

Opinion

IN THE MATTER OF
GENERAL FOODS CORPORATION

Docket 5675. Complaint, July 7, 1949—Decision, opinion, and dissenting opinion, Apr. 13, 1954

Charge: Discriminating in price in the sale of "Certo" and "Sure-Jell" pectin products in violation of Section 2 (a) of the Clayton Act, as amended.

Before *Mr. Abner E. Lipscomb* and *Mr. William L. Pack*, hearing examiners.

Mr. Eldon P. Schrup for the Commission.

Mr. Lester E. Waterbury, of White Plains, N. Y., for respondent.

DECISION OF THE COMMISSION DENYING APPEAL AND DISMISSING
COMPLAINT

This matter came before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint.

The Commission has considered the entire record herein including the exceptions to the initial decision and, for the reasons stated in the written opinion of the Commission which is issued herewith, is of the opinion that the rulings of the hearing examiner are free from prejudicial error and that the allegations of the complaint should be dismissed.

It is ordered, therefore, That the appeal of counsel supporting the complaint from the initial decision is hereby denied and that the allegations of the complaint are hereby dismissed.

Commissioner MEAD dissenting and Commissioner CARRETTA not participating.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

The complaint charges respondent with territorial price discrimination in violation of Section 2 (a) of the Clayton Act, as amended. At the conclusion of the evidence of counsel supporting the complaint, respondent moved for dismissal on the ground that the evidence failed to prove:

- (a) That the goods involved were of like grade and quality;
- (b) That there was any price discrimination; and
- (c) That the alleged practices tended substantially to lessen competition, or to create a monopoly, or to injure, destroy, or prevent

competition within the meaning and intent of said Section 2 (a) of the Clayton Act, as amended.

The hearing examiner sustained the motion on the latter ground and counsel, supporting the complaint, appeals.

Respondent, a large manufacturer and wholesale distributor of food products, also sells "Certo" (a liquid pectin) and "Sure-Jell" (a powdered pectin), which products are used by the housewife in making jellies and jams. In 1929, by the purchase of certain patents, respondent had a virtual legal monopoly in the liquid household pectin business. In 1939, because of the expiration of these patents and because of the appearance of powdered pectin on the market, the situation had changed considerably. At that time respondent had 75% to 80% of the national market of liquid pectin and 40% of powdered pectin. In the western territory it had 50% of liquid and 25% of powdered pectin.

In 1940 (and continuing until the end of 1947) respondent put into operation certain "deals" in the western territory (being roughly that portion of the United States west of the Rocky Mountains). Under these deals, respondent's wholesalers, jobbers, and retailers were authorized to sell one additional bottle of Certo, for example, for 3¢ when the customer bought two bottles at the regular price. The net effect of these deals was to sell Certo and Sure-Jell to the consumers in the western territory cheaper than prices maintained elsewhere. Within the chosen area the deals were open to all who wished to buy Certo and Sure-Jell. There is no claim of injury in other than the primary line, that is to competition between respondent and others engaged in the sale of household pectin at wholesale.

That part of Section 2 (a) of the amended Clayton Act material to this inquiry is as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States, or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them":

The first question to be considered is what is the test for determining injury to competition in territorial discrimination cases where injury is in the primary line. On that subject, the hearing examiner at page 6 of his initial decision said:

"Whatever may be the correct rule in cases charging injury to competition among competing purchasers, the examiner understands that in territorial price discrimination cases where the injury charged is in the primary line, that is, to competition among sellers, the inquiry is of a broader and more general nature. In such cases the important question is not whether a particular seller may have lost business but rather whether competition in the area in question has been or is likely to be substantially injured. In short, whether there is a substantial tendency toward monopoly."

It is true that in such cases injury to competition and a tendency toward monopoly are proper subjects of inquiry. But we do not believe the law makes the distinction between competitive injury to sellers and competitive injury to their customers that the above statement would seem to indicate. Both sellers and customers are equally under the protection of Section 2 (a). The test is the same in either case. The standard for determining the unlawfulness of an unjustified price discrimination, namely, the substantiality of the effects reasonably probable, is the same whether the competitive injury occurs at the seller level or at the customer level. The fact of injury is to be determined in all cases by a consideration of all the competent and relevant evidence and the inferences which may be reasonably drawn therefrom. Under differing circumstances the proof necessary to establish injury or even to make out a prima facie case will differ. See *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37 (1947).

That the statements of the Court in the Morton Salt case concerning permissible inferences of injury where the discrimination was between competing customers could not automatically be applied in cases of territorial price discrimination, even in the case of customers, is well set out in the 1948 Policy Statement of the Federal Trade Commission.

"However, there are strong reasons why the concept of injury adopted by the court in the Morton Salt case should not be applied automatically to discriminations arising under geographic pricing systems in which purchasers paying different prices are differently located and the price differences generally diminish as the distances diminish between purchasers' locations. In these circumstances competition between purchasers paying significantly different prices may occur in quite limited areas or only along the fringes of trade territories. Seeming advantages in price may be materially affected by

disadvantages of location. These and other considerations make it clear that in geographical price discriminations inferences of injury to competition drawn merely from the existence of price differences between purchasers who compete in some degree would have no sound basis. The minimum determination of injury should be based upon ascertained facts that afford substantial probability that the discriminations, if continued, will result in injury to competition."

Puerto Rican American Tobacco Company v. American Tobacco Company, 30 F. 2d 234, involved a territorial discrimination under Section 2 (a) prior to its amendment by the Robinson-Patman Act. The evidence there was that the competing seller had suffered severe financial loss because of the discrimination and also that the discriminator was selling cigarettes in Puerto Rico at a loss, for the purpose of eliminating its competitor. *Muller Company v. Federal Trade Commission* (1944) 142 F. 2d 511, was generally similar in its facts. There the evidence was that prices were reduced in certain areas below cost with the deliberate intention of eliminating a competing seller. That this competing seller did suffer injury was shown by the decline of its sales of chicory from 2,319,507 lbs. in 1936 to 1,459,195 lbs. in 1937.

Count III of *Minneapolis-Honeywell Regulator Company v. Federal Trade Commission* (1951) 191 F. 2d 786, involved price discriminations under Section 2 (a). The complaint charged injury in both the primary and secondary lines. The hearing examiner found "that competition is not injured." The Commission, with one member dissenting, reversed the hearing examiner. In reversing the Commission, the court pointed out "various undisputed facts as to the effect of Minneapolis-Honeywell practices on competitor competition" (that is, in the primary line), including the following:

(a) That the prices charged by Minneapolis-Honeywell's competitors were generally lower than those of Minneapolis-Honeywell and that there is no evidence of any undercutting of its competitors by the Minneapolis-Honeywell Company.

(b) That throughout the complaint period the keenest kind of price competition existed among control manufacturers.

(c) That during this period the total business of Minneapolis-Honeywell's competitors increased.

