

IN THE MATTER OF
FORSTER MFG. CO., INC., ET AL.

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

Docket 7207. Complaint, July 23, 1958—Decision, July 23, 1965

Order, pursuant to remand by the Court of Appeals, First Circuit, dated July 29, 1964, 335 F. 2d 47, 7 S.&D. 943, modifying an earlier order, dated March 18, 1963, 62 F.T.C. 852, which prohibited a Farmington, Maine, manufacturer of woodenware products from discriminating in price between its competing customers selling at retail by specifically enumerat-

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ing the items included in "woodenware products" as "woodenware skewers, clothespins, ice cream spoons, and other wooden products sold by respondents."

OPINION ON REMAND

On January 3, 1963, this Commission, with one member dissenting, concluded that respondents had engaged in discriminatory pricing in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13(a), and issued a proposed order to cease and desist.¹ On March 18, 1963, the Commission rejected respondents' objections to that proposed order for the reasons set forth in an accompanying opinion,² and issued its final order.

It was found that respondents had violated Section 2(a) in their discriminatory pricing of three separate woodenware products, wooden meat skewers, wooden clothespins, and wooden ice cream spoons. In the sale of their skewers, respondents were found to have unlawfully discriminated in favor of three customers, Armour, MCA, and Hantover. In the sale of their clothespins, respondents were found to have unlawfully discriminated in favor of 17 customers, all located in the Pittsburgh area. In the sale of their wooden ice cream spoons, respondents were found to have unlawfully discriminated in favor of two buyers, Pet and Sealtest.

On July 29, 1964, the Court of Appeals for the First Circuit handed down its opinion and order remanding the matter to the Commission for further proceedings in regard to respondents' proffered defense that, in some of the discriminatory transactions, they were discriminating "to meet the equally low price of a competitor" as provided in Section 2(b) of the Act, 15 U.S.C. 13(b), and for possible clarification or modification of the order to cease and desist. *Forster Mfg. Co. v. Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964).

On August 25, 1964, respondents petitioned the court for a rehearing, their principal contentions being that the court "appears not to have recognized the differing standards of proof which have been firmly established by the courts in 'primary-line' and 'secondary-line' cases," and that the court had allegedly overlooked several of respondents' contentions in regard to their discriminatory sales of one of the products, wooden ice cream spoons. This petition for rehearing was denied on September 1, 1964. On March 1, 1965, the Supreme Court denied respondents' petition for certiorari. Thereafter, respondents petitioned the Commission for leave to brief

¹ *In the Matter of Forster Mfg. Co., Inc.*, 62 F.T.C. 852, CCH Trade Reg. Rep. (1961-1963 Transfer Binder) Par. 16,243.

² CCH Trade Reg. Rep. (1961-1963 Transfer Binder) Par. 16,342 [62 F.T.C. 852,924].

one of the issues remanded by the court of appeals (the meeting competition question). This was granted, together with leave to brief the other remand issue (clarification and modification of the order), and such briefs have now been received.

The principal issue remanded to us by the court involves the question of "meeting competition" under Section 2(b). Specifically, the court has sent the case back "for application to the evidence of the standard of the 'reasonable and prudent person' in the situation of the respondents with respect to their sales of skewers to Armour & Co. and their sales of clothespins in the Pittsburgh area." 335 F. 2d at 56. There is thus no further issue as to the illegality of respondents' discriminatory sales of ice cream spoons to Pet and Sealtest³ nor as to the illegality of respondents' discriminatory sales of skewers to two other customers, MCA and Hantover.⁴ It is thus settled that respondents have violated the statute in their discriminatory sales of two different products involving four different customers.

Two distinct factual situations are involved in the "meeting competition" problem returned to us by the court. One, as noted, involves respondents' sales of their wooden clothespins to 17 customers in the Pittsburgh area at a 10% lower price than they were

³ The "meeting competition" defense was not asserted as to these transactions, and the court expressly affirmed our finding as to their discriminatory and injurious character.

⁴ The only defense really proffered by respondents here was their contention that MCA (a group of meat packers, organized as a "buying group" with headquarters in Chicago) and Hantover, a Kansas City, Missouri, distributor, performed a "function" that automatically justified the 5% lower price they received, irrespective of whether it injured competition, was unjustified by reason of cost savings, and so forth. The court squarely rejected this argument, pointing out that Section 2(a) "does not sanction 'functional' discounts as such," requiring them to meet the same tests as all other discriminatory low prices. Respondents' contention on this point also suffered from the fact that other meat packers and distributors did not get that 5% lower price.

Respondents made no serious effort to sustain their contention that this discriminatory low price was extended to MCA to "meet competition." It had been given long before any of the competitive prices pointed to by respondents. Further, it was a regular and systematic discrimination, always fixed at 5% and granted without regard to what competing sellers were charging. "But §2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition." *Federal Trade Commission v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945) (emphasis added). See also *Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F.2d 674, 677 (2d Cir. 1959): "A lowered price is within §2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system * * *."

As to respondents' discriminatory sales of skewers to Phil Hantover, the favored distributor in Kansas City, Missouri, respondents conceded even before our hearing examiner that these sales were indefensible under Section 2(b). See Tr. 3394. As a matter of fact, this favored buyer got his regular, systematic 5% discount from respondents' "list" price even after the latter had been plunged below cost. For example, Hantover bought skewers from Forster for \$6.56 on January 8, 1957 (CX 39) when even Armour, buying at respondents' then below-cost list price, was paying \$6.90. When asked whether he knew what Forster was referring to when it wrote him about allegedly lower prices from competing sellers, Hantover replied: "I do not." Tr. 1980.

charging other customers located in other geographical areas. The other factual situation involves respondents' sales of skewers to a single large customer, Armour & Co., at the discriminatory and below-cost price of \$6.90 per case when other buyers were paying \$8.20 per case.

The ultimate legal question is whether respondents have sustained their burden of affirmatively establishing that, when they granted these discriminatory prices to those favored customers and thus caused the adverse competitive effects found by the court, they were acting "in good faith to meet an equally low price of a competitor," as Section 2(b) requires, that is, whether respondents have sustained their burden of showing "the existence of facts which would lead a reasonable and prudent person to believe that the granting of [those] lower price[s] would in fact meet the equally low price of a competitor." *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760 (1945).

Turning to the Pittsburgh clothespin situation first, the critical facts are these. In May and June of 1957, a small manufacturer of clothespins—Penley Bros. of Paris, Maine—entered the Pittsburgh clothespin market for the first time. Its sales there were handled by a local food and merchandise broker, a Mr. Mander. His Pittsburgh sales force consisted of himself and his son.

Mander, Penley's broker, naturally encountered sales resistance from the Pittsburgh clothespin buyers. "They told me that I had no advantage," that "Forster had as good a deal as I did and they also had merchandise available through a local warehouse."⁵ In an obvious effort to get the "advantage" he needed to start getting "some distribution around the area," the Penley broker, in May and June of 1957, made three sales⁶ at what was, in effect, an approximately 10% lower price than respondents were then charging: for every 10 cases purchased at the then-current price, one additional case was given to the customer "free." Penley's three sales at this "special" price—each of the three to a different customer, and each made on a different date, namely, May 13, June 4, and June 24, 1957—amounted to 60 cases "sold" and six cases given

⁵ Tr. 2964.

