

Complaint

IN THE MATTER OF

JOSEPH WINKLER & COMPANY ET AL.

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

Docket 5645. Complaint, Mar. 11, 1949—Decision, Sept. 7, 1949

Where a corporation and two officers thereof, engaged in the interstate sale and distribution of general merchandise, especially hardware and household electrical appliances, fixtures, chinaware and related products, and in the conduct of a mail-order business in said commodities; in advertising their said products in circulars, catalogs, pamphlets, price lists, and newspapers and other periodicals, directly and by implication—

- (a) Represented falsely that said wares were immediately available in unlimited quantities, and that goods ordered would be shipped immediately; The facts being that in many instances there were long intervals between the receipt of the order and the shipment of the goods;
- (b) Represented falsely that said wares were of good quality and were usable for the purposes for which they were intended, and that (in the absence of a statement to the contrary), they were new;
- (c) Represented that prices quoted by them were wholesale prices when in fact they were identical with those which they quoted as retail; and
- (d) Represented that they would ship the commodities as described by them according to the orders received;

The facts being that in many instances they substituted inferior, or used articles, and articles not in usable condition;

With the effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous and mistaken belief that said representations were true, and thereby into the purchase of substantial quantities of their products:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John L. Hornor*, trial examiner.

Mr. Charles S. Cox for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission having reason to believe that Joseph Winkler &

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Co., a corporation, Jack Winkler and Jules Winkler, individually and as officers of Joseph Winkler & Co., hereinafter referred to as the respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Joseph Winkler & Co. is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 671 North Clark Street, Chicago, Ill. Respondents, Jack Winkler and Jules Winkler, are individuals and officers of the respondent Joseph Winkler & Co., a corporation, and formulate, dictate, direct, and control the policies, acts, and practices of said Joseph Winkler & Co., a corporation, particularly in respect to the acts and practices herein alleged; they also have their offices at 671 North Clark Street, Chicago, Ill.

PAR. 2. Respondents are now and for more than 5 years last past have been engaged in the sale and distribution of general merchandise and especially hardware and household electrical appliances, fixtures, chinaware, and related products, and conduct a mail-order business in said commodities at said location.

In the course and conduct of their business, the respondents have caused their said products, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and have maintained, a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia. Respondents' volume of trade in such commerce has been substantial.

PAR. 3. In the course and conduct of their business respondents have made false and deceptive statements and claims concerning their wares by means of circulars, catalogs, pamphlets, price lists, and advertisements in newspapers and other periodicals, including, but not limited to, an advertisement in Screenland magazine, issue of May 1946, a circular entitled "Winkler's Special Edition" and described as "Catalog 246," a circular entitled "Winkler's Special Edition" and described as "Catalog 147."

Among and typical of the statements and claims so made by respondents are the following:

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AVAILABLE FOR IMMEDIATE DELIVERY

(Drawing of a Radio) Radios—5 Tube
A. C. and D. C.
28.95 and 38.95

Automatic Electric
IRONS
6.95 and 8.95

(Drawing of Electric Hand IRON)

PLAIN Electric Irons
4.95 and 5.90

(Drawing of Electric Curling Iron) Electric Curling Irons
2.49 and 2.95

Electric Toasters
4.45 and 7.95

Electric Cookers—2 burner (Picture of an Electric Toaster)
6.95 and 8.95

Enclose deposit with order—balance C. O. D.

Send 3¢ stamp for illustrated catalog listing over 600 hard-to-get items—Electric
appliances. Cooking utensils, Hardware, etc.

Joseph Winkler & Co.
671 N. Clark St., Dept. C-4,
Chicago 10, Ill.

WINKLER'S SPECIAL EDITION

—Many Everyday Needs Now Available—

Catalog 246
Joseph Winkler
Retail only
671 North Clark Street, Chicago, Illinois.

WINKLER'S SPECIAL EDITION

Electrical Goods
Plumbing supplies
Hardware
Silverware
Chinaware
Cooking Utensils

And many other everyday needs at reduced prices.