(d) That Minneapolis-Honeywell's share of the available control business was reduced from 73% in 1937-1938 to only 60% in 1941.

With respect to the secondary line, the court also found that injury to competition was not proved because there was no causal connection between the price of controls (sold by respondent) and the price of the finished product (oil burners with respondent's controls attached) sold by respondent's customers. A writ of certiorari was dismissed

because the petition was not filed within the period allowed by law. The dissent of Mr. Justice Black indicated his disagreement with the conclusion arrived at by the Circuit Court of Appeals in regard to injury in the secondary line, a question not presented in the instant case.

The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Company v. Federal Trade Commission*, 135 F. 2d 453, the court held that proof of discrimination in price is not sufficient; that in addition "there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered." In suits brought to recover treble damages both before and after the Robinson-Patman Amendments to the Clayton Act, it has been indicated that the plaintiff must allege and prove injury to competition. See *Baren v. Goodyear Tire and Rubber Company* (1918) 256 Fed. 570; *Sidney Moss v. National Association of Stationers, Office Outfitters and Manufacturers* (1930) 40 F. 2d 620; *Arthur v. Kraft-Phenix Cheese Corporation* (1938) 26 Fed. Supp. 824.

Moss, Incorporated v. Federal Trade Commission (1945, Second Circuit) 148 F. 2d 378, apparently announces a different conclusion. That case involved discriminations in price under Section 2 (a) and the claimed injury was in the primary line, that is, to competitors of the seller. The Commission made findings of fact which set out eight instances in which respondent had discriminated in price. In each case, there was a finding that such discriminations resulted in substantial injury to respondent's competitors and tended to create a monopoly. (In the matter of *Samuel H. Moss, Inc.* (1942) 36 FTC 640.) Thus, the question of which party has the burden of proof is not involved. The court, however, stated that where a discrimination was shown, the burden was on anyone making such discrimination to show that injury to competition did not occur. This view was again expressed by the same court in *Federal Trade Commission v. Standard Brands* (1951) 189 F. 2d 510.

The view apparently taken by this court has been criticized by writers on the subject. See Oppenheim, "Should the Robinson-Patman Act be Amended," Robinson-Patman Act Symposium, New York State Bar Association, 1948 CCH edition, pp. 141, 152 (1948); McCollester, "Suggestions as to Certain Amendments," Robinson-Patman Act Symposium, *supra*, pp. 133, 136 (1948); Austern, "Required Competitive Injury and Permitted Meeting of Competition," Robinson-Patman Act Symposium, New York State Bar Association, 1947 CCH edition, pp. 63, 70 (1947).

The Federal Trade Commission has very generally held, that under Section 2 (a), counsel supporting the complaint has the burden of proof to establish the necessary competitive injury. Where that burden has not been sustained, the cases have been dismissed. See in the matter of *Champion Spark Plug*, Docket 3977; in the matter of *General Motors Corporation and A C Spark Plug Company*, Docket 5620; and in the matter of *The Electric Auto-Lite Company*, Docket 5624. Even in its brief opposing certiorari in the *Moss* case, the Commission expressed this same view, in the following language taken from page 8:

"Although a respondent undoubtedly has the burden of proving the various justifications listed in the provisos in Section 2 * * * the Commission has always construed the Act to require it as a part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition."

The first part of Section 2 (a) sets out the elements necessary to establish a violation of the law. They are: (1) discriminations in price between different purchasers of commodities of like grade and quality; (2) certain jurisdictional facts; and (3) competitive injury. Proof of all three is necessary to make out a prima facie case. It has often been pointed out that differences in price without competitive injury are not illegal.

The section then goes on to point out certain situations in which price difference is not illegal. That is, in those instances, proof of certain facts may be made, not by way of denial, but by way of justification. The burden, however, of affirmative justification is on the party charged with the violation. The facts which such a party must show are facts concerning which he would have peculiar means of knowledge. Therefore, Congress (following a plan often adopted by legislative bodies) put on him the burden of rebutting the prima facie case. As to the fact of competitive injury, however, such a party would ordinarily have no peculiar knowledge or means of knowledge. We should not assume that Congress meant to apply the same rules of proof to these clearly different situations unless it said so in clear and unequivocal language.

The complaint in this case alleges competitive injury and counsel supporting the complaint offered evidence to prove the allegation. In order to prove injury to a competitor, counsel supporting the complaint presented the testimony of Herbert T. Leo, President of the Mutual Citrus Products Company of California, a competitor of respondent in the sale of pectin. Mr. Leo stated that respondent's deals had adversely affected his business to a substantial degree. As pointed out by the hearing examiner, however, the figures given as

885

Opinion

to the sales by the witness in cross-examination showed a different picture.

"In 1939, the year immediately preceding the first of the deals, M. C. P.'s sales were 98,874 dozen packages; in 1940, the first year of the deals, sales were 101,001 dozen; in 1941, 120,070 dozen; in 1942, 168,878 dozen; in 1943, 405,202 dozen; in 1944, 410,251 dozen; in 1945, 294,263 dozen; in 1946, 42,708 dozen; in 1947, 335,447 dozen; in 1948, 495,113 dozen; in 1949, 428,423 dozen; in 1950, 327,052 dozen; in 1951 (to September 1), 387,215 dozen."

Mr. Leo further testified that the lower sales in 1946 were due to sugar rationing rather than to respondent's deals and that the increased sales of 1948 and 1949, after the deals ended, were due to the failure in quality of the product of a third competitor. The evidence also shows that the deal price of respondent was generally a little above Mutual Citrus Products prices, although in 1947 the latter advanced its price above the deal price but later went back to the old price.

The vice president of another competitor, Pen-Jel Corporation, also testified that respondent's deals injured that company. However, he also testified that Pen-Jel sales were 10% to 15% higher in 1947 than in 1940.

The record also shows that the sales of another competitor, Faultless Foods Company of Seattle, Washington, had dropped from 25,558 cases in 1939 to 3,058 in 1946, risen to 27,940 cases in 1947, and had declined to 1,740 in 1950. It appears however, that the drop in the volume of sales was due to causes other than the competition of respondent's deals. While the president of this company also claimed injury because of respondent's deals, he further expressed the opinion that his company had lost business to the two other competitors named herein.

Figures are not available to show respondent's position in the western territory during the years in which the deals were in operation. However, the percentage of the national pectin market held by Certo and Sure-Jell for certain years was shown to be as follows:

Year	%
1938-----	67.2
1939-----	62.2
1940-----	67
1941-----	69.4
1942-----	74.4
1943-----	72.6
1944-----	74.2
1945-----	80.2
1946-----	80.5
1947-----	64.6

Opinion

50 F. T. C.

The hearing examiner also found "except for the early years, when there was a legal monopoly due to the existence of patents, competition in the pectin industry, including that in the western portion of the United States, appears to have been at all times active and virile and to be so today."