⁶ Those three sales were: (1) On May 13, 1957, Penley's broker sold 10 cases of clothespins (each case contains 48 retail "boxes," and each box contains 30 individual clothespins, for a total of 1,440 clothespins per case) to Irwin Wholesale Company, of Irwin, Pennsylvania, at Forster's then-current price, but gave the customer one additional case "free." (2) On June 4, 1957, Penley's broker sold 30 cases to Fayette Feed Company, of Charlerois, Pennsylvania, giving the customer an additional three cases "free." (3) On June 24, 1957, the Penley broker sold 20 cases to Caplan Grocery Company, Ambridge, Pennsylvania, giving two additional cases "free."

away "free," the aggregate sales price, for all three sales, being \$318.50.

Penley made no further sales at this special price. On July 29, 1957—just over two months after its first sale in the Pittsburgh market—Penley wrote a letter to its broker, Mander, flatly refusing to fill a fourth order except at the full price, sans any concessions.⁷ During the rest of 1957, Penley sold a total of 55 cases in the Pittsburgh area. The next year, 1958, it sold 59 cases there.

Respondent Forster had been the dominant factor in the Pittsburgh clothspin market for many years. Its Pittsburgh broker, a Mr. Fisher of National Brokerage Company, testified that, while it would be "a pretty broad statement" to say Forster had 90% of the Pittsburgh clothespin market, "perhaps we have 70 percent of the business."⁸ His sales force of 15 to 20 salesmen called on the area's roughly 125 clothespin buyers approximately once in every two-week period, and Fisher himself calls on those customers about once a month. The salesmen submit written reports of their calls daily, including in those reports information concerning competitive prices encountered.

This broker of respondents testified that, in the early part of 1957, his salesmen began to report to him that "Penley [was] quoting one free with ten."⁹ While the written reports by his salesmen had been destroyed prior to the trial, the broker testified that eight to ten customers had given reports to him and his salesmen "to the effect that Penley was offering one case free with ten."¹⁰

On the basis of this information, Forster's Pittsburgh broker informed the home office in Maine that Penley was cutting prices in the area.¹¹ Forster's sales manager, a Mr. Lovejoy, who was going to Pittsburgh for other reasons anyway, went in to investigate. According to the broker, he and Forster's sales manager made a call on one customer from whom they "received an absolute report" that "Penley [was] offering one free with ten."¹² The broker says he then turned the Forster sales manager "over to a salesman and they made several calls."

Discussing the results of their investigation that evening, the broker and the sales manager concluded "that we had to do something."

⁷ CX 331.

⁸ Tr. 2927.

⁹ Tr. 2892.

¹⁰ Tr. 2895.

¹¹ "Morris Fisher [the Pittsburgh broker] advised me that the competition Penley was offering, one free case of round clothespins with ten in his market, or his territory through the Penley broker, which at that time was the A.R. Manders Co." Tr. 2772.

¹² Tr. 2907-2908.

What they did was this. "We covered the market, the entire market on the basis of one free with ten. We didn't pick out specific customers."¹³

The record shows that 17 Pittsburgh buyers took advantage of respondents' area-wide offer of the 10% lower price. Altogether these discriminatory sales totaled 1,980 cases, or almost \$10,000. This amounted to 95,040 retail "boxes" containing 30 clothespins each, a saturation of the Pittsburgh area with 3,136,320 clothespins. The lower price was continued until about August 1, 1957, "until we found evidence that the other [Penley's offer] was withdrawn."

Penley, the small competitor who had provoked this retaliation, was virtually repulsed from the market. As noted, after its third sale at the lower price on June 24, 1957, its sales for the remainder of 1957 amounted to only 55 cases, and its total sales for the following year, 1958, amounted to only 59 cases. For a period of about nine months—September 1957 to May 1958—Penley made no sales in the Pittsburgh area at all. In addition, as discussed in our earlier opinion, respondents' only substantial competitor, Diamond, suffered a decline in its Pittsburgh sales as a result of the "stocking up" by the local buyers during the period of respondents' discriminatory pricing.

As we understand it, respondents' only claim here is that, when they granted the 10% lower price, they entertained a good faith belief that such a price was "generally available" in the Pittsburgh area, not that they believed it had actually been *offered* to those particular 17 customers. But assuming such a claim is now made, we find no reasonable basis for it in this record. All we have here is the testimony of respondents' own officials that no more than 10 of the approximately 125 clothespin buyers in the Pittsburgh area "reported" that Penley was "quoting" or "offering" a 10% price concession; nowhere in that testimony do we find a suggestion that any of those 10 "reporting" buyers claimed to have received such a competitive offer *himself*. Since respondents knew they had the burden of proof under the statute, the natural inference from the vague generality of this testimony is that none of those buyers had in fact made such a claim. If so, respondents could have

¹³ *Id.* The broker testified further:

Q. You made the offer regardless of whether or not any particular prospective customer had or had not received any specific offer from Penley or anybody else as to one free case with ten?

A. I said that before.

Q. That's correct?

A. That's correct. Tr. 2936-2937.

readily resolved all doubt in their favor by simply calling those buyers to the stand. Under these circumstances, the failure to do so "is itself persuasive that their testimony, if given, would have been unfavorable to [respondents]. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse * * * Silence then becomes evidence of the most convincing character." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

Respondents would apparently have us infer that a competitive price concession is automatically "available" to a buyer once he "hears" about it. Their reasoning, we suppose, is that the buyer can always get that concession for himself by simply calling the supplier in question and saying, "I want to buy clothespins from you at the 10% lower price I hear you are offering." But this ignores the possibility that the seller, even if he has actually sold to one or a few buyers at the rumored lower price, may not be *capable* of sustained selling to all buyers in the area on those particular terms. It also ignores the fact that he might be *unwilling* to extend a price he has given to only 2 or 3 buyers in an area to another 100 or more in that market. Sellers who are both willing and able to offer special low prices or other concessions are generally at some pains to communicate that fact to customers and potential customers. Indeed, this desire of sellers to keep their buyers fully informed as to any particularly favorable terms of sale being "generally" offered is so universal that a seller's failure to notify all of his customers of special terms accorded only to a few is considered "tantamount to concealment" and thus a purposeful effort to preclude "those [uninformed buyers] from participating in them." *Fred Meyer, Inc.*, Dkt. 7492, p. 16 (March 29, 1963) [63 F.T.C. 1, 37]; Hickey, "The Fred Meyer Case," 9 *Antitrust Bulletin* 255, 261 (Mar.-Apr. 1964). As we understand the price discrimination law, a price or other special concession is not "available" to a particular customer until he has been affirmatively notified of that fact by a willing seller. See, e.g., *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962).

