANGLE CHEESE COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 4071. Complaint, Mar. 23, 1940—Decision, Oct. 1, 1940

Where three corporations which were engaged in purchase, as sole source of supply for the controlling and parent corporations, of Swiss and Limburger cheese in the Monroe area of the State of Wisconsin, source of substantially more than half of all such cheese produced in the United States, and in transporting, grading, inspecting, sorting, curing, selling, and distributing such products, and which, as dealer-purchasers of the output of some 200 of the 250 chiefly farmer-owned cheese factories in said area, constituted, along with such other relatively small dealer-purchasers in market in question, sole marketing mediums or outlets through which such factories could offer and dispose of their said product, and, prior to and but for acts and practices below set forth, in competition with one another in purchase in said area of said product for processing, packing, inspection, grading, sorting, and curing for subsequent sale to and through their principals, without State largely, and sale and distribution by latter in competition with one another, except as hindered by acts and practices herein;

Acting in response to situation first arising out of low price prevailing for cheeses in question and producers' dissatisfaction therewith, and intervention of State Department of Agriculture and suggestion for periodical meetings of dealer-purchasers and producers in area in question, and directed to securing for latter fair price for their said product—

Entered into and thereafter carried out an understanding, agreement, and combination with intent and effect of restricting and restraining competition in purchase of Swiss and Limburger cheese made and produced by such factories in said area, and, through such restricted and restrained competition, of suppressing and eliminating competition in sale of such cheese in trade and commerce between and among the several States and in the District of Columbia; and in pursuance of said agreement, etc., and acting for and in behalf of themselves and their said respective principals and parent companies—

(1) Agreed to and did hold monthly meetings sponsored by and under the supervision of the Department of Agriculture of said State, and over which representative of said department presided, to afford, in response to conferences called by said department and attended by its representatives and those of producers and dealers, and resulting interchange and discussion, opportunity for attempt to reach agreement as to fair prices to be paid by the dealers for cheese produced and made in factories in question, and

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- agreed to and did there fix, along with other representatives of other dealers and those of producers in said area, prices which would be and were paid to cheese factories therein for the Swiss and Limburger cheese which they produced and made;
- (2) Acted, during such meetings and in furtherance of aforesaid understanding, agreement, and combination, and along with representatives of other dealers in said area, as a unit in offering representatives of the factories the prices which they, the dealers, would pay on cheese produced and made by such factories;
 - (3) Held, as aforesaid indicated, and prior to such meetings, separate meetings among themselves at which they agreed upon the initial price which they would offer at such meetings with representatives of the producers;
 - (4) Held, also, separate meetings among themselves in the course of their said meetings with representatives of producers, at which they agreed to and did set upper limits as to the prices which they would agree to pay the cheese factories at their meetings with the producers' representatives; and
 - (5) Acceded in very few instances at such meetings to request of producers' representatives for increased prices for their Swiss and Limburger cheeses, but, in such instances, required such representatives either to accept the lower prices offered by the dealers' representatives for said products produced by factories in question in said Monroe area, or to receive same prices therefor as were paid by dealers for said cheese for preceding month;

With result that capacity, tendency, and effect of such understanding, agreement, and combination, and acts, practices, and things done pursuant thereto by said dealer-purchasers and their principals and parent companies, were to materially affect and influence prices at which Swiss and Limburger cheese were sold in commerce as aforesaid, influence at least in part prices at which some other dairy products were sold and distributed in such commerce, unreasonably lessen, eliminate, restrict, and hinder competition in purchase of said cheeses produced and made by cheese factories in Monroe area, and unreasonably lessen and restrict competition in resale thereof to purchasers in the several States and in said District:

Held, That such acts and practices of said subsidiary dealer-purchasers and their principals and parent companies, for which they acted as aforesaid, under the circumstances set forth, were all to the prejudice of the public and constituted unfair methods of competition.

Mr. Fletcher G. Cohn for the Commission.

Nicholson, Snyder, Chadwell & Fagerburg, of Chicago, Ill., for Badger-Brodhead Cheese Co. and Kraft-Phenix Cheese Corp.

Mr. Robert S. Gordon and *Mr. W. L. Keitt*, of New York City, for National Dairy Products Corp.

Milbank, Tweed & Hope, of New York City, for The Borden Co.

Levinson, Becker, Peebles & Swiren, of Chicago, Ill., for J. S. Hoffman & Co. and Triangle Cheese Co.

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 Badger-Brodhead Cheese Co., Kraft-Phenix Cheese Corp., National Dairy Products Corp., The Borden Co., J. S. Hoffman & Co., and Triangle Cheese Co., hereinafter referred to as respondents, have been, and are now using unfair methods of competition in commerce as "commerce" is defined by 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 Badger-Brodhead Cheese Co. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office and place of business located in Monroe, Wis. In the course of its business, it is engaged in the buying, and then the selling and distributing of Swiss, Brick, Limburger, and Munster cheese (hereinafter referred to as "foreign type cheese"), which are manufactured in cheese factories located in the State of Wisconsin.

Respondent Kraft-Phenix Cheese Corp. is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 500 Peshtigo Court, Chicago, Ill. It owns all the stock, except the qualifying shares, in respondent Badger-Brodhead Cheese Co., and directs and controls the business policies of its said subsidiary, Badger-Brodhead Cheese Co.

