

Syllabus

IN THE MATTER OF
THE SHERWIN-WILLIAMS CO., THE LOWE BROTHERS
COMPANY, AND JOHN LUCAS & COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2(a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED
BY ACT OF JUNE 19, 1936

Docket 3965. Complaint, Dec. 8, 1939—Decision, Jan. 8, 1943

Where three corporations, namely, the parent company and two subsidiaries, engaged in the manufacture and competitive interstate sale and distribution of paints and paint products which, in the case of said parent concern, were advertised, known, and sold on a Nation-wide scale through its extensive organization, and, in the case of the other two, on a more restricted scale in different sections of the country;

Selling their said products through separate organizations which, while competitive to some extent, reflected their relationship through one or more common officers or directors; doing a business running into many millions of dollars and selling and distributing through and to thousands of authorized dealers and many chain or line lumber yards and wholly owned retail stores; and making use, as respects matters herein concerned, of their "1938 plan" under which discounts off dealers' list of from 6 to 14 percent were contingent upon quantities ordered, ranging from 24 gallons up to carloads and truckloads, and of their "1939 plan" under which total dollar purchases for a given year determined the discount for the year ensuing—

- (a) Discriminated in price against independent dealer purchasers under the 1938 plan through extending to their chain lumberyard customers and to other customers operating two or more stores, the privilege of pooling the orders placed by their unit stores; and granting and allowing on the total gallonage the 10-, 8-, and 6-percent discounts off dealers' list prices for the combined orders, which, in other respects, were treated and delivered as separate orders; and

Where said parent concern—

- (b) Discriminated in price, as aforesaid, by granting and allowing to some of its chain lumberyard customers a flat 10 percent discount off dealers' list prices on all their purchases of trade sale items, irrespective of size;

With the result that the customers concerned, through taking advantage of said pooling privilege or 10 percent flat discount, received better prices for their unit stores—which generally received as much attention in sales and other assistance as did independents with comparable business in the same territory—than their independent dealer competitors whose "per order" purchases might have been even greater than those of said unit stores, the resulting differentials oftentimes amounting to as much as 10 percent; and

- (c) Discriminated in price in favor of certain of its dealers and distributors through accumulating their orders for a week, or sufficiently long period to enable the purchaser to earn the maximum quantity discounts, and granting and allowing to them, under the 1938 plan, the 10-, 8-, and 6-percent discounts off dealers' list prices which resulted from the gallonage represented by the orders thus accumulated; and

Where one of said subsidiaries which (1) maintained a warehouse in a building owned by a dealer-customer, competitor of the customers of said corporations and of other subsidiaries of said parent concern, and of latter's competitors; and which (2) at least adequately compensated said dealer-customer through paying it a 10-percent commission of the net amount of said subsidiary's paint products shipped out of such warehouse to the subsidiary's customers by said dealer-customer—

- (d) Discriminated in price against other of its dealers through granting and allowing aforesaid dealer-customer, under said 1938 plan, in addition to said 10-percent commission or compensation for warehousing and services in connection therewith, a 12-percent discount from dealers' list prices on all the purchases of such customer-dealer, estimating that, lacking said warehouse, it would have earned such discounts by carload and 84 gallon or greater l. c. l. shipments; and

Where said two subsidiaries which (1) in common with said parents concern customarily allowed functional discounts to customers who qualified as jobbers, wholesalers, or distributors, and to such dealers as performed jobber or distributor functions to the extent that they did so only; which (2) accepted, for the purpose of computing functional discounts, statements of their dealers as to the percentage that latter's distributor, i. e., dealer-to-dealer, business bore to their entire business, with resulting discrimination, in favor of some; and which (3) were in competition with many paint concerns selling directly, particularly in the metropolitan centers, to painters, master painters, painting contractors, and maintenance accounts, i. e., hotels, apartment houses, real estate corporations, insurance companies, commercial stores, industrial concerns, etc.—frequent buyers of paint in quantities of 4 gallons or more, and customarily at better prices than those paid by occasional consumers—and which concerns when they desire to secure substantial proportion of painter-maintenance business, customarily employ outside salesmen, provide delivery service, and oftentimes operate a credit department—

- (e) Discriminated in price in favor of some but not all of their dealers and dealer-distributors in particular localities through granting and allowing them functional or special discounts on nondealer business, i. e., purchases resold to painters, painting contractors, and maintenance accounts as above set forth;
- (f) Discriminated in the case of one or the other, as above set forth, (1) in favor of aforesaid "warehouse customer"—which sold no portion of the products purchased to other dealers, but sold substantially all to regular and occasional consumers, chiefly, painters, etc., as above set forth, through additional discounts, including one "in lieu of carload quantity"; and (2) through additional discounts similarly discriminated in favor of a customer of the other subsidiary, which similarly sold to consumers only, its purchases;
- (g) Discriminated in price in favor of some of their dealers and dealer-distributors on the purchases which they resold direct to the consumer through their retail departments or wholly owned branch stores, in competition with customer-dealers of said subsidiaries, or of parent concern, or of other sellers, through granting them functional or special discounts, on the basis of dealer-to-dealer business, in excess of such business, if any, done by them;

Effect of which discriminations, not shown as justified, had been and might be substantially to lessen competition with said parent concern or subsidiaries in the line of commerce in which they were engaged, and to injure, destroy, or prevent competition with them and with their customers who received benefit of discriminations aforesaid:

Held, That such acts and practices were in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. S. G. Churchill and *Mr. William C. Kern* for the Commission.

Davies, Richberg, Beebe, Busick & Richardson, of Washington, D. C., and *Mr. T. J. McDowell*, of Cleveland, Ohio, for respondents.

COMPLAINT

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," commonly known as the Clayton Act (U. S. C., title 15, section 13), as amended by an Act of Congress, approved June 19, 1936, commonly known as the Robinson-Patman Act, the Federal Trade Commission, having reason to believe that the respondent, The Sherwin-Williams Co.; the respondent, The Lowe Brothers Co.; and the respondent, John Lucas & Co., Inc., since June 19, 1936, have been and now are violating the provisions of subsection (a) of section 2 of said act as amended, issues its complaint against said respondents and states it charges with respect thereto as follows, to wit:

PARAGRAPH 1. The Sherwin-Williams Co., is a corporation, organized and existing under the laws of the State of Ohio and has its principal executive office and place of business at 1200 Midland Building, Cleveland, Ohio.

PAR. 2. The Lowe Brothers Co., is a corporation, organized and existing under the laws of the State of Ohio and has its principal executive office and place of business at 424 East Third Street, Dayton, Ohio.

PAR. 3. John Lucas & Co., Inc., is a corporation, organized and existing under the laws of the State of Maryland and has its principal executive office and place of business at 322 Race Street, Philadelphia, Pa.

PAR. 4. *Definitions*.—Except where the context requires another or different meaning, the following abbreviations and terms, for the purposes of this complaint, shall be understood to have the following meanings:

1. The Sherwin-Williams Co. (except for the allegations contained in paragraphs 1 and 5 hereof) means the corporate entity by that

name, acting by and through itself as an operating company and by and through its wholly owned operating subsidiaries, The Lowe Brothers Co. and John Lucas & Co., Inc., and by and through its other operating subsidiaries, and in its capacity of controlling the policies and activities of itself and said subsidiaries.

2. Sherwin-Williams means The Sherwin-Williams Co., solely in its capacity as an operating company, engaged in the manufacture, sale, and distribution of paint products.

3. Lowe Brothers means (except for the allegations contained in paragraph 2 hereof) The Lowe Brothers Co. and The Sherwin-Williams Co., solely by and through its wholly owned operating subsidiary The Lowe Brothers Co.

4. Lucas means (except for the allegations contained in paragraph 3 hereof) John Lucas & Co., Inc., as an operating company or by and through its wholly owned operating subsidiary W. W. Lawrence & Co., and The Sherwin-Williams Co., solely by and through its wholly owned operating subsidiaries, John L. Lucas & Co., Inc., and W. W. Lawrence & Co.

5. Manufacturers means Sherwin-Williams, Lowe Brothers and Lucas.

6. Seller means a person, partnership, or corporation (other than the manufacturers or The Sherwin-Williams Co.) engaged in the manufacture, sale and distribution of paint products.

7. Painters and Paint Contractors mean a person, partnership, or corporation, engaged in the business of utilizing and applying paint products, (1) that customarily includes the paint products to be used on a painting job in estimates made to procure such job or, in the alternative, that makes arrangements with the person with whom the contract to do the paint job has been made to furnish the paint to be used on the job at a stipulated price and (2) that customarily purchases paint in quantities of 4 gallons or more.

8. Maintenance Account means hotels, apartment houses, real estate corporations, insurance companies, commercial stores, industrial concerns, etc., that buy paint fairly frequently and customarily in quantities of 4 gallons or more.

9. Regular Consumer means painters, paint contractors, and maintenance accounts.

10. Occasional Consumer means a person, partnership, or corporation that buys paint products infrequently and customarily in very small quantities, rarely as much as 4 gallons.

11. Dealer means a person, partnership, or corporation that operates a retail establishment or store and is regularly engaged during

customary business hours in the sale of merchandise, including paint products, to occasional and/or regular consumers.

12. Line Yard Lumber Company or Chain Lumberyard means a person, partnership, or corporation that operates a number of retail establishments or stores, the individual establishments or stores (hereinafter referred to as "unit stores") (1) being customarily located in different communities, towns, or cities, some of said communities, towns, and cities oftentimes being in different States from others of said communities, towns, and cities, and (2) being regularly engaged in the sale of lumber and other merchandise, including paint products, to occasional and/or regular consumers. (Originally, the unit stores of any particular chain were located in communities, towns, or cities served by one branch of one railroad, but that is not necessarily true today, and may even represent the exceptional situation.)

13. Jobber or Distributor means a person, partnership, or corporation engaged in the business of buying and receiving paint products from the manufacturers or sellers thereof and of selling and shipping paint products to and in servicing, billing, and carrying dealer customers.

14. Specification Paint means paint manufactured according to a special formula prepared to meet the special requirements or demands of a large consumer, customarily a governmental body, a railroad, or a large industrial concern.

15. Trade Sale Line or Trade Item means standard products of the manufacturers or of other sellers, sold under trade mark bearing the name of the manufacturer or seller, including, among other products, exterior and interior house paint, roof, barn, and metal paint, varnishes and lacquers.

16. Companion Line means standard products of the manufacturers or of other sellers which are less expensive than the trade sale line products and not always sold under trade mark bearing the name of the manufacturer or seller.

17. Allied Line means miscellaneous products such as dry colors, bronzes, linseed oil, turpentine, alcohol, lead, and insecticide materials.

18. Paint Products means trade sale line, companion line (in the case of those companies that manufacture such a line) and allied line only.

19. General Scheme of Distribution means the general practice of the manufacturers pursuant to which they (a) sell directly to governmental bodies, railroads, and large industrial consumers their requirements of paint, usually specification paint; (b) sell directly to painting contractors having large volume the requirements of such contractors of specification paint and paint products; and (c) sell paint products

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indirectly through dealers, chain lumberyards, distributors, retail branches, and others to the occasional and/or regular consumers of paint.

PAR. 5. The Sherwin-Williams Co. owns 100 percent of the issued and outstanding equity stock and controls the policies and activities of the following corporations:

The Lowe Brothers Co.

John Lucas & Co., Inc.

Acme White Lead and Color Works of Hamtramck, Mich., and Martin Senour Company of Chicago, Ill.

each of which is engaged in the manufacture, sale, and distribution of trade sale and allied line paint products.

The Sherwin-Williams Co. owns a majority of the issued and outstanding equity stock and controls the policies and activities of the following corporation:

Detroit White Lead Works of Hamtramck, Mich.

which is engaged in the manufacture, sale, and distribution of trade sale and allied line paint products.

John Lucas & Co., Inc., owns 100 percent of the issued and outstanding equity stock of, and The Sherwin-Williams Co., by and through said John Lucas & Co., Inc., controls the policies and activities of, the following corporation:

W. W. Lawrence & Co. of Pittsburgh, Pa.

which is engaged in the manufacture, sale, and distribution of trade sale and allied line paint products.

Acme White Lead and Color Works owns 100 percent of the issued and outstanding equity stock of, and The Sherwin-Williams Co., by and through said Acme White Lead and Color Works, controls the policies and activities of, the following corporations:

Peninsular Paint and Varnish Company of Hamtramck, Mich., Lincoln Paint and Color Company of Lincoln, Nebr.

each of which is engaged in the manufacture, sale, and distribution of trade sale and allied line paint products.

PAR. 6. For many years prior to and since June 19, 1936, Sherwin-Williams has been and now is engaged in the business of manufacturing, selling and distributing (1) basic raw materials used in the production of paint, varnishes, and lacquers, (2) specification paint, and (3) paint products. The paint products of Sherwin-Williams are all standardized. In the course and conduct of its business Sher-

win-Williams has been and now is manufacturing said paint products principally at its factories which are located in Cleveland, Ohio; Chicago, Ill.; Newark, N. J.; and Oakland, Calif. That Sherwin-Williams maintains and operates approximately 40 warehouses situated in as many cities in over 25 States of the United States. That Sherwin-Williams, for convenience in selling and delivering its merchandise, maintains and operates district offices, sales division offices, or service stations in over one-half of the cities in which its warehouses are located, and, in addition, maintains and operates a sales office in Washington, D. C., where it has no warehouse. Sherwin-Williams employs several hundred salesmen who call regularly on all classes of customers. The annual net sales of Sherwin-Williams in the United States of paint products alone total approximately \$17,000,000. Such products are sold and distributed through (1) over 6,300 authorized dealers, a number of whom act as distributors with respect to a portion of such paint products purchased by them, (2) over 80 chain lumberyards, (3) approximately 120 wholly owned retail stores, and (4) other miscellaneous mediums.