The equivocal testimony of respondents' officials as to what they were told by these 10 buyers they allegedly interviewed, together with their failure to call any of those buyers to the stand, raises another adverse inference as well. Nothing in our experience suggests that buyers who "hear" about price concessions of this magnitude are slow in checking on such rumors; they frequently

call the various suppliers of the article in question and demand the rumored price. Here, for example, we would suppose that at least some of the 10 Pittsburgh buyers who allegedly reported the lower competitive offer to respondents would have taken the trouble to get on the phone and *ask* the various suppliers whether the rumored concession was "generally available." Respondents have given us no hint as to whether any such calls were reported to them and, if they were, what the inquiring buyers were told by either the Diamond Gardner or Penley representatives.¹⁴ Respondents' silence in this regard can only be construed as an admission that no such calls were reported to them or that, if they were, the inquiring buyers reported that neither Diamond nor Penley was willing to sell to them at the 10% lower price.

Nor were these 10 buyers the only source of information available to respondents. As noted above, their salesmen call on each of the area's approximately 125 clothespin buyers every two weeks. If Penley's lower price had in fact been "widespread" throughout the area, it seems reasonable to suppose those salesmen would have encountered numerous buyers claiming to have actually received it. Yet not one such buyer was presented here.

Respondents themselves conceded in their original brief before the court of appeals that the Section 2(b) defense does not permit a seller to blanket an entire area with a discriminatory price when he has reason to believe the competitive offer he purports to be meeting is not "general," but limited: "Obviously, if a seller's investigation of a competitive offer indicated that it was made to only a limited number of customers, the seller would not be acting in good faith if he 'met' the offer with a counter-offer to all customers in a wide area."¹⁵ We believe that is precisely what respondents have done here. We think it a fair inference from the ambiguous testimony they presented, and from the buyer testimony they failed to present, that they well knew the Penley price had not been offered either to the 17 particular customers to whom they gave the 10% lower price or to the trade "generally" in Pittsburgh. Certainly they have failed to carry their burden under the statute of showing they had any reasonable basis for believing otherwise. We conclude that their discriminatory pricing in Pittsburgh was an aggressive slash designed to repel that small competitor from the market—that it was, as the court summed it up,

¹⁴ Several of respondents' customers identified Penley as the seller allegedly making the lower offer, and some of them apparently identified A. R. Manders as Penley's local (Pittsburgh) broker. See n. 11, *supra*.

¹⁵ Brief on Behalf of Petitioners, p. 76.

“such a violent reaction to Penley’s rather feeble and tentative attempt to enter the market that it could not be said that respondents’ equally low price was made in good faith.” 335 F. 2d at 55.

Turning to the discriminatory sales of skewers to Armour, the critical facts are these. Respondents, with approximately 58% of the country’s skewer production and, as the court and the Commission found, a predatory desire to get the rest, first instituted a series of nondiscriminatory, across-the-board price cuts designed to put out of business its principal competitor, Farmington Dowel, a company that had approximately 22% of the national market in the relevant period, 1957.¹⁶ This predatory price cutting culminated in a price respondents conceded to be below their own costs. For example, on the basic size skewer (and other sizes accordingly), respondents first plunged the price from \$9.50 to \$7.50, a drop of 20%, on June 8, 1956. After several months of selling at that low price, respondents tried to buy Farmington out. Rebuffed on that proposal, they then dropped the price to \$6.90 (January 2, 1957), the latter price being admittedly below respondents’ costs.¹⁷ It remained in effect for approximately six weeks. On February 13, 1957, respondents raised their price to \$8.20, well above costs.

Armour, having enjoyed this below-cost price of \$6.90 for six weeks, was naturally unhappy when the price was raised to \$8.20. Its purchasing agent wrote to respondents on March 11, 1957, as follows:

We wish to acknowledge receipt of your price quotation on skewers, dated February 23.

Upon review of this price-list, we regret to report that the volume of business formerly extended to your concern will be sharply reduced because of the introduction of these new prices. As we have mentioned in conversation and correspondence, competition is becoming very keen, and in view of *interesting offers made by your competition*, we feel that the volume of orders from Armour and Company will be considerably reduced.

Should the foregoing information prompt your organization to review their list further, we would appreciate hearing from you.¹⁸ (Emphasis added.)

A few days later, March 21, 1957, respondents wrote to the Armour buyer, saying “we have reviewed the matter thoroughly and are adjusting our prices to you” from the existing level (\$8.20)

¹⁶ The country’s four other skewer manufacturers and their respective market shares in 1957 were as follows: Diamond, 11%; Morgan, 7%; Hardwood, 1%; and Ranger, 1%.

¹⁷ See, e.g., CX 206. Respondents’ total delivered costs at St. Louis, Missouri—including production, selling, administrative, brokerage, warehousing, and freight costs (freight from Maine to St. Louis)—were \$7.23 for the standard size skewer, a net loss of \$.47 at the \$6.76 price charged (\$6.90 less 2%—\$.14—cash discount).

¹⁸ RX 14.

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to \$6.90. This letter referred to the Armour buyer's letter, quoted above, and to a conversation between him and a Forster sales official on the matter, concluding: "We trust that you will find these prices to be attractive and hope that we may continue to supply your requirements for these items."¹⁹

The hearing examiner had found, and we agreed, that when respondents extended that discriminatory price of \$6.90 to Armour on March 21, 1957, the lowest "offer" Armour had in fact received from any competing seller of skewers was \$7.00.²⁰ Even this "offer," however, had no real commercial significance to Armour, since it came not from a manufacturer, but from a small distributor (Wood Specialty) who in turn bought from a skewer manufacturer with less than 1% of the industry's sales, the C. H. Ranger Company. Armour's buyer, a Mr. Betz, made it quite clear that he attached no real significance to the Wood Specialty/Ranger "offers" and that the "interesting offers" he was referring to in his March 11, 1957, letter to respondents was not the \$7.00 price quoted by Wood Specialty, but *Farmington Dowel's offer of \$7.70*.²¹

The Armour buyer testified that he had been contacted by a Farmington representative who said he "was interested in our skewer business * * *. I seem to recollect his prices were interesting at that time." Thereafter, "I believe that Forster Manufacturing Company's representative was in; I believe they told us that their volume was decreasing or shrinking somewhat, and at this time I told him that there were *more interesting offers* being offered to us, and we would like to have them take a look at their prices if they are interested in competing * * *. [I]t was one of these seesaw propositions, *Farmington had a price and then Forster asked about it*; we told them to review their prices again, and, as a matter of

¹⁹ CX 316.

²⁰ Respondents contended that Armour had received an even lower offer from the seller that bid the \$7.00 figure, an offer of \$6.80. As we discussed at some length in our earlier opinion of January 3, 1963, p. 29, n. 75 [62 F.T.C. 852, 910], this claim was refuted by the fact that all of Armour's actual purchases from that competitor were at \$7.00 until some two months after respondents' discriminatory price of \$6.90, and that, even then, Armour's purchases at the \$6.80 price were trifling in amount (\$26.66 on June 4, 1957 (RX 37), and \$6.66 on June 17, 1957 (RX 52)).

