

in which they have complied with this order.

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IN THE MATTER OF  
FRANK G. SHATTUCK COMPANY ET AL.

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

*Docket 7743. Complaint, Jan. 12, 1960—Decision, Apr. 22, 1964*

Order dismissing complaint which charged four affiliated firms in the candy and confectionery business with price discrimination in violation of Sec. 2(a) of the Clayton Act. As to three of the respondents there was insufficient evidence to support the allegations of the complaint; as to the fourth respondent the record supported the defense of good faith meeting of competitors' prices.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section

## Complaint

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2(a) of the amended Clayton Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint as follows:

PARAGRAPH 1. Respondent Frank G. Shattuck Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its principal office and place of business located at 50 West 23rd Street, New York, New York. This respondent also maintains an office at 18 West Street, in Boston, Massachusetts.

Respondent W. F. Schrafft & Sons Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its principal office and place of business located at 529 Main Street, Charlestown, Boston, Massachusetts. This respondent is a wholly owned subsidiary of the Frank G. Shattuck Company.

Respondent Schrafft's Sales Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 133-34 36th Road, Flushing, New York. This respondent is also a wholly owned subsidiary of the Frank G. Shattuck Company.

Respondent Wallace & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 460 Smith Street, Brooklyn, New York. This respondent is also a wholly owned subsidiary of the Frank G. Shattuck Company.

PAR. 2. Respondents are engaged in the business of manufacturing, distributing and selling candy and confectionery products. Respondents' total sales for the year 1958 were approximately \$56,000,000.

PAR. 3. These products were sold by respondents for use, consumption, or resale within the United States and respondents caused them to be shipped and transported from the state of location of their principal places of business to purchasers located in States other than the State in which the shipment or transportation originated.

PAR. 4. Respondents maintain a course of trade in commerce, as "commerce" is defined in the amended Clayton Act, in such products described, among and between the States of the United States.

Respondent W. F. Schrafft & Sons Corporation maintains and operates a manufacturing plant located in Charlestown near Boston, Massachusetts. From this plant it ships and sells throughout the United States to various purchasers located in the several States of the United States, including New York.

Respondent Wallace & Co. maintains and operates a manufacturing plant located in Brooklyn, New York. Through its jobbers, including respondent Schrafft's Sales Corporation, respondent Wallace & Co. ships and sells its candy products throughout the United States to various purchasers located in the several States of the United States.

PAR. 5. In the course and conduct of their business in commerce, respondents are discriminating in price between different purchasers of their products of like grade and quality by selling to some purchasers at higher and less favorably prices than they sell to other purchasers competitively engaged in the resale of their products with the non-favored purchasers.

For example, in the distribution and sale of their candy products, respondents have consistently charged independent retailers list price, and have granted the variety and drug chains list price less 10%. To illustrate, in Niagara Falls, New York, the following customers receive a 10% discount plus a 2% cash terms discount: Walgreen Drug and F. W. Woolworth Co. The following customers receive a 10% allowance but did not receive a 2% cash terms discount: Saraceni Drug, Mario De Gregari, People's Drug, Pine Drug, and Thriftway Five and Ten. The following customers receive a 2% cash terms discount but did not receive the special 10% allowance: Brittman, St. Francis Gift Shop, Tony and Lil's, Lo Tempio, Catatano Bros., La Salle Pharmacy Sarkus, Blue's Drug, Girard Pharmacy and Albert D'Amico.

PAR. 6. In the course and conduct of their business in commerce, respondents are competitively engaged with other corporations, individuals, partnerships and firms in the manufacture, distribution and sale of their products.

PAR. 7. The effect of respondents' discriminations in price, as alleged, may be substantially to lessen, injure, destroy or prevent such competition as alleged or tend to create a monopoly in the lines of commerce in which respondents and their purchasers are engaged.

PAR. 8. The foregoing acts and practices of the respondents as alleged violate Section 2(a) of the amended Clayton Act (U.S.C. Title 15, Sec. 13).

*Mr. Thomas A. Sterner* for the Commission.

*White & Case* by *Mr. Edgar E. Barton* and *Mr. Scott E. Bohon* of New York, N.Y., for respondents.

## INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

SEPTEMBER 20, 1962

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## PRELIMINARY STATEMENT

The complaint in this proceeding charges respondents Frank G. Shattuck Company, a Massachusetts corporation (hereinafter "Shattuck") and its wholly owned subsidiaries W. F. Schrafft & Sons Corporation, a Massachusetts corporation (hereinafter "Schrafft"),

Schrafft's Sales Corporation, a Delaware corporation (hereinafter "Schrafft Sales") and Wallace & Co., a New Jersey corporation (hereinafter "Wallace") with violating § 2(a) of the amended Clayton Act (15 U.S.C. § 13)<sup>1</sup> by "discriminating in price between different purchasers of their products of like grade and quality by selling to some purchasers at higher and less favorable prices than they sell to other purchasers competitively engaged in the resale of their products with the non-favored purchasers".

In this record counsel supporting the complaint (hereinafter "complaint counsel") has limited his proof of competitive injury, if any is proved, to competition at the retail level, to "secondary line" or "third line" competition.

Original complaint counsel, at the time complaint issued and until he was replaced by the present counsel on September 29, 1961, sought to prove that the parent company, Shattuck, although not a seller of the product line involved in the alleged price discrimination, exercised such degree of direction and control over the sales of its subsidiaries, the other corporate respondents, as to be liable for such § 2(a) violations as might be proven against any or all of such corporate subsidiary respondents in their sales of the product line. The original complaint counsel also stated his intention to prove that Schrafft Sales was and is engaged in interstate commerce, and can be held under § 2(a) of the Clayton Act for any price discriminations proven against it. In his proposed findings filed on August 17, 1962, present complaint counsel has admitted that the record will not support findings of fact and conclusions of law which would justify a cease-and-desist order against Shattuck and Schrafft Sales and in his oral argument on August 23, 1962, complaint counsel stated that this proceeding should be dismissed as to Shattuck and Schrafft Sales for failure of proof. The hearing examiner had arrived at the same conclusion by his independent examination of the record and such dismissal order as to Shattuck and Schrafft Sales will be entered. However, a proper evaluation of the record for initial decision does involve some minimal findings as to both these companies. These will be made later.

<sup>1</sup> " \* \* \* 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: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered \* \* \*."

In view of complaint counsel's admission that a case has not been made out in this record as to Shattuck and Schrafft Sales, the present posture of the case requires a determination only of:

(1) whether W. F. Schrafft & Sons Corporation ("Schrafft") has been proven to have violated § 2(a) of the Clayton Act under an "indirect purchaser" theory; and

(2) (a) whether Wallace's additional discounts to certain retail outlets and others constitute price discrimination under § 2(a);

(b) if so, whether competitive injury resulting from such price discrimination stands proven in this record; and

(c) if so, whether such discrimination may be justified under the "meeting competition" defense permitted under § 2(b)<sup>2</sup> of the Clayton Act, as amended.

Both Schrafft and Wallace sell the product line here involved.

Hearings have been conducted in Washington, D.C., and in Rochester, Buffalo, Syracuse and New York, New York. During the course of the hearings when the transcript consisted of 815 pages and there were over 700 Commission exhibits, the original complaint counsel resigned from the Commission to accept employment elsewhere. The new complaint counsel was given a generous extension of time within which to acquaint himself with the record, and particularly to decide whether he would use stipulations which had previously been negotiated by his predecessor. The present complaint counsel renegotiated the stipulations, which are now 57 pages in length, contain the testimony of 44 witnesses, and were admitted on March 15, 1962, as CX-737. The renegotiation by counsel and acceptance of the stipulations by the examiner obviated additional hearings in Buffalo, Rochester, Syracuse, and Niagara Falls, New York.

Proposed findings, conclusions, and briefs have been submitted and argued by the parties. Based upon the entire record, including the exhibits and stipulations, the examiner makes the findings and conclusions hereinafter set forth. Any finding proposed by the parties which is not hereinafter made in the form proposed, or in substantially that form, hereby is rejected. The fact that no finding summarizes the evidence in the exact manner which the parties have requested does not mean that such evidence has not been considered. It means merely that the examiner deems the evidence as summarized in his findings to be sufficiently relevant, probative, substantial and

<sup>2</sup> " \* \* \* on proof being made \* \* \* that there has been discrimination in price \* \* \*, the burden of rebutting the prima facie case \* \* \* shall be upon the person charged with a violation of this section \* \* \* *Provided, however,* that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price \* \* \* to any purchaser \* \* \* was made in good faith to meet an equally low price of a competitor."

material to dispose of the issues presented. All motions which have not previously been ruled upon, and which are not herein specifically ruled upon, are hereby overruled and denied.

Based upon the entire record, the hearing examiner makes the following:

#### FINDINGS OF FACT AND CONCLUSIONS

##### *I. The Product Involved*

1. The product line involved in this proceeding is the type of candy or confectionery known as "packaged gift chocolates" or "boxed candy" or "fancy packages", *i.e.*, factory-packaged boxes of candy, such as miniature chocolates which are usually sold at retail in one-pound or two-pound boxes at prices ranging from about \$1.35 to \$2.25 a pound, with an average price of about \$1.60 a pound (or sold at somewhat higher prices per pound in the case of certain special packaging such as Valentine hearts with corsages, etc.). With respect to the respondent Wallace, the product line involved in this proceeding is the type of packaged candy or confectionery described on the Wallace price lists as: "Fancy Packages", intended to retail at prices ranging from about \$1.59 to \$1.89 a pound, "Specialty Packages" intended to retail at prices ranging from about \$0.29 to \$1.50 per package, and "Jelly Treat Paks" intended to retail at about \$0.39 per package.

##### *II. The Case Against Shattuck and Schrafft Sales. Description of the Respondents and their Business and Relationships*

###### *A. Frank G. Shattuck Company*

2. Respondent Frank G. Shattuck Company, a Massachusetts corporation, has its principal office at 50 West 23rd Street, New York City. It also has an office at 18 West Street, Boston, Massachusetts. Its shares of corporate stock are listed for trading on the New York Stock Exchange. Its net sales, including those of all wholly owned subsidiaries, were \$61,650,076 in 1959; \$66,869,769 in 1960; and \$70,276,887 in 1961. Shattuck operates approximately 50 restaurants which are located in more than one State of the Union, a catering service, business food services, coffee services, and retail shops in New York City, which sell at retail the product line here involved and other food and food line products. Shattuck sells some of its products through supermarket "Quality Isles". It has franchised restaurants in States other than New York which are operated under the Schrafft name. Shattuck sells ice cream and ice cream toppings, fudges and fruit syrups at wholesale. At its bakery and plant in New York City, Shattuck prepares or manufactures bakery goods, some

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types of hard candy, and kitchen-type confections. Shattuck does not manufacture the type of boxed candy constituting the product line here involved. It purchases such boxed candy for resale at retail from its wholly owned subsidiary, respondent Schrafft. Shattuck resells this boxed candy at retail through its restaurants and retail stores. Shattuck is engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

3. During the time relevant to this proceeding Shattuck owned all of the issued and outstanding capital stock of the corporate respondents Schrafft, Schrafft Sales and Wallace. As such sole stockholder Shattuck normally would elect the directors of its wholly owned subsidiaries. The officers and directors of the four corporate respondents for the years 1957, 1958, and 1959 were:

*Officers and directors of Frank G. Shattuck Co. and wholly owned subsidiaries 1957-1959, incl.*

|                            | Frank G.<br>Shattuck Co.                              | W. F. Schrafft<br>& Sons   | Wallace & Co.                       | Schrafft Sales                               |
|----------------------------|-------------------------------------------------------|----------------------------|-------------------------------------|----------------------------------------------|
| Gerald Shattuck.....       | 1957 P, D<br>1958 P, D<br>1959 P, D                   | 1957 D                     |                                     |                                              |
| Harold D. Shattuck.....    | 1957 VP, D<br>1958 VP, D<br>1959 VP, D                |                            |                                     |                                              |
| Hazen W. Jones.....        | 1957 VP, Cl, D<br>1958 VP, Cl, D<br>1959 VP, Cl, D    |                            |                                     |                                              |
| Charles F. Oestereich..... | 1957 VP, Sec.<br>1958 VP, Sec.<br>1959 VP, Sec.       |                            | 1957 Sec.<br>1958 Sec.<br>1959 Sec. | 1957 Sec., D<br>1958 Sec., D<br>1959 Sec., D |
| H. Morgan Shattuck.....    | 1957 VP<br>1958 VP, D<br>1959 VP, D                   | 1957 D<br>1958 D<br>1959 D |                                     | 1958 D<br>1959 D                             |
| Henry B. Kennedy.....      | 1957 VP<br>1958 VP<br>1959 VP                         |                            |                                     |                                              |
| Francis C. Raethle.....    | 1957 VP<br>1958 VP<br>1959 VP                         |                            |                                     |                                              |
| Wesley W. Lang.....        | 1957 T<br>1958 T<br>1959 T                            |                            | 1958 Asst. T<br>1959 Asst. T        | 1958 Asst. T<br>1959 Asst. T                 |
| Christopher J. Kelly.....  | 1957 Asst. VP<br>1958 Asst. VP<br>1959 Asst. VP       |                            |                                     |                                              |
| LeRoy R. Sturn.....        | 1957 Asst. T<br>1958 Asst. T<br>1959 Asst. T          |                            |                                     |                                              |
| Henrietta H. Gunsten.....  | 1957 Asst. Sec.<br>1958 Asst. Sec.<br>1959 Asst. Sec. |                            |                                     |                                              |
| Allen J. Schnetzer.....    | 1957 Comp.<br>1958 Comp.<br>1959 Comp.                |                            |                                     |                                              |
| Alan R. Morse.....         | 1957 D<br>1958 D<br>1959 D                            |                            |                                     |                                              |
| John G. Shattuck.....      | 1957 D                                                |                            |                                     | 1957 D                                       |
| Isidore J. Silverman.....  | 1957 D<br>1958 D<br>1959 D                            | 1958 D, P<br>1959 D, P     |                                     |                                              |
| Carroll D. Fearon.....     | 1958 VP<br>1959 VP                                    |                            |                                     |                                              |
| Roland M. Howell.....      | 1958 VP<br>1959 VP                                    |                            |                                     |                                              |
| Frank M. Folsom.....       | 1958 D<br>1959 D                                      |                            |                                     |                                              |

