

IN THE MATTER OF
E. B. MULLER & CO. ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC.
2 (a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED

Docket 322½. Complaint, Feb. 11, 1938¹—Decision, June 11, 1941

Where corporations M. and F. with principal places of business in Port Huron, Mich., and Flushing, N. Y., engaged respectively, in the processing of chicory and, as between themselves, in noncompetitive complementary interstate sale and distribution thereof in bulk to coffee roasters and others, and in packaged form to retail outlets for resale to consumers, which, controlled and directed by husband and wife, were, prior to 1930, the only domestic producers of granulated chicory, with their only competition coming from the imported product, total imports of which were relatively small;

Following the installation in 1930 by S., theretofore principal importer of the product, of a plant in New Orleans for roasting and granulating imported dry chicory (operations of which S. concern in 1933 included the installation of a plant for drying chicory in Linwood, Mich., in the limited area in which the domestic product is grown, and in which said M. and F. procured and dried their supply; and shipment of the dried root therefrom to its New Orleans plant, where it roasted, granulated and prepared the root for distribution and sale); and as a part of a concerted and calculated campaign to harass, injure and, if possible, eliminate said S. from the competitive field, and thus to regain the substantially complete monopoly which they previously enjoyed in the distribution of chicory in the United States, and acting through one or the other, or both—

- (a) Represented that the color and uniformity of color of the chicory of M. were achieved by and attributable only to a superior method of roasting and a painstaking process of selecting and sorting, through affirmative statements in many ways, including published advertisements and letters to customers and prospective customers, when in fact said M. was artificially coloring its granulated chicory by adding iron oxide, which resulted in giving it an exceptionally desirable and uniform color, production of which solely by process of selection and roasting would be much more difficult and expensive, and of which addition it did not in any way advise its customers;
- (b) Defamed and disparaged the chicory products of said S., its sole competitor, on many occasions, with no sufficient knowledge of the facts to indicate good faith, through representing, by means of officials and sales representatives, that such products contained molasses, sugar beets or other foreign substances and were thus, as considered by the trade, adulterated; threatened customers of said competitor with seizure by governmental authority of chicory purchased from said competitor as being adulterated; and procured the institution of such a proceeding, advising chicory purchasers, on the basis of the analysis of one sample of product purportedly sold by said S., that said competitive product contained approximately 50 percent roasted sugar beet, and took no steps, following the

¹ Amended and supplemental.

abandonment of said proceeding shortly, to correct the disparaging statements previously made to the trade; and

Where said two corporations, with the deliberate intent of hindering, handicapping, injuring and destroying S., their aforesaid only domestic competitor, as shown by a long series of acts and practices including, among others, (1) efforts to secure an increase in the tariff on granulated chicory in order to cut off said competitor's source of supply with result that the increased tariff forced said competitor to cease importing the granulated chicory, and, instead, to import the root; (2) efforts, shortly thereafter, to seek an increase in the tariff on dried chicory root when it was learned that said competitor planned to import the root and manufacture the granulated product domestically; (3) cut in price in the New Orleans market, in which a substantial proportion of the products of M. and F. were sold, theretofore definitely rejected, as involving an unwarranted loss of \$30,000 a year; (4) steady and effective opposition to said competitor's efforts to secure a more favorable rate on the domestic chicory root brought by it from its Michigan kiln to its New Orleans plant, with the result that it cost said competitor \$70 more to deliver enough chicory root from Michigan to New Orleans to produce 40,000 pounds of the granulated chicory than it cost M. to transport a 40,000 pound carload of the granulated product between the same points, and that in the matter of freight rates (in which matter said M. had also secured, unlawfully, substantially more favorable rates than it was entitled to, through improperly shipping with chicory, cereals or coffee substitutes without disclosure), contrary to the usual situation in which a finished product normally pays higher transportation cost than the raw material, the reverse obtained; (5) establishment and use of a "fighting brand"; and, (6) other obstructive acts and practices as shown by discussion of subject in correspondence between officers and employees of the two corporations;

- (c) Sold, with aforesaid intent, (1) as respects said F. concern, a large proportion of its granulated chicory, during its 1936 and 1937 fiscal years, to two large customers in New Orleans at a loss of approximately 11 cents per hundred pounds during the 6 months ended June 30, 1936, and at cost or slightly below cost during the 8 months ended March 31, 1937, and sold also, from time to time, various other customers who purchased in smaller quantities at a loss also, while making from other profitable sales sufficient gain to overcome the losses set forth, and (2), as respects M., made sales, among others, to customers in New Orleans at losses ranging from 66 cents to \$1.11 per hundred pounds, and to those in Memphis, Louisville, St. Louis, and Birmingham at prices ranging from 67 cents per hundred pounds loss to 44 cents per hundred pounds profit, with said company's entire business in granulated chicory in the 1936 and 1937 fiscal years showing losses of approximately 18 cents and 8 cents per hundred pounds respectively, and with prices received by it in the New Orleans trade territory in general substantially lower than those it secured from purchasers for whose trade it did not have to compete with S., and, appealed to on several occasions by S., their said competitor, to increase their prices in the New Orleans area in order that it, S., would not be forced to lose money in attempting to meet their competition, rejected such requests, with result that said competitor eventually, finding it was losing so much money that it could no longer afford to sell at their prices, was compelled to increase its own, following which M. and F. likewise made in-

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creases in their prices, though still maintaining them below those of said S. and without terminating their selling below cost; and

Where said corporations, in engaging, as below set forth, in price discrimination under general pattern of making low prices in a few southern States where they were in active competition with said S., and recouping in part by higher prices elsewhere, as said competitor could not, and also in substantial discrimination among purchasers in said States and among those in other States—

- (d) Discriminated in price, in the case of F., by selling granulated chicory to its two largest customers in New Orleans at lower prices than all others and which, as respected all others, were not justified under the law by differences in cost; and, in the case of M., also discriminated among its customers generally in a variety of ways, including outright price differences, sale of better quality product at or below the price of inferior, use of quantity rebate or discount plans, and others; and, acting under the common control;
- (e) Discriminated in price in that, among their respective customers, each sold chicory of like grade and quality to some customers at prices different from those charged by the other to some of its customers, and at differences which were not justified as aforesaid;

Effect of which selling below cost and discriminations in price caused by selling to customers in trade area in which said sole competitor operated at lower prices than elsewhere in the United States, was to divert to themselves a substantial volume of business which their competitor might otherwise have obtained, to force said competitor to sell at unprofitable prices or at a loss in order to avoid being forced out of business, and thus to impair its financial position and render it unreasonably difficult, if not impossible, for it to secure capital for its operations, while they were substantially increasing their volume of sales; and tendency of which was to create in themselves a monopoly in the production and sale of domestic chicory, in sale of which even a small price variation is of highly important competitive significance to purchasers and coffee roasters;

With result, as respects aforesaid false disparagements and misrepresentations as to color and uniformity of color of said concerns' artificially colored chicory, of contributing to such injury to and suppression of competition and tendency toward monopoly in said concerns and of misleading and deceiving members of the purchasing public by creating in their minds the mistaken belief that such statements were true, whereby trade was unfairly diverted from competitors to them:

Held. (a) That said discriminations in price resulted in substantial injury to their competitors, hindered, obstructed and tended to suppress competition with them and create a monopoly in them in the processing and sale of granulated chicory, and resulted in substantial injury to competition among purchasers of such product by affording material and unjustified price advantages to preferred purchasers and not to others, and violated subsection (a) of section 2 of an act of Congress approved October 15, 1914, as amended by an act of Congress approved June 19, 1936; and

- (b) That sales below cost by them were made with purpose and effect of substantially injuring and lessening competition and tending to create a monopoly in the processing and sale of domestic granulated chicory in themselves, and that their said and other acts and practices, as aforesaid, were all to the injury and prejudice of the public and their competitors, and constituted unfair methods of competition in commerce.

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Before *Mr. William C. Reeves, Mr. W. W. Sheppard* and *Mr. John L. Hornor*, trial examiners.

Mr. J. J. Smith, Jr. and *Mr. John Darsey* for the Commission.

Beaumont, Smith & Harris, of Detroit, Mich., for E. B. Muller & Co., and along with—

Rathgeber & Noyes, of Long Island City, N. Y., for *Heinr. Franck Sons, Inc.*

AMENDED AND SUPPLEMENTAL COMPLAINT

Pursuant to the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" (the Federal Trade Commission Act), and pursuant to the provisions of an act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), as amended by an act approved June 19, 1936, entitled "An act to amend section 2 of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes" (the Robinson-Patman Act), the Federal Trade Commission, having reason to believe that E. B. Muller & Co. and Heinr. Franck Sons, Inc., have violated and are now violating the provisions of the said Federal Trade Commission Act and the said Clayton Act, as amended, issues this its amended and supplemental complaint against the said E. B. Muller & Co. and the said Heinr. Franck Sons, Inc., respondents in this proceeding, and states its charges as follows, to wit:

Count I

PARAGRAPH 1. Respondent E. B. Muller & Co. is a corporation organized and existing under the laws of the State of Michigan and has its principal office and place of business at 220 Quay Street in the city of Port Huron, Mich.

PAR. 2. Respondent Heinr. Franck Sons, Inc., is a corporation organized and existing under the laws of the State of Delaware and has its principal office and place of business at 131 Avery Avenue in the city of Flushing, N. Y.