²¹ He emphasized that, in selecting suppliers, you pick those who can handle your requirements properly, that an important consideration is "whether their source or whether their production was sufficient to take care of your requirements at all times." Tr. 2002. Asked if the fact that Wood Specialty was merely a distributor, not a manufacturer, would "influence the size" of the orders he would give it, he replied: "Well, the question would be in my mind whether or not he could handle an order that large, whether he could make delivery on it." Tr. 2039-2040. While he later insisted that Wood Specialty's prices "could" have been "one" of the "interesting offers" referred to in his letter to respondents, his testimony left no doubt that the lowest price really available to him for any substantial part of his requirements on March 21, 1957, was Farmington Dowel's price of \$7.70 per case.

fact, I wrote a letter to the Forster people * * *. I wrote them a letter and told them that under the circumstances their business would be sharply reduced in view of this. In the event that at any time they felt like they would like to review their prices and *come up with something more interesting*, we would consider going along with them on more business.”²²

The Armour buyer testified that he “switched” a substantial part of Armour’s business to respondents on the basis of that discriminatory, \$6.90 price extended to Armour alone on March 21, 1957. The record bears this out. During 1956, Farmington had overtaken respondents in the competition for Armour’s business, selling that important customer \$1,382 worth of skewers in *December* of that year, as compared to respondents’ sales of only \$843 to Armour that month. In the next year, 1957, however—the year the discriminatory, below-cost price of \$6.90 was given to Armour by respondents—that buyer purchased \$14,804 worth of skewers from respondents and only \$4,111.16 worth from Farmington. Then Farmington went out of business in February 1958. That year, 1958, respondents’ skewer sales to Armour amounted to \$17,289 (75% of Armour’s total skewer requirements). The following year, 1959, respondents’ skewer sales to Armour totaled \$22,245 (82% of Armour’s skewer requirements).²³

The next month after its major competitor, Farmington, went out of business, respondents raised their “list” prices (to the trade as a whole) from \$8.20 to \$8.90. A few months later, in November, 1958, they raised them again, this time to \$9.00.

Since respondents’ discriminatory, below-cost price of \$6.90 successfully took almost all of Armour’s business away from their competitors and contributed substantially to the elimination of Farmington, their most important competitor, it is clear that, when respondents gave that discriminatory price to Armour on March 21, 1957, they were not, *in fact*, merely “meeting” competition, but were “beating” it.

²² Tr. 2009-2011 (emphasis added). He further testified:

Q. As a matter of fact, it was the fact that you were buying or had started buying from Farmington Dowel that really prompted that letter, wasn’t that true?

A. Yes, sir. [Tr. 2023.]

Q. However, if you look at Respondents’ Exhibit 15, it would appear that Wood Specialties has a lower price than Farmington, does it not, and I would like to have you explain why you agreed that Farmington’s pricing would have prompted that letter?

A. I believe you will recollect, Mr. McCarty, that I stated that price is not the only factor involved in purchasing. There are many factors, several factors that are very important: Whether or not a company is able to service you adequately; whether they have the outlets, the distribution that other companies have, that a similar competitor has * * * . [Tr. 2043.]

²³ In each of the years 1957-1959, Armour also bought approximately \$5,000 worth of skewers from a third seller, Morgan Company.

The ultimate legal issue, however, is not whether respondents were in fact meeting competition, but whether they have shown, under the standard laid down in *Staley, supra*, 324 U.S. at 759-760, "the existence of facts which would lead a reasonable and prudent person to believe" the granting of that discriminatory price "would in fact meet the equally low price of a competitor." (Emphasis added.)

We find that respondents have made no such showing here. In addition to the letter from the Armour buyer (quoted above) telling them about "interesting offers made by your competition" and that, unless respondents should see fit, "to review their [price] list further," their "volume of orders" from Armour would "be sharply reduced," respondents relied upon the testimony of one of their sales officials as to a conversation he had had with the Armour buyer about the matter of competitive prices.

According to the Forster representative, the Armour buyer had told him "that the main reason that our sales had decreased was because our prices were not in line with competition." Asked if the Armour buyer had told him what price he would have to quote "to be competitive," the Forster representative replied: "Not in actual dollars and cents, but he referred to this increase in price of ours of February 13th, in saying that the prices we would need to be in line with would be the ones we had in effect right after January 1st [the below-cost price of \$6.90]." ²⁴

The Armour buyer denied this, however: "We never inform any suppliers of what prices are being extended by anybody else." ²⁵ There was nothing further. Shortly thereafter respondents "came up with a new price list," the discriminatory, below-cost figure of \$6.90, and that quotation, as noted, caused Armour to "switch" ²⁶ a greatly increased portion of its business (75% in 1958) to respondents.

From all of these circumstances, respondents could reasonably have concluded that Armour had, in fact, received from some competitor an offer of a lower price than respondents' own then-current price of \$8.20. Armour's purchases from them had started to drop, an indication that the Armour buyer was telling the truth when he said he had more interesting offers from other sellers. But

²⁴ Tr. 2849, 2850. He testified further:

Q. Now, when you spoke to Mr. Betz it is true, is it not, that the offers made by no particular company for any particular type of skewer was mentioned?

A. No, nothing in that detail * * *.

Not in any specific competitor or price. [Tr. 2855, 2859.]

²⁵ Tr. 2046.

²⁶ Tr. 2048-2049.

an offer that is "more interesting" than \$8.20 furnishes no rational link to a below-cost price of \$6.90. Between those two figures lies a vast gulf, the difference between life and death for the smaller members of the industry.

Respondents' claim that the foregoing constitute "facts which would lead a reasonable and prudent person to believe" that granting Armour the discriminatory price of \$6.90 "would in fact meet the equally low price of a competitor" is, in our view, wholly defeated by the fact that respondents knew it was a *below-cost* price. Since they knew it was below their own costs, they necessarily knew that it was also below the costs of their competitors; in view of the close relationship between volume and costs in this industry,²⁷ and in view of the fact that respondents had 58% of that industry while its five competitors shared the remaining 42%, respondents' contention that the "fact that the \$6.90 price was below petitioners' costs does not prove that it was below the costs of every competitor of petitioners"²⁸ is wholly unpersuasive. We find that, when respondents extended this discriminatory, below-cost price of \$6.90 to Armour, they knew very well they were "beating," not meeting, their competitors' prices.

A further fact that should have put respondents on notice that they were beating, not meeting, their competitors' prices to Armour was the fact, noted above, that their discriminatory price of \$6.90 was immediately followed by a switch of a substantial volume of Armour's purchases to respondents, and thus away from their competitors. This stepped up volume of sales to Armour, *e.g.*, 75% of that buyer's total requirements in 1958, with the ultimate business failure of their largest competitor, Farmington, should have put respondents again on notice that their prices were not merely meeting a competitor's "equally low price" but were substantially below it.