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*Officers and directors of Frank G. Shattuck Co. and wholly owned subsidiaries  
1957-1959, incl.—Continued*

|                           | Frank G.<br>Shattuck Co. | W. F. Schrafft<br>& Sons                              | Wallace & Co.                                   | Schrafft Sales                                  |
|---------------------------|--------------------------|-------------------------------------------------------|-------------------------------------------------|-------------------------------------------------|
| Walter A. McNeill.....    | 1957 D<br>1958 D         | 1957 P, D<br>1958 P, D                                | 1957 D<br>1958 D                                | 1957 D<br>1958 D                                |
| William O. Wallburg.....  |                          | 1957 VP, Cl., D<br>1958 VP, Cl., D<br>1959 VP, Cl., D |                                                 |                                                 |
| William V. Wallburg.....  |                          | 1957 D<br>1958 D<br>1959 D                            |                                                 |                                                 |
| William A. Silverman..... |                          | 1957 VP, D<br>1958 VP, D<br>1959 Exec. VP, D          |                                                 |                                                 |
| Earle Erickson.....       |                          | 1957 VP<br>1958 VP                                    |                                                 |                                                 |
| Ernest H. Schurian.....   |                          | 1957 T<br>1958 T<br>1959 T                            |                                                 |                                                 |
| Edgar H. Savage.....      |                          | 1957 D<br>1958 VP, D                                  |                                                 |                                                 |
| Samuel Sidd.....          |                          | 1957 D<br>1958 D, VP<br>1959 D, VP                    |                                                 |                                                 |
| Thomas E. Kneeland.....   |                          | 1958 VP, D<br>1959 VP, D                              |                                                 |                                                 |
| George F. Schrafft.....   |                          | 1958 D<br>1959 D                                      |                                                 |                                                 |
| Edward J. Murrman.....    |                          | 1959 VP                                               |                                                 |                                                 |
| Gerard E. Mulrahan.....   |                          | 1959 VP                                               |                                                 |                                                 |
| Herbert L. Bebar.....     |                          |                                                       | 1957 P, GM, D<br>1958 P, GM, D<br>1959 P, GM, D |                                                 |
| Edward A. Terry.....      |                          |                                                       | 1957 VP, D<br>1958 VP, D<br>1959 VP, D          |                                                 |
| John P. Joyce.....        |                          |                                                       | 1957 VP, D<br>1958 VP, D<br>1959 VP, D          |                                                 |
| George B. Newman.....     |                          |                                                       | 1957 T, D<br>1958 T, D<br>1959 T, D             |                                                 |
| Lawrence West.....        |                          |                                                       |                                                 | 1957 P, GM, D<br>1958 P, GM, D<br>1959 P, GM, D |
| Louis G. Best.....        |                          |                                                       |                                                 | 1957 T, D<br>1958 T, D<br>1959 T, D             |
| Thomas L. Shattuck.....   |                          |                                                       | 1959 D                                          | 1959 D                                          |

NOTE: Abbreviations used:  
 President=P  
 Vice President=VP  
 Treasurer=T  
 Secretary=Sec.  
 Comptroller=Comp.  
 Director=D  
 Clerk=Cl

*B. Schrafft's Sales Corporation*

4. Schrafft's Sales Corporation, a Delaware corporation, (hereinafter Schrafft's Sales), with its principal office at 133-34 36th Road, Flushing, New York, is not a manufacturer of the product line here involved, but sells the product line at wholesale, exclusively within the State of New York. In addition it sells toys, fountain specialties and novelties. Schrafft Sales sells to approximately 7,000 retail accounts located within the seven New York counties of Westchester, Nassau, Suffolk, New York, Bronx, Kings and Queens. Schrafft Sales'

total volume of business is about \$1,600,000 per year. It purchases and resells candy manufactured by Schrafft and Wallace, as well as other types of candy including Gardini chocolates, Phoenix candies, Minter bars, Callard & Bowser toffy and Greylock marshmallows. Approximately 80% of its sales volume is represented by candy manufactured by Schrafft.

5. Schrafft Sales, organized in 1939 (under the name Kantiko Inc.), is a wholly owned subsidiary of Shattuck and is successor to the wholesale jobbing business of the J. C. Schriner Co., a general confectionery jobber in New York City which went out of business in 1930. Its name was later changed from Kantiko Inc. to Shattuck Sales Company, and then to Schrafft's Sales Corporation.

6. The President, General Manager and operating head of Schrafft's Sales is Lawrence West, who has held that position for five years, and who has been employed by the Corporation since its incorporation in 1930. Prior to 1930, Mr. West had been employed by the preceding jobber, the J. C. Schriner Co. (p. 25). Mr. West, as the operating head of Schrafft's Sales, in fact runs Schrafft's Sales, acts as sales manager, and determines its sales policies, and the prices and terms upon which it sells its merchandise. Mr. West is not an officer of Shattuck but he keeps the president of Shattuck informed as to the overall financial situation of Schrafft's Sales, and consults with the Shattuck president about any capital requirements for refurbishing or plant improvement. No individual in Shattuck acts as liaison between Shattuck and Schrafft's Sales (p. 757). There is no evidence that Shattuck, or any of its officers or employees, either control or attempt to control the business operations or the sales policies or prices of Schrafft's Sales Corporation.

7. Schrafft Sales sells to all of the chain retail stores in its area which purchase Schrafft candy, including approximately eight or nine Walgreen drug stores, fifty Whelan drug stores, three Rexall drug stores, fifteen Grant variety stores, 150 Woolworth variety stores and four Newberry variety stores, at prices equivalent to 40% off the suggested retail price, plus 2% cash discount for prompt payment. The company has found it necessary to grant the 40% and 2% discounts to these retail outlets in order to meet the competition which it faces in selling candy and other products. The facts regarding the necessity for Schrafft Sales, Schrafft's and Wallace meeting the competitive prices in order to obtain and keep their candy business were testified to by the chain store candy buyers, called as witnesses by complaint counsel.

8. Some retail customers purchase Schrafft candy from Schrafft's Sales at a discount of 33 $\frac{1}{3}$ % from the suggested retail price, and a 2% cash discount for prompt payment.

Schrafft Sales' total sales to drug chains were as follows:

|                              | 1957     | 1958     |
|------------------------------|----------|----------|
| United Whelan Drug Corp..... | \$23,295 | \$22,672 |
| Walgreen Drug Co.....        | 13,568   | 15,560   |
| Rexall Drug Co.....          | 5,515    | 5,579    |
| Jaynet Drug Co.....          | 3,184    | 5,724    |
| Crown Drug Co.....           | 1,608    | 2,356    |

9. Schrafft's Sales employs about 57 persons, including nineteen salesmen. Two of these salesmen cover all of the chain store accounts to which Schrafft's Sales sells. The two salesmen who cover the chain store accounts are paid on a salary basis, while the other seventeen salesmen are paid on a commission of 7% of their sales. In most instances, Schrafft's Sales delivers directly to the individual retail store of a chain. However, deliveries to the Crown Drug Company are made to that company's central warehouse in Brooklyn, New York.

10. On page 28 of his proposed findings, complaint counsel admits, and the hearing examiner hereby finds and concludes, that the record does not support a finding that Schrafft Sales is engaged in commerce as "commerce" is defined in the amended Clayton Act.

*C. Wallace & Co.*

11. Wallace, founded in 1870, is engaged in manufacturing, at its plant in Brooklyn, New York, and selling certain types of candy and confectionery products, including boxed candy, directly to retail outlets such as candy stores and department stores through its own staff of nine salesmen. Wallace sells to about 4,000 retail accounts throughout the United States. During the period from 1957 through 1959, Wallace also sold a small volume of boxed candy to about 20 to 25 jobbers, including Schrafft Sales. In 1960 Wallace sold to about 35 jobbers, including Schrafft Sales.

12. Herbert L. Bebar, president of Wallace for approximately 5½ years, was vice president and general manager for the preceding four years. The business operations of Wallace are conducted by Mr. Bebar and the two vice presidents, Edward Terry in charge of production, and John Joyce in charge of sales. None of these men are officers of Shattuck. Mr. Bebar keeps the president of Shattuck informed as to the overall financial condition of Wallace, and consults with the president of Shattuck concerning any capital requirements for refurbishing and plant improvement. No individual in Shattuck acts as liaison between Shattuck and Wallace.

13. There is no evidence that Shattuck, or any of its officers or employees, either control or attempt to control the business operations, the sales policies, or the pricing practices of Wallace.

14. Wallace sells boxed candy to certain of its retail customers, principally department stores, at a 10% discount from its regular price to retailer (or the equivalent of a discount of 40% off the suggested retail price) because it has found it necessary to grant the additional 10% discount to meet the prices offered by its competitors (pp. 193-198, 881-900). Wallace sells boxed candy to its other retail customers at a 33 $\frac{1}{3}$ % discount off the suggested retail price. Wallace does not grant the additional 10% discount with respect to purchases of bulk candy.

15. In the regular course of business Wallace distributes to its retailer purchasers price lists for its products which include suggested resale prices to retail customers for its line of packaged candies. Wallace also attaches to its packaged candy printed tickets with suggested retail prices. During certain holiday seasons such retail price tickets may be omitted.

*D. W. F. Schrafft & Sons Corporation ("Schrafft")*

16. Schrafft manufactures, at its plant in Charlestown, Mass., and sells certain types of candy and confectionery products, including boxed candy, the product here involved. Other than the sales to Shattuck, all of the boxed candy sold by Schrafft is sold by a staff of from 40 to 50 territorial managers or salesmen, to approximately 600 wholesalers located throughout most of the United States. Almost all of these wholesalers are engaged in the wholesaling of tobacco products, cigarettes, cigars, and fountain syrups and appliances to retail outlets such as drug stores, tobacco shops, department stores, and similar retail purveyors. Four wholesalers who purchase and resell Schrafft's boxed candy testified in this case: Milhem Attea & Bros. (hereafter "Attea") in Buffalo, New York; Zutes, Inc. (hereafter "Zutes"), in Rochester, New York; Costello Bros. (hereafter "Costello") in Syracuse, New York; and Schrafft Sales in New York City.

17. In accordance with a long-standing policy of loyalty to its wholesalers, Schrafft has traditionally refused and still refuses to allow any retailers of its candy to by-pass the local wholesalers by buying boxed candy direct from the factory. Schrafft refers all inquiries or orders from retailers to the appropriate local wholesaler.

18. Schrafft distributes to its wholesalers printed price lists showing prices to the wholesalers, a recommended wholesale price from wholesalers to retailers, and a suggested retail price for sales of its boxed candy by retailers to consumers. In many, if not most, instances the retail price is preticketed on the package. The prices suggested for

sales by wholesalers to retailers represent a  $33\frac{1}{3}\%$  discount off the suggested retail price. Schrafft does not "fair trade" its products at any level of distribution.

19. Schrafft does not control the prices charged by its wholesalers to their retailer customers for Schrafft candy. The prices are quoted by the wholesaler, usually, as a percentage discount from the suggested retail price which Schrafft does publish.

20. I. J. Silverman, president of Schrafft since 1958, is the principal officer of the corporation. He carries on the business operations of Schrafft with the other Schrafft officers, none of whom are officers of Shattuck. Mr. Silverman keeps the president and the board of directors of Shattuck informed as to the overall financial condition of Schrafft (p. 23) and consults with the president and/or the board of directors of Shattuck concerning any extraordinary requirements for capital funds in excess of the amounts generated by ordinary depreciation allowances. No individual in Shattuck acts as liaison between Shattuck and Schrafft. Neither Shattuck nor any of its officers or employees either control or attempt to control the business operations or the sales policies or prices of Schrafft.

