

Decision

IN THE MATTER OF

P. SORENSEN MANUFACTURING CO., INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF THE
CLAYTON ACT

Docket 6052. Complaint, Oct. 16, 1952—Decision, June 29, 1956

Order requiring a manufacturer of automotive products and supplies, with factory at Woodside, N. Y., and warehouses in ten principal cities of the United States, to cease discriminating in price between two classes of wholesale customers competing with each other in three Texas cities through use of

- (1) A "warehouse distributor's sales agreement" applying to some 50 customers accounting for 25% to 30% of respondent's domestic sales based upon minimum annual purchases of \$12,000 net, who were granted a 20% discount off the current distributor's prices on each factory purchase and 10% on each warehouse purchase; and
- (2) An "authorized distributor's agreement" made with some 450 to 500 other customers who purchased approximately 60% of respondent's products, providing that the customer purchase a minimum of \$1,200 of respondent's ignition parts line annually, in consideration of which he received a 10% discount from the current distributor price and a "performance rebate" of 3% on annual purchases of \$3,000 to \$5,999, and 5% on \$6,000 or more;

Though tabulations made of respondent's invoice data in the three cities showed no general controlling principle in respondent's aforesaid classification of customers whose individual purchases actually varied widely from the contract requirements.

Mr. Eldon P. Schrup and *Mr. Francis C. Mayer* for the Commission.

Mr. James W. Cassidy, of Washington, D. C., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondent in this proceeding is charged with having violated subsection (a), Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, § 13) by discriminating in price between its customers competitively engaged in the resale of automotive products manufactured and sold by it. After the filing of an answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were received, duly recorded and later filed in the office of the Commission. Proposed findings of facts and conclusions have been submitted by counsel.

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Based upon the entire record, the following findings of fact and conclusions are made and order issued.

FINDINGS OF FACT

1. Respondent, P. Sorensen Manufacturing Co., Inc. (hereinafter referred to as Sorensen), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with principal office and place of business located at 32-31 Fifty Seventh Street, Woodside, New York.

2. Sorensen is now and for several years last past has been engaged in the manufacture, sale and distribution of automotive products and supplies which are offered by respondent in three classifications—(a) ignition service parts, (b) carburetor parts and kits, (c) cable, wire, and accessories—and are sold for use, consumption or resale within the United States and the District of Columbia. Sorensen causes said products and supplies so sold to be shipped and transported from the State or States of location of its places of business to the purchasers thereof located in States other than the State or States wherein said shipment or transportation originated. Sorensen maintains, and at all times mentioned herein has maintained, a substantial course of trade and commerce in said products and supplies among and between the various States of the United States and in the District of Columbia.

3. Sorensen, in the course and conduct of its business, as aforesaid, is now, and since June 19, 1936, has been, engaged in active competition with other concerns manufacturing, selling, and distributing comparable automotive products and supplies in commerce. Many of respondent's customers who purchase respondent's products for resale are competitively engaged with each other in the resale of said products. Within each classification or line, respondent's products are of like grade and quality.

4. Respondent maintains warehouse stocks of its products in the cities of Atlanta, Georgia, Boston, Massachusetts, Chicago, Illinois, Cleveland, Ohio, Dallas, Texas, Kansas City, Missouri, Los Angeles and San Francisco, California, Minneapolis, Minnesota, and Seattle, Washington. It employs fifteen salesmen and uses six factory representatives. During 1951, which has been taken as a sample or test year, its products were sold to more than 500 wholesaler customers to the extent of \$1,300,000, of which 75% represented sales of ignition service parts, the remaining 25% being about equally divided between the other two classifications.

5. During 1951, direct-buying wholesaler customers were permitted to procure merchandise either from respondents' factory located in Woodside, New York, or from one of respondent's warehouses. On all shipments from respondent's factory of purchases amounting to 100 pounds or more, respondent paid the freight charges. The evidence shows that an average shipment of 100 pounds' weight had a purchase value of approximately \$173. All customers were granted a cash discount of 2%, 10th prox. Otherwise respondent's customers were divided by contract arrangement into three groups.