PAR. 7. For many years prior to and since June 19, 1936, Lowe Brothers has been and now is engaged in the business of manufacturing, selling, and distributing specification paint and paint products. The paint products of Lowe Brothers are all standardized. In the course and conduct of its business, Lowe Brothers has been and now is manufacturing paint products at its factory which is located at Dayton, Ohio; that Lowe Brothers maintains and operates 15 warehouses located in the following cities: Dayton, Ohio; Chicago, Ill.; Kansas City, Mo.; Atlanta, Ga.; Boston, Mass.; Jersey City, N. J.; Cleveland, Ohio; Omaha, Nebr.; Minneapolis, Minn.; Indianapolis, Ind.; Memphis, Tenn.; Jacksonville, Fla.; Forth Worth and Houston, Tex.; and New Orleans, La.; that Lowe Brothers, for convenience in selling and delivering its merchandise maintains and operates district offices in the first 6 of the herein named cities in which its warehouses are located. Lowe Brothers employs a substantial number of salesmen, who call regularly on all classes of customers. The annual net sales of Lowe Brothers in the United States of paint products alone total over \$1,000,000. Such products are sold and distributed through (1) over 1,500 authorized dealers, (2) approximately 70 distributors, and (3) approximately 100 chain lumberyards, (4) 11 wholly owned retail stores, and (5) other miscellaneous mediums.

PAR. 8. For many years prior to and since June 19, 1936, Lucas has been and now is engaged in the business of manufacturing, selling, and distributing specification paint and paint products. The paint products of Lucas are all standardized. In the course and conduct of its

business, Lucas has been and now is manufacturing said paint products at its principal manufacturing plant which is located in Gibbsboro, N. J.; that Lucas maintains and operates 8 warehouses located in Philadelphia, Pa.; Boston, Mass.; New York City; Chicago, Ill.; Albany, N. Y.; Pittsburgh, Pa.; Minneapolis, Minn.; and Wadena, Minn.; that Lucas, for convenience in selling and delivering its merchandise, maintains and operates sales offices in the first 4 of the herein named cities in which its warehouses are located. Lucas employs a substantial number of salesmen who call regularly on all classes of customers. The annual net sales of Lucas in the United States of paint products alone total approximately \$2,000,000. Such products are sold and distributed through (1) approximately 1,500 authorized dealers, (2) approximately 100 distributors, (3) 3 chain lumberyards, (4) 10 wholly owned retail stores, and (5) other miscellaneous mediums.

PAR. 9. In the course and conduct of their respective businesses as aforesaid, the manufacturers transport or cause to be transported some of their paint products, when manufactured, from their respective factories aforesaid to their respective warehouses which are located, as hereinbefore set forth, in various States of the United States, and oftentimes in States other than the States in which their respective factories are located and in which such shipments originated, and transport or cause to be transported their paint products from their respective factories aforesaid or from their respective warehouses aforesaid to the purchasers thereof located in the several States of the United States and in the District of Columbia, other than the States in which their respective factories are located, and there is and has been, at all times herein mentioned, a continuous current of trade and commerce in said paint products between the respective factories, warehouses, and distributing points of said manufacturers and purchasers from each of them located in many and, as to Sherwin-Williams in all of the States of the United States and the District of Columbia.

The manufacturers advertise their respective paint products nationally and have created a public demand for such products throughout the States of the United States and the District of Columbia.

The manufacturers sell and distribute their respective paint products for use, consumption, or resale within the United States and in the District of Columbia, in the same States and places as and in competition with various other sellers of paint products. Many of said competing sellers distribute their products nationally, as do the manufacturers, while many of said competing sellers distribute their paint products to customers located within the trading area or areas em-

braced within or adjacent to the trading areas in which their factories are located.

The comparable trade sale line products sold by the manufacturers are of like grade and quality. The Sherwin-Williams customers who sell at retail are occasionally competitively engaged with each other locally, are oftentimes competitively engaged locally with the Lowe Brothers and/or Lucas customers who sell at retail and are almost uniformly competitively engaged locally with the retailer customers of the competitors of The Sherwin-Williams Co., in the resale of said products, said resales taking place in every State of the United States and in the District of Columbia. That a similar situation exists as to the retailer customers of Lowe Brothers and as to the retailer customers of Lucas.

PAR. 10. That, for the purpose of selling and distributing its paint products, Sherwin-Williams has divided the territorial United States into six zones. For each zone, Sherwin-Williams has published the prices that are applicable from time to time, on sales of its paint products to dealers in that zone (hereinafter referred to as "dealers' list prices" and whenever this term is used with respect to Sherwin-Williams, it shall be understood to refer to that one of the six different dealers' list prices issued by Sherwin-Williams that shall be in effect at the time and that shall be applicable to the particular situation or situations under consideration), the differentials in prices between the zones being sufficient, as a rule, to compensate Sherwin-Williams for the differences in the average cost of freight between its factories and its warehouses in the various zones. Sherwin-Williams, as a rule, ships its paint products to its customers f. o. b. the warehouse nearest the customer. In all cases where the customer buys a carload or truckload of 20,000 pounds or more and receives shipment direct from the factory, freight is allowed.

The dealers' list prices herein mentioned, so far as applicable to trade sale items, since June 19, 1936, have been subject to various discounts, depending either upon the total volume of Sherwin-Williams paint products, or certain of them, purchased by one customer during a specified period or upon the quantity purchased by one customer at and for shipment at one time.

On or about January 3, 1938, the Sherwin-Williams Co. put into effect, as to Sherwin-Williams, Lowe Brothers and Lucas, a discount plan (hereinafter referred to as the "1938 Plan") which was operative from that date until on or about September 1, 1939. The 1938 Plan, briefly described, was as follows:

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To any customer who purchased in one order for shipment at one time less than 24 gallons¹ of trade sale line paint products, no discount was granted from the dealers' list prices (except a 2-percent discount for cash); to any customer who purchased such paint products in one order for shipment at one time to an aggregate of 24 gallons or more, the following scale of discounts applied:

24 to 48 gallons—6 percent off dealers' list on entire order of such items.

48 to 84 gallons—8 percent off dealers' list on entire order of such items.

84 gallons and over—10 percent off dealers' list on entire order of such items.

Carloads and Truckloads (from factory)—14 percent off dealers' list on entire order of such items.

The aforementioned discount was shown on the face of the customer's invoice and the customer was billed for the net price, after the deduction of the per order discount.

On or about September 1, 1939, The Sherwin-Williams Co. altered the 1938 Plan herein described and now employs, as to Sherwin-Williams, Lowe Brothers and Lucas, a discount plan (hereinafter referred to as the "1939 Plan"), pursuant to which discounts from dealers list prices are dependent upon the annual volume of trade sale items purchased by a customer, with one exception hereinafter noted. Under the 1939 plan, a customer purchasing less than \$500 worth of such products during a year receives a 5 percent discount from dealers list prices. This is tantamount, as to those customers heretofore purchasing such items in quantities of less than 24 gallons per order, to a general price reduction of 5 percent. A customer purchasing more than \$500 worth of such products during 1 year receives an additional 5 percent discount. Such a customer pays 95 percent of dealers list prices, less 5 percent of such prices as so reduced. Such discounts are given on the face of the customer's invoice. Whether a particular customer is entitled to receive the 5 percent or the 5-5 percent discount is determined by averaging his purchases of such items over the 3-year period immediately preceding the inauguration of the 1939 Plan. A customer purchasing in carloads or truckloads and receiving shipment direct from the factory receives a further 5 percent discount. As to such a customer, the present base price of 95 percent of dealers' list prices is reduced by 5 percent thereof and by a further 5 percent of the

¹ Products packaged and priced by the pound were calculated at the rate of 1 gallon to every 12 pounds.

net figure thus obtained, to arrive at the net price which the carload or truckload customer pays.

That it has been and is the general policy and practice of Sherwin-Williams to sell its trade sale line paint products to its dealers and Sherwin-Williams has sold and is now selling such products to such dealers, generally at its dealers' list prices, less whatever discounts may have been or may be applicable under the 1938 or the 1939 Plan.

PAR. 11. That the Lowe Brothers methods of selling and distributing its paint products, so far as concerns the establishment of zones, the publishing of its own dealers' list prices for each zone, the collection of freight charges and the applicability of the 1938 and 1939 Plans to such dealers' list prices, have been and are substantially the same as those of Sherwin-Williams except that Lowe Brothers in shipping its paint products to its customers f. o. b. its warehouse nearest the customer, makes it a practice to equalize the freight charges with the freight charges applicable from that warehouse of a seller or of another of said manufacturers which is nearest to the customer.

That it has been and is the general policy and practice of Lowe Brothers to sell its trade sale line paint products to its dealers and Lowe Brothers has sold and is now selling such products to such dealers, generally at its dealers' list prices, less whatever discounts may have been or may be applicable under the 1938 or the 1939 Plan.

PAR. 12. That the Lucas methods of selling and distributing its paint products, so far as concerns the establishment of zones, the publishing of its own dealers' list prices for each zone, the collection of freight charges and the applicability of the 1938 and 1939 Plans to such dealers' list prices, have been and are substantially the same as those of Sherwin-Williams, with the following exceptions:

1. The territorial United States has been divided into four instead of six zones;

2. Lucas allows freight to destination. The paint products are shipped f. o. b. the warehouse, but the customer is permitted to deduct freight from the net amount of the invoice; and

3. Under a variation of the 1938 Plan applicable to Lucas, customers purchasing in carloads and truckloads of 20,000 pounds or more direct from the factory were allowed a 12 percent rather than a 14 percent discount from dealers' list prices.

That it has been and is the general policy and practice of Lucas to sell its trade sale line paint products to its dealers and Lucas has sold and is now selling such products to such dealers, generally at

its dealers' list prices, less whatever discounts may have been or may be applicable under the 1938 or the 1939 Plan.

PAR. 13. The Sherwin-Williams Co. and each of the manufacturers, in the course and conduct of their business in commerce, has, since June 19, 1936, discriminated in the prices at which it has sold and is now discriminating in the prices at which it is selling its products of like grade and quality between different purchasers of such products by giving and allowing to some of said purchasers, either directly or indirectly, rebates or discounts from its dealers' list prices which have not been given and allowed to others of its purchasers. That the manufacturers and The Sherwin-Williams Co. have effectuated the discriminations in price referred to herein in a variety of ways, some of said ways being more specifically hereinafter described.

PAR. 14. That, for the purpose of granting and allowing the quantity discounts under their respective 1938 Plans, the manufacturers, particularly Sherwin-Williams and Lowe Brothers, have permitted the main office of some chain lumberyard buyers to pool the orders of the unit stores thereof and have granted and allowed to such chain lumberyard buyers the quantity discounts applicable to the gallonage represented by the pooled orders. For example, if the pooled order has totaled over 84 gallons, each unit store through its main office has received a flat 10 percent off dealers' list prices on its purchases of paint products, even though no one unit store may have ordered a sufficient quantity to qualify for any discount. That, with respect to other chain lumberyard buyers, the manufacturers, particularly Sherwin-Williams, have granted and allowed a flat 10 percent discount off dealers list prices, irrespective of the size of the order and irrespective of whether the order represented the pooled requirements of all the unit stores of the chain lumberyard or the individual requirements of only one of the unit stores thereof. That, in either case, the manufacturer granting and allowing the pooling privilege or the flat 10 percent discount did not customarily make shipment of the full order to the main office of the chain lumber yard, but shipped the paint products so ordered to the various unit stores thereof. That the chain lumber yards receiving the flat 10 percent discount from dealers' list prices from one of said manufacturers were, in certain cases, in competition with other chain lumberyards which purchased either from the same or from another of said manufacturers, the latter chain lumberyards not receiving the flat 10 percent discount herein mentioned. That, in some cases, independent dealers who purchased trade sale line paint products from one of the manufacturers and who did not receive either the pooling privilege

or any flat discount, were in competition with the unit stores of chain lumberyards, which received the pooling privilege or the flat 10 percent discount, in some cases, from the same manufacturer and, in other cases, from another of said manufacturers.

PAR. 15. That, for the purpose of granting and allowing the quantity discounts under its 1938 Plan, Sherwin-Williams adopted the practice of accumulating the orders of some of its distributors and dealers, either for a specified period, usually a week, or for a time sufficiently long to enable the particular distributor or dealer to earn the maximum quantity discount for orders of less than carload quantities, and has granted and allowed to such distributors and dealers the quantity discounts applicable to the gallonage represented by the orders so accumulated. For example, Sherwin-Williams totaled the gallonage of all orders received in a period of 1 week from any one of its distributors or dealers in the trading area, known as "Metropolitan New York" and granted and allowed to each such distributor and dealer on each order the quantity discount that would have been applicable, had such gallonage been covered by one order for shipment at one time. This practice usually resulted in the favored distributors and dealers receiving a flat 10 percent off dealers' list prices, irrespective of the size of the individual orders. That, in the cases herein mentioned, Sherwin-Williams nevertheless customarily shipped or delivered to its thus favored distributors and dealers as often as it received orders from them and irrespective of the size of the individual order. That, during the period that the 1938 Plan was operative, neither Lowe Brothers nor Lucas accumulated the orders of their distributors and dealers located in Metropolitan New York or in other trading areas with respect to which Sherwin-Williams adopted this practice.