21. There is no evidence in this record of such control by Shattuck over its subsidiaries, Schrafft, Schrafft Sales and Wallace, as to indicate that the subsidiaries were mere tools of Shattuck. This record does not support a finding that the corporate identities of the Shattuck subsidiaries is a mere fiction, so as to hold Shattuck for any violation of subsection 2(a) of the Clayton Act, as amended, that may be proven against its subsidiaries. See *National Lead Company v. Federal Trade Commission*, 227 F. 2d 825, 828-829 (7th Cir 1955) reversed in part as to other issues in 352 U.S. 419 (1957); *H. J. Heinz Co., et al.*, 52 F.T.C. 1607 (1956); *Stokely-Van Camp, et al. v. FTC*, 246 F. 2d 458 (7th Cir. 1957); *Druggists Supply Corporation*, 52 F.T.C. 699, at 704-705 (1956); *Warren Petroleum Corporation*, 53 F.T.C. 268, 271-272, 282 (1956), and *Gummed Industries Assn.*, 55 F.T.C. 1409, 1411-1412 (1959).

22. In his proposed findings and conclusions complaint counsel admits and the hearing examiner hereby finds and concludes that the record "does not support a finding that respondent Frank G. Shattuck Company determines, directs, or controls the prices, terms and other policies upon which respondents W. F. Schrafft & Sons and Wallace & Co. deal with their customers" (see proposed conclusion No. 50 on page 28 of complaint counsel). The examiner finds and concludes that the complaint should be dismissed as to Shattuck.

*III. The Case Against Schrafft*

23. Complaint counsel seeks a cease-and-desist order against Schrafft on the "indirect purchaser" theory, even though the original complaint counsel did not draft his complaint on that theory. Paragraph Five of the complaint alleges:

In the course and conduct of their business in commerce, respondents are discriminating in price between different purchasers of their products of like grade and quality by selling to some purchasers at higher and less favorable prices than they sell to other purchasers competitively engaged in the resale of their products with the nonfavored purchasers.

24. This allegation in the complaint is not substantiated as to respondent Schrafft by reliable, probative and substantial evidence in this record. Schrafft sells its candy products only to wholesalers who in turn resell to retailers. Complaint counsel has not proven nor attempted to prove any price discrimination by Schrafft in favor of any of its wholesalers. Complaint counsel does not contend for price discrimination at the wholesale level but only at the retail level.

25. In order to prove price discrimination by Schrafft at the retail level, complaint counsel seeks to have the hearing examiner find that the retail sellers of Schrafft candy who purchase Schrafft candy from its wholesalers are indirect purchasers from Schrafft even though none buy their candy directly from Schrafft.

26. The "indirect purchaser" theory postulates:

If a manufacturer (Schrafft), even though not ostensibly, does in fact direct and control the sales and pricing practices of its wholesalers (Attea, Zutes and Costello), then the retail purchasers (Woolworth, Walgreen Drug, LoTempio Pharmacy, Stewart Drug, Saraceni Drug, LaSalle Pharmacy, Neisner Bros., McCrory's, Sarkus, Girard Pharmacy, United Whelan Drug, etc., etc.) from such wholesalers are indirect purchasers of Schrafft for the purpose of determining whether there has been a price discrimination in violation of § 2(a) of the Clayton Act. A retailer is nonetheless a purchaser because he buys indirectly, if the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys.<sup>3</sup>

<sup>3</sup> *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953); *General Motors Corp.*, 50 F.T.C. 54 (1953); *Electric Auto-Lite Co.*, 50 F.T.C. 73 (1953); *Whitaker Cable Corp.*, 51 F.T.C. 958 (1955); *aff'd* 239 F. 2d 253 (7th Cir. 1956), *cert. den.* 353 U.S. 938 (1957); *E. Edelman & Co.*, 51 F.T.C. 978 (1955), *aff'd* 239 F. 2d 152 (7th Cir. 1956), *cert. den.* 355 U.S. 941 (1958); *Thompson Products, Inc.*, 55 F.T.C. 1252 (1959); *Dentists' Supply Co. of N.Y.*, 37 F.T.C. 345 (1943); *General Foods Corp.*, 52 F.T.C. 798 (1956); *Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co.*, 129 F. Supp. 736 (D. Mass. 1955); *Klein v. Lionel Corp.*, 237 F. 2d 13 (3rd Cir. 1956); *American News v. FTC*, 300 F. 2d 104 (C.A. 2.) (1962); *Luxor Ltd.*, 31 F.T.C. 658 (1940); *Liggett & Myers Tobacco Company, Inc.*, 56 F.T.C. 221 (1959).

27. Complaint counsel seeks to establish Schrafft retailers as indirect purchasers because of (1) Schrafft's active participation in getting its products listed with the corporate chains, (2) the active participation of Schrafft salesmen in promoting the retail sales of Schrafft's candies, (3) the "domination" of the wholesaler's sales policies by Schrafft, and (4) Schrafft's rendition of other services to the retailer as well as the wholesaler in the marketing of its products.

*A. Schrafft's Participation in "listing" its Products with Chain Stores and Governmental Agencies*

28. A number of chain retailers such as F. W. Woolworth & Co., W. T. Grant Co., S. S. Kresge Co. and J. C. Penney Co., and a number of governmental agencies and instrumentalities such as the Veterans Administration, the Army & Air Force Exchange Service and the Navy Exchange Service do not permit their local outlets or buyers to stock or sell any merchandise or brands which have not first been "listed" with and approved for handling by the head office or chief buyer of the retailer or governmental agency. In order to secure a "listing" of its products with the retailers and agencies having such a requirement, a manufacturer must satisfy the chief buyer that the brand or product is adequate with respect to quality and salability, and must file with the chief buyer a detailed descriptive list of the various items comprising the manufacturer's line showing specifications, sizes, packaging, cost and suggested selling price. Samples are also submitted. If the chief buyer finds the product acceptable, the retailer or governmental agency then publishes and distributes to its various outlets, managers or local buyers a "listing" of the various items in the manufacturer's line which they are authorized to purchase and stock. Such a listing does not, however, require a local store manager to stock and sell the items listed, but merely authorizes him to do so. Schrafft seeks a listing by chain retailers and governmental agencies, in order to make this business available to the Schrafft candy wholesalers. Schrafft has not sought "listings" by Liggett Drug Co., United Whelan Drug Corp., Gray Drug Stores, Walgreen Drug Stores, Cunningham Drug Stores, Marshall Drugs, Read Drug & Chemical Co., Gallagher Drugs, Thrifty Drug Stores, Owl Drug Co., Dugan Drug Stores, Standard Drug Co. or Broward Drug & Surgical Supply Co., even though some of these retailers do in fact buy Schrafft's candy from Schrafft wholesalers.

29. These Schrafft wholesalers are not required by Schrafft to sell to the retailers or agencies with whom Schrafft's candy has been "listed". Several of the wholesalers choose not to sell to these retail outlets

in their area, with the result that Schrafft's candy is not carried in such stores.

30. Typical "listings" of Schrafft's candy with variety chain retailers are Commission's Exhibits 683 and 684, issued by the F. W. Woolworth Co. (p. 622, 633). These exhibits describe the approved items in the Schrafft line, and list the names and addresses of Schrafft wholesalers throughout the United States by geographic areas in which the particular Woolworth stores are located. The prices set forth in the listing are equivalent to a 40% discount from the suggested retail price of Schrafft candy, plus a 2% cash discount for prompt payment.

31. Most of the outlets of the variety chain stores which have "listed" Schrafft candy, actually buy Schrafft candy predominantly in "bulk", rather than the type of "boxed candy" which is involved in this proceeding. For example, in 1958 the three Woolworth stores in Syracuse, N.Y., purchased Schrafft candy in the total amount of \$7,385 from the wholesaler Costello, but only approximately 11% of this amount was "boxed candy". The three Grant stores in Syracuse purchased a total of \$2,269 of Schrafft candy from Costello, but only about 7% of this amount was "boxed candy". The two Kresge stores in Syracuse purchased a total of \$436 of Schrafft candy from Costello, but only about 4% of this amount was "boxed candy". The McCrory store in Syracuse purchased a total of \$39 of Schrafft candy from Costello, but only about 8% of this amount was "boxed candy" (CX 682B). A listing of Schrafft candy with the central buying office of the drug and variety store and department store chain, Woolworth, etc., etc., constitutes nothing more than official permission from the central buying office for the local store managers to buy the items listed on the terms stated in the listing. In practically every instance of national retail chains, the local store manager cannot purchase an item unless it is listed. Although the prices stated on a listing may result in some instances from negotiations between the central buying office and a representative of the Schrafft company, the local Schrafft jobber or wholesaler may or may not adhere to the terms set forth on the listing. If the local Schrafft wholesaler repudiates the terms stated in the listing, the wholesaler may, or may not get the business. In any event, the local Schrafft wholesaler is the person who ultimately determines the price at which he sells.

32. The practice of listing is a fact of life in modern corporate multiple unit operations, and nothing sinister or derogatory can or should be imputed to the listing practice. Listing does not connote price-fixing, price-cutting, nor discriminatory pricing practices. Schraffts' listing of its boxed candy with the central buying offices of corporate multiple unit chains does not make the individual units of

such chains, nor the chains themselves, the indirect customers of Schrafft. Without such listings Schrafft's real customers, its individual wholesalers, would not be able to sell to the individual units in the chain.

33. Complaint counsel suggested in his oral argument that Schrafft avoid the rationale of the "indirect purchaser" theory, attaching to its "listing" practices, by abandoning its present marketing procedures used since before the amendment of the Clayton Act—eliminating the wholesalers—and selling directly to the retailers. Enforcement of the Robinson Patman Act should not require abandonment of long-established marketing procedures unless a clear and undisputed case of illegality has been proven. Such is not proven in this record. And what of the 600 Schrafft wholesalers who make a profit from handling its candy? Shall these small businessmen be cut off from this source of revenue because of some misapplied theory of "indirect purchaser"?

#### *B. Activities of Schrafft Wholesalers*

##### *1. The Wholesaler Attea in Buffalo*

34. Milhen Attea & Bros. (hereafter referred to as Attea) is a general-line wholesaler of tobacco products, candy, appliances and other items in the Buffalo, New York area. Attea sells approximately 2,000 different items. Approximately 70–75% of Attea's total annual volume of business of \$5½ to \$6 million is in cigarettes; approximately 10% is in cigars; and approximately 10%–15% is in candy, including candy manufactured by Schrafft. Attea's total purchases of Schrafft candy during the year 1958 amounted to \$117,088, or approximately 2% of Attea's total business. Attea's total purchases of Schrafft candy amounted to \$122,313.72 in 1957. Attea does not buy Wallace candy. Attea employs between 32 and 36 persons, including eight salesmen, and sells to approximately 1,500–2,000 retail accounts within a forty-mile radius of Buffalo. It is estimated that somewhere between 200 to 400 of these retail accounts purchase some Schrafft candy. Attea salesmen are authorized to quote prices up to 40% off the suggested retail price of Schrafft candy in order to meet competition. Approximately 60% of the retail customers who purchase Schrafft candy from Attea are allowed 40% off the suggested retail price, and the remainder are allowed a 33⅓% discount. The 40% discount is granted by Attea to its retail customers without regard to whether they are part of a national or local chain, or are independent retailers. In addition to the 40% discount, Attea acquiesces in some customers, principally the chain stores, taking an additional 2% cash discount for prompt payment (pp. 365–368). All of the Niagara Falls, New York, retailers who

are specifically referred to in Paragraph Five of the complaint make all of their purchases of Schrafft candy from Attea; none of these retailers purchase Schrafft candy directly from Schrafft. Similarly, all of the other Buffalo, New York area retailers whose testimony has been stipulated in CX 737 purchase Schrafft candy directly from Attea, and not from Schrafft. Attea himself prices Schrafft candy to his customers without any indirect or direct influence or control by Schrafft.

35. Attea testified (p. 360), *inter alia*:

A. They could charge \$8.00 less 33%, less 40%, less 45%. It's up to my men how much discount he wants to give that retailer. And again (p. 370):

My man is on the road. They are privileged to meet competition and use their own judgment—unless it is a real serious problem. Then they discuss it with me. But I give the salesman a privilege to use their own judgment when they see fit to make the prices as they see fit.

Q. Now can they give this 40% off retail price on the demand of a retailer?

A. Yes. If they have good orders from them, yes.

*2. The Wholesaler Zutes In Rochester, N.Y.*

36. Zutes Inc. (hereafter Zutes) is a general line wholesaler of tobacco products, candy, health and beauty aids, novelties, toys, appliances and other items, in the Rochester, New York area. The wide variety of items sold by Zutes is illustrated by this wholesaler's extensive catalog. Approximately 35% of Zutes' total annual business of \$2,800,000 is in cigarettes, approximately 20%–25% is in cigars, and approximately 20% is in confectionery products, including Schrafft candy and candy manufactured by approximately 150 other candy firms. Zutes purchased \$111,920 of Schrafft candy during 1958, approximately 4% of Zutes' total volume. A substantial portion of Zutes' candy business is bulk candy which is not involved in this proceeding. During the year 1957, Zutes' total purchases of Schrafft candy amounted to \$97,631. Zutes does not buy Wallace candy.