There were about fifty customers, who purchased from 25% to 30% of respondent's domestically marketed products, who operated under a Warehouse Distributors' Sales agreement. This is a non-exclusive contract which provides that the purchaser will maintain an adequate stock of all Sorensen lines based upon minimum annual purchases of \$12,000 net, and will dispose of more than 50% of such purchases to Sorensen Approved Jobbers. Under this contract, the purchaser receives 20% discount off the current distributor price on each factory purchase, and 10% discount on each warehouse purchase.

Some 450 or 500 other customers, who purchased approximately 60% of respondent's products, operated under another non-exclusive contract, known as the Authorized Distributor Agreement, which provides that the purchaser will actively promote the sale of respondent's ignition-parts line and purchase \$1,200 or more of these parts annually. In consideration thereof he is extended a 10% discount from the current distributor price, and is granted a performance rebate of 3% if his accumulated annual purchases total \$3,000 to \$5,999, and 5% if such purchases amount to \$6,000 or more. The 10% discount applies on all purchases, whether from factory or warehouse; the performance rebates apply only on purchases shipped from the factory, although warehouse shipments are counted in computing total volume. Performance rebates are granted at the end of each year by the issuance of a merchandise-credit applicable to future purchases.

There are about fifty other customers who operate under a Special Distributor Sales Agreement, which provides for no minimum annual purchases, but requires that the distributor carry in stock and actively promote the sale of the entire line of respondent's ignition parts. He is allowed a performance rebate of 10% on all purchases if the total volume is \$1,200 or more. This also is covered by issuance of a merchandise-credit at the year's end, applicable on future purchases. Although the agreements show that customers in this group were granted discounts and performance rebates less favorable than were

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granted to the other two groups, little note of this fact was taken in the record, and the evidence as to respondent's transactions with members of this group is negligible.

6. There was also, in 1951, another contract group known as authorized jobbers, who operated under an Authorized Jobber Agreement supplied by respondent to its warehouse distributors for their convenience in formalizing their understanding with the jobbers who were their customers. The agreement is between the authorized jobber and a warehouse distributor, but requires respondent's approval. It provides that the jobber will carry an adequate stock of respondent's items "to serve his trade or a minimum of \$300 net," will actively promote the sale of respondent's merchandise, and will permit the checking of his stock at any time by a Sorensen or distributor representative. He is permitted to buy merchandise from the distributor at respondent's current Distributor price, upon such terms of payment as conform to the warehouse distributor's established policy.

Counsel supporting the complaint contend that sales under this agreement are actually sales made by respondent rather than by the warehouse distributors, and that authorized jobbers are purchasers from respondent within the meaning of the Clayton Act. In support of this contention counsel cites the Commission's decision of April, 1955, in the matter of *Whitaker Cable Corporation*, Docket 5722, in which the Commission refers to decisions in the matters of *Champion Spark Plug Co.*, Docket 3977 (1953) and *Kraft Phenix Cheese Corp.*, 25 F. T. C. 537 (1937). In those three cases the facts were more fully developed in this respect than they are in the instant proceeding. The present record is sketchy and inconclusive on this issue. Moreover there are other shortcomings in the record—lack of substantial evidence of competition between the authorized jobbers and respondent's direct-buying customers, lack of substantial evidence of competitive injury, and other failures of proof of such an extent that no conclusion can be reached in this proceeding that any violation of Section 2 (a) of the Clayton Act arose out of the respondent-authorized jobber relationship.

7. There appears to have been one other group of customers who were not bound by any contract, but were permitted to make purchases from respondent. They are referred to in respondent's invoices, as shown by the tabulation hereinafter set out, as "Net" buyers. Some of them received no discount from respondent's current distributor prices, others received 10% discount, and one received a discount

which amounted to 2.70% of his total purchases. However, the record as to this group of purchasers is in all other respects inconclusive, and no finding can be made that respondent's transactions with this group of buyers constitutes a violation of Section 2 (a) of the Clayton Act.