In summary, we find that respondents, knowing the \$6.90 price to Armour was below respondents' own and thus their competitors' costs, necessarily knew that no competitor could have made such an offer to Armour for any substantial part of its requirements. Secondly, we find that respondents, observing that this price was in fact "switching" the bulk of Armour's business to them, and thus destroying their major competitor, Farmington, were again

²⁷ A representative of Diamond, respondents' second largest competitor (11% of national market), testified that his company's "sales on skewers are a relatively low-volume item. In producing them at low volume quantities we could not be competitive with high-volume producers * * *. We could not be competitive with concerns that were making large quantities of this particular item." Tr. 2403.

²⁸ Brief on Behalf of Petitioners, p. 88.

and continuously informed that no competitor *was* offering Armour such a price on any substantial part of its requirements. From all of these circumstances we conclude that respondents have not shown "the existence of facts" which would have led a "reasonable and prudent person to believe" that the granting of the discriminatory prices to Armour was merely a meeting of an "equally low price of a competitor." While respondents could have reasonably believed Armour had received a competitive offer that was *some* lower than respondents' own then-current price of \$8.20, they had every reason to believe that competitive quotation was nowhere near as low as the below-cost figure of \$6.90 with which they retaliated.

We believe the foregoing is more than sufficient to demonstrate that these respondents, when they granted the discriminatory prices to the favored clothespin purchasers in Pittsburgh, and the discriminatory price to Armour on its skewer purchases, were not acting "in good faith to meet an equally low price of a competitor." Hence we think it unnecessary to analyze in detail the extent to which we think respondents further demonstrated their lack of good faith by failing in their duty, under *Staley*, to take steps to "investigate" the competitive prices they claimed to have been meeting, and thus "to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the lower price of a competitor." 324 U.S. at 758, 759. In our earlier opinion, we expressed the view that an appropriate place to begin such an investigation would be in the office of the buyer claiming to have received the lower price quotations from other sellers, and that the seller's inquiry of his buyer should include a request for the amount of the competitive quotation and the identity of the seller that gave it. It was not our intention to require "proof positive" on either of these points; only full access to a buyer's books and records could furnish such proof. We intended no more than that respondents, in failing to demand a statement of those particulars from its favored buyer, that is, in guessing blindly at an alleged "competitive offer in an unknown amount made by an unnamed competitor," as they argued it to the court,²⁹ had shown, in *Staley's* words, an "entire lack of a showing of diligence on the part of respondents to verify the reports" of lower competitive prices. A buyer's report of such lower price offers, like a witness' testimony in court, takes on increased credibility, and justifies greater reliance, as detail is

²⁹ Brief on Behalf of Petitioners, p. 76.

added. And a seller "should have better-and-better proof of competitive price the lower and lower he gets."³⁰ Not all such statements by purchasers are true, of course;³¹ but certainly they provide a more rational basis for an investigation than a mere statement that "more interesting offers" have been received.

In our earlier consideration of this problem, we gave little weight to respondents' contention that Armour would have refused a really "diligent" request for this information, notwithstanding the Armour buyer's statement that it was the company's practice not to give it, because it seemed to us that a buyer would be reluctant to change suppliers (with the disruption of routine and so forth that such changes bring) when he could get the "equally low price" from a regular supplier, without making such a change, by simply answering a perfectly lawful question. We must confess we had not considered the possibility that a buyer might not be content with merely getting from his regular supplier a price that merely "equals" the competitive price offered by the newcomer, but might, by remaining mute and letting that supplier "guess" at the amount of the competitive bid, hope to get a still lower price. We would have hesitated to consider this possibility without definite proof because a buyer's silence here, if motivated by a desire to secure a discriminatory price that "beats" competitive offers, might very well place the buyer himself in violation of another provision of

³⁰ Van Cise, "Antitrust in an Expanding Economy," *National Industrial Conference Board* 101 (May 16, 1962).

³¹ One of the witnesses in this proceeding, the Penley broker, testified that "we wouldn't know what was going on in the market if it was not for the buyer telling us. There are certain individuals who will specifically state deals that have been offered to them that we have 99½ percent doubt about because ordinarily he will lie for his benefit. But there are other individuals whom we know to be honorable men." Tr. 2980-2981. See also the Court's comment in *Staley* on the absence of "evidence of respondents' knowledge of their informants' character and reliability." 324 U.S. at 758.

On the practice of sellers in gathering such information, see Anderson, "The Climate of Antitrust," Second Conference on Antitrust in an Expanding Economy, *National Industrial Conference Board* 62-63 (March 7, 1963), describing a "form" used by salesmen in recording and reporting numerous details of competitive price quotations. See also Van Cise, *supra*, n. 34, who advises sellers seeking "information as to specific prices offered by a competitor to a specific customer" to "go directly to that customer. At times, he will give you the price list of your competitor and say, 'Will you meet this?' and if your company can meet this competition, you're in. At other times, very rarely, he will give you an invoice showing your competitor's price, and, again, if your company can meet this price, you're in. In still another situation, he will say, 'I will not give you a piece of paper, but the price I am being quoted by a reputable supplier is such-and-such,' and this is very, very usual today * * * ." *Id.*, at 90. This commentator does note, however, that some purchasing agents claim "certain ethics" preclude them from "mentioning the specific price," telling the seller only " 'You're high' or 'You're low.' "

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the statute, Section 2(f),³² a danger we would assume a buyer of Armour's stature would be most reluctant to run. We need not press the point here, however. This is not a close case; the discrimination in favor of Armour was so great, the injury so severe, and respondents' failure to satisfy the *Staley* requirements so patent, that under no conceivable construction of the statute could we find that these respondents had granted that discriminatory concession in any reasonable belief that it was merely a meeting "in good faith" of a competitor's price.

The court has also directed us to clarify and perhaps modify the order to cease and desist.

That order directs respondents to cease and desist "selling woodenware products to any purchaser at a price which is higher than the price charged any other purchaser where respondents, at the time, are selling in two or more trading areas and in the trading area in which such products are sold at the lower price are in competition with any other seller *who then and thereafter enjoyed a substantially smaller volume of sales of woodenware products than the total volume of sales enjoyed by respondents*" (emphasis added).

Respondents' criticism of the order centers largely upon the emphasized portion quoted above, that is, the phrase that refers to competing sellers "who then and thereafter enjoyed a substantially smaller volume of sales of woodenware products than the total volume of sales enjoyed by respondents." In a brief filed with the Commission on May 7, 1965, they state that their "basic objection to the form of this order is the substitution of a completely unworkable criterion of injury to competition for the criteria of such injury established by the courts * * *. Section 2(a) prohibits only such price discriminations as are likely to injure competition * * *. In framing the order against respondents herein the Commission made an arbitrary determination that a price discrimination by respondents is likely to result in injury to any competitor who enjoys a substantially smaller volume of sales of woodenware