37. Zutes employs about 28 persons, including nine salesmen, and sells to approximately 1,500 retail accounts in the seven counties around Rochester, New York. It is admitted that about 800 of these retail accounts purchase some Schrafft candy, and that about 250–300 of these retail accounts buy some Schrafft boxed candy. Zutes sells Schrafft candy to the Woolworth, Penney, Grant, Kresge, Newberry and Neisner stores and the Sibley-Lindsay & Curr department store in his area at prices equivalent to 40% off the suggested retail price, and an additional 2% cash discount for prompt payment. Zutes has found it necessary to grant the 40% and 2% discounts to these retail outlets in order to meet the competition of candy manufacturers (such as Deran Confectionery Co.) who sells directly to the retail outlets. Approximately

10% of the retail outlets which purchase Schrafft candy from Zutes Inc. receive a 40% discount from the suggested retail price, and the remainder of the retail customers receive a  $33\frac{1}{3}\%$  discount, and an additional 2% trade discount if they purchase Schrafft candy in unbroken cartons. The expected testimony of J. T. Gruden, E. J. Cornell, W. C. Burke and S. S. Shapiro of Rochester, New York, stipulated in this record, indicates that upon occasion they purchase Schrafft candy from Zutes in less than carton lots and consequently do not take advantage of the 2% trade discount. None of these Rochester, New York retailers purchase candy directly from Schrafft. They all purchase from Zutes.

38. Zutes prices Schrafft candy to his customers without any direct or indirect influence or control by Schrafft. Charles Zutes, Schrafft's Rochester wholesaler, testified (p. 457) :

Q. Now, so far as your pricing is concerned, on all of the products which you handle, is it not a fact that you yourself and your brothers determine the price which you are going to charge?

A. Oh yes.

Q. And that includes your Schrafft products that you handle?

A. It includes everything. If you will remember, I said, when Mr. Snyder asked me what my duties were, "My duties are to establish prices", and policies include prices. I have to determine the factors as to establishing our prices.

### *3. The Wholesaler Costello in Syracuse*

39. Costello Bros. (hereinafter "Costello") is a wholesaler of cigars, confectionery products and fountain syrups in the Syracuse, New York area. It sells hundreds of different items, including from 70 to 100 different brands of candy. Approximately 60%-75% of Costello's \$500,000-\$550,000 annual business is in cigars, and the remainder is in fountain syrups and confectionery products, including the candy manufactured by Schrafft. Isadore Rose, a 50% owner of Costello, testified (pp. 517-58, 581) that Costello purchased \$87,524 of Schrafft candy during 1958. This represented approximately 16% of Costello's total business. During the year 1957, Costello purchased \$81,559 of Schrafft candy. Costello purchases a small amount of Wallace candy, but has only two customers for this candy.

40. Costello employs six persons, including four salesmen, and sells to approximately 800 retail accounts within a radius of 25 miles around Syracuse, New York. It is estimated that about 250 or 300 of these retail accounts purchase some Schrafft boxed candy. Costello sells Schrafft candy to Daw Drug, Day Bros., W. T. Grant, S. S. Kresge, Liggett & Co., Lincoln Stores, Murphy 5 and 10, McCrory's, United Whelan, Walgreen and Woolworth stores, at a 40% discount from the

suggested retail price, and a 2% cash discount for prompt payment. The same 40% and 2% discounts are given to the Syracuse department store E. W. Edwards & Sons. The Neisner Bros. stores in Syracuse purchase Coca-Cola syrup from Costello, but do not purchase candy from Costello (p. 540). Costello grants these 40% and 2% discounts to meet the competition which it faces in selling candy and other products. Other purchasers of Schrafft candy from Costello receive a 33⅓% discount and a 2% cash discount for prompt payment. Costello's prices are approximately 10% higher to its customers who purchase candy in quantities of less than a full carton. For example, Costello charges \$8.00 for a carton of six one-pound boxes of Schrafft Gold Chest candy, or the equivalent of about \$1.33 per box, but charges \$1.50 per box for any purchases of this candy in quantities of less than a full carton of six. The suggested retail price for each one-pound Gold Chest box of candy is \$2.00.

41. The expected testimony of Joseph G. Krassenbaum, Ephraim M. Bodow, Bernard J. Carey, Pat Vitacolonna, Richard T. Byrnes, Abraham Meyerson, Alexander Edelman, Earl Rothschild, and Henry A. Panasci has been stipulated (CX 737, pp. 20-31). All of these are Syracuse, New York area retailers who sell Schrafft candy. Schrafft does not have any direct or indirect influence or control over the prices these retailers pay to Costello for Schrafft candy. All of these retailers purchase Schrafft candy directly from Costello. At least one (Krassenbaum) buys less than a carton at a time, and consequently pays Costello the less-than-carton price. Schrafft neither directs, controls nor influences the prices which these or any other retailers pay Costello for Schrafft candy.

42. Isadore Rose, one of the owners of Costello, testified (p. 575) :

Q. Mr. Rose, you charge your customers what you want to for the products you sell them, do you not?

A. Oh, sure, I make exceptions every day in the week.

Q. And that is true with regard to all the products that you sell?

A. Sure. A customer tells me "I can buy Coca-Cola for such-and-such a price, or Blackman Syrups". I'll either meet it or I'll lose the business. Consequently I'll meet it.

Q. And consequently that is true with regard to Schrafft products?

A. Absolutely.

*C. Activities of the Schrafft Salesman in the Buffalo and Rochester Areas*

*1. Theodore Zymanek*

43. Theodore Zymanek has been for about five years Schrafft's sole sales representative and "Territorial Manager" in Western New York

State including Rochester, Buffalo, Niagara Falls, and a small portion of Pennsylvania, including Bradford and St. Mary's. His job is to sell Schrafft candy to the thirteen wholesalers in his territory. Mr. Zymanek does not sell Wallace candy. He makes his headquarters in Buffalo, New York, and endeavors to spend Friday of each week calling upon the Buffalo wholesaler, Attea. He endeavors to call upon the Rochester wholesaler, Zutes, for one or two days every second week. He makes it a point to see the other eleven wholesalers in his territory at least once every four weeks, and plans to call on a jobber every day of the week.

44. Mr. Zymanek travels approximately 30,000 miles per year on business. When he calls upon a wholesaler he tries to make adjustments for unsalable goods; attends meetings of the wholesalers' salesmen to discuss new items and advertising drives; takes inventory of the wholesaler's stock of Schrafft candy; confers with the wholesaler or the wholesaler's buyer concerning new orders for Schrafft candy; and writes up such orders. In such time as remains after calling upon wholesalers Mr. Zymanek observes retail market conditions for Schrafft candy by calling upon retailers. Sometimes he calls on retailers alone, and at other times he is in the company of one of the wholesalers' salesmen. Mr. Zymanek may call upon retailers who do not handle Schrafft candy (*i.e.*, Lee Drugs) to observe the retailer's stock and displays of packaged candy. Occasionally, Mr. Zymanek may spend an entire day accompanying one of the wholesaler's salesmen in calls on the wholesaler's retail customers. Whenever Mr. Zymanek accompanies a wholesaler's salesman, the latter sells and takes orders on the entire general line of items which the wholesaler carries, which may include Schrafft candy, other brands of candy, tobacco products, etc. If Mr. Zymanek makes calls upon retailers alone he later turns over to the wholesaler, or to the wholesaler's salesman who services that particular retail account, any order for Schrafft candy which he may have obtained.

*2. E. P. Costello, Jr.*

45. E. P. Costello, Jr. (who has no connection with the Costello Bros. who are the Schrafft wholesaler in Syracuse), has been the sole Schrafft Syracuse area salesman and "Territorial Manager" for about five years, serving the area from Malone, New York, near the Canadian border, to the southern part of New York State, including Elmira and Binghamton, New York. Mr. Costello's job is to sell Schrafft candy to the sixteen wholesalers who are located within his territory. Mr. Costello resides and makes his headquarters in Syracuse, New York. Mr. Costello travels about the same mileage on business per year (30,000) as

does Mr. Zymanek. He performs his duties for Schrafft in the Syracuse area in substantially the same manner that Mr. Zymanek performs his duties in the Buffalo area. Messrs. Zymanek and Costello Jr. were required to, and did send in to the Schrafft main office very detailed reports of all of their activities, including a listing of the wholesalers and retailers upon whom they called, and any orders which may have been given to them for retransmittal to the wholesaler. The preparation and making of such reports by salesmen is usual and customary in all well-run sales organizations. Such facts do not add any materially significant evidence to support complaint counsel's charge that Schrafft retailers were indirect purchasers from Schrafft, even though their prices to the retailer are fixed by the wholesaler. Although the evidence demonstrates and the examiner finds that Messrs. Zymanek and Costello employ all the usual and accepted techniques of promoting vigorously the sale of Schrafft candy, the examiner also finds that neither Zymanek nor Costello control or influence, either directly or indirectly, the prices at which the Schrafft wholesalers resell Schrafft boxed candy to the retailers. Evidence in this record shows, and the examiner finds, that representatives of other products which Schrafft's wholesalers sell function as salesmen for their products, in substantially the same way that Schrafft salesmen do—attending the wholesaler sales meetings—inventorying stock—writing up orders—making appointments—calling on the retail trade alone or with the wholesaler's salesmen—attempting to generate consumer interest in their products—surveying the market, etc. (see Zutes testimony p. 453), *et seq.* This is what any alert and aggressive salesman for any product sold through wholesalers would do and be expected to do. Nevertheless, as far as the pricing of Schrafft's boxed candy is concerned, each of the wholesalers—Attea, Zutes and Rose, and Schrafft's officers—testified, and the examiner finds, that the wholesaler is the final and sole authority in establishing pricing policies and carrying out pricing practices. Neither Mr. Zymanek nor Mr. Costello influences the pricing directly or indirectly.

#### *D. Corporate Chains' Purchasing Practices*

46. Complaint counsel has introduced the testimony of Samuel Garrellick, the chief candy buyer for United Whelan Drug Stores (p. 594), William C. Strom, candy buyer for F. W. Woolworth (p. 621), Tudor Bradley, merchandise controller for W. T. Grant Company (p. 651), Alva Elliott, candy buyer for W. T. Grant Company (p. 662), and Edwin Fox, candy buyer for J. C. Penney. What these buyers testified is summarized below and constitutes a finding of fact.

47. The expected testimony of Joseph E. Wisniewski, the chief candy buyer for the Walgreen Drug Chain, is stipulated in CX 737, page 47.

48. The testimony of these candy buyers fails to prove or to supply a link in the chain of proof, that the retailer of Schrafft boxed candy is an indirect purchaser from Schrafft.

*1. United Whelan Company*

49. The United Whelan Company operates a chain of approximately 120 retail drug stores, and provides wholesale services for approximately 500 or 600 Whelan "agency" retail drug stores. The 120 United Whelan stores sell approximately \$150,000-\$160,000 worth of boxed candy per year. About \$25,000 or 16% is Schrafft boxed candy, and the balance of the boxed candy sold is Whitman, and Page & Shaw (p. 619). United Whelan retail drug stores do not sell bulk candy. On the purchase of all boxed candy they receive a discount of at least 33 $\frac{1}{3}$ % and 10% (or the equivalent of 40%) from the suggested retail price. Whelan store managers purchase Schrafft candy from the Schrafft wholesaler in their particular geographic location, except that the sixty Whelan stores in metropolitan New York purchase Schrafft candy from Schrafft's Sales. Schrafft Sales is paid directly for the candy purchased from it, and the local Schrafft jobber is likewise paid directly for candy purchased from him. The individual store handles its complaints about Schrafft's candy directly with the local wholesaler or jobber from whom it purchases.

*2. F. W. Woolworth Co.*

50. The F. W. Woolworth Company (hereinafter "Woolworth") operates a chain of approximately 2,000 retail variety stores in the United States which sell drygoods, hosiery, hardware, novelties, toys, stationery, notions and candy, including both boxed candy and bulk candy. About 200 of these stores are within metropolitan New York. Woolworth's total annual sales volume of candy is approximately \$51 million. Woolworth purchases candy from approximately 400 different candy manufacturers, and "listings" are issued by the Executive Office of Woolworth with respect to each of these manufacturers. All Woolworth candy is purchased directly from the manufacturer except Schrafft candy, which is purchased from wholesalers. The Woolworth witness could not determine with any degree of accuracy the amount of Schrafft candy sold by the Woolworth stores, since each individual store manager purchases it from the 600 separate Schrafft wholesalers. For the same reason, there appeared to be no way to determine accurately the number of Woolworth stores which actually

do purchase Schrafft candy. It was estimated that a majority of Woolworth stores handle it. A comparison of the volume of Schrafft candy sold by Woolworth (CX 21, in camera), with Woolworth's \$51 million total candy sales volume, makes it apparent, and the examiner finds, that Schrafft candy represents a very small proportion of the total Woolworth candy sales. This includes Schrafft bulk candy as well as the boxed candy—the product here involved. Approximately 85% or 90% of the Schrafft candy purchased by the Woolworth stores is "bulk" candy, rather than the boxed candy involved in this proceeding.