8. The competitive injury charged in this proceeding is at the secondary level, arising out of differences in respondent's selling prices to its wholesaler customers, some of whom suffered competitively as a result of such price differences. Substantial evidence was presented as to price differentials and resulting injury only as it affected the members of two groups of respondent's contract purchasers, warehouse distributors and authorized distributors, who compete with each other in the trade areas in which they mutually operate. The trade areas in such instances include the cities in which such wholesaler customers are located and the surrounding communities within a radius of from 25 to 75 miles.

The differences in net purchasing prices at which members of these two groups may buy respondent's products are inherent in the contracts hereinabove described, and are shown by tabulations and computations which were made by the Commission's economic staff from data taken from respondent's invoice records of business transacted in 1951. To conserve time and expense, testimony and other evidence were taken in this proceeding only in New York, Washington, D. C., Dallas, San Antonio and Houston. For the same reason tabulations and computations were limited to data pertaining to selected cities, and only such portion of that data as relates to transactions in the trade areas of Dallas, San Antonio and Houston is shown herein.¹ A comparison of sales, discounts and rebates to respondent's customers in these three areas is shown as follows:

¹ Included in the complete tabulation are data of respondent's 1951 transactions with wholesaler customers in the following other cities: Berkeley, Burbank, North Hollywood, Long Beach, Los Angeles, Lynwood, Oakland, Richmond, Sacramento, San Fernando, San Francisco and San Leandro, California; Portland, Oregon; Salt Lake City, Utah; and Seattle and Spokane, Washington.

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Comparison of sales, discounts and rebates granted by Sorensen to wholesaler customers in specified localities during the year 1951

Customer and location	Classification ¹	Sales at list price	Discounts and rebates allowed on sales		Shipments	
			Amount	Percent	Factory amount	Ware-house amount
(1)	(2)	(3)	(4)	(5)	(6)	(7)
DALLAS						
Ashby-Garrett Auto Supply.....	Net	\$13.20				\$13.20
Automotive Appliance Co.....	Net	27.55				27.55
Carter Auto Supply.....	Net	53.19				53.19
Dave Crockett Supply Co.....	Net	199.49	\$5.39	2.70	\$28.42	171.07
Gates & Warner Auto Parts Co.....	AD	1,068.93	106.36	9.95		1,068.93
Greater Dallas Automotive.....		119.88	10.66	8.89		119.88
Henderson Auto Parts.....	AD	1,842.70	182.13	9.88	451.65	1,391.05
Leach Auto Supply.....	WD	9,695.34	1,611.17	16.62	6,530.19	3,165.15
Lenamond Auto Parts.....	AD	528.39	52.46	9.93		528.39
L. D. McCorkle Co.....	Net	19.45				19.45
McMillen Auto Parts.....	WD	1,595.91	206.14	12.92	470.54	1,125.37
Motor Supply Co.....	Net	16.88	1.69	10.01		16.88
National Auto Parts Exchange.....	AD	3,510.24	441.29	12.57	3,389.03	121.21
Terry Automotive Supply.....	Net	6.96				6.96
HOUSTON						
Airline Auto Supply.....	AD	2,493.01	438.65	12.56	3,309.63	183.38
Al's Auto Parts.....	AD	3,508.74	439.17	12.52	3,340.41	168.33
Althaus Motor Parts.....	AD	2,467.21	244.74	9.92	2,039.61	427.60
Anchor Automotive Supply Co.....	AD	725.66	72.30	9.96	263.43	462.23
Anderson Auto Supply.....	AD	332.65	33.27	10.00	332.65	
Comet Automotive Supply Co.....	AD	2,805.91	279.84	9.97	2,417.07	388.84
Lester Battery & Electric Co.....	Net	90.59			90.59	
Marlin Automotive Supply Co.....	AD	426.47	41.52	9.74	426.47	
Milam Supply Company.....	WD	18,036.10	3,587.40 2 377.85	19.89	18,032.50	3.60
E. J. Quade Auto Supply.....	AD & Net	177.54	14.38	8.10	33.88	143.66
Schuman Auto Supply, Inc.....	WD	404.00	80.80	20.00	404.00	
Texas Parts and Supply Co., Inc.....	WD	1,809.10	354.82	19.61	1,756.11	52.99
SAN ANTONIO						
A. A. Auto Supply Co.....	AD & WD	10,225.37	1,793.10	16.66	10,080.17	145.20
Alamo Auto Electric & Brake Co.....	WD	4,287.63	845.99	19.73	4,287.63	
Bowen Auto Parts & Machine Co.....	WD	8,083.88	1,605.59	19.86	8,083.88	
Chapman Auto Parts.....	AD	8,144.65	1,147.26	14.09	7,709.50	435.15
Colbatu Auto Supply Co.....	Net	71.30	7.13	10.00		71.30
Motor Machine & Parts Co.....	WD	3,103.80	614.27	19.79	3,074.80	29.00
H. H. Roper Auto Parts.....	AD	442.38	44.04	9.96	45.99	396.39
Stille Auto Supply.....	AD	2,568.47	255.74	9.96	2,528.66	39.81