PAR. 16. That Lowe Brothers granted and allowed to some of its dealers, during the period that its 1938 Plan was in effect, so-called "carload discounts" on purchases by such dealers of relatively small per order quantities of its trade sale line paint products. For example, Lowe Brothers maintains a warehouse in the building at 2063 East Fifty-fifth Street, Cleveland, Ohio, owned by The Cleveland Builders Supply Co. (hereinafter referred to as "Cleveland Builders"), a corporation organized and existing under the laws of the State of Ohio and engaged in the sale and distribution of paint products. Cleveland Builders customarily withdraws its paint requirements daily from said warehouse, but occasionally orders paint products for shipment direct from the Lowe Brothers factory in Dayton, Ohio. Such daily withdrawals or such factory orders rarely, if ever, total 84 gallons and oftentimes do not total 24 gallons. Lowe

Brothers nevertheless granted and allowed to said Cleveland Builders a flat 12 percent "carload discount" on all the latter company's purchases of trade sale line paint products. That Cleveland Builders is in competition in Cleveland and environs with other customers of Lowe Brothers and with the customers of Sherwin-Williams and Lucas and with the customers of the competitors of The Sherwin-Williams Co. in the sale and distribution of paint products.

PAR. 17.

Introductory Allegations

That, in addition to the per order quantity discounts applicable under their respective 1938 plans and generally available to all purchasers from them and the volume discounts and carload or truckload quantity discount applicable under their respective 1939 plans and generally available to all purchasers from them, the manufacturers have granted and allowed and are now granting and allowing to some of their customers, and not to others, certain functional discounts. It is the established policy and practice of the manufacturers to grant and allow functional discounts only to jobbers or distributors and to such dealers that perform the functions of the jobber or distributor, and only in the latter cases, to the extent that such dealers perform such functions. It is not the policy or general practice of the manufacturers to grant or allow functional discounts on paint products which are resold by distributors or dealers (1) directly to regular or occasional consumers or (2) indirectly through retail branches, owned or controlled by the distributors or dealers, to regular or occasional consumers.

That Sherwin-Williams does not have any customers who operate exclusively as distributors, but does grant functional discounts to some of its dealers who perform the functions of a distributor; that such discounts vary from 5 to 12½ percent, although they customarily amount to 7½ and 10 percent. That Sherwin-Williams, as a rule, requires its dealers acting as distributors to submit statements at the end of each month showing the total sales at dealers' list prices made to other dealers during the preceding month. From such total sales, Sherwin-Williams deducts the discounts that have been received by the reporting dealer with respect to the purchases which have been so resold. The applicable percentable functional discount is then applied to the net amount thus obtained to ascertain the sum due the reporting dealer as a functional discount for that month.

Lowe Brothers and Lucas allow a maximum functional discount of 15 percent to their distributors. In the case of dealers performing the functions of a distributor, the functional discount, as a rule,

bears the same ratio to 15 as the percentage of the dealer's distributor business bears to his entire business. In either case, the functional discount is granted and allowed on the face of the invoice. In the case of Lowe Brothers, however, the functional discount is based upon the gross dollar value of the dealer's purchases at dealers' list prices and prior to the deduction of quantity or volume discounts, whereas in the case of Lucas, the functional discount is based upon the net amount of the dealer's purchases at dealers' list prices, after the deduction of the quantity or volume discounts.

A

That Lowe Brothers and Lucas, during the period that their respective 1938 Plans were in effect, permitted a distributor-dealer to combine in one order his purchases for resale to other dealers (on which he was paid a functional as aforesaid) and his purchases for resale at retail and granted and allowed to such distributor-dealer the quantity discount applicable to the combined gallonage. This practice enabled distributor-dealers to procure the trade sale line paint products they resold at retail at a lesser price than was paid for similar products by 100 percent dealers and subdealers of Lucas and Lowe Brothers who were in competition with the distributor-dealers in the sale of such paint products at retail.

B

That the manufacturers have granted and allowed and are now granting and allowing, in addition to quantity or volume discounts, functional discounts to some of their dealers, and not to others, on consumer business. Typical examples of this practice are the following:

(1) Lowe Brothers has granted and allowed and now grants and allows to Cleveland Builders, in addition to the so-called "carload discount" of 12 percent described in paragraph 16 hereof, a functional discount of 15 percent on 50 percent of its purchases of trade sale line paint products from Lowe Brothers or $7\frac{1}{2}$ percent on 100 percent of its purchases. That Cleveland Builders sells substantially all of the paint products it purchases from Lowe Brothers at retail to regular and occasional consumers of paint and does not sell any portion thereof to other dealers. That Cleveland Builders, in the sale of paint products at retail to regular and occasional consumers thereof, is engaged in competition in Cleveland and environs with dealers who purchase, directly or indirectly, either from Lowe Brothers or from one of the

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other manufacturers or from a seller, and who do not receive any functional discount.

(2) Lucas has granted and allowed and now grants and allows to Landis Spanos, an individual trading in Pittsburgh under the firm name and style of "Spanos Paint Store" (hereinafter referred to as "Spanos"), in addition to quantity or volume discounts, a functional discount of 15 percent on 60 percent of his trade sale line purchases or 9 percent on 100 percent of such purchases. That Spanos sells substantially all of the paint products he purchases from Lucas at retail to regular and occasional consumers of paint and does not sell any portion thereof to other dealers. That Spanos, in the sale of paint products at retail to regular and occasional consumers thereof, is engaged in competition in Pittsburgh and environs with dealers who purchase trade sale line paint products, directly or indirectly, either from Lucas or from one of the other manufacturers or from a seller and who do not receive any functional discount. That a substantial portion of the trade sale line paint products sold by Spanos at retail to regular and occasional consumers of paint are sold at dealers' list prices, the price that retailers in competition with said Spanos pay or would have to pay for said paint products.

(3) Lucas has granted and allowed and now grants and allows to B. Frank Shinn Paint Co., a corporation engaged in the retail distribution of paint and other products in the city of Wilmington, Del. (hereinafter referred to as "Shinn Co."), in addition to quantity or volume discounts, a functional discount of 15 percent on 100 percent of its trade sale line purchases. That Shinn Co. sells substantially all of the paint products it purchases from Lucas to regular and occasional consumers of paint and does not sell any portion thereof to other dealers. That the Shinn Co., in the sale of paint products at retail to regular and occasional consumers thereof, is engaged in competition in Wilmington, Del., and environs with dealers who purchase trade sale line paint products, directly or indirectly, either from Lucas or from one of the other manufacturers or from a seller, and who do not receive any functional discount.

C

That the manufacturers have granted and allowed and are now granting and allowing, in addition to quantity or volume discounts, functional discounts to some of their distributor-dealers who resell to other dealers at less than dealer list prices, irrespective of the size of the orders of said subdealers. A typical example of this situation is the following:

Lowe Brothers has granted and allowed, and now grants and allows to Waite Hardware Co., a corporation engaged in the wholesale and retail distribution of hardware, paint, and other products in the city of Worcester, Mass. (hereinafter referred to as "Waite"), in addition to quantity or volume discounts, a functional discount of 15 percent on 86 $\frac{2}{3}$ percent of its purchases of trade sale line paint products from Lowe Brothers or 13 percent on 100 percent of said purchases. That Waite has knowingly received and now knowingly receives the benefit of said functional discount. That Waite resells such Lowe Brothers paint products in the city of Worcester, Mass., and environs, to dealers there engaged in the retail distribution of paint products, at a flat 4 percent discount off dealers' list prices, irrespective of the size of the individual orders received by Waite from said dealers. That the dealers to whom Waite resells are competitively engaged in the sale of paint products at retail in Worcester, Mass., and environs with Waite and other dealers who purchase trade sale line paint products, directly or indirectly, either from Lowe Brothers or from one of the other manufacturers and who pay dealers list prices for the paint products so purchased, without the benefit of said flat 4 percent discount, irrespective of the size of the order.

D

That the manufacturers have granted and allowed and are now granting and allowing, in addition to the quantity or volume discounts, functional discounts to some of their distributors who resell at less than dealers' list prices, irrespective of the size of the order, (1) to dealers in which the distributor has a substantial financial interest, and (2) to dealers which own all or substantially all of the issued and outstanding stock of the distributor. Typical examples of this method of effecting price discriminations are the following:

(1) Roy Harpester is an individual residing in Newark, Ohio, and has been engaged in the retail hardware business for over 17 years; Roy Harpester at the present time owns the following financial interests in the following partnerships, each of which is engaged in the retail hardware business, in the following cities:

Extent of interest	Name of partnership	Location
$\frac{1}{2}$	Harpester & Daugherty.....	Newark, Ohio.
$\frac{1}{2}$	Harpester & Zollinger.....	Thornville, Ohio.
$\frac{2}{3}$	Harpester & Paulson	Mt. Vernon, Ohio.
$\frac{1}{2}$	Harpester & Daugherty.....	Rushville, Ohio.

and, in addition thereto, said Harpester and one Helser together own over one half of the issued and outstanding equity stock of the Martin

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Winter Hardware Co. of Lancaster, Ohio, a corporation likewise engaged in the retail hardware business (said partnerships and said corporation being hereinafter collectively referred to as the "Harpester stores").

Early in 1938 Roy Harpester, in his individual capacity, leased a small, two-story warehouse in the city of Newark, Ohio, and shortly thereafter said Harpester as an individual and trading under the firm name and style of "Union Hardware Co." (said Roy Harpester as an individual and trading under the firm name and style of "Union Hardware Co." being hereinafter sometimes referred to as "Union Hardware") began to purchase hardware supplies and paint products direct from the manufacturers thereof at jobbers prices, all of said products being purchased for resale to the Harpester stores or for resale to other retail hardware dealers. Roy Harpester is in charge of and has control over the purchases and sales of Union Hardware and the purchases and sales of the various Harpester stores.

Early in 1938, Lucas agreed to sell its paint products to Union Hardware at jobbers prices. The Lucas price to Union Hardware for trade sale items from such date, until or on about September 1, 1939, was the dealers' list, less the per order quantity discounts applicable to the varying quantities purchased, less a functional discount of 15 percent. From on or about September 1, 1939, to the present time, the price has been dealers' list, less the various discounts applicable under the 1939 Plan, less a functional discount of 15 percent. That Union Hardware has knowingly received and now knowingly receives the benefit of this 15 percent functional discount. That Lucas salesmen solicit both the Harpester stores and the independent retail hardware dealers to whom Union Hardware sells, referring all orders to Union Hardware. That only a small portion of the space contained in the Union Hardware warehouse is devoted to the storing of the paint products procured from Lucas by Union Hardware.

Union Hardware sold and now sells Lucas trade sale line paint products to the Harpester stores and to independent retail stores at a flat 10 percent off dealers' list prices, irrespective of the size of the individual orders received from said stores. That the bulk of the individual orders received by Union Hardware from the herein mentioned stores are for quantities of less than 24 gallons. All of said stores are in competition with dealers who purchase such paint products, customarily in quantities of less than 24 gallons per order, at dealers' list prices without the benefit of the flat 10 percent discount, irrespective of the size of the order, either directly or indirectly, from one or more of the manufacturers.

(2) Harry Lampert is an individual residing in Lowell, Mass., and has been engaged in the retail hardware business for over 12 years; Harry Lampert at the present time owns the following financial interests in, and is an officer and director of, the following corporations, each of which is engaged in the retail distribution of hardware, paint, and other products, in the following cities:

Extent of interest	Name of corporation	Location
100%-----	Middlesex Supply Co.-----	104 Middlesex St., Lowell, Mass.
100%-----	Simmons Electric Supply Co., Inc.-----	112 Middlesex St., Lowell, Mass.; 534 Merrimac St., Lowell, Mass.

(said corporations being hereinafter collectively referred to as the "Lampert Owned Stores"); Harry Lampert at the present time owns the following financial interests in, and is an officer and director of the following corporations, each of which is engaged in the retail distribution of hardware paint and other products, in the following cities:

Extent of interest	Name of corporation	Location
$\frac{1}{3}$ -----	Haverill Hardware & Plumbing Supply Co....	Haverill, Mass.; Portsmouth, N. H.; ¹ Dover, N. H. ²
$\frac{1}{3}$ -----	Nashua Hardware & Plumbing Supply Co....	Main Street, Nashua, N. H.
$\frac{1}{3}$ -----	Bangor Plumbing & Supply Co.-----	Broad Street, Bangor, Maine.
$\frac{1}{3}$ -----	Gloucester Hardware & Plumbing Supply Co.	Main Street, Gloucester, Mass.
$\frac{1}{3}$ -----	Lewiston Hardware and Plumbing Supply Co.	71 Lisbon St., Lewiston, Maine.
$\frac{1}{3}$ -----	Waterville Hardware and Plumbing Supply Co.	Main Street, Waterville, Maine.
$\frac{1}{3}$ -----	Woburn Hardware and Plumbing Supply Co.	Main Street, Woburn, Mass.

¹ Irving Lampert, brother of Harry Lampert, is manager of the Haverill store and is the registered owner of one-third of the issued and outstanding equity stock of this corporation. Ben Gordon, brother-in-law of the Lamperts, is the registered owner of the remaining one-third issued and outstanding equity stock of this corporation.

² Haverill Hardware & Plumbing Supply Co. trades in this community under the name of Portsmouth Hardware and Supply Co.

³ Haverill Hardware & Plumbing Supply Co. trades in this community under the name of Dover Hardware & Supply Co.

⁴ Maxwell Saroken is the registered owner of one-third of the issued and outstanding equity stock of this corporation, and Myer Saroken is the registered owner of the remaining issued and outstanding equity stock of this corporation.

⁵ Maxwell Saroken is the registered owner of one-third of the issued and outstanding equity stock of this corporation.

⁶ Maxwell Saroken is the registered owner of one-third of the issued and outstanding equity stock of this corporation.