The hearing examiner concluded that the evidence failed to establish a prima facie case in support of the complaint. He had opportunity to observe the witnesses both on direct and cross-examination and his findings are to be given proper weight. *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474; *Folds v. Federal Trade Commission* (1951) 187 F. 2d 658.

We agree with the conclusion of the hearing examiner, and it is therefore ordered that the complaint be dismissed.

Commissioner MEAD dissents and Commissioner CARRETTA did not participate.

DISSENTING OPINION OF COMMISSIONER MEAD

The respondent in this case, the General Foods Corporation, is one of the nation's largest producers and distributors of foods. It produces a number of nationally advertised products such as "Jell-O", "Maxwell House", "Birds Eye" and others. This case relates to respondent's pectin products designated "Certo" and "Sure-Jell." Certo is a liquid product and Sure-Jell is a powdered product. Pectin is used in making jams and jellies.

The Commission on July 7, 1949 issued a complaint alleging that respondent was violating Section 2 (a) of the Clayton Act, as amended, by discriminating in price in the sale of its pectin products. This case relates to the Robinson-Patman amendment to the Clayton Act.

The attorney in support of the complaint has completed his case in chief. The attorney for the respondent has filed a Motion to dismiss the complaint on the ground that the record does not support a prima facie case of law violation by the respondent. The Hearing Examiner issued his initial decision dismissing the complaint. The attorney in support of the complaint appealed to the Commission from this initial decision.

The record indicates that the pectin industry in the United States originated as a result of certain experiments performed by Robert E. Douglas who obtained two U. S. patents. In 1929 General Foods purchased all of the assets of the Douglas Company, including the Douglas patents. These patents included only liquid pectin which was the only type manufactured at that time. For a few years after General Foods obtained the Douglas patents, it enjoyed a complete

885

Opinion

monopoly in the sale of pectin in this country. In the mid thirties the Douglas patents expired. Respondent and others also began to produce a powdered form of pectin. According to the Hearing Examiner, in 1939 in the liquid pectin field, General Foods' percentage of the national market had declined from 100% to approximately 75% or 80%. In the powdered pectin field, General Foods controlled approximately 40% of the national market. In the Western states respondent's share of the liquid pectin market was approximately 50% and of the powdered pectin market approximately 25%.

The record shows that a few small manufacturers began to give respondent some competition in the pectin field in the late thirties. Respondent considered ways and means of retaining its dominant position in the field. Respondent could have, of course, in meeting price competition, reduced its prices across the board. It decided against a general price reduction and in lieu thereof, chose to offer its customers in the Western States, where it had competition, certain so-called "deals." In other words, respondent did not choose to reduce its prices generally but did choose to discriminate in price between two geographical areas.

The "deals" described above were offered by General Foods to its Western customers from 1940 until about 1947. For illustration, in 1946, respondent's usual case price for Certo was \$4.30 per case of two dozen. Respondent's "deal" price for Certo was \$3.22 per case less handling allowance of 4 cents per case. The "deal" price therefore was \$3.18 per case as compared to the usual price of \$4.30 per case. As for Sure-Jell, respondent's usual price was \$3.25 per case but its "deal" price amounted to a net of \$2.57½ per case.

Respondent distributed its pectin products on a nationwide basis. As stated above, respondent offered these "deals" only in the Western States. Respondent therefore was discriminating in price among its purchasers of commodities of like grade and quality in commerce. It is not necessary under Section 2 (a) of the Clayton Act that the customers of the seller be competing customers. If the price discrimination is among *competing* customers, the question is usually whether or not there has been any injury in the so-called secondary line of commerce, that is, whether the injury is to the purchasers who are discriminated against. In this case as the purchasers who were discriminated against are not in competition with the favored customers, the question of injury relates only to the so-called primary line of commerce, that is, to the manufacturers who are competing with General Foods.

Although we may assume from the record that the competitive products are of equal quality to the General Foods pectin products,

the latter command premium prices in the market. This is apparently because of the prestige of General Foods, the wide distribution, nationwide advertising, etc. Although by use of the "deals" in the Western States respondent substantially reduced its prices in that area, the prices charged by respondent's local competitors in those States continued to be lower than respondent's prices. It is an obvious economic fact, however, that a reduction in the price of a well advertised national brand of merchandise may cause business to be diverted from a relatively unknown local or regional product although the reduced price of the national brand may continue to be greater than the price of the local or regional brand.

There is very frequently a trade price differential between well advertised brands and relatively unknown brands of merchandise although the quality of the two may be substantially equal. If this trade differential is 10 cents a unit and the gap is reduced to 8 cents a unit, a certain number of customers will discontinue purchasing the cheaper product and will purchase the premium product. This economic fact was recognized in the hearings before Congressional committee in connection with the proposals to amend the Robinson-Patman Act provision relative to meeting the equally low price of a competitor. The point was that if a seller is to be allowed to claim the defense of good faith meeting of competition, he should not be required to meet the identical price in order to plead this defense. He should only be required to meet that price which is equal to the customary trade differential between the two products if such trade differential in fact exists.

The purpose of General Foods in offering these "deals" in the Western states was frankly aggressive. As stated by the attorney for General Foods in his able oral argument before the Commission:

"We were interested in getting some more business in the 11 Western states, that is the reason we did it."

A memorandum obtained from the files of the respondent and dated November 30, 1942, describes the purpose of the "deals" as follows:

"I also am of the opinion that had we not made it tough for M. C. P. as we did the last three years, they would have spread eastward at a much faster rate than they did and we would now be facing some pretty tough competition in the middle-west, the high 'Sure-Jell' per capita market. * * * The management may rightfully ask how much longer is it going to be necessary for us to continue the deal operation in the West. I cannot answer that question. The record, however, would indicate that if we cease to be competitive in the West, we will very likely lose ground rapidly to M. C. P. and other local competition. If we can, by means of the deal operation, confine this competition

largely to the Far West, I think there is good insurance and that the deal serves a two-fold purpose." (Comm. Ex. No. 28)

The general picture, therefore, as I see it, is that the former legal patent monopolist in the field and the current dominant seller initiated these deals in order to confine its existing competitors to their local markets in the Western states and to prevent these competitors from obtaining any higher percentages of the Western market. Assuming these to be the purpose of the "deals," they were successful as General Foods has localized this competition and has obtained a larger percentage of the national market.

The Examiner and the majority opinion point out that certain of respondent's competitors increased their dollar volume during the period that General Foods offered these deals. However, the significant test as to whether or not a concern is losing ground or succeeding in the competitive struggle over any period of time is the changes, if any, in the share of the market enjoyed by such concern. The record in this case shows that General Foods increased its share of the market and that the competitors of General Foods had a decreasing share of the market.