Respondent National Dairy Products Corp. is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at 120 Broadway, New York, N. Y. It has as one of its solely owned subsidiaries, respondent Kraft-Phenix Cheese Corp., and directs and controls the business policies of said subsidiary.

Respondent The Borden Co., is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business being located at 350 Madison Avenue, New York, N. Y. As part of its business it operates a division known as Carl Marty & Co., which division is located in Monroe, Wis., and is engaged in the business of buying and then selling and distributing foreign types of cheese, which are manufactured in the State of Wisconsin.

Respondent J. S. Hoffman & Co. is a corporation organized and existing under the laws of the State of Illinois, with its principal

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office and place of business being located at 320 West Illinois Street, Chicago, Ill. It is a dealer in American and foreign type cheese; it owns all the stock in respondent Triangle Cheese Co., and directs and controls the business policies of said respondent.

Respondent Triangle Cheese Co. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office and place of business being located in Monroe, Wis. It buys foreign types of cheese manufactured in Wisconsin, which cheese is then sold and distributed by its parent corporation, respondent J. S. Hoffman & Co.

PAR. 2. Of the four varieties of foreign type cheese, Swiss and Brick constitute the bulk of the production. Approximately two-thirds of all the Swiss cheese produced in the United States is made in the State of Wisconsin, with approximately 90 percent of that amount being produced in an area comprising four southern counties of Wisconsin, i. e., Green, Lafayette, Dane, and Iowa, with the city of Monroe located in Green County, Wis., being the center of this foreign type cheese area (said area is hereinafter referred to as the "Monroe area"). There are located in said Monroe area approximately 250 factories making Swiss cheese, 90 percent of which are owned by the farmers in this locality on a cooperative basis, with the farmers generally being patrons of the factories in which they are interested. The manager of each factory is styled the cheese maker. About one-third of the factories operate on a year around basis with the rest operating only during the flush season, shutting down during the winter months.

The average cheese factory handles a comparatively small amount of cheese; it has no facilities for storing cheese for an appreciable length of time; and it has little, if any, financial reserve.

The owners of a given cheese factory—generally the farmer patron, choose one of their number as a business representative who sells the cheese produced at the factory to the dealers in cheese, which dealers are either located, or have representatives, in the Monroe area. There is no marketing agency for the selling of the cheese produced by the factories other than through these cheese dealers.

PAR. 3. Until 1921, there were many cheese dealers who were actively competing for the output of the various cheese factories in the Monroe area. However, in the last 15 years, there has been a gradual consolidation, of these cheese dealers and a centralized control in the sale of the output of the various factories.

In 1911, the first merger of any consequence of dealers in the Monroe area took place, when seven independent cheese dealers, located in said area, merged and organized the Badger Cheese Co., a Wisconsin cor-

poration. In 1920, Kraft Cheese Co. bought 51 percent of the stock in this concern and in 1925 became the full owner. In 1926, Phenix Cheese Co. began operating in the Monroe area but shortly thereafter the Kraft and Phenix interests merged as the respondent Kraft-Phenix Cheese Corp. In 1928 this respondent bought the stock and assets of the Brodhead Cheese & Cold Storage Co., which was an active cheese dealer in the Monroe area, and formed a new corporation, respondent Badger-Brodhead Cheese Co., which was a merger of the Badger Cheese Co., which had been an active cheese buyer in the Monroe area and the aforementioned Brodhead Cheese & Cold Storage Co. Respondent Badger-Brodhead Cheese Co. is one of the largest, if not the largest, buyer of foreign type cheese in the United States. In 1929, respondent Kraft-Phenix Cheese Corp. secured the business of Charles Zweifel Co., Brodhead, Wis., which was then one of the largest cheese dealers in the Monroe area.

In 1938, Carl Marty & Co. of Monroe, Wis., a large cheese buyer of foreign type cheese in the Monroe area, purchased the assets and good will of a partnership known as Ackerman & Abplanalp, which was the third largest buyer of foreign type cheese in the Monroe area. Then on January 1, 1939, respondent The Borden Co., which theretofore had not been represented in this territory, purchased the stock and assets of the said Carl Marty & Co., which next to respondent Badger-Brodhead Cheese Co., was the largest cheese dealer in the Monroe area. Thus, respondents Kraft-Phenix Cheese Corp., acting for and on behalf of respondent National Dairy Products Corp., of which it is a subsidiary, and respondent The Borden Co., have gradually, by means of mergers and purchases eliminated practically all of the independent cheese dealers in the Monroe area.

Approximately 75 percent of the foreign type cheese produced in Wisconsin is purchased by the respondents, all dealers in this type of cheese, said purchases being made either directly by said respondents, or through their subsidiaries. None of the dealers in foreign type of cheese own any factories, but they purchase the output of certain cheese factories; out of the approximately 250 cheese factories making foreign types of cheese in the aforementioned Monroe area, respondent Badger-Brodhead Cheese Co., acting for and on behalf of respondents, Kraft-Phenix Cheese Corp. and National Dairy Products Corp., buys the annual output of from 40 to 60 of the cheese factories in said area; respondent The Borden Co., through its division, Carl Marty & Co., buys on an average the annual output of 75 of these factories; and respondents, J. S. Hoffman & Co., with its subsidiary, Triangle Cheese Co., annually purchase the output of approximately 60 of these

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factories. Consequently the respondents herein purchase the annual output of approximately 200 of the 250 cheese factories located in the Monroe area.