PAR. 3. The officers of the respondent E. B. Muller & Co. are H. Gordon McMorran, president, Miss Charlotte C. McMorran, vice president, and Mrs. Charlotte H. McMorran, secretary-treasurer. Said officers comprise the board of directors of respondent E. B. Muller & Co.

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The officers of the respondent Heinr. Franck Sons, Inc., are David McMorran, president, A. F. Kalk, vice president, and Eugen Beitter, secretary-treasurer. Said officers comprise the board of directors of Heinr. Franck Sons, Inc.

David McMorran and Mrs. Charlotte H. McMorran are, respectively, husband and wife, and the father and mother of H. Gordon McMorran and Miss Charlotte C. McMorran.

Respondent E. B. Muller & Co. has outstanding 30,000 shares of common stock, of which the Detroit Trust Co., a banking corporation organized and existing under the laws of the State of Michigan and having its principal office and place of business in Detroit, Mich., holds 25,578 shares in trust for David McMorran and Mrs. Charlotte H. McMorran for life under a trust agreement which provides that David McMorran and Mrs. Charlotte H. McMorran jointly, or the survivor of them, may terminate said trust at any time and cause said shares to be delivered and transferred to them, or to the survivor of them, absolutely and unconditionally. Mrs. Charlotte H. McMorran owns in her own right 41 shares of the common stock of the respondent E. B. Muller & Co. Respondent E. B. Muller & Co., has no preferred stock outstanding.

Respondent Heinr. Franck Sons, Inc., has outstanding 10,000 shares of common stock, all of which is owned by David McMorran, and 5,430 shares of preferred stock, of which the Michigan Debenture Co., a corporation organized and existing under the laws of the State of Delaware, owns 4,400 shares and Eugen Beitter owns 1,030 shares. David McMorran owns all the stock of the said Michigan Debenture Co.

The respondents dominate the market for green chicory root in the United States and purchase and use in their respective businesses the greater part of all green chicory root produced in the United States. The respondents also dominate the granulated chicory market in the United States, manufacturing and selling the greater part of all granulated chicory manufactured and sold in the United States. In the course and conduct of their respective businesses, as is more particularly hereinafter stated, the respondents are engaged in competition with other purchasers and users of green chicory root in the United States and with other manufacturers and sellers of granulated chicory in the United States, and if those competitively engaged with the respondent in the United States in the purchase and use of green chicory root and the manufacture and sale of granulated chicory are eliminated from the business of purchasing and using green chicory root and manufacturing and selling granulated chicory, the above-mentioned David McMorran and Mrs. Charlotte H. McMorran, husband

and wife, will have and enjoy, through the respondents, a monopoly in the purchase and use of green chicory root in the United States and in the manufacture and sale of granulated chicory in the United States.

PAR. 4. For more than 2 years prior hereto the respondents have been, and are now, engaged in the business of manufacturing granulated chicory from green chicory root and in selling and shipping granulated chicory, and in the course and conduct of their respective businesses the respondents have sold and shipped, and do now sell and ship, granulated chicory in commerce between and among the various States of the United States from the States in which their respective factories are located and from States in which they maintain stocks of granulated chicory across State lines to purchasers thereof located in States other than the States in which respondents' said factories are located and other than the States in which respondents maintain stocks of granulated chicory.

PAR. 5. In the course and conduct of their respective businesses, as aforesaid, the respondents have been, and are now, engaged in substantial competition in commerce with other manufacturers and sellers of granulated chicory who, for more than 2 years prior hereto have been, and are now, manufacturing granulated chicory from green chicory root and selling and shipping granulated chicory in commerce across State lines between and among the various States of the United States.

PAR. 6. In the course and conduct of their respective businesses, as aforesaid, with the intent, purpose, and effect of injuring, restraining, suppressing, and destroying competition in commerce in the manufacture and sale of granulated chicory between themselves and competing manufacturers and sellers of granulated chicory, the respondents have been, and are now, manufacturing granulated chicory and selling, shipping, and delivering the said granulated chicory across State lines to purchasers thereof at prices below the cost to the respondents of manufacturing, selling, shipping, and delivering said granulated chicory.

PAR. 7. The effect and result of the sale and delivery by respondents of granulated chicory in commerce across State lines to purchasers thereof at prices below the cost to the respondents of manufacturing, selling, shipping and delivering the same, as above set forth in paragraph 6 hereof, have been, and are now, unduly and substantially to injure, restrain and suppress competition between respondents and their competitors in the manufacture of granulated chicory and the sale and shipment thereof in commerce across State lines, and to

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tend to create in the above mentioned David McMorran and Mrs. Charlotte H. McMorran, through the respondents, a monopoly in the manufacture and sale of granulated chicory in the United States.

PAR. 8. Granulated chicory is an ingredient used principally by commercial processors and roasters of coffee for the purpose of imparting to and fixing in coffee certain flavors desired by many consumers thereof. Such processors and roasters prefer to purchase and use granulated chicory which does not contain molasses, sugar beet, or sugar beet pulp, and granulated chicory which does contain molasses, sugar beet, or sugar beet pulp is regarded by processors and roasters of coffee as an undesirable and adulterated commodity.

In purchasing granulated chicory the color or shade thereof and its uniformity of color or shade are factors which are considered, and to which great importance is attached, by processors and roasters of coffee. Color or shade is generally imparted to granulated chicory by roasting, and uniformity of color or shade is generally attained by separating or assorting such chicory according to color or shade after it has been roasted. Unless otherwise advised and informed processors and roasters of coffee assume that the color or shade of granulated chicory and its uniformity of color or shade are attributable to the method by and manner in which it is roasted and thereafter separated or assorted according to color or shade by the manufacturers of such chicory.

PAR. 9. In the course and conduct of its business, as aforesaid, the respondent, E. B. Muller & Co., has adopted, practiced, and engaged in the following methods of competition in the sale and shipment of granulated chicory in commerce across State lines between and among the various States of the United States, to wit:

(a) It has falsely defamed and disparaged the granulated chicory manufactured and sold and shipped in commerce across State lines by one of its competitors, namely, R. E. Schanzer, Inc., of New Orleans, La., by falsely asserting and representing to purchasers and users of granulated chicory that the granulated chicory manufactured and sold by the said R. E. Schanzer, Inc., contained molasses, sugar beet, or sugar beet pulp, or two or more of such substances.

(b) It has artificially colored granulated chicory manufactured and sold by it and shipped by it across State lines by adding or applying thereto iron oxide, or some other pigment or pigments, which have imparted to such granulated chicory a commercially attractive and desirable, and exceptionally uniform, color or shade, has failed to advise the purchasers of such granulated chicory that the same was artificially colored, and has affirmatively or impliedly falsely represented to such purchasers that the color or shade of such chicory was achieved by and attributable to the respondent E. B.

Muller & Co.'s superior method of roasting chicory, and that the uniformity of such color or shade was achieved by and attributable to the respondent E. B. Muller & Co.'s careful and painstaking method of separating and assorting such chicory, after roasting, according to color or shade.

(c) In single railroad cars, commonly referred to as "combination cars," it has combined, shipped, and caused to be transported across State lines by common carriers by railroad coffee substitutes (generally referred to in the coffee trade as "cereals") and granulated chicory, and has falsely and fraudulently billed, classified, and described the contents of said cars by falsely and fraudulently representing to the carriers thereof that said cars contained only granulated chicory, by means of which false and fraudulent billing, classification, description and representation the respondent E. B. Muller & Co. has caused combination cars of coffee substitutes and granulated chicory to be transported across State lines by common carriers by railroad at freight rates substantially lower than the freight rates lawfully applicable thereto and which should have been paid thereon.

PAR. 10. The effect and result of the use by the respondent, E. B. Muller & Co., of the methods of competition set forth above in paragraph 9 hereof have been, and are now, unduly and substantially to injure, restrain and suppress competition between respondent, E. B. Muller & Co., and its competitors in the manufacture of granulated chicory and in the sale and shipment thereof in commerce across State lines, and to tend to create in the above mentioned David McMorran and Mrs. Charlotte H. McMorran, through the respondents, a monopoly in the manufacture and sale of granulated chicory in the United States.

PAR. 11. The sale of granulated chicory by the respondents below cost as above alleged in paragraph 6 hereof, with the effect and result as above alleged in paragraph 7 hereof, is to the injury and prejudice of the public, and to the injury and prejudice of respondents' competitors, and constitutes an unfair method of competition in commerce within the intent and meaning of section 5 of the aforesaid Federal Trade Commission Act.

PAR. 12. The use by the respondent, E. B. Muller & Co., of the methods of competition set forth above in paragraph 9, hereof, with the effect and result set forth above in paragraph 10 hereof, is to the injury and prejudice of the public, and to the injury and prejudice of respondent E. B. Muller & Co.'s competitors, and said methods of competition are unfair methods of competition in commerce within the intent and meaning of section 5 of the aforesaid Federal Trade Commission Act.

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Count II

PARAGRAPH 1. Paragraph 1, paragraph 2, paragraph 3, paragraph 4, and paragraph 5 of count I of this amended and supplemental complaint are, by reference, incorporated herein and made a part hereof as fully and completely as if set out verbatim.