¹ Key to Customer Classification:

AD—Authorized Distributor.

WD—Warehouse Distributor.

Net—Non-Contract Customers.

² \$377.85 rebate allowed on redistribution to AD accounts.

9. The tabulation shows that the bulk of purchases were factory-shipped. This is as would be expected. Respondent pays freight charges when any such shipment amounts to 100 pounds or more; warehouse distributors receive 20% discount on factory purchases, only 10% discount on warehouse shipments; authorized distributors purchasing \$3,000 or more of respondents' products annually receive performance quantity rebates on factory purchases, none on warehouse purchases.

The tabulation shows no general controlling principle in respondent's classification of customers. Although the Warehouse-Distributor

contracts require a customer in that category to purchase \$12,000 in parts annually, only one of eight warehouse distributors listed in the three cities met that requirement; one purchased as little as \$404 worth of merchandise. Among the fourteen authorized distributors, eight exceeded the required annual purchases of \$1,200 or more, and had a higher volume of purchases than some of the warehouse distributors in the same area. In each of the three cities the second-largest purchaser was an authorized distributor.

10. Price differences are determined by the differences in discounts and rebates allowed respondent's various customers, the net price of each customer being the distributor list price shown in column (3) of the tabulation minus the discounts and rebates shown in column (4).

In Dallas the warehouse distributor who made the largest purchases received discounts amounting to 16.62%; the authorized distributor who made the next largest purchases was given only 12.57% discount. In Houston a warehouse distributor whose total purchases amounted to only \$1,809 enjoyed discounts of 19.61%, while the largest-buying authorized distributor, who bought \$3,508 worth of respondent's merchandise, received but 12.52% discount. In San Antonio two customers purchased almost equal amounts—one, a warehouse distributor, on purchases of \$8,083, received 19.86% discount, while the other, an authorized distributor whose purchases were \$8,144, received 14.09% discount. The differentials in these three instances were 4.05%, 7.09% and 5.77% respectively, all favoring warehouse distributors. Other comparisons readily present themselves. Considering purchases amounting to \$1,000 or more, discounts varied from 9.88% to 16.62% in Dallas, from 9.92% to 19.89% in Houston, and from 9.96% to 19.86% in San Antonio—differentials of 6.74%, 9.97% and 9.90% respectively.

11. The economic effect of the price differences resulting from respondent's pricing, discount and rebate practices has been and is to injure, destroy, prevent, and thus substantially to lessen competition. It was the testimony of many competing customers of respondent that their margin of profit is small, that they order from the factory whenever possible to save freight charges, and that they take advantage of the 2% cash discount as a matter of financial necessity because failure to do so would seriously impair profits. Obviously, if the taking or losing of a 2% cash discount is enough seriously to affect profits, cost differences varying up to 9.97% could be disastrous.