51. Mr. William C. Strom, the chief candy buyer for Woolworth, and the individual responsible for issuing "listings" on candy to the Woolworth stores, deals with approximately 400 manufacturers of candy who sell directly to Woolworth. Some of these 400 manufacturers have candy comparable to the Schrafft line. They include, among others, Voneiff Drayer, Dewitt P. Henry, Derand, E. J. Brach, Sisco, Hamilton, Page & Shaw, Brown & Hollis, and Candy Cupboard. Woolworth purchases directly from all of these manufacturers, except Schrafft, at roughly comparable prices, with an average discount of around 40% from the suggested retail price of the candy for the pre-ticketed boxed candy.

### *3. W. T. Grant Company*

52. The W. T. Grant Company operates a chain of approximately 850 retail stores in 44 States, selling general merchandise, including such items as enameled ware, hardware, appliances, notions and candy. Grant operates about six stores in New York City. The 850 Grant stores' total volume of candy sales is between \$15 million and \$16 million per year, of which it is estimated that roughly \$150,000 to \$200,000, or about 10%, is represented by candy manufactured by Schrafft.

53. Alva Elliott, chief buyer of candy, cookies and tobacco for Grant, is responsible for issuing "listings" on candy to the Grant stores.

54. Grant purchases candy from about 300 or 400 different candy manufacturers, and "listings" have been issued by the executive office of Grant with respect to each of these manufacturers. Grant purchases its boxed candy directly from the manufacturer with the sole exception of Schrafft boxed candy, which is purchased from Schrafft wholesalers.

55. Somewhere between 200 and 400 of the Grant stores carry some Schrafft candy, but some stores with the largest candy sales volume do not handle any Schrafft candy.

56. Individual Grant store managers order and purchase Schrafft candy from the Schrafft wholesaler in their particular merchandising areas.

57. Approximately 2% or 3% of total candy sales is boxed candy. The remainder consists of bulk candy, candy bars, nuts, chewing gum, etc. Most of Grant's purchases of Schrafft candy is of bulk candy. Manufacturers of boxed candy who sell directly to Grant include a number which have lines comparable to Schraffts'. Those manufacturers include Whitman, New England Confectionery Co., Bunte (before it went bankrupt), Hershey, and others. They sell boxed candy to Grant at 40% off the suggested retail price. This is the same price at which local Schrafft wholesalers sell to Grant. There are so many candy suppliers that Grant does not find it necessary to bargain or negotiate with respect to prices and terms. If a local Grant manager is unable to purchase Schrafft candy at the 40% discount price from the local wholesaler, he will not buy Schrafft merchandise (p. 688). Several different Schrafft wholesalers who refused the 40% discount lost the business. As a result of not getting the 40% discount from some Schrafft wholesalers, Grant did not place any of its 1961 Easter candy orders with Schrafft wholesalers.

*4. J. C. Penney*

58. The J. C. Penney Co., Inc., operates approximately 1,690 retail stores in the United States, of which approximately 80 have candy departments. None of its stores in the New York City metropolitan area have candy departments. Penney sells over \$3.5 million worth of candy a year, of which less than 5% is boxed candy.

59. Edwin Fox, chief candy buyer for Penney, is responsible for issuing "listings" on candy to the Penney stores. Penney discontinued listing Schrafft candy on May 7, 1959 and insofar as Mr. Fox was aware, only one Penney store has continued to purchase Schrafft candy since that date—the Buffalo, New York store, which purchases Schrafft candy from Attea. Even when Penney did have a listing for Schrafft candy, the Penney stores did not purchase any significant amount of Schrafft boxed candy, according to Mr. Fox's best recollection. Penney purchases candy from about 75 or 80 different manufacturers, and listings have been issued to each of them (pp. 714–715). Boxed candy is purchased directly from the manufacturer (p. 717), with the sole exception of such Schrafft candy, if any, as an individual Penney store may purchase from Schrafft wholesalers, even though Schrafft candy is no longer "listed". Many manufacturers sell directly to Penney lines of boxed candy comparable to the Schrafft line. These include Martha Washington, Mrs. Stevens, Cresca, and Brown & Haley. Penney pays these manufacturers from 40% to 43% off the suggested retail price. At the time of the hearing in this case, Penney had also received, but

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had not yet acted upon, an offer from Stephen F. Whitman Company to sell boxed candy at 40% off the suggested retail price.

### 5. Walgreen Drug Stores

60. Walgreen Drug Stores operates approximately 451 retail drug stores in the United States. Joseph E. Wisniewski is the chief candy buyer for Walgreen. Representatives of Schrafft do not seek to have Walgreen issue a "listing" on Schrafft candy. Walgreen's Chicago, Illinois, warehouse has purchased Schrafft candy from P. J. Rubey Inc., the wholesaler handling Schrafft candy in the Chicago area in the following quantities:

|      |       |             |
|------|-------|-------------|
| 1957 | ----- | \$75,375.87 |
| 1958 | ----- | 100,999.71  |
| 1959 | ----- | 57,202.78   |
| 1960 | ----- | 93,417.51   |

Most of the Walgreen Drug Stores handle Schrafft boxed candy. Sales of Schrafft candy to the Walgreen stores located outside the Chicago area are made to the individual Walgreen stores by local jobbers. The purchases by Walgreen's Chicago warehouse represent about 40% of the total volume of Schrafft candy handled by the Walgreen stores. Mr. Wisniewski's office lists Schrafft boxed candy at "retail less 33½% and 10%". This discount was in effect prior to Mr. Wisniewski's becoming candy buyer. Mr. Wisniewski believes that the Walgreen stores purchase Schrafft candy from the Schrafft wholesalers at the equivalent of 40% discount from the suggested retail price, plus a 2% cash discount for prompt payment.

61. Walgreen purchases Schrafft boxed candy directly from Schrafft wholesalers. No significant legally operative fact about the Walgreen handling of Schrafft boxed candy distinguishes the situation particularly from United Whelan, Woolworth, Grant and Penney handling of the Schrafft boxed candy line.

### 6. S. S. Kresge Co.

62. Ralph P. Horner (p. 723), assistant regional manager of S. S. Kresge Company, was subpoenaed by complaint counsel even though Earl Schmoyer was its chief candy buyer at the time. The S. S. Kresge Company operates approximately 790 retail variety stores in the United States, including about 187 in the New York region. Earl Schmoyer is the chief candy buyer for Kresge, and is the individual responsible for issuing "listings" on candy to the Kresge stores (p. 725). The individual Kresge store managers are not authorized to purchase any candy or other merchandise which has not been listed (p. 725),

and are not authorized to purchase on any terms other than those stated in a specific listing (p. 727). Nothing in Mr. Horner's testimony justifies a conclusion other than that the Kresge listing procedure does not vary in any legally significant material respect from the procedures of the other chain stores whose chief candy buyers also testified. The testimony of these buyers in many respects was repetitious, cumulative, and nothing more than a rehash of the testimony of George M. Crouse (p. 137 *et seq.*), Sales Control Manager for Schrafft and its assistant Sales Manager from 1948 until 1959.

63. The hearing examiner hereby finds and concludes that Schrafft has neither directly nor indirectly discriminated in price between different purchasers of its boxed candy of like grade and quality. It is undisputed that Schrafft's selling and pricing procedures under which it sells its boxed candy exclusively to jobbers or wholesalers has been in continuous use prior to the 1936 amendments to the Clayton Act. There is no discrimination in price by Schrafft in selling to these wholesalers or jobbers. Complaint counsel has not alleged, nor has he attempted to prove, that Schrafft does discriminate in the price at which it sells to wholesalers or jobbers. It further appears that Schrafft is the only manufacturer of boxed candy (the product line here involved) which still does sell its boxed candy to jobbers and wholesalers, and not directly to retailers. The Schrafft wholesalers and jobbers who testified in this record stated unequivocally that Schrafft does not, directly or indirectly, influence or control their pricing of Schrafft's candy to the retailer. The differences in the prices at which the wholesalers or jobbers sell to the retailers are dictated by many factors, which include among them (a) the necessity of meeting competition and the demands which must be met to keep the business, (b) the size of the account, (c) the promptness with which the retailer pays his bills and (d) whether the retailer buys in carton lots, or less-than-carton lots. The wholesalers probably take into account also the retailer's purchases of the other products which the wholesaler sells, such as cigars, tobacco, cigarettes, novelties, chewing gum, nuts, bulk candy, appliances, etc., etc., and other factors related to the retailer's overall business relationship with the wholesaler.

64. There does not appear to be any § 2(a) proceeding where a cease-and-desist order has issued based upon a marketing system such as the one under attack here. In *Kraft-Phenix*, 25 F.T.C. 37 (footnote 3) *supra*, the complaint was dismissed. In *Champion Spark Plug Co.*, 50 F.T.C. 30, a § 2(a) case, the manufacturer had two marketing channels, sold a substantial number of its spark plugs through distributors, but at the same time made substantial sales to large fleets of motor trucks or buses; made agreements with automobile manufac-

turers obligating the automakers to purchase from respondent their entire requirements of spark plugs for a specified term; used two types of agreements with its distributors; and otherwise directly controlled the details of several differing distribution systems, which resulted in competing sellers buying at different prices.

65. In *Electric Auto-Lite Company*, 50 F.T.C. 73, the manufacturer discriminated in the prices at which it sold spark plugs as between (a) direct purchasers, (b) direct purchasers and indirect purchasers, and (c) between spark plugs sold as original equipment and spark plugs of like grade and quality sold for replacement. No discrimination by the manufacturer has been alleged or proven in the instant case. In *Auto-Lite* as in *Champion*, the manufacturer was operating more than one selling system, which also had separate pricing systems. The same is applicable to *General Motors Corporation*, 50 F.T.C. 54. In *Whitaker Cable*, 51 F.T.C. 958 (1955) *aff'd*, 239 F. 2d 253, 7th Cir. (1956) *cert. den.* 353 U.S. 938 (1957), another automotive-parts case, purchasers from the manufacturer were of more than one classification: *i.e.*, Warehouse Jobbers, Group Buying Jobbers, Wholesale Distributor Jobbers, and Private Brand Customers. The opinion found, *inter alia* (p. 962), "All of said private brand purchasers sold to jobbers and direct to retail dealers and to this extent were in competition with respondent's direct and indirect purchasers hereinabove described." In the instant case there is only one class of purchaser from the manufacturer—the wholesaler or jobber.

66. *E. Edelmann & Co.*, 51 F.T.C. 978; 239 F. 2d 152, another automotive-parts case, found that respondent sold its products to some 3500 to 4000 purchasers, of which approximately 40 were classified as warehouse distributors, 15 to 20 as private brand accounts, six as cooperative buying groups, fifty as industrial accounts, and the remainder as automotive jobbers who either buy from petitioner's distributors or from petitioner direct (239 F. 2d 153). "The price discriminations which were found to be unlawful discriminations resulted from the application of a 20% discount from a distributor's net price on purchases of petitioner's brass line and 15% on the glass and brake lines."

67. None of the features of *Edelmann's* selling and pricing procedures which were found unlawful by the Commission and the court are present in *Schrafft's* selling and pricing procedures.

68. *Thompson Products Inc.*, 55 F.T.C. 1252, another automotive-parts case, also involved more than one selling and pricing procedure by the same manufacturer. Its distributors were automotive-part wholesalers who annually executed distributor franchise agreements, and were served through respondent's replacement

division. The jobbers were wholesalers signing jobber franchise agreements which required them, inter alia, to maintain an average minimum dollar inventory on certain lines of Thompson merchandise. The prices at which Thompson sold its automotive parts to various vehicle manufacturers were substantially lower than those received by it for parts of like grade and quality purchased by Thompson's independent distributors and jobbers. The Thompson's selling and pricing procedures, like all the other automotive-parts cases, are so unlike the Schrafft selling and pricing procedures as to furnish no factual basis for comparison.

69. In *Dentists Supply Co. of New York*, 37 F.T.C. 343, the supply company manufactured and sold artificial teeth to (a) wholesale dealers known as dental supply houses, (b) to dental laboratories, and (c) to dentists. There again the manufacturer sold through three separate distribution channels, unlike Schrafft, which sells only to wholesalers or jobbers. In *Dentists Supply* the Commission found that the respondent discriminated in price among different customers to whom it sold directly, and who were in competition with each other on the same level of distribution. A volume discount was also involved in this case. Neither the facts, nor the law enunciated by the Commission, in *Dentists Supply* are applicable to the Schrafft situation.