PAR. 2. In the course and conduct of their respective businesses, as aforesaid, since June 19, 1936, the respondents have been, and are now, discriminating in price between different purchasers of granulated chicory of like grade and quality sold and shipped by the respondents in commerce across State lines to said purchasers for use, consumption and resale by said purchasers within the United States, in that the respondents have sold and shipped, and are now selling and shipping, granulated chicory in commerce across State lines, for use, consumption, and resale within the United States, to certain purchasers of said granulated chicory at prices below the prices at which the respondents have sold and shipped, and are now selling and shipping, in commerce across State lines, for use, consumption, and resale within the United States, granulated chicory of like grade and quality to other purchasers of said granulated chicory engaged in competition with the former purchasers in the use, consumption, and resale within the United States of said granulated chicory, and the respondent, E. B. Muller & Co., has been, and is now, further and additionally discriminating in price between different purchasers of granulated chicory of like grade and quality sold and shipped by the said respondent, E. B. Muller & Co., in commerce across State lines to said purchasers for use, consumption, and resale by said purchasers within the United States, in that upon the said respondent, E. B. Muller & Co.'s sales to purchasers of granulated chicory of like grade and quality, sold and shipped in commerce across State lines by the said respondent, E. B. Muller & Co., to said purchasers for use, consumption and resale by them within the United States, the said respondent, E. B. Muller & Co., has been, and is now, granting, allowing, and paying to certain favored purchasers rebates upon said favored purchasers' purchases of granulated chicory from the said respondent, E. B. Muller & Co., and denying to other purchasers engaged in competition with said favored purchasers rebates upon said other purchasers' purchases of granulated chicory from the said respondent, E. B. Muller & Co.

PAR. 3. The effect of the discriminations in price made by the respondents in the sale of granulated chicory as above set forth in paragraph 2 of this count has been and may be substantially to lessen competition, or to injure, destroy, or prevent competition between

respondents and their competitors in the manufacture, sale, and distribution of granulated chicory in the United States and to tend to create in the above-mentioned David McMorran and Mrs. Charlotte H. McMorran, through the respondents, a monopoly in the manufacture, sale, and distribution of granulated chicory in the United States, and has been and may be substantially to lessen competition or to injure, destroy, or prevent competition in the use, consumption, or resale of granulated chicory within the United States between those customers of respondents who receive the benefit of the lower prices or rebates above mentioned in paragraph 2 of this count and those customers of respondents engaged in competition with them who do not receive the benefit of said lower prices or said rebates.

PAR. 4. The aforesaid discriminations in price made by the respondents as above stated in paragraph 2 of this count constitute a violation of the provisions of paragraph (a) of section 2 of the aforesaid Clayton Act, as amended.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an Act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (The Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13), the Federal Trade Commission on September 11, 1937, issued and thereafter served its complaint in this proceeding upon respondents, E. B. Muller & Co., a corporation, and Heinr. Franck Sons, Inc., a corporation, charging them with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act, and with discriminations in price in the sale of chicory in violation of the provisions of subsection (a) of section 2 of said Clayton Act as amended.

After the issuance of said complaint and the filing of respondents' answers thereto, testimony, and other evidence in support of the allegations of said complaint were introduced by attorneys for the commission, and in opposition thereto by attorneys for respondents, before examiners of the Commission theretofore duly designated by it. On February 11, 1938, the Commission issued and thereafter served upon respondents an amended and supplemental complaint charging violations of the aforesaid statutes. After the filing of respondents' answers to the amended and supplemental complaint, testimony, and other evidence in support of the allegations of said complaint were introduced by attorneys for the Commission, and

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in opposition thereto by attorneys for the respondents, before examiners of the Commission theretofore duly designated by it, and the testimony and other evidence taken pursuant to both complaints were duly recorded and filed in the office of the Commission.

Thereafter this proceeding regularly came on for final hearing before the Commission on the amended and supplemental complaint, the answers thereto, testimony, and other evidence, report of the trial examiners and exceptions thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel; and the Commission, 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 this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, E. B. Muller & Co., is a corporation organized and existing under the laws of the State of Michigan and having its principal place of business at 220 Quay Street, Port Huron, Mich.

Respondent, Heinr. Franck Sons, Inc., is a corporation organized and existing under the laws of the State of Delaware and having its principal place of business at 131 Avery Avenue, Flushing, N. Y.

Respondents for many years have been engaged in the processing and sale of chicory, and at all times mentioned in the complaint have been, and are now, selling and shipping chicory from the States in which their respective factories are located, and from States in which they maintain stocks of processed chicory, across State lines to purchasers located in States other than those in which such factories or stocks are located, and have maintained a constant course of trade in such products in commerce as "commerce" is defined in said acts.

PAR. 2. Chicory is a root or tuber resembling in appearance the sugar beet and is commercially produced in the United States in only a few counties in the State of Michigan. It is also produced in Belgium and the Netherlands. When dried, roasted, and granulated it is mixed with coffee for the purpose of imparting to or fixing in coffee certain flavors desired by many consumers. The principal market for this product is in New Orleans, La., and in the trade territory served from that city, although it is sold and used to some extent in most, if not all, of the States of the United States. About 75 percent of the production of respondent Heinr. Franck Sons, Inc., and 40 percent of the production of respondent E. B. Muller & Co. is sold in the New Orleans trade territory.

PAR. 3. The officers of respondent, E. B. Muller & Co., are H. Gordon McMorran, president, Miss Charlotte C. McMorran, vice president, and Mrs. Charlotte H. McMorran, secretary-treasurer; and these officers constitute the board of directors of said company.

The officers of respondent, Heinr. Franck Sons, Inc., are David McMorran, president, A. F. Kalk, vice president, Eugen Beitter (until his death during the pendency of this proceeding), secretary-treasurer; and these officers constitute the board of directors of that company.

David McMorran and Mrs. Charlotte H. McMorran are, respectively, husband and wife and father and mother of H. Gordon McMorran and Miss Charlotte C. McMorran.

Prior to 1919 the businesses now conducted by respondents were owned by different interests and presumably competed with each other. David McMorran, who was then an officer and director of E. B. Muller & Co., and who with his father, the then president of that company, owned a controlling interest in it, purchased the stock of Heinr. Franck Sons, Inc., at public auction from the United States Alien Property Custodian. After a hearing by the Federal Trade Commission, David McMorran was advised by the Alien Property Custodian that upon recommendation of said Commission the sale to him would not be confirmed unless he resigned as an officer and director of E. B. Muller & Co., and disposed of his stock in that concern. David McMorran thereupon sold his stock in E. B. Muller & Co., to his father, to his attorney, and to a personal friend, and represented in an affidavit submitted to the Alien Property Custodian for the purpose of securing confirmation of his purchase that his stock in said company had been disposed of absolutely and unconditionally. Subsequently the stock sold to David McMorran's attorney and to his friend was acquired by his brother-in-law. Between 1919 and 1924 Mrs. Charlotte H. McMorran acquired all the stock originally disposed of by her husband, David McMorran, together with the stock previously owned by David McMorran's father, totaling more than five-sixths of the outstanding 30,000 shares of capital stock of E. B. Muller & Co., all upon consideration furnished by David McMorran and upon the understanding that the stock was to be placed in a trust for David McMorran and his wife, Charlotte H. McMorran, for life, provided that David McMorran and Charlotte H. McMorran jointly, or the survivor of them, might terminate the trust at any time and cause the stock to be delivered and transferred to them or to the survivor of them absolutely and unconditionally. This stock was held until 1939 under such a trust agreement by the Detroit Trust Co., a banking corporation, when the

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trust was set aside by a State court decree purporting to hold that David McMorran had no interest in the stock. There is no testimony, however, that the understanding with respect to terms upon which the stock was acquired has been abrogated.

Respondent, Heinr. Franck Sons, Inc., has outstanding 10,000 shares of common stock and 5,430 shares of preferred stock. David McMorran owns all of the common stock of this company and 4,400 shares of the preferred stock, the latter being owned by him through the medium of the Michigan Debenture Co., of which he owns all the capital stock.

David McMorran is furnished by respondent, E. B. Muller & Co., with an office and clerical assistance at the principal place of business of said respondent company, has access to the files and records of both respondent companies, advises and consults with and gives directions to officers, agents, and employees of both respondent companies. Gordon McMorran has access to the files and records of respondent, Heinr. Franck Sons, Inc., and advises and consults with officials of that company. Neither Mrs. Charlotte H. McMorran nor Miss Charlotte C. McMorran does more than formally participate in the management and direction of the respondent companies. Upon testimony and other evidence the Commission finds that David McMorran and his wife, Charlotte H. McMorran, own control of respondent companies, and David McMorran dominates, directs, and controls the policies and practices of both companies and operates them in the common interest of the two companies.

PAR. 4. Prior to 1930 respondents were the only domestic producers of granulated chicory and their only competition came from imported chicory. The total imports of such chicory were relatively small in comparison with respondents' production, and the largest importer of this product was R. E. Schanzer, Inc., a Louisiana corporation, having its principal place of business in New Orleans, La.

Respondent, E. B. Muller & Co., has concentrated upon the production of granulated chicory and the sale thereof in bulk. A limited quantity of this product is packed by said respondent in small containers and sold to retail outlets for resale to consumers, but such sales have been insignificant in volume and the company desires and is endeavoring to discontinue the manufacture and distribution of packaged chicory. Substantially all of said respondent's sales volume consists of granulated chicory in bulk, sold largely to coffee roasters.