Catalog 147
Joseph Winkler
Wholesale Distributors of General Merchandise
671 North Clark Street, Chicago, Illinois.

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In the said circulars, catalogs, pamphlets, price lists and advertisements respondents have described the wares offered for sale, their kind and quality, and the terms and conditions upon which they can be obtained.

PAR. 4. Through the use of the statements and claims hereinabove set forth, and others similar thereto not specifically set forth herein, respondents have represented, directly and by implication that the said wares are immediately available in unlimited quantities; that goods ordered will be shipped immediately; that respondents' wares are of good quality and are usable for the purposes for which they are intended; that the goods are new in the absence of a statement to the contrary; that the prices quoted by respondents are wholesale prices, and that respondents will ship the commodities as described by respondents according to the orders received.

PAR. 5. In truth and in fact the said representations were false and deceptive. Respondents did not have the said goods available in unlimited quantities, or for immediate delivery. In many instances there were long intervals between the receipt of the order and the shipment of the goods ordered. Many of the articles described by respondents were not of good quality, many were not usable for the intended purposes, and some were not new, although this was not disclosed. In many instances respondents have not shipped the goods as described by them, and as ordered, but have substituted other, inferior, or used articles and articles not in usable condition. The prices quoted by respondents as wholesale prices were not wholesale prices but identical with prices which they quoted as retail prices.

PAR. 6. The aforesaid false and deceptive representations and claims of respondents in connection with the sale and offering for sale of their products in commerce have had the tendency and capacity to and did mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said representations were true and into the purchase of substantial quantities of respondents' products in commerce because of said erroneous and mistaken belief.

PAR. 7. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 11, 1949, issued and subsequently served its complaint in this proceeding upon the respondents, Joseph Winkler & Co., a corporation, and Jack Winkler and Jules Winkler, individually and as officers of Joseph Winkler & Co., charging said respondents with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. On June 13, 1949, the respondents filed their answer, in which answer they admitted all of the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearings as to said facts. Thereafter, the proceeding regularly came on for final hearing before the Commission upon the complaint and the answer thereto; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Joseph Winkler & Co. is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 671 North Clark Street, Chicago, Ill. Respondents Jack Winkler and Jules Winkler are individuals and officers of the respondent Joseph Winkler & Co., a corporation, and formulate, dictate, direct, and control the policies, acts, and practices of said Joseph Winkler & Co., a corporation, particularly in respect to the acts and practices herein found; they also have their offices at 671 North Clark Street, Chicago, Ill.

PAR. 2. Respondents are now, and for more than 5 years last past have been, engaged in the sale and distribution of general merchandise and especially hardware and household electrical appliances, fixtures, chinaware, and related products, and conduct a mail-order business in said commodities at said location.

In the course and conduct of their business the respondents have caused their said products, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and have maintained, a course of

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trade in said products in commerce among and between the various States of the United States and in the District of Columbia. Respondents' volume of trade in such commerce has been substantial.

PAR. 3. In the course and conduct of their business respondents have made false and deceptive statements and claims concerning their wares by means of circulars, catalogs, pamphlets, price lists, and advertisements in newspapers and other periodicals, including but not limited to, an advertisement in "Screenland" magazine, issue of May 1946, a circular entitled "Winkler's Special Edition" and described as "Catalog 246," a circular entitled "Winkler's Special Edition" and described as "Catalog 147."

Among and typical of the statements and claims so made by respondents are the following:

AVAILABLE for IMMEDIATE DELIVERY

(Drawing of a Radio)	Radios—5 Tube A.C. and D.C. 28.95 and 33.95
Automatic Electric IRONS 6.95 and 8.95	(Drawing of Electric Hand IRON)
PLAIN Electric Irons 4.95 and 5.90	
(Drawing of Electric Curling Iron)	Electric Curling Irons 2.49 and 2.95
Electric Toasters 4.45 and 7.95	
Electric Cookers—2 burner 6.95 and 8.95	(Picture of an Electric Toaster)

Enclose deposit with order—balance C. O. D.

Send 3c stamp for illustrated catalog listing over 600 hard-to-get items—Electric appliances. Cooking utensils, Hardware, etc.