(said corporations being hereinafter collectively referred to as the "Lampert Stores, Group A"); Harry Lampert at the present time owns the following financial interests in, and is an officer and director of, the following corporations, each of which is engaged in the retail distribution of hardware, paint, and other products, in the following cities:

Extent of interest	Name of corporation	Location
$\frac{1}{3}$ -----	New Hampshire Hardware & Plumbing Supply Co.	Elm Street, Manchester, N. H.
$\frac{1}{3}$ -----	Maine Hardware & Plumbing Supply Co.-----	Congress St., Portland, Maine.
$\frac{1}{3}$ -----	Concord Hardware & Plumbing Supply Co.-----	North Main St., Concord, N. H.

Said corporations being hereinafter collectively referred to as the "Lampert Stores, Group B"); Harry Lampert at the present time is an officer and director of, and may have substantial financial interests in, the following corporations, each of which is engaged in the retail distribution of hardware, paint and other products, in the following cities:

Name of Corporation	Location
Essex Hardware and Plumbing Supply Co.....	Lawrence, Mass.,
New England Pipe and Supply Co.....	Charlestown, N. H.,
Portsmouth Hardware Co.....	Portsmouth, N. H.,
Niagara Hardware and Plumbing Supply Co.....	Niagara Falls, N. Y.

(said corporations being hereinafter collectively referred to as the "Lampert Stores, Group C").

The annual gross sales of hardware, paint, and other merchandise of the Lampert Owned and the Lampert Stores, Groups A and B are in excess of \$2,000,000, and the annual gross sales of said stores in paint products alone amount to approximately \$200,000.

Early in 1937, Lampert, in his individual capacity, purchased certain improved real property located at 25 Middlesex Street, Lowell, Mass., and has been since such date and is now the equitable owner of such improved real property; the improvement on said real property consists of a four-story warehouse, the dimensions of each floor being approximately 300 feet by 60 feet.

On or about April 2, 1937, for the purpose of enabling the retail stores in which he had a financial interest to purchase their requirements at wholesale prices, Harry Lampert caused Atlantic Distributing Co. (hereinafter referred to as "Atlantic") to be incorporated under the laws of the Commonwealth of Massachusetts; Harry Lampert is the Treasurer, a director and the dominating factor in said Atlantic and is the registered owner of one-third of the issued and outstanding equity stock thereof; Harry Lampert is in charge of and has control over both the purchases and sales of Atlantic and the purchases and sales of the Lampert Owned and the Lampert Stores, Group A; Max Saroken, a nephew of said Harry Lampert, is the President of Atlantic and is the registered owner of one-third of the issued and outstanding equity stock of said corporation; Irving Lampert a brother of Harry Lampert, is a clerk for Atlantic and is the registered owner of one-third of the issued and outstanding equity stock of said corporation; Harry Lampert rents the improved real property aforementioned, of which he is the equitable owner, to Atlantic at a nominal rental; that shortly after the organization of Atlantic, Atlantic began to purchase hardware supplies and paint

products directly from the manufacturers thereof at jobbers prices, practically all of said products being purchased for sale through the Lampert Owned Stores or the Lampert Stores, Groups A, B, and C.

On or about the time of the formation of Atlantic, Lucas agreed to sell Atlantic its paint products at jobbers prices. The Lucas price to Atlantic for trade sale items from such date, until on or about September 1, 1939, was the dealers list, less the per order quantity discounts applicable to the varying quantities purchased, less a functional discount of 15 percent. From on or about September 1, 1939, to the present time, the price has been dealers list, less the various discounts applicable under the 1939 Plan, less a functional discount of 15 percent. That Atlantic has knowingly received, and now knowingly receives, the benefit of this 15 percent functional discount. All of the Lampert Owned Stores and all of the Lampert Stores, Group A, handle Lucas products, and the annual gross sales of said stores of Lucas products exceed \$50,000; that Lucas salesmen solicit the Lampert Owned Stores and the Lampert Stores, Group A, and otherwise aid in the sale and distribution of Lucas products to and by all of the stores in which Harry Lampert has a financial interest, referring all orders to Atlantic. That Lucas delivers a substantial portion of the products sold through the Lampert Owned Stores and the Lampert Stores, Group A, directly to said stores and grants, allows and pays with respect to said products so delivered a functional discount of 10 percent. That Atlantic has knowingly, and now knowingly, receives the benefit of this 10 percent functional discount. That Atlantic sells to only one or two stores in which Harry Lampert does not have a substantial financial interest. That approximately three-fourths of one floor of the aforementioned warehouse is utilized for the storage of paint products.

Atlantic sold and now sells Lucas trade sale line paint products to the Lampert Owned and the Lampert Stores, Group A, at a flat 10 percent off dealers list prices, irrespective of the size of the individual orders received from said stores. All of said stores are in competition with dealers who purchase such paint products, at dealers list prices, without the benefit of the flat 10 percent discount, irrespective of the size of the order, either directly or indirectly, from one or more of the manufacturers.

(3) American Hardware Supply Co. (hereinafter referred to as "American"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its main office in Pittsburgh, Pa. All of the issued and outstanding stock of American is owned by approximately 190 persons, partnerships and corporations (hereinafter referred to as "owner stores"), engaged in the retail dis-

tribution of hardware and kindred supplies, including paint products. The great majority of said owner stores are located and do business in the States of Pennsylvania, Ohio, New York, Maryland and West Virginia.

American owns and operates a large warehouse, situated at 4143 Terminal Way, Pittsburgh, Pa. American purchases in its own name from numerous manufacturing concerns and other sources of supply the present and anticipated requirements of the owner stores and of other retail stores that buy from it. American's annual purchases of general hardware merchandise amount to approximately \$1,200,000, and its purchases of paint products alone total over \$70,000.

In 1933 Lucas agreed to sell American its paint products at jobbers prices, and since that date American has handled Lucas paint products almost exclusively. The Lucas price to American for trade sale items from or about January 3, 1938, until on or about September 1, 1939, was the dealers list, less the per order quantity discounts applicable to the varying quantities purchased, less a functional discount of 15 percent. From on or about September 1, 1939, to the present time the price has been dealers list less the various discounts applicable under the 1939 Plan, less a functional discount of 15 percent. That American has knowingly received, and now knowingly receives the benefit of this 15 percent functional discount. That Lucas salesmen solicit the owner stores and assist said owner stores in the sale of Lucas paint products. That the owner stores, with respect to approximately 50 percent of the paint products purchased by them from American, pick up their own purchases at American's warehouse. That Lucas delivers some of the products sold through American directly to the owner stores and grants, allows and pays with respect to said products so delivered a functional discount of 15 percent. That American has knowingly, and now knowingly, receives the benefit of this 15 per cent functional discount.

American sold, and now sells, Lucas trade sale line paint products to the owner stores at a flat 10 percent off dealers list prices, irrespective of the size of the individual orders received from said stores. In addition thereto, the owner stores receive at the end of each year a patronage dividend varying from 4 to 7 percent on the net value of their purchases during the prior year from American of Lucas paint products. That the bulk of the individual orders received by American from the herein mentioned stores is for quantities of less than 24 gallons. All of said owner stores are in competition with dealers who purchase trade sale line paint products, customarily in quantities of less than 24 gallons per order, at dealers list prices without the benefit of the flat 10 percent discount, irrespective of the

size of the order, and without the benefit of any patronage dividend, either directly or indirectly, from one or more of the manufacturers.

E

The manufacturers have granted and allowed, and now grant and allow, functional discounts to some of their distributors that are so identified, from the standpoint both of financial interest and control, with the dealers to whom they allegedly resell that, within the contemplation of the law the distributor, in such cases, is merely an agency through which the dealers, identified with it, purchase; and the granting and allowing of the functional discount to the distributor is tantamount to the granting and allowing of such discount to the dealers to whom the paint products are allegedly resold. Typical examples of such distributors are: Union Hardware, Atlantic Distributing and American.

PAR. 18. The effect of the discriminations in price set forth in paragraphs 13 to 17, inclusive, hereof, may be substantially to lessen competition between The Sherwin-Williams Co., and its competitors; between the customs of a manufacturer in whose favor that manufacturer discriminates and such manufacturer's other customers; between the customers of The Sherwin-Williams Co. in whose favor such discriminations are made and the other customers of The Sherwin-Williams Co.; between the customers of The Sherwin-Williams Co. in whose favor such discriminations are made and the customers of the competitors of The Sherwin-Williams Co.; tend to create a monopoly in The Sherwin-Williams Co. in the line of commerce in which it is engaged; to injure, destroy or prevent competition with each of the manufacturers and with The Sherwin-Williams Co.; to injure, destroy or prevent competition with customers of each of the manufacturers and with customers of The Sherwin-Williams Co. who receive the benefit of such discriminations; to injure, destroy or prevent competition with customers of persons, partnerships and corporations that have knowingly received and are now knowingly receiving the benefit of such discriminations.

Such discriminations in price by each of the manufacturers and by The Sherwin-Williams Co. between different purchasers of goods of like grade and quality in interstate commerce in the manner and form aforesaid, are in violation of the provisions of subsection (a) of section 2 of the act described in the preamble hereof.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monop-

lies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress (the Robinson-Patman Act) approved June 19, 1936, the Federal Trade Commission, on December 8, 1939, issued its complaint against the above-named respondents and caused such complaint to be served as required by law, charging that said respondents were and had been discriminating in price between different purchasers from them of commodities of like grade and quality in the course of interstate commerce, in violation of the provisions of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

After the respondents had duly filed their answer to said complaint, a stipulation as to certain of the facts was executed on December 6, 1940, with the approval of the Commission, by and between Chief Counsel for the Commission and the attorneys for the respondents. Subsequent thereto, on October 20, 1942, a supplemental stipulation as to certain of the facts was signed and executed by counsel for the respondents and W. T. Kelley, Chief Counsel for the Federal Trade Commission, subject to the approval of the Commission. It was agreed therein that the facts stipulated in said supplemental stipulation and in the stipulation of December 6, 1940, together with the exhibits made a part thereof, should constitute the entire record herein with respect to the practices alleged in paragraphs 14 to 16, inclusive, and in subdivision B of paragraph 17 of the complaint herein and that the Commission may proceed upon said statement of facts to make its report stating its findings as to the facts and its conclusion based thereon and enter its order disposing of the proceeding. In said stipulation respondents expressly waived further hearing as to the facts with respect to such practices, as well as all other intervening procedure with respect thereto, including the filing of briefs and the presentation of oral argument.

Thereafter, this proceeding regularly came on for final hearing upon said complaint, answer, and stipulations, said stipulations having been approved, accepted, and filed, and the Commission, having duly considered the same and being fully advised in the premises, now makes these its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The Sherwin-Williams Co., is a corporation, organized and existing under the laws of the State of Ohio and has its principal executive office and place of business at 1200 Midland Building, Cleveland, Ohio.

PAR. 2. The Lowe Brothers Co., is a corporation, organized and existing under the laws of the State of Ohio and has its principal executive office and place of business at 424 East Third Street, Dayton, Ohio.

PAR. 3. John Lucas & Co., Inc., is a corporation, organized and existing under the laws of the State of Maryland and has its principal executive office and place of business at 322 Race Street, Philadelphia, Pa.

PAR. 4. *Definitions.*—Except where the context requires another or different meaning, the following abbreviations and terms, for the purposes of these findings of fact and the order, shall be understood to have the following meanings:

1. The Sherwin-Williams Co. (except where it is obviously used to refer only to the parent company, as in paragraphs 1 and 5 hereof) means the corporate entity by that name, acting by and through itself as an operating company and by and through its wholly owned operating subsidiaries, the The Lowe Brothers Co. and John Lucas & Co., Inc., and by and through its other operating subsidiaries, and in its capacity of controlling the policies and activities of itself and said subsidiaries.

2. Sherwin-Williams means The Sherwin-Williams Co., (parent company only) solely in its capacity as an operating company, engaged in the manufacture, sale and distribution of paint products.

3. Lowe Brothers means (except as used in paragraph 2 hereof) The Lowe Brothers Co. and The Sherwin-Williams Co., solely by and through its wholly-owned operating subsidiary, The Lowe Brothers Co.

4. Lucas means (except as used in paragraph 3 hereof) John Lucas & Co., Inc., as an operating company or by and through its wholly-owned operating subsidiary W. W. Lawrence & Co., and The Sherwin-Williams Co., solely by and through its wholly-owned operating subsidiaries, John L. Lucas & Co., Inc., and W. W. Lawrence & Co.

5. Manufacturers means Sherwin-Williams, Lowe Brothers and Lucas.

6. Seller means a person, partnership or corporation (other than the manufacturers or The Sherwin-Williams Co., or one of its other subsidiaries) engaged in the manufacture, sale, and distribution of paint products.

7. Painters and Paint Contractors means a person, partnership, or corporation, engaged in the business of utilizing and applying paint products, (1) that customarily includes the paint products to be used on a painting job in estimates made to procure such job or, in the alternative, that makes arrangements with the person with whom

the contract to do the paint job has been made to furnish the paint to be used on the job at a stipulated price, and (2) that customarily purchases paint in quantities of four gallons or more.

8. Maintenance Account means hotels, apartment houses, real estate corporations, insurance companies, commercial stores, industrial concerns, etc., that buy paint fairly frequently and customarily in quantities of four gallons or more.

9. Regular Consumer means painters, paint contractors and maintenance accounts.

10. Occasional Consumer means a person, partnership, or corporation that buys paint products infrequently and customarily in very small quantities, rarely as much as four gallons.

11. Dealer means a person, partnership, or corporation that operates a retail establishment or store and is regularly engaged during customary business hours in the sale of merchandise, including paint products, to occasional and/or regular consumers.