There is evidence in the record that in some instances resale prices were reduced and custom gained because of such discounts. But the Commission and the courts have said that price reduction is but one form of competition. Additional services to customers, use of addi-

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tional salesmen to call on customers, enlarged or improved facilities, all made possible by larger profits, may enable favored distributors to stay in business and prosper, at the expense of less-favored competitors. Net cost of merchandise purchased for resale is a major factor in determining margin of profit, and any preferential discount that can be obtained by any one of respondent's wholesaler customers contributes materially to his ability to compete and to succeed in the resale of respondent's products. This statement, supported by substantial, reliable, probative evidence in this proceeding, seems to be so simple and reasonable as to be axiomatic, and remains true even though the lower cost of acquisition may not be reflected in lower resale prices.

12. No cost justification for price or discount and rebate differentials was offered in this proceeding, nor was there any attempt on the part of the respondent to show that the lower prices to some customers were made to meet an equally low price offered to such purchasers by a competitor of respondent.

CONCLUSIONS

1. Respondent's automotive products and supplies purchased by its wholesaler customers for resale are of like grade and quality.

2. Respondent's differing discounts and rebates result in substantially higher net purchase prices being paid by some customers who purchase respondent's products for resale than are paid for such products by other competing customers.

3. Respondent's discriminatory prices, when reflected in the resale price of said products, enable favored distributors to attract business away from non-favored distributors, or force the non-favored distributors to resell at a substantially reduced profit; when respondent's suggested resale prices are used, these discriminatory prices enable the favored distributors to resell said products at a substantially higher profit margin than that obtainable by the non-favored distributors, and thus render them financially able to compete more effectively than the non-favored distributors in such resale.

4. The higher net purchase prices paid by some of the wholesaler purchasers of respondent's products are such as tend to, and do, injure, destroy or prevent competition between said purchasers and other wholesaler purchasers who purchase and competitively resell such products.

5. The aforesaid discriminations in price constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended. Therefore,

It is ordered, That respondent P. Sorensen Manufacturing Co., Inc., a corporation, and its officers, representatives, agents and em-

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ployees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such automotive products and supplies of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

This is an appeal by respondent from an initial decision and an order under Section 2 (a) of the amended Clayton Act.

Respondent, a corporation, with its principal place of business in Woodside, New York, is engaged in the manufacture, sale and distribution of automotive products and supplies, which are classified as follows: (a) ignition service parts, (b) carburetor parts and kits, and (c) cable, wire, and accessories. Shipments are made from the factory and also from warehouses located in various parts of the country including Dallas, Texas.

Respondent sells to customers who may be classified in accordance with their contracts or arrangements with respondent as follows: (1) warehouse distributors, (2) authorized distributors, (3) customers operating under a special distributors sales agreement, (4) customers operating under an authorized jobbers agreement, and (5) customers known as "net" buyers.

For reasons set out in his initial decision, the hearing examiner found substantial evidence as to price differentials and resulting injury only as it affected the members of the first two groups.

Evidence introduced related to respondent's transactions for the year 1951 principally with wholesale customers in three Texas cities. The evidence shows that about 50 of respondent's customers operated under a warehouse distributor's sales agreement. Their total purchases amounted to from 25% to 30% of respondent's products sold in the domestic market. Under the terms of this written contract, the customers agreed to (1) maintain adequate stock of all Sorensen lines based upon minimum annual purchases of \$12,000 net, and (2) to dispose of more than 50% of such purchases to Sorensen approved jobbers. The contract bound respondent to pay 20% discount off the current distributor's prices on each factory purchase and 10% on each warehouse purchase.

About 450 to 500 customers buying approximately 60% of respondent's products operated under an authorized distributor's agreement. This contract required the purchaser to actively promote the sale of respondent's ignition parts line and to buy at least \$1,200 worth of these parts annually. Respondent allowed him a 10% discount and a "performance rebate" of 3% if his accumulated annual purchases were between \$3,000 and \$6,000, and 5% if such purchases were over \$6,000. The 10% discount applies on all purchases, whether from factory or warehouse; the performance rebates apply only on purchases shipped from the factory although warehouse shipments are counted in computing total volume. Performance rebates were granted at the end of each year by the issuance of a merchandise credit applicable to future purchases.