Joseph Winkler & Co.
671 N. Clark St., Dept. C-4,
Chicago 10, Ill.

WINKLER'S SPECIAL EDITION

—Many Everyday Needs Now Available—
Catalog 246
Joseph Winkler
Retail only
671 North Clark Street, Chicago, Illinois

WINKLER'S SPECIAL EDITION

Electrical Goods
Plumbing Supplies
Hardware
Silverware
Chinaware
Cooking Utensils

And many other everyday needs at reduced prices.

Catalog 147

Joseph Winkler

Wholesale Distributors of General Merchandise

671 North Clark Street, Chicago, Illinois.

In the said circulars, catalogs, pamphlets, price lists, and advertisements respondents have described the wares offered for sale, their kind and quality, and the terms and conditions upon which they can be obtained.

PAR. 4. Through the use of the statements and claims hereinabove set forth, and others similar thereto not specifically set forth herein, respondents represented, directly and by implication, that the said wares were immediately available in unlimited quantities; that goods ordered would be shipped immediately; that respondents' wares were of good quality and were usable for the purposes for which they were intended; that the goods were new in the absence of a statement to the contrary; that the prices quoted by respondents were wholesale prices, and that respondents would ship the commodities as described by respondent according to the orders received.

PAR. 5. In truth and in fact the said representations were false and deceptive. Respondents did not have the said goods available in unlimited quantities, or for immediate delivery. In many instances there were long intervals between the receipt of the order and the shipment of the goods ordered. Many of the articles described by respondents were not of good quality, many were not usable for the intended purposes, and some were not new, although this was not disclosed. In many instances respondents did not ship the goods as described by them, and as ordered, but substituted other, inferior, or used articles and articles not in usable condition. The prices quoted by respondents as wholesale prices were not wholesale prices but identical with prices which they quoted as retail prices.

PAR. 6. The use by respondents of the aforesaid false and deceptive representations and claims in connection with the sale and offering for sale of their products in commerce had the tendency and capacity

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to and did mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said representations were true and into the purchase of substantial quantities of respondents' products in commerce because of said erroneous and mistaken belief.

CONCLUSION

The aforesaid acts and practices of the respondents as herein found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Commissioner Davis absent.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of the respondents thereto, in which answer said respondents admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearings as to said facts; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That respondent Joseph Winkler & Co., a corporation, and its officers, and the respondents Jack Winkler and Jules Winkler, and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of hardware and household electrical appliances, fixtures, chinaware, or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

(1) That wares not available are in fact available for immediate delivery;

(2) That wares are of good quality, or that they are usable for the purposes for which such wares are customarily used, when such is not a fact;

(3) That used or second-hand articles are new by failing to disclose that they are used or second-hand;

(4) That the established or regular retail prices at which wares are sold or offered for sale are wholesale prices.

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

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to respondents who thereafter invoice and ship the food products to the customers. The respondents pay such intermediaries or brokers for their services in negotiating and making such sales for respondents' account, commissions or brokerage fees which are customarily based on a percentage of the invoice sales price of the food products sold.

Such intermediaries or brokers are not traders for profit and do not take title to nor have any financial interest in the product sold and neither make a profit, nor suffer a loss, on the transaction. This phase of respondents' business is not challenged by the complaint herein.

(b) The second method, which is challenged, is respondents' sales of food products in commerce direct to buyers who are paid, directly or indirectly, commissions, brokerage fees, or other compensation or allowances, or discounts in lieu thereof, on purchases made for their own account. All such buyers referred to herein are "direct buyers." In transactions between respondents and such buyers, the respondents do not use brokers. Such direct buyers purchase respondents' food products in commerce for their own account, and for resale to their customers located in the several States of the United States.

Such direct buyers generally transmit their own purchase orders for food products directly to the respondents. The respondents thereafter invoice and ship such products directly to such buyers or to the customers of said buyers. Respondents collect the purchase price of the food products from the buyers and not from the buyers' customers. The respondents pay said buyers commissions or brokerage fees on such purchases, usually by deducting from the invoice price of the food products purchased, an amount which is equal or approximately equal to the commissions or brokerage fees paid by the respondents to their brokers, as described in the first method above.