Dollar volumes increased substantially in the war years. During that period a concern might continue to have the same dollar volume or even have a modest increase in its dollar volume but yet be falling behind competitively speaking. It is common knowledge that during this period the cost of doing business substantially increased. Concerns were staying competitive not by retaining their past dollar volumes but by retaining their proportionate shares of the expanding market. The substantial new business helped offset the higher break even levels which were a necessary floor for staying in business. The contest among competitors, therefore, was for this new business which could be obtained during the war years. This contest was vital for small business with limited resources.

The statistical picture showing the different shares of the market of the pectin competitors between 1939 (prior to the General Foods' deals) and 1946 (after the deals had been in effect for approximately 6 years) is very vividly illustrated by Commission's Exhibit 79. This exhibit was obtained from the files of General Foods.

In 1939 total United States pectin sales were divided as follows:

<i>Liquid Sales—56%</i>		<i>Powder Sales—44%</i>	
1. Certo sales-----	41.4%	1. Sure-Jell sales-----	20.8%
2. Jels-Rite -----	5.9%	2. Pen-Jell sales-----	11.6%
3. All others-----	8.7%	3. All others-----	11.6%

General Foods had 62.2% National Market.

In 1946 total United States pectin sales were divided as follows:

<i>Liquid Sales—48.5%</i>		<i>Powder Sales—51.5%</i>	
1. Certo sales-----	42.8%	1. Sure-Jell sales-----	37.7%
2. All others-----	5.7%	2. Pen-Jell -----	6.1%
		3. M. C. P. sales-----	4.4%
		4. All others-----	3.3%

General Foods now had 80.5% of the National Market. This shows (A) The 1939 liquid market dropped from 56% in 1939 to 48.5% in 1946 or a drop of 7.5 percentage points.

1. Certo gained from 41.4% in 1939 to 42.8% in 1946 or a 1.4 percentage point gain on a dropping market.

2. All other liquids including Jels-Rite dropped from 14.6% in 1939 to 5.7% in 1949 or a loss of 8.9 percentage points.

(B) The powdered market gained from 44% in 1939 to 51.5% in 1946 or a gain of 7.5 percentage points.

1. Sure-Jell gained from 20.8% in 1939 to 37.7% in 1946 or a gain of 16.9 percentage points.

2. Pen-Jell lost from 11.6% in 1939 to 6.1% in 1946 or a loss of 5.5 percentage points on a rising market.

3. M. C. P. which first appears on the chart in 1941 with 4.7% had 4.4% in 1946 or a loss of $\frac{3}{10}$ of a percentage point on a rising market.

4. All others lost from 11.6% in 1939 to 3.3% in 1946 or a loss of 8.3 percentage points on a rising market.

The above analysis and also the majority opinion point out that in 1939, the year immediately prior to the initiation of the deals, General Foods controlled 62.2% of the national market in pectin. The opinion and the analysis further shows that General Foods' share of the market increased during the "deal" years to 1946 when its share was 80.5% of the market. (During the last deal year—1947—General Foods had operational difficulties and its share of the national market decreased.)

The Court in the case of *E. B. Muller & Co. vs. Federal Trade Commission*, 142 F. 2d 511, aptly described this economic situation.

"These discriminations were not, as petitioners would have us believe, unrelated to the central purpose, which was the destruction of petitioners' only competitor. By discriminating against other general trade areas in favor of New Orleans, Muller, on the one hand, was able to force the price so low in New Orleans that Schanzer could not meet its competition. On the other hand, by selling at higher prices in other general trade areas, Muller made up its loss in the New Orleans district."

Economists may differ as to what particular percentage of the national market a concern may have before it may be classified as a monopoly. A concern having 35% of the market may not be a monopoly, but certainly when a concern begins to obtain over 50% of the national market in any particular commodity, then such concern, because of such share, is in the position to exert a very significant effect on the market. An area price discrimination by a concern having 35% of the market may not have as great an adverse effect as a discrimination by a concern controlling 80% of the market. If a crocodile had any concern as to the future of the fish enclosed with him in a small pool, the crocodile should exert some care as to the manner in which he flips his tail. It would not be necessary for him to exercise the same degree of care if he and the fish were in a large body of water. In the smaller pool the crocodile already occupies most of the maneuvering space.

Commission Exhibit 28 which was taken from the files of General Foods affords a very enlightening picture as to what officials of General Foods believed these deals were accomplishing on the West Coast. The exhibit states in part that the Pacific Northwest and Southwest account for close to one-fourth of the total pectin sales "hence losses or gains in this important pectin territory affect our national pectin sales materially." The exhibit states that a table shown on the exhibit "shows a comparison of our (General Foods) competitive position in these two crop areas for 1938 and 1939—the two years immediately preceding our deal operation and for the three years during which we had the consumer deal in effect." This table shows that in 1939 (the last pre-deal year) the competitive brands had 53.9% of the market and General Foods brands had 46.1% of the market in the Pacific Northwest. In 1942 (the last deal year shown on this particular table) all competitive brands had 37.5% of this market and General Foods' brands had 62.5% of the Pacific Northwest market. The table shows that for the Pacific Southwest in 1939 all competitive brands had 44.3% of the market and General Foods' brands had 55.7% of the market. The table shows that in 1942 all competitive brand had 30.9% of the Pacific Southwest market and General Foods' brand had 69.1% of such market.

Commission exhibit 28 (taken from General Foods' files) states immediately after the table referred to above, as follows:

"Prior to 1939, M. C. P. (a competitor) was selling a liquid pectin in a tin can which did not meet with any success. In 1939 they introduced their powdered product and promoted it aggressively. The above figures show that we lost heavily the first two years of M. C. powder competition. In the Southwest, Certo and Sure-Jell (

bined dropped from 73% of the market to 52% in two years. In 1940 we offered the Sure-Jell deal in the Southwest. We made a good gain on Sure-Jell but M. C. P. made greater gains, resulting in a further sharp decline for Certo. In 1941 we offered deals on both products and registered substantial progress, M. C. P. taking a sharp loss. In 1942 we made a further gain on Sure-Jell but lost a little ground on Certo. M. C. P. also showed a small gain but you will notice that liquid competition has almost been completely eliminated, Certo and Sure-Jell combined getting 69% of the market compared to 52% in 1940 and 73% in 1938."

As an addendum to the above, the share of the market enjoyed by General Foods continued to increase subsequent to 1942 until in 1946 General Foods had 80.5% of the market. If this exhibit (28) had been prepared in 1946 instead of 1942, the officials of General Foods would probably have stated that the deals had been extraordinarily successful in view of the fact that General Foods then had almost a monopoly on pectin sales in the United States.

Monopoly and competition has been a favorite subject recently of learned economists. We are advised from the cloistered halls of economic thinking that perfect price competition does not exist. Our aim, we are told, should be to obtain the most desirable form of imperfect competition. There is, however, a disagreement among economists as to which is the preferred type of imperfect competition. We hear such terms as countervailing powers, workable competition, effective competition, potential competition, substitute products, etc. Some of the economists appear to give doctrinal support for the thesis that the antitrust laws as interpreted by the Courts are now outmoded. It is indicated that we should view the problem of competition on a much broader basis than heretofore.