³² Section 2(f) of the amended Clayton Act provides: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, *knowingly to induce or receive* a discrimination in price which is prohibited by this section [Section 2, including, of course, subsection 2(a), the provision involved here]." See *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953); *In the Matter of Fred Meyer, Inc.*, FTC Dkt. 7492 (March 29, 1963), [63 F.T.C. 1, 26]; *In the Matter of National Parts Warehouse*, FTC Dkt. 8039 (December 16, 1963), [63 F.T.C. 1692], *aff'd*, 346 F.2d 311 (7th Cir., May 28, 1965). "[I]f the buyer * * * —when he is asked what prices are being offered—misleads you by quoting a fictitiously low price and thereby induces a lower price from you than was the actual price of any competitor, he also by this misrepresentation is wilfully inducing a violation of the Robinson-Patman Act. I think many of your purchasing agents are very vulnerable, if someone wants to sue them for these practices." Van Cise, n. 30, *supra*, at 100-101.

products than the total volume of sales enjoyed by respondents. Thus, while pricing practices engaged in by respondents' competitors will continue to be legal unless they in fact are likely to result in injury to competition, respondents will be prohibited under the order from engaging in any pricing practices which involves price differentials solely on the basis that they are in competition with a smaller seller, *regardless of whether there is any likelihood of injury to competition.*"³³ Respondents argue that "the necessary effect of the order is to require respondents to eliminate all discounts of any kind, including trade or functional discounts, cash discounts, etc." and that this would leave them "no alternative under this order than to establish a uniform price throughout the United States."

In addition to these broad objections to the order, respondents further contend that the emphasized portion quoted above is confusing or unworkable in a number of particulars. They are especially troubled by the phrases "then or thereafter" and "woodenware products." They point out, for example, that many thousands of items, including such products as household furniture, are considered "woodenware products." And since respondents themselves produce only a few of these products "there is no possible way in which they could ascertain the total sales volume of any of their competitors." Hence, they conclude that this emphasized portion of the order, in prohibiting discriminatory prices in areas where they are competing with sellers having "a substantially smaller volume of sales of woodenware products," puts an unfair and unworkable burden upon them. Finally, respondents argue that this limitation of the order's applicability to those markets in which they have weaker competitors is in fact no limitation at all, "since in *every* trading area in the United States respondents are in competition with one or more sellers whose total volume of sales may be less than the total sales volume of respondents."³⁴

The order will be amended to prohibit respondents from discriminating in price:

By selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, where such lower price undercuts the lowest price offered to that purchaser by any other seller having a substantially smaller annual volume of sales of wood-

³³ Brief on Behalf of Respondents on Remand to Commission, May 7, 1965, pp. 29-31 (emphasis added).

³⁴ *Id.*, at p. 32 (emphasis added).

enware products than respondents' annual volume of sales of those products.

As used herein, the term "woodenware products" means wooden skewers, clothespins, ice cream spoons, and other wooden products sold by respondents.

This definition of "woodenware products" makes it clear that the order is directed solely to competition in the sale of the particular woodenware products sold by respondents themselves, not with "household furniture" or other items unrelated to their business. By omitting the phrase "then and thereafter," this order should also relieve respondents' professed fear that they might be prejudiced by some post-discrimination change in their competitive position vis-a-vis that of their competitors; here they need only concern themselves with probable injury to those of their competitors who are smaller at the time of the prohibited act—the discrimination—not at some later date. Finally, the limitation of the order to discriminations between purchasers "at the same level of distribution" should make it clear that this proceeding is directed not to price differences that merely reflect the compensation of bona fide middlemen for additional distributive services actually performed, but a program of predatory pricing designed to destroy respondents' own competitors.

We see no merit in respondents' other objections to the order. There is no requirement that cease-and-desist orders issued under Section 2(a) of the amended Clayton Act be conditioned upon future showings of adverse competitive effects; injury having followed discrimination in the past, the order may assume, without further proof, that it will continue to do so in the future. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 472-474 (1952). Indeed, any such general limitation of the order would have the necessary effect of shifting this burden of measurement to the courts in subsequent penalty or contempt proceedings and would therefore be at odds with the Supreme Court's unequivocal ruling on this point in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 54 (1948). Here, however, we have not in fact prohibited "all" future price discriminations, *Ruberoid, supra*, at 473-474, but have, instead, limited the prohibition to those we believe are virtually certain to have the adverse competitive effects described by the statute—those directed against competitors who are substantially smaller than respondents and thus unable, no matter how efficient they might be, to withstand a discriminatory price attack. See *Bergjans Farm Dairy Co. v. Sanitary Milk Pro-*

ducers, 241 F. Supp. 476 (D. Mo. 1965), 1965 Trade Cases Par. 71,466. Hence this provision of the order is not, as respondents contend, a "substitution" of another and arbitrary "standard" of competitive injury for the standard set forth in the Act; it is, instead, an express embodiment of that statutory standard into an order narrowly tailored to the facts of this particular case.³⁵

If respondents are honestly resolved to cease their predatory pricing, they should have no difficulty complying with this order. As the court said in *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962): "The difficulties respondent foresees in determining whether it is complying with the order seem factitious. The order contains the usual provision for the filing of a report of compliance, 16 C.F.R. §3.26, and it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts and thereafter follows it, the Commission will subsequently and without notice claim a violation entailing the civil penalties of 15 U.S.C. §21(1). If at some future time respondent desires to change to a procedure different from what it originally proposed, it need not proceed at its peril. The Commission's offices will still be open for discussion * * *."

Under the Commission Rule referred to by the court, respondents can secure at any time binding advice from the Commission "as to whether a proposed course of action" will "constitute compliance with such order." 16 C.F.R. §3.26(b). Moreover, as the Supreme Court noted only a few days ago in *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 377 (1965), any unforeseen difficulties that might actually arise under the order can be permanently corrected through a petition for "reopening the order approved today. The Commission has statutory power to reopen and modify its orders at all times." Here, for example, respondents complain that the order would not allow them to discriminate anywhere at the present time, "since in every trading area in the United States respondents are in competition with one or more sellers whose total volume of sales may be less than the total sales volume of respondents."³⁶ We think this supports rather than argues against the order we are entering here. In time, however, the force

³⁵ Other primary-line orders have been considerably broader. In *Page Dairy Co.*, 50 F.T.C. 395, 399 (1953), respondent was ordered to "cease and desist from discriminating in price by selling said fluid milk of like grade and quality to any purchaser at prices lower than those granted other purchasers where respondent, in the sale of such product, is in competition with any other seller." (Emphasis added.) A similarly unqualified prohibition of price discrimination was included in the order entered in *E. B. Muller & Co.*, 33 F.T.C. 24, 57 (1941), *aff'd*, 142 F.2d 511 (6th Cir. 1944). The court found it "evident that the order is authorized by the statute and is proper in scope." 142 F.2d at 520.

³⁶ *Ibid.*

of competition can be expected to dissipate respondents' unlawfully acquired dominance of this industry and restore a more evenly matched rivalry. When that occurs, any competitive disadvantages actually encountered under the order can be presented to us "in evidentiary form rather than as fantasies." *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 431 (1957).

An appropriate order will be entered.

Commissioner Elman concurred and has filed a concurring opinion.

Commissioner MacIntyre did not concur and has filed a statement of non-concurrence.