Respondent, Heinr. Franck Sons, Inc., produces and sells a large quantity of chicory in packaged form to retail outlets for resale to consumers. This packaged chicory is granulated chicory which

has been subjected to a further grinding process and converted into a powder, and thereafter packaged in different forms. Said respondent also sells granulated chicory in bulk form to a very limited number of coffee roasters, but does not actively solicit or seek to sell to coffee roasters generally.

Respondents do not compete with each other in any real sense; the business of each is designedly complementary, rather than competitive, to that of the other. Respondents agreed between themselves that E. B. Muller & Co. would not seek business from established customers of Heinr. Franck Sons, Inc., and when sales representatives of the former sought business from customers of the latter they were advised to avoid this as E. B. Muller & Co. was not competing with Heinr. Franck Sons, Inc. An example of this policy appears in the following extract from a letter of May 14, 1934, from Gordon McMorran to the New York office of E. B. Muller & Co. in which reference is made to a sales representative of that company in New Orleans as follows:

He also must be definitely warned off of F customers with the exception of those customers whom we know are buying from Schanzer. We do not want any of F's business and must concentrate solely on Schanzer's.

PAR. 5. In 1930 R. E. Schanzer, Inc., formerly the principal importer of chicory, installed a plant in New Orleans, La., for roasting and granulating imported dried chicory, and in 1933 this company installed and commenced the operation of a plant for drying chicory in Linwood, Mich., in the limited area in which domestic chicory is grown. It is in this area that respondents procure and dry their supply of chicory which E. B. Muller & Co. subsequently processes in Michigan and Heinr. Franck Sons, Inc., in New York. R. E. Schanzer, Inc., ships dried chicory root from Michigan to its plant in New Orleans where it is roasted, granulated, and prepared for distribution and sale. Even before R. E. Schanzer, Inc., commenced the operation of the abovementioned plant in New Orleans it represented the only substantial competition to respondents, and after the installation of said plant in 1930 respondents began a definite and active campaign to harass, injure, and, if possible, eliminate R. E. Schanzer, Inc., from the competitive field and thus regain the substantially complete monopoly which they previously enjoyed in the distribution of chicory in the United States. This concerted effort on the part of respondents was further intensified after R. E. Schanzer, Inc., established a drying plant in Michigan and became a competitor of respondents in the processing and sale of domestically produced chicory. The calculated course of action taken by respondents look-

ing toward crippling or destroying the competition offered by R. E. Schanzer, Inc., has manifested itself in a number of forms, among which are those set out in subsequent paragraphs.

PAR. 6. Granulated chicory is ordinarily produced in three different shades of color, usually designated light, medium, and dark, and in different sized granules in each color. Inasmuch as granulated chicory is added to coffee by coffee roasters, color and uniformity of color in chicory are of great importance to such customers. Darker colors are more expensive to produce by roasting, and uniformity of color is more expensive and difficult to attain by natural means because of the cost of inspection and selection required. It is the general understanding and belief of coffee roasters that color and uniformity of color in chicory are secured by care in selecting and processing chicory. At all times mentioned in the complaint respondent, E. B. Muller & Co., artificially colored the granulated chicory which it sold by adding iron oxide to such chicory. The addition of iron oxide resulted in giving its granulated chicory an exceptionally desirable and uniform color which would be more difficult and expensive to produce solely by the process of selection and roasting. This respondent did not in any way advise its customers that its chicory was artificially colored. On the contrary, it represented to its customers that the color and uniformity of color of its chicory were achieved by and attributable only to a superior method of roasting and a painstaking process of selecting and sorting. Affirmative representations of this character were made in many ways, including published advertisements such as:

All chicory grown and sold by E. B. Muller & Co. is fully kiln dried and expertly roasted by the Caloritherm process. Color and grinds are uniform,
* * *

* * *
Those roasters who buy Muller Chicory have learned by experience that the full flavor developed by the exclusive Caloritherm roasting process makes a noticeable improvement in the coffee blend. Less moisture, quicker solubility and rich color characterize Muller products.

and, further, by letters to customers and prospective customers containing statements such as:

As to Roasts, of which we produce several shades, they are produced actually by roasting light, medium or dark. Other methods can and have been used to produce differences in color but not by us. This also applies to our "Standard" Grade.

At the time representations such as those quoted from above and others of like import were being made, respondent E. B. Muller & Co. was in fact using iron oxide to aid in attaining color and uniformity of color in its chicory products.

Chicory used for blending with coffee should not contain foreign substances such as sugar beet or molasses, and chicory which does contain such foreign substances is considered by the trade to be adulterated. Since 1930 respondent, E. B. Muller and Co., through its officials and sales representatives, has frequently and on many occasions disparaged the chicory products sold by R. E. Schanzer, Inc., by representing to purchasers of chicory that such products contained molasses, sugar beet, or other foreign substances. Customers of R. E. Schanzer, Inc., have been threatened by respondent with seizure by governmental authorities of chicory purchased from R. E. Schanzer, Inc., as being adulterated. A sales representative of respondent was instructed to advise a customer of R. E. Schanzer, Inc., who had on hand a quantity of molasses which he wished to sell that such sales representative knew where this molasses could be sold and to supply the name of R. E. Schanzer, Inc., as the prospective purchaser. Upon consideration of the evidence it is found that respondent, E. B. Muller & Co. has defamed and disparaged the chicory products of its competitor, R. E. Schanzer, Inc., by falsely representing that they contained foreign substances, and many such representations were knowingly and deliberately made without any actual or adequate knowledge of the facts sufficient to indicate good faith on the part of respondent.

Respondent, Heinr. Franck Sons, Inc., had an analysis made of a sample of chicory purported to have been sold by R. E. Schanzer, Inc., the report of which analysis stated that this sample contained approximately 50 percent roasted sugar beet; whereupon the sales representative of said respondent was instructed to, and did, advise chicory purchasers that the chicory sold by R. E. Schanzer, Inc., was adulterated with a large percentage of sugar beet, and further, procured the institution of a proceeding by governmental authorities against R. E. Schanzer, Inc., which proceeding was soon abandoned, but respondent took no steps of any kind to correct the statements previously made to the trade by its representative.

PAR. 8. Frequently the freight rates on granulated chicory differ considerably from those on coffee substitutes, commonly known in the trade as cereals. In order to take advantage of the substantially lower rate frequently prevailing on granulated chicory as compared with coffee substitutes, and of the lower carload freight rates, respondent, E. B. Muller & Co., on numerous occasions over a period of years misbilled to the railroads its products moving in interstate commerce. Muller shipped in single railroad cars combinations of its products consisting of large quantities of chicory and smaller quantities of coffee substitutes, falsely and fraudulently describing and

representing to the railroads that the cars contained chicory only. By this means respondent obtained substantially lower freight rates than those applicable to coffee substitutes properly described and classified, and in some cases rates lower than those applicable to either of the commodities so transported since the less-than-carload rate for less-than-carload shipments would have applied on both products had the proper billing been made except that the carload rate for the minimum carload quantity permitted may be paid in lieu of the less-than-carload rate on the actual quantity shipped. The freight advantage so secured has amounted to as much as \$65.16 per car. Such falsified billings were made with the knowledge of officials of E. B. Muller & Co. and with the deliberate intent of obtaining an illegal freight advantage. This is illustrated by the following extract from a letter dated November 16, 1931, from the sales manager of E. B. Muller & Co. to respondent's New Orleans broker:

As we previously advised you, we are not supposed to ship any cereals in Chicory cars, and if it were discovered it would make trouble for us. Port Huron therefore marked these goods only W. R. D. standing for Whole Rye Dark, and it will be advisable that you tell the warehouse not to in any way reveal the fact that these goods are anything but Chicory.

PAR. 9. Detailed cost studies for 1936 and 1937 were made of the granulated chicory business of each respondent. The record shows that respondent, Heinr. Franck Sons, Inc., in its 1936 and 1937 fiscal years sold 5,094,320 and 5,123,974 pounds of granulated chicory, respectively, that of these amounts 3,821,279 and 4,445,149 pounds, respectively, were sold to two customers of respondent in New Orleans, La., and that sales to these two customers were made at a loss of approximately 11 cents per hundred pounds during the 6 months ended June 30, 1936, and at cost or slightly below cost during the 8 months ended March 31, 1937. It is apparent from the record that from time to time various other customers of this respondent who purchased in smaller quantities were also sold at a loss but that the gains from profitable sales were sufficient to overcome the losses mentioned so that the business of this respondent in granulated chicory, considered as a whole, was not operated at a loss. The two large customers in New Orleans referred to above were William B. Reily & Co. and Merchants Coffee Co. Among those purchasing in smaller quantities at prices which represented a loss to this respondent were The Great Atlantic & Pacific Tea Co. in Atlanta, A. Jochelson in New York, McGaffey Coffee Co. in Los Angeles, Jones Thierbach Co. in San Francisco, and others.

The record shows that respondent, E. B. Muller & Co., conducted its entire business in granulated chicory in its 1936 and 1937 fiscal

years at average losses of approximately 18 cents and 8 cents per hundred pounds, respectively. The prices which this respondent received from purchasers in the New Orleans trade territory were in general substantially lower than the prices secured from purchasers for whose trade it did not have to compete with R. E. Schanzer, Inc. For example, in the year ended June 30, 1937, sales were made to customers in New Orleans at losses ranging from approximately 66 cents to \$1.11 per hundred pounds, and to customers in Memphis, Louisville, St. Louis, Birmingham, and Atlanta at prices which represented a range of from 67 cents per hundred pounds loss to 44 cents per hundred pounds profit. Examples of losses on sales to specific customers in New Orleans are American Coffee Co., Arnaud Coffee Corporation, Boothe Brothers Coffee Co., and others, who were sold at losses of from 66 cents to 91 cents per hundred pounds, and C. D. Kenny Co., which was sold at losses of \$1.10-\$1.11 per hundred pounds. From this it is plain that the prices of this respondent in the New Orleans trade territory were more substantially below its costs than the figures shown by the cost study for sales in other territories and for the business as a whole of this respondent in granulated chicory.