For illustration, if the manufacturer of a product becomes too monopolistic a competitive substitute product will be developed and thus curb the monopolistic practice and make unnecessary an antitrust legal proceeding. This broad type of cosmic economic thinking is interesting, if indefinite. However, this Commission is enforcing specific statute. We are dealing here with questions of fact about injury to certain small competitors. We are not dealing with general economic theories.

The sum of competition in this industry equals the accumulative parts of these small competitors of the dominant seller—General Foods. The only way to view the whole—competition in the industry—is to examine the parts.

Certain sources have claimed that the Robinson-Patman Act promotes soft competition rather than hard competition. This generally

erroneous concept may be due in part to a misunderstanding or perhaps in a few cases, to a misapplication of the Robinson-Patman Act.

The Robinson-Patman Act promotes hard, fair competition. For illustration, General Foods, the dominant seller, encountered a degree of competition on the West Coast. Competition is vitalized by any one or more of the following: (1) lowering prices; (2) raising quality; or (3) better selling methods. General Foods choose to use a "deal" offer which was in fact a price reduction. But did this Goliath march bravely on the field of battle and compete with these little Davids by making this "deal" available to all of its customers? That would have been a choice by General Foods *for* hard and fair competition between General Foods and the small business competitors. But General Foods did not so choose. It chose instead to have its customers in the other sections of the country, who did not enjoy the fruits resulting from this competition by the small competitors, to be charged higher prices so that General Foods would have a war chest to beat down the small business competition. For General Foods—it was soft competition. For the small competitors—it was unfair competition.

Under this system the small local area businessman cannot compete on even approximately equal terms with the nationwide distributor. The large corporation can play its area pricing patterns like a piano. It can crush small business competition wherever the latter appears and charge the tariff to its other customers who have no price alternatives. The little Davids are deprived of even their sling shots in their contest with Goliath. Is that hard or soft competition for Goliath? It is soft for the dominant seller, the Goliath. It is calamitous for small business, the little Davids.

Because of his limited area distribution, each of the small businessman's customers is generally in competition with the other customers. The small distributor, therefore, must charge all of his customers proportionately equal prices or else he may be guilty of an illegal price discrimination. The nationwide distributor, of course, has many customers who are not in competition with each other and he may charge different prices in different areas without directly injuring the nonfavored customers. If the nationwide distributor can legally use this area price discrimination weapon against his small competitors, he has another powerful weapon to add to his arsenal which includes mass production, nationwide advertising, large financial resources, research facilities, and many others. Should a large distributor receive a price subsidy from other areas of the country in order to compete with a few small competitors on the West Coast? Again I ask, is that hard or soft competition—for General Foods?

To constitute a prima facie case of violation of Section 2 (a) of the Clayton Act, there must be established (1) jurisdiction; (2) the sale of goods of like grade and quality to purchasers at discriminatory prices; and (3) the existence of circumstances which makes it reasonably probable that the competitive effects described in the statute will result from this price discrimination.

There is no issue before us as to jurisdiction, the grade or quality of the goods or that General Foods sold at discriminatory prices. The only issue is as to whether or not the competitive effects described in the statute resulted from the price discrimination. The statute describes these effects as follows:

“may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them”;

It is admitted that Government counsel did not offer in evidence in this case the scalps or the hides of the small business competitors of General Foods. We do not have in evidence pounds of flesh or buckets of blood. We should not expect the type of evidence that Salome is said to have asked of Herod—the head of John the Baptist on a silver platter.

In lieu of sanguinary evidence, let us review what the victims of General Foods' price discrimination practices had to say about this particular brand of competition. A witness representing M. C. P., a competitor of General Foods, testified on page 307 of the record as follows:

“Q. I ask you one direct question, Mr. Leo. Is it your testimony that during the years 1940 through 1947, while the General Foods Corporation deals were in effect on Certo and Sure-Jell that they hurt your business?

A. Yes, they did very materially.”

This witness also testified as follows:

“Q. Now, in the areas where the General Foods' special deals on Certo and Sure-Jell were in effect, would you tell us whether or not they substantially affected the sales of your product?

A. Yes, very definitely, because it was a special deal that they offered. And General Foods, without any special deals, are pretty tough competition. They operate some 2,500 salesmen and have entre to retail chains and jobbers by various pressure methods. They are able to get distribution where the average small business concern today is faced with a horrible problem of trying to get distribution, and they try to hold that distribution from time to time. And we

885

Opinion

didn't have a margin of profit sufficient to travel very many men out. Even now we can only travel two or three men, and it's quite difficult to maintain distribution."

This competitor was fortunate in that he also sold in an area where General Foods did not offer these deals. This competitor enjoyed some increase in business. However, this witness was asked whether or not the business increase was more in the territories where there was no deal than it was in the territories where there was a deal. The witness answered "Positively."

A witness for Jels-Rite, another competitor of respondent, testified on page 747 of the record as follows:

"Q. State whether or not the deals in effect on Certo and Sure-Jell during the years 1940 through 1947 in any way affected the sales of your product, Jels-Rite.

"A. I feel definitely that they did.

"Q. What effect did they have on your sales?

"A. Decreasing our sales through their advertising medium and their free goods, or whatever you wish to term it, and their aggressiveness, pointed, I would say, particularly at our Northwestern territory."

This witness on cross-examination was interrogated as follows:

"Q. As I understand it, you complain because the price of Sure-Jell as you contend was reduced in your territory; is that right?

"A. Right.

"Q. Well, what difference did it make to you whether it was reduced or maintained outside of your territory? What effect would that have on your territory?

"A. The effect it had was to break down my territory, I would say. In other words, I was reaching at that time to Denver and San Diego and it did make, it made it increasingly hard for me to get into these territories, and I am completely out of them now."

A witness for the California Fruit Growers Exchange testified on page 454 of the record:

"Q. And would you state that, in your sales to the jobbers, those deals of General Foods Corporation might affect the sales to these jobbers?

"A. Yes, I think any special deal of any competitor is bound to affect the sale of a similar product of other manufacturers."

A witness for a food brokerage firm in Portland, Oregon, was interrogated at page 876 of the record as follows:

"Q. And what effect, if any, on your attempted sales of M. C. P. products did these General Foods Corporation deals on Certo and Sure-Jell have?

"A. Well, it has been my job to cover the entire area, the State of Oregon and the 7 Southern Counties in Washington, and also West

Idaho there, to cover all the jobbers and large direct chain buyers in the interest of M. C. P. powdered pectin.

"Now, as you gentlemen well know the merchandising of pectin is entirely a seasonal operation. Time is the essence, and as I made these rounds and contacts, it was particularly noticeable among the larger jobbers and the larger chains, also the fact that when we presented our picture to the jobber, buyer, or other chain store buyer, the buyers' answers seemed to be entirely contingent upon the receipt of an announcement from General Foods as to the number of Certo deals and the number of Sure-Jell deals he was going to receive.