PAR. 4. All the respondents, either directly or through their subsidiaries, assemble the foreign types of cheese, which they purchase from the cheese factories in the Monroe area, at their various warehouses located in the State of Wisconsin, and in the course and conduct of their business, they, or their subsidiaries, which they control and direct, ship, or cause to be shipped, said cheese from these warehouses located in the State of Wisconsin, to purchasers of the cheese located in States of the United States other than the State of Wisconsin, and in the District of Columbia. The said cheese, which respondents purchase from the cheese factories in the Monroe area, does not come to rest in the State of Wisconsin, but is sold and distributed either directly or indirectly, by the respondents or their subsidiaries, in commerce between and among the various States of the United States and in the District of Columbia, and the purchasers of said cheese by the respondents or their subsidiaries, from the cheese factories in the State of Wisconsin are an integral part of the interstate trade in commerce of said cheese. Respondents have maintained, and still do maintain, a course of trade, in foreign types of cheese, in commerce between and among the several States of the United States and in the District of Columbia.

PAR. 5. Respondents are in competition with one another in the purchase of foreign types of cheese from the cheese factories which manufacture same in the aforementioned Monroe area, and in the sale of said cheese in commerce between and among the several States of the United States and in the District of Columbia, except insofar as said competition has been hindered, lessened, restrained, or restricted or potential competition among them forestalled by the unfair practices and methods hereinafter set forth.

PAR. 6. The prices at which respondents, acting directly or through their subsidiaries, sell and distribute the aforesaid foreign types of cheese in commerce between and among the several States of the United States and in the District of Columbia, are fixed and determined by, and dependent upon, the prices at which the respondents purchase said cheese from the cheese factories in the aforementioned Monroe area.

PAR. 7. In 1938, respondents, Badger-Brodhead Cheese Co., acting for itself and also for and on behalf of respondents, Kraft-Phenix Cheese Corp. and National Dairy Products Corp., J. S. Hoffman & Co., acting both for itself and its subsidiary, Triangle Cheese Co., and Carl Marty & Co., acting for and on behalf of respondent The

Borden Co., which through its later purchase of the said Carl Marty & Co., did ratify and affirm the actions of the said Carl Marty & Co., entered into, and thereafter carried out, an understanding, agreement, combination, and conspiracy, for the purpose and with the intent and effect of restricting and restraining competition in the purchase of foreign types of cheese, and of monopolizing, and suppressing and eliminating competition in the sale of such cheese in trade and commerce, between and among the several States of the United States and in the District of Columbia.

PAR. 8. Pursuant to this understanding, agreement, combination, and conspiracy, entered into by and between the respondents, and in furtherance thereof, said respondents, among other acts and things did:

1. Agree to fix, and did fix the prices which they would pay to the cheese factories in the Monroe area for the foreign types of cheese produced by said factories.

2. Agree to holding monthly meetings in conjunction with representatives of the cheese factories in the Monroe area, at which they and said representatives of the cheese factories, would fix the prices to be paid to the cheese factories in the Monroe area for foreign types of cheese produced by said factories.

3. Hold, and since October 27, 1938, have held, such monthly meetings, at which the prices to be paid, and which were paid, for said cheese moving into the warehouses of said respondents were fixed, determined, and established.

4. Have their representatives hold separate meetings among themselves prior to the meeting of said representatives with the representatives of the cheese factories; at these meetings among the representatives of the respondents, the said representatives set the upper limits as to prices they would agree to pay to the cheese factories in their meetings with the representatives of said cheese factories.

PAR. 9. Each of the respondents, at the times mentioned herein, acted in concert with one or more of the other representatives in doing and performing the acts and things hereinabove alleged in furtherance of the understanding, agreement, combination, and conspiracy hereinbefore set forth.

PAR. 10. The capacity, tendency, and effect of said understanding, agreement, combination, and conspiracy and the acts and things done by the respondents pursuant thereto, are, and have been:

1. To control the prices at which foreign types of cheese are sold in commerce between and among the various States of the United States and the District of Columbia.

2. To determine, at least in part, the prices at which dairy products, other than foreign types of cheese, are sold and distributed in said commerce.

3. To monopolize in the the respondents the entire supply of foreign types of cheese, which are purchased by the respondents for the purpose of selling and distributing the same in said commerce.

4. To unreasonably lessen, eliminate, restrict, stifle, hinder, and suppress competition in the purchase of foreign types of cheese from the cheese factories in the aforementioned Monroe area.

5. To unreasonably lessen, eliminate, restrict, stifle, hinder, and suppress competition in the resale of the foreign types of cheese, purchased by the respondents from the cheese factories in the Monroe area, to the purchasers thereof located in the several States of the United States and in the District of Columbia.