STATEMENT OF NON-CONCURRENCE

BY MACINTYRE, *Commissioner*:

I do not concur in the action of the Commission in adopting and entering the order it is entering in this case. I do not concur because the order has now been so revised as to make it inadequate and ineffective. Those of us who hold views as to why this is so or is not so could continue to write volumes about the matter. This I shall not do. Future events will demonstrate eloquently the inadequacy and ineffectiveness of the Commission's order to cease and desist in this case.

The Commission found and the Court affirmed the finding that the respondent discriminated in price with destructive results to its competitors. Indeed, it is beyond dispute that respondent utilized these discriminatory practices with the result of eliminating a substantial amount of competition in the primary line of commerce in which respondent is engaged. Included among its discriminations were those by which respondent charged substantially higher prices in some areas than it charged in other areas where it was seeking to eliminate competition. The order the Commission is issuing will not be effective in preventing such discriminations in the future.

I am unaware of any instance in which either I or others have urged the proposition that price discriminations are *per se* illegal. I do not advance such proposition here. At the same time, I shall not permit such red herring to color and obscure my proper perspective as to the necessity of an adequate remedy to prohibit the illegal practices documented in this proceeding. It is believed that the Commission should be capable and willing to formulate an order which, without outlawing any and all price differentials, would present a prospect of greater effectiveness than the order the Commission is entering here.

CONCURRING OPINION

BY ELMAN, *Commissioner*:

In a decision rendered on January 3, 1963, the Commission held that Forster had violated Section 2(a) of the Clayton Act by engaging in predatory price discrimination. In particular, the Commission found that Forster, the nation's dominant manufacturer of woodenware, had attempted to destroy or cripple its principal skewer competitor, Farmington Dowel Products Company; a small new competitor in the Pittsburgh clothespin market, Penley Brothers; and certain small competitors in the sale of ice cream spoons. The Commission entered a sweeping and drastic cease and desist order which, I noted in dissent, "restricts respondents' freedom to compete to a wholly unjustifiable degree." On appeal, the Court of Appeals upheld the Commission's finding of a *prima facie* violation of Section 2(a), but disagreed with the standard of law applied by the Commission in rejecting Forster's defense of meeting competition in good faith and remanded the case to the Commission for reconsideration of that defense. 335 F. 2d 47 (1st Cir. 1964). At the same time, the court suggested, without elaborating, that the "order might well be clarified and perhaps somewhat modified." *Id.*, at 56-57.

In its opinion on remand, the Commission holds that the meeting-competition defense has not been established and enters a cease and desist order that, in line with the Court of Appeals' expressed desire that it be clarified and modified, differs in important respects from the old order. The Commission's discussion of the meeting-competition defense seems to me questionable on many points. However, the issue whether Forster was meeting in good faith the equally low prices of firms like Farmington and Penley has in effect been foreclosed by the Commission's earlier determination, not disturbed by the Court of Appeals, that Forster's price discriminations were intended to destroy or cripple these very firms. Forster's predatory conduct toward them was the very antithesis of the "good faith" that must be shown for the meeting-competition defense to prevail.

The cease and desist order entered by the Commission on remand represents a marked improvement over the original order. The difficulties encountered in drafting practical and effective orders under the Robinson-Patman Act are nowhere more pronounced than in territorial price discrimination cases. On the one hand, the public interest in fair and effective competition requires an order that will surely stop a seller found to have engaged in unlawful

territorial price discrimination from using territorial price differences as a method of destroying, crippling, or disciplining weak competitors. But the same public interest requires equally that the seller be left free to engage in vigorous and effective price competition. We want to fence in a seller found to have engaged in unlawful territorial price discrimination sufficiently to assure that there will be no recurrence of such conduct (*F.T.C. v. National Lead Co.*, 352 U.S. 419, 431), but we do not want to fence him in so tightly as to deprive him of all initiative and flexibility in price competition, and make him a sluggish, passive competitor; such a result, which weakens not strengthens competition, is opposed to the objectives of the Robinson-Patman Act.

The task of striking a proper balance, so as to avoid unduly restricting a respondent's ability to compete but still assure the cessation of the illegal practice, is a difficult and delicate one. It requires the kind of flexibility and imagination in the formulation of remedies that the Commission, as an expert administrative agency, is uniquely equipped to provide.

The order originally entered by the Commission in this case was inflexible, unimaginative, and even irrational in the sweep and stringency of its prohibitions. It provided that Forster could not sell to any purchaser, of whatever type (e.g., wholesaler, jobber, retailer, or ultimate consumer) and wherever located, at a price higher than Forster charged any other purchaser, of whatever type and wherever located, if, in the market where the lower price was charged, Forster was competing with another seller who "then and thereafter" had a "substantially" smaller total annual volume of woodenware sales than Forster's total annual volume of—apparently—all products. The order thus would have required Forster to establish a single, uniform price to all purchasers in all areas of the country. The apparent limitation in the order permitting Forster to cut prices where it faced competition from a larger woodenware seller was illusory, there being no such sellers. Under the order, Forster could have deviated from a uniform national price only where it was prepared to prove that a lower price was justified as a good-faith effort to meet a competitor's equally low price or was cost-justified under the stringent standards of that defense.

To be sure, this order, had it been upheld, would have prevented Forster from ever again engaging in predatory price discrimination. But it would also have prevented Forster from:

(1) Raising its price in any geographical area without simultaneously raising it everywhere (Forster could hardly have proved

that its price in every other market was justified under either the cost-justification or meeting-competition defenses);

(2) Granting legitimate functional discounts (for example, under the order Forster could not have charged a wholesaler a different price from a retailer, or a retailer a different price from the ultimate consumer);

(3) Initiating a price reduction in any market that was not simultaneously made effective throughout the nation, no matter how abnormal the price level in that market due to inefficient or monopolistic sellers, how slight the reduction, or how high above the prevailing price Forster's price would have been *after* the reduction, or whether Forster's competitors in the market were all large and diversified firms much more powerful than it (the order was applicable if a competitor's woodenware sales were smaller than Forster's total sales of all products; the competitor's total sales of all products could of course be much greater); or

(4) Entering new markets or expanding its market share in markets where its sales volume was small (both of which practices typically involve initially charging a low but temporary promotional price) without regard, again, to whether such an exercise of competitive initiative was likely to help or to hurt competition.

In addition, the order was full of vague and ambiguous terms—especially “then and thereafter” and “substantially smaller.”

An antitrust cease and desist order that reduces the largest seller in an industry to competitive impotence, wholly depriving it of flexibility and initiative in pricing and confining it to a strictly defensive posture in every market, is justifiable, if at all, only if there is no alternative form of order that would adequately protect the public against a recurrence of the unlawful conduct without so severe an anticompetitive impact. As the Commission has come to realize, that is not the case here. The original order, moreover, violated the cardinal principle that the remedy should be suited to the unlawful practice, and not include unrelated practices. *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 433; *F.T.C. v. Henry Broch & Co.*, 368 U.S. 360, 366. The practice forbidden by the order was that of selling the same product in different geographical areas at different prices, but the unlawful practice involved in this case is not that—it is the practice of using area price differences to destroy competitors; it is *predatory* area price discrimination.¹ The Commission did not find that area price differences *as such*

¹ See *Anheuser-Busch, Inc. v. F.T.C.*, 289 F.2d 835, 843 (7th Cir. 1961); *Turner, Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1339-48 (1965).