12. Line Yard Lumber Co. or Chain Lumber Yard means a person, partnership or corporation that operates a number of retail establishments or stores, the individual establishments or stores (hereinafter referred to as "unit stores") (1) being customarily located in different communities, towns, or cities, some of said communities, towns, and cities, oftentimes being in different States from others of said communities, towns, and cities, and (2) being regularly engaged in the sale of lumber and other merchandise, including paint products, to occasional and/or regular consumers.

13. Jobber or Distributor means a person, partnership, or corporation engaged in the business of buying and receiving paint products from the manufacturers or sellers thereof and of selling and shipping paint products to and in servicing, billing and carrying dealer customers.

14. Specification Paint means paint manufactured according to a special formula prepared to meet the special requirements or demands of a large consumer, customarily a governmental body, a railroad, or a large industrial concern.

15. Trade Sale Line or Trade Sale Item means standard products of the manufacturers or of other sellers, sold under trade-mark bearing the name of the manufacturer or seller, including, among other products, exterior and interior house paint, roof, barn, and metal paint, varnishes and lacquers.

16. Companion Line means standard products of the manufacturers of or other sellers which are less expensive than the trade sale line products and not always sold under trade-mark bearing the name of the manufacturer or seller.

17. Allied Line means miscellaneous products such as dry colors, bronzes, linseed oil, turpentine, alcohol, lead, and insecticide materials.

18. Paint Products means trade sale line, companion line (in the case of those companies that manufacture such a line) and allied line only.

PAR. 5. The Sherwin-Williams Co. (herein sometimes referred to as the "parent company") owns 100 percent of the issued and outstanding equity stock of the following corporations (herein sometimes referred to as "first degree subsidiaries"):

The Lowe Brothers Co.; John Lucas & Co., Inc.; Acme White Lead and Color Works, of Hamtramck, Mich.; Detroit White Lead Works, of Hamtramck, Mich.; Martin Senour Co., of Chicago, Ill.; and The Sherwin-Williams Co. of California, each of which is engaged in the manufacture, sale, and distribution in commerce of trade sale and allied line paint products.

John Lucas & Co., Inc., owns 100 percent of the issued and outstanding equity stock of the following corporation (herein sometimes referred to as a "second degree subsidiary"):

W. W. Lawrence & Co., of Pittsburgh, Pa., which is engaged in the manufacture, sale and distribution in commerce of trade sale and allied line paint products.

Acme White Lead and Color Works owns 100 percent of the issued and outstanding equity stock and controls the policies and activities of the following corporations (herein sometimes referred to as "second degree subsidiaries"):

The Peninsular Paint and Varnish Co., of Hamtramck, Mich.; and The Lincoln Paint and Color Co., of Lincoln, Nebr., each of which is engaged in the manufacture, sale and distribution in commerce of trade sale and allied line paint products.

Each of the aforesaid first and second degree subsidiary corporations, with the exceptions of Peninsular Paint and Varnish Co. and Lincoln Paint and Color Co., which are operated as departments or divisions of Acme White Lead and Color Works, manufactures and operates generally as a separate and distinct operating company with a management and personnel, which is not the same as the management and personnel, either of the parent company or of any of the other subsidiaries. Each of said subsidiaries, however, has certain officers and directors who are also either officers or directors, or both, either of the parent company or of one or more of the other subsidiaries or of both the parent company and of one or more of the other subsidiaries.

PAR. 6. For many years prior to and since June 19, 1936, Sherwin-Williams has been and now is engaged in the business of manufac-

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turing, selling, and distributing (1) basic raw materials used in the production of paint, varnishes, and lacquers, (2) specification paint, and (3) paint products. In the course and conduct of its business Sherwin-Williams has been and now is manufacturing said paint products principally at its factories which are located in Cleveland, Ohio; Chicago, Ill.; Newark, N. J.; and Oakland, Calif. Sherwin-Williams maintains and operates approximately forty warehouses situated in as many cities in over 25 States of the United States. Sherwin-Williams, for convenience in selling and delivering its merchandise, maintains and operates district offices or sales division offices in over one-half of the cities in which its warehouses are located, and, in addition, maintains and operates a sales office in Washington, D. C., where it has no warehouse. Sherwin-Williams employs several hundred salesmen who call regularly on all classes of customers. The annual net sales of Sherwin-Williams in the United States of trade sale line paint products alone total in excess of \$16,000,000. Such products are sold and distributed through (1) over 6,300 authorized dealers, a number of whom act as distributors with respect to a portion of such paint products purchased by them, (2) over 80 chain lumber yards, (3) approximately 120 wholly owned retail stores, and (4) other miscellaneous mediums.

PAR. 7. For many years prior to and since June 19, 1936, Lowe Brothers has been and now is engaged in the business of manufacturing, selling and distributing specification paint and paint products. In the course and conduct of its business, Lowe Brothers has been and now is manufacturing paint products at its factory which is located at Dayton, Ohio; Lowe Brothers maintains and operates 17 warehouses located in the following cities: Dayton, Ohio; Chicago, Ill.; Kansas City, Mo.; Atlanta, Ga.; Boston, Mass.; Jersey City, N. J.; Cleveland and Cincinnati, Ohio; Omaha, Nebr.; Minneapolis, Minn.; Indianapolis, Ind.; Memphis, Tenn.; Jacksonville, Fla.; Fort Worth, San Antonio and Houston, Tex.; and New Orleans, La. Lowe Brothers, for convenience in selling and delivering its merchandise, maintains and operates district offices in the first six of the herein named cities in which its warehouses are located. Lowe Brothers employs a substantial number of salesmen, who call regularly on all classes of customers. The annual net sales of Lowe Brothers in the United States of trade sale line paint products alone total over \$4,000,000. Such products are sold and distributed through (1) over 1,500 authorized dealers, (2) approximately 70 distributors, and (3) approximately 100 chain lumber yards, (4) 11 wholly owned retail stores, and (5) other miscellaneous mediums.

PAR. 8. For many years prior to and since June 19, 1936, Lucas has been and now is engaged in the business of manufacturing, selling and distributing specification paint and paint products. In the course and conduct of its business, Lucas has been and now is manufacturing said paint products at its principal manufacturing plant which is located in Gibbsboro, New Jersey. Lucas maintains and operates seven warehouses located in Philadelphia, Pa.; Boston, Mass.; New York City; Chicago, Ill.; Albany, N. Y.; Pittsburgh, Pa.; and Richmond, Va. Lucas, for convenience in selling and delivering its merchandise, maintains and operates sales offices in the first four of the herein named cities in which its warehouses are located. Lucas employs a substantial number of salesmen who call regularly on all classes of customers. The annual net sales of Lucas in the United States of trade sale line paint products alone total approximately \$2,000,000. Such products are sold and distributed through (1) approximately 1,500 authorized dealers, (2) approximately 100 distributors, (3) 3 chain lumber yards, (4) 10 wholly owned retail stores, and (5) other miscellaneous mediums.

PAR. 9. Each trade sale line paint product manufactured by Sherwin-Williams conforms as nearly as possible to the standard which has been determined upon by Sherwin-Williams for that particular product. As to any particular trade sale line paint product of Sherwin-Williams, the entire output of such product is manufactured according to the same formulae, the processes of manufacture and the finished products are substantially identical and the entire output thereof is of like grade and quality. Sherwin-Williams manufactures numerous paint products of different formulae for different consumption, such as, for example, exterior house paint, interior house paint, enamels, varnishes, etc., each of which is a different product and a different composition.

Each trade sale line paint product manufactured by Lowe Brothers conforms as nearly as possible to the standard which has been determined upon for that particular product. As to any particular trade sale line paint product of Lowe Brothers, the entire output of such product is manufactured according to the same formulae, the processes of manufacture and the finished products are substantially identical and the entire output thereof is of like grade and quality. Lowe Brothers manufactures numerous paint products of different formulae for different consumption, such as, for example, exterior house paint, interior house paint, enamels, varnishes, etc., each of which is a different product and a different composition.

Each trade sale line paint product manufactured by Lucas conforms as nearly as possible to the standard which has been determined

upon for that particular product. As to any particular trade sale line paint product of Lucas, the entire output of such product is manufactured according to the same formulae, the processes of manufacture and the finished products are substantially identical and the entire output thereof is of like grade and quality. Lucas manufactures numerous paint products of different formulae for different consumption, such as, for example, exterior house paint, interior house paint, enamels, varnishes, etc., each of which is a different product and a different composition.

Each of the manufacturers manufactures and sells trade sale line paint products designed for like or similar purposes. The trade sale line products of each of the manufacturers are competitive with the comparable trade sale line products of each of the other manufacturers and a dealer selling the trade sale line products of one of the manufacturers in a given trading area often is in competition with a dealer selling the trade sale line products of another of said manufacturers.

PAR. 10. In the course and conduct of their respective businesses as aforesaid, the manufacturers transport or cause to be transported some of their paint products, when manufactured, from their respective factories aforesaid to their respective warehouses which are located as hereinbefore set forth, in various States of the United States, and oftentimes in States other than the States in which their respective factories are located and in which such shipments originated, and transport or cause to be transported their paint products from their respective factories aforesaid or from their respective warehouses aforesaid to the purchasers thereof located in the several States of the United States and in the District of Columbia, other than the States in which their respective factories are located, and there is and has been, at all times herein mentioned, a continuous current of trade and commerce in said paint products between the respective factories, warehouses and distributing points of said manufacturers and purchasers from each of them located in many and, as to Sherwin-Williams, in all of the States of the United States and the District of Columbia.

Sherwin-Williams advertises its paint products nationally; Lowe Brothers and Lucas advertise their products in a more limited manner. As a result of said advertising, Sherwin-Williams has created a public demand for its products throughout all of the States of the United States and in the District of Columbia, and each of the other manufacturers has created a public demand for its products in several of the States of the United States and, in some instances, in the District of Columbia.

The manufacturers sell and distribute their respective paint products for use, consumption, or resale within the United States and in the District of Columbia, in the same States and places as and in competition with various other sellers of paint products. Many of said competing sellers distribute their products nationally or in a number of the States of the United States, as do the manufacturers, while many of said competing sellers distribute their paint products to customers located almost exclusively within the trading area or areas embraced within or adjacent to the trading areas in which their factories are located.

The Sherwin-Williams customers who sell at retail are occasionally competitively engaged with each other locally, are oftentimes competitively engaged locally with the customers of Lowe Brothers and/or of Lucas and/or one or more of the other subsidiaries of The Sherwin-Williams Co., who sell at retail and are almost uniformly competitively engaged locally with the retailer customers of the competitors of The Sherwin-Williams Co., in the resale of said products, said resales taking place in every State of the United States and in the District of Columbia. A similar situation exists as to the retailer customers of Lowe Brothers and as to the retailer customers of Lucas.

PAR. 11. Sherwin-Williams, for the purpose of selling and distributing its paint products, has divided the territorial United States into six zones. For each zone, Sherwin-Williams has published the prices that have been applicable from time to time, on sales of its paint products to dealers in that zone (hereinafter referred to as "dealers list prices" and whenever this term is used with respect to Sherwin-Williams, it shall be understood to refer to that one of the six different dealers' list prices issued by Sherwin-Williams that shall be in effect at the time and that shall be applicable to the particular situation or situations under consideration), the differentials in prices between the zones being sufficient, as a rule to compensate Sherwin-Williams for the differences in the average cost of freight between its factories and its warehouses in the various zones. Sherwin-Williams, as a rule, ships its paint products to its customers f. o. b. the warehouse nearest the customer. In all cases where the customer buys a carload or truckload of 20,000 pounds or more and receives shipment direct from the factory, freight is allowed.

The dealers' list prices herein mentioned, so far as applicable to trade sale items, since June 19, 1936, have been subject to various discounts, depending either upon the total volume of Sherwin-Williams paint products, or certain of them, purchased by one customer during a specified period or upon the single order quantities purchased by, and shipped to, one customer. Under the "per order" discount plans, a

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customer was not deprived of whatever discount he was entitled to receive upon his single order purchase, although Sherwin-Williams, because of circumstances beyond the control of the customer, had to fill his single order by two or more shipments.

On or about January 3, 1938, Sherwin-Williams, and shortly thereafter, Lowe Brothers and Lucas commenced to operate under a discount plan (hereinafter referred to as the "1938 Plan") which was operative from that date until on or about September 1, 1939. The 1938 Plan, briefly described, was as follows:

To any customer who purchased in one order for shipment at one time less than 24 gallons¹ of trade sale line paint products, no discount was granted from the dealers list prices (except a 2 percent discount for cash within 10 days from date of invoice); to any customer who purchased such paint products in one order for shipment at one time to an aggregate of 24 gallons or more, the following scale of discounts applied:

24 to 48 gallons—6 percent off dealers list on entire order of such items.

48 to 84 gallons—8 percent off dealers list on entire order of such items.

84 gallons and over—10 percent off dealers list on entire order of such items.

Carloads and truckloads (from factory)—14 percent off dealers list on entire order of such items.

The aforementioned discount was shown on the face of the customer's invoice and the customer was billed for the net price, after the deduction of the per order discount.