PAR. 11. The understanding, agreement, combination, and conspiracy of the respondents, and the acts and things done by said respondents, thereunder and pursuant thereto, as above alleged, are all to the prejudice of the public, and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 23d day of March 1940, issued and served its complaint in this proceeding upon respondents named in the caption hereof, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. Answers were filed by all of the respondents to this complaint. Thereafter, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts signed and executed by all of the respondents herein and W. T. Kelley, chief counsel for the Federal Trade Commission, subject to the approval of the Commission, may be taken as the facts of this proceeding and in lieu of testimony in support of the charges stated in the complaint, or in opposition thereto, and that the said Commission may proceed upon said statement of facts to make its report, stating its findings as to the facts and its conclusion based thereon, and enter its order disposing of the proceeding without the presentation of argument, the filing of briefs, or the filing of a report upon the evidence by a trial examiner. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answers, and stipulation, said stipulation having been approved, accepted, and filed, and the Com-

mission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Badger-Brodhead Cheese Co. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office and place of business located in Monroe, Wis. In the course of its business, it is engaged in buying, transporting, grading, inspecting, sorting, curing, selling, and distributing Swiss and Limburger cheese manufactured in cheese factories in the State of Wisconsin.

Respondent Kraft-Phenix Cheese Corporation is now named Kraft Cheese Co., and will be so designated hereinafter. It is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 500 Peshigo Court, Chicago, Ill. It owns all of the stock, except the qualifying shares, in the respondent Badger-Brodhead Cheese Co., which respondent, in purchasing Swiss and Limburger cheese manufactured in the Monroe area in the State of Wisconsin, which area is hereinafter defined in paragraph 3, acts as the sole source of supply of said cheese for respondent Kraft Cheese Co., a substantial amount of the cheese thus purchased by respondent Badger-Brodhead Cheese Co. being sold and distributed by respondent Kraft Cheese Co. Respondent Badger-Brodhead Cheese Co., in purchasing said Swiss and Limburger cheese manufactured in the Monroe area of the State of Wisconsin, acts as the agent for the respondent Kraft Cheese Co., so that respondent Kraft Cheese Co. is legally responsible for the acts and practices of said respondent Badger-Brodhead Cheese Co., as hereinafter found, in purchasing said cheese.

Respondent The Borden Co. is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, New York, N. Y., and as part of its business, it operates a division known as Lakeshire-Marty Division of the Borden Co. (referred to in the complaint as Carl Marty & Co.), located in Monroe, Wis. In the course of its business it is engaged in buying, transporting, grading, inspecting, sorting, curing, selling, and distributing Swiss and Limburger cheese manufactured in cheese factories located in the State of Wisconsin.

Respondent J. S. Hoffman Co. (referred to in the complaint as J. S. Hoffman & Co.), is a corporation organized and existing under

the laws of the State of Illinois, with its principal office and place of business located at 322 West Illinois Street, Chicago, Ill.; it owns all the stock in respondent Triangle Cheese Co.

Respondent Triangle Cheese Co. (referred to in the complaint as Triangle Cheese Co.), is a corporation organized under the laws of the State of Wisconsin, with its office and principal place of business located in Monroe, Wis. Said respondent is engaged in the business of buying, transporting, grading, inspecting, sorting, curing, and selling the Swiss and Limburger cheese manufactured in the cheese factories of the State of Wisconsin, and in the purchasing of said cheese, acts as the sole source of supply of same for respondent J. S. Hoffman Co.; all of said cheese, thus purchased by respondent Triangle Cheese Co., being sold and distributed by respondent J. S. Hoffman Co. On or about June 1, 1940, respondent Triangle Cheese Co. ceased purchasing Limburger cheese.

Respondent Triangle Cheese Co., in purchasing said Swiss and Limburger cheese manufactured by the factories in the Monroe area of the State of Wisconsin, acts as the agent for respondent J. S. Hoffman Co., so that said respondent J. S. Hoffman Co. is legally responsible for the acts and practices of respondent Triangle Cheese Co. as hereinafter found, in purchasing said cheese.

Respondent National Dairy Products Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 75 East Forty-fifth Street, New York, N. Y. It has as one of its solely owned subsidiaries respondent Kraft Cheese Co.

PAR. 2. Respondent National Dairy Products Corporation did not, directly or indirectly, engage in any of the acts or practices of the other respondents named in the caption herein as hereinafter found.

PAR. 3. Approximately two-thirds of all the Swiss cheese produced in the United States is made in the State of Wisconsin, with approximately 90 percent of the amount being produced in an area comprising four southern counties of Wisconsin, i. e., Green, Lafayette, Dane, and Iowa, with the city of Monroe, located in Green County, Wis., being the center of the area producing these cheeses, which area is referred to in this stipulation as the "Monroe area."

There are located in said Monroe area approximately 250 factories making and producing Swiss cheese, 90 percent of which are owned by the farmers in this locality on a cooperative basis, with the farmers generally being patrons of the factories in which they are interested. There is selected by said patrons, a manager of each factory, who is styled the cheese-maker. About one-third of the factories operate on a year-round basis, with the rest operating only during the flush

season and shutting down during the winter months. The average cheese factory handles a comparatively small amount of cheese; it has no facilities for storing cheese for any appreciable length of time; and it has little, if any, financial reserve.

The owners of a given cheese factory—generally the farmer patrons—choose one of their number as a business representative who sells the cheese produced at the factory to dealers in cheese, which dealers are either located, or have representatives, in the Monroe area.