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are in this industry a source of actual or probable competitive injury whenever and wherever a Forster might use them. The case was focused, rather, on Forster's predatory price discriminations. There is no basis in this record for assuming that all area price differences established by Forster are likely to be predatory, and for forbidding such differences across the board.²

An order reasonably limited to the actual unlawful practice in which Forster was found to have engaged, and which would adequately safeguard the public interest in vigorous and effective competition by large as well as small firms, should differentiate between those area price differences that are likely to injure competition and those that are not. I do not believe such an order is beyond the Commission's capacity to formulate; and here, as in *Lloyd A. Fry Roofing Co.*, F.T.C. Docket 7908 (decided this date) [p. 217 herein] the Commission has made great strides in the right direction. In the first place, the Commission has modified the original order to include the qualification imposed by the court in *Maryland Baking Co. v. F.T.C.*, 243 F. 2d 716 (4th Cir. 1957), and by the hearing examiner in his initial decision in this case, limiting the order's ban to discrimination between purchasers at the same functional level. This obviates my objection (2) (see p. 213, *supra*) to the original order. In the second place, the order does not ban all price differences between such purchasers, but only differences that result in Forster's undercutting *all* of its smaller competitors in a particular local market; this goes far to meet my objection (1). Moreover, it seems relatively unlikely that Forster should find it necessary to undercut *all* of its smaller competitors in order to penetrate a new market or shake up a market where competition has slackened (objections (3) and (4)). And as I noted in connection with the same form of order in *Lloyd A. Fry*, *supra* (concurring opinion, p. 269):

² The Commission has many times pointed out that it does not regard all area price differences as dangerous to competition. Thus, in *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 303, the Commission stated: "if the order was worded so as to require respondent to maintain uniform prices this, if anything, would be contrary to market realities. Respondent's prices vary in the different markets in which it sells, resulting in differences which, with the exception of the price discriminations charged in the complaint, are not in issue in this proceeding." See also *Maryland Baking Co. v. F.T.C.*, 243 F.2d 716, 719 (4th Cir. 1957); Commission Policy Toward Geographic Pricing Practices, Trade Reg. Rep. ¶ 10412 (9th ed. 1948); Reply Brief for the F.T.C., p. 8, *F.T.C. v. Anheuser-Busch, Inc.* (No. 389, October Term 1959), 363 U.S. 536, quoted in *Quaker Oats Co.*, F.T.C. Docket 8112 (decided Nov. 18, 1964), pp. 4-5 [66 F.T.C. 1131, 1193]: "The Commission has recognized that there is a crucial difference 'between normal and legitimate pricing activities designed to obtain a larger share of business in a marketing area and those which represent a punitive or destructive attack on local competitors and impair the vitality and health of the process of competition.' "

[I]t is implicit in the order that it does not preclude Fry from making price reductions in a market where competitors maintain a uniformly high, monopolistic price, or from making temporary promotional price reductions necessary for entry into a concentrated local market. In other words, the order should not, and I believe will not, be read as forbidding area price differences where Fry can show that they promote—and not, as in this case, retard—vigorous and healthy competition.

The weakness of the Commission's order is that it does not specify the circumstances under which a deep price reduction by Forster undercutting all of its competitors in a particular market would not be forbidden because it would not be injurious to competition. One alternative to the Commission's order would be an order drafted in the language of Section 2(a). Such an order would make liability turn squarely on competitive effect, but would be far too vague to be practically enforced or complied with. It would require Forster, before initiating any price cut, to guess its probable competitive effects. A wrong guess would result in a violation of the order and lay Forster open to heavy monetary penalties. With liability so uncertain and unpredictable, Forster would dare not initiate price reductions except on a uniform nationwide basis.

Much better than a boilerplate order, better even, I believe, than the Commission's new order, would be one that expressly forbade Forster to engage in predatory area price discrimination, that is, area discrimination designed to injure, cripple, discipline, or destroy a competitor. Such an order would not be altogether free from uncertainty (cf. *Bakers of Washington, Inc.*, F.T.C. Docket 8309 (decided February 28, 1964), dissenting opinion, p. 5) [64 F.T.C. 1079, 1146], but it would establish a familiar and reasonably clear standard for determining Forster's compliance with the order. Interpreted in the light of the Commission's two opinions, it would have substantial value in deterring the kind of obviously destructive, unfair, and unjustifiable tactics toward weaker competitors which this record reveals and which, after all, is the practice the Commission has found unlawful.

The important thing is that the Commission give serious and continuing thought to more responsive and effective remedies than orders simply forbidding area price differences. I have noted the Commission's sometime failure³ to appreciate that the objective

³ See my separate opinions in *Vanity Fair Paper Mills, Inc.*, 60 F.T.C. 568, 579-84, *aff'd*, 311 F.2d 480 (2d Cir. 1962); and *Quaker Oats Co.*, 60 F.T.C. 798, 812-20. For recent court decisions on this theme, see e.g., *Joseph A. Kaplan & Sons, Inc. v. F.T.C.*, 347 F.2d 785, 789-791 (D.C. Cir. 1965); *Country Tweeds, Inc. v. F.T.C.*, 326 F.2d 144, 148-49 (2d Cir. 1964), and cases cited therein.

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of a cease and desist order is not to forbid as much as possible, but to effectuate and foster the purposes of the statute being enforced—which, in the case of the Robinson-Patman Act, are the promotion of competition and the prevention of monopoly. My concern is not, of course, that a Commission order might impair the profitability of the subject firm. Having violated the law, a respondent must expect fencing in by the Commission. My concern, and it is, I believe, the Commission's as well, is with the health of the competitive process. An order that crippled Forster's ability to compete might satisfy a desire to see respondents punished for their unlawful conduct, but punishment is not our business, and a punitive and vindictive order—which the Commission has to its credit now renounced—would needlessly impair the basic objective of fostering fair competition.

FINAL ORDER

This matter having been remanded to the Commission by the United States Court of Appeals for the First Circuit for further proceedings not inconsistent with the court's opinion of July 29, 1964 [335 F. 2d 47, 7 S.&D. 943], and the Commission having complied therewith:

It is ordered, That respondent Forster Mfg. Co., Inc., a corporation, and its officers and the individual respondent Theodore R. Hodgkins, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution in commerce of woodenware products, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality:

By selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, where such lower price undercuts the lowest price offered to that purchaser by any other seller having a substantially smaller annual volume of sales of woodenware products than respondents' annual volume of sales of those products.

As used herein, the term "woodenware products" means wooden skewers, clothespins, ice cream spoons, and other wooden products sold by respondents.

It is further ordered, That respondents Forster Mfg. Co., Inc., and Theodore R. Hodgkins, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which

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they have complied with the order to cease and desist set forth herein.

Commissioner Elman concurred and has filed a concurring opinion. Commissioner MacIntyre did not concur and has filed a statement of non-concurrence.