On all shipments from respondent's factory of purchases amounting to 100 pounds or more, respondent paid the freight charges. All customers were allowed a cash discount of 2%, 10th prox.

The two classes of customers involved here, namely, the warehouse distributors and the authorized distributors, compete with each other in the trade areas in which they mutually operate, which trade areas include the cities in which such wholesaler customers are located and the surrounding communities within a radius of from 25 to 75 miles.

The initial decision contains a chart entitled, "Comparison of Sales Discounts and Rebates Granted by Sorensen to Wholesale Customers in Specified Localities During the Year 1951." The three cities are Dallas, Houston, and San Antonio, all in Texas. These charts and others appearing in the record were prepared by a Commission accountant from the books and records of the respondent.

For our purposes, the results of these tabulations of figures are sufficiently set out in the following statements in the initial decision:

The tabulation shows no general controlling principle in respondent's classification of customers. Although the Warehouse-Distributor contracts require a customer in that category to purchase \$12,000 in parts annually, only one of eight warehouse distributors listed in the three cities met that requirement; one purchased as little as \$404 worth of merchandise. Among the fourteen authorized distributors, eight exceeded the required annual purchases of \$1,200 or more, and had a higher volume of purchases than some of the warehouse distributors in the same area. In each of the three cities the second-largest purchaser was an authorized distributor.

Price differences are determined by the differences in discounts and rebates allowed respondent's various customers, the net price of each customer being the distributor list price shown in column (3) of the tabulation minus the discounts and rebates shown in column (4).

In Dallas the warehouse distributor who made the largest purchases received discounts amounting to 16.62%; the authorized distributor who made

the next largest purchases was given only 12.57% discount. In Houston a warehouse distributor whose total purchases amounted to only \$1,809 enjoyed discounts of 19.61%, while the largest-buying authorized distributor, who bought \$3,508 worth of respondent's merchandise, received but 12.52% discount. In San Antonio two customers purchased almost equal amounts—one, a warehouse distributor, on purchases of \$8,083, received 19.86% discount, while the other, an authorized distributor whose purchases were \$8,144, received 14.09% discount. The differentials in these three instances were 4.05%, 7.09% and 5.77% respectively, all favoring warehouse distributors. Other comparisons readily present themselves. Considering purchases amounting to \$1,000 or more, discounts varied from 9.88% to 16.62% in Dallas, from 9.92% to 19.8% in Houston, and from 9.96% to 19.86% in San Antonio—differentials of 6.74%, 9.97% and 9.90% respectively.

Respondent first argues that "the record does not contain reliable, probative and substantial evidence establishing the substantiality of injurious competitive effects, actual or reasonably probable, in the secondary line of commerce."

Specifically, it argues that the tabulations and computations purporting to show the percentage difference in net purchasing prices to the two groups are inadequate for such purpose. The reasoning on this point may be briefly summarized as follows:

The products sold consisted of three distinct, different lines of products comprising more than 52 entirely different types, with different designs and functional uses and intended for different makes and models of motor vehicles; that many of the different types do not compete with each other; that the evidence does not show the names and locations of any two purchasers who purchased the same type of automotive products of like grade and quality at different prices; that some of the differences depended upon whether the products were shipped from the factory or from a warehouse which was a choice at the option of the purchaser.

It is, of course, true that the tabulations do not show the exact differentials on any particular type of automotive product, any particular purchase, or any particular shipment. The figures show averages arrived at from an extensive examination of the books and records of the corporation and by the application of the usual rules of accounting. All of the purchasers were engaged in substantially the same line of endeavor, to wit, the buying and selling of such parts as the varying needs of their own customers might demand. This made necessary the stocking of many different items. To require the discount, rebate or price history of each separate item or a showing of its individual effect would carry us beyond the limitations of practical bookkeeping. The accountant, however, did make an examination of the respondent's invoices to determine the particular types of products sold to the various wholesalers in the three Texas cities.