Approximately 60 percent of the Limburger cheese produced in the United States is manufactured by cheese factories in the Monroe area, and the greater proportion of said cheese is purchased by respondents, Badger-Brodhead Cheese Co. and The Borden Co.; prior to on or about June 1, 1940, respondent Triangle Cheese Co. likewise purchased Limburger cheese in this area.

Each cheese factory makes but one type of cheese.

There is no marketing agency for either the Swiss or the Limburger cheese manufactured and produced by the factories of the Monroe area, other than through dealers in said cheese.

PAR. 4. In the year 1911, seven independent cheese dealers located in the Monroe area, organized the Badger Cheese Co., a Wisconsin corporation. In the year 1924, Kraft Cheese Co., a predecessor of the respondent Kraft-Phenix Cheese Corporation, bought 51 percent of the common stock of said Badger Cheese Co., and became the full owner of the common stock in 1928. The preferred stock of the Badger Cheese Co. remained outstanding in the hands of the general public until 1932, when it was retired. In the year 1926, Phenix Cheese Co. began operating in the Monroe area. In the year 1928, there was a merger of Kraft Cheese Co. and Phenix Cheese Co., resulting in the organization of a predecessor corporation of the respondent Kraft-Phenix Cheese Corporation. In the year 1928, said predecessor of respondent Kraft-Phenix Cheese Corporation purchased the capital stock of Brodhead Cheese & Cold Storage Co., which was then an active cheese dealer in the Monroe area. Some of the assets of the Brodhead Cheese & Cold Storage Co. were acquired by the Badger Cheese Co. from the predecessor of respondent Kraft-Phenix Cheese Corporation, and in 1929, the name of Badger Cheese Co. was changed to the present name of the respondent Badger-Brodhead Cheese Co. The latter-named respondent is one of the largest buyers of foreign type cheese in the United States. Subsequently respondent Kraft-Phenix Cheese Corporation changed its name Kraft Cheese Co.

Findings

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In 1938, Carl Marty & Co., of Monroe, Wis., a large cheese dealer in foreign type cheese in the Monroe area, purchased the assets and good will of a partnership known as Ackerman & Abplanalp, which was one of the larger buyers of foreign type cheese in the Monroe area. On or about January 1, 1939, respondent The Borden Co., which theretofore had not been represented in the Monroe area, acquired the business of Carl Marty & Co., which business, since January 1, 1939, respondent The Borden Co. has operated as a part of the Lakeshire-Marty Division of The Borden Co.

Approximately 75 percent of the Swiss and Limburger cheese manufactured and produced in Wisconsin is purchased by the respondents Badger-Brodhead Cheese Co., The Borden Co. and Triangle Cheese Co., all dealers in these types of cheese, but since January 1, 1940, Triangle Cheese Co. has discontinued purchasing Limburger cheese.

None of the dealers in Swiss and Limburger cheese, including the aforementioned respondents, own any factories, but they purchase the output of certain cheese factories; out of approximately 250 cheese factories in the Monroe area the respondent Badger-Brodhead Cheese Co. buys the annual output of from 40 to 60 of said factories; respondent The Borden Co., through its Division, Lakeshire-Marty Co., buys, on an average, the annual output of 75 of these factories; and the respondent Triangle Cheese Co. annually purchases the output of approximately 60 of these factories. Consequently, these respondents purchase the annual output of approximately 200 of the 250 Swiss cheese factories located in the Monroe area. The purchases of Swiss and Limburger cheese, manufactured and produced in this area, by the remaining dealers in the Monroe area, are relatively small.

PAR. 5. In the last 15 years there has been a gradual consolidation of the dealers in Swiss and Limburger in the Monroe area, with the resultant effect that approximately 80 percent of the Swiss cheese factories and a majority of the Limburger cheese factories located in the Monroe area have sold their output of such cheese to respondents Badger-Brodhead Cheese Co., The Borden Co., or Triangle Cheese Co.

PAR. 6. Each of the respondents, Badger-Brodhead Cheese Co., The Borden Co., and Triangle Cheese Co., assemble the Swiss and Limburger cheese which they purchase from the cheese factories, which produce and manufacture said cheeses in the Monroe area, at the respective plants of said respondents located in the State of Wisconsin. It is there graded, reinspected, sorted, and thereafter dealt with in the manner hereinafter described.

Limburger cheese is held at the factory, where it is manufactured and produced, for some 12 to 14 days after manufacture, although there is no State law requiring this to be done with respect to Limburger cheese. The cheese is manufactured in 1- and 2-pound blocks. At the end of the customary holding period, at which time the cheese is purchased by said respondents, it is wrapped at the factory in a parchment, manila, and foil wrapper, and packed tightly in large wooden boxes containing from 1 to 200 blocks of cheese, and after being so packed, is transported to said respondents' plants. The manila or wax paper is used because of the necessity of curing the cheese after wrapping in an anaerobic seal in order to secure the proper Limburger flavor and consistency. After receipt in said respondents' plants, the cheese ordinarily is held at suitable temperatures for a period required for it to reach the flavor and consistency of the more desirable grade of said cheese. The combination of temperature controls and anaerobic seal serves to promote bacteriological action, changing the character but not the content of the product. With reference to Swiss cheese, the laws of the State of Wisconsin require it to be held on curing shelves in the factories for 6 weeks in the summer and 8 weeks in the winter after manufacture. At the end of the holding period, the cheese is graded by State graders at the factories and placed in skids furnished by the respondents Badger-Brodhead Cheese Co., The Borden Co., and Triangle Cheese Co. in which it is transported from the factory to the various plants of said respondents in Wisconsin. There the cheese is again inspected, graded, and sorted according to the moisture content, grade, and condition of the cheese. The weak-bodied cheese is sorted out, and that which will improve with further curing is set aside in said respondents' plants in Wisconsin, in curing rooms for that purpose, where the eye development and flavor improve, but the texture and composition remain unchanged. The cheese is placed in the curing rooms of said respondents' plants, of varying temperatures according to the condition of the body and the size of the eyes of the cheese.