On or about September 1, 1939, Sherwin-Williams, and shortly thereafter, Lowe Brothers and Lucas, ceased to operate under the 1938 Plan herein described and commenced to operate under a discount plan (hereinafter referred to as the "1939 Plan"), pursuant to which discounts from dealers list prices are dependent upon the annual volume of trade sale items purchased by a customer, with one exception hereinafter noted. Under the 1939 Plan, as applied by Sherwin-Williams, a customer purchasing less than \$500 worth of such products during a year receives a 5 percent discount from dealers list prices. A customer purchasing more than \$500 worth of such products during one year receives an additional 5 percent discount. Such a customer pays 95 percent of dealers list prices, less 5 percent of such prices as so reduced. Such discounts are given on the face of the customer's

¹ Products packaged and priced by the pound were calculated at the rate of 1 gallon to every 12 pounds.

invoice. Whether a particular customer is entitled to receive the 5 percent or the 5-5 percent discount is determined by ascertaining his purchases of trade sale items in prior years. Unless it appears that the customer's purchases of such products will be far in excess of \$500 a year, Sherwin-Williams requires an executed contract by the customer that he will purchase from Sherwin-Williams trade sale line products in the amount of \$500 or more during the course of the year. A customer purchasing in carloads or truckloads and receiving shipment direct from the factory receives a further 5 percent discount. As to such a customer, the present base price of 95 percent of dealers list prices is reduced by 5 percent thereof and by a further 5 percent of the net figure thus obtained, to arrive at the net price which the carload or truckload customer pays.

Under the 1938 Plan and during all the time it was in effect, it was the general policy and practice of Sherwin-Williams to sell its trade sale line paint products to its dealers and Sherwin-Williams sold such products to such dealers, generally at its dealers list prices, less whatever discounts may have been applicable under the 1938 Plan. It is, and, since September 1, 1939, has been, the general policy and practice of Sherwin-Williams to sell its trade sale line paint products to its dealers and Sherwin-Williams has, since September 1, 1939, been selling and is now selling such products to such dealers, generally at its dealers list prices, less whatever discounts are applicable under the 1939 Plan.

PAR. 12. The Lowe Brothers methods of selling and distributing its paint products, so far as concerns the establishment of zones, the publishing of its own dealers list prices for each zone, the collection of freight charges and the applicability of the 1938 and 1939 Plans to such dealers list prices, have been and are substantially the same as those of Sherwin-Williams, with the following exceptions:

1. Lowe Brothers, in shipping its paint products to its customers f. o. b. its warehouse nearest the customer, makes it a practice to equalize the freight charges with the freight charges applicable from that warehouse of a seller (or of another of said manufacturers or of one of the other subsidiaries of The Sherwin-Williams Co.) which is nearest to the customer.

2. Under variations of the 1939 Plan applicable to Lowe Brothers, (a) a customer purchasing more than \$500 worth of trade sale line paint products during a year receives a 10 percent discount from dealers list prices instead of a 5-5 percent discount.

- (b) A customer purchasing in carloads or truckloads and receiving shipment direct from the factory receives a 15 percent discount instead of a 5-5-5 percent discount.

(c) Whether a particular customer is entitled to receive the 10 percent discount is determined by averaging his purchases of trade sale items over a 3-year period, but as soon as that average falls below \$500, the classification of such customer is changed to eliminate the discount to which a customer purchasing over \$500 is entitled.

Under the 1938 Plan and during all the time it was in effect, it was the general policy and practice of Lowe Brothers to sell its trade sale line paint products to its dealers and Lowe Brothers sold such products to such dealers, generally at its dealers list prices, less whatever discounts may have been applicable under the 1938 Plan. It is, and, since on or about September 15, 1939, has been, the general policy and practice of Lowe Brothers to sell its trade sale line paint products to its dealers and Lowe Brothers, since on or about September 15, 1939, has been selling and is now selling such products to such dealers, generally at its dealers list prices, less whatever discounts are applicable under the 1939 Plan.

PAR. 13. The Lucas methods of selling and distributing its paint products, so far as concerns the establishment of zones, the publishing of its own dealers list prices for each zone, the collection of freight charges and the applicability of the 1938 and 1939 Plans to such dealers list prices, have been and are substantially the same as those of Sherwin-Williams, with the following exceptions:

1. The territorial United States has been divided into four instead of six zones.

2. Lucas allows freight to destination. The paint products are shipped f. o. b. the warehouse, but the customer is permitted to deduct freight from the net amount of the invoice.

3. Under a variation of the 1938 Plan applicable to Lucas, customers purchasing in carloads and truckloads of 20,000 pounds or more direct from the factory were allowed a 12 percent rather than a 14 percent discount from dealers list prices.

4. Under variations of the 1939 Plan applicable to Lucas, (a) the discounts allowed by Lucas are based upon three different groupings of products, as follows: On group 1, discounts are 10-10 percent to customers purchasing less than \$500 worth of such products during 1 year, and 10-10-5 percent to customers purchasing more than \$500 worth of such products during 1 year, and 10-5-5 percent on carload and truckload shipments of such products direct from the factory to the purchaser. On group 2 products, the discounts are 5 percent to customers purchasing less than \$500 worth of such products during one year and 5-5 percent to customers purchasing more than \$500 worth of such products during 1 year with an additional 5 percent on

direct carload and truckload shipments of such products. On group 3 products, there are no discounts whatsoever.

(b) Discounts are granted upon the basis of the total purchases of trade sale items by a customer during the preceding year.

Under the 1938 Plan and during all the time it was in effect, it was the general policy and practice of Lucas to sell its trade sale line paint products to its dealers and Lucas sold such products to such dealers, generally at its dealers list prices, less whatever discounts may have been applicable under the 1938 Plan. It is, and, since on or about September 5, 1939, has been, the general policy and practice of Lucas to sell its trade sale line paint products to its dealers, and Lucas, since on or about September 5, 1939, has been selling, and is now selling, such products to such dealers, generally at its dealers list prices, less whatever discounts are applicable under the 1939 Plan.

PAR. 14. The manufacturers sell their trade sale line paint products to a number of chain or line yard lumber companies. A chain lumberyard customer may operate from two- to over seventy-unit stores.

For the purpose of granting and allowing the quantity discounts under their respective 1938 Plans, each of the manufacturers customarily treated an order from a unit store of one of its chain lumberyard customers in the same way that it treated an order from an independent dealer. If the order was for less than 24 gallons of trade sale items, dealers list prices were charged; if for more, the discount applicable to the number of gallons ordered was granted and allowed. However, for the purpose of granting and allowing such discounts, each of the manufacturers treated all orders received at one time from the main office of a chain lumberyard as a single order, although such combined order may have called for shipments to a number of the unit stores of the chain. This privilege granted chain lumberyard customers was known as "pooling." The mechanics of ordering, invoicing, shipping and billing in a typical case of this sort may be described as follows:

Each of the unit stores of the chain that needed a supply of paint products would designate on the regular order forms of the particular manufacturer from which that chain was purchasing the amount, number, sizes, colors, etc., of the paint products desired by it, together with the name and address of the unit store. These filled in order forms were sent by the unit stores to the main office of the chain which in turn would forward a number of them at one time to the manufacturer. The manufacturer would give, to all these orders which were received at one time from one chain lumberyard customer, a single order number. This order number would then be placed by the manufacturer upon each of the order forms that had been executed by the

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various unit stores. The manufacturer would place after this order number the letters A, B, C, D, E, etc., to designate the different unit stores to which shipments were to be made.

Separate invoices were made out by the manufacturer to cover the paint products listed on each one of the order forms which had been executed by the various unit stores. Any particular invoice might cover only a very few gallons of trade sale line paint products, but the quantity discount granted, allowed, and shown on the face of each of such invoices was that applicable to the combined gallonage of such products covered by all of the orders received from the chain lumberyard customer at one time. For example, if the pooled order totaled over 84 gallons of trade sale items, the invoice covering the 10-gallon order of but one unit store would grant, allow and show on the face of such invoice a 10 percent discount off the manufacturer's dealers list prices.

The paint products ordered by the various unit stores through their main office were then shipped by the manufacturer to such unit stores at the various addresses which appeared on the order forms filled out by such stores. All the invoice sheets which covered all the orders of all the unit stores which had been forwarded to the manufacturer at one time by the main office of the chain lumberyard were then sent to the main office of the chain for payment. Thus, the main office of each chain received detailed information and detailed billing, regarding the separate orders of its unit stores which together made up the pooled order and regarding the individual shipments made pursuant thereto.

The pooling privilege herein described was extended by each of the manufacturers, not only to all of its chain lumberyard customers, but also to every one of its customers which owned, controlled, or operated two or more stores.

Sherwin-Williams, under the 1938 Plan, granted and allowed to some of its chain lumberyard customers a flat 10 percent discount off dealers list prices on all their purchases of trade sale items, irrespective of the size of the order. In such cases, a separate order for a few gallons of such products from a unit store of one of such chains sent directly to Sherwin-Williams was accorded the 10 percent discount.

The salesmen of the manufacturers in general devoted approximately the same amount of time in calling on, servicing and rendering sales assistance to a unit store of a chain lumberyard customer as was spent on an independent dealer in the same territory whose per order and annual purchases were approximately the same as those of the unit store.

Chain lumberyard and other customers of the manufacturers, by taking advantage of the pooling privilege, or by being given and accepting the 10 percent flat discount, received better prices for their unit stores than were received by independent dealers who were in competition with such unit stores, and whose "per order" purchases might have been the same or even greater than those of said unit stores; the differential might and oftentimes did amount to as much as 10 percent.

We find that The Sherwin-Williams Co., by Sherwin-Williams granting and allowing, under the 1938 Plan, a flat 10 percent discount off dealers list prices to some of the chain lumberyard customers of Sherwin-Williams, has discriminated in price against (1) other chain lumberyard customers of Sherwin-Williams; and (2) independent dealers purchasing from Sherwin-Williams.

We find that Sherwin-Williams, Lowe Brothers, and Lucas, by granting and allowing, under the 1938 Plan, to their chain lumberyard customers and to some of their other customers the 10, 8, and 6 percent discounts off dealers list prices which have resulted from the extension to them of the pooling privilege, have discriminated in price against their independent dealers and that The Sherwin-Williams Co., has likewise discriminated in price in favor of chain lumberyards and such other customers purchasing from Sherwin-Williams against independent dealers purchasing from Sherwin-Williams.

PAR. 15. For the purpose of granting and allowing the quantity discounts under its 1938 Plan, Sherwin-Williams adopted the practice of accumulating the orders of some of its distributors and dealers, either for a specified period, usually a week, or for a time sufficiently long to enable the particular distributor or dealer to earn the maximum quantity discounts for orders of less than carload quantities, and has granted and allowed to such distributors and dealers, the quantity discounts applicable to the gallonage represented by the orders so accumulated.

For example, Sherwin-Williams accumulated the orders of its dealer in Crystal Falls, Mich., until the orders received by it from him covered 84 gallons of trade sale items; the 10 percent discount from dealers list prices was then granted and allowed in invoicing and billing such dealer on his purchases of all such items. Sherwin-Williams nevertheless cutomarily shipped to said dealer as often as it received orders from him, and irrespective of the size of the order. This practice necessarily resulted in this dealer receiving a flat 10 percent off dealers list prices irrespective of the size of his individual orders.

Further illustrating the practice herein considered, Sherwin-Williams totaled the gallonage of all orders received in a period of one

week from anyone of some, but not all, of its distributors and dealers in the trading area known as "Metropolitan New York," and granted and allowed to each such favored distributor and dealer on each order the quantity discount that would have been applicable, had such gallonage been covered by one order for shipment at one time. Sherwin-Williams nevertheless customarily shipped or delivered to its thus favored distributors and dealers in Metropolitan New York as often as it received orders from them, and irrespective of the size of the individual orders. In the cases of several of such favored distributors and dealers, Sherwin-Williams frequently delivered to them as often as once a day. This practice usually resulted in the favored distributors and dealers receiving 10 percent off dealers list prices, irrespective of the size of the individual orders.

During the period that the 1938 Plan was operative neither Lowe Brothers nor Lucas accumulated the orders of their distributors and dealers located in Metropolitan New York or in other trading areas with respect to which Sherwin-Williams adopted this practice.

We find that Sherwin-Williams by granting and allowing to some of its dealers and distributors, under the 1938 Plan, the 10, 8, and 6 percent discounts off dealers list prices which have resulted from the extension to them of the accumulation privilege, has discriminated in price against other dealers and distributors of Sherwin-Williams and that The Sherwin-Williams Co. has likewise discriminated in price in favor of those Sherwin-Williams dealers and distributors to whom the accumulation privilege has been extended and against other dealers and distributors of Sherwin-Williams.

PAR. 16. Lowe Brothers, from on or before January 15, 1938, until on or about May 6, 1940, maintained a warehouse in the building at 2063 E. Fifty-fifth Street, Cleveland, Ohio, owned by The Cleveland Builders Supply Co. (hereinafter referred to as "Cleveland Builders"), a corporation organized and existing under the laws of the State of Ohio. Cleveland Builders, during the period aforementioned, has been and is now engaged in Cleveland and environs in the sale and distribution of paint products, and has been and is itself a dealer in Lowe Brothers products.

Approximately three-fourths of the paint products which have been stored by Lowe Brothers in said warehouse have been ultimately shipped by Cleveland Builders, pursuant to the instructions of Lowe Brothers, to customers of Lowe Brothers, other than Cleveland Builders. The remaining paint products stored by Lowe Brothers in said warehouse have been withdrawn from time to time by Cleveland Builders and delivered by Cleveland Builders to its own customers to whom it has sold such products.

On or before the 10th day of each month during the period that its 1938 Plan was in effect, Lowe Brothers paid to Cleveland Builders, in lieu of a fixed monthly rental for the aforesaid warehouse and for services performed by Cleveland Builders, or its employees, in connection therewith, a commission equal to 10 percent of the total net amount of Lowe Brothers paint products shipped out of said warehouse to Lowe Brothers' customers by Cleveland Builders during the immediately preceding month. Payment was made by credit memorandum. Cleveland Builders used this credit memorandum as an offset against the sums due Lowe Brothers for paint products purchased by Cleveland Builders and withdrawn by it from the warehouse for its own account during the immediately preceding month.