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The results indicate that a number of customers bought a substantial number of the same items.

The general situation here is similar to that considered in the matter of Moog Industries, Inc., Docket 5723, where the Commission's opinion said:

Respondent's customers do not purchase respondent's products as individual items. They purchase them as part of a line designed to supply the needs of garages and others to whom the products are resold. The rebates were not granted on the basis of the individual items purchased but on the basis of the total dollar purchases of a particular line. The price differentials involved did not arise from any difference in the grade or quality of the products sold to different customers. Instead they arose from varying rebates on an entire line.

Respondent next claims that even assuming that different net prices have been shown, the evidence is not sufficient to establish the substantiality of injury, either actual or reasonably probable, in the second line of commerce.

It seems to be respondent's view that the hearing examiner presumed injury from the mere finding of price differentials—in other words, that he applied a *per se* doctrine of injury flowing automatically and certainly from price differences.

We do not so construe the initial decision. The initial decision, and also that of the Commission, is based on the evidence in the record, together with the inferences and conclusions which may properly be drawn therefrom.

No claim is made that the differences can be cost justified or that they were due to lawful attempts to meet competition. The sole question at this point has to do with the sufficiency of the evidence to establish the reasonable probability of injury.

Considerable evidence was introduced showing the general situation under which the wholesalers in the three Texas cities operated. In general they were small businesses wholesaling automotive parts to garages, trucking companies, service stations, and sometimes to brokers. Their field of operation was relatively small, being confined to the city of their business location and a surrounding area included within a radius of 25 to 75 miles. They sold over the counter, by telephone with accompanying delivery, or through outside salesmen, although, in some instances, not all of these methods of sale were utilized. A substantial proportion of the business consisted of over the counter transactions. They employed from one to seven salesmen and the volume of sales in 1951 for the different establishments varied from \$7,000 to \$250,000.

The situation here is somewhat similar to that involved in the *FTC v. Morton Salt Company* (1948), 334 U.S. 37. There, a number of stores, both small and large, were selling a single homogeneous prod-

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uct, to wit, salt. They were competing in a relatively small area under substantially the same conditions. There appeared to be considerable evidence of actual injury in the record. Nevertheless, the competitive situation of the different retailers of salt was such as to lead Mr. Justice Black to make, in the majority opinion, the following statement:

It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

The late Mr. Justice Jackson dissented from the use of the word "possibility" instead of "probability." Speaking of the general competitive situation, he said:

Even applying the stricter test of probability, I think the inference of adverse effect on competition is warranted by the facts as to the quota discounts. It is not merely probable but I think it is almost inevitable that the further ten-cent or fifteen-cent per case differential in net price of salt between the large number of small merchants and the small number of very large merchants, accelerates the trend of the former towards extinction and of the latter towards monopoly.

The validity of these observations is borne out by the experiences of the customers in this case as shown by their testimony. All were entitled to a 2% cash discount on purchases from respondent and substantially all agreed that it was an important item in the conduct of their businesses. They testified that wherever possible they arranged their affairs to get the advantage of the discount. In regard to the 2%, various witnesses made statements in substance as follows:

It is the difference of making a profit at the end of the year and not making a profit at the end of the year; it amounts to quite a bit of my net profit at the end of the year; we need that 2%. We take that in buying from all manufacturers where they allow 2%; With that 2%, we can pay the rent of the building; I have to have that to operate.

The fact that the 2% involved a cash discount is not significant. Its importance lies in the opinion expressed by the witnesses that a wholesaler, who for any reason is required to pay 2% more for his products than his competitor, was at a disadvantage which reflected itself in the margin of his profit and in his financial success. If a 2% difference in the cost of a shipment is enough to create injury, then 9.97% would create even more injury.

It also appears from the testimony that shipments from the factory required more time than shipments from a nearer warehouse. Nevertheless, the bulk of the purchases were factory shipped. Most customers arranged their buying schedules to take advantage of the condition that respondent paid the freight on shipments of 100 pounds or more. The average value of the 100-pound shipment was \$173. As in the case of the 2% cash discount, many customer witnesses testified that they considered the money saved on freight charges was important to their business success.