"Now, in other words, when we were working against the General Foods deal, it was extremely difficult for us to secure large initial placement orders at the beginning of the season, with which to merchandise to the retailer and other consumers. * * *

"In other words, there was a natural reluctance on the part of the buyer to purchase large quantities of M. C. P. or even to cover at times, until he knew exactly what he had coming from General Foods; and by the way, these allotments in my territory were usually handled on the allotment basis, and the jobber and the chain were told earlier in the season how many cases of deals they could plan on receiving, and their merchandising was built around that quantity.

"Now, that infiltrates itself into the retail level because every retailer has got to buy the deals to protect himself from competition, and it is entirely relative."

The testimony of this food broker paints a very clear picture of the effect on competition of the deals offered by General Foods. Each customer of General Foods was allotted a certain number of these deals and apparently these customers would not consider purchasing competitive products until it was ascertained by them the extent of the deal allotment they would receive from General Foods. One must keep in mind that these deals constituted price reductions to customers on the West Coast and price discriminations to customers elsewhere. I believe it is obvious that the use by General Foods of these deals not only resulted in a reasonable probability that competition in these Western states was injured but on the basis of the present record the Commission could reasonably find that competition was injured in fact.

In *F. T. C. v. Morton Salt*, 334 U. S. 37, the Supreme Court pointed out that the Congressional Committee reports on the Robinson-Patman Act emphasized the belief that the old Section 2 of the Clayton Act had been too restrictive in requiring a showing of general injury to competitive conditions. The Court in a footnote quoted from the statement of the Senate Judiciary Committee as follows:

"This clause represents a recommended addition to the Bill as referred to your committee. It tends to exclude from the Bill other-

wise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause not contained in Section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is the injury to the competitor victimized by the discrimination. Only through such injury, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower."

We do not have here only one competitor testifying that he has been "victimized" by a discrimination in price, but we have substantially all of respondent's competitors on the West Coast testifying that they have been "victimized." If the dominant seller continues to suppress its smaller competitors and continues to obtain by means of price discriminations a larger and larger share of the market, the probable result would be a monopoly and then perhaps a Sherman Act case for dissolution. A dissolution would certainly not be good for the dominant concern. For the entire economy, it is much better for these conditions to be corrected before a dissolution proceeding is necessary. It was for that principal reason that the Congress passed the Clayton Act. It is the duty of the Commission to act in the incipency of the monopolistic tendencies before the monopoly matures and a dissolution suit is the only effective remedy.

It is stated that assuming that General Foods illegally discriminated in prices between 1940 and 1946 this discrimination was not continued thereafter. In other words, it is claimed that there is no public interest now to justify the Commission proceeding further in this matter. General Foods contends that it did not discriminate illegally. General Foods has not stated that if the Commission dismisses this complaint General Foods will not resume this practice in the future. In this connection, Commission Exhibit No. 80 dated November 12, 1948, is interesting. This was a memorandum obtained from the files of General Foods. The memorandum was written after the deals had been discontinued by General Foods but a few months before the complaint was issued by the Commission. The memorandum states:

"West Coast promotion—study of Barton and Neilson reports indicate that the major powdered competitor—M. C. P.—made competitive headway on the Coast this summer, as did Pen-Jell on a smaller scale. For lack of a better explanation, we have to believe that the withdrawal of our West Coast free-goods deal put us at a competitive disadvantage which we can ill afford in that region. Accordingly, we agree with you that it is almost essential that you reinstate some form of deal in '49."

Opinion

50 F. T. C.

It is reasonable to assume that if the complaint in this case had not been issued, General Foods would have resumed offering the deals on the West Coast. In other words, the smaller competitors could compete with General Foods if General Foods did not discriminate in price. The dominant seller, however, demands the added weapon of price discrimination when it competes with small business. Does General Foods want hard competition or soft competition—for General Foods?

The majority Opinion relies as a matter of law in dismissing this case on *Minneapolis-Honeywell Regulator Company vs. F. T. C.*, 191 F. 2d 786. That was a Section 2 (a) Clayton Act case involving in part the question of injury in the primary line of commerce. However, the price discriminations involved were not geographical price discriminations. Minneapolis-Honeywell was using a quantity discount system of pricing which it was alleged was discriminatory. The Court of Appeals for the Seventh Circuit reversed a finding by the Commission of injury in the primary line of commerce. The Court based its opinion on a showing that the total business of Minneapolis-Honeywell competitors had increased, that three new concerns which had entered the industry had enjoyed a steady growth in sales volume, that Minneapolis-Honeywell's share of the available control business was reduced from 73% in 1937-1938 to only 60% in 1941, that Minneapolis lost to its competitors 53% of the control business of 31 customers who previously had standardized on Minneapolis controls and that in the same year 126 of Minneapolis' other oil burner manufacturer-customers also purchased competitive controls.

In my opinion, the above statement by the Court of the facts in the Minneapolis-Honeywell case clearly distinguishes that case from the factual situation in this case. General Foods had a larger share of the market and the area price discrimination used by General Foods was obviously devised for the purpose of obtaining the customers of the small competitors. No evidence was introduced in the Minneapolis-Honeywell case of documents written by officials of that company boasting of the success of Minneapolis price discriminations in eliminating competition.

In regard to the Minneapolis-Honeywell case, it is interesting to note that the Government petitioned the Supreme Court for a writ of certiorari in that case. The Supreme Court in its opinion of December 22, 1952 dismissed the appeal of the Commission on the ground that the Commission did not file its petition for writ of certiorari within 90 days after the entry of the judgment of the Court of Appeals. However, Mr. Justice Black in a dissent commenting on the opinion of the Court of Appeals stated :

"The end result of what the Court does today is to leave standing a Court of Appeals decree which I think is so clearly wrong that it could well be reversed without argument."

Justice Black further stated that the "Court of Appeals here failed to follow our holding in the Morton Salt case. For this reason also it should be reversed."

It might be argued that the Minneapolis-Honeywell case was not reversed because of a technical error in the filing of a petition for the writ of certiorari. Whether or not the Supreme Court would have reversed Minneapolis-Honeywell if the Court had considered the case on its merits is a matter of speculation. Granting, however, that Minneapolis-Honeywell is a correct statement of existing law, I believe that the evidence of injury to competition in this case is much more significant and substantially greater than was present in the record in the Minneapolis-Honeywell case. If we accord the decision in Minneapolis-Honeywell full scope, the facts in this case would still, in my opinion, amply justify the Commission in finding the requisite statutory injury to competition in the primary line of commerce.