The best grade of Swiss cheese is that of a firm body, not too high in moisture content, and with fully developed eyes. Cheese of this classification is placed in curing rooms at said respondents' plants at a relatively cool temperature which arrests further development of the eyes, and causes improvement in the Swiss cheese flavor, but does not alter the texture or content thereof. The Swiss cheese which has a firm body, but relatively small eyes, is placed in curing rooms at higher temperatures according to the body and size of the eyes. This permits further eye development, along with the improvement of the flavor, but does not alter the texture or content of the cheese.

The occasional wheel of Swiss cheese with poor body and high moisture content, is subjected to a firming process by being placed in a cool temperature room for a short period, but the texture and content of the cheese is not changed.

All of the cheese held at said respondents' plants is graded, stenciled with the grade in accordance with State requirements, and is placed in tubs containing three or four wheels each, which is necessary for shipment, the cheese not being stenciled or tubbed in the factories.

More than 90 percent of the Limburger and Swiss cheese purchased by said respondents is sold by them directly, or through affiliated companies, to be shipped, and is shipped, to points outside of the State of Wisconsin. It is known by said respondents, at the time they acquire the cheese from the factories, that this substantial percentage will ultimately be shipped out of the State. No shipments of cheese are made by said respondents from their plants in Wisconsin, except as the result of sales made upon orders received by said respondents. Purchases are not made by said respondents for the purpose of filling previous orders, but in the usual course of the business of said respondents, the orders received by said respondents will require shipment of at least 90 percent of said cheese to points outside the State of Wisconsin, which fact is known by said respondents at the time of said purchases.

PAR. 7. Respondents Badger-Brodhead Cheese Co., Kraft-Cheese Co. (referred to in the complaint as Kraft-Phenix Cheese Corporation), The Borden Co., J. S. Hoffman Co. (referred to in the complaint as J. S. Hoffman & Co.), and Triangle Cheese Co., in the manner, and by the methods hereinbefore found, have maintained, and still do maintain, a course of trade in commerce between and among the several States of the United States and in the District of Columbia, of the Swiss and Limburger cheese, which was, and is, purchased by them either directly or indirectly, from the cheese factories in the Monroe area which manufacture and produce said cheese.

Respondents, Badger-Brodhead Cheese Co., The Borden Co., and Triangle Cheese Co. were and are, in competition with one another, in the purchase of Swiss and Limburger cheese from the cheese factories which manufacture and produce same in the Monroe area (however, since on or about June 1, 1940, respondent Triangle Cheese Co. has ceased to purchase Limburger cheese manufactured and produced in said factories) and respondents The Borden Co., Kraft Cheese Co. (referred to in the complaint as Kraft-Phenix Cheese Corporation), acting directly or through its subsidiary, respondent Badger-Brodhead Cheese Co., and respondent J. S. Hoffman Co. (referred to in the complaint as J. S. Hoffman & Co.), acting directly or through its subsidiary, Triangle Cheese Co., are in competition with each other in the

sale and distribution of said Swiss and Limburger cheese, manufactured and produced by the factories in the Monroe area, in commerce between and among the several States of the United States and in the District of Columbia, except insofar as said competitions have been hindered, lessened, restrained, or restricted, or potential competitions among them forestalled, by the unfair practices and methods herein-after found.

PAR. 8. The prices at which respondents Badger-Brodhead Cheese Co., Kraft Cheese Co. (referred to in the complaint, as Kraft-Phenix Cheese Corporation), The Borden Co., J. S. Hoffman Co. (referred to in the complaint as J. S. Hoffman & Co.), and Triangle Cheese Co. sell and distribute the Swiss and Limburger Cheese, manufactured and produced in the cheese factories in the Monroe area, in commerce between and among the several States of the United States and in the District of Columbia, are materially affected and influenced by the prices at which the respondents, Badger-Brodhead Cheese Co., The Borden Co., and Triangle Cheese Co. purchase said cheese from said cheese factories in the aforementioned Monroe area.

PAR. 9. In August 1938, as more fully set forth in paragraph 10 hereof, respondents Badger-Brodhead Cheese Co., acting both for itself, and also for and on behalf of respondent Kraft Cheese Co. (referred to in the complaint as Kraft-Phenix Cheese Corporation), J. S. Hoffman Co., (referred to in the complaint as J. S. Hoffman & Co.), acting both for itself and for and on behalf of respondent Triangle Cheese Co., and Carl Marty & Co., acting for and on behalf of respondent The Borden Co., which through its later purchase of the said Carl Marty & Co., did ratify and affirm the actions of the said Carl Marty & Co., entered into, and thereafter carried out, an understanding, agreement, and combination, for the purpose, and with the intent and effect of restricting and restraining competition in the purchase of the Swiss and Limburger cheese manufactured and produced by the factories in the Monroe area, and through such restricted and restrained competition, of suppressing and eliminating competition in the sale of such cheese in trade and commerce between and among the several States of the United States and in the District of Columbia.