70. In *General Foods Corporation*, 52 F.T.C. 798, respondent was charged with violating § 2(a), § 2(d), and § 2(e) of the Clayton Act, as amended. Respondent sold its products to institution wholesalers, to "Institution Contract Wagon Distributors", to wholesalers dealing exclusively in institution products, to wholesalers who dealt in both institution and grocery-pack products, and to numerous direct buying purchasers who operate for the feeding establishments. Its grocery-pack products were sold to wholesalers who resell to retail grocers, to chain stores, to company commissaries and others. *General Foods'* marketing system in no way resembled nor can it be equated to Schrafft's marketing system. At page 813 the hearing examiner held:

Under the doctrine recognized in Commission cases and accepted by the courts, it is possible to consider a customer's customer as a "purchaser" within the meaning of § 2(a) if in fact the original seller exercises such a degree of control over sales by its direct customer that the latter's sales are essentially sales by the original seller. However, the decided cases disclose no common requirement, the absence of which would fail to establish an indirect customer of a manufacturer to be a "purchaser" from such seller. No case goes so far as to hold that solicitation of orders by a respondent manufacturer and turning over those orders to an intermediate distributor for billing and handling is sufficient to establish a seller-purchaser relationship between the manufacturer and the persons from whom such orders were procured. The fact that respondent's

representatives may have suggested billing prices in a few instances does not indicate a policy or practice on the part of the respondent, and in the absence of further facts, there is no basis in the present record for a finding that the users who thus procure respondent's merchandise fall within the "purchaser" category envisioned by § 2(a) of the Act.

On the whole record, the conclusion is reached that there is insufficient reliable, probative and substantial evidence to support the conclusion that any of the users of respondent's products who procure those products indirectly through intermediate sources of supply are "purchasers" from respondent within the meaning of the Act.

71. *Luxor, Ltd.*, 31 F.T.C. 658 (1940), a § 2(e) proceeding, involved the sale of toilet articles and cosmetics to retail dealers. Respondent sold its products to retail druggists and jobbers. Respondent, by contracts, fixed the resale price of its products in every State of the Union where the law permitted it to do so. In that case respondent offered its popular "Junior Size" 10¢ package only to novelty, variety, syndicate and 5 and 10¢ stores and refused to furnish such "junior" size to competing purchasers [retail druggists] of the identical products. In issuing its cease-and-desist order, the Commission relied upon its finding that Luxor's salesmen called on retail druggists who did not receive direct shipments from Luxor, and, Luxor's pricing policies on its products were maintained as to retail druggists, who were not under contract, and who purchased indirectly through drug jobbers, in the same manner in which the prices were maintained, as to druggists who were under contract to maintain prices and who received direct shipments from Luxor.

72. In his book, *The Price-Discrimination Law*, Corwin Edwards comments as follows (p. 627) :

The cases involving disproportionate services have included proceedings, such as that against Luxor, in which the Commission enforced the use of a channel of distribution that the seller had vainly sought to employ before the case, the use of which was found to be undesirable by the distributors themselves after the order. The cases against disproportionate advertising allowances made it difficult if not impossible to engage in selective advertising whether or not there was a harmful competitive effect. The cases concerned with price discrimination included some, like the automobile parts cases, in which the Commission perceived injury in the secondary line of commerce even though the disfavored customers were unanimous that they had not been injured; and some, like the rubber stamp cases, in which disorderly price competition among small sellers was held to be seriously damaging to competition among them. In policy toward discrimination, the comprehensive sweep that was given to the concept of injury determined the impact of the statute; for cost justification was so difficult that it could seldom be successfully invoked, and the statutory meaning of good faith in meeting competition was so far from ordinary business conceptions of such good faith that this type of defense held innumerable snares for the unwary. A considerable portion of the Commission's effort was spent in proceedings

among small concerns directed against injuries to competition that had nothing to do with the big buyer or the predatory seller. Consequently, the statute has had an unnecessarily harassing effect on business conduct. Moreover, in applying the law in this way, the Commission was diverted from the substantial problems of power, which were the principal concern of the legislation.

73. In *Liggett & Myers Tobacco Company, Inc.*, 56 FTC 221, (1959), a § 2(d) proceeding, the hearing examiner discussed at length the "indirect customer" concept, and analyzed *Dentists' Supply Company, Luxor Ltd., Kay Windsor Frocks, Inc., Kraft-Phenix, General Motors*, and *Electric Auto-Lite*. On appeal from that decision, Commissioner Tait, *inter alia*, stated:

The examiner additionally found, among other things, that § 2(d) was not shown to have been violated through payments made to some customers such as vending-machine operators and not made on proportionately equal terms to certain retailers [the so-called "indirect customers"] purchasing respondent's cigarettes from wholesalers or jobbers, for the reason that such retailers were not shown to be customers of the respondent within the meaning of § 2(d).

74. Complaint counsel did not appeal from the hearing examiner's finding concerning "indirect customers", and the only reference to it in the Commission's opinion is cited above.

75. In his opinion, in *Liggett & Myers*, the hearing examiner, *inter alia*, had stated (p. 233):

The cases in which it has been decided that those who procured a respondent's products through an intermediate source were actually customers of, or purchasers from, such respondent within the meaning of the Clayton Act are not numerous, and most of them have involved § 2(a) or § 2(e) violations. All have been decided upon the principle that where such purchases were so made, *the respondent must have exercised such a degree of control over the transaction that the sales were actually sales by respondent.* (Emphasis supplied.)

76. *K. S. Corp. v. Chemstrand Corporation*, 198 F. Supp. 310, (S.D.N.Y. 1961) cited by the court in *American News, infra*, was a private action under § 2 of the Clayton Act as amended. What was before the court was a motion to dismiss the complaint. In ruling on the motion the court said, *inter alia*:

The ultimate determination as to whether sufficient control exists to make the plaintiff a purchaser within the meaning of the Act will depend to a large extent on the proof adduced as to the number and quality of the contacts between Chemstrand, the plaintiff, and Fabrex. A reading of the above-cited cases indicates the vague line that separates a covered, indirect purchaser and one who is not. It would appear that *each case must be decided on its own facts.* \* \* \* (Emphasis supplied.)

77. *American News Company v. FTC*, 300 F. 2d 104, (CA 2 1962), was a proceeding by the Federal Trade Commission under § 5 of the Federal Trade Commission Act to reach practices allegedly viola-

tive of § 2(d) of the Clayton Act as amended. In its opinion, the Second Circuit stated (p. 107) :

The Federal Trade Commission found that in every instance the national publisher controls the prices and terms of sale throughout the distribution process, so that neither the national distributor nor the wholesaler has any power to set prices, terms, or conditions of sale to retailers of the magazine. Moreover, since each publication bears a cover price chosen by the publisher, the publisher effectively sets the retail price as well. \* \* \*

78. Continuing (p. 109) :

If the manufacturer deals with the retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a "customer" or "purchaser" of the manufacturer if the latter deals directly with the retailers and *controls the terms upon which he buys* (quoting cases). (Emphasis supplied.)

79. The testimony of Schrafft employees, the testimony of the wholesalers themselves and all the other incidents of Schrafft's sales procedures specifically negate a finding that "the manufacturer \* \* \* controls the terms upon which he [the retailer of Schrafft's candy] buys".

80. At the argument on the proposed findings, the examiner requested complaint counsel to specify the things which Schrafft is presently doing which complaint counsel would have Schrafft cease doing. His response, in substance, was that he would have Schrafft sell directly to the retailer. A marketing practice which has been employed for more than fifty years, and which directly benefits the wholesalers who are part of it, must not, of course, be lightly ordered cast aside. § 2(a) does not empower the Commission to order a manufacturer to desist from any marketing procedure unless it is proven that the manufacturer, either directly or indirectly, discriminates in price between different purchasers of commodities of like grade and quality. Such proof being absent in this record as to the Schrafft sales to its customers, it must be found that a violation of § 2(a) does not stand proven in this record. Moreover, the proof in this case does not establish the fact that Schrafft has exercised control over sales by its wholesalers to their retailers to such an extent as to justify a finding that Schrafft "controls the terms upon which he [the retailer] buys" (*American News Company v. FTC, supra*).

IV. *The Case Against Wallace*

81. Wallace, unlike Schrafft, sells its boxed candy directly to retailers by means of its own sales staff. Wallace does sell goods of like grade and quality at differing prices to different retailers for resale.

82. In Buffalo, Wallace granted an additional 10% discount on boxed candy to Adam Meldrum & Anderson Co. Inc., Hens & Kelly,

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and Wm. Hengerer department stores. During the years 1958 and 1959 such discounts were:

|                                       | 1958     | 1959     |
|---------------------------------------|----------|----------|
| Adam Meldrum & Anderson Co. Inc.----- | \$103.20 | \$162.98 |
| Hens & Kelly-----                     | 4.01     | 26.24    |
| Wm. Hengerer Co.-----                 | 46.10    | 59.90    |

(CX 738).

83. Wallace did not grant the 10% discount on boxed candy to Gertrude Shalala Candy Shoppe, William E. Mathias Co., or Wm. A. Jepson Inc. These latter retailers' total purchases of Wallace packaged candy of the type purchased by the department stores were:

|                       | 1958     | 1959    |
|-----------------------|----------|---------|
| Gertrude Shalala----- | 0        | \$61.52 |
| Wm. E. Mathias-----   | \$124.00 | 187.68  |
| Wm. A. Jepson-----    | 754.32   | 840.56  |

A 10% discount on these purchases comparable to the discount granted to the department stores would have amounted to total additional discounts as follows:

|                       | 1958    | 1959   |
|-----------------------|---------|--------|
| Gertrude Shalala----- | 0.00    | \$6.15 |
| Wm. E. Mathias-----   | \$12.40 | 18.77  |
| Wm. A. Jepson-----    | 75.43   | 84.06  |

84. It has been stipulated (CX 737) that the proprietors or owners of Gertrude Shalala Candy Shoppe, Wm. E. Mathias, and Wm. A. Jepson would, if called, testify (over a timely objection that the opinion portion of the testimony constitutes conclusions of fact and expressions of opinion) that:

They compete in the resale of Wallace boxed candy with the downtown department stores Adam Meldrum & Anderson Co., Inc., Hens & Kelly, and Wm. Hengerer Co.;

There is "keen competition in the sale of candy products", and in their opinion, if a competitor were able to purchase Wallace boxed candy at a 10% lower price than they, this would adversely affect their business in that such competitor would have a relatively greater overall profit margin on such candy, which extra margin could be used to improve his facilities, advertise his products, or otherwise improve his competitive position;

The two Gertrude Shalala Candy Shoppes "take advantage of all trade discounts because such discounts are extremely important in the computation of net profit";

They take advantage of all cash discounts when possible, but no cash discounts have been taken on Wallace products during the past year;

The Wm. E. Mathias Co. Inc. store and cigar and candy stand have about \$270,000 annual sales;

The owner's average markup is about 23%, and is 33% on Wallace boxed candy;

The owner takes advantage of all trade discounts because such discounts are extremely important in the computation of net profit;

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Cash discounts particularly are very important to him, and he always takes them;

During the past year he has taken advantage of the 2% cash discount for prompt payment offered by Wallace;

Wm. A. Jepson, Inc., a fancy food store, does about \$140,000 annual business; The company's net profit is between 2% and 2½%, excluding the owner's salary of \$115.00 weekly;

Its markup on Wallace boxed candy is 33⅓% and the markup on many of the grocery items carried varies from 25% to 10%;

The owner takes advantage of all trade discounts when possible because such discounts are extremely important in the computation of net profit;

He considers the 2% cash discount very important, but very often the unavailability of cash makes taking the 2% discount impossible;

On occasion during the past year he has taken the 2% cash discount for prompt payment offered by Wallace;

During 1958-1959 Gertrude Shalala Candy Shoppes never took advantage of the 2% cash discount for payment within fifteen days from the date of the invoice;

Upon a number of occasions Wm. A. Jepson Inc. did not take advantage of the 2% cash discount.

85. In the Rochester area, Wallace granted an additional 10% discount on purchases of boxed candy to E. W. Edwards & Son and Sibley Lindsay & Curr Co., department stores. Such discounts were:

|                               | 1958     | 1959    |
|-------------------------------|----------|---------|
| E. W. Edwards.....            | \$107.15 | \$13.87 |
| Sibley Lindsay & Curr Co..... | 120.84   | 167.72  |

86. Wallace did not grant the additional 10% discount to Josephine Pendleton (Rochester Nut Shop), nor to Jackson & Bailey, Inc. These retailers' purchases of Wallace packaged candy of the type purchased by the Rochester department stores were:

|                                        | 1958    | 1959    |
|----------------------------------------|---------|---------|
| J. Pendleton (Rochester Nut Shop)..... | \$41.84 | \$69.44 |
| Jackson & Bailey.....                  | 322.32  | 316.16  |

The additional 10% discount on these purchases would have amounted to:

|                                        | 1958   | 1959   |
|----------------------------------------|--------|--------|
| Rochester Nut Shop (J. Pendleton)..... | \$4.18 | \$6.94 |
| Jackson & Bailey.....                  | 32.23  | 31.61  |

[See CX 737, CX 738.]

87. It has been stipulated that the proprietors or owners of these retail stores in the Rochester trade area, if called, would testify (over a timely objection that the opinion portion of the testimony constitutes conclusions of fact and expressions of opinion), that they compete in the resale of Wallace & Co. boxed candy with the downtown Rochester department stores E. W. Edwards & Son and Sibley-Lindsay & Curr Co.; that there is "keen competition in the sale of

candy products"; and that, in their opinion, if a competitor were able to purchase Wallace boxed candy at a 10% lower price than they, this would adversely affect their business, in that such competitor would have a relatively greater overall profit margin on such candy, which extra margin could be used to improve his facilities, advertise his products or otherwise improve his competitive position.