The disturbing factor to me in this case is the question of what is the future of Section 2 (a) of the Clayton Act as it relates to possible injuries in the primary line of commerce. If the price discrimination is among competing customers and the resulting injury is in the secondary line of commerce, the fact of such probable injury may be readily apparent and demonstrable. In other words, if a seller has two customers located across the street from each other and the seller discriminates in price between the two customers, probable injury to the non-favored customer may be reasonably apparent. However, the question of injury in the primary line is not so readily discernible, particularly if the sellers are of comparable equal size and control substantially the same percentage share of the market. If the sellers are substantially equal and if the competition is keen, there may be a constant fluidity of prices as one competitor may lower a price here or there to test the market. Any price discriminations resulting from these factors may be sporadic and may strengthen competition rather than injure it. An entirely different situation is present, however, when one large seller controls most of the market and uses an area price discrimination over a substantial period of time for the obvious purpose of controlling an even greater share of the market and thus deprive his seller competitors of their opportunity for healthy growth or ultimate survival. It is apparent to me that is the situation in this case.

Opinion

50 F. T. C.

A reasonable man might very well find in the light of the Morton Salt case (334 U. S. 37) and the fact that General Foods has discriminated in price and also controls such a large share of the market that the obvious result may be the competitive injury described in Section 2 (a) of the Clayton Act. However, in this case there is much more than just proof of a price discrimination and the fact that the seller has a large share of the market. There is in the record the testimony of the small competitors that they were seriously injured by the General Foods price discriminations. There are in the record documents taken from General Foods' files in which officials of the company bragged about the results of the deals (price discriminations) and stated in Commission Exhibit 28 that in 1942 "liquid competition has almost been completely eliminated." It is very unusual for the government to obtain the type of evidence that was obtained in this case. I am referring to the exhibits from respondent's files in which officials boasted that because of the price discriminations, General Foods' share of the market had been substantially increased. If the evidence now in this record is not sufficient to establish a prima facie case under Section 2 (a), I seriously pose the question of what additional evidence could the government reasonably obtain in order to carry its burden.

In the vernacular of baseball, it is much easier for the batter to get a three base hit or a home run if he proceeds from first base directly to third base and avoids following the base paths around second base. If his competitors are required to follow the rules and touch second base, that is soft competition for the base runner. In this case, the small competitors have followed the rules. They are not discriminating in price. General Foods is discriminating in price. If the New York Yankees were competing with a small minor league baseball club it would be unfair to require the players on the minor league team to circle the bases properly according to the rules and to permit the Yankees to bypass second base. General Foods—like the New York Yankees—should touch second base.

In my opinion, the record shows prima facie that General Foods has violated Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act. In my opinion, the decision of the Hearing Examiner dismissing the complaint should be reversed and the case remanded to the Examiner to permit the respondent to proceed with its defense.

The majority of the Commission has concluded that General Foods has not violated the law, and has dismissed the complaint. From that action by the majority, I dissent.

Consent Settlement

IN THE MATTER OF
PAUL E. FEDER DOING BUSINESS AS SIGMA SEWING
MACHINE COMPANY

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6147. Complaint, Dec. 3, 1953—Decision, Apr. 15, 1954

Where an individual engaged in the sale of sewing machine heads imported from Japan and of complete sewing machines incorporating the same, upon the front of which a medallion, easily removable, displayed the word or words "Japan" or "Made in Japan" in such indistinct lettering as not to constitute adequate notice to the public that the machines were imported, and upon which, in the event of such removal, there appeared no visible marks of origin—

- (a) Failed to disclose adequately on his said sewing machines and sewing machine heads—upon which, before offered to the public, he placed no other marks disclosing their foreign origin—that said products were made in Japan;
- (b) Falsely represented, through the adoption and use of the words "Admiral Star" as the trade name for his said products, and the conspicuous display thereof on the front horizontal arm of the machine and use thereof in his advertising matter, that his said product was made by or connected in some way with the well and favorably known American firm with which the word "Admiral" had long been associated:

Held, That such acts and practices constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. William L. Pack*, hearing examiner.
Mr. Ames W. Williams for the Commission.

CONSENT SETTLEMENT ¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on December 3, 1953, issued and subsequently served its complaint on the respondent in the caption hereof, charging him with unfair and deceptive acts and practices and the use of unfair methods of competition in violation of Section 5 of said Act.

¹ The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 15, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

Findings

50 F. T. C.

The respondent, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint hereby:

1. Admits all the jurisdictional allegations set forth in the complaint.

2. Consents that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondent, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrains from admitting or denying that he has engaged in any of the acts or practices stated therein to be in violation of law.

3. Agrees that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondent consents may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Paul E. Feder, is an individual trading as the Sigma Sewing Machine Company with his office and principal place of business located at 270 West 19th Street, New York 11, New York.

PAR. 2. Respondent is now and has for several years last past been, engaged in the sale of sewing machine heads imported from Japan and complete sewing machines of which said heads are a part to distributors and also to retailers who in turn sell to the purchasing public. In the course and conduct of his business, the respondent causes his products, when sold, to be transported from his place of business in the State of New York to the purchasers thereof located in various other states and maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States. The volume of trade in said commerce has been and is substantial.

PAR. 3. When the sewing machines were sold by the respondent they were marked with a medallion placed upon the front of the machine

and upon which medallion the word "Japan" or the words "Made in Japan" appear. The lettering of such word or words was so indistinct, however, as to not constitute adequate notice to the public that the sewing machines were imported. Furthermore, said medallion could be easily removed and when the medallion was so removed no visible marks of origin appeared on the machine.

Respondent placed no other marks on the sewing machines disclosing foreign origin before such machines were offered for sale to the public.

PAR. 4. When sewing machines or sewing machine heads are exhibited and offered for sale to the purchasing public by retail dealers and others who sell to the public and such products are not labeled or otherwise distinctly marked so as to disclose foreign origin the purchasing public understands and believes such products to be wholly or substantially of domestic origin.

There is and was among the members of the purchasing public a substantial number who had and now have a decided preference for sewing machines and sewing machine heads which are manufactured in the United States over such products originating in whole or in substantial part in foreign countries.

PAR. 5. Respondent used the words "Admiral Star" as a trade name for his sewing machines. Such name appeared in conspicuous letters on the front horizontal arm of the sewing machine. It likewise appeared as a trade or brand name in respondent's advertising matter. The word "Admiral," used as aforesaid by the respondent, is the trade name, mark, or brand of a business organization, long established and engaged in the manufacturing and marketing of household appliances in the United States, and which has been and is favorably known to the purchasing public.

PAR. 6. By using a domestic trade or brand name such as "Admiral Star" respondent represented, and now represents, directly and by implication, that his product, a household appliance, is manufactured by, or connected in some way with, the well and favorably known American firm with which the word Admiral has long been associated, which is contrary to the fact, and the use of such name by respondent confuses and misleads the public and constitutes an unfair and deceptive act and practice. The use of said trade or brand name by the respondent on his sewing machines and sewing machine heads enhanced the belief upon the part of the public that said sewing machines and heads were products of or sponsored by the well and favorably known firm with which said name has long been associated.