The sales below cost made by respondents during the period covered by the cost study, as well as other sales below cost prior to the period covered by such study, were made with the deliberate purpose and intent of hindering, handicapping, injuring, and, if possible, destroying their only domestic competitor, R. E. Schanzer, Inc. This general intent and purpose of both respondents, acting under the common control and direction heretofore mentioned, is demonstrated by a long series of acts and practices consisting not only of selling below cost but also of the use of other means directed toward the same end. Some of these acts and practices were as follows:

In 1929 R. E. Schanzer, Inc., was not a manufacturer of granulated chicory and depended upon imports as its source of supply. It was, however, at that time becoming a serious competitor of respondents. Respondents appeared before a committee of the United States House of Representatives and sought an increase in the tariff on granulated chicory for the purpose of making it impracticable to import granulated chicory and thereby cutting off the source of supply of R. E. Schanzer, Inc., but no request was made for an increase in the tariff on dried chicory root, and the Committee was advised that in the event of a short domestic crop manufacturers wished to be in a position to import foreign chicory root. Soon after this appearance respondents learned that R. E. Schanzer, Inc.,

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planned, if the tariff were increased on granulated chicory, to import dried chicory root and manufacture granulated chicory in this country. Thereupon respondents appeared before a committee of the United States Senate and sought an increase in the tariff on dried chicory root. Respondent, Heinr. Franck Sons, Inc., was advised by its New Orleans representative under date of July 5, 1930, in part:

Schanzer has been obliged to raise his price $\frac{1}{4}\text{¢}$ because of the tariff, and the supposition is he will have to raise it more, which will practically put him out of the chicory business, because our chicory being better, and if his reaches the same price, ours will be preferred.

R. E. Schanzer, Inc., was in fact put out of the business of importing granulated chicory but continued in the chicory business by the establishment of a plant in New Orleans in which it made granulated chicory from imported chicory root.

Under date of April 10, 1931, Gordon McMorran wrote the New York office of E. B. Muller & Co. in part:

We have your letter of the 7th in reference to prices in southern territory. We note your persistence in advocating a cut in New Orleans prices. What you seem to overlook is the fact that a cut by us at the present time to 8¢ New Orleans for the New Orleans trade will result in a loss to us of \$30,000 per year. The whole New Orleans trade is not worth that to us.

Later in the same year E. B. Muller & Co. in fact reduced its price in New Orleans to 7 $\frac{1}{4}$ cents.

On November 2, 1931, David McMorran wrote an official of Heinr. Franck Sons, Inc., in part as follows:

If you think advisable perhaps it would be well to write Reilly (one of Franck's largest customers) that Schanzer is making desperate efforts to sell out. * * * If Reilly should contract with Schanzer, it would not only reduce his rebate from us but it would be a very uncertain source of supply. Schanzer is liable to pass out at any time and if European root went up or the tariff was increased Schanzer would simply fold up and fail to deliver to Reilly.

Under date of January 14, 1933, a sales representative of respondent, E. B. Muller & Co., wrote that company in part:

I am sorry that we have allowed Schanzer to get to the point where he can expand, which was made possible by partner who has some capital. However, if a reduction on tariff should take place, it would make the situation still worse. I certainly hope that we can, as you expect, eliminate him entirely, by making prices that he cannot meet without losing money.

In a letter dated February 2, 1933, David McMorran wrote another official of Heinr. Franck Sons, Inc., discussing the possibility of an offer of lower prices to one of that company's large customers in New Orleans. He said in part:

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The reduction in our basis price will put a crimp in Schanzer's operations and probably discourage him from making any further investment.

Under date of March 17, 1933, the production manager for E. B. Muller & Co. wrote the New York office of that company in part:

January reports show largest importation per month on record, 237,000# of root, at an average cost of \$1.44, which is, as we recall it, considerable lower than any previous low, so that the cut of $\frac{1}{2}\text{¢}$ which he (R. E. Schanzer, Inc.) made following us to some extent is offset by a lower cost to him.

In a letter written 2 days later between the same parties the production manager stated in part:

Regardless of what loss it may involve for the present, we are still in favor of lower Chicory prices, effective at this time. We know it involves a loss, but we fear it will react upon us later because of the strength we are giving competitors by maintaining present basis, but, as you well know, such recommendations would not receive any support now, but we believe we should both do all we can to prevail for a reduction of another $\frac{1}{2}\text{¢}$ in the Fall, possibly November first.

At the time R. E. Schanzer, Inc., was beginning the construction of a drying kiln in Michigan in 1933 in order to utilize domestic chicory root, respondents claimed that the patterns and blue prints used by a machinery manufacturer to build machinery for them belonged to them, and when this claim was of no avail purchased such patterns and blue prints to prevent their use in building machinery for R. E. Schanzer, Inc. In July 1933 David McMorran wrote an official of Heinr. Franck Sons, Inc., in part:

Schanzer asked Kinzle (respondent's employee) if we would sell him the cutter from Midland and Kinzle told him he would have to find out. I advised Kinzle to stall Schanzer along as long as possible and then tell him "No."

Under date of November 27, 1933, the sales manager of E. B. Muller & Co. advised its New Orleans representative that the company's St. Louis representative would be visiting in New Orleans soon and would call, and said in part:

As the question of prices will no doubt arise, we wish you would not stress the extremely low prices we are compelled to make at New Orleans for reasons well known to you. He is of course, accustomed to obtaining very much higher prices at St. Louis despite the much lower freight rate to that point from Port Huron. This of course by reason of the fact that New Orleans would have to pay a considerable freight rate on shipments to St. Louis, as he has had the business so well in hand for years, that they have found it impossible to break in—and for us, it is a case of averaging up, as if we were compelled to sell at other points at the same price as we sell in New Orleans, we could just as well close up the plant, as we could not exist on the profit.

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Under date of January 3, 1934, David McMorran wrote another official of Heinr. Franck Sons, Inc., in part :

I think Schanzer requires our immediate and careful consideration. You will have noted from the prices on recent imports that Schanzer's imported dried root is costing him approximately \$80 per ton delivered. His Linwood dried root this fall will also cost him approximately \$80 per ton delivered New Orleans. This means 4¢ per pound for his root. Add to this 20% shrinkage or say 1¼¢ per pound plus 1¼¢ for manufacturing, making a total cost to him of 6½¢. If we maintain present prices in New Orleans and the South, it means that Schanzer can scrape thru the next year at just about cost without any overhead cost which in his case is rather low as he has his crockery business to pay his traveling expenses. I am inclined to think that Schanzer has spent most of his working capital at Linwood this year and is probably pretty hard up. If we lower the price of granulated ½ or ¼ cent it will mean that Schanzer will have to do business at a considerable loss as he is selling approximately 1,000,000 pounds per year. We can justify the lower price on the basis of lower cost of our dried root this year. If Schanzer continues to operate at Linwood after this year, he will be a serious menace as his kiln is now in fairly good operating condition with a few minor changes which he contemplates making. His greatest danger now is fire at Linwood as his kiln draft is tremendous and he loads his floors very lightly and will probably result in charring the lower layer. With a lower price for this year, Schanzer will probably be extremely hard up and unable to finance another crop.

A cut of ¼ to ½¢ will mean some loss to us. Is it better to let him go along and scrape thru this year and be in position to become a serious factor next year, or is it better to lower the price with probably his inability to continue?

At the time R. E. Schanzer, Inc., began using domestic chicory root produced in Michigan the company on two occasions sought to obtain a reduction in freight rates on dried chicory root from its kiln in Michigan to its manufacturing plant in New Orleans. Respondents recognized the reasonableness of the reduction sought, as indicated by a letter of March 2, 1934, from the production manager of E. B. Muller & Co. to the New York office of that concern :

Have just received the inclosed wire from New Orleans, which, of course, follows local carriers' refusal to join the Southern on the basis of 47¢, 80,000# minimum. I do not see how we could consistently fight this 65¢ rate, 60,000# minimum, because of the fact that it is generally conceded that raw material or semi-raw material should command a lower rate than prepared and finished material, and we have a 65¢ rate on the latter, 40,000# minimum.

Respondents, however, opposed both applications. Both were refused and chicory root continued to take the same rate as the finished product, granulated chicory, with the result that it costs R. E. Schanzer, Inc., some \$70 more to deliver enough chicory root from Michigan to New Orleans to produce 40,000 pounds of granulated chicory than it costs E. B. Muller & Co. to deliver a 40,000 pound car of granulated chicory from Michigan to New Orleans.

A letter of July 26, 1934, from the New Orleans sales representative to the New York office of E. B. Muller & Co., in referring to competition with R. E. Schanzer, Inc., stated:

In the writer's humble opinion, all that is necessary to finish the job, would be to allow "Free Drayage and Tare on Bags," to the local trade. What think ye?

We realize this is an expensive undertaking, but if the plan is adopted, we know he cannot survive the summer.

Shortly thereafter the plan referred to was in fact put into operation.