It also appears that respondent furnished suggested resale price lists. At least one witness indicated some departure from these suggested prices. He testified: "There are variations, you make concessions to some of those prices at times * * *. Depends on the customer purchasing the product, you know, if you know the customer is buying that part somewhere else for possibly a little lower price, you will meet that price to try to keep his business; that happens."

Speaking of this evidence, the initial decision points out:

But the Commission and the courts have said that price reduction is but one form of competition. Additional services to customers, use of additional salesmen to call on customers, enlarged or improved facilities, all made possible by larger profits, may enable favored distributors to stay in business and prosper, at the expense of less-favored competitors. Net cost of merchandise purchased for resale is a major factor in determining margin of profit, and any preferential discount that can be obtained by any one of respondent's wholesaler customers contributes materially to his ability to compete and to succeed in the resale of respondent's products. This statement, supported by substantial, reliable, probative evidence in this proceeding, seems to be so simple and reasonable as to be axiomatic, and remains true even though the lower cost of acquisition may not be reflected in lower resale prices.

Finally, respondent urges that:

The provisions of the order to cease and desist fail to meet the constitutional standards of definiteness and reasonableness required by due process of law under the Fifth Amendment to the Constitution of the United States and the enforcement of the order will constitute a denial of due process of law under said Amendment.

The order is as follows:

It is ordered, That respondent P. Sorensen Manufacturing Co., Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such automotive products and supplies of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

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Order

The order is similar to the one considered by the court in *FTC v. Ruberoid Company* (1952), 343 U.S. 470, and to the orders in the matter of *E. Edelmann & Company*, Docket 5770, and in other similar cases recently decided by the Commission.

The findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission.

Respondent's appeal is denied and it is directed that an order issue accordingly.

Commissioner Mason dissented to the decision herein in accordance with his views expressed in Docket 5913.

FINAL ORDER

Respondent P. Sorensen Manufacturing Co., Inc., having filed on April 16, 1956, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying respondent's appeal and adopting the initial decision as the decision of the Commission.

It is ordered, That respondent, P. Sorensen Manufacturing Co., Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in said initial decision.

Commissioner Mason dissenting in accordance with his views expressed in Docket 5913.

IN THE MATTER OF

J. C. MARTIN CORP., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 6145. Complaint, Dec. 2, 1953—Decision, June 29, 1956*

Order requiring sellers in New York City of a variety of merchandise, including jewelry, silverware, kitchen utensils, and toilet articles, to cease using lottery devices in the sale of said merchandise through members of the public by means of pull cards they mailed to them, giving the purchaser the option of either pulling a tab or buying outright as many articles as he wished from the list in accompanying circulars giving description and price of each.

Mr. J. W. Brookfield, Jr. for the Commission.

Mr. Edward L. Smith, of Washington, D. C., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with the use of lottery methods or games of chance in the sale and distribution of their merchandise. After the filing of respondents' answer denying all the material allegations of the complaint, hearings were held at which evidence was received, both in support of and in opposition to the complaint. Proposed findings and conclusions were then submitted by counsel and the case argued orally. The matter is now before the hearing examiner for final consideration and decision.

2. Respondent J. C. Martin Corp., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 133 West 20th Street, New York, New York. Respondents Jack Kaslow and Seymour Orenstein are officers of the corporation and control its policies and sales activities. Respondent Jack Kaslow also trades as K. W. Sales Company, with his office and principal place of business located at 20 West 17th Street, New York, New York. Respondent Seymour Orenstein also trades as L. & S. Sales Company, with his office and principal place of business located at 598 Broadway, New York, New York. All of the respondents have cooperated with one another and acted in concert in carrying on the activities hereinafter described.

3. Respondents are engaged in the sale and distribution in commerce, as that term is defined in the Federal Trade Commission Act, of numerous and varied articles of merchandise, including, among others, jewelry, silverware, kitchen utensils and toilet articles. Prac-