Lowe Brothers guaranteed that Cleveland Builders' annual commissions would total not less than \$1,800 a year. No commissions were paid by Lowe Brothers on Cleveland Builders' own purchases of stock from the warehouse. The cost to Lowe Brothers of procuring warehousing services and facilities comparable to those furnished by Cleveland Builders does not normally exceed 7 percent of the net amount billed by it on all the paint products so warehoused. The 10 percent commission paid by Lowe Brothers to Cleveland Builders was at least an adequate payment to Cleveland Builders for the warehousing of all the paint products which were, from time to time during the aforementioned period, stored in said warehouse, including those purchased by Cleveland Builders for its own account, and for services rendered by Cleveland Builders, or its employees, in connection therewith.

Whenever Cleveland Builders receive an order from any of its own customers for any of the Lowe Brothers paint products, it withdrew from the Lowe Brothers warehouse sufficient paint products to fill said orders. Tickets were made out to cover each such withdrawal. These tickets showed the value at dealers' list prices of the paint products so withdrawn. Only rarely did an individual ticket cover 84 or more gallons of Lowe Brothers trade sale items; oftentimes, a single ticket did not cover 24 gallons of such products. Cleveland Builders made almost daily withdrawals from the warehouse; occasionally, more than one withdrawal was made during one day.

Early in each month, Lowe Brothers billed Cleveland Builders for all the paint products withdrawn from the warehouse by Cleveland Builders during the preceding month.

During the period that its 1938 Plan was in effect, Lowe Brothers granted and allowed to Cleveland Builders a flat discount of 12 percent from dealers list prices on all its purchases of trade sale items. This discount was arrived at by estimating that, if Lowe Brothers had not had a warehouse in one of Cleveland Builders' buildings, a purchaser

of the quantities customarily purchased by Cleveland Builders would ordinarily purchase 50 percent in carload quantities and the remaining 50 percent in 84 gallons or greater l. c. l. quantities. During said period, Cleveland Builders purchased annually from Lowe Brothers at dealers list prices between \$10,000 and \$11,000 worth of paint products.

A dealer's paint inventory will normally average between 25 and 50 percent of his annual purchases. In other words, a dealer does not normally turn over his paint stock more frequently than four times a year.

Cleveland Builders, during the period the 1938 Plan was in effect, was in competition in Cleveland and environs with the customers of Sherwin-Williams, with the customers of Lucas and other subsidiaries of The Sherwin-Williams Co., and with the customers of the competitors of The Sherwin-Williams Co. in the sale and distribution of paint products.

We find that Lowe Brothers, by granting and allowing, under the 1938 Plan, to a dealer-customer from which it had rented warehouse space, a flat 12 percent discount from dealers list prices on all the purchases, however small, of such customer, has discriminated in price against other Lowe Brothers dealers.

PAR. 17. In addition to the per order quantity discounts applicable under their respective 1938 Plans and generally available to all purchasers from them and the volume discounts and carload or truckload quantity discount applicable under their respective 1939 Plans and generally available to all purchasers from them, the manufacturers have regularly and customarily granted and allowed and are now granting and allowing functional discounts to customers who have qualified as jobbers, wholesalers or distributors. It was, at the time of the issuance of the complaint herein, the established policy and practice of the manufacturers to grant and allow functional discounts only to jobbers or distributors and to such dealers that perform the functions of the jobber or distributor, and only in the latter cases, to the extent that such dealers perform such functions. It was not, at the time of the issuance of the complaint herein, the policy or general practice of the manufacturers to grant or allow functional discounts on paint products which were resold by distributors or dealers (1) directly to regular or occasional consumers or (2) indirectly through retail branches, owned or controlled by the distributors or dealers, to regular or occasional consumers.

Sherwin-Williams does not have any customers who operate exclusively as distributors, but does grant functional discounts to some of its dealers who perform the functions of a distributor; that such discounts,

depending upon the services performed by the distributor, vary from 5 percent to 12½ percent, although they customarily amount to 7½ or 10 percent. Sherwin-Williams, as a rule, requires its dealers acting as distributors to submit statements after the end of each month showing the total sales at dealers list prices made to other dealers during the preceding month. From such total sales, Sherwin-Williams deducts the discounts that have been received by the reporting dealer with respect to the purchases which have been so resold. The applicable percentage functional discount is then applied to the net amount thus obtained to ascertain the sum due the reporting dealer as a functional discount for that month. Sherwin-Williams then issues a credit memorandum to the reporting dealer covering the functional discount so allowed for such month.

Lowe Brothers, during the period its 1938 Plan was in effect, allowed a maximum functional discount of 15 percent to its distributors. In the case of dealers performing all of the functions of a distributor, the functional discount, as a rule, bore the same ratio to 15 as the percentage of the dealer's distributor business bore to his entire business. The functional discount, as a rule, was granted and allowed on the face of the invoice and was based upon the gross dollar value of the dealer's purchases at dealers list prices and prior to the deduction of the per order quantity discounts. Since its 1939 Plan has been in effect, Lowe Brothers has allowed a maximum functional discount of 17 percent to its distributors. The functional discount is now based upon the net amount of the dealer's purchases at dealers list prices, after the deduction of the volume or quantity discount.

Lucas, under the 1938 Plan, allowed and now allows, under the 1939 Plan, a maximum functional discount of 15 percent to its distributors. In the case of dealers performing all of the functions of a distributor, the functional discount, as a rule, formerly bore and now bears the same ratio to 15 as the percentage of the dealer's distributor business bore or bears to his entire business. The functional discount, as a rule, was and is granted or allowed on the face of the invoice and was and is based upon the net amount of the dealer's purchases at dealers list prices, after the deduction of the quantity or volume discounts.

PAR. 18. During the time that both the 1938 and 1939 Plans have been in effect, Lowe Brothers, as a rule, has accepted and now accepts the statements of its dealers as to the percentage that their distributor business bears to their entire business. As a result of this method of computing and paying functional discounts, however, a substantial number of Lowe Brothers dealer-distributors have been receiving functional discounts with respect to a substantial portion of the trade

sale items resold by them to regular and occasional consumers, either (1) directly or (2) indirectly, through retail branches owned by them.

All of the Lowe Brothers dealer-distributors who receive functional discounts on trade sale item purchases which are resold to regular and occasional consumers, either (1) directly, or (2) indirectly, through retail branches owned by them, are occasionally in competition with other Lowe Brothers dealers, are frequently in competition with the dealers of another of said manufacturers or of other subsidiaries of The Sherwin-Williams Co., are almost invariably in competition with the dealers of other sellers, and are not infrequently in competition with the dealer-distributors, either of Lowe Brothers, or of another of said manufacturers, or of other subsidiaries of The Sherwin-Williams Co., or of other sellers.

PAR. 19. When Lucas adopted its 1938 Plan, all dealer-distributors were requested to submit invoices or certified statements each month showing the sales of trade sale items to other dealers during the preceding month. Some of the dealers complied; others said they would not do so. As a result, the company adopted two forms of distributor agreements, the first (yellow) being signed by all distributors who were willing to submit invoices or certified statements each month, the second (white) being signed by those who would do no more than certify the percentage of their business transacted with retail dealers. Practically all Lucas distributors signed only the white contract, and, during the time that the 1938 and 1939 Plans were in effect, received functional discounts from Lucas on the basis of the representations contained therein. As a result of this method of computing and paying functional discounts, a substantial number of Lucas dealer-distributors, have been receiving functional discounts with respect to a substantial portion of the trade sale items resold by them to regular and occasional consumers, either (1) directly, or (2) indirectly, through retail branches owned by them.

All of the Lucas dealer-distributors who receive functional discounts on trade sale item purchases which are resold to regular and occasional consumers, either (1) directly, or (2) indirectly, through retail branches owned by them are occasionally in competition with the other Lucas dealers, are frequently in competition with the dealers of another of said manufacturers, or of other subsidiaries of The Sherwin-Williams Co., are almost invariably in competition with the dealers of other sellers and are not infrequently in competition with the dealer-distributors, either of Lucas, or of another of said manufacturers or of other subsidiaries of The Sherwin-Williams Co., or of other sellers.

PAR. 20. The respondents The Lowe Brothers Co. and The John Lucas & Co., Inc. have granted and allowed and are now granting and allowing, in addition to quantity or volume discounts, additional discounts denominated functional to some of their dealers, and not to others on consumer business in certain localities. Illustrative of this practice are the following examples:

Lowe Brothers, under the 1938 Plan, granted and allowed to Cleveland Builders, in addition to the flat 12 percent discount described in paragraph 15 of the stipulation of December 6, 1940, a discount of 15 percent on 50 percent of its purchases of trade sale line paint products from Lowe Brothers or $7\frac{1}{2}$ percent on 100 percent of its purchases. Under the 1939 Plan, and until on or about May 6, 1940, Lowe Brothers granted and allowed to Cleveland Builders, in addition to the volume discounts under said 1939 Plan, a discount of $10\frac{1}{2}$ percent on 100 percent of its purchases of Lowe Brothers trade sale line paint products. Two and one-half percent of this additional discount was arrived at by estimating that, if Lowe Brothers had not had a warehouse in one of Cleveland Builders buildings, a purchaser of the quantities customarily purchased by Cleveland Builders would ordinarily purchase 50 percent in carload quantities. It was an "in lieu of carload quantity" discount. Under the 1939 Plan, and subsequent to on or about May 6, 1940, Lowe Brothers has granted and allowed to Cleveland Builders, in addition to the volume and quantity discounts under said 1939 Plan, a discount of 8 percent on 100 percent of its purchases of Lowe Brothers trade sale line paint products. Cleveland Builders does not sell any portion of the paint products which it purchases from Lowe Brothers to other dealers, but sells substantially all thereof to regular and occasional consumers of paint, approximately 90 percent thereof being sold to painters, paint contractors and maintenance accounts. Lowe Brothers has one other dealer customer located in Metropolitan Cleveland. Cleveland Builders, during all the time that the 1939 Plan has been in effect, has been in competition in Cleveland and environs with the customers of the competitors of Lowe Brothers in the sale and distribution of paint products.

Lowe Brothers, under its 1938 Plan, granted and allowed another one of its customers, in addition to the per order quantity discounts under said 1938 Plan, a 5 percent discount on the basis that $33\frac{1}{4}$ percent of the business of that customer was jobber business, and under its 1939 Plan, now grants and allows to such customer, in addition to the volume and quantity discounts under said 1939 Plan, a discount of $6\frac{1}{2}$ percent on the basis that 38 percent of the business of this customer is jobber business. Such customer's net purchases during

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each of the calendar years, 1938, 1939, and 1940, approximated \$15,000. Actually, such customer sold only approximately 13 percent of its purchases of Lowe Brothers trade sale line paint products during each of said calendar years to other dealers. This customer has been, during all the times herein mentioned and is now in competition with the customers of the competitors of Lowe Brothers in the sale and distribution of paint products.

Lowe Brothers, under the 1938 Plan, granted and allowed another one of its dealer-distributor's customers, in addition to the per order quantity discounts under said 1938 Plan, a 12 percent discount on the basis that 80 percent of the business of that customer was jobber business and, on the same basis under the 1939 Plan, now grants and allows to such customer, in addition to the volume and quantity discounts under said 1939 Plan, a discount of 13½ percent on all of the purchases of such customer. Such customer's net purchases during each of the calendar years 1938, 1939, and 1940, exceeded \$35,000. Actually, such customer sold approximately 50 percent of its purchases of Lowe Brothers trade sale line paint products at retail through retail stores wholly owned and operated by it. All the records for both the wholesale and retail departments were kept by the same employees. Approximately one-half of the purchases of the Lowe Brothers paint products sold at retail by such customer were sold by the retail store located in the same building as such customer's wholesale department, and approximately one-half thereof were sold by two wholly owned and operated retail stores located in the same city in which such dealer-distributor customer is located. Practically 100 percent of the Lowe Brothers paint products sold at retail by such customer were sold to the occasional consumer. In no one of the three aforementioned years did the percentage of such customer's purchases of Lowe Brothers trade sale line paint products which it resold to other dealers exceed 55 percent of its total purchases of such products. Some of the Lowe Brothers dealers to whom this Lowe Brothers dealer-distributor sells are located in the same city as the dealer-distributor, the remainder being located in the same and adjoining counties. In selling Lowe Brothers products to these independent dealers, this Lowe Brothers dealer-distributor has charged the prices and granted the discounts which have been applicable from time to time under the Lowe Brothers 1938 and 1939 Plans. This dealer-distributor customer has been, during all the times herein mentioned, and is now in competition with the customers of the competitors of Lowe Brothers in the sale and distribution of paint products.

Lucas, under the 1938 Plan, granted and allowed, and, under the 1939 Plan, now grants and allows to one of its dealers, in addition to the quantity or volume discounts applicable thereunder, a discount of 15 percent¹ on 100 percent of that customer's trade sale line purchases. This customer's purchases of Lucas paint products amount to approximately \$4,000 per year at dealers' list prices. Such customer sells all of the paint products it purchases from Lucas to regular and occasional consumers of paint and does not sell any portion thereof to other dealers.

Lucas, under the 1938 Plan, granted and allowed to one of its dealer customers, in addition to the per order quantity discounts under said 1938 Plan, a discount of 15 percent on 60 percent of the trade sale line purchases of such customer or 9 percent on 100 percent of such purchases. Under the 1939 Plan, Lucas now grants and allows to such customer, in addition to volume and quantity discounts under said 1939 Plan, a discount of 15 percent on 75 percent of the trade sale line purchases of such customer or 11¼ percent on 100 percent of such purchases. Lucas, in 1938, sold to such customer trade sale line items having a value at net prices of approximately \$4,000, in 1939 of approximately \$4,500, and in 1940 of over \$11,000. In addition to operating a store for the sale at retail of paint products, this customer is himself a painting contractor. More than \$1,500 worth (at net prices) of the trade sale items purchased by this customer from Lucas in 1938 and also in 1939 were used by him in his own painting business and more than one-half of the trade sale items purchased by him from Lucas in 1940 were used by him in his own painting business. The remaining paint products which he purchased from Lucas were sold by him at retail to regular and occasional consumers of paint. No portion thereof was sold to other dealers. Lucas has a number of other dealer customers located in the same city in which this customer is located. A substantial portion of the trade sale items sold in 1938, 1939, and 1940 by such customer at retail to regular and occasional consumers of paint were sold at dealers' list prices, the prices (except for the per order quantity or volume discounts) that other Lucas dealers in the same city in which such customer is located paid for said paint products.

Lucas, in 1938, sold to one of its dealer-distributor customers trade sale items having a value at dealers list prices of approximately \$40,000, or a net value after the deduction of per order quantity discounts and a 15 percent jobber discount of approximately \$30,000.

¹ The maximum discount allowed by Lucas on its "Royal Blue" line is 10 percent. To the extent that a customer's trade sale line purchases include "Royal Blue" items, the discount never exceeds this 10 percent.

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Lucas granted and allowed the 15 percent discount to such customer on the basis that 100 percent of its business was jobber business. Actually, said customer sold at retail through a separately operated retail store, located in the same city in which its wholesale business is transacted and wholly owned and operated by it, a substantial portion of the paint products purchased by it from Lucas. The value at dealers' list prices of Lucas trade sale items sold by such customer at retail amounted to approximately \$4,000. Lucas in 1939 and 1940 granted to such customer said 15 percent discount on all of its purchases of Lucas trade sale items, although such customer sold a substantial portion of its purchases in each year through said retail branch to regular and occasional consumers of paint products.

All of the customers of Lucas referred to in this paragraph have been, during the times herein mentioned, and now are in competition with the customers of the competitors of Lucas in the sale and distribution, of paint products.

PAR. 21. Many paint concerns competing with the respondents sell directly, particularly in the metropolitan centers, to painters, master painters, painting contractors, and maintenance accounts. These classes of customers customarily buy paint products at better prices than those paid by occasional consumers. Dealers and dealer-distributors desiring to procure a substantial portion of the painter-maintenance business customarily employ outside salesmen, provide delivery service, and oftentimes operate a credit department. However, at no time during the years 1938, 1939, and 1940, has either Lowe Brothers or Lucas granted and allowed to all its dealers and dealer-distributors discounts (in addition to the regular per order or volume discounts then in effect) on that portion of the purchases of such customers which were resold by them to painters, painting contractors, master painters and maintenance accounts.

PAR. 22. We find that Lowe Brothers and Lucas, by granting and allowing, under the 1938 and 1939 Plans, functional or special, discounts to some of their dealers and dealer-distributors in a particular locality on nondealer business (that is, on the purchases which are resold by such customers to painters, painting contractors, and maintenance accounts), have discriminated in price against others of their dealers and dealer-distributors in such locality.

We find that Lowe Brothers and Lucas, by granting and allowing, under the 1938 and 1939 Plans, functional or special discounts to some of their dealer-distributors on the purchases of such dealer-distributors which are resold by such dealer-distributors directly to the consumer through their retail departments or branch stores wholly owned by

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Order

them, have discriminated in price against others of their dealer-distributors.

PAR. 23. All of the prices and discounts on said prices of the manufacturers have been made in the course of commerce.

PAR. 24. The effect of the discriminations in price, set forth in paragraphs 14 to 16, inclusive, and paragraphs 20, 21 and 22, hereof, has been and may be substantially to lessen competition with the respondent or respondents, as the case may be, in the line of commerce in which they are engaged; to injure, destroy, or prevent competition with the respondent or respondents as the case may be, and to injure, destroy, or prevent competition with the customers of said respondents who received the benefit of such discriminations.

PAR. 25. No evidence appears in the record to justify the price differentials resulting from the practices set forth in paragraphs 14 to 16, inclusive, and paragraphs 20, 21 and 22, hereof, and the Commission finds that said price differentials are not justified.

CONCLUSION

The aforesaid acts and practices of the respondent or respondents, as the case may be, as set out in paragraphs 14 to 16, inclusive, and paragraphs 20, 21 and 22, hereof, are in violation of Section 2 (a) of said Act of Congress 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 (the Clayton Act), as amended by Act of Congress approved June 19, 1936 (the Robinson-Patman Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the joint answer of the respondents, and two stipulations as to the facts dated December 6, 1940, and October 20, 1942, respectively, signed by counsel for the Commission and counsel for the respondents, in which it is provided that the statement of facts contained therein may be accepted as the facts in this proceeding in lieu of testimony in support of the charges stated in the complaint and in opposition thereto, and the taking of testimony and all intervening procedure having been waived and the Commission having made its findings as to the facts and conclusion that said respondents have violated the provisions of Section 2 (a) 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 Act of Congress approved June 19, 1936 (The Robinson-Patman Act).

It is ordered, That the respondent, The Sherwin-Williams Co., a corporation, its successors and assigns and its officers, directors, agents, and employees, in connection with distribution and sale of trade sale line paint products in commerce between the several States of the United States and in the District of Columbia, do forthwith cease and desist:

1. From continuing or resuming, under a per order discount plan providing a 6 percent discount from dealers' list prices for an order of 24 to 48 gallons, an 8 percent discount for an order of 48 to 84 gallons and a 10 percent discount for an order of 84 gallons or more or under any plan substantially similar thereto, the practice of granting and allowing to purchasers operating a number or chain of retail distribution outlets, the 10, 8, or 6 percent discounts based upon quantity per order, when the said order is split into several shipments to various of the said retail distribution outlets;

2. From continuing or resuming, under a per order discount plan providing a 6 percent discount from dealers' list prices for an order of 24 to 48 gallons, an 8 percent discount for an order of 48 to 84 gallons and a 10 percent discount for an order of 84 gallons or more or under any plan substantially similar thereto, the practice of granting and allowing to purchasers operating a number or chain of retail distribution outlets, a 10 percent or other substantially similar flat discount from said dealers' list prices, in lieu of the quantity per order discounts available thereunder.

3. From continuing or resuming, under a per order discount plan providing a 6 percent discount from dealers' list prices for an order of 24 to 48 gallons, an 8 percent discount for an order of 48 to 84 gallons and a 10 percent discount for an order of 84 gallons or more under any plan substantially similar thereto, the practice of granting and allowing to purchasers the 10, 8, or 6 percent discounts based upon quantity per order, when the so-called "order" upon which said discounts are based is not in fact a single order but represents a number of orders from a single purchaser accumulated over a definite or indefinite period of time.

It is further ordered, That the respondent, The Lowe Bros. Co., a corporation, its successors and assigns and its officers, directors, agents and employees, in connection with the distribution and sale of trade sale line paint products in commerce between the several States of the United States and in the District of Columbia, do forthwith cease and desist:

1. From continuing or resuming, under a per order discount plan providing a 6 percent discount from dealers' list price for an order of 24 to 48 gallons, an 8 percent discount for an order of 48 to 84 gallons and a 10 percent discount for an order of 84 gallons or more under any plan substantially similar thereto, the practice of granting and allowing to purchasers operating a number or chain of retail distribution outlets, the 10, 8, or 6 percent discounts based upon quantity per order, when the said order is split into several shipments to various of the said retail distribution outlets.

2. From continuing or resuming, under a per order discount plan providing a 6 percent discount from dealers' list prices for an order of 24 to 48 gallons, an 8 percent discount for an order of 48 to 84 gallons, a 10 percent discount for an order of 84 gallons or more and a 14 percent discount on carload or truckload (20,000 lbs. or more) purchases for shipment direct from the factory, or under any plan substantially similar thereto, the granting and allowing to any of its dealer customers from whom it has or shall have purchased, leased, or rented warehouse space any quantity per order discounts which are greater, different or other than the quantity per order discounts available thereunder to all dealer customers purchasing in the same per order quantities.

3. From granting and allowing under a discount plan providing a 5 percent discount from dealers' list prices for annual purchases totaling less than \$500, a 10 percent discount for annual purchases in excess of \$500 and a 15 percent discount on carload or truckload (20,000 lbs. or more) purchases for shipment direct from the factory, or under any plan substantially similar thereto, to any of its dealer customers from whom it has or shall have purchased, leased or rented warehouse space, any carload discounts or any discounts in lieu of carload discounts, except with respect to the actual carload or truckload purchases of such dealers shipped direct from the factory.

4. From discriminating in price between dealer and dealer-distributor customers through the practice followed under present and prior discount plans of granting and allowing to some of its dealer-distributor customers discounts (in addition to the regular per order or volume discounts from dealers' list prices in effect at the time and granted and allowed to all of its customers) on such portion of the purchases of said favored dealer-distributor customers as is sold at retail through the wholly owned and operated retail stores of said dealer-distributor customers.

5. From discriminating in price between its customers through the practice followed under present and prior discount plans of grant-

ing and allowing to some of its customers in a particular locality special or additional discounts (in addition to the regular per order or volume discounts from dealers' list prices in effect at the time and granted and allowed to all of its customers) on purchases made by said favored customers which are not resold by them to other dealers, while not granting and allowing such special or additional discounts on such purchases to all of its customers in such locality.

It is further ordered, That the respondent, John Lucas and Co., Inc., a corporation, its successors and assigns and its officers, directors, agents, and employees, in connection with the distribution and sale of trade sale line paint products in commerce between the several States of the United States and in the District of Columbia, do forthwith cease and desist:

1. From continuing or resuming, under a per order discount plan providing a 6 percent discount from dealers' list prices for an order of 24 to 48 gallons, an 8 percent discount for an order of 48 to 84 gallons and a 10 percent discount for an order of 84 gallons or more or under any plan substantially similar thereto, the practice of granting and allowing to purchasers operating a number or chain of retail distribution outlets, the 10, 8, or 6 percent discounts based upon quantity per order, when the said order is split into several shipments to various of the said retail distribution outlets,

2. From discriminating in price between dealer and dealer-distributor customers through the practice followed under present and prior discount plans of granting and allowing to some of its dealer-distributor customers discounts (in addition to the regular per order or volume discounts from dealers list prices in effect at the time and granted and allowed to all of its customers) on such portion of the purchases of said favored dealer-distributor customers as is sold at retail through the wholly owned and operated retail stores of said dealer-distributor customers.

3. From discriminating in price between its customers through the practice followed under present and prior discount plans of granting and allowing to some of its customers in a particular locality special or additional discounts (in addition to the regular per order or volume discounts from dealers list prices in effect at the time and granted and allowed to all its customers) on purchases made by said favored customers which are not resold by them to other dealers, while not granting and allowing such special or additional discounts on such purchases to all of its customers in such locality.

It is further ordered, That the charges set out in paragraphs 17, A, C, D, and E of the complaint be and the same are hereby dismissed

without prejudice to the right of the Commission to proceed thereon in the future in any appropriate manner.

It is further ordered, That the respondents named in the caption hereof, within 60 days after service upon them of this order, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied and are complying with this order..

IN THE MATTER OF
WORLD'S STAR-MALLOCH, INC., ALSO HAVING TRADED
AS "STRAND-SEALED HOSIERY CO."

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

Docket 3623. Complaint, Oct. 4, 1938—Decision, Jan. 9, 1943

Where a corporation, engaged in competitive interstate sale and distribution to the purchasing public of various articles of wearing apparel, including lingerie, hosiery, shirts, and dresses, principally through sales agents whom it obtained through advertisements in newspapers and periodicals of wide distribution and to whom it forwarded, upon receipt of inquiries, circular letters and other advertising material, supplying to those who agreed to serve in such capacity a sales kit which included various leaflets, circulars, pamphlets and other advertising material to be used by them and exhibited to prospective purchasers—

- (a) Represented through representations in its said advertising, directly and by implication, that its "Strand-Sealed" hosiery was made by a secret process, use of which greatly increased its wearing qualities and enabled it to give two or three times as much wear as other hosiery; and
- (b) Represented that its said product was proof against snags and runs, and that the number of turns or twists used therein was greatly in excess of that used in other hosiery;

The facts being that, as disclosed by examination and report made by the Bureau of Standards, the process employed by it was not secret but was in fairly common use among manufacturers; the number of turns or twists used by it was about the same as that of other hosiery on the market; and process commonly employed among modern manufacturers of "sealing" their hosiery or silk yarn used therein through subjection to certain solutions had not been used to any extent in its said hosiery, which was not proof against snags or runs, and which did not give any degree of wear substantially greater than other hosiery; and

- (c) Portrayed in a pamphlet a purported sample of the silk thread used in the manufacture of its said products which had a fairly high degree of twist, and a sample of the thread used in "ordinary" silk hosiery which had very little twist, in connection with which it claimed superior advantages for its hosiery with respect to snags and breaks;

Notwithstanding that the pictured strands or threads claimed to be representative of those used in its said product had a considerably higher degree of twist than the strands in the product itself; and

- (d) Represented that persons acting as sales agents for it might reasonably expect, under normal conditions, to earn amounts ranging up to \$1.30 per hour, \$15 per day, and \$47 per week;

The facts being that the highest amount which had ever been earned by its representatives was \$20 per week and that not in recent years; and figures given were greatly in excess of the amounts which agents could reasonably expect to earn under normal conditions; and