PAR. 10. In August 1938, prices for Swiss and Limburger cheese were unusually low, resulting in the producers of same becoming very dissatisfied. Under these circumstances, an appeal was made by the producers, that is, the farmers who produce the milk used in the factories for the manufacture of such cheese, to the department of agriculture of the State of Wisconsin, for relief. Conferences were called by the said department of agriculture, and attended by representatives

of the department, of the producers and of the dealers, at which the representatives of the producers suggested that monthly meetings be held under the sponsorship of the department of agriculture of the State of Wisconsin, between representatives of the cheese factories and of the dealers, at which an attempt would be made to reach an agreement as to fair prices to be paid by the dealers for cheese produced and manufactured in the factories. The request was acquiesced in by representatives of the dealers. Beginning in October 1938, the respondents, Badger-Brodhead Cheese Co., and Triangle Cheese Co., together with other cheese dealers in the Monroe area, began attending such meetings; then in February 1939, respondent, The Borden Co., which acquired the business of Carl Marty & Co. on or about January 1, 1939, joined said dealers in sending a representative to such meetings. These meetings were sponsored by, and were held under the supervision of, the department of agriculture of the State of Wisconsin, and a representative of said department attended and presided over all such meetings. The meetings were open to the attendance of Swiss and Limburger dealers and producers in Wisconsin and were attended by many of them. At these meetings, the representatives of the respondents, Badger-Brodhead Cheese Co., The Borden Co., and Triangle Cheese Co., and of the other Swiss and Limburger dealers and the representatives of the producers, interchanged market information, discussed and agreed upon the prices to be paid for Swiss and Limburger cheese at the factories according to the grade. These prices were then generally charged by the producers and paid by the dealers in the Monroe area, including respondents Badger-Brodhead Cheese Co., The Borden Co., and Triangle Cheese Co., for the current month's Swiss and Limburger cheese.

PAR. 11. Pursuant to the agreement, understanding, and combination, hereinbefore found in paragraph 9, and as a part thereof, the said respondents Badger-Brodhead Cheese Co., acting both for itself and also for and on behalf of respondent Kraft Cheese Co. (referred to in the complaint as Kraft-Phenix Cheese Corporation), the Borden Co. and Triangle Cheese Co., acting both for itself and also for and on behalf of respondent J. S. Hoffman Co. (referred to in the complaint as J. S. Hoffman & Co.), did agree to hold and did hold, the monthly meetings, hereinbefore found in paragraph 10, and in said meetings, said respondents did agree to fix, and did fix, along with the representatives of the other dealers and those of the producers in the Monroe area, the prices which would be paid, and were paid, to the cheese factories in said area, for the Swiss and Limburger cheese produced and manufactured by said factories; also during said meetings, in furtherance of the aforefound understanding, agreement and combination, the representatives of respondents Badger-Brodhead

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Findings

Cheese Co., The Borden Co., and Triangle Cheese Co., with the representatives of the other dealers in the Monroe area, acted as a unit in offering to the representatives of the factories the prices which the dealers would pay for the cheese produced and manufactured by said factories; and furthermore, said representatives of the aforementioned respondents and those of the other dealers in the Monroe area, did, prior to their meetings with the representatives of the producers, hold separate meetings among themselves at which they agreed upon the initial prices they would offer at these meetings with the representatives of the producers, and during their meetings with said representatives of the producers, did also hold separate meetings among themselves to which they agreed to set, and did set, the upper limits as to the prices they would agree to pay the cheese factories at their meetings with the representatives of the producers; likewise, at the said meetings with the representatives of the producers, which meetings were held in the manner heretofore found in paragraph 10 the representatives of the cheese dealers, including the representatives of the respondents Badger-Brodhead Cheese Co., The Borden Co., and Triangle Cheese Co., in very few instances acceded to the request of the representatives of the producers for increased prices for Swiss and Limburger cheese, said representatives of the producers, in most instances, being required to either accept the lower prices offered by the representatives of the dealers for the Swiss and Limburger cheese produced by the cheese factories in the Monroe area, or else receive the same prices for said cheese as were paid by the dealers for said cheese for the preceding month.

PAR. 12. The capacity, tendency, and effect of the understanding, agreement, and combination hereinbefore found in paragraph 9, and the acts, practices, and things done by the respondents Badger-Brodhead Cheese Co., Kraft Cheese Co. (referred to in the complaint as Kraft-Phenix Cheese Corporation), The Borden Co., J. S. Hoffman Co. (referred to in the complaint as J. S. Hoffman & Co.), and Triangle Cheese Co. pursuant thereto, as hertofore found in paragraphs 10 and 11, have been, and are, to materially affect and influence the prices at which Swiss and Limburger cheese are sold in commerce between and among the various States of the United States and in the District of Columbia, to influence, at least in part, the prices at which some other dairy products are sold and distributed in said commerce; to unreasonably lessen, eliminate, restrict, and hinder competition in the purchase of said Swiss and Limburger cheese produced and manufactured by the cheese factories in the Monroe area; and to unreasonably lessen and restrict competition in the resale of said cheese to the purchasers thereof located in the several States of the United States and in the District of Columbia.