Contrary to the manner in which brokers operate (as described in the first method above) such buyers (as described here in the second method) are traders for profit, purchasing and reselling such food products in their own names and for their own account for resale, taking title thereto, and assuming all risks incident to ownership. Such resales are not made at prices or on terms directed by respondents, but at prices and on terms determined by the buyers, who make a profit or suffer a loss thereon, as the case may be. This phase of respondents' business is challenged by the complaint herein.

PAR. 5. The respondents named in the caption hereof, and each of them, since June 19, 1936, in the course and conduct of their business, have sold and distributed and are now selling and distributing a sub-

stantial portion of their food products in commerce directly to buyers located in States other than the State in which the respondents are located and, as a result of said sales and the respondents' instructions, such food products have been and are shipped and transported across State lines by respondents to said buyers, or to said buyers' customers.

PAR. 6. The acts and practices of the respondents named in the caption hereof, and each of them, in promoting the interstate sale of their food products since June 19, 1936, by granting and allowing buyers commissions, brokerage fees, or other compensation or allowances, or discounts in lieu thereof, by the second method set forth in paragraph 4 (b) herein, are in violation of subsection (c) of section 2 of the Clayton Act as amended.

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 monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act) (15 U. S. C. Sec. 13), the Federal Trade Commission on March 16, 1949, issued and subsequently served its complaint in this proceeding upon the respondents, Pacific Grape Products Co., a corporation, Stanley F. Triplett, individually and as president of Pacific Grape Products Co., and Aleck Rasmussen, individually and as director of Pacific Grape Products Co., charging said respondents with violation of subsection (c) of section 2 of the Clayton Act as amended. After the issuance of the complaint the respondents filed their answer, in which answer they, in substance, admitted the material allegations of fact set forth in said complaint but alleged that the practices complained of had been discontinued and waived all intervening procedure, including further hearings as to the facts. Thereafter this proceeding regularly came on for final hearing before the Commission upon the complaint and the answer thereto, and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Pacific Grape Products Co. is a corporation organized and existing under the laws of the State of California with its principal office and place of business located at 302-320 Grand

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Street, Modesto, Calif. The respondent company is engaged in the canning, selling, and distribution of fruits and vegetables, such as fruit cocktail, grapes, peaches, pears, apricots, tomatoes, tomato paste, tomato puree, spinach, Irish potatoes, and beans, all of which are hereinafter referred to as "food products."

PAR. 2. Respondents Stanley F. Triplett and Aleck Rasmussen are individuals with principal offices and places of business located at 302-320 Grand Street, Modesto, Calif. Respondent Triplett is now president of Pacific Grape Products Co. and has been a substantial stockholder and an officer in said company since some time after June 19, 1936. Respondent Aleck Rasmussen is now a director of Pacific Grape Products Co. and has been a stockholder and director therein since some time after June 19, 1936. Each of said respondents has exercised, and still exercises, a substantial degree of authority and control over the business conducted by the corporate respondent, including the direction of its distribution and sales policies.

PAR. 3. Respondents, and each of them, through said respondent Pacific Grape Products Co., have sold and distributed, and now sell and distribute, their food products in commerce, as "commerce" is defined in the Clayton Act as amended, to buyers through intermediaries or brokers who act as agents for respondents in finding buyers and in negotiating the sale of respondents' food products at prices and on terms established by respondents. Such intermediaries are paid commissions or brokerage fees for their services in negotiating and making such sales for respondents' account.

PAR. 4. In addition, respondents, during the period of 1938 into 1943 and in instances thereafter, have sold their food products in commerce, as "commerce" is defined in the Clayton Act as amended, to direct buyers who purchased from respondents in their own names and for their own accounts for resale to their customers located in the several States of the United States. In transactions between respondents and such direct buyers the respondents do not use brokers. Such buyers in purchasing for their own accounts for resale take title to the merchandise and assume all risks incident to ownership. During the times mentioned, respondents have paid or allowed to said direct buyers commissions or brokerage fees on such purchases. Respondents have paid commissions or brokerage fees thereon to such purchasers usually by deducting from the invoice price of the food products purchased an amount which is equal to the commissions or brokerage fees paid by the respondents to their brokers.