PAR. 7. Respondent, by placing in the hands of dealers his said sewing machines and sewing machine heads, provided said dealer

a means and instrumentality whereby they may mislead and deceive the purchasing public as to the manufacture and place of origin of such sewing machines and sewing machine heads.

PAR. 8. Respondent, in the course and conduct of his business, was and is in substantial competition in commerce with other individuals and with firms and corporations engaged in the sale of sewing machines and sewing machine heads in commerce.

PAR. 9. The failure of the respondent to disclose adequately on his sewing machines and sewing machine heads that such products are made in Japan, and also the use of the trade or brand name "Admiral Star" on his sewing machines and sewing machine heads had the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that his products were of domestic manufacture and were manufactured by the well and favorably known firm with which said trade or brand name "Admiral" has long been associated, and to induce members of the purchasing public to purchase sewing machines and sewing machine heads because of said erroneous and mistaken belief.

As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from his competitors and substantial injury has been and is being done to competition in commerce.

CONCLUSION

The acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent, Paul E. Feder, individually and trading as the Sigma Sewing Machine Company, or under any other name, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines and sewing machine heads in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign-made sewing machine heads, or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads in such manner that it will not be hidden or obliterated the country of origin thereof.

907

Order

2. Using the word "Admiral", or any simulation thereof, as a brand or trade name, or as a part thereof, to designate, describe or refer to his sewing machines or sewing machine heads; or representing through the use of any other word or words, or in any other manner, that said sewing machines or sewing machine heads are manufactured by anyone other than the actual manufacturer.

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

(Sgd) Paul E. Feder,
PAUL E. FEDER,

doing business as Sigma Sewing Machine Company.

Date: March 23, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 15th day of April 1954.

Consent Settlement

50 F. T. C.

IN THE MATTER OF
SVIRSKY CLOTHING CO., INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT

Docket 6166. Complaint, Feb. 5, 1954—Decision, Apr. 15, 1954

Where a corporation and its two officers, engaged in the manufacture and interstate sale and distribution of wool products as defined in the Wool Products Labeling Act—

- (a) Misbranded certain men's coats in that while they were labeled or tagged as containing "All Wool" or "100% Wool", they contained substantial quantities of reprocessed and reused wool;
- (b) Further misbranded such coats in that the fiber content of interlinings contained therein was not separately set forth on labels or tags attached thereto as required under the provisions of said Act; and
- (c) Further misbranded certain of said wool products in that the stamp, tag, label, or other means of identification required under the provisions of said Act failed to disclose the name or registered identification number of the manufacturer thereof, or of one or more persons engaged in the introduction into commerce or in the offer for sale, sale, transportation, distribution, or delivery for shipment of said wool products in commerce:

Held: That such acts and practices, under the circumstances set forth, were in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John Lewis*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Mr. Sidney A. Mauriber, of New York City, for respondents.

CONSENT SETTLEMENT ¹

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, the Federal Trade Commission, on February 5, 1954, issued and subsequently served its complaint upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Acts.

¹ The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 15, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order of disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

The respondents, desiring that this proceeding be disposed of by consent settlement procedure, provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.
2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Svirsky Clothing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York. Respondents Samuel Svirsky and Seymour Svirsky are the president and secretary-treasurer, respectively, of said respondent corporation. These individuals formulate, direct and control the acts, policies, and practices of said corporate respondent. The offices and principal place of business of all respondents is 110 Fifth Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since 1951, respondents have manufactured for introduction into commerce, introduced in commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (1) of said Wool Products Labeling Act and the rules and regulations promulgated thereunder in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Order

50 F. T. C.

Among such misbranded wool products were men's coats labeled or tagged by respondents as containing "All Wool" or "100% Wool," whereas, in truth and in fact, said products did not consist of all wool or 100% wool as defined in said Act, but contained substantial quantities of reprocessed and reused wool.

PAR. 4. Certain of said wool products were further misbranded by the respondents in that the fiber content of interlinings contained in said coats were not separately set forth on labels or tags attached thereto as required under the provisions of Section 4 (a) (2) of said Wool Products Labeling Act, and of Rule 24 of the rules and regulations promulgated thereunder.

PAR. 5. Certain of said wool products were further misbranded by the respondents in that the stamp, tag, label, or other means of identification required under the provisions of Section 4 (a) (2) of said Act failed to disclose the name or registered identification number of the manufacturer thereof, or of one or more persons engaged in the introduction into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment of said wool products in commerce, as "commerce" is defined in said Wool Products Labeling Act.

CONCLUSION

The acts and practices of the respondents as herein found were in violation of the Wool Products Labeling Act of 1939 and of the rules and regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent Svirsky Clothing Co., Inc., a corporation, and its officers, and respondents Samuel Svirsky and Seymour Svirsky, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of men's coats or other "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by :

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein;

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five per centum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter;

(c) The name of the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Failing to separately set forth on the required stamp, tag, label or other means of identification the character and amount of the constituent fibers appearing in the interlinings of such wool products, as provided in Rule 24 of the Rules and Regulations promulgated under the said Act.

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939, and

Provided further, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act or the Rules and Regulations promulgated thereunder.

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

Svirsky Clothing Co., Inc.,
a corporation.

By /s/ Samuel Svirsky,

President.

/s/ Samuel Svirsky,
Samuel Svirsky, individually
and as an officer of Svirsky
Clothing Co., Inc.

/s/ Seymour Svirsky,
Seymour Svirsky, individually
and as an officer of Svirsky
Clothing Co., Inc.

Date: March 12, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 15th day of April 1954.

Consent Settlement

IN THE MATTER OF

HARRY BERNSTEIN & SONS, INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATIONS OF THE
FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING
ACT

Docket 6182. Complaint, Feb. 18, 1954—Decision, Apr. 15, 1954

Where a corporation and its two officers, engaged in the manufacture and interstate sale and distribution of wool products as defined in the Wool Products Labeling Act—

- (a) Misbranded men's suits in violation of said Act and the Rules and Regulations promulgated thereunder in that, labeled or tagged as consisting of "100% Wool", they contained in addition to wool a substantial quantity of non-woolen fibers;
- (b) Misbranded such suits in that labels attached thereto were neither clear, distinct, nor plainly legible, as required by Rule 5 of said Rules and Regulations; and
- (c) Misbranded certain samples, swatches, or specimens of woolen fabrics in that they were not marked, tagged, or labeled to show their fiber content and other information required by law:

Held, That such acts and practices, under the circumstances set forth, were in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Mr. Louis Epstein, of New York City, for respondents.

CONSENT SETTLEMENT ¹

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, the Federal Trade Commission on February 18, 1954, issued and subsequently served its complaint upon the respondents named in the caption hereof charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Acts.

The respondents, desiring that this proceeding be disposed of by consent settlement procedure, provided in Rule V of the Commission's

¹ The Commission's "Notice" announcing and promulgating the consent settlement published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 15, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusions, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.