88. Jackson-Bailey Inc., is a confectionery store located outside the downtown shopping area of Rochester. It sells ice cream, candy, nuts and greeting cards, and its total annual sales are between \$50,000 and \$60,000. The sale of ice cream accounts for slightly over 50% of its total business. Its "business has been getting progressively worse over the past three years", and, as a result, the president of the company "has not been able to draw any salary from the business for the past two years". Overall markup on all its products is about 35%, and on Wallace boxed candy, 33 $\frac{1}{3}$ %. The owner takes advantage of all trade discounts because such discounts are extremely important in the computation of net profit. During the past year he was unable to take any cash discounts because of the lack of available cash.

89. The Rochester Nut Shop (Josephine Pendleton) is a confectionery store located in the downtown shopping area. It sells only nuts and candy. Its total sales for 1960 were about \$36,000, with a net profit of slightly less than 15%, including owner's salary. Overall markup on all or most of its products is 33 $\frac{1}{3}$ %. The owner "takes advantage of all trade discounts because such discounts are extremely important in the computation of net profit". She takes advantage of the 2% cash discount for prompt payment whenever possible, but sometimes she cannot take advantage of it because of the lack of available cash.

90. During the years 1958 and 1959 Jackson & Bailey Inc., and Josephine Pendleton (Rochester Nut Shop) usually did not take advantage of the 2% cash discount for payment within fifteen days of the date of the invoice.

#### *1. Wallace's Defense of No Injury to Competition*

91. The Supreme Court held in *FTC v. Anheuser Busch, Inc.*, 363 U.S. 536 (1960), that a price discrimination under § 2(a) is merely a price difference. Applying the rationale of that decision to this case, it would appear that complaint counsel has, as to Wallace, made out a *prima facie* case. However, in *Anheuser Busch* the Supreme Court remanded the case to the Seventh Circuit for that circuit to make a determination of whether the record would support the requisite finding of competitive injury. The Seventh Circuit found that

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the requisite competitive injury had not been proven, and dismissed the proceeding (289 F. 2d 835).

92. No evidence of actual or probable injury has been adduced in this record except the non-probative, speculative and conjectural stipulated evidence of retailers in Commission's Exhibit 737. However, as this examiner reads the holdings of the Federal Trade Commission in *Tri Valley Packing Association*, Dockets 7225 and 7496 (Commissions' opinion dated May 10, 1962) [60 F.T.C. 1134, 1168], *American Oil Company*, Docket 8183 (opinion dated June 27, 1962) [60 F.T.C. 1786, 1804], and *United Biscuit Company of America*, Docket 7817 (opinion of the Commission dated June 28, 1962) [60 F.T.C. 1893], such proof of competitive injury is no longer required. The Commission has enunciated a "*per se*" standard for judging probable injury to competition under § 2(a) of the Robinson-Patman Act.

93. In *Tri Valley*, the Commission held (p. 1175):

\* \* \* In view of our holding that respondent's price discriminations may result in injury to competition regardless of whether there is actual competition in the resale and distribution of the products involved in the discriminations, we believe that the phrase "in the resale and distribution of respondent's products" unduly limits the scope of the order and should be deleted therefrom. (Emphasis supplied.)

and on page 1171:

In any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent (*Federal Trade Commission v. Morton Salt Company*, *supra*); and it has been held that such an inference is permissible despite testimony by the nonfavored purchaser that he had not been injured by the discrimination. *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (1956); *E. Edelman & Co. v. Federal Trade Commission*, 239 F. 2d 152 (1956). (Emphasis supplied.)

94. In *American Oil*, the Commission in its opinion (p. 1806) interpreted *Morton Salt Co.* (334 U.S. 37 (1948)) as holding:

in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. (Emphasis supplied.)

95. Although *Anheuser* was remanded by the Supreme Court for the Seventh Circuit to determine whether there was proof of competitive injury in the record, it would appear that the opinions in *Tri Valley*, *American Oil* and *United Biscuit* eliminate the requirement of proof of competitive injury. In *American Oil* (page 3) the Commission stated: "Hence, it is unnecessary to determine whether the hearing examiner's finding of actual injury is supported by the record."

96. In *United Biscuit*, Docket 7817 [60 FTC 1893, 1898] (opinion of June 28, 1962), the Commission stated, in commenting on *Tri Valley*:

in any case involving the effect of a price discrimination on competition between buyers, the requisite injury *may be inferred* from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case. (Emphasis supplied.)

97. As the examiner reads the Commission's opinions in *Tri Valley*, *American Oil*, and *United Biscuit*, the absence of proof in this record of competitive injury resulting from Wallace's price differentials does not compel a dismissal of this proceeding as to Wallace.

98. However, Wallace defends further on the grounds that its lower prices to some purchasers of its candy were made in good faith to meet an equally low price of a competitor. The evidence shows and the examiner further finds:

## 2. Wallace's "Meeting Competition" Defense

99. The additional 10% discount was granted by Wallace to the department stores in Buffalo and Rochester because the officers of Wallace honestly and reasonably believed, in good faith, that they were meeting the equally low prices offered and given to these same department stores by a large number of Wallace's competitors, including, among others, Russell Stover Candies, New England Confectionery (Candy Cupboard), Cresca (Pascal), Stevens Candy Kitchens (Mrs. Stevens), Maple Grove, DeMet's, Loft, Jaret Imports Inc., Edward Sharp Sales Inc., Maillard, Bonomo, Brown & Haley, Whitman, Este, Miller & Hollis, Delson, Goetz, Parkside, Wunderle, Peerless, Rosemary DeParke and Louis Sherry. The need of meeting this competition was confirmed by the testimony of wholesalers in Buffalo, Rochester and Syracuse: Attea, Zutes, and Rose who sell or attempt to sell candy to these same department stores; and by the testimony of the candy buyers for United Whelan, F. W. Woolworth, W. T. Grant, and J. C. Penney Co. These candy buyers testified that they purchase candy at prices equivalent to at least a 40% discount from the suggested retail price from many competing candy companies, including, among others: Whitman, Page & Shaw, Voneiff Drayer, DeWitt P. Henry, Derand, E. J. Brach, Sisco, Hamilton, Brown & Hollis, Candy Cupboard, Martha Washington, Mrs. Stevens, Cresca and Brown & Haley.

100. John P. Joyce, who had been associated with Wallace for a long time and had been vice president in charge of sales, left Wallace on June 15, 1961, and was, at the time of his testimony, sales manager for the Loft Candy Corporation. His testimony appears at pages 880 *et seq.* of the record. At page 898 Mr. Joyce testified that in pricing

Wallace packaged candy to the E. W. Edwards department store and Sibley Lindsay & Curr stores in Rochester, and to the Adams, Meldrum & Anderson Co., Inc. and William Hengerer Co. department stores in Buffalo, he actually believed in good faith that he was "merely meeting the equally low prices offered and given to these particular department stores by the competing sellers of candy \* \* \*". Wallace had been granting the additional 10% discount to all the department stores, without exception, for as long as Joyce had been in the business. These same department stores took a higher markup on bulk candy (not involved here) than on boxed candy because of "bag shrinkage". The Rochester and Buffalo department stores were receiving the additional 10% discount on Wallace package candy at the time Mr. Joyce went with Wallace. It was Mr. Joyce's "educated guess" that the practice of the candy manufacturers allowing the department stores the additional 10% discount on packaged candy began "some forty years ago". The manufacturers who refused this additional discount simply did not get the packaged-candy business.

101. Packaged candy has been sold to the department stores for many years past at a wholesale price which reflected a 40% markup, based upon the suggested retail sales price.

102. It is complaint counsel's position that "a seller who adopts a system of pricing which results in routine and continuing discrimination in favor of all department-store customers has no standing to invoke §2(b)"<sup>1</sup>, citing *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) and *Federal Trade Commission v. Cement Institute*, 333 U.S. 683.

103. The Supreme Court, in *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396 (1958) (a sequel to *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951)), specifically approved a §2(b) defense in a factual situation similar to the one proven here. In *Standard Oil* the Supreme Court took cognizance of *Staley*, *Cement Institute* and *National Lead* (355 U.S. 401), but held, nevertheless, that the §2(b) defense was properly invoked. In *Standard Oil*, as in this case, the pricing practice apparently preceded the 1936 Robinson-Patman amendments to the Clayton Act.

104. At page 402, the Court said:

It appears to us that the crucial inquiry is not why reduced prices were first granted \* \* \* but rather why the reduced price was continued subsequent to passage of the Act in 1936 \* \* \*.

Respondent Wallace's exhibits 6 through 18-L, read in conjunction with the testimony of John P. Joyce (who had been in the candy busi-

<sup>1</sup> See complaint counsel's reply memorandum filed August 31, 1962.

ness for many years) and the other evidence in this record, support a finding, and the examiner does find, that Wallace's additional 10% discounts to the retailers, as proven in this record, were "\* \* \* a response to individual competitive situations, rather than pursuant to a pricing system \* \* \* " (see *Standard Oil, supra*, 355 U.S. at 404). Wallace has proven that its lower prices to some purchasers were made in good faith to meet an equally low price of a competitor, or competitors.

## CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over the respondents Frank G. Shattuck Company, W. F. Schrafft & Sons Corporation, and Wallace & Co., and these respondents are engaged in commerce as "commerce" is defined in the Clayton Act as amended.

2. This record does not support the conclusion that respondent Schrafft's Sales Corporation was engaged in commerce, as "commerce" is defined in the amended Clayton Act. The Federal Trade Commission does not have jurisdiction over Schrafft's Sales Corporation, and this complaint should be dismissed as to that respondent.

3. Respondent Frank G. Shattuck Company does not manufacture the product line involved in this proceeding. As to its wholly owned subsidiaries, W. F. Schrafft & Sons Corporation and Wallace & Co., who do manufacture and sell such product line, Shattuck does not determine, direct, or control the prices, terms, and other policies upon which such wholly owned subsidiaries do sell the product line and deal with their customers. Respondent Frank G. Shattuck Company has not been proven in this record to have violated the Clayton Act as charged in the complaint. The complaint should be dismissed as to respondent Frank G. Shattuck Company.

4. Respondents W. F. Schrafft & Sons Corporation and Wallace & Co. manufacture and sell the product line involved in this proceeding. In the course and conduct of their businesses in commerce, Schrafft and Wallace are competitively engaged with other corporations, individuals, partnerships and firms in the manufacture, distribution and sale of their products.

5. The evidence in this record does not establish that W. F. Schrafft & Sons Corporation, in the course of its trade in commerce and in its sale of the product line here involved, has discriminated in price, either directly or indirectly, between different purchasers of commodities of like grade and quality by selling to some purchasers at higher and less favorable prices than they sell to other purchasers competitively engaged in the resale of their products with the more

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avored purchasers, as charged in the complaint. The complaint should be dismissed as to the respondent W. F. Schrafft & Sons Corporation.

6. The evidence in this record establishes that respondent Wallace & Co. sold its products of like grade and quality to some purchasers at higher and less favorable prices than it sold such products to other purchasers competitively engaged in the resale of its products with the non-favored purchasers. Wallace & Co.'s lower prices to some purchasers were made in good faith to meet the equally low prices of its competitors. The complaint should be dismissed as to Wallace & Co.

## ORDER

Now, therefore,

*It is ordered*, That the complaint, and this proceeding, be and hereby are, dismissed as to each and all of the respondents Frank G. Shattuck Company, W. F. Schrafft & Sons Corporation, Schrafft's Sales Corporation, and Wallace & Co., jointly and severally.

## OPINION OF THE COMMISSION

APRIL 22, 1964

By DIXON, *Commissioner*:

This matter is before us on the appeal of Commission counsel from the hearing examiner's dismissal of the complaint, which had charged each of the respondents with price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526 (1936), 15 U.S.C. 13(a)).

Briefly summarized, the corporate relationships of the various respondents are as follows. Frank G. Shattuck Company is the parent corporation and owns all of the stock in the remaining respondents. Shattuck was made a party to the proceeding solely on the theory that it exercised sufficient direction and control over the sales activities of its wholly owned subsidiaries to be held legally responsible therefor. W. F. Schrafft & Sons Corporation maintains a plant in Charlestown, Massachusetts where it produces candies for a nationwide market. Wallace & Company manufactures candy for sale in commerce at its Brooklyn, New York, plant. Schrafft's Sales Corporation is a wholesaler located in the city of New York and is engaged primarily in the sale of candy products manufactured by W. F. Schrafft & Sons and Wallace to retailers in that city.