CONCLUSION

The paying and granting by the respondents herein, under the circumstances and in the manner described in paragraph 4, of brokerage fees, commissions, or other compensation or allowances in lieu thereof, to buyers of their food products who purchase such food products in their own names and for their own accounts for resale as hereinabove found, are in violation of subsection (c) of section 2 of the Clayton Act as amended.

Respondents contend that no useful purpose will be served by issuance of an order requiring cessation of the practices for the reason that the payment of brokerage commissions or discounts in lieu thereof to the other parties to the transactions was abandoned in 1943. A few instances of such payments thereafter, respondents aver, have occurred through misunderstanding, ignorance, or oversight, and measures looking to the prevention of reoccurrence have been taken. The Commission is of the opinion, however, that in the circumstances here an order to cease and desist should be entered pursuant to the provisions of the statute.

Commissioner Davis absent.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of the respondents, which answer, in substance, admits the material allegations of fact set forth in the complaint and waives all intervening procedure and further hearings as to said facts; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of subsection (c) of section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an act approved June 19, 1936 (the Robinson-Patman Act):

It is ordered, That the respondent Pacific Grape Products Co., a corporation, its officers, agents, representatives, and employees, and the respondents Stanley F. Triplett and Aleck Rasmussen, individually and as president and director, respectively, of said corporate respondent, their respective representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale of food products or other merchandise in commerce, as "commerce" is defined in the aforesaid Clayton Act as amended, do forthwith cease and desist from:

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Paying or granting, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, to any purchaser upon purchases for his own account or to any agent, representative, or other intermediary acting in fact for, or on behalf of, or subject to the direct or indirect control of, the purchaser to whom sale is made.

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

Commissioner Davis absent.

Syllabus

IN THE MATTER OF

C. LEE COOK MANUFACTURING COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 3 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 5649. Complaint, Apr. 15, 1949—Decision, Sept. 30, 1949

Where a corporation which (1) was engaged in the manufacture and competitive interstate sale and distribution of metallic packings and metallic packing replacement and repair parts, for use on compression machinery of all types, made by others; (2) sold its said packings to compression engine manufacturers for use as original equipment, and its said product and parts to them and their purchaser customers for replacement and repair; (3) had long maintained, throughout the United States, and particularly throughout the oil and gas fields of the Southwest, an extensive sales and service organization, which sold said replacement and repair packings and replacement and repair parts both for metallic packings of its own make and for replacement and repair of such packings and packing parts made by others; and, (4) with the exception of several who specialized in metallic packings for railway locomotives, was the largest manufacturer of such packings in the United States, and occupied a dominant position in the industry and particularly so as respects such packings and parts for gas compressors and booster pumps used by the oil and gas industry—

- (a) Made sales and contracts for sale for such packings and packing replacement and repair parts, and fixed prices for such products or discounts from or rebates upon said prices on the condition, agreement or understanding that the purchaser should not use or deal in the metallic packings or parts or other goods or products of a competitor;
- (b) Allowed discounts from and rebates upon prices, in such sales and contracts for sale, to purchasers in consideration of their agreement to purchase its metallic packings as standard, factory, or original "full line" equipment for all engines of certain types made by said purchasers, to the exclusion of other sellers;
- (c) Allowed discounts from and rebates upon prices, in such sales and contracts for sale, to purchasers in consideration of their agreement to purchase from it their entire requirements of replacement and repair parts, including renewal rings, for makes of metallic packings other than those made by it and which had been installed on the manufacturing purchasers' engines, to the exclusion of other sellers, including the original manufacturers of said packings needing repair or replacement parts;

Effect of which sales and contracts for sale of said corporation's metallic packings and metallic packing replacement and repair parts, and of the fixing of prices or discounts from or rebates upon the prices for such products, on the aforesaid condition, agreement or understanding, might tend to substantially lessen competition in the line of commerce in which said