In a letter of December 28, 1934, from Gordon McMorran to the New York office of E. B. Muller & Co. it was stated in part:

We learn that Schanzer has applied to the Seatrains for a special rate on chicory from Linwood to New Orleans. This application probably covers a rate on dried root only. Please keep in touch with the Seatrains traffic department and tell them that if the rate is made on dried chicory root we will have to have the same rate applied on manufactured chicory or discontinue our shipments.

In 1934 the sales manager for E. B. Muller & Co. told the wife of the company's New Orleans representative that if her husband succeeded in putting R. E. Schanzer, Inc., out of business he would buy her the best fur coat in New York. This promise was repeated in 1935 and on April 12, 1935, it was referred to in a letter from the wife of the sales manager for E. B. Muller & Co. to the wife of the New Orleans representative of that company in a statement hoping that the New Orleans representative "has a most successful season from all points, as we want to shop for a fur coat this fall."

Ways and means of eliminating R. E. Schanzer, Inc., and the progress made in that direction were frequent topics of conversation among respondent's officers and employees. A former sales representative of E. B. Muller & Co. testified it was his understanding that the purpose of the company in opening a New Orleans office was to break R. E. Schanzer, Inc. In a letter to the New York office of E. B. Muller & Co. this former representative referred to the opening of the New Orleans office and stated, "It was with the intention of breaking Schanzer."

In replying to an observation by a sales representative concerning difficulties which might ensue if customers of E. B. Muller & Co. not solicited by Schanzer discovered that other purchasers received more favorable prices, the sales manager of E. B. Muller & Co. under date of October 2, 1934, wrote in part:

It is quite evident that neither Forbes or Evans have sold these people and not likely that the sale will come to their attention. If it should, your explanation is—that we are fighting an unscrupulous competitor who will

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possibly pass out of the picture before long, but in the meantime we will have to do such things to discourage him, but that before long we hope conditions will get back to their normal basis, so that we as in the past could work with the Jobbers entirely. This wish is father to the thought.

In 1934 E. B. Muller & Co. decided to thereafter offer two grades of granulated chicory, one known as "Premium" and the other as "Standard" and to maintain their then current prices on the best grade and use the Standard grade as a competitive brand. On October 9, 1934, the sales manager of E. B. Muller & Co. in a letter to one of its sales representatives explained the plan in part as follows:

The decision arrived at, is to offer hereafter two grades of Chicory, maintaining present prices on our best grade, which will be the goods as we turned them out heretofore, somewhat improved, and use the second grade, which however, will be stock equal to anything our competitor can offer and very likely better than his, as our fighting brand with price. However, the change will not go into effect until Nov. 1 and as it will be necessary that you have samples to show the difference in the grades, it will be just as well not to make mention of it now, especially among the small trade which you are visiting.

The introduction of two grades of chicory by E. B. Muller & Co. was carried out in a manner intended to, and which so far as practicable did, limit the sale of the so-called fighting brand to the territory in which respondent competed with R. E. Schanzer Inc. Respondent sells much the greater part of the Premium grade at higher prices in other territories and the quantity of Premium grade sold as such in the territory covered by R. E. Schanzer, Inc., is relatively quite small.

In a letter of September 9, 1935, from the sales manager of E. B. Muller & Co. to its New Orleans sales representative, in referring to R. E. Schanzer, Inc., it was stated:

Evidently Neal has drawn in the lines on account of poor conditions—so by continuing our efforts and putting a crimp into him wherever possible, we may ultimately curb this competition if we should not succeed in eliminating it entirely.

In a letter of November 14, 1935, from the sales manager of E. B. Muller & Co. to one of its sales representatives an attempt was made to explain the price situation and it was stated in part as follows:

Against that, if we sold trade in St. Louis at rock-bottom prices without considering what competition can do, we would have a good chance of going broke in our efforts to eliminate the competition.

On November 27, 1935, Gordon McMerran in writing to the New York office of E. B. Muller & Co. stated in part:

Regarding your suggestion to make the differential between Standard and Premium $\frac{1}{2}\%$, we can not quite agree that this is necessary in all cases. In

fact we expressed our opinion a year ago that we are not interested in maintaining any volume on Premium, but must have a higher priced article to protect ourselves in the event that competition should be eliminated, and also to prevent any suggestion that we are engaged in price cutting.

On December 24, 1935, Gordon McMorran in writing to the New York office of E. B. Muller & Co. concerning negotiations with a customer, stated in part:

We would rather sell Drown at a price just below Schanzer as Drown thoroughly understands our position and knows that we are out to beat our competition.

On several occasions prior to 1937 R. E. Schanzer, Inc., appealed to respondents to increase their prices in the New Orleans area in order that it would not be forced to lose money in attempting to meet their competition. Finally, in January 1937 R. E. Schanzer, Inc., found that it was losing so much money that it could no longer afford to sell at respondents' prices and that it was compelled to, and consequently did, increase its prices. Respondents on the occasion of one such request by R. E. Schanzer, Inc., stated if that company could not afford to lose money it should get out of the chicory business, and on another such occasion told R. E. Schanzer, Inc., that while they were not making any money they were satisfied with the way things were going and would not increase their prices, and further that they intended to retain their sales volume at any and all costs.

R. E. Schanzer, Inc., attempted to explain the necessity of the price increase by that company to its customers. An example of one such effort is contained in a letter of January 29, 1937, which reads in part as follows:

Your letter of January 26th received and in connection with our advance on Chicory let me first give the facts that forced us to take this step.

In the first place, the price prevailing during 1936 of $5\frac{1}{4}\text{¢}$ fob New Orleans was in itself below actual cost but we continued selling at this basis hoping that competitive conditions would adjust themselves and that we would be able to obtain a price that would at least cover our cost.

As soon as figures were available for the 1936/7 crop it disclosed that the cost of the new crop was very much higher than we had anticipated * * *.

In view of these conditions and if we want to continue in the Chicory business there was no alternative left but raise our price to where we at least break even. We are fully aware that there will be some customers who will quit us entirely but, on the other hand we have hopes that the majority of our friends will recognize the distinct service we have rendered them in the past and favor us at least with a portion of their requirements. We feel our presence in the Chicory business will always assure them of a fair and reasonable price for this product.

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Promptly after the increase in price was made by R. E. Schanzer, Inc., E. B. Muller & Co. made an increase in its price which was followed by an increase in price by Heinr. Franck Sons, Inc., and a few months thereafter a second increase by E. B. Muller & Co. The increases in price made by the respondents did not, however, raise their prices to the same level as those of R. E. Schanzer, Inc., or terminate their selling below cost.

From long experience in the manufacture and sale of chicory and periodical checks upon their costs respondents were aware that they were selling below their own costs in their efforts to destroy and suppress the competition of R. E. Schanzer, Inc. Examples of such knowledge appear in evidence previously referred to and also in the following excerpts from communications by respondents' officials. In a letter from the production manager of E. B. Muller & Co. to its sales manager dated November 8, 1935, it was stated in part:

It is not likely that there will be further reductions at New Orleans as a price of 5½¢ is already substantially below cost * * *.

In a letter of April 15, 1937, to its sales representative in New Orleans the sales manager of E. B. Muller & Co. stated in part:

5.55 with freight of 54¢ and stop-over charge, nets us less than 5¢ and we have been given to understand that cost is slightly over 5¢. It certainly seems a shame that under present conditions we should be compelled to continue working at a loss.

An official of Heinr. Franck Sons, Inc., informed one of its largest customers that his company was losing between \$20,000 and \$25,000 a year on sales to that customer.

PAR. 10. Respondent, Heinr. Franck Sons, Inc., has discriminated in price among its customers by selling granulated chicory to some at prices materially different from the prices charged others for chicory of like grade and quality. Its largest customers, William B. Reily & Co. and Merchants Coffee Co., both of New Orleans, La., received the lowest prices. Considering these two customers as one group against all other customers of this respondent as a second group, the actual average price differentials between the two groups were substantial and were not justified by reason of differences in cost to respondent of manufacture, sale, or delivery resulting from differing methods or quantities in which chicory of like grade and quality was sold and delivered. Examples of such unjustified price differences as between the two customers mentioned and other customers where the difference is not accounted for by any general change in respondent's prices are: A 50 cents per hundred pounds higher price to American Coffee Co., New Orleans, which failed of justification by 48 cents; a 75 cents per hundred pounds higher price

to Southern Coffee Mills, New Orleans, which failed of justification by 72 cents; a \$1.25 per hundred pounds higher price to U & J Lenson Co., New York, which failed of justification by 6 cents; a \$2.50 per hundred pounds higher price to Golden Gate Supply Co., San Francisco, which failed of justification by \$1.66; and other similar instances. There are, of course, instances where higher prices to others were fully justified by respondent's cost differences.

Respondent, Heinr. Franck Sons, Inc., also discriminated in price as among its customers generally, in addition to the discriminations between its two large customers and others mentioned or referred to above, by selling granulated chicory of like grade and quality to some at materially higher prices than to others, and certain of these differences are not justified by cost differences to the respondent. Examples of such discriminations in prices are: A 25 cents per hundred pounds higher price to U & J Lenson Co. than to S. A. Schonbrunn Co. and Old Dutch Mills, all of New York City, for which difference no cost justification is shown; a 25 cents per hundred pounds higher price to S. B. Cole & Co. than to McGaffey Coffee Co., both of Los Angeles, which difference failed of justification by \$1.12; a price of \$7.75 to Golden Gate Supply Co. of San Francisco as against a \$6 per hundred pounds price to American Coffee Co., New Orleans, resulting in a price difference of \$1.75 per hundred pounds, which failed of justification by 93 cents; a price of \$8.25 to Haas Baruch & Co. of Los Angeles as against a \$6 per hundred pounds price to The Great Atlantic & Pacific Tea Co. of Atlanta, which difference failed of justification by 77 cents per hundred pounds; and others of a similar nature.