After the record had been closed, counsel supporting the complaint recommended to the examiner that the charge against Frank G. Shattuck Company, the parent corporation, be dismissed on the basis that the evidence failed to show that it was responsible for the sales

policies of its subsidiaries. He also recommended that the charge against Schrafft's Sales, whose activities were confined solely to intrastate sales, be dismissed. The examiner made independent findings of fact in accord therewith, and these findings, which are supported by the evidence, are hereby adopted as the findings of the Commission. W. F. Schrafft & Sons Corporation and Wallace & Company, both of which are manufacturers of candy products, are thus the only respondents before us at this time. The charges against each present different problems and accordingly will be discussed separately.

### I.

W. F. Schrafft & Sons markets its boxed or gift candy, the product in issue, through wholesalers who resell the products to retailers. Although Schrafft makes a few sales directly to supermarkets, these particular sales constituted only a small part of Schrafft's total sales at the time of the hearing and are not in issue in this proceeding. Thus, for the purposes of this case, all of Schrafft's sales of its products were made to wholesalers. These wholesalers purchase the products from Schrafft at a uniform price, regardless of their subsequent customers, and resell them to independent retailers and to such chain organizations as F. W. Woolworth Company, W. T. Grant Company, and Walgreen Drug Stores. The charge is predicated upon the fact that the chains are able to purchase Schrafft's candies from wholesalers for less than independent retailers purchasing the same products from the same wholesalers. Independent retailers are charged a price computed on the basis of a 33 $\frac{1}{3}$ % discount from the suggested consumer price, while chain stores are granted an additional 10% discount from the price at which the independents purchase. The additional discount permits the chain stores to purchase at 40% off the suggested consumer price and was thus sometimes referred to in the transcript as a 40% discount. A discount of 2% is also available to both classes of customers for prompt payment.

The first question which arises is whether responsibility for these price differences attaches to Schrafft, since instead of selling directly to retailers, Schrafft utilizes a distribution system in which it sells to wholesalers who in turn resell the products at differing prices to retailers. We have held in prior cases that where the evidence demonstrates that the manufacturer exercises a specified degree of control over the relationships and terms of the sale which occurs when the retailer purchases from the wholesaler, the retailer may, for the purposes of the Clayton Act as amended, be deemed an "indirect purchaser" from the manufacturer. *E.g.*, *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937); *Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Dentists' Sup-*

*ply Co. of New York*, 37 F.T.C. 345 (1943); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953). The courts have recognized and applied the indirect purchaser doctrine on several recent occasions. *E.g.*, *K. S. Corp. v. Chemstrand Corp.*, 198 F. Supp. 310 (S.D.N.Y. 1961); *American News Co. v. Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962). Although the court in *Klein v. Lionel Corporation*, 237 F. 2d 13 (3d Cir. 1956), declined to extend the doctrine to situations where the control was exercised through state fair trade contracts, no such issue arises in this case.

In determining whether the doctrine enunciated by these cases is applicable in a particular situation, the decision must be made on a case-by-case basis with careful scrutiny of the differing circumstances presented in each instance. *K. S. Corp. v. Chemstrand Corp.*, *supra*. From an examination of these and other cases, it appears that the most important factor to be considered is the degree of control exercised by the manufacturer over the prices and other terms of the sale made by the wholesaler to the retailer. Another is the extent, if any, to which the manufacturer deals directly with the retailer and by such dealing recognizes the retailer as his customer. Examples of instances of direct contact which are of particular significance are negotiations of franchise agreements with the retailer, negotiations with the retailer concerning the price which the retailer will be charged by the wholesaler, attempts by the manufacturer's salesmen to solicit orders from the retailer, policing of the retailer's resale prices by the manufacturer, inspections by the manufacturer to determine whether the retailer is fulfilling his obligation to the wholesaler, and furnishing of advertising supplies to the retailer by the manufacturer.

In this case, the transcript is replete with instances of direct contact between Schrafft and all retailers of its products, both chain and independent. Schrafft registers its products with the central purchasing offices of the various chains so that the products will be listed for purchase by the buyers of the local outlets. As required by the chains, the registration states the price at which the products are available to the chains' local outlets. The chains have indicated that they will not "list" products for purchase by their local outlets unless the products may be obtained at a price not greater than 40% off the suggested consumer price. Schrafft has thus informed the central purchasing offices of the various chains that its products may be purchased from wholesalers at such a price, which is 10% less than its usual suggested wholesale price. When chains have been billed by the wholesaler at the normal rather than the preferential price established by the act of registration, occasionally the chain has complained directly to Schrafft and Schrafft has intervened for the purpose and with the

effect of obtaining for the chain the lower price. Further, Schrafft's salesmen visit the various retailers. During these calls, the salesmen may promote new products, advise the retailers on methods of display and advertising, and even solicit orders. Schrafft requires that its salesmen complete and file with it a specific form after such visits. Obviously, therefore, Schrafft deals directly in many ways with the retailers who market its products, thus providing a basis for an inference that it recognizes these retailers as its own customers.

On the other hand, the evidence is patently insufficient to establish that Schrafft exercises any significant degree of control over the terms of the sales made by the wholesalers to the independent retailers purchasing its products. Although the wholesalers usually charge the independent retailers Schrafft's suggested price of  $33\frac{1}{3}\%$  off the consumer price, the transcript revealed instances where independents were able to purchase from the wholesalers at the more favorable chain store price. Several wholesalers testified that they were free to set the prices at which they sold their products. One testified that he always sold to the independents at the same price at which he sold to chains, and another stated that if he received enough pressure from independents he made the lower price available to them. Further, and by way of distinguishing this case from others of a similar nature, there is no evidence that any contracts have been executed between the wholesalers and the independents governing the prices and terms of the sales by the wholesalers to the independent retailers, the provisions of which were established by Schrafft. It does not appear that Schrafft requires the retailers to maintain a minimum inventory or a complete line of its products, or that it attempts in any way to enforce the price which it suggests that the wholesalers charge the independents for its products. In short, there is little to indicate that Schrafft could eradicate the price difference in favor of the chains by requiring that the wholesalers make its products available to the independents at the same lower price even if it attempted to do so.

Complaint counsel argues that a finding that the independent retailers are indirect purchasers from Schrafft is not necessary for a holding that Schrafft has discriminated in price. In essence, the argument is as follows. Schrafft intervened in a sales distribution system which isolated it from direct sales contact with retailers by knowingly establishing a discriminatory price in favor of the chains. The act of intervention was an act of control over prices which created a discrimination which would not otherwise have existed. Thus, according to complaint counsel, the power of control over the prices at which chains purchase from wholesalers creates a corresponding duty to

protect other retailers from price discrimination. The failure to fulfill that duty is the basis for liability under Section 2(a).

We are unable to adopt this theory. The instant case presents a unique factual situation. All of the sales in issue were made by Schrafft to independent wholesalers at uniform prices. The acts of discrimination occurred in subsequent sales by the wholesalers to the various chains and independent retailers. With the facts in this posture, we are of the opinion that Schrafft may not be held responsible for the discrimination unless it can be shown that both the chains and the independents are "indirect purchasers," as that term has been defined, from Schrafft. Our finding that the independent retailers are not "indirect purchasers" is thus a finding that an essential element of the offense has not been established and compels dismissal of the charge against Schrafft. We express no opinion on whether Schrafft exercises sufficient control over the price charged the chain stores by the wholesalers to support a finding that the chains are "indirect purchasers."

## II.

The packaged candy products manufactured by Wallace & Company are sold to retailers through several channels. Some are marketed through a distribution system composed of some forty brokers and thirty-five jobbers or wholesalers. However, the majority of Wallace's sales are made directly to approximately four thousand retailers, and it is with these latter sales that we are presently concerned. Wallace's normal wholesale price is  $33\frac{1}{3}\%$  less than the suggested consumer price. Chains and department stores purchase at 10% less than the normal wholesale price or 40% off the suggested consumer price. That price difference was the basis for the charge of price discrimination against Wallace.

The hearing examiner found the evidence insufficient to support a finding of probable competitive injury, but after commenting that the Commission had established a "per se" rule on that issue, held that such a failure of proof was not grounds for dismissal. Upon consideration of Wallace's defense that its prices were granted in a good faith attempt to meet lower prices of competitors, the examiner concluded that the prices had in fact been so granted and on that basis dismissed the charge. Although we are in agreement with the examiner that the charges against Wallace should be dismissed, we have concluded that the dismissal must be upon different grounds.

We reject outright the examiner's conclusion that a failure of proof on the issue of probable competitive injury is not grounds for dismissal of a charge of price discrimination, and turn to a consideration of the evidence offered in support of this issue. The evidence on the question is limited to the cities of Buffalo and Rochester, New York.

Instead of calling witnesses, a stipulation containing the expected testimony of three non-favored independent retailers from Buffalo and two non-favored retailers from Rochester was introduced. One of the retailers from Buffalo was engaged in the sale of candy products, another operated a cigar and candy stand, while the third was classified as a fancy food store. In Rochester, one of the retailers realized over 50% of his business from the sale of ice cream, while the other operated a store selling candy and nuts exclusively. All, if called, would have stated that they compete with several specific stores which, according to other evidence, received the preferential ten percent discount. They would have testified further that competition in the sale of candy products is keen, that they take advantage of all trade and cash discounts where possible, and that, in their opinion, if a competitor were able to purchase Wallace boxed candy at ten percent less, their business would be adversely affected because the greater over-all profit margin on candy could be used to improve their competitors' position in the market in various ways. All considered the 2% cash discount to be "extremely important," "very important," or "particularly important." However, four of the five did not habitually take advantage of it. Three assigned as their reason the unavailability of funds, but no reason was advanced by the fourth. The stipulation revealed the average net profit margins of only two of the five witnesses. The fancy food store located in Buffalo reported an average net profit margin of 2 to 2½% on annual sales of \$140,000. The other, the candy and nut store located in Rochester, reported a net profit during 1960 of slightly less than 15% on sales of \$36,000. No further information on the average net profit margins of the non-favored retailers of Wallace candy appears. The stipulation is silent on the average net profit margin realized from the sale of Wallace products considered separately.

In addition to the stipulation of expected testimony complaint counsel introduced invoices showing all sales made by Wallace in the Buffalo and Rochester areas during the years 1958-1959. These invoices revealed the cash value of the discount granted to the favored retailers and provided a basis for a computation of what the value would have been to the non-favored retailers during those years. According to the examiner's calculations, the value of the discount to the non-favored Buffalo retailers reporting an average net profit margin of 2 to 2½% on annual sales of \$140,000 would have been \$75.43 in 1958 and \$84.06 in 1959. The cash value to the Rochester retailer reporting a net profit margin of slightly less than 15% on annual sales of \$36,000 would have been \$4.18 in 1958 and \$6.94 in 1959.

In a case such as this, where there is no proof of actual competitive injury and the non-favored retailers resell the products at a preticketed

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price, factors such as the net profit margins of the non-favored retailers and the extent to which they take advantage of the 2% cash discount take on an added significance in determining the probability of competitive injury. Thus, where the discrimination does not alter the price at which the product is ultimately resold, the effects of the discrimination must be measured with reference to such factors as the impact on average net profits. Where, as here, the non-favored retailers are engaged in different types of retail business, and the evidence reveals the net profit margins of only two, whose profits are somewhat divergent, there is little upon which to project the probable effects of a discrimination. In addition, although we are told that competition in the sale of packaged candy is keen, so much so that the cash discount of 2% is of extreme importance, the evidence reveals that four of the five non-favored retailers did not habitually take advantage of this discount. In these circumstances, we find that there is in this record no basis for an informed determination of the probable competitive effect of Wallace's price discriminations.

In view of the foregoing, we find it unnecessary to reach Wallace's contention that the discriminatory prices were granted in good faith to meet the lower prices of its various competitors, and as a consequence we do not adopt the examiner's findings and conclusions in regard thereto.

For the reasons stated, the charges against each of the respondents will be dismissed. An order modifying those parts of the initial decision in conflict with our views as discussed herein and adopting the decision as so modified will issue. Rules of Practice, Section 3.24(b) (August 1, 1963), 28 Fed. Reg. 7080, 7091 (July 11, 1963).

Commissioner MacIntyre not concurring for the reason set forth in the order, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

## FINAL ORDER

This matter having been heard by the Commission upon appeal by counsel supporting the complaint from the hearing examiner's initial decision, dated September 20, 1962, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the appeal should be denied, and that the initial decision of the examiner should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

*It is ordered*, That the initial decision, dated September 20, 1962, be, and it hereby is, modified by striking from the findings of fact

paragraphs 32 and 33, paragraphs 63 through and including paragraph 80, paragraphs 91 through and including paragraph 104; by striking from the conclusions paragraph 6; and by substituting therefor the findings and conclusions of the accompanying opinion.

*It is further ordered,* That the initial decision as above modified and as modified in the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

Commissioner MacIntyre not concurring for the reason that he considers this to be a price discrimination case of a fundamental type where competitive opportunities of small business retailers are substantially adversely affected by a continuing 10% price discrimination in favor of the large chains with which they "keenly" compete and, consequently, believes that minimally this matter should be handled in the same manner as Federal Trade Commission Docket No. 8513, *In the Matter of Atlantic Products Corporation, et al* (December 13, 1963) [63 F.T.C. 2237]. Commissioner Reilly not participating for the reason that he did not hear oral argument.