Order

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CONCLUSION

The aforesaid acts and practices of the respondents, Badger-Brodhead Cheese Co., Kraft Cheese Co. (referred to in the complaint as Kraft-Phenix Cheese Corporation, the Borden Co., J. S. Hoffman Co. (referred to in the complaint as J. S. Hoffman & Co.), and Triangle Cheese Co., as hereinbefore found, are all to the prejudice of the public and constitute unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of the respondents, and a stipulation as to the facts entered into between the respondents herein and W. T. Kelley, chief counsel for the Commission, which provides, among other things, that without further evidence or other intervening procedure, the Commission may issue and serve upon respondents herein findings as to the facts and conclusion based thereon and an order disposing of the proceeding, and the Commission having made its findings as to the facts and conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Badger-Brodhead Cheese Co., a corporation, Kraft Cheese Co. (referred to in the complaint as Kraft-Phenix Cheese Corporation), a corporation, The Borden Co., a corporation, J. S. Hoffman Co., (referred to in the complaint as J. S. Hoffman & Co.), a corporation, and Triangle Cheese Co. (referred to in the complaint as Triangle Cheese Co.), a corporation, and their respective officers, directors, representatives, agents, and employees, together with the successors or assigns of each of said respondents, directly, indirectly, through any corporate or other device or through or by means of any wholly or partially owned subsidiary, in connection with the offering to purchase or the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of Swiss or Limburger cheese, which is sold, or offered for sale, by the producers or manufacturers thereof or by an agent or representative of such a producer or manufacturer, forthwith cease and desist from fixing or maintaining, or attempting to fix or maintain, pursuant to agreement, understanding, or combination between or among themselves, or between or among any two or more of them, or between or among any one or more of them and any other competing corporation or corporations or any compet-

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Order

ing person or persons, the prices offered to be paid, or paid, for such cheese.

It is further ordered, That the case growing out of the complaint herein be, and the same hereby is, closed as to the respondent, National Dairy Products Corporation, but without prejudice to the right of the Commission, should future facts so warrant, to reopen the same and resume prosecution thereof in accordance with its regular procedure.

It is further ordered, That the respondents, Badger-Brodhead Cheese Co., a corporation, Kraft Cheese Co. (referred to in the complaint as Kraft-Phenix Cheese Corporation), a corporation, The Borden Co., a corporation, J. S. Hoffman Co. (referred to in the complaint as J. S. Hoffman & Co.), a corporation, and Triangle Cheese Co. (referred to in the complaint as Triangle Cheese Co.), a corporation, and each of them, shall, within 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
**CHARLES D. BROWN, TRADING AS MICHIGAN MERCHAN-
DISING COMPANY**

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 4217. Complaint, Aug. 5, 1940—Decision, Oct. 1, 1940

Where an individual engaged in sale and distribution of small electric water heaters to purchasers in various other States, and maintaining course of trade therein in commerce between the various States and in District of Columbia—

- (a) Made such representations, in the "Help Wanted" columns of newspapers, as "Man to look after deliveries. \$25 salary and share in profits. References required. Give phone if possible. Must have \$100 cash to pay for first consignment of goods. Box—";
- (b) Represented, through persons employed by him to contact prospective distributors responding to such advertisements, and to induce them to sign contracts for purchase of heaters, that services required of distributors were only to make deliveries of and collections for such products, and that no selling was required of them, and that he would establish, directly or through such representatives, required number of dealers to handle heaters on consignment basis without any sales effort on part of distributor;
- (c) Represented that said initial payment of \$100 required of each distributor was in nature, or in lieu, of a temporary bond and would be refunded to distributor as soon as list of dealers had been secured and approved by him or his representatives, and that such procurement and approval was merely routine procedure requiring not more than 10 days, and that he would pay to distributor weekly salary of \$25, commencing on day he signed contract, plus commission of 50 cents per heater for every one over two sold each week by each established dealer in distributor's territory;

Facts being contracts were so drawn as to make impossible of fulfillment conditions upon which refunds of initial payments were to be made by him, and no refund had ever been made, no salary or commission was ever paid by him to any so-called distributor, and no quota of dealers had ever been established by him or his representatives which met number required to be established to enable distributor to be entitled to refund of money paid and eligible to salary and commissions, aforesaid initial payment of \$100 was not in nature, or in lieu, of temporary bond, but applied by him as payment for 48 of said heaters, and his various representations were all false and fraudulent, and business conducted by him was fraudulent scheme to extract money from persons in need of employment through false representation as above indicated, and under which so-called distributor became mere purchaser of said heaters, without any adequate outlets for disposal thereof or established dealers to handle same; and

- (d) Sold and distributed said product through such fraudulent and deceptive sales methods with label bearing legend reading "Wonder Electric Water Heater—Introductory Price \$5.95—Guaranteed Forever. Manufactured and guaranteed by the Jenner Mfg. Co., Pontiac, Mich.";