Respondent, E. B. Muller & Co., has discriminated in the price of granulated chicory of like grade and quality as among many of its customers by charging materially different prices to some than to others, and many such price differences are not justified by differences in cost to the respondent of manufacture, sale, or delivery resulting from the differing methods or quantities in which said chicory was sold or delivered. The price discriminations by this respondent were accomplished in many different ways: Some resulted merely from outright price differences among customers; some were accomplished by selling a higher grade of chicory to preferred customers at or below the price of a lower grade, when other purchasers of the higher grade were required to pay a premium in price; some were created by the use of a rebate or discount plan under which a few preferred customers who made large annual purchases were granted an additional price reduction or discount; and some were created by other means. The quantity discount or rebate plan referred to was offered to only a few

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customers of respondent, and among such preferred customers neither the base price nor the rate of discount or rebate was uniform as among those with whom agreements were entered into prior to June 19, 1936, but pursuant to which sales were made subsequent to that date. As among preferred customers who received such quantity discounts or rebates pursuant to agreements entered into subsequent to June 19, 1936, the rate of discount or rebate was uniform but the base prices were not. Examples of unjustified discriminations in price by respondent, E. B. Muller & Co., are: A 45 cents per hundred pounds higher price to American Coffee Company, New Orleans, than to C. D. Kenny Company, New Orleans, no part of which price difference was justified; a 20 cents per hundred pounds higher price to Southern Coffee Mills, New Orleans, than to Mobala Coffee Co., New Orleans, no part of which difference was justified; a 25 cents per hundred pounds higher price to the Southland Coffee Co., Atlanta, than to McDougall Coffee Co., Atlanta, no part of which difference was justified; and other similar instances.

Respondents, acting under the common control heretofore stated, have discriminated in price as among the customers of each other in that each respondent has sold chicory of like grade and quality to some of its customers at prices different from those charged by the other respondent to some of its customers, and such price differences are not justified by reason of differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such chicory of like grade and quality was sold or delivered. Examples of such discriminatory price differences are: A 25 cents per hundred pounds higher price to William B. Reily & Co., New Orleans, by Heinr. Franck Sons, Inc., than to New South Warehouse Coffee Co., New Orleans, by E. B. Muller & Co., which failed of cost justification by 95 cents; a 30 cents per hundred pounds higher price to Merchants Coffee Co., New Orleans, by Heinr. Franck Sons, Inc., than to Southern Coffee Mills, New Orleans, by E. B. Muller & Co., which failed of justification by 95 cents; a \$1.08 per hundred pounds higher price to American Coffee Co., New Orleans, by Heinr. Franck Sons, Inc., than to C. D. Kenny Co., New Orleans, by E. B. Muller & Co., which failed of justification by \$1.81; a \$1.50 higher price to U & J Lenson Co., New York, by Heinr. Franck Sons, Inc., than to Boothe Bros. Coffee Co., New Orleans, by E. B. Muller & Co., which failed of justification by \$1.02; a 63 cents per hundred pounds higher price to American Coffee Co., New Orleans, by Heinr. Franck Sons, Inc., than to Trico Coffee Co., New Orleans, by E. B. Muller & Co., which failed of justification by \$1.36; and numerous other similar instances.

The general pattern of the price discrimination followed by respondents has been to make low prices in a few southern States where they are in active competition with R. E. Schanzer, Inc., and make higher prices on sales elsewhere in the United States where their competitor does not attempt to and cannot, because of transportation costs, sell its products. As a result of this respondents recouped in part for the lower prices at which they sold their products in southern States. Respondents' price discriminations, while following the general pattern stated, also included substantial price discriminations as among purchasers within the southern States referred to and among purchasers elsewhere in the United States. In many instances respondents maintained discriminatory prices as between customers located in the same city.

PAR. 11. The effect of respondents' selling below cost in the trade area in which their competitor, R. E. Schanzer, Inc., operates, and the discriminations in price caused by selling to customers in the trade territory covered by R. E. Schanzer, Inc., at lower prices than elsewhere in the United States, has been to divert to themselves a substantial volume of business which their competitor might otherwise have obtained, to force their competitor to sell at unprofitable prices or at prices which represented a loss in order to avoid being forced out of business, and thus to impair their competitor's financial position and render it unreasonably difficult if not impossible for it to secure capital to finance and expand its operations.

During the year 1937 when R. E. Schanzer, Inc., was forced to increase its prices substantially above those of respondents in an effort to avoid financial losses which it could not bear, respondents continued their sales below cost and discriminatory prices and this resulted in a loss of sales volume by R. E. Schanzer, Inc., of nearly 650,000 pounds, or more than 25 percent of its volume in the preceding year. At the time that R. E. Schanzer, Inc., was losing volume of sales because of respondents' pricing and other practices, respondents were substantially increasing their volume of sales. Respondents have by these practices not only weakened and injured competition but have also tended to create in themselves a monopoly in the production and sale of domestic chicory.

The threat of monopoly which might be followed by monopolistic prices was recognized among purchasers of chicory. An inter-company communication by the purchasing officer of a large user of chicory stated in part:

There is no getting around it but what if Schanzer had stayed out of the picture we would be paying much higher prices for chicory from either Heintz or Franck or Muller so we really owe something to them. Muller and Franck

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have always had an opportunity to quote on our business and they always quoted the same price. Now, since Schanzer has gotten the business they are making a strenuous effort to get it back and just the minute that they have eliminated Schanzer I feel quite sure that their prices would be much higher.

That this view was warranted is indicated in the following extract from a letter of March 9, 1937, from the sales manager of E. B. Muller & Co. to the Port Huron office of that concern, stating in part:

We would suggest that they be given a price of 6¢ Jacksonville, which with freight Port Huron to New York and New York to Jacksonville, 65½¢ total, would net 5.34½ Port Huron, unless different information should come to hand of Schanzer having actually closed up entirely, in which case of course, a better price could be obtained * * *.

The sales manager of E. B. Muller & Co. used the possibility of creating a monopoly in respondents as a threat to purchasers. He wrote a sales representative of that company in part as follows:

However, we feel sure that if you will diplomatically advise your trade that Schanzer surely will not last much longer, which is certainly proven by the repeated offers he has made to us to buy him out, they will see the handwriting on the wall, and realize that if Schanzer drops out, which he undoubtedly will, they will have to come back to us, and it should appear reasonable to them to consider that we would not feel as kindly towards those who have gotten away from us for a slight consideration in price, than to those who stuck to us and that they would be the ones in future who will receive the greatest consideration.

Of course it is needless to tell you that this will have to be handled very carefully, not in the nature of a threat but just as a friendly suggestion on your part, and we believe it can be handled very much better by you than by the writer, as such intimation coming from him would not take as well.

Many of the discriminatory prices granted by respondents were among purchasers engaged in competition with each other in the sale of coffee containing chicory. In their competition for trade coffee roasters who purchase chicory and use it for blending with coffee which they sell for resale feel the competitive effects of paying a higher price for chicory than their competitors pay. The importance of price is recognized in the trade since a very small difference in price, sometimes as little as one-twentieth of a cent per pound, will result in a change of source of supply. The importance of price is expressed by a coffee roaster in a letter to respondent E. B. Muller & Co. which stated in part:

* * * although we like your product much better we would like to buy Chicory as cheaply as possible on account of the competition we have on cheap mixed goods in which we use Chicory.

A sales representative of E. B. Muller & Co., reporting to that company, stated in part:

They (referring to a customer) were also very appreciative of our telling them about the use of Standard Chicory in the cheaper Coffee blends as the competition is very keen and they were losing business using our higher priced Chicory when it was not necessary.

Respondents themselves recognized and admitted the substantial competitive advantage to a coffee roaster of a lower price for chicory. David McMorran in writing to an official of Heinr. Franck Sons, Inc., stated in part:

This is the danger in letting one customer get too big as we have done by rebates to Reilly. Reilly has been able to undersell his competitors thru our help and when he gets big enough he will unquestionably attempt to go into the business himself. The only thing that will prevent him will be the fear that if he does do this there will be a fight and every 5 bag buyer in New Orleans will get his chicory just as cheap as Mr. Reilly can produce it for itself. Reilly would not be able to sell much outside of his own trade and if his chicory costs him as much as his small competitors, all of Reilly's advantage is gone.

In another letter to the same official David McMorran stated in part:

What I am trying to get at is to reduce the cost of granulated for a portion of the New Orleans trade. I cannot see my way clear to consenting to making further quantity rebate to Reilly. The rebate is altogether too high now and we are damaging our other granulated trade by giving Reilly such a large rebate. It is dangerous for us to increase Reilly's trade at the expense of his competitors.

The Commission finds that the sales below cost and the discriminations in price made by respondents resulted in substantial injury to competition among their customers and the customers of each of them.

PAR. 12. Respondents attempted to justify their sales below cost and their discriminations in price on the ground that such prices were made in good faith to meet the competition of R. E. Schanzer, Inc. Upon consideration of the evidence the Commission finds that with minor exceptions the discriminatory prices and sales below cost made by respondents were not protective measures on their part to meet previously established lower prices by R. E. Schanzer, Inc., but were aggressive acts in which they deliberately cut their prices below those of their competitor and discriminated in price among their customers as a part of their purpose and design to suppress and destroy competition, and that there is no foundation in fact for the claim of meeting competition in good faith.

At the time R. E. Schanzer, Inc., was selling imported chicory, by reason of a prejudice among purchasers against imported chicory or doubt as to its quality being equal to that of domestic chicory, said company was unable to sell such imported products at the price level

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of competing domestic products, and the making of sales of imported goods required the granting of a slightly lower price than that current on domestic chicory. During this period of time the instances where respondents reduced their prices below those of R. E. Schanzer, Inc., as well as those instances where such reductions resulted in prices level with those of R. E. Schanzer, Inc., amounted to more than meeting competition in good faith and were not warranted by competitive necessity.

There have been instances where the prices of R. E. Schanzer, Inc., were lower than the prices of Heinr. Franck Sons, Inc., but not lower than the then current prices of E. B. Muller & Co., or lower than the prices of E. B. Muller & Co. but not lower than the then current prices of Heinr. Franck Sons, Inc. In the great majority of such instances the fact that the prices of R. E. Schanzer, Inc., were lower than those of one of the respondents resulted from an attempt by R. E. Schanzer, Inc., to meet lower prices established by the other respondent.

A former sales representative of respondent E. B. Muller & Co. testified that during his connection with that company it was E. B. Muller & Co. and not R. E. Schanzer, Inc., which assumed the initiative in cutting prices and that his company four or five times reduced its prices below those of R. E. Schanzer, Inc., and that he knew of no instance where R. E. Schanzer, Inc., had cut its prices below those of E. B. Muller & Co.

On November 12, 1931, E. B. Muller & Co. wrote its New Orleans sales representative in part:

We would like to know just what Schanzer's prices now are. While you wrote us that he met our cut, it is not clear to us to what extent, as we have three prices, * * *.

On January 13, 1932, E. B. Muller & Co. wrote its New Orleans sales representative in part:

We note that Schanzer has met our prices both locally and in the country. We are wondering how long he will be able to do this without losing a lot of money.

On March 15, 1933, the production manager of E. B. Muller & Co. wrote its New York office with reference to R. E. Schanzer, Inc., and said in part:

* * * that the cut of $\frac{1}{2}\text{¢}$ which he made following us to some extent is offset by a lower cost to him.

On April 24, 1934, the sales manager of E. B. Muller & Co. in writing to its New Orleans sales representative, referring to a recent price reduction made by his company, stated in part:

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Black reports having met Schanzer's man in Atlanta the first day he was able to be out again after having been ill, and he sure acted as though he had gotten a Solar Plexus blow, going so far as to rail at Black in front of a customer for having made a reduction at this time, when they appear to be looking for an increase in price.

On February 21, 1935, a sales representative of E. B. Muller & Co. wrote the New York office of that concern in part:

Schanzer recently sold the Jobbers Coffee Co., 902 Main Street, Columbia, S. C., chicory at 6.90 * * * I made them a price of 6.85 on our Standard * * *.

On March 1, 1937, a sales representative of E. B. Muller & Co., writing from Birmingham, Ala., advised the New Orleans office of that concern that he had seen the buyer for Standard Brands, Inc., and had been:

* * * told that Schanzer is charging them 6¼¢ FOB New Orleans on the chicory he is shipping them now. I quoted them 6¢ FOB Birmingham, as you instructed me and this price may swing this business to us.

The contention of respondents that prices in other cities are not discriminatory where they are equal to the New Orleans, Port Huron, or New York base price of respondents plus the amount transportation from the nearest of these three points would cost is not accepted. The costs which may be used in justification of price differences are actual costs as distinguished from theoretical or artificial costs.

PAR. 13. The false and disparaging representations published and circulated by respondents concerning alleged adulteration of the products of competitors, and the false and misleading representations that the color and uniformity of color of their own granulated chicory were obtained by care and selection in roasting when in truth and in fact such granulated chicory was artificially colored as hereinbefore set out, contributed to the injury to and suppression of competition and tendency toward monopoly in respondents resulting from the sales below cost and discriminations in price as aforesaid, and in addition thereto in and of themselves have had, and now have, the capacity and tendency to, and have, and do, mislead and deceive members of the purchasing public by creating in their minds the erroneous and mistaken belief that such statements were, and are, true, with the result that trade has been unfairly diverted from competitors to respondents.

CONCLUSION

The discriminations in price by respondents as hereinabove set out have resulted, and do result, in substantial injury to their competitors, hinder, obstruct, and tend to suppress competition with respondents

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and create a monopoly in them in the processing and sale of granulated chicory, and have resulted, and do result, in substantial injury to competition among purchasers of such chicory by affording material and unjustified price advantages to preferred purchasers and not to others, and violate subsection (a) of section 2 of an act of Congress entitled, "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, sec. 13). The sales below cost by respondents were made with the intent and purpose and with the effect of substantially injuring and lessening competition and tending to create a monopoly in the processing and sale of domestic granulated chicory in respondents and this practice and the other acts and practices of respondents as aforesaid are all to the injury and prejudice of the public and of respondents' competitors and constitute unfair methods of competition in commerce 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 and the amended and supplemental complaint of the Commission, the answers of respondents, testimony and other evidence in support of the allegations of said complaints and in opposition thereto taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiners and exceptions thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel; and the Commission having made its findings as to the facts and its conclusion that respondents have violated the provisions of the Federal Trade Commission Act and of subsection (a) of section 2 of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13).

It is ordered, That respondents, E. B. Muller & Co., a corporation, and Heinr. Franck Sons, Inc., a corporation, their officers, representatives, agents, and employees, either jointly or severally, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of granulated chicory in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Disparaging the products of competitors by falsely representing that such products contain molasses, sugar beets, sugar beet pulp, or

other foreign substances, or are adulterated in any manner; or otherwise making and publishing any false and disparaging representations concerning the products of competitors.

2. Representing that granulated chicory the color or uniformity of color of which has been affected by the use of iron oxide or any other artificial coloring agent is not artificially colored, either by affirmative representations or by failure clearly to disclose that such product has been artificially colored.

3. Selling or offering to sell granulated chicory at a price less than the cost thereof to respondents with the purpose or intent, and where the effect may be, to injure, suppress, or stifle competition or tend to create a monopoly in the production or sale of such products. (As used in this paragraph the term "cost" means the total cost to respondents of any such transactions of sale, including the costs of acquisition, processing, preparation for marketing, sale, and delivery of such products.)

It is further ordered, That said respondents, their officers, representatives, agents, and employees, either jointly or severally, directly or through any corporate or other device, in the sale of granulated chicory in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating directly or indirectly in the price of such products of like grade and quality, as among purchasers from either or both of them, where the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered:

(A) By selling any material quantity of such products to purchasers in one or more general trade areas at prices different from those to purchasers in any other general trade area.

(B) By selling such products to some purchasers in any general trade area at prices materially different from those to other purchasers in the same general trade area.

It is further ordered, That respondents shall, within 60 days after the 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
VON SCHRADER MANUFACTURING COMPANY ET AL.
COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3924. Complaint, Oct. 12, 1939—Decision, June 11, 1941

Where two partners, successors to a discontinued corporate business, engaged in the competitive interstate sale and distribution of electrically operated portable rug and carpet washing machines, cleaning function of which involved the automatic application to, and removal from, the surface being cleaned, of soap solution fed to machines' oscillating rubber brushes; by advertisements in magazines and other publications of general circulation, circulars, other printed matter, and letters distributed to members of the purchasing public—

- (a) Represented that their machine would restore the original color of rugs or carpets, destroy germs or other micro-organisms therein and sterilize or substantially sterilize the same, through such statements, among others, as "Let us restore the exquisite colorings in your rugs and carpets," "All the delicate colors, the beautiful shades that you have long forgotten were in your rug or carpet, are brought back * * *," and "* * * removes the deeply imbedded grime and the microbes of disease which are carried into the home by every shoe that crosses the threshold";

Facts being soap solution used therein was not a germicide, and would not "destroy every vestige of germs" or remove "the microbes of disease," the cleaning action of the machine being limited to the removal of such dirt and other foreign material as might be loosened by its scrubbing action and incorporated in the lather, and machine did not restore the original colors of carpets and rugs, except for any freshness of appearance which might result from such cleaning; and

- (b) Represented that the profits of operators of their said machine averaged \$200 or \$400 a month, through such statements as "\$200 to \$400 a month is an easy average," and "\$200 my first week";

Facts being business in question is a seasonal one and there are periods when little business is obtained by operators; \$200 to \$400 a month profit was not an easy average for operators nor an average of any kind of their earnings, and representations as to large gross amounts which had been earned by individual operators in their best day, week, or month, were false and misleading, in that they represented unusual and exceptional conditions and not the ordinary course of business under normal conditions;

With capacity and tendency to mislead and deceive members of the purchasing public as to the effectiveness of their machines and earnings which might be secured from operation thereof, with result that many members of such public were thereby induced to purchase their products under the erroneous belief that said representations were true, and trade was diverted to them from competitors, to the substantial injury of competition in interstate commerce: