

IN THE MATTER OF  
BOISE CASCADE CORPORATION

FINAL ORDER, OPINION, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE  
CLAYTON ACT

*Docket 9133. Complaint, April 23, 1980—Final Order, Feb. 11, 1986*

This final order requires a Boise, Idaho distributor of office products to cease accepting from any supplier a net price for office products that is lower than the price at which the supplier sells the products to other retailers with whom respondent competes. The Commission ruled that respondent violated the Robinson-Patman Act by knowingly receiving wholesaler discounts on goods it sold at retail in competition with other dealers.

*Appearances*

For the Commission: *Arnold C. Celnicker, Chris M. Couillou, Phylliss M. Richardson and Harold E. Kirtz.*

For the respondents: *John T. Loughlin, R. Clifford Potter, Scott M. Mendel and Dennis P.W. Johnson, Bell, Boyd & Lloyd, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Boise Cascade Corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act and Section 2(f) of the Clayton Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Boise Cascade is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at One Jefferson Square, Boise, Idaho.

PAR. 2. Respondent Boise Cascade is now, and for many years has been, engaged in the operation of an integrated forest products company. The respondent, among other activities, distributes office supplies, stationery, printing paper, coarse paper and office furniture through its distribution centers across the United States.

PAR. 3. In the course and conduct of its business, respondent Boise Cascade has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act. In the course of that commerce, Boise Cascade has been and is now purchasing office product supplies for resale within the United States from suppliers also engaged in commerce, as "commerce" is defined in the Clayton Act.

In connection with such transactions, Boise Cascade is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and the resale of office product supplies of like grade and quality which are purchased from the same or competitive suppliers. [2]

The aforesaid suppliers are located in the various States of the United States, and respondent Boise Cascade and such suppliers cause the products when purchased by said respondent to be transported from the place of manufacture or purchase to Boise Cascade's retail stores or warehouses located in the same state and various other States of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent Boise Cascade has knowingly induced or received from some of the aforesaid suppliers discriminatory prices, discounts, allowances, or terms and conditions of sale favorable to respondent in the commodity purchase transactions described.

For example, respondent resells office product supplies at both the wholesale and retail levels but receives a wholesale discount on all office product supplies it purchases from certain suppliers. These wholesale discounts, however, are not available to all competitors of respondent who sell these products at the retail level.

PAR. 5. The favorable discriminatory prices, discounts, allowances, or terms and conditions of sale were not granted by said suppliers to all of respondent's competitors nor received by all of respondent's competitors in connection with the like or similar purchase transactions of commodities of like grade and quality so purchased for consumption, use or resale.

PAR. 6. When respondent induced or received the discriminatory net prices from its suppliers, as alleged, respondent knew or should have known that such discriminatory net prices constituted discriminations in price prohibited by Section 2(a) of the Clayton Act, as amended.

PAR. 7. The effect of the knowing inducement or receipt by respondent of the discrimination in price, as above alleged, has been or may be substantially to lessen, injure, destroy, or prevent competition between suppliers of office products granting such discriminations and other suppliers of such products who do not grant or allow such

discriminations, or between respondent and its competitors not receiving or securing such discriminations.

PAR. 8. The acts and practices of Boise Cascade herein alleged are in violation of Section 5 of the Federal Trade Commission Act and Section 2(f) of the Clayton Act, as amended. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

STATEMENT OF COMMISSIONER PAUL RAND DIXON\*

In voting in favor of the order directing the ALJ to consider evidence as relevant because it bears upon the function and service defense set out in *Doubleday & Co.*, 52 F.T.C. 169 (1955), I want to make it clear that I believe a unanimous Commission was correct when it explicitly repudiated *Doubleday* in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963). *Doubleday*, unlike *Mueller*, does not comport with the language, history or precedent of the Robinson-Patman Act, and should not be revived. In addition, I do not believe that amendments or modifications to the Robinson-Patman Act should emanate from the Commission or commentators no matter how certain they are that the Act is inconsistent with current economic doctrine.

Nonetheless, I do not believe that it is appropriate in these circumstances for me to deny to other Commissioners the opportunity to review and analyze evidence that they may find relevant in their consideration of the case.

I note that from my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation as charged under the *Doubleday* standard as well as under *Mueller*.

DISSENTING STATEMENT OF COMMISSIONER DAVID A. CLANTON\*\*

The majority of the Commission today issues a complaint proceeding on two mutually exclusive, inconsistent theories of violation of the Robinson-Patman Act. On the facts presented, I cannot support this approach.

The first theory, *viz.*, that Boise Cascade has violated the rule set forth in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), utilizes, in my view, an unsound, inequitable doctrine. It does not appropriately take account of the value of the services rendered by Boise as a dual distributor, and so leads to a result which is

\* Commissioner 1961-1981.

\*\* Commissioner 1976-1983.

at odds with the ideals underlying the Act. Accordingly, I could not support a complaint premised on this theory.

The second theory, based upon our decision in *Doubleday & Co.*, 52 F.T.C. 169 (1955), does examine whether the discounts received by Boise are reasonably related to the services provided by that firm in connection with its sales to end users. Regrettably, because of our preoccupation with *Mueller*, sufficient evidence has not been developed at this time to enable me to determine whether there is reason to believe that Boise is being overcompensated by its suppliers. Since the mere existence of price differentials does not make out a *prima facie* case of violation under the *Doubleday* theory, I am unable to support issuance of the complaint under this approach without further investigation.

DISSENTING STATEMENT OF COMMISSIONER ROBERT PITOFSKY\*

The Commission today has issued an extremely unwise Robinson-Patman complaint. I would not ordinarily dissent from the issuance of a complaint (and certainly not at such length), but this one has such a profound anticompetitive potential that it ought not to go by without comment.

Let me emphasize that this is *not* the kind of quarrel over the advisability of Robinson-Patman enforcement that has split the Commission in the past. That statute should be enforced by this agency, and I am convinced that sensible cases can be initiated—addressing real issues of injury to competition. I can't believe, however, that a solution to the problem of non-enforcement is this misguided effort.

In the remarks that follow, I don't mean to downplay the difficult policy questions involved in Robinson-Patman enforcement. As is often the case, this division among Commissioners occurs because of the tension between the philosophies of the Sherman Act and the Robinson-Patman Act—a conflict created by Congress and left unresolved on the FTC's doorstep many years ago. That kind of issue generates honest differences that in turn reflect deeply held points of view.

This complaint involves the office supply industry and focuses on the legality of discounts to Boise Cascade, a [2] so-called dual distributor. Before examining the legality of that discount, a bird's eye view of the industry might help.<sup>1</sup>

All agree that the office supply industry is highly competitive. At

\* Commissioner 1978-1981.

<sup>1</sup> To the extent this Dissenting Statement makes preliminary factual assertions regarding the office supply industry or Boise, it is based on my understanding of the facts developed by staff during the pre-complaint investigation. When the initial decision in this matter comes to the Commission I will, of course, base my decision solely on the record developed at trial.

the manufacturing level there is extreme deconcentration with some 2900 relatively small companies manufacturing a product line or two (for example, pencils, pens, manila folders, staplers, chairs, etc.). Some of these manufacturers sell directly to large corporate users but most sell through about 6000 intermediate distributors.

While there is a wide variety of intermediate distributors and channels of distribution, we can simplify this discussion by limiting consideration to three categories of distributors:

*Contract Stationers.* These are relatively large dealers who buy from manufacturers at between 50 and 65% off list and sell directly and only to large users.

*Dealers.* These are much smaller distributors who usually buy from manufacturers at no better than 40% off list, or from intermediate wholesalers (see immediately below) at a price that is roughly the equivalent of 30 or 40% off list. [3]

*Wholesalers.* This is the category that includes the respondent, Boise Cascade. Boise is a large national wholesaler and buys from manufacturers at 50–65% off list. Unlike contract stationers which frequently buy at the same price, Boise not only sells to large commercial users but also to dealers at roughly a 20 to 30% markup. It is because Boise, unlike contract stationers, is a “dual distributor” that Robinson-Patman questions arise.

Section 2(f) of the Robinson-Patman Act says it’s illegal for a company “knowingly to induce or receive a discrimination in price” which is prohibited in other parts of the statute. Where’s the discrimination here? No one has suggested there is anything illegal about Boise getting 50 to 65% and the dealers only 40% on those transactions where Boise sells to the dealers. That’s a legitimate “functional discount” which compensates Boise for services performed in the sale of manufacturers’ products; for example, maintaining an inventory, carrying a full line, distributing catalogs, delivering to dealers on request, etc. Functional discounts are justified on the theory that there can be no injury to competition if they are available to all similar types of sellers in roughly equal amounts.

Problems arise, however, when a company like Boise not only sells to intermediate dealers but sells to large commercial users in competition with those dealers. On those sales, [4] Boise will have received 50 to 65% and the dealers only 40%. Arguably, that’s a discrimination in price between competing sellers that leads to an injury to competition, and therefore Section 2(a) of the Robinson-Patman Act is violated; arguably, Boise *knowingly* received that illegal discount and hence violated 2(f). Boise’s explanation is that it is not being favored over its dealer customers; rather, the extra 10 to 25% only compensates Boise

for special services it provides which are not furnished by the dealers. These are the same wholesale services for which it can legally be compensated when it sells to dealers. In statutory terms, Boise says there can't be any injury to competition even when it sells to users if the greater discount only pays for the better services it provides.

In the 1950's and 1960's, two contradictory rules of law were developed to deal with this kind of problem. One was the so-called *Mueller* rule (named after the Commission's 1962 decision in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962); *aff'd*, 323 F.2d 44 (7 Cir. 1963)). That rule essentially holds that it is never a defense for a dual distributor to justify a discount in excess of the discount available to dealers with whom it competes by pointing out that the discount is only compensation for valuable services it performs in selling the manufacturer's product. It is a rigid *per se* rule which prevents the issue of "just compensation" from being put to [5] proof.<sup>2</sup> If there is a justification for *Mueller*, it is that any services that the dual distributor performs are valuable not only to the manufacturer but to the dual distributor as well. Since it's difficult to apportion these values, the *Mueller* solution is to allow no compensation defense.

Before *Mueller* was decided, the *Doubleday* rule was the law (named after a 1955 Commission decision, *Doubleday & Co.*, 52 F.T.C. 169 (1955)) *Doubleday* accepted the principle that there could be no injury to competition and hence no violation of the Robinson-Patman Act if the additional discount paid to the dual distributor did no more than roughly compensate the dual distributor for the useful services it provided. In *Doubleday*, the Commission found that the extra discount was not justified and found a violation—showing the weakness of any argument that an absolute *per se* rule is necessary to have any effective enforcement. The heart of *Doubleday* is to recognize that money paid to a dual distributor could be a discriminatory allowance because the dual distributor is a power buyer or could be fair compensation for valuable services, and it puts that issue to proof. [6]

In my view, the *Mueller* rule is anticompetitive, anticonsumer and anti-efficient. In addition, in a fine display of what can be accomplished with a bad rule of law, it's probably anti-small business as well.

1. *Competitive Considerations.* If Boise sold only to wholesalers or sold only to users (as contract stationers do), it is clear that there could be no violation of the Robinson-Patman Act; it is the dual distribution

<sup>2</sup> Technically, Boise could justify receipt of favorable discounts if they were equal to or no more than cost savings enjoyed by its suppliers as a result of dealing with Boise. See 15 U.S.C. 13(a) (1970) and *United States v. Bordon Co.*, 370 U.S. 460, 468 (1962). But since Boise's suppliers don't engage in wholesaling, there is no "cost saving" to the supplier and hence no cost justification defense—even though the services Boise performs are highly desirable to both suppliers and customers from a business point of view.

function that creates the problem. But it is well established that dual distribution is pro-competitive. It introduces new competition at both levels at which the dual distributor operates, disrupts possible consensual patterns of price uniformity, and causes or encourages discounting. That sort of competition has always been regarded as desirable from the point of view of the Sherman Act.

If Boise cannot be compensated by its suppliers for expenses incurred in selling the suppliers' products, one possibility is that it will retreat into the wholesale line and like contract stationers, sell only to direct users. Another possibility is that it will discontinue sales to users and sell only to dealers. Either way, competition is diminished. In the past, *Mueller* supporters have occasionally granted that such anticompetitive consequences would occur, but have claimed that a *per se* rule is desirable because losses in competition that may result from that policy [7] were anticipated and recognized by Congress when it enacted the Robinson-Patman Act.

In recent years, there has been increasing recognition of the necessity to reconcile the Sherman Act's demand for competition with the Robinson-Patman Act's legitimate concern that small business not be done in by powerful rivals who are in a position to coerce lower prices from manufacturers. If there were any doubt whether the philosophy of reconciling Robinson-Patman and Sherman Act principles should prevail, a clear answer should have been provided by the Supreme Court in its *A&P* decision last year (where, incidentally, it threw out an earlier 2(f) case brought by this agency). The Court said:

In the *Automated Canteen* case, the Court warned against interpretations of the Robinson-Patman Act, which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 343 U.S. 63. Imposition of 2(f) liability on the petitioner in this case would lead to just such price uniformity and rigidity.

The *Doubleday* approach which allows distributors to be compensated, but not over-compensated, for services allows that reconciliation; the *Mueller* rule seems to me a classic example of an R-P approach in "open conflict with the purposes of other antitrust legislation."<sup>3</sup> [8]

2. *Anti-consumer Aspects.* One thing is fairly sure if a Commission majority prevails in its effort to resuscitate *Mueller*—that is, users will pay more for pencils, pens, staples, and so forth. This could be true because, as indicated above, competition will be reduced when dual distributors are forced to choose among different lines of distri-

<sup>3</sup> The Department of Justice apparently felt the same way in 1968 when it filed an *amicus* brief in the Supreme Court opposing the Commission's *Mueller* approach. see *Pencilator Products, Inc. v. FTC*, 389 U.S. 1045 (1968).

bution. Another possibility is that dual distributors will continue to operate on both levels, but when denied a discount from manufacturers on sales to users, will find it necessary to raise price to users. The money charged to users will then go into the pockets of manufacturers who are prevented by law from paying a functional discount.

Alfred Kahn discussed this very issue in 1954:

The denial to combined wholesaler-retailers of the buying prices to which their performances of wholesaling functions entitles them remains an unquestionably rigid, anti-competitive—indeed discriminatory—solution.

See Dirlam and Kahn, *Fair Competition: The Law and Economics of Antitrust Policy*: (1954) at 251.

3. *Anti-efficiency Concerns.* The *Mueller* rule is also undesirable because of the powerful way it undermines the ability of businessmen (including small businessmen) to do business in an efficient way.

The present complaint is as clear an example of this as one could find. Remember that this is an industry in which thousands of small manufacturers tend to make a single line or two of products. As a result, there are no [9] manufacturers who have the economic incentive to go into the business of wholesaling their own products since the central feature of wholesaling is the availability of a wide line of supplies.

Boise and other dual distributors have introduced into the industry the idea of building large computerized wholesale establishments which simultaneously can serve the needs of small dealers and commercial users. But under *Mueller* once a dealer becomes a dual distributor, any preferential discount on sales made in competition with its own customer-dealers will be illegal. Obviously, dual distribution will be discouraged. This is true no matter how valuable to the manufacturer the service performed by the dual distributor, no matter how efficient it is to have an integration of functions within a single distributor (or to have the distributor rather than the manufacturer do it), and no matter how valuable and desirable the arrangement is to the consumer.

4. *Small Business Impact.* The idea of a *Mueller* rule is to protect small businesses against dual distributor competition—an approach which Commissioner Dixon rightly points out has been viewed in the past as consistent with the purpose of the Robinson-Patman Act. The irony is that its application may end up hurting small businesses more than a less rigid approach. [10]

This effect occurs because many small dealers enter cooperative ventures which jointly purchase inventory and provide some of the

same wholesale functions offered by firms like Boise. But if an inflexible *Mueller* rule is applied, those small businessmen, who already know enough to protect their own competitive interests, will be denied a discount compensating them for the costs of their wholesaling if they both sell to and compete with other dealers. See Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 Boston Coll. Ind. and Comm. L. Rev. 543, 555 (1976).

The Commission here is proceeding, at least at this point, on a *Mueller* theory. To cushion the shock of resort to this approach, an order has simultaneously been issued which will permit Boise to introduce the kind of evidence, described above, that would be relevant only under a *Doubleday* standard.<sup>4</sup>

To say the least, that unusual approach—indicating that the case may be tried under two thoroughly inconsistent theories—will introduce great uncertainty into the law. Businessmen, for a considerable period of time, will not know whether to run their businesses (and keep records) as if [11] *Mueller* or *Doubleday* were the law. The approach is particularly unfair to Boise, the respondent in this case. It knows that it can't win this case under *Mueller* (no favored dual distributor could); it asserts it can win the case under *Doubleday*. It therefore must take the risk of an expensive defense, knowing that it may find after several years that a majority of the Commission still thinks that all the evidence it introduces is irrelevant under the *Mueller* standard. This confusing approach might be justified if there were any reason to believe that the Commission would be in a better position after a trial to choose between the *Mueller* and *Doubleday* standards. But that just isn't so. The whole point of a *Mueller* rule is to make discounts to dual distributors absolutely illegal, regardless of services performed to earn them, and the pros and cons of that approach are as apparent now as they will ever be. Thus, in an area where the Commission would serve all its constituencies by clarifying the law, it manages here to do the opposite.

It's fashionable these days to be in favor of deregulation—that is, to oppose excessive and unjustified government regulation of price and entry as a substitute for the operation of competitive forces. But over-regulation comes in many guises. It's one thing to try to protect, under the Robinson-Patman Act, small businessmen from power sellers and power buyers; it's another thing to resuscitate [12] a rule that discourages dual distribution—thereby raising entry barriers at the

<sup>4</sup> Because of the way this case has been investigated and presented to the Commission, I can't tell whether a complaint based on *Doubleday* would be proper. Accordingly, lacking reason to believe a violation has occurred on a valid *Doubleday* approach, I must vote against the complaint.

wholesale or dealer level—by denying to those affected by the rule the opportunity to argue that there has been no injury to competition.

The Commission's separate order, directing the Administrative Law Judge to admit evidence on the question of injury to competition, does imply that at least some Commissioners may eventually move away from the *Mueller per se* approach. However, for the reasons I've indicated, I believe it is preferable to accomplish that result now in a clear and direct fashion. In my view, this complaint should never have been issued and an advisory opinion clarifying the Commission's views on the *Mueller* and *Doubleday* rules should have been promptly published.

STATEMENT OF COMMISSIONER DIXON IN RESPONSE TO  
MOTION FOR RECUSAL

I cannot agree with respondent Boise Cascade Corporation, Inc. ("Boise") that my statement issued concurrently with the issuance of the complaint demonstrates prejudgment by me of the merits of this case.

The statement challenged by Boise was issued to make clear the basis on which I voted to issue the complaint. While a majority of the Commission agreed to issue a complaint against Boise, Commissioners disagreed on the appropriate legal standard to be applied to the investigatory record in order to determine whether there was "reason to believe" that a violation of law had occurred. One possible legal standard would make available the "function and service" defense as set out in *Doubleday & Co.*, 52 F.T.C. 169 (1955). An alternative standard was the one set forth in *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd.*, 323 F.2d 44 (7th Cir. 1963). This conflict was made clear to respondent by my statement, by statements of Commissioners Pitofsky and Clanton, and by an order of the Commission requiring the ALJ "to enter [2] findings sufficient for disposition of the proceeding under both the *Mueller* and *Doubleday* rubrics."

As respondent Boise recognizes, a Commissioner must have "reason to believe" that the facts disclosed in the investigatory record indicate a violation of law before he or she may vote for the issuance of a complaint. My review of the record persuaded me that there was "reason to believe" that a violation of law had occurred whether judged by the *Doubleday* or the *Mueller* standard, and my statement says no more than this:

from my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation as charged under the *Doubleday* standard as well as under *Mueller*.

Respondent argues that my statement goes "much further" than an expression of the statutory standard to be met in issuing a complaint, and characterizes it as showing "that he [Dixon] has weighed the evidence and concluded even before any trial that Boise is guilty regardless of whether the evidence is examined under either the *Mueller* or the *Doubleday* standard."

This recasting of my words quoted above is entirely gratuitous. If I did not have "reason to believe" that a violation of law could be found from the evidence presented to the Commission prior to issuance of its complaint, I would have had no legal basis to vote for a complaint. Since the law requires me to have "reason to believe" that a violation of law may be found before I can vote to challenge it, I cannot see how the recitation of that fact can amount to prejudgment, and, indeed, I have not prejudged this case. If I am called upon to adjudicate the merits of this matter, [3] my judgment will be based solely upon the trial record compiled by the litigants. The Commission has frequently dismissed cases for failure of proof after originally finding "reason to believe" that a violation has occurred. Since I fail to discern how a reasonable person reading my statement could conclude that I have prejudged the merits of this case, I will not recuse myself from this matter.

Finally, I note that complaint counsel argue that this matter is not properly before the Commission in the absence of a certification by the ALJ. However, since disqualification is a question uniquely within the province of the Commissioner at whom the motion to disqualify is directed, I have addressed the merits of respondent's motion, and believe it is appropriate for it to be raised before the Commission.

January 30, 1981

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

FEBRUARY 14, 1984

#### I. HISTORY OF THE PROCEEDING

On April 23, 1980, the Commission, with Commissioner Pitofsky dissenting, issued a complaint charging that Boise Cascade Corporation ("Boise") had violated Section 2(f) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act. The complaint alleges that Boise distributes office supplies, stationery, printing paper, coarse paper, and office furniture through distribution centers

located throughout the United States. The complaint further alleges that Boise has been and is engaged in commerce, as "commerce" is defined in the Clayton Act and that in the course of that commerce, it purchases office product supplies for resale within the United States from suppliers who are also engaged in commerce. [2]

The complaint claims that Boise competes with other businesses which are engaged in the purchase and resale of office products of like grade and quality which are bought from the same or competitive suppliers, and it charges that Boise, in the course of its business, has knowingly induced or received from some of its office product suppliers discriminatory prices, discounts, allowances, or terms and conditions of sale which were not granted by its suppliers on sales of goods of like grade and quality to all of its competitors; it further states that Boise should have known that the prices it induced or received constituted price discriminations prohibited by Section 2(a) of the Clayton Act, as amended.

Finally, the complaint alleges that Boise's knowing inducement or receipt of the price discriminations has been or may be substantially to lessen, injure, destroy, or prevent competition between suppliers of office products or between Boise and its competitors.

As an example of the violation alleged, the complaint states that Boise resells office product supplies at both the wholesale and retail level, but receives a wholesale discount on all products purchased from certain suppliers. These discounts are allegedly not available to all of Boise's competitors who sell the products at the retail level.

Boise's alleged dual function—i.e., sales at the wholesale and retail levels of goods it purchases at wholesale discounts—prompted the Commission to direct me, in an order accompanying the complaint, to admit evidence of the services and functions performed by Boise on goods it purchases for resale at the retail level, and after considering *Mueller Co.*, 60 F.T.C. 120 (1962), *affd*, 323 F.2d 44 (7th Cir. 1963), *cert denied*, 377 U.S. 923 (1964) and *Doubleday & Co.*, 52 F.T.C. 169 (1955), to decide the materiality of such evidence. The Commission also ordered me to "enter findings sufficient for disposition of the proceeding under both the *Mueller* and *Doubleday* rubrics."

Because it received a stay in this proceeding from a federal district court, Boise, was not required to file its answer until November 3, 1980, an answer which essentially denied all of the charges in the complaint and interposed fourteen separate defenses.

After extensive and time-consuming discovery, evidentiary hearings began on April 13, 1982. The hearings concluded on April 27, 1983. Because of a complicated dispute over the application of the attorney-client and work product privileges to a Boise document and the testimony of one of its former employees, the record was not closed

until August 17, 1983. The parties filed their proposed findings of fact, conclusions of law and proposed orders on September 16, 1983. Answers were filed on November 14, 1983. [3]

At my request, the Commission granted me an extension of time to February 27, 1984 to file this initial decision.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted several of the proposed findings verbatim. Others have been accepted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

## II. FINDINGS OF FACT

### A. Boise's Business Activities

1. Boise is an integrated forest products company which is organized, exists and does business under the laws of the State of Delaware and whose headquarters is located in Boise, Idaho. It is engaged principally in the manufacture, distribution and sale of paper, packaging, office products, wood products, and building materials (Ans.; CX 17B).<sup>1</sup> Its total sales for 1980 exceeded \$3 billion, of which more than \$853 million were attributable to its packaging and office products business. The Office Products Division's total net sales in 1980 were [I.C.] (CX's 30, 17Z-28).

2. The headquarters of Boise's Office Products Division is located in Itasca, Illinois, and it operates through distribution centers located in twenty-seven cities (CX 48D).

3. Boise entered the business of distributing office products through the acquisition of Associated Stationers Company and Honolulu Paper Company in 1964 (Tr. 116-17; CX 672, p. 10). Since the acquisition of Associated Stationers, Boise has expanded to the nationwide distribution of office products [4] primarily by acquiring other office products distributors (Tr. 5074-76; CX 672, pp. 10, 56).

4. Boise's Office Products Division is decentralized in its operation (Tr. 5070). Each distribution center is a profit center, responsible for

<sup>1</sup> Abbreviations used in this decision are:

CX - Commission Exhibit  
RX - Respondent's Exhibit.  
Tr. - Transcript page.  
CPF - Complaint counsel's proposed findings.  
CRB - Complaint counsel's reply brief.  
RPF - Respondent's proposed findings.  
RRB - Respondent's reply brief.  
Ans. - Boise's answer to the complaint.  
F. - Finding in this decision.  
I.C. - *See in camera* findings.

tactical planning, inventory management, purchasing for its needs, warehousing, sales and customer service (CX's 48D, 34R). Strategic planning, merchandising and catalog production, the negotiation of discounts from manufacturers, data processing and computer operations, financial accounting, and credit management are handled by the Itasca headquarters (CX's 48D, 34R, 973, p. 150).

5. Boise operates as a dual distributor, selling both to office products dealers and end-users. Based only on its wholesale sales (*i.e.*, sales to dealers), Boise is one of the two largest wholesalers in the country (Tr. 4913). Boise is the largest office products distributor in the industry (Tr. 4548, 5127; RX 501; CX 45G).

6. Although "office products" may be defined as stationery, office supplies, office furniture, office equipment, office machines, and related items (CX 352, p. 4), the term is used in this decision to include stationery, supplies, and furniture, but not equipment and machines.

#### *B. Participants In The Office Products Industry*

##### *1. Manufacturers*

7. Office products are produced by more than 1,000 manufacturers (Tr. 962-64, 1220-21, 1669, 5069, 1832, 4788) who sell their goods to both wholesalers and dealers (Tr. 766, 1523, 2856, 2228-29). Some manufacturers also sell directly to end-users but this practice is not particularly prevalent in the office products industry (Tr. 766, 879, 1116, 1582, 2739, 3178, 3240, 3555; CX 702, pp. 74-75).

##### *2. Manufacturers' Prices*

8. Price in the office products industry is usually expressed as a discount off manufacturer's suggested list price (Tr. 6592). The discount may take the form of a chain discount, for example, 50-20%. Assuming a manufacturer's suggested list price of \$1.00, a 50-20% discount means a 50% discount is first taken, leaving 50 cents. Then a 20% discount is taken from the fifty cents, leaving forty cents as the selling price (Tr. 817, 2730). [5]

##### *a. Quantity And Volume Discounts*

9. Manufacturers often offer some form of quantity pricing whereby an order for a larger quantity of a product or group of products is priced lower on a per unit basis than an order for a smaller quantity (F.'s 114, 168, 260, 293-96, 298, 343).

10. Some manufacturers offer only quantity discounts whereby any customer buying a given quantity receives the same price (Tr. 6713-14, 6625-26, 6640); other manufacturers offer volume discounts whereby dealers who buy more than a certain volume on an annual

basis will receive a larger discount than other dealers (F.'s 172, 225, 227, 229).

b. *Wholesale Discounts*

11. Manufacturers also offer wholesale discounts along with quantity or annual volume discounts. This is a common practice, according to Mr. Clay Barth who was employed from 1956 to 1982 by Rediform and who held management positions with that company in marketing and operations (Tr. 758-60). He testified:

Q. Mr. Barth, did you say that the 50/20 discount that you extended to wholesalers is a functional discount?

A. Yes.

Q. In your opinion, is it a trade practice to give a wholesale functional discount to wholesalers?

A. It is a trade practice which is very general and very broad; it is not ours only, in other words (Tr. 833).

12. Other knowledgeable industry members confirmed the widespread existence of wholesale functional discounts in the office products industry. Mr. Hal Webb, who had been President or Chairman of the Board of Master Products for twenty-three years (Tr. 1885), stated that such discounts are common (Tr. 1979-80), as did Mr. Jones of Kardex (Tr. 1596). Mr. Bernard Seltzer, who has been Executive Vice President of the Wholesale Stationers' Association for over eleven years, guessed that about half of the 200 manufacturer members of WSA give such discounts (Tr. 6587-88, 6593-95). Mr. Philip Rhodes, who has been in the industry over forty years and is Chairman of the Board and Chief Executive Officer of one of the five national [6] wholesalers, S.P. Richards, testified that in his estimation 60 to 70% of vendors selling to his company gave it a wholesale functional discount, and that more than 60 to 70% of his company's total purchases were from vendors giving such a discount (Tr. 6803, 6806, 6814-15). In fact, Mr. Rhodes believes that in the past decade the number of manufacturers offering a wholesale functional discount has increased (Tr. 6817).

13. Dr. Kenneth Elzinga, a professor of economics at the University of Virginia, who testified as an expert witness for Boise, reached a different conclusion after reviewing the record in this case. He testified that the pricing of the six manufacturers complaint counsel chose to illustrate price discriminations favoring Boise is not representative of pricing in the office products industry. In his opinion, "most manufacturers . . . sell on what might be called a quantity or volume discount basis, not on a functional discount basis" (Tr. 6097). I disagree, for I believe that the experience of industry members who testi-

fied in this case outweighs that of Dr. Elzinga who had no knowledge of the industry before he was hired by Boise (Tr. 6134-35).

14. Since a wholesaler purchasing from a manufacturer who gives wholesale functional discounts pays a lower price than a dealer buying similar quantities (Tr. 6813; CX 974, pp. 99-100), this discount is attractive to a wholesaler such as Boise, as is apparent from the stipulated testimony of Mr. Gerald Twietmeyer, who worked in a management capacity for Boise from 1968 to 1978 (Tr. 6739-42):

As an employee of Boise Cascade in 1978, I supervised and participated in a study which showed that Boise received a substantial dollar amount of trade or wholesale functional discounts from various office products vendors and those discounts exceeded the discounts Boise would receive if those vendors did not classify Boise as a wholesaler but instead treated Boise as a dealer or contract stationer.

The results of this study were consistent with the understanding I had of the discounts Boise received from such vendors based on my experience in the industry and with Boise (Stipulation of the Parties dated August 15, 1983; Order Receiving Stipulation into Evidence and Denying Boise Cascade's Request for *In Camera* Treatment dated August 17, 1983). [7]

#### *c. Bid Discounts*

15. In some cases, end-users who need large quantities of office products will ask for bid pricing from manufacturers which is different than prices that are normally offered (Tr. 1170-71, 879, 1028-29, 2293, 1974; CX 975, p. 41).

16. Sales through bids do not constitute a large portion of office product manufacturers' sales. Representatives of manufacturers who testified in this proceeding estimated that such sales ranged from less than 1% to 8% of total sales (Tr. 1028-29, 1636, 1171, 2851, 1975).

17. Some manufacturers' bid discounts may be equal to their normal wholesale functional discounts (Tr. 1171); some are greater than the dealer discount but less than the wholesale functional discount (Tr. 816, 879-80). Some manufacturers may limit bid prices to government purchases (Tr. 1170-71, 879, 1028).

18. Manufacturers offer the same bid discount to all customers requesting prices for a particular bid (Tr. 2851, 2294).

19. Some dealer witnesses testified that their purchases at special bid prices were a small portion of their total purchases (Tr. 3206, 3878, 3487, 707-08, 2564, 2662-65).

#### *d. Promotional Discounts*

20. Manufacturers also offer promotional discounts to their customers in addition to quantity or functional discounts and special bid prices. These promotional discounts may be in the form of additional year-end discounts, credits, the payment of cash to purchasers or their

salesmen, extensions of time in which to pay, and extensions of the application of price increases (Tr. 1202, 2403-04, 2856-57, 1462-63, 2370-73, 2316-19, 3070-71, 1707, 3578-82, 2137-39, 2110-12, 3850-52, 710-11, 746-47, 2130, 4630, 5036-37, 6632, 4445-48, 3879). In some cases, these discounts are not reflected on manufacturer's invoices (Tr. 2110-12, 2139).

21. Although one manufacturer's testimony suggests that wholesalers might not be able to use all the promotional discounts offered to dealers (Tr. 2317-18), others testified that they offer the same promotion to all customers (Tr. 1202, 2404). Concerning promotions, Clay Barth, who has worked for Rediform Office Products since its creation in 1956 (Tr. 758), stated: [8]

When we go to market through retail and wholesale we deliberately try not to give advantage one way. We don't tilt the thing. It would be stupid to try to do something with a retailer and not let the wholesaler do it when we let the wholesaler sell to the retailer (Tr. 912).

22. In one case, wholesalers were given an advantage over dealers. B&P's "one buy-in and one buy-out" promotion provided wholesalers with an additional 5% discount on any group of products the wholesaler might select. B&P did not restrict the number of these promotions a wholesaler could have. A wholesaler could have had it twelve times a year if it wished (Tr. 2856-57).

### 3. Wholesalers

#### *a. Industry Definition Of Wholesaler*

23. A wholesaler is generally defined in the office products industry as a buyer for resale to dealers (CX 974, pp. 10-11).

24. The National Office Products Association's by-laws define wholesaler members as:

Firms that buy stationery, office supplies, office furniture, and equipment and related items on their own account for resale to retailers in the course of which they warehouse the merchandise; promote the sale of the merchandise; service the retailer and advise him on his retail merchandising and buying program . . . (CX 352, p. 5).

25. Under the by-laws of the Wholesale Stationers' Association, wholesale sales are sales made to retailers or dealers for resale to other customers (Tr. 6610; CX 2002D).

#### *b. Volume Of Sales*

26. According to an estimate by Boise, the wholesale sales (sales to dealers) of the five so-called national wholesalers in 1979 were: [9]

## Initial Decision

|                   |               |
|-------------------|---------------|
| Boise             | \$138,000,000 |
| United Stationers | \$132,000,000 |
| S.P. Richards     | \$103,000,000 |
| Champion          | \$ 91,000,000 |
| Zellerbach        | \$ 80,000,000 |

(CX 51Z-34)

27. Most wholesalers, however, are small, privately-owned businesses with annual volumes of under \$10 million (CX 2004A).

*c. Geographic Areas Served*

28. Although most wholesalers are small, privately-owned businesses, there are five wholesalers that operate in numerous locations: United Stationers, Boise, S.P. Richards, Champion and Zellerbach (Tr. 4914). Each of these so-called national wholesalers is not in every city, but they account for approximately 60% of the total volume of wholesale sales (Tr. 4914-15; CX 51Z-34).

*d. Catalogs*

29. National wholesalers publish catalogs which are sold to dealers (Tr. 2493-94, 3550). Most local wholesalers do not produce a catalog (Tr. 5127). Wholesalers' catalogs vary as to the number of items depicted. For example, United Stationers' catalog has 20,000 items while Boise's catalog has about 8,500 items (Tr. 4607-08, 5561; CX 62).

*e. Wholesalers' Competition With Manufacturers And Their Knowledge Of Manufacturers' Prices*

30. Wholesalers view manufacturers as competitors for dealers' business (CX 977, p. 89), and they are therefore interested in the prices at which manufacturers sell to dealers. Mr. Philip Rhodes, Chairman of the Board and Chief Executive Officer of S.P. Richards, a wholesaler, testified that his firm was interested in vendors' pricing to dealers "because we like to be competitive. We like to be able to sell at a price where we would be competitive and obtain a share of that business" (Tr. 6806).

31. Robert Sherman, President of L.D. Sherman, a San Francisco wholesaler, testified that the wholesale functional discount is vital because if he buys at a price equal to the [10] price at which dealers do, he will not be competitive on his resale of the product to dealers (Tr. 6583).

32. Everett Patterson, who is general manager of a dealer in Massachusetts, had worked as a merchandise manager for Champion Office Products, a wholesaler, and he placed orders with manufacturers, dealt with the local salesmen, and maintained the local pricer (i.e., price list) (Tr. 6540). Mr. Patterson testified that it was essential for

him to know what the dealer pricing was from the manufacturer because the wholesaler's salesmen have to know the price their dealer customers could obtain the goods for if they bought directly from the manufacturer (Tr. 6540-41).

33. Bernard Seltzer, Executive Vice President of the Wholesaler Stationers' Association, explained that officers of WSA have encouraged manufacturers to give wholesalers a wholesale functional discount because they have to compete with manufacturers for sales to dealers. Volume discounts are not substitutes for wholesale functional discounts because, according to Mr. Seltzer "not every wholesaler is able to buy in large volume. WSA and the industry has very many small wholesalers whose volume would not justify a large discount, but who perform a function that justifies a discount" (Tr. 6596).

34. Although dealers may not know the pricing practices of particular manufacturers, they know that wholesalers receive better prices than dealers (Tr. 3637-38, 7242, 4307-08, 2172; CX 702, p. 17).

35. In explaining why he viewed Boise differently than his other competitors, Louis Applebaum, Executive Vice President of A. Pomerantz & Co., a large Philadelphia dealer, testified:

Boise's prices generally, in our opinion, are lower because they are buying products at lower prices than we are.

Q. Do you have an opinion as to why that would be?

A. It is my opinion that they are using their wholesale discounts, wholesale functional discounts in the costing of the products in competing with us (Tr. 1341-42).

36. In the mid-1970's, Boise received complaints from several dealers who objected to its competition with them (Tr. 5093-96). The primary industry trade association, the National Office Products Association ("NOPA"), also received complaints from dealers in the early to mid-1970's about Boise's dual distribution; they argued that they could not purchase from [11] manufacturers at prices as low as Boise and that Boise was selling to their end-user customers at prices the dealers could not compete with. A copy of the complaints was given to Boise (Tr. 1798; CX's 105, 438A, 439B).

37. Robert Welnhof is Vice President, Corporate Development, for United Stationers, a national wholesaler. He was General Manager of Boise's Office Products Division from 1965-1967 and 1970-1977, and from 1967-1970 had a number of other management positions with Boise (CX 672, pp. 5-8). Mr. Welnhof testified that Boise regularly discussed their pricing policies with manufacturers "because one of our objectives is to become knowledgeable about the industry and how products are bought and sold" (CX 672, pp. 125-26).

38. Mr. Welnhof noted that some wholesalers even designate on their own price lists to dealers the price the dealer will pay if the

dealer buys from the manufacturer instead of the wholesaler. The wholesaler does this to show the dealer that he can buy at as good a price from the wholesaler as from the manufacturer; to do this, the wholesaler has to know the manufacturer's prices to the dealer (CX 672, pp. 125-27).

39. George Harig, who is employed by Boise at its headquarters and deals with manufacturers, told the management of Dennis Office Supply, a Boston dealer, that, after its acquisition by Boise, Dennis would be entitled to wholesale discounts which Dennis did not obtain as a dealer, and that as a result there would be lower cost of goods sold and more profit (Tr. 6560-61).

40. Craig Hajduk is a Boise Product Manager who is responsible for binders, the loose-leaf section, all writing instruments, word processing, data processing, attaches, art supplies and drafting (CX 971, p. 7). He testified that one of the ways certain manufacturers encourage the sale of their products through wholesalers is to charge a lower price to wholesalers than to dealers, and that this would be a positive factor for Boise in deciding whether to take on the vendor's line (CX 971, pp. 102-03). In further explaining how manufacturers have pricing that encourages wholesalers, Mr. Hajduk stated:

[I]f the pricing structure as presented to someone like myself, where the pricing structure for a dealer versus wholesale and where Boise's pricing in that realm would be, if there is a large difference, it obviously would be more advantageous for us to take on a line where we feel confident we can get a lot of dollars and a lot of potential sales versus a line where pricing to the dealer is the same as the pricing to us (CX 971, pp. 106-07). [12]

41. In addition to considering the size of a manufacturer's wholesale functional discount in deciding whether to carry a line, Mr. Hajduk considers the manufacturer's price to the dealer in setting Boise's wholesale price to dealers. This is because it would be undesirable for Boise's price to dealers to be significantly higher than the manufacturer's price to dealers. This is especially true on popular lines or items (CX 971, pp. 72-76).

42. "Buyers Guides," which are used by buyers in each of Boise's distribution centers, are sent to them from its Itasca headquarters (CX's 973, p. 37; 974, pp. 21-23). These guides disclose both Boise's buying terms and the manufacturers' published selling policies to dealers (CX's 116-20, 158-59, 181-83, 219-22, 267, 321). The pricing information in the guides is provided, usually by telephone, by the manufacturer (CX 971, p. 8). Information on dealers' prices was eliminated from the guides in about 1982 (Tr. 4824).

#### 4. Dealers

##### *a. Industry Definition Of Dealers*

43. As used in the office products industry, a dealer is a firm or individual that purchases office supplies, furniture, equipment and related items for resale to users (Tr. 1547, 2204, 775, 1095-96; CX's 352, p. 5; 974, pp. 10-11).

44. The term "contract stationer," while having no generally accepted meaning in the office products industry, is sometimes used to refer to large dealers, but it also may mean any dealer that has contracts with customers (Tr. 5071-72, 6508). Because small and medium sized dealers have contracts with large industrial customers, the term contract stationers may also apply to them (Tr. 5071-72).

##### *b. Dealers' And Manufacturers' Use Of Wholesalers*

45. Dealers purchase substantial amounts of office products from wholesalers for resale to their own customers (Tr. 3799, 3355, 3028, 3660, 3540-41, 4212, 2492, 651, 2034, 4074, 3421-22, 2427, 3136; CX 702, pp. 119-20).

46. Dealers recognize that wholesalers such as Boise provide valuable services to them, such as a broad inventory, which allows dealers to operate without carrying in their own inventory products their customers need (Tr. 715-16, 4076, 4811-12, 2462-63; CX's 702, p. 123; 974, pp. 88-89; 672, pp. 164-67), [13] faster delivery than from manufacturers, and improvement in cash flow (Tr. 2034-35, 2973, 3322-23, 3300, 3660, 3541; CX 702, p. 122). Without wholesalers, either the dealers or manufacturers would have to maintain more inventory, which would increase their costs (Tr. 715-16, 1681-82, 4076, 4811-12, 2462-63; CX's 974, pp. 88-89; 672, pp. 164-67). Wholesalers also help set up new dealers, aid manufacturers in introducing new products and provide services which, if they did not exist, manufacturers would have to provide (Tr. 2356, 1587, 1272-73, 2340, 1229-31, 1674-83, 1694-96).

##### *c. The Increase In The Number of Dealers*

47. There are some 8,000 office products dealers in the United States, and according to data compiled by Dr. Elzinga from the National Office Products Association and American Business Lists, there has been a steady increase in the number of dealers from 1976-1982 both nationwide and in the states where complaint counsel's dealer witnesses are located (RX 801-03; CX 2302-03).

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*C. Boise's Office Products Division*

## 1. Boise's Entry Into Office Products

48. Boise entered the office products industry in 1964 through the acquisition of Associated Stationers Company, a wholesaler that operated retail stores under the name of Horder, and the Honolulu Paper Company, an office products dealer with retail stores (Tr. 5116-17; CX 672, pp. 10, 88).

49. Subsequently, Boise entered new areas by acquiring office product dealers or wholesalers (Tr. 5075-76, 5554, 4934-35, 3980-81, 3034-35, 4435-36, 2914-15, 5154; CX 977, pp. 26-27).

50. When Boise purchased Dennis Office Supply in Boston, a dealer, it became acquainted with the prices at which Dennis bought. In fact, Dennis bought directly from the manufacturers involved in this case (Tr. 4443-45; CX 970, p. 124).

## 2. The Location Of Boise's Distribution Centers

51. Boise has distribution centers located in twenty-seven cities and ships office products into all fifty states (CX 48D; F. 59). The eight distribution centers that are involved in this case make sales in the following geographic areas: [14]

Boston (Burlington): East New York, Massachusetts, Maine, Vermont, New Hampshire, Rhode Island, Central and Northern Connecticut.

Moonachie, New Jersey (New York): New York metropolitan area.

Philadelphia (Pennsauken, New Jersey): Southern New Jersey, Eastern Pennsylvania, Delaware, parts of Maryland and Washington, D.C.

Phoenix: Northern Arizona.

Portland: Oregon, Western Idaho.

Salt Lake City: Utah, Eastern Idaho, Western Wyoming.

San Francisco (Brisbane): Northern California, Northern Nevada.

Seattle: Alaska, Washington, Northern Idaho, Western Montana (Tr. 4435-36, 5678, 5680, 5626; CX's 630C, 975, p. 24; 65C).

## 3. The Division's Sales Volume

52. Boise's Office Products Division's combined wholesale and retail sales make it the largest distributor of office products in the United States (Tr. 5127, 4548; CX 45G; RX 501).

53. Considering only its sales to dealers, Boise is one of the top largest wholesalers in the United States (Tr. 4913).

54. For 1976, Boise's total net sales to users (including sales through

Boise's retail stores and sales to commercial accounts) and to resellers were:

|                    |        |
|--------------------|--------|
| Sales to Users     | [I.C.] |
| Sales to Resellers | [I.C.] |
| Other Revenues     | [I.C.] |
| Total Net Sales    | [I.C.] |

(CX 18).

55. For 1977, Boise's total net sales to users (including sales through Boise's retail stores and sales to commercial accounts) and to resellers were: [15]

|                    |        |
|--------------------|--------|
| Sales to Users     | [I.C.] |
| Sales to Resellers | [I.C.] |
| Other Revenues     | [I.C.] |
| Total Net Sales    | [I.C.] |

(CX 21).

56. For 1978, Boise's total net sales to users (including sales through Boise's retail stores and sales to commercial accounts) and to resellers were:

|                         |        |
|-------------------------|--------|
| Sales to Users          | [I.C.] |
| Sales to Resellers      | [I.C.] |
| Catalogs/Marketing Aids | [I.C.] |
| Total Net Sales         | [I.C.] |

(CX 24).

57. For 1979, Boise's total net sales to users (including sales through Boise's retail stores and sales to commercial accounts) and to resellers were:

|                         |        |
|-------------------------|--------|
| Sales to Users          | [I.C.] |
| Sales to Resellers      | [I.C.] |
| Catalogs/Marketing Aids | [I.C.] |
| Total Net Sales         | [I.C.] |

CX 27).

58. For 1980, Boise's total net sales to users (including sales through Boise's retail stores and sales to commercial accounts) and to resellers were:

|                         |        |
|-------------------------|--------|
| Sales to Users          | [I.C.] |
| Sales to Resellers      | [I.C.] |
| Catalogs/Marketing Aids | [I.C.] |
| Total Net Sales         | [I.C.] |

X 30).

#### 4. The Distribution Centers' Sales Volume

59. Some Boise distribution centers do not currently solicit end-user accounts. These are: Tampa, Miami, [16] Jacksonville, Atlanta, Nashville, Charlotte, Cincinnati, Cleveland, Indianapolis, Milwaukee, Minneapolis, Houston and Denver. Those that currently solicit end-users are: Honolulu, Seattle, Portland, San Francisco, Los Angeles, Tucson, Phoenix, Salt Lake City, Chicago, Dallas, Boston, New York, Philadelphia and Detroit (Tr. 5074-75).

60. Annual sales of office products for the eight Boise locations focused on in this case were:

|                | 1976 | 1977 | 1978 | 1979 | 1980 |
|----------------|------|------|------|------|------|
| Boston         | [    |      | I.C. |      | ]    |
| New York       | [    |      | I.C. |      | ]    |
| Philadelphia   | [    |      | I.C. |      | ]    |
| Phoenix        | [    |      | I.C. |      | ]    |
| Portland       | [    |      | I.C. |      | ]    |
| Salt Lake City | [    |      | I.C. |      | ]    |
| San Francisco  | [    |      | I.C. |      | ]    |
| Seattle        | [    |      | I.C. |      | ]    |

(CX 630D-E).

61. The 1980 dollar and percent breakdown of sales to dealers and users for the eight distribution centers being focused on in this case was:

|                | Sales to Dealers | Sales to Users | Total Sales |
|----------------|------------------|----------------|-------------|
| San Francisco  | [                | I.C.           | ]           |
| Seattle        | [                | I.C.           | ]           |
| Portland       | [                | I.C.           | ]           |
| Salt Lake City | [                | I.C.           | ]           |
| Phoenix        | [                | I.C.           | ]           |
| Philadelphia   | [                | I.C.           | ]           |
| New York       | [                | I.C.           | ]           |
| Boston         | [                | I.C.           | ]           |

(CX 630E).

#### 5. Boise's Dual Distribution Strategy

62. Boise has always sold both for resale (to dealers) and direct (to commercial accounts). This policy originated through Boise's acquisition policy in the 1964-1966 period (CX 44A).

63. Boise's marketing strategy has been to make dual distribution

a viable marketing concept. Boise's 1977-1981 Business Plan noted that although Boise "has always encountered a [17] negative dealer attitude towards its selling direct," both its "direct and wholesale business are important; it is impractical to withdraw from either" (CX 44H).

64. Some distribution centers do not actively solicit commercial accounts because, according to Boise's 1977 Manager's Year-End Review of Operations:

It is beginning to be understood internally that while the Division is a dual operator, we may also maintain pure wholesale operations based on: 1) inadequate industrial potential in the community, and 2) ability to grow and meet our [Return of Investment] objectives as a wholesaler (CX 37D).

#### 6. Source Of Products

65. Boise carried products from about 250 vendors in its 1982 catalog (Tr. 4839); however, it purchased some products from about 1,800 vendors (Tr. 4784-85).

66. Boise's Itasca headquarters makes the decision as to which manufacturers' lines are to be carried in Boise's catalog and negotiates with the manufacturers (CX's 48D; 34R; 973; pp. 150-51; 2077, pp. 8-9).

67. Boise distribution centers are responsible for their own inventory. The purchasing department at each location places its orders directly with the manufacturer, who in turn ships the goods directly to the individual location that placed the order (CX's 975, pp. 34, 36; 973, pp. 30, 32; 48D). Correction of any billing errors associated with its orders from manufacturers are negotiated by each Boise location, not by the central office in Itasca (CX's 975, pp. 36-37; 973, pp. 32-35).

68. In deciding on which manufacturers it should purchase from, Boise considers market acceptance and quality of the product, manufacturer service, price as compared with that of other manufacturers, potential profitability, and whether the manufacturer gives a wholesale functional discount (Tr. 4795-96, 4836-37; CX's 672, pp. 5-8, 148-49; 2077, p. 11; 1022, 51R, 970, pp. 23-24; 971, pp. 106-07).

69. The market acceptance of some products sometimes dictates that Boise purchase them even though it might prefer to drop them (CX's 2077, pp. 21-24, 44-48; 976, pp. 66-67; 971, pp. 63-64). [18]

#### 7. The Distribution Centers' Inventory

70. The wholesale-commercial mix of customers served by a distribution center and its size are two factors that affect what percent of the items in Boise's catalog each distribution center stocks (CX 970, pp. 46-47). Boise locations that are primarily wholesale, serving the

dealer market, are required to stock all the catalog items (Tr. 4839; CX 971, pp. 66-67). The distribution centers with stronger commercial sales stock only as much of the catalog as they deem necessary (Tr. 4839; CX 971, pp. 66-67). These centers thus operate more like dealers than wholesalers (*See also* F. 71).

71. In stocking inventory, Boise's fill-rate goal is 90% for commercial accounts and 85% for dealer accounts. The lower fill-rate goal for dealer accounts exists because (Tr. 4580; CX's 976, pp. 135-36; 974, pp. 84-85; 91Z-46, 64Z-13):

The dealer customer tends to purchase within a much wider spectrum of items contained in the industry. Our branch operations for the dealer need to, therefore, stock more in terms of quantities and types of items related to our catalog than our commercial operations (CX 970, pp. 45-46).

72. On October 26, 1978, the number of items stocked by the locations focused on in this case were:

|                      |        |
|----------------------|--------|
| Boston (BOS)         | [I.C.] |
| Pennsauken (PEN)     | [I.C.] |
| Moonachie (NYC)      | [I.C.] |
| Salt Lake City (SLC) | [I.C.] |
| San Francisco (SFO)  | [I.C.] |
| Seattle (SEA)        | [I.C.] |
| Portland (PRT)       | [I.C.] |
| Phoenix (PHX)        | [I.C.] |

(CX's 972, pp. 58-61; 84H, F, G, 973, p. 118; 80F-H).

73. The warehouse space of the distribution centers focused on ranges from 28,000 sq. ft. in Salt Lake City (CX 973, p. 13) to 120,000 sq. ft. in Seattle (Tr. 5509).

74. The number of inventory turns in 1979 for Boise's distribution centers focused on in this case was: [19]

|                |       |
|----------------|-------|
| Philadelphia   | - 4.9 |
| New York       | - 3.8 |
| Boston         | - 2.8 |
| San Francisco  | - 5.5 |
| Seattle        | - 5.2 |
| Portland       | - 5.1 |
| Salt Lake City | - 4.1 |
| Phoenix        | - 3.2 |

The average turn for the Division was 4.6 (CX 51Z-16).

75. In 1980, for the Office Products Division as a whole, of the \$138,563,478 of commercial sales, \$21,349,186 or 15.4% were drop-

shipped directly from the factory to the customer, the remaining 84.6% being sold out of warehouse inventory (CX 30).

#### 8. The Distribution Centers' Sales Forces

76. Separate sales forces call on Boise's dealer and commercial accounts. The dealer-account salespeople are paid a salary plus bonus; the commercial-account salespeople are on commission (CX's 970, pp. 15-16; 976, pp. 29-30).

77. In 1976, the Pennsauken location had five sales representatives for commercial accounts and four handling dealer accounts (CX 69U). Around 1978, Pennsauken increased its commercial-account sales force. Now Pennsauken has seven outside salespeople who call exclusively on commercial accounts in its sales office in Washington, D.C. (Tr. 5784-85).

78. In 1982, the Boston distribution center had one salesperson calling on dealers, and seven calling on commercial accounts (Tr. 4582-83).

79. Boise's Salt Lake City location has four outside sales representatives and they handle commercial accounts exclusively (Tr. 5003-04).

80. In 1978, the Seattle distribution center had nineteen commercial sales representatives and two dealer salespeople (CX 90Z-23).

81. The Portland location had one dealer sales representative and nine salespeople for commercial accounts in 1980 (CX 96D). In 1982, the commercial sales force had increased to eleven but the dealer sales force remained at one (Tr. 5389-90).

82. The San Francisco location has eighteen sales representatives calling on commercial accounts and four representatives calling on dealers (Tr. 5646-47). [20]

#### 9. Boise's Services To Commercial Accounts

83. To attract business from commercial accounts, Boise distribution centers offer them attractive prices and various services. Some accounts are given better prices on frequently ordered items than are normally offered in Boise's price lists (Tr. 4869-70, 5044, 5693; CX's 60, 1368A-E; RX 216A-N).

84. In some cases, Boise uses pricing as a competitive weapon. In the 1979 Phoenix Marketing Plan, a competitive analysis of Wist Supply and Equipment Company (CX 84A-B, Z-6-Z-10) said that Wist has "the best service of anyone in the valley" and "our salespeople say the only way we have been able to take away their accounts are through lower pricing" (CX 84Z-9). To be more effective against Wist, Boise planned to:

Key on all larger accounts served by this competitor.

Offer a more competitive price to the larger accounts.

Offer a larger inventory selection to the larger accounts (CX 84Z-10).

85. Boise employees who testified in this case stated that it offers more and better services than competing dealers (Tr. 5402, 5243, 5174, 5575) and that they emphasize these services when they sell to commercial accounts (Tr. 4635-36, 4582, 5175; CX 972, p. 43). Some accounts have switched to Boise because of the services it offers (Tr. 5253-54, 5201-02, 5635).

86. The importance of service, as well as price, was summarized by Nathan Parrish, director of administrative services for Nike, Inc. (Tr. 5440), who explained what factors he considered in choosing Boise as a primary supplier for Nike:

I think generally we look at what the cost to us in doing business with the supplier is. A part of that, obviously, is the price of the products that they charge us, but also a more important part, too, is the level of service they provide to us. That is all a part of what we identify as the cost of doing business with a supplier or the cost directly to us for what he furnishes (Tr. 5444). [21]

#### 10. Boise's Net Profits

87. Net profit is the net income that is arrived at by deducting all operating and administrative expenses from the gross profit (Tr. 4341). For the period 1976 to 1979, the net profit before taxes as a percent of sales for Boise has steadily increased:

| <u>1976</u> | <u>1977</u> | <u>1978</u> | <u>1979</u> |
|-------------|-------------|-------------|-------------|
| [           | I.C.        |             | ]           |

(CX 51Z-12).

Boise's 1979-1983 Business Plan revealed that its return on sales was comparable to the leading industrial stationers in the industry (CX 48H).

#### *D. The Prices Charged By Six Office Product Manufacturers To Boise And Competing Office Products Dealers And Boise's Knowledge Of Those Prices*

##### 1. Introduction

88. To prove the complaint's allegation that Boise violated Section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving discriminations in price from its suppliers that are prohibited by Section 2(a) of the Act, complaint counsel called twenty-one dealers

and presented evidence of the prices charged to Boise and those dealers by six manufacturers.

## 2. Price Charts And Boise's Objections To Them

89. Complaint counsel offered, and I received in evidence, six charts (CX's 1-6) which summarize entries on invoices which reflect the discounts granted by six manufacturers of office products to Boise and to selected competing dealers; however, the invoices were not offered through a witness and Boise claims that they should not have been admitted because there was no evidence presented as to how the charts were prepared or whether the prices were representative of the prices charged to dealers. Boise also objects that only the chart for Boorum and Pease and that part of the Sheaffer Eaton chart relating to Duo-Tang products show invoice prices (RPF's 263, 265). [22]

90. In addition, Boise points out, and complaint counsel concede, that they did not, as Dr. Elzinga testified, "draw a random sample of invoices between the manufacturer and commercial stationers and a random sample of invoices between the manufacturer and the dual distributor. . . ." (Tr. 6283).

91. Boise also refers to some instances in which it discovered dealer invoice entries containing discounts equal to or greater than it received (RPF's 266-69), it argues that items which are priced on the basis of volume should not have been excluded from the charts (RPF 270) and its claims that the charts omit proof of sale of the products (RPF's 271-74). Other objections are that the charts do not establish that the purchases were reasonably contemporaneous (RPF's 275-76), that the goods sold were of like grade and quality (RPF 277) or that the discounts and prices listed included all of the discounts offered by the manufacturers (RPF 278).

92. Boise's major objection to the charts seems to be that they were not offered through a witness. A witness would have been superfluous after the extensive pre-trial discovery Boise had, for it was given copies of all six manufacturers' invoices, and complaint counsel's charts were corrected when errors were discovered. Sample invoices were also received in evidence so that the chart entries could be understood, and a representative from each of the manufacturers testified and was cross-examined by Boise's attorneys.

93. Boise's other objections are not well-founded. The Robinson-Patman Act does not require random selection of manufacturers or their invoices. Many invoices do not show price because the manufacturers' net prices are computed by applying a standard discount from suggested list price. The difference in discounts as between Boise and a competing dealer is thus as revealing and as probative of a price difference as are actual invoiced net prices. The charts do not analyze

the manufacturers' volume prices because these prices are not challenged by complaint counsel (CRB, p. 6).

94. Contrary to Boise's claim, invoiced prices (or discounts) do reveal the price which a customer paid for a manufacturer's products:

JUDGE PARKER: What does the invoice mean? That the product was shipped?

THE WITNESS: That is a bill, an invoice rendered.

JUDGE PARKER: It means the product was actually shipped to the customer? [23]

THE WITNESS: Yes, sir, from that we expect a payment from that piece of paper (Tr. 1266).

Mr. Williams of Bates also confirmed the obvious:

Q. Here is another strange question for you: I am compelled to ask you this, so forgive me. In the normal course of business what happens when a customer receives an invoice? Does the customer pay the amount on the invoice to Bates?

A. Yes (Tr. 2289-90).

95. After extensive discovery, Boise was able to find a few instances in which manufacturers may have favored the selected dealers over Boise or may have charged Boise and a dealer the same price (RPF's 266-69), but this occurred on less than a dozen invoices (CRB, pp. 36-37); complaint counsel have established, on the other hand, that in thousands of cases in 1979,<sup>2</sup> Boise was consistently favored over the selected dealers on goods of like grade and quality. The only possible conclusion is that the charts accurately reflect the prices charged, or discounts given, by the six manufacturers to Boise and the selected dealers in 1979.

### 3. The Selected Dealers Compete With Boise

96. For each of the following dealers, all of whom are listed in the price charts, Boise admits that: (1) it solicited end-user accounts which at the same time were being served in whole or in part by the dealer; (2) it obtained end-user accounts which were served before in whole or in part by the dealer; and (3) it sold office supplies in competition with the dealer:

Union Office Supply, Boston, Mass.  
G.E. Stimpson Co., Worcester, Mass.  
Monroe-Narcus Stationers, Brighton, Mass.  
David Appel, Paterson, N.J. [24]  
A. Pomerantz & Co., Philadelphia, Pa.  
Yorkship Business Supply, Cherry Hill, N.J.  
Hugh A. George Co., Wilmington, Del.  
George D. Hanby Co., Wilmington, Del.

<sup>2</sup> There are over 5,800 entries on CX's 1-6. Over 4,500 of them reflect sales where both the sale to Boise and the compared sale to a competing dealer crossed state lines (CX's 1-6).

Andrews Office Products, Washington, D.C.  
Associated Ruggles, Seattle, Wash.  
John L. Bird Co., Seattle, Wash.  
The Stationers, Tacoma, Wash.  
Trick & Murray, Seattle, Wash.  
Dean Mark, Fremont, Cal.  
Gilbert-Clarke, San Francisco, Cal.  
Curtis Lindsay, Inc., Santa Clara, Cal.  
Charlie Helwig, Inc., Portland, Ore.  
Kilham Stationery & Printing, Portland, Ore.  
Klip Stationers, Portland, Ore.  
Kelly Co., Salt Lake City, Utah  
Mid-West Office Furniture and Suppliers, Salt Lake City, Utah  
Weber Office Supply, Salt Lake City, Utah  
Wist Supply and Equipment Co., Phoenix, Ariz.

(CX 431S-Z-3, Requests 132-34, 136-55, 159-61, 163-82, 186-88, 190-209; Order Ruling on Complaint Counsel's Motion to Determine the Sufficiency of Boise Cascade's Answers to Requests for Admissions, April 12, 1982).

97. Twenty of the dealers who testified indicated who they considered to be their primary competitors. (Weber Office Supply was not asked to do so.) The dealers generally listed two to six competitors and nineteen of the twenty included Boise among the competitors they named (Kilham testified it competed with all dealers, including Boise, but did not categorize which ones were primary competitors) (Tr. 3662, 3664-65, 3144, 4081, 3424-25, 3556, 3240, 3359, 3327, 3897, 4217, 3034, 3980, 2605-06, 656, 1341, 2533-34, 2037, 2431, 2913; CX 702, Exhibit 3, p. 5).

98. The Boise distribution center managers named each of the dealers who testified as competitors, with the exception of Union, The Stationers and Gilbert-Clarke (Tr. 5611, 4962-63, 4577; CX's 977, pp. 89-90; 972, pp. 77, 91; 976, p. 145; 974, pp. 105-06; 973, pp. 20-21; 975, pp. 11-13).

99. The Boise distribution centers' Marketing Plans analyze major competitors. Among the dealers analyzed in those plans are Curtis Lindsay (CX 99F), Pomerantz (CX 70Z-3-Z-7), G.E. Stimpson (CX's 75Z-3-Z-8, 74Z-7-Z-11), Ruggles (CX's 90U, 91Z-2), Trick & Murray (CX's 90Z-6, 91M), Wist (CX 85V), Mid-West (CX 79F), Kelly (CX 79F), and Weber (CX 79G).

100. Boise distribution centers' Marketing Plans list Key Target Accounts. The current supplier of the target account is included on the form. Among the dealers who were current suppliers of key target accounts are Klip (CX 95Z-10), Pomerantz [25] (CX 70Z-60), Andrews (CX 70Z-61), Monroe (CX 75Z-18-Z-21), Kelly (CX's 80Z-26, Z-30, Z-31, Z-34, 81Z-36-Z-37), Weber (CX's 80Z-30, Z-33, 81Z-36, Z-39).

Wist (CX 85Z-11), Trick & Murray (CX's 90Z-29, 91Z-54), and Ruggles (CX 91Z-54).

#### 4. Rediform Office Products

##### a. *Description*

101. Rediform Office Products ("Rediform") is a division of Moore Business Forms, Inc. and has been located in Paramus, New Jersey, for thirteen or fourteen years (Tr. 756-57). It sells stock business forms, related business forms, and recordkeeping devices (Tr. 757).

102. Rediform's sales were approximately \$18 million in 1979 and \$23 million in 1981 (Tr. 762, 764). In 1979, 48% of its sales were to retail dealers and 52% were to wholesalers (Tr. 766).

##### b. *Products*

103. Rediform classifies its stock business forms in nine groups which correspond to the business functions for which they are used: purchasing, receiving, stockkeeping, production, selling, delivery, billing, collecting and disbursing (Tr. 768, 1019; CX 400, p. 3).

104. Rediform's business forms come in several types. For instance, a Rediform Speediset is a complete set of forms with copies and carbon held together in a single unit by a firmly posted perforated stub which is for one-time use. Another example is book forms, which have numbered sets of forms in a book with reusable carbon for copies (Tr. 768-69; CX 400, p. 4).

105. Rediform also sells form-handling equipment and autographic registers. Each of these constitutes less than 1% of its sales (Tr. 800-01).

106. Recordplate is another major line produced by Rediform which includes recordkeeping diaries, appointment books and loose-leaf products (Tr. 757-58).

107. There are no differences between the products sold by Rediform to Boise and those sold to dealers. They are packaged the same way, sold under the same label, and used for the same purpose (Tr. 769-73, 787-88, 845-46, 855). [26]

##### c. *Sales In Commerce*

108. Rediform produces Recordplate products in a manufacturing facility in El Monte, California, and it operates three distribution facilities located in Paramus, New Jersey; St. Louis, Missouri; and Los Angeles, California. These distribution centers house inventory and ship orders to customers (Tr. 833, 855).

109. The Paramus distribution facility serves the eastern United States from Cleveland east, including New Jersey, Pennsylvania and

Massachusetts. The Los Angeles facility serves the eleven western states, including California, Washington, Oregon, Arizona and Utah (Tr. 883-86).

110. Rediform's distribution centers obtain business forms from factories operated by Moore in the United States (Tr. 885). They generally order from Moore plants four times a year, or more often for fast-moving goods (Tr. 894-96).

111. In 1979, Rediform's Paramus distribution center obtained stock business forms from Moore plants at the following locations: Elmira, New York; Lewisburg, Pennsylvania; Rochester, Indiana; Marion, Kentucky; and Honesdale, Pennsylvania (Tr. 886-87).

112. In 1979, the Los Angeles distribution center of Rediform obtained Speedisets from Moore plants in Salem, Oregon; Logan, Utah; Lewisburg, Pennsylvania; and Rochester, Indiana (Tr. 891; CX 410A).

113. In 1979, Rediform's distribution centers obtained Recordplate products from the plant in El Monte, California (Tr. 885-86, 855).

#### *d. Sales Policy*

114. The suggested list prices published by Rediform reflect different prices for different quantities. The higher the quantity, the lower the price per unit (Tr. 792-93, 820-21; CX's 225, 203).

115. Retail dealers have received a 50% discount off suggested list price on Rediform business forms since 1956 (Tr. 790-91, 793-94, 798-99, 803-04, 807, 828; CX's 197, 206-10).

116. Wholesalers have received a 50-20% discount off suggested list price on Rediform business forms since about the late 1950's (Tr. 816-17, 820-21, 827-28; CX's 204-05, 196). Boise and its predecessor have received this 50-20% discount on [27] Rediform business forms since the late 1950's or early 1960's (Tr. 843-44).

117. Retail dealers have received a 50% discount off suggested list price from Rediform on Recordplate since September 26, 1977 (Tr. 808-09; CX 214-18), while Boise has received a 50-20% discount from Rediform on these products since late 1977 (Tr. 817-18, 843-44).

118. Rediform pays the freight for all wholesalers and dealers, except on purchases of certain minor products in which case the customer pays the freight (Tr. 907).

119. Rediform's payment terms have always been the same for all customers (Tr. 908).

#### *e. Examples Of Discriminatory Sales*

##### *(1) Billing Forms*

120. CX 4 identifies billing forms sold to dealers and competing Boise distribution centers by Rediform (CX 4A, Amended L, M, N,

Revised Z-5, Z-6, Z-7, Amended Z-18, Z-19, Z-24, Z-25, Revised Z-38). The billing forms are identified by descriptions of discrete subsets of the billing forms line which have similar characteristics. For instance, "Invoice Books,  $5\frac{1}{2} \times 7\frac{7}{8}$ " are identified (CX 4A, Amended L, M, N, Revised Z-5, Z-7, Z-24, Z-25, Revised Z-38). There are four invoice books meeting that description. All of them have the same format. They differ only in the number of copies per numbered form (CX's 400, p. 2; 225J, 203, p. 10). Another example is "Speediset Invoices, Ruled,  $8\frac{1}{2} \times 11$ " (CX 4A, Amended L, M, Z-6, Z-7, Z-24, Z-25). There are two speedisets meeting this description, differing only as to the number of copies per set (CX's 400, p. 56; 255J, 203, p. 10).

121. During 1979, Stimpson, Monroe-Narcus, Pomerantz, Yorkship, Hanby, Ruggles, John L. Bird, The Stationers, Trick & Murray, Dean Mark, Gilbert-Clarke, Curtis Lindsay, Kilham, and Wist purchased billing forms of one or more of the following types from Rediform at a discount of 50%:

- Invoice books,  $5\frac{1}{2} \times 7\frac{7}{8}$
- Invoice books,  $7 \times 8\frac{1}{2}$
- Invoice books,  $8\frac{1}{2} \times 11$
- Credit memo books
- Speedipak invoices, ruled,  $8\frac{1}{2} \times 7$
- Speedipak invoices, ruled,  $8\frac{1}{2} \times 11$
- Speedipak invoices, unruled,  $8\frac{1}{2} \times 7$
- Speediset invoices, ruled,  $8\frac{1}{2} \times 7$
- Speediset invoices, ruled,  $8\frac{1}{2} \times 11$  [28]
- Speediset invoices, unruled,  $8\frac{1}{2} \times 7$
- Speediset invoices, unruled,  $8\frac{1}{2} \times 11$

(CX 4A, Amended L, M, N, Revised Z-5, Z-6, Z-7, Amended Z-18, Z-19, Revised Z-38).

122. During 1979, Boise's distribution centers which competed with the dealers identified in F. 121 purchased the same types of billing forms as did those dealers at a discount of 50-20% (CX 4A, Amended L, M, Revised Z-5, Z-6, Amended Z-18, Z-24, Revised Z-38).

## (2) Producing Forms

123. CX 4 identifies producing forms sold to dealers and competing Boise distribution centers (CX 4J, K, Z-3, Z-3.1, Z-4, Revised Z-16, Z-17, Z-17.1, Z-46). The producing forms are unique in many instances, for example, weekly time tickets; Speediset, Speedimemo, unruled  $8\frac{1}{2} \times 7$ ; and Speediset, Rediletter, unruled  $8\frac{1}{2} \times 7$  (CX 4J, K, Z-3.1, Z-4, Revised Z-16, Z-17.1). Each of these products comes in only one version (CX's 225D, 203, pp. 4, 5, 14; 225E, N). Other producing forms are identified by descriptions of discrete subsets of the producing-forms line that have similar characteristics, such as

"Speedisets, Speedimemo, Ruled  $8\frac{1}{2} \times 7$ " (CX 4Z-3.1, Z-4, Revised Z-16, Z-17, Z-17.1). This product comes in four versions which differ only in format and as to whether the copies are made with carbon paper or carbonless paper (CX's 400, pp. 21-22; 225E, 203, p. 5).

124. During 1979, Pomerantz, Yorkship, Hugh George, George Hanby, Andrews, Ruggles, John L. Bird, The Stationers, Trick & Murray, Dean Mark, Gilbert-Clarke, Curtis Lindsay, and Appel purchased producing forms of one or more of the following types from Rediform at a discount of 50%:

Weekly time tickets  
 Speediset, Speedimemo, ruled  $5\frac{1}{2} \times 8\frac{1}{2}$   
 Speediset, Speedimemo, ruled,  $8\frac{1}{2} \times 7$   
 Speediset, Speedimemo, unruled  $8\frac{1}{2} \times 7$   
 Speediset, Speedimemo, ruled  $8\frac{1}{2} \times 11$   
 Speediset, Rediletter, ruled  $8\frac{1}{2} \times 7$   
 Speediset, Rediletter, unruled  $8\frac{1}{2} \times 7$   
 Auto repair inspection report  
 Auto repair orders,  $8\frac{1}{2} \times 8\frac{1}{2}$   
 Speedicopy pads,  $8\frac{1}{2} \times 11$   
 Envelopes, double-window

(CX 4J, K, Z-3, Z-3.1, Z-4, Revised Z-16, Z-17, Z-17.1, Z-46). [29]

125. During 1979, Boise's distribution centers which competed with the dealers identified in F. 124 purchased the same types of producing forms as did those dealers at a discount of 50-20% (CX 4J, Z-3, Z-3.1, Z-16, Z-46).

### (3) Selling Forms

126. CX 4 identifies selling forms sold to dealers and competing Boise distribution centers (CX 4D, E, F, Amended Q, Amended R, S, T, Z-10, Z-11, Z-12, Z-27, Z-28, Z-29, Z-40, Z-41, Z-49). The selling forms are identified by descriptions of discrete subsets of the selling-forms line which have similar characteristics. For instance, "Sales Books,  $3\frac{5}{8} \times 6\frac{3}{8}$ ," is listed (CX 4D, F, Amended Q, Amended R, S, T, Z-10, Z-11, Z-27, Z-29, Z-40, Z-49). This product comes in two versions, duplicate and triplicate (CX's 400, p. 34; 225G, 203, p. 7).

127. During 1979, Stimpson, Monroe-Narcus, Yorkship, Hugh A. George, George D. Hanby, Andrews, Ruggles, John L. Bird, The Stationers and Trick & Murray purchased selling forms of one or more of the following types from Rediform at a discount of 50%:

Sales books,  $3\frac{5}{8} \times 6$   
 Sales books,  $3\frac{5}{8} \times 6\frac{3}{8}$   
 Sales books,  $4\frac{1}{4} \times 6\frac{3}{8}$   
 Sales books,  $4\frac{1}{4} \times 7\frac{7}{8}$

Sales books,  $5\frac{1}{2} \times 7\frac{7}{8}$   
Sales form books  
Salesman's order book,  $4\frac{1}{4} \times 6\frac{3}{8}$   
Salesman's order book,  $5\frac{1}{2} \times 7\frac{7}{8}$   
Salesman's order book,  $8\frac{1}{2} \times 11$   
Continuous register sales forms  
Speediset, sales forms,  $5\frac{1}{2} \times 8\frac{1}{2}$

(CX 4D, E, F, Amended Q, Amended R, S, T, Z-10, Z-11, Z-12, Z-40, Z-41).

128. During 1979, Boise's distribution centers which competed with the dealers identified in F. 127 purchased the same types of selling forms as did those dealers at a discount of 50-20% (CX 4D, Amended Q, Amended R, Z-10, Z-11, Z-40, Z-41).

#### (4) Delivery Forms

129. CX 4 identifies delivery forms sold to dealers and competing Boise distribution centers by Rediform (CX 4B, Revised [30] C, Amended O, P, Z-8, Z-9, Z-20, Z-21, Z-26, Z-34, Z-39, Z-48). The delivery forms are identified by descriptions of discrete subsets of the delivery-forms line. For instance, "Speediset Short Form, B/L" is listed (CX 4B, Revised C, Amended O-P, Z-8-Z-9, Z-20-Z-21, Z-26, Z-48). This product comes in two versions, triplicate and quadruplicate (CX's 400, p. 50; 225I, 203, p. 9).

130. During 1979, Stimpson, Monroe-Narcus, Pomerantz, George D. Hanby, Yorkship and Wist purchased delivery forms of one or more of the following types from Rediform at a discount of 50%:

Speediset short form, b/1  
Speedipak short form, b/1  
Call notice  
Packing slips  
Driver's daily log  
Delivery receipts  
Railroad b/1  
Speediset motor carrier, b/1  
Meter check  
Speediset Canadian Customs Inventory  
Driver's daily log

(CX 4B, Revised C, Amended O, P, Z-8-Z-9, Z-20-Z-21, Z-26, Z-34, Z-39, Z-48).

131. During 1979, Boise's distribution centers which competed with the dealers identified in F. 130 purchased the same types of delivery forms as did those dealers at a discount of 50-20% (CX 4B, Amended O, Z-8, Z-9, Z-20, Z-26, Z-34, Z-39, Z-48).

## (5) Purchasing Forms

132. CX 4 identifies purchasing forms sold to dealers and competing Boise distribution centers (CX 4G, H, I, Amended U, Amended V, W, X, Z-13-Z-15, Z-22, Z-23, Z-30-Z-31, Z-42-Z-43, Z-50). The purchasing forms are identified by descriptions of discrete subsets of the purchasing-forms line which have similar characteristics. For instance, "Material Requisitions" is listed (CX 4G, I, Amended U, W, Z-13-Z-14). This product comes in two versions, duplicate and triplicate (CX's 400, p. 5; 225B, 203, p. 2).

133. During 1979, Union, Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, Hanby, Ruggles, Trick & Murray, Dean Mark, Gilbert-Clarke, Curtis Lindsay, Wist and Appel purchased purchasing forms of one or more of the following types from Rediform at a discount of 50%: [31]

- Material requisitions
- Purchasing requisitions
- Parts/material requisitions
- Purchase orders,  $4\frac{1}{4} \times 6\frac{3}{8}$
- Purchase orders,  $5\frac{1}{2} \times 7\frac{7}{8}$
- Purchase orders,  $8\frac{1}{2} \times 11$
- Speedisets, ruled purchase orders,  $8\frac{1}{2} \times 7$
- Speedisets, ruled purchase orders,  $8\frac{1}{2} \times 11$
- Speedisets, unruled purchase orders,  $8\frac{1}{2} \times 7$
- Speedisets, unruled purchase orders,  $8\frac{1}{2} \times 11$
- Speedisets, requests for quotation

(CX 4G, H, I, Amended U, Amended V, W, X, Z-13-Z-15, Z-22-Z-23, Z-42-Z-43, Z-50).

134. During 1979, Boise's distribution centers which competed with the dealers identified in F. 133 purchased the same types of purchasing forms as did those dealers at a discount of 50-20% (CX 4G, Amended U, Amended V, Z-13-Z-14, Z-22, Z-30, Z-42, Z-50).

## (6) Collecting Forms

135. CX 4 identifies collecting forms sold to dealers and competing Boise distribution centers. The collecting forms identified are "money receipts 4 on a page" (CX 4Z-32, Z-35, Z-44). The receipts come in five versions and vary as to size, format and number of copies (CX's 225K, 400, pp. 59, 61).

136. During 1979, Helwig, Kilham, Kelly, Mid-West, Weber and Wist purchased "money receipts 4 on a page" at a discount of 50% (CX 4Z-32, Z-35, Z-44).

137. During 1979, Boise's distribution centers which competed with

the dealers identified in F. 136 also purchased "money receipts 4 on a page" at a discount of 50-20% (CX 4Z-32, Z-35, Z-44).

138. During 1979, the dealers identified in F.'s 121, 124, 127, 130, 133, 136 paid Rediform 25% more<sup>3</sup> for stock business forms than did the Boise distribution centers with which those dealers competed (F.'s 120-37). [32]

#### (7) Recordplate

139. CX 4 identifies products in the Recordplate line sold to dealers and competing Boise distribution centers (CX 4, Amended Y, Z-1-Z-2, Z-33, Z-36-Z-37, Z-45, Revised Z-51). The products are unique in many instances, for example, address forms,  $2\frac{1}{2} \times 5$ ; address forms,  $2\frac{1}{2} \times 3\frac{7}{8}$ ; address-o-ref forms,  $2\frac{1}{2} \times 5$ ; address-o-ref forms,  $2\frac{1}{2} \times 3\frac{7}{8}$ ; and faint-ruled sheets,  $8 \times 5$  (CX 4, Amended Y, Z-1-Z-2, Z-33, Z-36-Z-37, Z-45). Each of these products comes in only one version, excluding differences in color (CX's 192J, pp. 3, 8; 223B, 224B). Other Recordplate products are identified by descriptions of discrete subsets of the Recordplate line which have very similar characteristics. For instance, "Bookset, Address, #653" is listed (CX 4, Amended Y, Z-1-Z-2, Revised Z-51). This product comes in three versions, which differ in ring capacity and in color (CX's 192J, p. 1; 223A, 224A).

140. During 1979, Pomerantz, Yorkship, Andrews, Klip, Kelly, Weber, Wist, and Appel purchased Recordplate products of one or more of the following types from Rediform at a discount of 50%:

- Address forms,  $2\frac{1}{2} \times 5$
- Address forms,  $2\frac{1}{2} \times 3\frac{7}{8}$
- Address-O-Ref forms,  $2\frac{1}{2} \times 5$
- Address-O-Ref forms,  $2\frac{1}{2} \times 3\frac{7}{8}$
- Faint-ruled sheets,  $8 \times 5$
- Bookset, address, #653
- Bookset, address, #613
- Bookset, telephone
- Sales follow-up

(CX 4, Amended Y, Z-1-Z-2, Z-33, Z-36).

141. During 1979, Boise's distribution centers which competed with the dealers identified in F. 140 purchased the same types of Recordplate products as did those dealers at a discount of 50-20% (CX 4, Amended Y, Z-1, Z-33, Z-36, Z-45, Z-51).

142. During 1979, Pomerantz, Yorkship, Andrews, Klip, Kelly, Weber, Wist and Appel paid Rediform 25% more for Recordplate

<sup>3</sup> For example, if a product had a suggested list price of \$1.00, Boise received a 50-20% discount, thereby paying 40 cents (F. 8). The dealer received a 50% discount, thereby paying 50 cents. The difference of 10 cents, divided by 40 cents, equals 25%.

products than the Boise distribution center with which each dealer competed (F.'s 139-41).

*f. Volume Of Boise's Purchases From Rediform*

143. Rediform's sales in 1979 to selected Boise distribution centers of Rediform products and Recordplate were: [33]

|                | Rediform<br>Products | Recordplate | Total    |
|----------------|----------------------|-------------|----------|
| Boston         | \$ 5,595             | \$ 1,584    | \$ 7,179 |
| Atlanta        | 22,725               | 7,664       | 30,389   |
| Charlotte      | 15,580               | 2,098       | 17,678   |
| Jacksonville   | 12,505               | 1,759       | 14,264   |
| Miami          | 35,523               | 3,564       | 39,087   |
| Moonachie      | 2,194                | 377         | 2,571    |
| Pennsauken     | 33,161               | 3,640       | 36,810   |
| Tampa          | 21,650               | 2,331       | 23,981   |
| Cincinnati     | 54,298               | 5,992       | 60,290   |
| Cleveland      | 30,172               | 147         | 30,319   |
| Detroit        | 25,296               | 3,570       | 28,866   |
| Dorsey-Dallas  | 11,385               | 2,075       | 13,460   |
| Dorsey-Houston | 10,299               | 1,269       | 11,568   |
| Itasca         | 123,186              | 19,528      | 142,714  |
| Milwaukee      | 45,403               | 4,042       | 49,445   |
| Nashville      | 28,552               | 2,356       | 30,908   |
| St. Paul       | 70,994               | 5,759       | 76,753   |
| Denver         | 49,125               | 5,036       | 54,161   |
| Los Angeles    | 27,951               | 6,434       | 34,385   |
| Portland       | 20,683               | 1,627       | 22,310   |
| Seattle        | 45,644               | 3,953       | 49,597   |
| Brisbane       | 21,479               | 3,175       | 24,654   |
| Phoenix        | 14,194               | 1,229       | 15,423   |

(CX 194).

144. In 1979, Boise distribution centers purchased approximately \$718,402 of products from Rediform distribution facilities located in states different from those in which the Boise distribution centers were located (New Jersey, St. Louis, Los Angeles) (F.'s 108, 143).

145. Boise's total purchases from Rediform in the years indicated were:

|      |           |      |           |
|------|-----------|------|-----------|
| 1976 | \$446,746 | 1978 | \$724,173 |
| 1977 | \$641,457 | 1979 | \$913,501 |

(CX 630G).

146. Boise is one of Rediform's largest customers (Tr. 765-66). [34]

*g. Boise's Possession Of Price Information*

147. Rediform sends schedules reflecting retail dealer discounts to wholesale customers (Tr. 795, 798, 800, 803-04, 807, 809). It sent retail dealer discount schedules to Boise because it is customary to provide wholesale customers with information concerning retail dealer discounts. This is done because wholesalers sell to retailers and it is helpful to the wholesaler to know the discounts at which dealers can buy from manufacturers (Tr. 795-96).

148. Boise's files contained Rediform's retail dealer discount schedules for business forms dated July 1, 1977 to October 6, 1980. These schedules reflected the 50% dealer discount (CX's 206-10, 438A, 439B).

149. Boise's files contained retail dealer discount schedules for Recordplate dated from September 26, 1977 to October 6, 1980. These schedules reflected the 50% dealer discount (Tr. 808-09; CX's 438A, 439B, 214-18).

150. Boise's Buyers' Guides dated November 11, 1977, March 22, 1978, April 6, 1979, and September 2, 1980 show that Rediform's published discount to dealers was 50% (CX's 219-22, 438A, 439B).

151. Rediform sent an announcement to wholesalers of Recordplate that on September 26, 1977, the discount on Rediform and Recordplate lines would be the same, a 50-20% discount for wholesalers and a 50% discount for retail dealers. Boise had a copy of this announcement in its file (Tr. 824; CX's 230, 438A, 439B).

152. Boise had in its files a copy of a 1979 letter from Rediform which stated that its discount on Recordplate products to dealers was 50% (CX's 237, 438A, 439B).

153. Dennis Office Supply, acquired by Boise in 1978, had purchased products from Rediform at a discount of 50%. Boise's Boston distribution center buys at a discount of 50-20% (Tr. 830-31).

**5. Sheaffer Eaton**

*a. Description*

154. Sheaffer Eaton is a division of Textron (CX's 269Z-27, 270Z-24). Textron is located in Providence, Rhode Island. Sheaffer Eaton has been located in Pittsfield, Massachusetts, since 1976 (Tr. 1058-59). [35]

155. Within the Sheaffer Eaton Division of Textron, Sheaffer manufacturers writing instruments and Eaton includes the Duo-Tang line, At-A-Glance record books, Berkshire typewriter papers, and social stationery, among others (Tr. 1059).

156. In 1981, Sheaffer Eaton's sales of Duo-Tang were approximate-

ly \$33 million and sales of At-A-Glance were approximately \$25 million (Tr. 1091).

*b. Products*

157. Duo-Tang is a line of paper carriers which includes a number of variations of portfolios and covers for binding papers (Tr. 1080-81; CX 290A).

158. At-A-Glance is a record-book line which includes dated and nondated products. The dated portion of the line has three basic formats, Day At-A-Glance, Week At-A-Glance, and Month At-A-Glance. The dated portion of the line for the most part "is simply a proliferation of those formats into different configurations and sizes . . ." (Tr. 1066). The At-A-Glance books come in pocket and desk sizes (CX's 269B, 270B).

159. The nondated portion of the line includes telephone address books, auto record books, expense books and similar items (Tr. 1066).

160. The At-A-Glance line is sold to wholesalers and dealers. There are no differences between the items in the line which are sold to wholesalers and to dealers. They are packaged the same way and sold under the same label (Tr. 1074-76).

161. Duo-Tang products are sold to both wholesalers and dealers. There are no differences in the Duo-Tang products which are sold to wholesalers and to dealers (Tr. 1083-84).

162. The Duo-Tang and At-A-Glance products sold to Boise are not specifically manufactured for Boise. They are stock items (Tr. 1155).

*c. Sales In Commerce*

163. Duo-Tang products have been produced in Paw-Paw, Michigan since approximately 1945. Products are shipped directly to customers from Paw-Paw (Tr. 1079).

164. At-A-Glance products have been produced in Pittsfield, Massachusetts since 1947. At-A-Glance products are shipped directly from Pittsfield to the customer. No distribution centers are used (Tr. 1066-67). [36]

*d. Sales Policy*

165. Sheaffer Eaton has had a 50% discount for dealers on At-A-Glance for twenty-five years (Tr. 1102-03, 1058).

166. Sheaffer Eaton has given a 50-10% discount on At-A-Glance products to contract stationers since 1974 or 1975 (Tr. 1108, 1141-42; CX 262A).

167. Sheaffer Eaton has given a 50-20% discount to wholesalers on At-A-Glance since approximately 1974 or 1975 (Tr. 1126, 1112-13; CX 271A).

168. Sheaffer Eaton has given a 50% discount on Duo-Tang products to dealer customers since 1968 (Tr. 1092, 1099). On purchases of 2,500 to 4,999 units of Duo-Tang, dealers receive a discount of 50-5%. On purchases of 5,000 units or more, dealers receive a discount of 50-10% (Tr. 1128-29; CX's 244A; 289; 291A; 293A, 296A).

169. Sheaffer Eaton has given contract stationers a 50-10% discount on Duo-Tang since 1968 (Tr. 1107, 1128, 1130-32, 1136; CX's 244B, 245E).

170. Sheaffer Eaton has given wholesalers a 50-20% discount on Duo-Tang since 1968 (Tr. 1125, 1131, 1135; CX's 244B, 245A, 297). This discount was inherited from a predecessor company, Ellingsworth (Tr. 1125-26, 1138; CX 672, p. 146).

171. Sheaffer Eaton classifies Boise as a wholesaler for purchases of At-A-Glance and Duo-Tang products, and Boise has received a 50-20% discount from Sheaffer Eaton as long as James Golden, a twenty-five year employee of Sheaffer Eaton, has known Boise (Tr. 1128, 1058).

172. In order for a customer to qualify as a contract stationer, it must have bought \$5,000 net of combined Duo-Tang, At-A-Glance and Berkshire products the preceding year. The customer must also buy in large quantities and bid for large consumer office supply needs. Before a contract stationer discount was extended by Sheaffer Eaton, the customer had to have a completed qualification sheet approved by regional and national management of the division (Tr. 1104-05; CX 259E, F).

173. In 1979, freight terms were the same for all customers purchasing Duo-Tang products. Sheaffer Eaton would pay freight on orders of \$400 or more (Tr. 1132; CX 244A-C).

174. In 1979, Sheaffer Eaton paid freight on purchases of \$2,000 or more of At-A-Glance products by wholesalers; otherwise [37] the wholesaler paid freight (Tr. 1113; CX 271A). In 1979, dealers and contract stationers received free freight on orders of \$1,600 or more. On orders of \$500 to \$1,599.99 dealers and contract stationers received partial freight and free shipment to New York City. On orders of less than \$500, dealers and contract stationers paid freight (Tr. 1142; CX's 262-63).

175. Sheaffer Eaton offered the same payment terms to all purchasers of Duo-Tang and At-A-Glance products (Tr. 1129-31, 1143; CX 244A-C).

*e. Examples Of Discriminatory Sales*

## (1) Duo-Tang

176. CX 5 identifies Duo-Tang products by Duo-Tang stock numbers which identify products sold by Sheaffer Eaton (Tr. 1081-83; CX 290A-K). Some of the stock-numbered products come in various colors (CX 290A-K), while others come in only one color (e.g., stock numbers 55558, 55530, 55540, 50525) (CX's 290D-G, 5S, V, Z-5, Z-11, Z-20).

177. During 1979, the dealers listed below paid Sheaffer Eaton more, by the median percentages indicated, for Duo-Tang products than the Boise distribution centers with which they competed:

|                |       |
|----------------|-------|
| Union          | 12.5% |
| Yorkship       | 12.5% |
| Hugh George    | 25.0% |
| Andrews        | 12.5% |
| Pomerantz      | 12.5% |
| Curtis Lindsay | 12.5% |
| Klip           | 12.5% |
| The Stationers | 24.7% |
| Ruggles        | 25.0% |
| Appel          | 12.5% |

(CX 5A-C, S-V, Z-3-Z-5, Z-11, Z-20).

178. During 1979, Boise's distribution centers competing with the dealers identified in F. 177 paid Sheaffer Eaton lower prices for Duo-Tang products identical to those purchased by the [38] dealers<sup>4</sup> except possibly for differences in color (CX 5A-C, S-V, Z-3-Z-5, Z-11, Z-20).

## (2) At-A-Glance

179. CX 5 identifies products in Sheaffer Eaton's At-A-Glance line that are sold to dealers and competing Boise distribution centers (CX 5D-L, Amended M-N, Revised O-R, W, X-Y, Z-1-Z-2, Z-6-Z-10, Z-12-Z-14, Amended Revised Z-15, Amended Z-16-Z-19; Tr. 1074-76). The At-A-Glance products are identified by descriptions of discrete subsets of that group of products (CX 269B-J). Although individual items may vary in size, format, color and cover material, they perform the same function for the consumer (Tr. 1313, 1309; CX 269C-T).

180. For example, the pocket week appointment books which are listed (CX 5D, G, I, J, W, X, Amended Z-12, Z-14) are primarily pocket diaries or notebooks for arranging appointments. Sheaffer Eaton makes them with different covers, inserts, formats, sizes, and with or without auxiliary inserts such as memo pads and telephone and ad-

<sup>4</sup> In these cases, the charts reveal that both Boise and competing dealers purchased products with the same stock

dress lists. They also come in four or five colors. Regardless of these variations, they basically serve the same function for the consumer (Tr. 1307, 1309; CX 269E-G).

181. Desk week appointment books which are listed (CX 5E, G-I, K, W, Y, Amended Z-12, Amended Revised Z-15) are appointment books for desk use (Tr. 1310-11). The desk week appointment books vary in covers, insert formats, colors, sizes and auxiliary inserts such as telephone and address lists (CX 269H-J). Regardless of these variations, the desk week appointment books serve the same function for the consumer (Tr. 1312).

182. During 1979, Pomerantz, Yorkship, Hugh A. George, George D. Hanby, Andrews, Curtis Lindsay, Trick & Murray and Appel purchased dated At-A-Glance products of one or more of the following types from Sheaffer Eaton at discounts of 50% to 50-10%:

- Pocket week appointment books
- Pocket 2-Week appointment books
- Pocket month appointment books
- Desk day appointment books
- Desk week appointment books
- Desk month appointment books
- Professional appointment books - desk day [39]
- Professional appointment books - desk week
- Academic/fiscal appointment books - desk week
- Planning calendars
- Leather appointment books
- Refills/dated record books

(CX 5D-L, Amended M, W-Y, Z-6, Z-7, Amended Z-12-Z-14, Amended Revised Z-15, Amended Z-16-Z-17).

183. During 1979, Boise's distribution centers which competed with the dealers identified in F. 182 purchased the same types of dated At-A-Glance books and refills as did those dealers at a discount of 50-20% (CX 5D-G, W-X, Z-6, Amended Z-12-Z-14).

184. During 1979, Pomerantz, Yorkship, Hugh A. George, George D. Hanby, Andrews, Curtis Lindsay, Trick & Murray and Appel paid Sheaffer Eaton 12.5% to 25% more for dated At-A-Glance products than the Boise distribution centers with which they competed (F.'s 179-83).

185. CX 5 identifies nondated products in Sheaffer Eaton's At-A-Glance line that are sold to dealers and competing Boise distribution centers (CX 5N, Revised O-R, Revised Z-1-Z-2, Z-8-Z-10, Z-18-Z-19). The nondated products are identified by descriptions of discrete subsets of that group of products that have similar characteristics (CX 269V-Z-6). For instance, pocket telephone/address books are listed (CX 5N, Revised O, Q, Z-1, Z-8-Z-9, Z-18-Z-19). The pocket tele-

phone/address books come in eight stock number models. They vary in size, capacity, and covers. All serve as record books for names, addresses and telephone numbers (CX 269Z-3-Z-4).

186. During 1979, for nondated At-A-Glance record books and refills, Pomerantz, George D. Hanby, Curtis Lindsay, The Stationers, Trick & Murray and Appel purchased four or more of the following types from Sheaffer Eaton at discounts of 50% or 50-10%:

Pocket telephone/address books  
 Desk telephone/address books  
 Auto expense books  
 Expense and tax books  
 Guest register books  
 Desk week appointment books  
 Refills: Telephone/address  
 Refills: Memo pad  
 Refills: Expense and tax

(CX 5N, Revised O-R, Z-1-Z-2, Z-8-Z-10, Z-18-Z-19). [40]

187. During 1979, Boise's distribution centers which competed with the dealers identified in F. 186 purchased the same types of nondated At-A-Glance books and refills as did those dealers at a discount of 50-20% (CX 5N, Revised O, Z-1, Z-8-Z-9, Z-18).

188. During 1979, Pomerantz, George D. Hanby, Curtis Lindsay, The Stationers, Trick & Murray and Appel paid Sheaffer Eaton 12.5% to 25% more for nondated At-A-Glance books and refills than the Boise distribution centers with which they competed (F.'s 185-87).

*f. Volume Of Boise's Purchases From Sheaffer Eaton*

189. Sheaffer Eaton's sales of At-A-Glance to Boise's distribution centers in 1978 and 1979 were:

| At-A-Glance Sales      | 1979      | 1978      |
|------------------------|-----------|-----------|
| Itasca, Illinois       | \$ 85,700 | \$ 71,573 |
| Seattle, Washington    | 22,473    | 14,097    |
| Cincinnati, Ohio       | 19,380    | 14,908    |
| Warren, Michigan       | 21,367    | 20,232    |
| Milwaukee, Wisconsin   | 7,552     | 7,880     |
| St. Paul, Minnesota    | 22,222    | 21,446    |
| Brisbane, California   | 4,286     | 1,796     |
| Pennsauken, New Jersey | 21,576    | 23,485    |
| Compton, California    | 18,466    | 7,919     |
| Brooklyn Heights, Ohio | 0         | 7,659     |
| Atlanta, Georgia       | 14,355    | 15,209    |
| Denver, Colorado       | 9,991     | 7,515     |
| Portland, Oregon       | 0         | 3,151     |
| Houston, Texas         | 9,868     | 6,806     |
| Nashville, Tennessee   | 0         | 8,639     |

|                           |        |        |
|---------------------------|--------|--------|
| Tampa, Florida            | 7,116  | 4,872  |
| Charlotte, North Carolina | 6,590  | 6,353  |
| Miami, Florida            | 16,334 | 17,509 |
| Moonachie, New Jersey     | 7,278  | 5,784  |
| Burlington, Massachusetts | 1,656  | 573    |
| Dallas, Texas             | 12,604 | 30,514 |
| Jacksonville, Florida     | 8,233  | 9,806  |
| Phoenix, Arizona          | 188    | 0      |

(CX 279).

190. Boise's total purchases of At-A-Glance products from Sheaffer Eaton were \$307,726 in 1978 and \$336,854 in 1979 (CX 279). [41]

191. Sheaffer Eaton's 1979 sales of Duo-Tang to the Boise distribution centers listed below were:

|                        |          |
|------------------------|----------|
| Boston, Massachusetts  | \$21,038 |
| Phoenix, Arizona       | 5,016    |
| Portland, Oregon       | 33,252   |
| Brisbane, California   | 70,056   |
| Seattle, Washington    | 49,735   |
| Pennsauken, New Jersey | 49,611   |
| Moonachie, New Jersey  | 22,017   |
| Salt Lake City, Utah   | 4,753    |

(CX 249B).

192. Boise's total purchases of Duo-Tang products from Sheaffer Eaton in 1979 were \$1,039,197 (CX 2070A).

193. Boise is one of Sheaffer Eaton's ten largest customers (Tr. 1265).

*g. Boise's Possession Of Price Information*

194. Sheaffer Eaton has given dealers a 50% discount on At-A-Glance for twenty-five years. This discount is common knowledge to wholesalers and dealers in the industry (Tr. 1102-04).

195. Boise had in its files documents reflecting dealer discounts extended by Sheaffer Eaton on Duo-Tang products dated January 17, 1977, July 3, 1978, March 19, 1979, August 15, 1979, and February 1, 1980 (CX's 289, 284, 286-87, 291, 293, 296, 438A, 439B).

196. Dennis Office Supply, acquired by Boise in 1978, had received a discount of 50% from Sheaffer Eaton on At-A-Glance and Duo-Tang products (Tr. 1159; CX 246B-L, N-P).

197. Robert Welnhof, former General Manager of Boise's Office Products Division, knew that Sheaffer Eaton offered wholesale discounts on At-A-Glance dated products and Duo-Tang products (CX 672, p. 146). [42]

## 6. Kardex Systems, Inc.

### a. *Identity And Business*

198. Kardex Systems, Inc. ("Kardex") is located in Marietta, Ohio (Tr. 1555). Victor Systems and Equipment is a division of Kardex which sells office products (Tr. 1520).

199. Kardex's fiscal year starts September 1 and ends August 31. In the fiscal year ending 1981, Victor's sales were approximately \$13 million. In the preceding year, sales were approximately \$11.5 million (Tr. 1521-22).

200. In the fiscal year ending August 31, 1980, approximately 37% of Victor's sales were to dealers and 63% were to wholesalers (Tr. 1523).

201. Victor has sold visible recordkeeping equipment and insulated files for approximately thirty years. During that time, Victor has had several corporate parents. In September 1978, Victor was divested by Sperry Univac and became "Kardex"<sup>5</sup> (Tr. 1529, 1531-32).

### b. *Products*

202. Victor sells a visible recordkeeping line which is divided into three parts: card forms, visible record systems and visible reference equipment (Tr. 1530-31; CX's 325A, 326A, 327A).

203. Card forms are designed to hold information. They come in various sizes and have different applications (CX 327A-P; Tr. 1545). Card forms are used in conjunction with Victor's visible record systems and visible reference equipment (CX's 326D, 325D).

204. The common elements of the visible record system are card forms, visible pockets, visible signals, and pocket holders (CX 326D).

205. Cards are inserted into pockets and pockets serve as a device for holding the cards (Tr. 1545, 1549). Pocket size varies with the size of the card held (CX 326D).

206. Signals are small plastic clips which are affixed to the leading edge of a pocket to indicate certain information [43] without requiring the unloading of the pocket (Tr. 1552; CX 326D). Signals come in various sizes and colors (CX 326"O").

207. The pockets are inserted into pocket holding devices which include cabinet slides or drawers, book units and panels (Tr. 1549; CX 326"O").

208. A book unit is a portable visible equipment device containing two panels in book form. Panels contain a series of cards in shingled fashion (Tr. 1543). Book units and panels come in a variety of sizes and capacities for holding pockets (CX 326J, M).

209. A cabinet is a complete unit containing a number of drawers

<sup>5</sup> The names Victor and Kardex are used interchangeably hereafter.

or slides which house cards in shingled form (Tr. 1544). Cabinets vary in the number of drawers and sizes of cards housed (CX 326F).

210. A section is an individual component of a cabinet containing one slide or drawer (Tr. 1550; CX 326H). Sections vary in size and capacity (CX 326H). A top is a section placed on top of a group of sections stacked on one another so it becomes a finished unit (Tr. 1553; CX 326H). A bottom section begins the stack (CX 326H).

211. Visible reference equipment consists of four basic elements: forms, frames, frame holding devices and bases (CX 325D).

212. Forms for reference equipment include strips, inserts, and cards (CX 325D).

213. Inserts are perforated pieces of material upon which information is placed for insertion in frames (Tr. 1546-47). Before insertion, the inserts are placed in a plastic sleeve called a "tube" (Tr. 1554). Tubes and inserts come in various sizes (CX 325I-K).

214. Strips are similar to inserts and are also inserted into frames (Tr. 1551). Information is typed on the strip for storage on the frame. Strips come in various sizes and colors (CX 325H).

215. Frames are devices designed to hold forms, and come in various sizes (CX 325D, F). Frames of a given height will fit all frame holding devices within the product lines (CX 325D).

216. Frame holding devices include, among others, desk stands (CX 325F). Desk stands vary as to the number of frames and the height of frames they accommodate (CX 325F).

217. Bases are tables upon which stands are placed (CX 325D, G). Bases come in several sizes and in two colors (CX 325G). [44]

218. Recordex is a portable piece of recordkeeping equipment (Tr. 1549). Recordex is a record folder which utilizes the pocket approach to information storage (CX 326L).

219. Victor encourages the purchase of the products in its visible line as a system rather than as individual items (CX 1023B).

220. Insulated files are file cabinets designed to protect either paper or other flammable material in the event of fire (Tr. 1555).

221. The products involved in this case are sold by Victor to both wholesalers and dealers. There are no differences in the products sold to wholesalers and dealers. They are sold under the same trade name and packaged the same way (Tr. 1542-55).

222. Boise buys stock items that are sold to other customers, including dealers; they are not specially produced for Boise (Tr. 1616).

### *c. Sales In Commerce*

223. Kardex produces its visible recordkeeping line in Reno, Ohio, and its insulated file line in Marietta, Ohio. Other than its facilities in these locations, Kardex does not use any distribution facilities.

Since approximately 1975, products have been shipped directly from the manufacturing facilities to customers (Tr. 1555-56).

*d. Sales Policy*

224. Victor has given dealers a discount of 40% off list price on visible equipment and supplies since November 15, 1974 (Tr. 1563, 1568-69; CX's 305H, 304H, 328G, 307D).

225. During 1979, a dealer that agreed to buy \$5,000 worth of visible equipment in a year received a 50% discount as a "key dealer" of visible equipment (Tr. 1572-73).

226. Wholesalers have received a discount of 50-10% on visible equipment and supplies since at least January 1979 (Tr. 1579, 1520; CX's 310B, 333D).

227. Prior to September 1, 1979, Victor offered discounts off the suggested list prices of insulated files. A discount of 40% was given unless the customer committed to purchase a certain number of files per year. If the customer committed to buy a certain number of files, the size of the discount was predicated [45] on the number of units to which the customer committed. The latter discount was known as a contract discount (Tr. 1590-91).

228. On September 1, 1979, Victor eliminated contract pricing on insulated files and changed to a discount similar to that used for visible equipment. On insulated files, Victor gave dealers a discount of 40-5%, key dealers 50%, and wholesalers 50-10% (Tr. 1593; CX's 310B, 307D, 333D).

229. In order to qualify as a key dealer of insulated files, a customer had to buy \$15,000 a year of insulated files (Tr. 1597; CX 310B).

230. Boise has received a discount of 50-10% on visible equipment since January of 1979 and on insulated files since September 1, 1979 (Tr. 1579, 1616-17).

231. From July 1, 1978 to September 1, 1979, freight was prepaid for all customers on orders of \$100 net (Tr. 1756-57; CX 328C). After September 1, 1979, freight was prepaid for all customers on orders of visible equipment of \$100 net or more and on orders of insulated files of \$700 net or more (Tr. 1754-56; CX's 307A-B, 333C).

232. Victor's payment terms on visible and insulated products in 1979 were "1%, 15 days, net 30 days" for dealers, and "1%, 10th prox., net 30 days" for wholesalers (CX's 328C, 307A, 333A). This allowed wholesalers a few more days than dealers to avail themselves of the cash discount (Tr. 1611-12).

*e. Examples Of Discriminatory Sales*

233. During 1979, Yorkship, Hanby, Ruggles, The Stationers, Trick & Murray, Mid-West, Weber, Curtis Lindsay, Charlie Helwig, Kilham

and Klip purchased one or more of the following types of visible equipment and supplies from Kardex at a discount of 40%: bases, book units, bottoms, cabinets, cards, desk stands, frames, inserts, pockets, Recordex, sections, signals, strips and tops (Tr. 4156-61; CX's 6C-D, F-G, Revised H-J, L-R, T-W, 440A, 444B-C, 445B-C).

234. During 1979, Union, Stimpson, Kelly and Pomerantz purchased one or more of the following types of visible equipment and supplies from Kardex at discounts of 40% or 50%: bases, book units, bottoms, cabinets, cards, frames, inserts, panels, pockets, Recordex, sections, strips and tops (Tr. 4156-61; CX's 6A-F, L-M, 440A, 444B-C, 445B-C).

235. During 1979, Boise's distribution centers which competed with the dealers identified in F.'s 233 and 234 purchased the same types of visible equipment and supplies from Kardex as did those dealers at a discount of 55% (i.e., 50-10%) [46] (Tr. 4156-61; CX's 6A-D, G, Revised H, L, P-Q, T-U, 440A, 444B-C, 445B-C).

236. During 1979, Yorkship, Hanby, Ruggles, The Stationers, Trick & Murray, Mid-West, Weber, Curtis Lindsay, Charlie Helwig, Kilham and Klip paid Kardex one-third more for visible equipment and supplies than did the Boise distribution centers with which they competed (F.'s 233, 235).

237. During 1979, Union, Stimpson, Kelly and Pomerantz paid Kardex 11% to 33% more for visible equipment and supplies than did the Boise distribution centers with which they competed (F. 234-35).

*f. Volume Of Boise's Purchases From Kardex*

238. In the fiscal year ending August 31, 1980, Kardex's sales to Boise distribution centers were:

|                           |           |
|---------------------------|-----------|
| Phoenix, Arizona          | \$ 19,235 |
| Tucson, Arizona           | 10,590    |
| Brisbane, California      | 65,633    |
| Compton, California       | 58,473    |
| Denver, Colorado          | 47,406    |
| Jacksonville, Florida     | 35,296    |
| Miami, Florida            | 54,574    |
| Tampa, Florida            | 42,066    |
| Atlanta, Georgia          | 57,827    |
| Itasca, Illinois          | 184,614   |
| Burlington, Massachusetts | 5,658     |
| Warren, Michigan          | 29,104    |
| St. Paul, Minnesota       | 44,682    |
| Moonachie, New Jersey     | 11,029    |
| Pennsauken, New Jersey    | 41,684    |
| Charlotte, North Carolina | 23,389    |
| Brooklyn Heights, Ohio    | 23,565    |
| Cincinnati, Ohio          | 48,631    |

|                      | Initial Decision | 107 F.T.C. |
|----------------------|------------------|------------|
| Portland, Oregon     | 50,365           |            |
| Nashville, Tennessee | 23,510           |            |
| Garland, Texas       | 38,195           |            |
| Houston, Texas       | 51,984           |            |
| Salt Lake City, Utah | 2,206            |            |
| Milwaukee, Wisconsin | 28,186           |            |
| Seattle, Washington  | 61,059           |            |

(CX 320A-B).

239. Boise's total purchases of office products from Kardex in the years indicated were: [47]

|      |            |
|------|------------|
| 1976 | \$ 694,722 |
| 1977 | 753,815    |
| 1978 | 943,587    |
| 1979 | 1,062,222  |
| 1980 | 1,319,864  |

(CX 630G).

240. Boise is Kardex's largest customer (Tr. 1528).

*g. Boise's Possession Of Price Information*

241. Boise had a copy of Victor's dealer terms and discounts, dated July 1, 1978, in its files. This document stated that dealers received a 40% discount on visible equipment and supplies (CX's 328A, G, 438A, 439B).

242. Victor did not take any measure to conceal its key dealer discount. In fact, its sales representative had a mandate to circulate the information (Tr. 1698).

243. Boise had prepared a Buyers' Guide dated October 8, 1979, which reflected Victor's dealer and key dealer discounts (CX's 321A-B, 438A, 439B).

244. In a letter to Chris Milikin of Boise dated August 2, 1979, Victor announced its intention to adopt a wholesale functional discount of 50-10% on insulated files on September 1, 1979. The letter stated: "For the first time, you will have available a complete Wholesaler functional discount program" (Tr. 1598-99, 1622-24; CX's 330, 438A, 439B).

245. The 50-10% discount Victor gives to wholesalers on insulated files and visible equipment is considered a functional discount by Arthur Jones, Vice President of Marketing of Kardex. It is not available to dealers (Tr. 1599). According to Mr. Jones, informed people in the industry knew that a wholesale functional discount was not available to dealers (Tr. 1624).

## 7. Boorum & Pease Company

### a. Description

246. Boorum & Pease Company ("B&P") has been in existence for over 134 years (CX 150, p. 2). Since 1975 or 1976, it has been located in Elizabeth, New Jersey (Tr. 2709). [48]

247. B&P's fiscal year runs from May 1st to April 30th. In the fiscal year ending April 30, 1980, its sales were approximately \$70 million (Tr. 2714).

248. B&P sells data processing binders, microfilm housing ring-books, catalog binders, sheet holders, presentation binders, ringbook sheets and indexes, binders for personal and business records, visible binders, post binders, sheets and indexes, columnar sheets, pads and accounting forms, bound books, columnar, account, cash and trial balance business records for special purposes, and marking devices (CX's 146-47).

249. In the fiscal year ending April 30, 1979, B&P made approximately 52% to 53% of its sales to wholesalers. In the following fiscal year, sales to wholesalers accounted for 55% of its sales (Tr. 2856).

### b. Products

250. B&P sold identical products to Boise distribution centers and dealers with whom they competed during its fiscal year that ended April 30, 1980 (F.'s 251-52, 271; CX 2).

251. CX 2 summarizes some of the information contained in invoices to Boise and competing dealers (Tr. 2825-30; CX 427A-Z-28). The same B&P product number on an invoice to Boise and a competing dealer indicates that both customers purchased an identical product (Tr. 2831-32).

252. The products listed below are examples of B&P products listed in CX 2; each product number is accompanied by a short description of the product:

|              |                         |                                             |
|--------------|-------------------------|---------------------------------------------|
| 40652        | Plastic Sorter          | (CX's 2 Revised A, 150, p. 65, 427A-B)      |
| S3562ML      | Stiff Ring Binder       | (CX's 2E, 150, p. 26, 427E, H)              |
| S2556        | Canvas Ring Binder      | (CX's 2, Revised I, 150, p. 27, 427J, P, R) |
| 0621 1/2 SPG | Stiff Vinyl Ring Binder | (CX's 20, 150, p. 28, 427S-T)               |
| 0122SPGR     | Stiff Vinyl Ring Binder | (CX's 2W, 150, p. 29, 427U-V)               |
| N3114        | Data Binder             | (CX's 2Z-1, 150, p. 18, 427W, Y) [49]       |
| 6559         | Bound Memorandum Book   | (CX's 2Z-1A, 150, p. 102, 427Z-1-Z-2)       |

|          | Initial Decision           | 107 F.T.C.                                    |
|----------|----------------------------|-----------------------------------------------|
| 1002     | Ledger Binder              | (CX's 2Z-2, 150, p. 82,<br>427Z-3, Z-7)       |
| 2146U    | Nylon Post Binder Index    | (CX's 2Z-2.1, 150, p. 24,<br>427Z-8-Z-9)      |
| 8821     | Accountant Work Sheet Pads | (CX's 2Z-8, 150, p. 92,<br>427Z-10-Z-11)      |
| 216150   | Bound Columnar Book        | (Tr. 2840-44; CX's 2Z-10,<br>150, p. 98, 428) |
| 40655    | Pressboard Sorter          | (CX's 2Z-11, 150, p. 65,<br>427Z-17-Z-18)     |
| 40654    | Pressboard Sorter          | (CX's 2Z-11, 150, p. 65,<br>427Z-19-Z-20)     |
| 212-30   | Microfiche Jackets         | (CX's 2Z-13, 150, p. 1,<br>427Z-21-Z-22)      |
| S03523ML | Stiff Ring Binder          | (CX's 2Z-17, 150, p. 26,<br>427Z-26, Z-28)    |
| X188     | Numbering Machine          | (Tr. 2847; CX 2Z-6)                           |

*c. Sales In Commerce*

253. B&P has had distribution centers located in Elizabeth, New Jersey, Kankakee, Illinois, Atlanta, Georgia, and Los Angeles, California since 1975 (Tr. 2834).

254. B&P's distribution centers serve certain geographic areas. The service area of B&P's Elizabeth location includes Boston, Massachusetts; Pennsauken and Moonachie, New Jersey; Philadelphia, Pennsylvania; and Washington, D.C. The service area of B&P's Los Angeles facility includes Seattle, Washington; Phoenix, Arizona; and San Francisco, California. Salt Lake City, Utah is served by either B&P's Los Angeles or Kankakee, Illinois, distribution center (Tr. 3836-37).

255. Shipments to customers go through the distribution centers except in emergency situations when shipments may be direct from a B&P production facility (Tr. 2835-36).

256. B&P produces its products at facilities in Syracuse and Brooklyn, New York; Elizabeth, New Jersey; Kankakee, Illinois; and Los Angeles, California (Tr. 2837-38). [50]

257. B&P's distribution center in Los Angeles produces heat seal products. Heat seal is a manufacturing process for vinyl ring binders. No other products were made by B&P in California. Products that are not heat sealed were necessarily produced outside of California (Tr. 2838, 2847-48).

258. Products identified in CX 2 as sold to Boise's Moonachie and Pennsauken distribution centers and compared to purchases by Appel and Yorkship, respectively, were produced outside the State of New Jersey (Tr. 2860-65).

259. Products identified in CX 2 as sold to Boise's San Francisco

distribution center and to Curtis Lindsay and Gilbert-Clarke, with the exception of heat seal products, were produced outside the State of California (Tr. 2840-50; CX 2Z-2.1, Z-3-Z-8, Revised Z-9-Z-10).

*d. Sales Policy*

260. The suggested list prices published by B&P reflect different prices for different quantities. The higher the quantity is, the lower the price per unit (Tr. 2724-26; CX 172).

261. B&P has given dealers a discount of 50% at least since 1962. The discount is applied to the suggested list price of the quantity purchased (Tr. 2729; CX's 156, 145).

262. Since at least 1962, B&P has given a discount of 50-10% to contract stationers, those accounts with an initial annual volume of \$35,000 and subsequent annual volumes of \$50,000 to \$75,000. The discount is applied to the suggested list price of the quantity purchased (Tr. 2730-33; CX's 156, 145).

263. Wholesalers receive a discount of 50-10-5% off the lowest suggested list price regardless of quantity purchased (Tr. 2734). This discount has existed for twenty years, and Boise has received it for almost twenty years (Tr. 2709, 2734).

264. B&P also has a net pricer for wholesalers on some products. The net pricer is known as the WQPL. A WQPL price is generally lower than a price calculated with a 50-10-5% discount from suggested list (Tr. 2745). B&P did not require wholesalers to buy any special quantity to receive its WQPL price; wholesalers only had to buy B&P's products in the standard pack (Tr. 2749), just like all of its customers (CX's 146, p. 2; 147, p. 2).

265. Dealers and contract stationers paid freight on purchases from B&P, except when shipments were sent to certain geographic areas called "free delivery zones" (Tr. 2736; CX 156). [51]

266. B&P paid freight for wholesalers on purchases of 5,000 lbs. or more and on shipments to free delivery zones. On other purchases, wholesalers paid for freight (Tr. 2736; CX 156).

267. B&P's free delivery zones included the counties of Bergen, Essex, Union, Hudson, Passaic and Middlesex, New Jersey, and the cities of San Francisco and San Jose, California; Seattle, Washington; and Portland, Oregon (CX 419A-B).

268. Payment terms offered to dealers and contract stationers were identical. Wholesalers received an extra fifty or sixty days to pay (Tr. 2738-39; CX 156).

*e. Examples Of Discriminatory Sales*

269. CX 2 identifies sales of identical products to Boise distribution

centers and to dealers competing with those centers. All sales occurred within the fiscal year ending April 30, 1980 (Tr. 2714; CX 2).

270. During B&P's fiscal year ending April 30, 1980, the dealers listed below paid B&P more by the median percentages indicated than the Boise distribution centers with which they competed when purchasing identical products from B&P:

|                 |       |
|-----------------|-------|
| Stimpson        | 5.8%  |
| Monroe-Narcus   | 5.9%  |
| Pomerantz       | 5.3%  |
| Yorkship        | 17.0% |
| Hugh A. George  | 23.8% |
| George D. Hanby | 7.7%  |
| Andrews         | 7.6%  |
| Ruggles         | 17.0% |
| Bird            | 21.1% |
| The Stationers  | 22.5% |
| Trick & Murray  | 17.0% |
| Gilbert-Clarke  | 8.5%  |
| Curtis Lindsay  | 17.0% |
| Kelly           | 5.8%  |
| Mid-West        | 28.5% |
| Wist            | 17.3% |
| Appel           | 25.1% |

(Tr. 2825-34; CX's 2, 427A-Z-28).

271. During B&P's fiscal year ending April 30, 1980, Boise's distribution centers competing with the dealers identified in F. 270 paid B&P lower prices for products identical to those purchased by the dealers (Tr. 2825-34; CX's 2, 427A-Z-28). [52]

*f. Volume Of Boise's Purchases From B&P*

272. B&P's sales to Boise's distribution centers were:

|                | Year Ending<br>4/30/80 | Year Ending<br>4/30/79 |
|----------------|------------------------|------------------------|
| Salt Lake City | \$ 26,137              | \$ 22,264              |
| Phoenix        | 8,544                  | 2,770                  |
| Boston         | 18,216                 | 8,173                  |
| Moonachie      | 167,476                | 115,498                |
| Portland       | 242,283                | 190,676                |
| Seattle        | 569,672                | 488,311                |
| Pennsauken     | 231,745                | 243,096                |
| San Francisco  | 457,735                | 363,934                |

(Tr. 2715-17, 2720; CX 426B, D-E, H, J, M, O, R).

273. The Seattle, Salt Lake City, Phoenix, and Boston distribution centers of Boise purchased from B&P's distribution facilities located

in states different from those in which the four Boise distribution centers were located. In the fiscal year ending April 30, 1980, the total purchases of these four distribution centers was approximately \$622,569 (F.'s 253-54, 272).

274. Boise's total purchases of office products from B&P in the years indicated were:

|      |             |
|------|-------------|
| 1976 | \$4,141,717 |
| 1977 | \$4,978,933 |
| 1978 | \$5,396,276 |
| 1979 | \$6,265,349 |
| 1980 | \$6,734,912 |

(CX 630G).

275. Boise was B&P's largest customer in the fiscal year ending April 30, 1980 (Tr. 2714).

*g. Boise's Possession Of Price Information*

276. A 50% discount to dealers is a standard discount in the industry (Tr. 2729). [53]

277. A discount of 50-10% to contract stationers is well established amongst B&P and its competitors (Tr. 2732).

278. According to Robert Looney, who worked for B&P for twenty years and was its Vice President and General Sales Manager from 1972 through 1981: "It wasn't difficult to communicate the [B&P] discounts because everyone knew them, and if you didn't, you didn't belong in the business" (Tr. 2870-71, 2709).

279. Robert Welnhof, former General Manager of Boise's Office Products Division, testified that B&P and its primary competitors had discounts of 50% for dealers, 50-10% for select dealers who bought in large volume, and approximately 50-10-5% for customers classified as wholesalers (CX 672, pp. 129, 143-44).

280. B&P sent prenotifications of price increases to wholesalers which included a printout, 941-1-AQ showing prices at 50% off list, 50-10% off list, and prices offered to wholesalers. The prenotification also included a printout, 941-1-Z, showing B&P prices at 50% off list (Tr. 2753, 2755-57, 2760-68; CX's 162, 174Z-14, Z-18). Boise received a price increase prenotification dated January 18, 1978, and it also received a printout 941-1-AQ dated December 28, 1979 (CX's 162, 174, 438A, 439B).

281. Boise's Buyers' Guides concerning B&P refer to dealer price lists (CX's 158A, 159A).

282. B&P formulated a promotional plan called the Merchandise Assistance Plan which was presented to the NOPA convention in the fall of 1978. Promotional materials were distributed to B&P's custom-

ers, including wholesalers, in 1978. The promotional material contained list prices and prices showing a 50% discount to dealers. Boise received this promotional material (Tr. 2779-81; CX's 164C-I, 438A, 439B).

## 8. Bates Manufacturing Company

### a. *Identity And Business*

283. Bates Manufacturing Company ("Bates") has been located in Hackettstown, New Jersey, since 1921 (Tr. 2184).

284. In 1981, Bates had consolidated sales of approximately \$19 million. In 1979, sales were approximately \$17 million (Tr. 2189-90). [54]

285. In 1979, Bates made more than half of its sales to dealers and approximately 45% of its sales to wholesalers (Tr. 2228-29).

286. Bates produces a numbering machine line, a stapler line, a ruler line, a list finder line, a rotary file line, and an eyeleter line (Tr. 2186; CX 129R).

### b. *Products*

287. In 1979, Bates offered five stock numbering machine models for sale (CX's 126A, 418A). Each Bates stock numbering machine model comes in five to seven variations. Models vary as to the number of wheels of engraved characters and the type style of the characters (CX's 126A, 418A).

288. In 1979, Bates offered numbering machine ink and inked pads in five colors (CX 126E). Inked pads fit into numbering machines to ink the wheels. Numbering machine ink is placed on the pads used in the machines (Tr. 2266-67).

289. Bates offered eleven list finder models in 1979 (CX 126F-G). Each Bates list finder model comes in two to five variations with the exception of the Model A, which comes in one version. Models vary only in color and trim (CX 126F-G). All Bates list finders serve the same function, which is to act as a repository for telephone numbers and addresses (Tr. 4835; CX 129N-O).

290. An eyeleter is a device that punctures paper and puts a small round brass eyelet in the paper which binds it together. Bates made only two types of eyeleters in 1979 (Tr. 2268; CX 126E). Bates sold eyelets in three sizes in 1979 (CX 126E).

291. There is no difference in the quality of list finders, list finder refills, stock numbering machines, numbering machine ink, inked pads, eyeleters and eyelets that are sold by Bates to dealers and wholesalers, including Boise (Tr. 2251-52, 2254-55, 2264-69).

*c. Sales In Commerce*

292. Bates produces its products in Hackettstown, New Jersey, except for two telephone list finders that are produced in Japan, and ships those products directly from Hackettstown to its customers (Tr. 2189). [55]

*d. Sales Policy*

293. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all list finders to dealers purchasing the quantities indicated:

|             |        |
|-------------|--------|
| 1-35        | 40%    |
| 36-71       | 40-5%  |
| 72-143      | 40-10% |
| 144 or more | 50%    |

(Tr. 2203-04, 2206; CX's 125A, G, 126A, G, 130A, G, 131A, G, 132A, H, 418A, G).

294. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all list finder refills to dealers purchasing the quantities indicated:

|            |     |
|------------|-----|
| 12-71      | 40% |
| 72 or more | 50% |

(Tr. 2204, 2206; CX's 125G, 126G, 130G, 131G, 132H, 418G).

295. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all stock numbering machines to dealers purchasing the quantities indicated:

|            |           |
|------------|-----------|
| 1          | 30%       |
| 2-11       | 33&1/3%   |
| 12-35      | 33&1/3-5% |
| 36 or more | 40%       |

(Tr. 2204, 2206; CX's 125A, 126A, 130A, 131A, 132A, 418A).

296. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all numbering machine ink to dealers purchasing the quantities indicated:

|                                                 |          |
|-------------------------------------------------|----------|
| 1 dozen 1 oz. or<br>2 oz. bottles               | 40%      |
| 2 dozen 1 oz. or<br>2 oz. bottles<br>and quarts | 50% [56] |

(Tr. 2204, 2206; CX's 125E, 126E, 130E, 131E, 132E, 418E).

297. From March 21, 1977 to July 1, 1980, Bates gave dealers a discount of 50% off the list prices of all numbering machine inked pads (Tr. 2204, 2206; CX's 125E, 126E, 130E, 131E, 132E, 418E).

298. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all eyeleters to dealers purchasing the quantities indicated:

|            |        |
|------------|--------|
| 1-5        | 40%    |
| 6-11       | 40-5%  |
| 12-35      | 40-10% |
| 36 or more | 50%    |

(Tr. 2204, 2206; CX's 125E, 126E, 130E, 131E, 132E, 418E).

299. From March 21, 1977 to July 1, 1980, Bates gave dealers a discount of 40% off the list prices of all eyelets (Tr. 2204, 2206; CX's 125E, 126E, 130E, 131E, 132E, 418E).

300. Bates gave wholesalers the discounts indicated on the products listed below:

|                              |        |
|------------------------------|--------|
| list finders                 | 50-10% |
| list finder refills          | 50-10% |
| stock numbering machines     | 40-5%  |
| numbering machine ink        | 50-10% |
| numbering machine inked pads | 50-10% |
| eyeleters                    | 50%    |
| eyelets                      | 50-10% |

(Tr. 2215, 2217; CX 128A).

301. Bates also extended the equivalent of its wholesale discount to certain large contract stationers, such as New Jersey Office Supply, Eastman's, M.S. Ginn, Publix and Ivan Allen (Tr. 2216, 2226). None of the dealers selected for this case received the equivalent of Bates' wholesale discount (CX 1).

302. Bates has had its wholesale discounts since the 1940's (Tr. 2324), and Boise has been receiving that discount from Bates as long as it has been a customer (Tr. 2218).

303. Bates did not apply equal freight terms to dealers and wholesalers. Wholesalers received free freight on orders of 500 [57] lbs. or more to locations in California, Oregon, and Washington, and on orders of 200 lbs. or more elsewhere. Otherwise, a wholesaler paid for freight on an order. Dealers always paid freight (Tr. 2276-78).

304. All of Bates' customers were offered the same payment terms (Tr. 2219-20).

e. *Examples Of Discriminatory Sales*

(1) List Finders

305. During 1979, the dealers listed below purchased one to nine of the same model list finders as the Boise distribution centers with which they competed at the discounts indicated:

|                |                             |
|----------------|-----------------------------|
| Union          | 50%                         |
| G.E. Stimpson  | 40-10%, and 50%             |
| Monroe-Narcus  | 40-5%, 40-10%, and 50%      |
| Pomerantz      | 40%, 40-5%, 40-10%, and 50% |
| Hugh A. George | 40% and 40-10%              |
| George Hanby   | 40-5%                       |
| Andrews        | 40-10% and 50%              |
| Dean Mark      | 50-5%                       |
| Klip           | 50%                         |
| Mid-West       | 40%, 40-5%, 40-10%, and 50% |

(Tr. 4156-61; CX's 1B-D, P-R, Z-3, Z-9-Z-10, Z-17, 440A, 444B-C, 445B-C).

306. During 1979, Boise's distribution centers competing with dealers identified in F. 305 purchased Bates list finders at a discount of 50-10% (Tr. 4156-61; CX's 1A-B, N-P, Z-1-Z-2, Z-8-Z-9, Z-16-Z-17, 440A, 444B-C, 445B-C).

307. During 1979, Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, George Hanby, Andrews, Dean Mark, Klip and Mid-West paid Bates from 5.5% to 33% more for list finders than the Boise distribution centers with which they competed (F.'s 305-06).

(2) List Finder Refills

308. During 1979, the dealers listed below purchased three or more identical types of list finder refills as the Boise distribution centers with which they competed at the discounts indicated: [58]

|                |             |
|----------------|-------------|
| Union          | 50%         |
| G.E. Stimpson  | 40% and 50% |
| Monroe-Narcus  | 40% and 50% |
| Pomerantz      | 40%         |
| Hugh A. George | 40%         |
| Andrews        | 50%         |
| Dean Mark      | 50-5%       |
| Klip           | 40% and 50% |
| Mid-West       | 40% and 50% |

(Tr. 4156-61; CX's 1E-F, S-T, Z-5, Z-11, Z-18, 440A, 444B-C, 445B-C).

309. During 1979, Boise's distribution centers that competed with the dealers identified in F. 308 purchased Bates list finder refills at

a discount of 50-10% (Tr. 4156-61; CX's 1E, S, Z-4, Z-11, Z-18, 440A, 444B-C, 445B-C).

310. During 1979, Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, Andrews, Dean Mark, Klip and Mid-West paid Bates from 5.5% to 33% more for list finder refills than the Boise distribution centers with which they competed (F.'s 308-09).

### (3) Stock Numbering Machines

311. During 1979, the dealers listed below purchased one to three of the same model stock numbering machines as the Boise distribution centers with which they competed at the discounts indicated:

|                |                   |
|----------------|-------------------|
| Union          | 33% and 40%       |
| G.E. Stimpson  | 40%               |
| Monroe-Narcus  | 30% and 33%       |
| Pomerantz      | 40%               |
| Hugh A. George | 30% and 33%       |
| Andrews        | 33-5%             |
| Klip           | 30% and 33%       |
| Dean Mark      | 30%               |
| Trick & Murray | 33-5% and 33-5-5% |
| Wist           | 33%               |

(Tr. 4156-61; CX's 1G-H, U-V, Z-6, Z-12, Z-14, Z-20, 440A, 444B-C, 445B-C).

312. During 1979, Boise's distribution centers that competed with the dealers identified in F. 311 purchased stock [59] numbering machines at a discount of 40-5% (Tr. 4156-61; CX's 1G, U, Z-6, Z-12, Z-14, Z-20, 440A, 444B-C, 445B-C).

313. During 1979, Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, Andrews, Dean Mark, Klip, Trick & Murray, and Wist paid Bates from 5.3% to 22.8% more for stock numbering machines than the Boise distribution centers with which they competed (F.'s 311-12).

### (4) Inked Pads

314. During 1979, the following dealers purchases, at a discount of 50%, inked pads of the same color as the Boise distribution centers with which they competed: Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, George D. Hanby, Andrews, Dean Mark, Klip, Trick & Murray, and Mid-West (Tr. 4156-61; CX's 1I-J, W-X, Z-7, Z-13, Z-15, Z-19, 440A, 444B-C, 445B-C).

315. During 1979, Boise's distribution centers that competed with the dealers identified in F. 314 purchased inked pads at a discount of

50-10% or 50-10-5% (Tr. 4156-61; CX's 1G, I, W, Z-7, Z-13, Z-15, Z-19, 440A, 444B-C, 445B-C).

316. During 1979, Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, George Hanby, Andrews, Dean Mark, Klip, Trick & Murray and Mid-West paid Bates from 11.1% to 17% more for inked pads than the Boise distribution centers with which they competed (F.'s 314-15).

#### (5) Numbering Machine Ink

317. During 1979, Union, Monroe-Narcus and G.E. Stimpson purchased, at discounts of 40% and 50%, numbering machine ink, which Boise's Boston distribution center also purchased (Tr. 4156-61; CX's 1K, 440A, 444B-C, 445B-C).

318. During 1979, Boise's Boston distribution center purchased numbering machine ink at a discount of 50-10% (Tr. 4156-61; CX's 1K, 440A, 444B-C, 445B-C).

319. During 1979, Union, Monroe-Narcus and G.E. Stimpson paid Bates from 11.1% to 33.3% more for numbering machine ink than the Boise distribution center with which they competed (F.'s 317-18). [60]

#### (6) Eyelets

320. During 1979, Union, G.E. Stimpson, Pomerantz and Andrews purchased, at a discount of 40%, the same size eyelets as the Boise distribution centers with which they competed (Tr. 4156-61; CX's 1M, Y, 440A, 444B-C, 445B-C, 126E).

321. During 1979, the Boise distribution centers competing with the dealers identified in F. 320 purchased eyelets at a discount of 50-10% (Tr. 4156-61; CX's 1M, Y, 440A, 444B-C, 445B-C).

322. During 1979, Union, G.E. Stimpson, Pomerantz and Andrews paid Bates 33.3% more for eyelets than the Boise distribution centers with which they competed (F.'s 320-21).

#### f. Volume Of Boise's Purchases From Bates

323. In 1979, Bates' sales to individual Boise distribution centers were:

| Location                           | 1979 Sales   |
|------------------------------------|--------------|
| Rancho Dominguez, CA (Los Angeles) | \$ 27,161.39 |
| Portland, OR                       | 18,816.85    |
| Seattle, WA                        | 56,706.43    |
| Phoenix, AZ                        | 6,063.24     |
| Tucson, AZ                         | 5,300.12     |
| Denver, CO                         | 30,446.37    |
| Salt Lake City, UT                 | 3,667.65     |
| Atlanta, GA                        | 23,250.49    |

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|                              |            |
|------------------------------|------------|
| Hialeah, FL                  | —          |
| Tampa, FL                    | 17,807.88  |
| Miami, FL                    | 16,967.73  |
| Jacksonville, FL             | 9,710.18   |
| Nashville, TN                | 26,576.57  |
| Garland, TX                  | 11,837.19  |
| Houston, TX                  | 57,507.53  |
| Charlotte, NC                | 20,329.34  |
| Brisbane, CA (San Francisco) | 22,455.74  |
| Burlington, MA (Boston)      | 7,030.99   |
| Pennsauken, NJ               | 26,298.23  |
| Moonachie, NJ                | 10,034.61  |
| St. Paul, MN                 | 32,735.97  |
| Cincinnati, OH               | 31,121.57  |
| Warren, MI                   | 23,186.08  |
| Brooklyn Heights, OH         | 17,698.75  |
| Milwaukee, WI                | 21,437.94  |
| Itasca, IL (Chicago)         | 115,408.25 |

(CX 456A). [61]

324. Boise's total purchases of office products from Bates in the years indicated were:

|      |           |
|------|-----------|
| 1976 | \$402,432 |
| 1977 | 460,896   |
| 1978 | 598,900   |
| 1979 | 665,158   |
| 1980 | 626,801   |

(CX 630G).

325. Boise is one of Bates' larger customers (Tr. 2190).

*g. Boise's Possession Of Price Information*

326. Bates' dealer price lists contain trade discounts which are given to dealers. Dealer price lists are sent to all customers of Bates, including wholesalers (Tr. 2204). Bates' dealer price lists dated March 21, 1977, August 16, 1977, April 17, 1978, December 28, 1978, and July 1, 1980, were contained in Boise's files (CX's 125-26, 130-32, 438A, 439B).

327. Bates' personnel also proposed that Boise catalog Bates' steel rule line; they discussed this with Craig Hajduk of Boise and at one point mentioned that Boise's cost would be lower than dealers' costs would be whenever dealers purchased directly from Bates (CX 971, pp. 50-51).

## 9. Master Products Manufacturing Co.

### a. Description

328. Master Products Manufacturing Co. ("Master Products") has been located in Los Angeles, California, for over forty years (Tr. 1885).

329. In 1979, Master Products made about \$3.6 million in sales to the office products industry. In 1981, sales were slightly over \$4 million (Tr. 1890).

### b. Products

330. Products sold by Master Products fall into four basic categories: visible sectional filing equipment, index guides, paper punches, and sales cases (Tr. 1885-86). [62]

331. Visible sectional filing is Master Products' main line; it is used for filing loose-leaf material (Tr. 1887, 1893). The heart of the visible sectional filing system is the base which is a receptacle for the insertion of sections. Sections are designed to hold loose-leaf paper or small catalogs (Tr. 1941).

332. Master Products also produces cabinets which are the same thing as bases except they can accommodate more sections than bases (Tr. 1949; CX 184C-D, H).

333. Sections are of three basic types: ring, multi-post, and bar. Ring and post sections are designed to hold loose-leaf material. Bar sections are used to accommodate bound references such as catalogs that cannot be conveniently punched with holes (Tr. 1954-55, 1958, 1967-68; CX 184F).

334. Ring sections are produced in one-inch capacity and double capacity. Six models of each capacity are produced. They vary in the number of rings—from two to seven—and the spacing of the rings (CX 184F-G). The multi-post sections are also produced in two types, one-inch single capacity and a double capacity. Fourteen models of each capacity are produced. They vary in the number of posts, post diameter, and spacing of posts (CX's 184G, 187A). Bar sections are produced in two versions, one single capacity and one double capacity (CX 184F). Sections are interchangeable with all of Master Products' sectional filing equipment (CX 184F, P).

335. Bases sold by Master Products vary in the number of sections they hold and their reading angle (CX 184C, H). Some bases allow for the addition of extensions which increase the capacity of the base (Tr. 1966; CX 184C). Extensions come in only two versions, each having a different reading angle (CX 184C, H).

336. Master Products also produces accessories for its visible sectional filing equipment, for instance, turntables which permit the

filing equipment to be swivelled 360 degrees (Tr. 1967). Turntables come in only one version (CX 184E).

337. The indexing Master Products sells was designed as an integral part of the visible sectional filing and is primarily purchased by customers for use with visible sectional filing (Tr. 1891).

338. Indexing sold by Master Products comes in two types: slip-lok tabs and alphabetical perma-seal tabs. A tab is a metal device riveted to an index guide which is made either of vinyl or pressed paper. Slip-lok tabs allow the user to type information on a piece of paper which is placed in the window of the tab for indexing purposes. Slip-lok tabs vary in window size. Alphabetical perma-seal tabs are permanently sealed with letters [63] of the alphabet appearing in them. Models vary as to the number of divisions of the alphabet (Tr. 1962-63; CX 184K, L).

339. Master Products produces several types of paper punches. Generally, each type is designated by a series number, such as "25 series," "33 series," "1,000 series," or "5,000 series." With the exception of the "33 series" punch which comes in only one version, punch series vary as to the number of punch heads and the shape of the punch head (CX 184T-Y, Z-1). A punch head is the mechanism which is activated to punch holes in paper (Tr. 1963). Punch heads come in various diameters and shape (CX 184Z-2).

340. Master Products produces sales binders which also utilize the sections used in its visible filing equipment (Tr. 1891; CX 184B), except for the compression binder which holds loose-leaf paper by a compression method as opposed to using post or ring sections (Tr. 1969). Master Products' "Streamliner" cases are also sales binders (Tr. 1916). Sales binders vary in size depending on the number of sections they accommodate (CX 184Q, P, S).

341. There are no differences in the products Master Products sells to both dealers and wholesalers, including Boise (Tr. 1934-35, 1953, 1955, 1962-69).

#### *c. Sales In Commerce*

342. Master Products manufactures its products in Los Angeles, California; it has not operated any separate distribution facilities for forty years. Products are shipped directly from its plant in Los Angeles to the customer (Tr. 1898-99).

#### *d. Sales Policy*

343. Master Products gives dealers the discounts off list price indicated on the following product groups:

visible sectional filing

40%

## Initial Decision

|                |             |            |
|----------------|-------------|------------|
| indexing       |             | 40%        |
| punches:       | 1 to 5      | 40%        |
|                | 6 to 23     | 40-10%     |
|                | 24 to 71    | 50%        |
|                | 72 to 143   | 50-5%      |
|                | 144 or more | 60%        |
| punch parts    |             | 40%        |
| sales binders: | 1 to 29     | 40%        |
|                | 30 or more  | 40-5% [64] |

The discounts have not changed for twenty-three years (Tr. 1903; CX's 189, 176).

344. Master Products also has a "master stationery" or "MS" customer classification. There are seven to twenty customers in this class. Master Products gives MS customers the discount off list price indicated on the following product groups:

|                                         |            |
|-----------------------------------------|------------|
| visible sectional filing                | 50%        |
| indexing                                | 50%        |
| punches:                                | 50%        |
|                                         | 1 to 72    |
|                                         | 72 or more |
| punch parts (when ordered with punches) | 60%        |
| punch parts (when ordered alone)        | 60%        |
| sales binders                           | 50%        |

These discounts have been in effect for twenty-three years with minor changes (Tr. 1920-23; CX 424).

345. Master Products gives some customers a wholesale functional discount. These customers are designated "MSW's" for internal purposes (Tr. 1914-15). All MSW's resell to dealers with the possible exception of one or two who buy for resale to the computer industry (Tr. 1918). Master Products gives MSW's the discounts indicated on the following product groups:

|                                         |     |
|-----------------------------------------|-----|
| visible sectional filing                | 55% |
| indexing                                | 55% |
| punches                                 | 60% |
| punch parts (when ordered with punches) | 60% |
| punch parts (when ordered alone)        | 50% |
| sales binders                           | 50% |

These discounts have been the same for approximately forty years (Tr. 1915-16; CX 175).

346. Master Products has classified Boise as an MSW for discount purposes for at least the last ten years (Tr. 1981-85).

347. During 1979, Master Products' freight terms were the same for all customers. Customers paid freight from Los Angeles or from a

Chicago basing point, whichever cost was lower (Tr. 1933-34). An exception to this policy was for orders of 100 lbs. or more for which Master would pay freight up to 11% of the invoice (CX 189). [65]

348. Master Products' payment terms are the same for all customers (Tr. 1934).

*e. Examples Of Discriminatory Sales*

(1) Visible Sectional Filing

349. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Kelly, Mid-West, Weber, Wist, and Helwig purchased visible sectional filing of one or more of the following types from Master Products at a discount of 40%: bases, cabinets, extensions, turntables, ring sections, multi-post sections, and bar sections (Tr. 4156-61; CX's 3A-B, E-I, P-Q, U-V, Z-2, 440A, 444B-C, 445B-C).

350. During 1979, Boise's distribution centers which competed with the dealers identified in F. 349 purchased the same types of bases, cabinets, extensions, turntables, ring sections, multi-post sections, and bar sections as did those dealers at a discount of 55% (Tr. 4156-61; CX's 3A-B, E-G, P, U-V, Z-2, 440A, 444B-C, 445B-C).

351. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Kelly, Mid-West, Weber, Wist, and Helwig paid Master Products one-third more for visible sectional filing equipment than the Boise distribution centers with which they competed (F.'s 349-50).

(2) Tabs

352. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Kelly, Mid-West and Wist purchased slip-lok tabs or slip-lok tabs and alphabetical perma-seal tabs from Master Products at a discount of 40% (Tr. 4156-61; CX's 3C, J-K, R, W, 440A, 444B-C, 445B-C).

353. During 1979, Boise's distribution centers which competed with the dealers identified in F. 352 purchased the same types of slip-lok tabs and alphabetical perma-seal tabs from Master Products as did those dealers at a discount of 55% (Tr. 4156-61; CX's 3C, J, R, W, 440A, 444B-C, 445B-C).

354. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Kelly, Mid-West, and Wist paid Master Products one-third more for tabs than the Boise distribution centers with which they competed (F.'s 352-53). [66]

## (3) Punches

355. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Mid-West, Weber, Wist, Charlie Helwig, Kilham, and Klip purchased three-hole punches of one or more of the following series from Master Products at a 40% to 50% discount: 25 series, 33 series, 1,000 series, and 5,000 series (Tr. 4156-61; CX's 3D, L-M, Revised N, S-T, X-Y, Z-3-Z-4, 440A, 444B-C, 445B-C).

356. During 1979, Boise's distribution centers which competed with the dealers identified in F. 355 also purchased 25 series, 33 series, 1,000 series and 5,000 series three-hole punches from Master Products at a discount of 60% (Tr. 4156-61; CX's 3D, L-M, Revised N, S, X, Z-3-Z-4, 440A, 444B-C, 445B-C).

357. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Mid-West, Weber, Wist, Charlie Helwig, Kilham, and Klip paid Master Products from 25% to 50% more for three-hole punches than the Boise distribution centers with which they competed (F.'s 355-56).

## (4) Compression Binders

358. During 1979, Trick & Murray and Wist purchased sales or compression binders from Master Products at a discount of 40% (Tr. 4156-61; CX's 3"O", Z-1, 440A, 444B-C, 445B-C).

359. During 1979, Boise's distribution centers which competed with the dealers identified in F. 358 purchased the same types of products from Master Products as did those dealers at a 50% to 55% discount (Tr. 4156-61; CX's 3"O", Z-1, 440A, 444B-C, 445B-C).

360. During 1979, Trick & Murray and Wist paid Master Products 20% to 33% more for sales and compression binders than the Boise distribution centers with which they competed (F.'s 358-59).

*f. Volume Of Boise's Purchases From Master Products*

361. Master Products sold to all Boise distribution centers in 1979 (Tr. 1893). Its sales to selected distribution centers of Boise were: [67]

|                |             |
|----------------|-------------|
| Boston         | \$ 8,471.98 |
| Moonachie      | 5,457.90    |
| Pennsauken     | 23,865.28   |
| Phoenix        | 5,179.27    |
| Salt Lake City | 1,424.07    |
| Seattle        | 72,859.80   |
| Portland       | 20,026.21   |
| San Francisco  | 11,247.98   |

(Tr. 1896-97).

362. Boise's total purchases of office products from Master Products in the years indicated were:

|      |            |
|------|------------|
| 1976 | \$ 341,123 |
| 1977 | 429,678    |
| 1978 | 574,688    |
| 1979 | 628,163    |
| 1980 | 722,343    |

(CX 630G).

*g. Boise's Possession Of Price Information*

363. Boise had in its files a copy of Master Products' trade price list, effective February 1979, which contained discounts extended to dealers (Tr. 1904; CX's 189, 438A, 439B).

364. Boise's Buyers' Guides dated November 11, 1977, May 16, 1978, and January 1, 1980, reflected Master Products' published discounts to dealers (CX's 181A, 182-83).

365. Hal Webb has been employed by Master Products for twenty-three years and is Chairman of its Board of Directors (Tr. 1885). In his opinion, major wholesalers knew the discounts at which Master Products sold to dealers (Tr. 1980). There are few secrets concerning prices available to dealers, according to him (Tr. 1980-81).

366. Prior to about 1972, Master Products did not classify certain Boise distribution centers as MSW customers and did not extend the wholesale functional discount to those distribution centers. During that period, those distribution centers purchased at the dealer discount (Tr. 1981-85; CX 672, pp. 138-39). [68]

10. Boise Knew Or Should Have Known The Prices  
Which The Six Manufacturers Charged Dealers

367. The six manufacturers have, for many years, sold to a group of customers which they have classified as wholesalers and to whom they have granted wholesale functional discounts. This group includes Boise (F.'s 489-95) which was aware that these manufacturers granted it a wholesale functional discount. In fact, Boise's proposed findings concede that the six manufacturers' "initial discounts which are then deducted from the list price to arrive at the purchaser's invoice line price" are functional discounts (RPF 109). Furthermore, Mr. Twietmeyer's stipulation states (F. 14):

As an employee of Boise Cascade in 1978, I supervised and participated in a study which showed that Boise received a substantial dollar amount of trade or wholesale functional discounts. . . .

368. Boise was also aware, from calls which its salespersons made on accounts which were solicited as well by dealers, that it competed with dealers (F.'s 98-100) and the evidence obtained from its files, as well as complaints received from dealers, reveals that it knew the six manufacturers granted it a greater discount than they did to dealers (F.'s 36, 42, 147-53, 194-97, 241-45, 276-82, 326-27, 363-66). Even if this conclusive evidence had not existed, it is inconceivable that Boise, which resells to dealers, would be unaware of the prices which manufacturers charge dealers, for other wholesalers who testified expressed keen interest in and awareness of dealer prices (F.'s 30-33), as did Boise employees (F.'s 37-41).

369. Finally, Boise has acquired dealers, one of which, Dennis, purchased at the dealer price before its acquisition. Boise had access to Dennis' records and must have been aware of the prices at which manufacturers were selling to dealers (F. 39).

370. Boise's answer to all of this evidence is that the six manufacturers, and others, do not sell at published prices, but at prices which are generally the same regardless of the functional status of its customers.

371. The detailed charts presented by complaint counsel which reveal continuous and significant discriminations favoring Boise over its dealer competitors simply do not square with the claim that off-list discounts are rampant, but Boise ignores the evidence of the charts.  
[69]

372. Boise argues, instead, that it does not "know" that manufacturers adhere to published prices and that the charts—even though they may show a clear pattern of discrimination—are not as significant as the belief of its employees that there is no discriminatory pricing in this industry. Thus, Boise relies on the testimony of persons such as Mr. Welnhofer, a former general manager of its Office Products Division, who stated that "pricing in this industry is a jungle" and that he didn't know whether "they [manufacturers] sell everything at the prices that they publish" (CX 672, pp. 122-23), and Mr. Bazant, Product Planning and Development Manager of Boise's Office Products Division, who argued that the six manufacturer's policies "allow the dealer and Boise Cascade to buy at approximately the same cost." This conclusion was based on additional discounts which are given such as "promotional monies, free goods, spiffs to the house sales people, contract pricing," etc. which could affect the published price by 25% or more (Tr. 4770-73).

373. I do not accept this belief as probative of Boise's lack of knowledge for it is based on a self-serving, and undocumented, view of the industry. If these management officials truly believed that their company enjoyed no better pricing than dealers, then they should have

advised their superiors to settle this matter. Instead, Boise has insisted upon the right to receive wholesale functional discounts when it competes with dealers, a right whose importance Boise has recognized (F. 63). Thus, I do not credit the testimony of Mr. Welnhofner and Mr. Bazant; the true state of Boise's knowledge is revealed, I believe, in Mr. Twietmeyer's stipulated testimony:

Boise received a substantial dollar amount of trade or wholesale functional discounts from various office products vendors and those discounts exceeded the discounts Boise would receive if those vendors did not classify Boise as a wholesaler but instead treated Boise as a dealer or contract stationer (F. 14).

374. Boise's other arguments on this point involve either irrelevancies or rely on shaky interpretations of record evidence. For example, the claim that all manufacturers sell significant product lines on a purely volume basis (RPF 110-11), while true (CRB, p. 5) has nothing to do with the functional discounts at issue here.

375. Similarly, while some manufacturers may give contract stationers discounts equal to their wholesale functional discounts (RPF's 49, 113-14), only one of the six involved in this case does (Bates) and only to a small number of its some 1,200 active accounts (Tr. 2210, 2221, 2224, 2226). [70]

376. Dealers do receive special bid discounts (RPF's 50, 128-29, 250-58), but there is no evidence that they have either received lower prices than Boise on a significant volume of their purchases<sup>6</sup> or that they have consistently used bid-priced merchandise in their regular sales.

377. Boise also argues that dealers' prices are negotiated and that they can buy at the same price as Boise from unpublished price lists (RPF's 51-59, 104-06). This assertion is simply not supported by the record evidence cited. An example of Boise's liberal interpretation of the record is RPF 52, where it is claimed that Mr. Crompton of Hugh A. George testified that he buys "generally at an unpublished price;" it is clear, however, that the words "unpublished price" refer merely to the fact that he—like Boise and all other industry members—purchases at the manufacturers' list prices less a discount (Tr. 693-94). There is simply no way that anyone familiar with industry pricing could state that this language supports the claim that Hugh A. George enjoyed unpublished prices.

378. Complaint counsel's reply brief extensively analyzes and convincingly refutes Boise's claim that dealers enjoy the same prices it does, but I will not repeat all of their arguments. A few examples

<sup>6</sup> Manufacturers' bid sales are a very small portion of their total sales (F.'s 16, 19).

suffice to show that Boise's reading of the record is too expansive to be relied upon.

379. Thus, while Mr. Cleary, sales manager of Boise's Boston distribution center, and a former assistant sales manager at Monroe, one of the selected dealers, testified that, in general, Boise's and Monroe's purchase prices were identical, he referred only to the prices of five manufacturers (Tr. 4622-23) of the several hundred who sold to Monroe (Tr. 2462). Furthermore, it is unclear whether the prices he reviewed were in connection with bids or the manufacturers' regular pricing (Tr. 4622); in addition, Mr. Cleary conceded that he did not do a systematic study of the prices paid by Monroe and Boise (Tr. 4623).

380. Boise also relies heavily on the testimony of Mr. Rodman, the general manager of its Boston distribution center, and the former president of Dennis Office Supply. Mr. Rodman stated that after reviewing Dennis' and Boise's prices from manufacturers "what stuck out in my mind are that Dennis Office Supply, on some of the items, was getting lower prices than Boise Cascade was" (Tr. 4456).

381. Complaint counsel spend seventeen pages of their reply brief commenting on this and other testimony of Mr. Rodman; [71] after analyzing their argument, I agree with them that his testimony does not support the conclusion that Boise and Dennis often enjoyed the same prices or that Boise paid higher prices than Dennis. For example, he testified that he became aware that Dennis was buying ACCO products at lower prices than Boise because of a conversation with Mr. Twietmeyer (Tr. 4461), but Mr. Twietmeyer had no recollection of such a discussion (Tr. 6744). Furthermore, specific ACCO pricing which he referred to (Tr. 4559-60) was denied by an ACCO representative who reviewed its sales from October 1977 through March 31, 1979 to Dennis and Boise. She testified that "It's not possible" that his testimony regarding ACCO's prices was accurate (Tr. 6709-10). A representative from Swingline also testified, after analyzing the appropriate files (Tr. 6621), that Mr. Rodman's recollection of its prices to Dennis was "mistaken" (Tr. 6624). Other instances of Mr. Rodman's inaccurate testimony are detailed in complaint counsel's reply brief (CRB, pp. 142-54)—so many, in fact, that I find that none of his testimony regarding the availability of discounts is credible.

382. Boise also relies on prices offered by one of the selected dealers, John L. Bird, to the Metropolitan Bus Company of Seattle (RX 246) to prove that manufacturers sold to Bird at lower prices than to Boise. These manufacturer's prices are arrived at by backward calculations from Bird's and Boise's offering prices using unwarranted assumptions about markups (CRB, p. 25). I will not accept calculated prices of such dubious ancestry as support for the sweeping conclusion that Boise is not a favored purchaser.

383. In conclusion, the only reliable evidence of prices which were charged to Boise and the selected dealers is contained in the charts (CX's 1-6). Boise's attempt to inject uncertainty about the manufacturers' pricing in support of its claim of lack of knowledge is rejected because it is based on inaccurate and misleading testimony and unwarranted assumptions derived from that testimony. I therefore find that the charts accurately reflect the discriminatory prices at which the manufacturers sold office products to Boise and selected dealers, and I find that Boise knew or should have known the prices at which it and the selected dealers purchased those manufacturers' products.

#### *E. Dealer Injury*

##### *1. Accounts Lost To Boise By Dealers*

384. Twenty-one of the twenty-three selected dealers testified that they have lost accounts to Boise in recent years. In some cases, all of the business of an account was lost; in others, only part of its business was transferred to Boise distribution centers. The accounts were lost either [72] because of Boise's lower prices, better service, or a combination of these factors (Tr. 657-59, 1342, 2038-39, 2432, 2498-501, 2607-09, 2915-21, 3035, 3145, 3241, 3327-28, 3359-60, 3425, 3429, 3434-35, 3557, 3665-70, 3804-06, 3812-13, 3815-16, 3897-900, 3981-85, 3989-94, 4081-82, 4218). Details of some of the lost accounts are given in the following findings.

385. In 1980, Delaware Trust Co. in Wilmington moved its \$100,000 annual office supply account which had been shared equally by Hugh A. George Co., George D. Hanby Co., and H&H Stationers, to Boise's Pennsauken distribution center (Tr. 5824-26). The decision to change suppliers was based on a computerized stock control program offered by Boise which was not available from the three former suppliers (Tr. 5829-32).

386. A. Pomerantz, a large office products dealer in Philadelphia, lost the Bell Telephone of Pennsylvania bid in 1980 to Boise. Pomerantz had been one of many dealers that had been supplying Bell Telephone of Pennsylvania. Its annual sales to Bell before 1980 were \$30,000 to \$40,000. Sales in 1982 were less than \$5,000 to \$6,000 (Tr. 1343-46; CX 560A-B).

387. Capitol Milk Producers is an account which Andrews Office Supply in Washington, D.C., lost to Boise based on price. Andrews' pricing to Capitol Milk Producers was 20% off manufacturers' list. Boise priced Capitol Milk at 38% off manufacturers' list. Mark Cashman, General Manager of Andrews, testified that he was told personally that the 38% discount applied to "any quantity, any order" (Tr. 2609-10).

388. National Semi-Conductor is an account now served by Boise's Salt Lake City distribution center (Tr. 5051). Weber Office Supply, one of the larger dealers in the Salt Lake City area, had the account during 1981. Boise took the account from Weber in March 1982 because of lower prices, in the opinion of Sue Anderson, General Manager of Weber (Tr. 3806, 3809-11).

389. Tandem Computers is a Boise account in San Francisco (CX 977, p. 102). Prior to 1980, Tandem had been one of Curtis Lindsay's larger accounts, doing about \$20,000 per month. After complying with a request for pricing by one of Tandem's divisions, Curtis Lindsay lost the business. In trying to regain the full account, Curtis Lindsay was told by the account that its prices were higher than Boise's (Tr. 3897-99). Curtis Lindsay also lost to Boise the one division of Fairchild that it had served (Tr. 3899). Boise now has all of the eight or nine Fairchild divisions (CX 977, p. 106). Fairchild consolidated its purchasing for all divisions and Curtis Lindsay was asked to submit pricing. It did so, but Fairchild stopped ordering. Curtis Lindsay made several attempts to regain the business, each time cutting its prices until its final pricing was near cost, but Fairchild's buyer said its prices were still too high (Tr. 3899-900). [73]

390. Victoria Station, a restaurant chain headquartered in Marin County about twenty miles from San Francisco, is a Boise account (CX 977, pp. 118-20) which was taken from Gilbert-Clarke in approximately 1978 or 1979. Victoria Station, which had purchased approximately \$15,000 to \$20,000 per year from Gilbert-Clarke, changed to Boise because of pricing and services which Boise offers (Tr. 3330-31; CX 977, p. 120).

391. "Considerably better" price was the controlling factor in the loss of Weyerhaeuser Corporation by The Stationers, a Tacoma dealer, to Boise's Seattle location in 1970-1971 (Tr. 3559-60). When Weyerhaeuser changed to Boise, it was The Stationers' largest account, doing \$10,000 to \$12,000 per month, approximately 14% of the total sales volume of The Stationers (Tr. 3557-58).

392. Rainer Bank is a customer of Boise's Seattle location (CX 976, p. 159). In the early 1970's, it had been Trick & Murray's largest supplies account, purchasing about \$125,000 per year before it was lost to Boise (Tr. 3435-36, 3439). Another account obtained by Boise's Seattle location from Trick & Murray was Perkins Coie. The account had purchased about \$50,000 per year until Boise took it in approximately 1980. Perkins Coie changed to Boise because of lower prices and because of a computer-generated usage report which Trick & Murray could not provide because of inadequate computer capability (Tr. 3429-31).

393. The City of Seattle is an account of Boise's Seattle location that

is considered a major account by its manager (CX 976, p. 151). A number of dealers had sold to the city but John L. Bird had the majority of the city's business before 1973, when the account switched its business to Boise, with the exception of small orders for quick pick-up (Tr. 4124-25). Boise's salesman testified that although Boise has not always made the low bid to this account: "The City of Seattle buys from Boise because of usage reports, because of some of the sophistication in the invoicing system, because of depth of inventory and high [fill] rates" (Tr. 5573).

394. Monroe-Narcus Stationers in Boston lost the 14-year old Raytheon account to Boise in 1981. Raytheon had been Monroe's largest account, purchasing about \$1 million per year, or some 12% of Monroe's total sales. Bernard Julius, co-owner of Monroe, who was personally in charge of the account, testified that Raytheon's contract manager told him that the reason for the change to Boise was "strictly economics." Boise had guaranteed to hold contract prices for one year. Mr. Julius felt that he could not do this and still make a profit (Tr. 2432-34).

395. Boise's Boston location bid against G.E. Stimpson and took the Prime Computer account in 1981, which Stimpson had served since the inception of the company. Prime Computer had been purchasing about \$35,000 per month from Stimpson (Tr. 2915-16). In another bid situation, Boise's Boston location under-bid [74] G.E. Stimpson for the Hospital Services of New England account, an organization of 100 member hospitals (Tr. 2915-18). G.E. Stimpson had been servicing approximately fifty of these hospitals, and lost about 20% to 30% of its volume of business, but retained some because of its previous history of service (Tr. 2917-18). Another G.E. Stimpson account from which Boise's Boston location obtained increased business in 1981 was Arkwright Boston (Tr. 4555-56), resulting in a loss to Stimpson of approximately \$1,000 to \$2,000 in sales per month (Tr. 2920).

396. Reilly-Stoker Corporation is another account where Boise's Boston location successfully under-bid G.E. Stimpson (Tr. 4553). Reilly-Stoker is located in Worchester, Massachusetts, the same city where G.E. Stimpson is located, and had been using Stimpson as its sole supplier until Boise offered them significantly better prices. Stimpson lost about \$8,000 in monthly sales volume when it lost this account (Tr. 2920-21).

397. Monroe-Narcus also bid against Boise's Boston distribution center for the Hospital Services of New England business, offering 30% of manufacturers' suggested list for items carried in inventory and 15% off manufacturers' suggested list for all other office products (Tr. 4689-90). Boise won the bid with prices at 35% to 40% off manufacturers' suggested list for everything in Boise's catalog and 35% off

manufacturers' suggested list for items not in the catalog (Tr. 4556-57).

398. Boise's Boston location obtained the New England Telephone account in 1979. It had previously been served by a number of dealers, including Union Office Supply (Tr. 2038, 2140). Prior to Boise obtaining the account, Union sold it about \$250,000 per year in office supplies, which was about 30% of its total sales at the time (Tr. 2039). Although Boise may have offered a little better pricing than Union, the other factor which led the telephone company to go with Boise instead of Union was that Boise had a computerized backup system that Union did not have at the time (Tr. 2145).

399. Robert Helwig, owner of Charlie Helwig, Inc., in Portland Oregon, lost the Halton Tractor account that had been with Helwig for many years to Boise's Portland distribution center in 1979. Boise offered end-column pricing, its lowest prices, if Halton Tractor agreed to buy all of its supplies from Boise (Tr. 3359-62). Mr. Helwig was told by Mr. Alexander of Halton that Boise's prices were "considerably less" than Helwig's (Tr. 3362). Boise's Portland location, since getting the Halton Tractor account, has realized as much as \$40,000 per year in sales of office supplies to Halton in good times, and about one-third of that figure recently (CX 974, p. 129).

400. Consolidated Freightways was a long-time customer and the largest account of Charlie Helwig, Inc., and bought as much as \$70,000 annually in office supplies before switching most of its business to Boise. Helwig's sales to Consolidated were about [75] \$13,000 in 1982 (Tr. 3370-72). Boise's employees did not agree as to how they managed to get Consolidated Freightways' business. Richard Viskov, former sales manager, testified that Boise's prices were not lower but that he called on the account since 1973 and finally "wore the account down" and got the business (Tr. 5375-76). On the other hand, Rick Mealy, a Boise salesman, testified that the change resulted because Helwig was charging Consolidated list or close to list prices. Boise was not charging list prices to this customer (Tr. 5426-27).

401. FMC is an account of Boise's in Portland (CX 974, p. 109). Kilham Stationery had served the account for about fifteen years. Boise took FMC by offering 40% off list (Tr. 3668), usage reports, easy order forms and a basic supply system (Tr. 5370). Wakefield Mack, owner of Kilham, testified that the buyer for FMC had said to his salesman that "she couldn't afford to do business with Kilham's Stationery" (Tr. 3668).

402. Boise's Portland location identified Wagner Mining, a Klip Stationers account for ten to fifteen years, as one of its target accounts (CX 95Z-10). Boise succeeded in 1981 in taking all of the Wagner account, which had been buying \$2,000 per month from Klip (Tr.

3247-48) by offering services such as cost center summary billing and cataloging even though its prices were higher (Tr. 5379, 5394-95).

403. Martori, Meyer, Hendrick is an account that had been served by Wist Office Supply before switching to Boise's Phoenix distribution center (Tr. 5230, 4219-20). The account wrote the following note on a Boise invoice given to Wist's salesman by the account:

Here is a copy of an invoice we received today. I'll be happy to review any comparable prices Wist might be able to offer us (CX 660).

On the other hand, Boise's salesperson, Janet Bode, testified that the account switched to Boise to get more frequent sales calls and access to a broader inventory than Wist carried (Tr. 5257-59).

404. There are other examples of Boise's winning bids: It bid against Yorkship and Executive Office Supply for the Vineland City Bid, under-bidding by \$2,500 on contract items and giving 40% off manufacturers' list on non-contract items, against the 28% and 29% off list quoted by Yorkship and Executive (Tr. 2501). Boise took the Campbell Soup Co. and the Rancocas Valley Hospital bids from Pomerantz (Tr. 1342), and the General Electric bid from Curtis Lindsay in 1980 (Tr. 3949), as well as the Atari bid in 1982 (Tr. 5620-21). Weber Office Supply was [76] unsuccessful in bidding against Boise for the Mt. Fuel Supply Co. business (Tr. 3819).

405. Dealers testified that they have lowered their prices in some instances to try to keep an account when competing against Boise. For example, G.E. Stimpson dropped its prices to Wellesley College and Arkwright Boston (Tr. 2918-20). Joseph Cresci of G.E. Stimpson testified that, in competing against Boise for the Weyman Gordon account, it "cost us significantly in our margins to retain the account" (Tr. 2921). Weber Office Supply also lowered its margins to retain several accounts (Tr. 3818-19) as did Kelly Co. (to 5%) to retain four large accounts (Tr. 3995-96, 3998-99). Dealers in the Seattle/Tacoma and Philadelphia areas lowered margins to retain accounts being solicited by Boise (Tr. 4140, 3145, 2502).

406. Some dealers testified that they refrained from competing against Boise for certain accounts. Weber Office Supply has discontinued bidding on State of Utah bids and on other bid accounts. Weber considers it not worth the time and effort to bid if Boise is bidding (Tr. 3820-21). For accounts such as Amcor and Logan Hospital, Weber's sales representative does not believe that he can get his foot in the door (Tr. 3819). Mid-West Office Supply has stopped actively seeking bid business because it was unable to price competitively against Boise and maintain the margins needed to be a financially viable business (Tr. 3039-41).

407. None of the selected dealers who lost accounts in whole or in part to Boise were able to conclude that the losses were due to the different prices charged them and Boise by the six manufacturers (Tr. 2646-50, 3091, 2464, 4641, 714, 4455, 177-78, 190-91, 196, 202, 206, 211, 215-16, 223, 231-32, 2671, 2674, 2679, 2145, 1455-61, 2981-82, 2989-90; CX 702, pp. 106-15, 177-78, 182-83, 190-91, 196, 201-02, 206, 211-12, 215-16, 223, 231-32).

## 2. Accounts Lost To Dealers By Boise

408. The battle between dealers in the office products industry is highly competitive (Tr. 655, 2603, 2651, 2037, 2431, 3191, 3665, 1340, 2497; CX's 702, p. 76; 972, p. 51; 672, p. 22; 44D, 69Z-17) and it is inevitable that when Boise competes with the selected dealers it will lose accounts to them.

409. Boise employees identified accounts who, although not always lost, were offered lower prices by many of the dealers who testified or dealers in the same areas. These include: Seattle Public Health Hospital, Pioneer Annuity, Talos, Farm & Home Life, Metro Seattle, Safeco, State of Arizona, Motorola, Digital Equipment, Boswell Memorial Hospital, Phoenix General Hospital, American Benefit Plan, Merck, Sharp & Dohme, State of Utah, [77] Hercules, Group Hospital Association, Colonial Penn Insurance, Franklin Mint, Converse Rubber, Canada Dry, Century Bank & Trust, Raytheon, Wellesley College, Form Corp., Grossmans, Cumberland Farms, Fred S. James, Blue Cross/Blue Shield, Boston Financial Data Services, Sperry Flight Systems, Kaibab Industries, Sullivan & Mason, ADP, EIMAC, DuPont, Honeywell, Citizens Bank, Seattle First National Bank, Children's Orthopedic Hospital, CH2M Hill, United Technology, Sohio, Sperry Univac, IBM, First Interstate Bank, United States National Bank, and Polaroid (Tr. 3805, 687-88, 4500-05, 4508-11, 4642-47, 5175, 5189, 5194-97, 5611-12, 5615-20, 5365-68, 5380-87, 4964-66, 4987-88, 5198-200, 5584-85, 5247-52, 5273-75, 5519-27, 4111-15, 2469, 5689-99, 4488, 4491, 4497; CX 976, p. 180). Some detailed examples of situations where Boise faced lower prices from dealers follow.

410. Mr. Ralph Barnett, of Boise's Washington, D.C. sales office, discussed several instances where dealers offered lower prices to customers than Boise. Mr. Barnett first solicited Group Hospitalization in Washington, D.C. seven years ago, and offered prices that were 22% over Boise Cascade's cost and received only six of 135 to 140 items. Andrews, one of the selected dealers, received the business instead of Boise. Since that time, this account has given more business to Boise, even though it has not lowered its prices, because of the service it provides. Mr. Barnett saw the prices offered by Andrews and

another dealer on one item. Boise's price was 10% higher (Tr. 5748-55).

411. Mr. Barnett also solicited the business of the University of Maryland which at that time purchased from the lowest-priced vendor. Mr. Barnett offered prices that were 25% over cost and did not do very well; he then reduced Boise's prices to 20% over cost but sold only some minor items because dealers were offering this account lower prices. Mr. Barnett then emphasized Boise's services and he convinced the University to buy from Boise without lowering his prices (Tr. 5755-62).

412. Mr. Barnett was recently provided a dealer's price list by one of his accounts, Interstate Federal Savings and Loan. The price list, according to an analysis by Interstate's buyer, offered prices on seventy-two items that were on average 33% below those offered by Boise.<sup>7</sup>

413. Two other accounts informed Mr. Barnett that a Washington, D.C. dealer, M.S. Ginn was offering pricing that was 40% and more off the list price, well below the prices offered by Boise. In one instance, Mr. Barnett was forced to lower his [78] prices to obtain business from the account (Tr. 5762-64, 5774-78).

414. Mr. Hallstrom, a sales representative from Boise's Salt Lake City distribution center, periodically submits bids to Salt Lake City for its office products needs. He reviews the bid recaps made public by the city to see where Boise's pricing is in relation to its competitors. A bid recap by the city reveals that Boise obtained only 20% of the bid while a dealer was awarded the remaining 80%. Mr. Hallstrom submitted pricing to two school districts which was only 4% to 5% over Boise's costs. The bids were worth well over \$100,000 and Boise received 15-20% of the business of one and 10% of the other (Tr. 5026-28).

415. The Church of Latter Day Saints buys approximately \$500,000 worth of office supplies annually. Boise receives only a small amount of the business because dealers offer the Church lower prices (Tr. 5029).

416. Mr. Hallstrom solicited Utah Power and Light Co. for many years. He started out offering column pricing without success, then lowered the prices offered from 22% gross profit down to 8% gross profit without receiving any business. Finally at 6% gross profit, Boise Cascade received a small amount of business. One of the principal suppliers of this account is Mid-West (Tr. 5030-31).

417. Mr. Lothar Vielstich, general manager of Boise's Salt Lake City distribution center testified about a 1980 bid which Boise submitted to the State of Utah, which awards its bids on the basis of price.

<sup>7</sup> Mr. Barnett recalculated the differences and, after finding a few errors, concluded that the difference was actually 30% (Tr. 5770-71).

Boise's bid was priced at 5% to 10% over its costs, but it was not awarded any of the bid (Tr. 4964-66, 4979). Boise received a recap of the bid from the state. After reviewing the recap, and believing that the dealers quoted prices below Boise's costs, Mr. Vielstich called Mr. Bazant at Boise's headquarters to "find out how come we have to pay such a high price for our products" (Tr. 4983).

418. Mr. Ian Patrick, general manager of Boise's Philadelphia distribution center, testified to losing four accounts in the last quarter of 1982 with combined business of over \$700,000 because dealers offered lower prices to these accounts. Boise offered prices to one of the accounts, Merck, Sharp & Dohme, that gave only 5% to 7% gross profit on stockroom items and column eight on the nonstock items. Boise lost the business to Pomerantz (although it was very competitive on stockroom items) because, according to the buyer, its column eight prices were 25% higher than Pomerantz's (Tr. 5693-95). Boise submitted prices to Group Hospital Association that were 8% to 10% over cost, but it lost the bid because, it was told, its prices were too high (Tr. 5695-96). Boise also submitted prices to Colonial Penn Insurance and Franklin Mint which were 4-6% above its costs and still lost the business to dealers (Tr. 5696-99). [79]

419. Boise's Boston distribution center submitted prices to United Technology, whose business was worth over \$2 million annually, in 1979, 1981 and 1982. After learning that its prices in 1979 and 1981 were not competitive, Boise offered prices in 1982 that were 5% over cost, but lost the bid to a dealer because, it was told, its prices were still 5% to 7% too high (Tr. 4511-12).

420. Mr. Cleary, of Boise's Boston distribution center, testified that Monroe, one of the selected dealers, took all or part of the business of several accounts from Boise, in one case, according to the buyer, offering 20% lower prices on some items (Tr. 4642-46). Monroe also offered lower prices than Boise to Converse Rubber, Canada Dry and Century Bank & Trust (Tr. 4488, 4491, 4497). The bank eventually returned to Boise because of service problems with Monroe (Tr. 4492).

421. Jan Bode, a sales representative for Boise's Phoenix distribution center testified that Boise lost four accounts to Wist, a selected dealer because Wist offered lower prices (Tr. 5246-52), and the sales manager for this office named three more accounts where Wist beat Boise's prices (Tr. 5189-200).

422. Not all of the record instances where Boise or the selected dealer lost customers to each other are described above, but switches of this kind from supplier to supplier are not uncommon, as some of the dealers confirmed (Tr. 2655, 2657-60, 3402-03, 3410-13, 3074, 4280-81, 1386-90, 2536-40, 2964-65, 685-87, 2078-82, 3187-89; CX 702, pp. 82, 173).

### 3. The Selected Dealers' Performance In Recent Years

#### a. *Net Profits*

423. The major industry trade association, NOPA, compiles data on dealer operations and publishes the data in the Dealer Operating Results (CX's 355-57) which have been compiled for over fifty years (Tr. 1808). About six to seven thousand copies are printed and they are distributed primarily to dealers, manufacturers and wholesalers. Dealers use them in comparing their business to other dealers (Tr. 1812) and in approaching banks for loans. Dunn & Bradstreet republishes a portion of the Dealer Operating Results (Tr. 1813).

424. In the opinion of the Executive Vice President of NOPA, Mr. Haspel, the Dealer Operating Results "is a pretty good overall sample of the industry," not just of the dealers who report (Tr. 1815-16). [80]

425. Net profit before taxes as a percent of sales is computed by NOPA and included in the Dealer Operating Results (Tr. 1856). For each year between 1967 and 1980, dealers' median net profit before taxes as a percent of sales was between 3.0% and 3.9%, except in 1974 when it was 4.3% (CX's 355, p. 3; 357, p. 2).

426. Ronald Rowe, complaint counsel's accounting expert, reviewed the Dealer Operating Results. Mr. Rowe has been an accountant with the Federal Trade Commission for over twenty-two years and his work regularly involves financial standards or benchmarks (Tr. 7104-05). He has personally worked on aggregating industry data, including industry profitability data, in the Quarterly Financial Report Program, and the Rates of Return in Selected Manufacturing Industries publications, as well as the aggregating of industry data as necessary for cases he has worked on (Tr. 7107-08).

427. In Mr. Rowe's opinion, the financial information shown in the Dealer Operating Results is reliable; his opinion is based on Mr. Haspel's testimony concerning the data, the uses made of the report, the consistency of the figures from year to year, the fact that the report has been published for over fifty years, and the general reliability of trade association data of this type (Tr. 7110).

428. Mr. Rowe also presented data from The Robert Morris Associates' Annual Statement Studies showing, for retailers of office supplies and equipment, net profit before taxes as a percent of sales for five periods between June 30, 1977 and March 31, 1982 to be in the range of 3.2% to 3.9% (CX 2300).

429. In Mr. Rowe's opinion, the Robert Morris Associates' Annual Statement Studies is reliable. The basis for that opinion is that the information is used by banks for determining whether credit will be given, and virtually every financial analysis reference book or text book which mentions an external source for industry information

mentions Robert Morris; moreover, the studies have been published for over sixty years (Tr. 7112-13).

430. Mr. Rowe also computed the median net profit before taxes as a percent of sales for the dealers who testified and whose financial information was available. For the years 1976 to 1981, their median net profit before taxes as a percent of sales ranged from 2.3% to 3.5% (Tr. 7119; CX 2301).

#### b. Sales And Gross Profits

431. Mr. Bertholdt, who has had considerable experience in reviewing and analyzing the financial statements of small businesses (Tr. 4336-38, 4348), reviewed the financial statements and income tax returns of the selected dealers to evaluate their [81] financial viability (Tr. 4334, 4341-42). After analyzing the sales and gross profits of eighteen dealers for which such data was available for each year 1977 through 1980 (Tr. 4348), he testified that all eighteen dealers enjoyed an increase in sales and that the average annual growth was in excess of 22% (Tr. 4348-49; RX 300). Gross profit grew at the same rate (*Id.*). Mr. Bertholdt considered such growth unusual, particularly in light of the recessionary economy during the period 1977 to 1980 (Tr. 4350).

432. Dr. Elzinga also examined the financial performance of the complaining dealers:

But basically, as the sheet [RX 804] shows on the face of it, it gives the dealer sales for all of the dealers for which sales figures were available for the period '77 through '80. If you even give a casual glance, much less a long studied reflection of the sheet, you find that for these dealers their sales are increasing, in some cases not dramatically, in some cases quite dramatically.

But the overall assessment I make of this, as one kind of proxy measure of their viability, is these are a group of firms whose sales are definitely on an upward trend and their sales trend is upward at a time when, for many retail businesses, you just wouldn't get figures like this.

\* \* \* \* \*

With regard to their credit rating, I asked to see a Dun & Bradstreet report for each of the complaining dealers. That was secured and paid for, not by myself, but someone else who provided this information to me. I spent a fair amount of time studying all of the D&Bs for the complaining dealers.

\* \* \* \* \*

If I can give a short, abbreviated assessment of my study of the credit character of the complaining dealers, it is that on the whole they are dealers of good credit risks; some were marginal. I don't think any received the actual 4 rating, which is the lowest category or rating that D&B gives. There were 3s and 2s, and there [82] were a number of 1s, which is the highest that D&B gives.

\* \* \* \* \*

I think the only missing thread that might need to be tied at this point is my mention of my surprise at the recent D&B reports to learn that the financial character, the trend of business, the credit ranking of a number of the companies—of the majority of the

companies that had a change, it was in the upward direction, even though, again, we are in a time period when I suspect for most industries you would find just the opposite.

But overall, the assessment of a number of the companies had not changed. Two or three, I think, had gotten worse. Eight or nine, I believe, is the number you will find when you examine these documents tonight that the credit ranking, their net worth, their business trend was assessed by D&B to be up (Tr. 6124-26, 6129-30).

#### 4. Expert Opinion On Dealer Injury

433. After reviewing the record relating to the selected dealers' lost accounts, Dr. Elzinga concluded:

Q. Well, then have you drawn any conclusions as to whether or not the evidence on lost accounts shows any injury to competition?

A. Yes, I have. The evidence that I have studied and reflected on with regard to lost accounts persuades me that you simply cannot look at that evidence and conclude that injury to competition has occurred or is occurring here.

In fact, the thing that really strikes me—and here again I speak as an economist—is you look at these dealers who are—I will call them the complaining dealers—and they have literally hundreds and hundreds and in some cases thousands of accounts, and when they are asked to give illustrations and to document the accounts they have lost to Boise, they are able to come up with a handful at best. I was really struck at the tiny number, in fact. [83]

In fact, it was in a way even troubling to me as an economist that there were not more accounts being diverted around just through normal market processes. I would have expected much more just through almost random competitive shocks.

In fact, whereas the record reveals that the typical dealer will mention a handful of accounts, you can usually count them on one hand or two at best, and then as I read on in the testimony I find that with some of those they may be out of business or there is a real question as to whether the account was truly lost, whether it was regained, whether they ever really had that account in terms of being sole supplier, whether Boise was, in fact, the customer—excuse me, the rival, that ended up with that account.

\* \* \* \* \*

So to come back to your question, the striking thing to me is how few accounts were lost, and then when you start to get into the record as to the precise facts about those purportedly lost accounts, I find over and again that it is not clear to me they were lost to Boise, much less were they lost to Boise because Boise buys products at lower prices from manufacturers (Tr. 6119-22).

434. Dr. Elzinga's reading of the record convinced him that dealers' accounts were lost for a different reason than Boise's lower prices:

If you were trying to develop a theory of account shifting in the office products industry, probably the most robust theory you could develop is that accounts shift when salespeople shift.<sup>8</sup> Over and again, as I am reading testimony about account shifting, I find that the real reason the account shifted is because a salesperson left. That is, Boise hires a salesperson away from Yorkship, and they get some accounts from Yorkship. Although in that case, if you read on, you find later Yorkship gained some of those back. [84]

<sup>8</sup> (Tr. 3855-56, 3276-78, 4239-40, 2498, 2527, 2544-45, 2953, 681-82, 2041, 2051, 2071, 4098-104, 3467, 2444-45, 2170-71, 67-70, 50-51, 910).

I think Bird hired a batch of service personnel from Boise, and a bunch of accounts shifted over to Bird. It is so common in this industry I think they have a term for it. It is called following; the salespeople have a following. The thing that struck me is the amount of evidence that seemed unambiguous of an account shifting that was explicable not by lower prices, not by better service, but by the simple pristine fact that the salesperson shifted.

Now, that I think is the most robust theory; that is, it is the most unambiguous. It doesn't explain all the sales shift or account shift. Price and service has [sic] something to do with it. But one can't read the record in this case without being struck by the potency of the salesperson in taking business with him, and increasingly, with her, when they leave the employ of one dealer to another (Tr. 6118-19).

## 5. Availability Of Lower Prices To Selected Dealers

### a. *Alternative Sources Of Supply*

435. Some of the products sold by the six manufacturers enjoy strong consumer preference; for example, the owner of George D. Hanby Co. testified that "anybody that wants a numbering machine that's going to last wants a Bates" (CX 702, p. 115; *see also*, Tr. 4134-35), and Boise would not consider dropping the Bates machine from its line, even though it carries a lower priced private label machine (CX 971, pp. 63-64).

436. Testimony regarding other products involved in this case reveals that quality and price considerations differentiate them from competing products (Sheaffer Eaton At-A-Glance; Tr. 1295-96); (B&P ring binders; Tr. 2596-97); (CX 975, pp. 16-17; Tr. 7239-40, 6772-73, 1332), and that dealers select manufacturers on the basis of customer demand for their products (Tr. 2493, 1331, 3031, 3323, 3801), and the manufacturer's reputation and product quality (Tr. 3975, 1331, 2035, 3140, 4211, 3031, 3323, 3801-02).

437. Testimony also reveals that once customers decide on certain products they tend to stay with them (CX 975, p. 33; Tr. 5839, 5430). Of course, this is not a universal phenomenon; some customers will accept substitutes; others will not (CX's 974, p. 156; 976, pp. 63-64). [85]

438. In some cases, there are no substitutes for certain products; for example, Bates list finder refills must be used with Bates list finders (Tr. 4136).

439. The industry recognizes the importance of customer preference and suppliers will generally obtain approval before substitutions are made (CX 977, p. 80; Tr. 4580-81); otherwise, there would be too many returns (CX 976, p. 61; Tr. 5492).

440. Switching from one manufacturer's line to another may also result in resistance of the salespersons, and inventory control and recordkeeping problems (Tr. 3801-02, 2599-600, 3140-42, 1331-32, 3234-35, 4833-34).

441. Boise's Marketing Plans disclose that it recognizes, and caters to, customer preferences for certain products. An analysis of its competitors in the Philadelphia market noted that one competitor had good order fill accuracy with few substitutions (CX 70Z-8-Z-10) while another competitor had "some problems with bad substitutions" (CX 70Z-28-Z-30). Also, the Portland distribution center in 1980 reported "consumer trends are stable; no major swings in end use or product substitutions. Slow change in accepting non-Xerox manufactured supplies for Xerox equipment" (CX 94D). And, in a proposal to New England Telephone, Boise listed as one of its advantages compared to its competition: "Originator and creator of our Own Catalog—creates little or no substitution; our inventory mirrors our catalog" (CX 1011A; *see also* CX's 672, pp. 5-8, 149; 2077, p. 11; 1022; Tr. 4795-96).

442. Mr. Twietmeyer testified that some manufacturers' products have such well-established reputations and customer acceptance that to exclude them from the catalog would severely curtail sales (Tr. 6772-73). For example, Boise considered taking Rediform out of the catalog because it did not pay a catalog allowance, but the market demand for its products is so strong that Boise could not remove it (CX 2077, pp. 21-24).

443. John Grant was a Boise product manager responsible for choosing filing supplies and loose-leaf products for the catalog and negotiating price with the manufacturers (CX 2077, p. 9). He testified that, although Master Products does not have a catalog allowance, Boise could not consider removing Master Products from the catalog because Master Products "has 90% of the catalog [rack] market" (CX 2077, pp. 44-48).

444. At one point in time, Master Products would sell certain Boise locations only at the dealer price and threatened to cut Boise off if it transhipped from wholesale-priced locations (CX 672, pp. 138-39). The Boise locations that did not have Master Products had a difficult time substituting another catalog rack because Master Product's catalog racks are "fairly well entrenched and its also something where you generally add to. When you add to something, you try to add something that [86] looks the same" (CX 976, pp. 66-67). Thus, Boise, as does it competition, must consider the market acceptance of the products which it purchases (CX's 672, pp. 5-8, 149; 2077, p. 11; 1022; Tr. 4795-96).

445. Dr. Elzinga based his conclusion that the office products industry has unusually informed buyers on the fact that buyers make repeat purchases and can judge differences in quality. He testified that:

If a law firm such as this one is buying yellow pads and they find that the cardboard

backing is so flimsy that when you hold the thing on your lap it won't keep its shape for writing, they will probably tell their stationer that that is a bad yellow pad. I don't want that kind again. If you can't get me a better kind, I may shift accounts. That is what I mean, the character of the product is different than buying deodorant (Tr. 6201-03).

*b. Ability Of Selected Dealers To Obtain  
The Wholesale Functional Discount*

446. Manufacturers in the office products industry who grant wholesale functional discounts to companies such as Boise do not base their decision to do so on the quantities purchased by, but on the resale function of, their wholesalers; generally, wholesalers resell to dealers who would otherwise not buy directly from the manufacturer (Tr. 1582, 2741-42, 1910, 2211-12).

447. Thus, Rediform gives wholesalers a functional discount because they help the "manufacturer distribute his product through wholesale and retail sources to the ultimate consumer" (Tr. 833). Mr. Barth of Rediform testified that a wholesaler is:

[A] customer who would purchase our products, warehouse them in one or numerous warehouses or distribution centers, would in turn distribute and sell these to retail dealers, who would provide a major catalog which is given to retailers and on through retailers to consumers and prices to go with that, who would promote the sale of those products through the dealers to the consumers, who would help the dealers in the normal conduct of their business, provide them aid and [87] assistance in doing that, who would have salesmen who call on the dealer and help to sell that, who would perform numerous functions in helping the manufacturer get his product through the wholesaler into and through the retail trade to the consumer (Tr. 815-16).

448. Because of this view of wholesalers, manufacturers do not make the wholesale functional discount available to dealers. For example, Gilbert-Clarke in San Francisco asked Rediform and John L. Bird in Seattle requested that Rediform, Bates and Master Products provide them with its wholesale discount. They were denied the discount because they were not wholesalers (Tr. 3324-25, 4074-75).

449. Kardex defines a wholesaler as a "distributor who maintains inventory on a variety of product lines for resale to dealer customers," publishes a price list, may publish a catalog and have outside salespeople. The key issue, according to Mr. Jones of Kardex is whether "the merchandise going out of the warehouse goes either to a consumer or a dealer" (Tr. 1576-78). Therefore, Kardex will not give dealers its wholesale functional discount unless they have changed from selling to end-users to selling to dealers. Dealers will not be given this discount even when, as a courtesy, they sell to other dealers (Tr. 1578-79, 1668).<sup>9</sup>

<sup>9</sup> Victor's vice-president of marketing and sales did testify that dealers who met Victor's criteria for being a

(footnote cont'd)

450. Sheaffer Eaton gives wholesalers a 50-20% discount because they sell to dealers, warehouse and promote merchandise, publish a catalog, and employ and train salesmen who call on dealers (CX 271A; Tr. 1112, 1127-28). It will not classify a customer as a wholesaler unless it meets these criteria (CX's 271A, 273; Tr. 1124).

451. B&P views a wholesaler as a customer who resells to dealers and contract stationers. It does not have any customers who purchase at the wholesale discount of 50-10-5% who do not sell to retailers (Tr. 2735).

452. Bates' criteria for classifying a customer as a wholesaler requires the customer to resell to the retail trade, carry an inventory of its products and have a catalog (Tr. 2210). Questioned as to the importance of wholesalers, C.E. Williams, President of Bates since 1958 (Tr. 2188), testified: [88]

Q. Is it important to Bates that wholesalers sell to dealers?

A. We consider that as their purpose (Tr. 2412).

453. With the possible exception of two customers selling to the computer industry, customers classified by Master Products as MSW's resell to dealers (Tr. 1918-19). As opposed to its MSW customers, dealers who buy from Master Products resell to end-users, not to other dealers (Tr. 1911). Master Products extends a wholesale functional discount to MSW customers (Tr. 1914-15).

454. Complaint counsel's expert witness, Dr. John Nevin, Professor of Marketing, University of Wisconsin, reviewed the testimony of the six manufacturers and concluded that they offered wholesalers a higher discount than they offered dealers, and that dealers could not obtain the wholesale discount even if they performed the same functions as wholesalers (Tr. 6938-39).

### *c. Buying Groups*

455. Mr. Bazant of Boise testified that informal and formal dealer buying groups exist in virtually every geographic area and that "many vendors will sell them on a price level that is as good as wholesale or better" (Tr. 4825-26). Several formal groups were identified by other witnesses: Northwest Wholesale, Mark IV, Indiana Hoosier Group, Independent Stationers, and Chico (Tr. 4825, 3662, 3750, 1660, 1749).

456. The only buying group whose operations were discussed on the record is Northwest Wholesale, which receives wholesale prices from manufacturers (Tr. 1665-66, 2328). One dealer testified that he was

wholesaler can obtain the wholesale price, but mentioned only two dealers who were "converted to wholesalers" to whom this discount was given (Tr. 1666-67, 1691).

aware of the existence of Northwest but decided not to purchase through it (Tr. 696-97).

457. This decision was not irrational, for dealers purchasing through Northwest do not enjoy the same prices as does Boise on the same goods. Mr. Wilhelmi of the Stationers is a member of Northwest, but buys most of his company's goods from two wholesalers, Zellerbach and Champion, because even with the rebate which he obtains from Northwest, prices on the majority of products are higher from that company (Tr. 3542-45). The real reason that the Stationers buys from Northwest is that it is a third source of supply and "we might as well belong to the 'co-op', as they refer to it, and get that rebate than not belong to it and not get the rebate, because then the price would be even higher" (Tr. 3546). [89]

458. John L. Bird Co., a Seattle dealer, buys a small amount from Northwest Wholesale, but is not a member. Mr. Hagstrom explained why he chose to buy more products from wholesalers such as Champion and Zellerbach:

The reason we are not; initially, there is a down payment, and I believe it is approximately \$6,000 to \$8,000 now. They get a rebate—the members get a rebate at the end of the year, which, again, fluctuates, depending upon their profit, but I believe it's to be approximately seven to ten percent. When they give most of their pricing at 40 off, and then you get the rebate at the end of the year—even if it were 14 percent, it would come out close to about a 50 percent discount, totally, counting the rebate—we get those extreme prices from Champion and Zellerbach now locally, because we buy over a hundred thousand dollars a year from each of them.

We get their extreme price, which is at least 50 percent off, and we get it quicker (Tr. 4077-78).

459. Another Seattle dealer, Associated Ruggles, buys a very small amount from the co-op but is not a member because the rebate does not offset the better pricing that the dealer can get from other wholesalers. In addition, Northwest does not stock many of the products that this dealer wants (Tr. 3138-40).

#### *F. Absence Of Manufacturers' Defenses And Boise's Knowledge Thereof*

##### *1. Absence Of A Cost-Justification Defense*

###### *a. The Purpose Of Wholesale Discounts*

460. The six manufacturers selected by complaint counsel grant wholesale discounts to Boise and to other wholesalers because of the functions performed by them, and not because of the volume of their purchases (F.'s 446-53), which, in some cases, may be no more, or even

less, than the volume purchased during equivalent periods of time by dealers. [90]

*b. Absence Of Significant Differences In Methods Of  
Serving Boise And Dealers*

461. Record evidence of the relationship between the six manufacturers, Boise, and dealers reveals that there are no significant differences in the manufacturers' cost of manufacture, sale or delivery resulting from different methods of manufacture, sale or delivery to Boise as compared with dealers.

(1) Manufacture

462. The goods sold to Boise by the manufacturers are not made solely for Boise; they are stock items which are produced and sold to all customers, including dealers, and there are no differences in the products sold to Boise and other customers (Tr. 1616, 2251-52, 1934-35, 1155, 2822, 855-57, 769-73, 787-88, 1534, 1542-55, 2831-32, 2254-55, 2264-69, 1074-76, 1081-84, 1953, 1955, 1962-69).

(2) Sale And Delivery

463. Although Boise's Office Products Division has a central office in Itasca, Illinois, the distribution centers function autonomously in all significant respects when dealing with manufacturers. They place orders directly with the manufacturers, and goods are shipped to the center which has ordered them (Tr. 849-50, 5330; CX's 976, p. 71; 972, pp. 24, 27; F. 67). The manufacturers also bill the distribution centers, not Itasca (Tr. 5330, 1152, 1604, 1929-30; CX's 976, p. 71; 977, p. 39).

464. Manufacturers' representatives call on Boise's distribution centers to handle returns, follow up on back orders, deal with shipping problems, answer questions, attend sales meetings and show new products (Tr. 4841, 5232, 5430, 1120-22, 1148, 1233, 2816-17, 845; CX's 977, pp. 53-54; 972, p. 53; 976, pp. 92-95; 974, pp. 64-65).

465. Boise's distribution centers are set up as separate accounts by the six manufacturers (Tr. 850, 1604-05, 1930, 2719-20, 1152, 2290; CX's 426A-R, 425Q, Y, Z-4, Z-7, Z-9, Z-13, 456A), they order in the same way as dealers do (Tr. 1149-51, 1602, 2284, 1927-28, 848-49, 2817), and they process and fill Boise's and other wholesalers' orders in no significantly different way than they do the orders of dealers (Tr. 2817-18, 1603-04, 1740-44, 1928-29, 849, 2284-86, 2291, 1149-51). [91]

466. Even where an individual order by a Boise distribution center exceeds that of an order by a dealer, the cost of filling such an order does not differ as between these customers:

Q. Mr. Jones, I will ask you the question again just so you will have it in mind. Are there any differences in the filling of an order that is reflected on [CX 701C] for Kelly and that which would have been reflected on [CX 701D] for Boise Cascade, Salt Lake City?

A. To the best of my knowledge, there are no differences. But perhaps I am not following. You said the filling of an order. And I honestly can't see what difference there would be between the two in the way we filled the order.

Q. What about the keypunching for the packing ticket that you mentioned yesterday, is there any difference there?

A. No. It would be done the same way, to my knowledge.

Q. And what about the actual packing in the warehouse, would that be done the same way?

A. Yes, to my knowledge.

Q. And the generation of an invoice, would that be done the same way?

A. Yes.

Q. Is that true even though the amount invoiced on [CX 701D] is much smaller than that on [CX 701C]?

A. That's correct (Tr. 1743-44).

467. In addition to calling on the distribution centers regularly, manufacturers' representatives call on Boise's headquarters on "goodwill" missions (Tr. 1148-49, 1622-23, 2239, 901-03).

468. Although the manufacturers use various methods of delivering their goods to customers, none are limited to one particular class of customers; generally, the method chosen depends on the size of a customers' order (Tr. 849-50, 1973-74, 2819). [92]

### (3) Quantities Purchased

469. Although the totality of the purchases of all of Boise's distribution centers from a particular manufacturer over a certain period of time may, and probably does, exceed the purchases of any one of the selected dealers over the same period from the same manufacturers, such comparison is meaningless for purposes of analyzing cost savings since the products are sold and delivered to the individual centers. Thus, the proper comparison for this purpose is between each Boise distribution center which competes with each selected dealer. CX's 1-6 reveal that in many cases dealers purchased quantities equal to or greater than those purchased by a competing Boise distribution center yet paid higher per unit prices than did the center.

470. CX's 7-13 show the range of purchase sizes and median purchase sizes from the six manufacturers of goods purchased by certain Boise distribution centers and dealers with which they compete. Comparisons of the range of purchases from each of the six manufacturers show that dealers and Boise's distribution centers often purchased in the same range. Boise's distribution centers and dealers often purchased amounts less than \$100, more than \$1,000, and amounts in

between (CX's 7-13). With respect to each of the six manufacturers, there are examples of dealers whose median purchase size was higher than that of a Boise distribution center.

471. In 1979, Union, Stimpson and Hanby had median purchases of \$447, \$263, and \$357 respectively from Bates. In the same year, Boise's distribution centers in Boston and Pennsauken had median purchases of \$245 and \$183 respectively from Bates (CX 7).

472. In 1979, Ruggles, Stimpson, Pomerantz and Andrews had median purchases of \$336, \$148, \$158 and \$287 respectively from B&P. During the same year, Boise's distribution centers in Seattle, Boston and Pennsauken had median purchases of \$102, \$75 and \$87 respectively from B&P (CX 8).

473. During 1979, Mid-West and Ruggles had median purchases of \$263 and \$303 respectively from Master Products. During the same year, Boise's distribution centers in Phoenix and Salt Lake City had median purchases of \$281 and \$222 respectively from Master Products (CX 9).

474. During 1979, Stimpson, Appel and Kelly had median purchases of \$184, \$138, and \$136 respectively from Rediform. During the same year, Boise's distribution centers in Boston, Moonachie, and Salt Lake City had median purchases of \$90, \$107 and \$33 respectively from Rediform (CX 10). [93]

475. During 1979, The Stationers and Dean Mark had median purchases of \$877 and \$1186 respectively of Eaton products from Sheaffer Eaton. During the same year, Boise's distribution centers in Seattle and San Francisco had median purchases of \$296 and \$240 respectively of Eaton products from Sheaffer Eaton (CX 11).

476. During 1979, Yorkship had a median purchase size of \$1036 of Duo-Tang products from Sheaffer Eaton. In the same year, Boise's distribution center in Pennsauken had a median purchase size of \$892 of Duo-Tang products (CX 12).

477. During 1979, Union, Stimpson, Yorkship, Hanby, and Andrews had median purchase sizes of \$331, \$688, \$369, \$268, and \$283 respectively from Victor. During the same year, Boise's distribution centers in Boston and Pennsauken had median purchase sizes of \$208 and \$183 respectively from Victor (CX 13).

478. There are also numerous examples of Boise distribution centers that have purchased less than dealers even on an annual basis.

479. Victor has dealer customers who purchase more than \$25,000 per year (Tr. 1607-08). In Victor's fiscal year 1980, eight of Boise's distribution centers purchased less than \$25,000. For instance, Boise's distribution center in Boston purchased \$5,658 and the distribution center in Salt Lake City purchased \$2,206 (CX 320A).

480. In 1979, Sheaffer Eaton had dealer customers who purchased

more than \$20,000 of At-A-Glance products (Tr. 1306). In 1979, thirteen distribution centers of Boise purchased less than \$20,000 of At-A-Glance products. For example, Boise's distribution center in San Francisco purchased \$4,286 and the distribution center in Moonachie purchased \$7,278 (CX 279).

481. Rediform has retail dealer customers who purchase more than \$25,000 per year (Tr. 859). In 1979, ten Boise distribution centers purchasing from Rediform purchased less than \$25,000. For example, the Boise distribution center in Boston purchased \$7,179 from Rediform (CX 194).

482. Master Products has dealer customers who purchase more than \$12,000 per year (Tr. 1976). In 1979, at least four of Boise's distribution centers purchased less than \$12,000 from Master Products. For example, the Salt Lake City distribution center purchased approximately \$1,424 from Master Products (Tr. 1894-97).

483. Each of the six manufacturers grant wholesale discounts to their wholesaler customers regardless of the quantity they purchase (Tr. 1600-02, 1127, 1131, 2823-24, 1976-77, 2291-92, 857; CX 310A-B), their size, or the number of their locations (Tr. 857, 2823-24, 1601-02, 1976-77, 2291-92, 1154). [94] The testimony of the manufacturer witnesses and the sample transactions confirm the conclusion that the Boise distribution centers received a better discount or lower price than competing dealers whether the centers bought less, the same, or greater quantities of merchandise than did the dealers (CX's 1-6).

## 2. Boise's Knowledge Of The Absence Of A Cost-Justification Defense

484. None of the six manufacturers ever undertook a written study of the cost of sales or delivery to wholesalers or dealers (Tr. 1154-55, 1607, 857, 2822, 1932, 2292) since they reward wholesalers with lower prices than dealers because of the functions performed by the wholesalers, not because of the amount of merchandise they purchase (F. 460).

485. Boise is aware that it receives a wholesale discount because of the functions it performs, and not because it purchases more than dealers with which it competes:

JUDGE PARKER: So, again, I'm saying you wouldn't go to a supplier, would you, and tell them that you're entitled to whatever the wholesale discount is if you, in fact, didn't sell to dealers, regardless of how much you bought?

THE WITNESS: Correct (Testimony of Mr. Bazant, Tr. 4894).

486. Thus, it is not surprising that there is no evidence that any of the six manufacturers ever told Boise that the discounts it received

were based on savings realized because of its volume of purchases (Tr. 2824, 1617-18, 860, 2292).

487. Boise's acquisition of office supply dealers also made it aware of the fact that suppliers were granting it a functional discount unrelated to volume. For example, it acquired a Boston dealer, Dennis Office Supply (Tr. 4435-36) which was receiving dealer prices. After Boise meshed its buying practices with those of Dennis (CX 970, p. 124), it is a reasonable inference that it became aware that although the new distribution center's volume of purchases and method of buying from the six manufacturers (Tr. 4443-45) did not differ from when Dennis was given the dealer price, the center immediately qualified for the wholesale discount, a discount which it knew could not be cost-justified.

488. Boise's twenty years of experience in selling to dealers (F. 48) made it aware of the volume of dealer purchases, [95] and a comparison of its own volume of purchases from manufacturers made it aware, or should have made it aware, that in many cases, its distribution centers often purchased no more during the same period of time than did competing dealers.

### 3. Absence Of A Meeting-Competition Defense

489. The six manufacturers' wholesale discounts have existed, without change, for many years, and they are not limited to particular geographic areas, but are applied nationwide. Rediform has given a discount of 50-20% off of the suggested list price of its business forms to wholesalers for over twenty years (Tr. 816-17, 820-21, 828; CX's 204-05, 196) and a discount of 50-20% off the suggested list price of its Recordplate line since late 1977 (Tr. 817-18, 832; CX's 212-13, 198, 230). Boise and its predecessor have received the discount on business forms since the late 1950's or early 1960's and a 50-20% discount on Recordplate since late 1977 (Tr. 843-44).

490. Master Products' MSW discounts have been the same for some forty years; Boise has been classified as an MSW for discount purposes since at least 1970 (Tr. 1915-17).

491. Most of the discounts used by Bates were in effect when C.E. Williams, its president, began working for the company thirty-five years ago (Tr. 2399, 2184). Boise has been receiving the wholesale discount from Bates as long as it has been a customer (Tr. 2218).

492. Sheaffer Eaton has given wholesalers a 50-20% discount on Duo-Tang since 1968. The discount was inherited from a predecessor (Tr. 1125-26, 1138). It has given a 50-20% discount to wholesalers on At-A-Glance products since around 1974 or 1975 (Tr. 1126). Boise has received wholesale discounts on these products as long as James Gold-

en, a twenty-five year employee of Sheaffer Eaton, has known Boise (Tr. 1128, 1058).

493. Kardex has given wholesalers, including Boise, a discount of 50-10% on visible equipment and supplies since at least January 1979 (Tr. 1579-80).

494. B&P, which sells to all Boise distribution centers at the same discount (Tr. 2895), has given wholesalers, including Boise, a discount of 50-10-5% from its lowest suggested list price for approximately twenty years (Tr. 2734, 2709). B&P also has a net price for wholesalers on some products, known as WQPL. The WQPL prices are generally lower than a price calculated with a 50-10-5% discount from suggested list (Tr. 2745). The WQPL prices existed from around 1975 until 1981 (Tr. 2752, 2747). A very important factor in the creation of the WQPL was competition from Wilson Jones (Tr. 2874). [96]

495. Prior to 1979, the only Boise distribution centers that were classified as wholesalers for discount purposes by Wilson Jones were located in Itasca, Houston, and Dallas. The other twenty-five Boise distribution centers were not classified as wholesalers (Tr. 4870-72). Between 1979 and 1982, Boise's distribution centers in Minneapolis-St. Paul, Tampa, Atlanta, Miami, Charlotte, Nashville, Jacksonville, Milwaukee and Denver also began purchasing at the wholesale price from Wilson Jones. Others did not (Tr. 4870-73; CX's 1025-26). Robert Looney, former Vice-President and General Manager of B&P, did not know whether Wilson Jones sold at the same discount level to all Boise distribution centers during the fiscal year ending April 10, 1980 (Tr. 2895).

#### 4. Boise's Knowledge Of The Absence Of A Meeting-Competition Defense

496. Boise received, and was aware that it received, wholesale functional discounts from the six manufacturers for many years and that over the years, the discounts did not vary. Thus, Boise knew or should have known that the wholesale discounts which it received were given because of the function which it performed, and that the discounts were not granted to meet the prices of the six suppliers' competitors.

#### 5. Absence Of A Changing-Conditions Defense

497. The six manufacturers did not grant Boise the discounts challenged by complaint counsel because the goods it purchased were damaged, obsolete or discontinued (Tr. 2252, 1617, 1924-25, 2821-22, 1146, 844-45).

### 6. Boise's Knowledge Of The Absence Of A Changing-Conditions Defense

498. Since Boise purchased regularly-stocked items from the six suppliers and its purchases were made continuously over many years, it knew or should have known that the wholesale discounts which it received were not based on the condition of the products which it purchased. [97]

### G. Boise's And The Selected Dealers' Expenses

#### 1. Boise

499. Boise claims that it undertakes wholesaling expenses in its sales to dealers which would otherwise be performed by the six manufacturers and that under the *Doubleday* theory, the manufacturers' compensation for such expenses, in the form of the price discriminations discussed above, is not illegal under Section 2(a) of the Act (RPF, pp. 243-50).

500. In support of this claim, Boise retained Mr. Richard Bertholdt, partner-in-charge of Price Waterhouse & Company's Chicago office, to review its accounting and other records and to compute the operating expenses incurred in making sales to dealers for the year 1979, the year focused on by complaint counsel (Tr. 4334, 4372-73). Mr. Bertholdt analyzed the operating expenses of Boise's Office Products Division and determined which of those expenses should be allocated to the dealer portion of the Division's business. He then determined which dealer expenses were attributable to Boise's resale of the goods purchased from the six manufacturers (Tr. 4373).

501. Mr. Bertholdt then totalled the expenses incurred by Boise in selling the six manufacturers' products to dealers, and compared them with Boise's "cost of sales" (purchases, Tr. 4409) from each of the manufacturers:

| Manufacturers   | Cost of Sales | Attributed<br>Expense | Percentage |
|-----------------|---------------|-----------------------|------------|
| Bates           | [             | I.C.                  | ]          |
| B&P             | [             | I.C.                  | ]          |
| Rediform        | [             | I.C.                  | ]          |
| Sheaffer        | [             | I.C.                  | ]          |
| Master Products | [             | I.C.                  | ]          |
| Victor          | [             | I.C.                  | ]          |
| Total           | [             | I.C.                  | ]          |

(Tr. 4408-10; RX 310)

502. Dr. Elzinga testified that when Boise competes with dealers there "may be a need" to receive a lower price from a supplier if it

is "providing a service to the manufacturer that the dealer does not provide . . . a need to get a lower price to offset the greater costs that it may incur or greater risks that it might incur. . . ." (Tr. 6160), and Dr. Nevin, complaint counsel's expert witness agreed that to the extent that Boise [98] performs functions for manufacturers which are not performed by dealers, it is entitled to a lower price (Tr. 6989-90); however, according to Dr. Nevin this situation does not exist in the present case (F. 522).

## 2. The Selected Dealers

503. The selected dealers also incur expenses when they store and resell the products which they have purchased from manufacturers. These expenses, just as does Boise's, reduce the manufacturers' costs of inventorying products (Tr. 1774-75, 2022, 2402-03).

504. In the Boston area, Monroe Stationers has a 60,000 sq. ft. warehouse, 40,000 sq. ft. of which is used to house its office supply inventory of approximately 4,000 items (Tr. 2425-26). G.E. Stimpson Co. has 30,000 sq. ft. of warehouse devoted to the approximately 3,500 items it stocks (Tr. 2907, 2939). Union Office Supply's warehouse is approximately 20,000 sq. ft. (Tr. 2032-33).

505. In the Philadelphia area, A. Pomerantz devotes 66,000 sq. ft. of warehouse to the 8,000 items that it regularly keeps in inventory (Tr. 1336-37), Yorkship carries an inventory of 7,500 items in a 21,000 sq. ft. warehouse (Tr. 2495-96), and Andrews Office Supply in Washington, D.C., has approximately 10,000 to 15,000 sq. ft. of warehouse space for the 5,000 item inventory it carries (Tr. 2602).

506. In Salt Lake City, the Kelly Company has approximately 40,000 sq. ft. of warehouse, of which 13,000 sq. ft. are used for the 5,500 supply items that are normally stocked (Tr. 3975, 3977-78), and Mid-West Office Supply carries 12,000 items in inventory, the majority of which are office supplies (Tr. 3032).

507. In Phoenix, Arizona, Wist Office Supply & Equipment reserves 18,000 sq. ft. of its 40,000 sq. ft. warehouse for office supply items (Tr. 4215-16).

508. In the Seattle, Washington area, The Stationers stocks more than 10,000 items carried in inventory in its warehouse of 24,000 sq. ft. (Tr. 3552-53), and Associated Ruggles has 23,000 sq. ft. of warehouse and stocks 5,000-6,000 items in inventory (Tr. 3142).

509. In Portland, Kilham Stationers has an inventory of 8,000-10,000 items housed in approximately 10,000 sq. ft. of warehouse (Tr. 3663), and Klip Stationers devotes over 10,000 sq. ft. to some 10,000 items carried in stock (Tr. 3238).

510. In the San Francisco area, Gilbert-Clarke devotes 19,000 sq. ft. of its 25,000 sq. ft. warehouse to office supplies [99] (Tr. 3325-26), and

Curtis Lindsay maintains 18,000 items in inventory with warehouse space of approximately 15,000 sq. ft. (Tr. 3894, 3896-97).

511. The dealer witnesses testified that only a small percentage of their sales involved products drop-shipped directly from the manufacturers to the customer (Tr. 1339, 3032, 3326, 3663). In some instances, drop-shipments amounted to 1% or less of the dealers' total sales (Tr. 3239, 3978, 3802-03).

512. Another resale expense which dealers incur is catalogs which are often purchased from wholesalers (Tr. 3894, 3973-74, 3800, 3030, 2493-94, 3237, 3137, 3550-51, 5480; CX's 702, p. 124, 62). Some dealers produce their own catalogs (Tr. 3973-74, 3237).

513. Some dealers provide computer reports of purchases to their commercial accounts (Tr. 1334-35, 2429-30, 3143-44, 4253, 3969).

514. Most dealers also have salespeople who call on accounts regularly (Tr. 48, 1724-25, 2213-14, 5072-73, 2035, 1335-36, 3978-79, 3033, 3803, 3326, 4079, 2912, 3664, 3354-55, 3143, 3239, 4216, 3424, 2427, 2601-02, 2494-95, 3895). Statistics gathered by the trade association NOPA indicate that 85% of all dealers employ outside salespeople, typically three, and 94% of dealers with volumes over \$1 million employ outside salespeople, typically five (CX 356, pp. 11, 19).

### 3. Trade vs. Functional Discounts

515. I have used the term "functional discount" in this decision to describe the pricing practices of the six manufacturers, but Drs. Elzinga (Tr. 6408) and Nevin<sup>10</sup> believe that this term is often used to describe two different pricing schemes and that a distinction should be made between the two, using the terms "functional discount" and "trade discount."

516. Dr. Nevin testified that the terms "functional discount" and "trade discount" are not consistently used in business and marketing literature (Tr. 6840-41) but he believes that the distinction between the two terms is important in this case (Tr. 6873-74). [100]

517. A trade discount is one which is given to marketing intermediaries at a level of trade because they are at that level of trade. This discount is based on who the marketing intermediary resells to, and is completely independent of the marketing functions performed by the intermediary. For example, a manufacturer may define wholesalers as marketing intermediaries who resell to dealers and provide all wholesalers an additional discount which is not given to the dealers. The discount received by the wholesaler is a trade discount (Tr. 6843-44; CX 2101).

<sup>10</sup> Dr. Nevin is a professor of business at the Graduate School of Business, University of Wisconsin, Madison. His area of specialization is marketing; within this area, he specializes in "marketing management" and "channels of distribution" (Tr. 6832-33; CX 2100).

518. In comparison, a functional discount rewards a marketing intermediary for assuming and performing a function that would otherwise be performed by that manufacturer (Tr. 6850).

519. Dr. Nevin testified that if a manufacturer decides to offer a functional discount, it should be offered to any marketing intermediary that performs the function, regardless of the level of trade which the intermediary occupies. Thus, if a dealer and dual distributor perform the same function (e.g., carrying inventory) they should both receive the same discount (Tr. 6859-61). Dr. Elzinga, in effect, supported Dr. Nevin's argument by agreeing with the following quote from an article discussing functional discounts:

On the other hand, to say that two buyers who perform the same services and buy in the same quantities should, on grounds of efficiency, receive different discounts solely because they resell to different customers also is nonsense (Tr. 6400).

520. Dr. Elzinga also concluded that while he might "quibble" with the nomenclature, he recognized that:

[T]here are entities in the office products distribution chain, call them contract stationers, or commercial stationers in [the Kearney Report's] parlance, that in a functional sense do some or all of the things that wholesalers do. That is, they buy in large quantities, they hold inventory, they break bulk (Tr. 6423).

521. Dr. Nevin testified that when dealers buy directly from manufacturers, the dealers incur a large portion of the costs which wholesalers incur when dealers buy through the wholesalers. In other words, dealers may hire purchasing agents to go through the numerous manufacturers' catalogs and price [101] lists, contact them and place the orders, etc. Alternatively, dealers may buy through wholesalers who will perform those functions for dealers and dealers will pay wholesalers for those costs as they will be included in the price paid to the wholesalers by dealers for the goods. In either case, the manufacturer does not incur those costs (Tr. 6930-31, 6949-50).

522. Based on his review of portions of the record, Dr. Nevin "Basically . . . found the dealers performing the same marketing functions that Boise performs in their sales to commercial users," a conclusion with which I agree (F.'s 70, 503-14). A document which he reviewed was the Kearney report which was prepared for Boise by the management consulting firm of A.T. Kearney & Co. (Tr. 6863). As Dr. Nevin stated:

In the Kearney report they essentially talked about the marketing functions that were performed by a variety of different marketing intermediaries in the channel. I remember that the Kearney report indicated that commercial stationers, which are in essence

dealers, performed the same functions with respect to selling to commercial users that Boise performed (Tr. 6864).

523. Referring to the six manufacturers, Dr. Nevin testified that since Boise operates as a dual distributor it is entitled to receive the trade or wholesale discount on sales it makes to dealers but that it is not entitled to receive the wholesale discount on sales it makes in a dealer capacity directly to users (Tr. 6871), because he does not believe that any party should have a competitive advantage imposed on it externally which it has not earned. Thus, if two resellers sell in the same way, they should have access to the same goods at the same price (Tr. 6872). [102]

### III. CONCLUSIONS OF LAW

#### *A. The Manufacturer's Sales To Boise And The Selected Dealers Were Contemporaneous And Discriminatory*

Complaint counsel's charts establish that the six manufacturers, by granting Boise substantial wholesale functional discounts which were not given to competing dealers, discriminated in price between these customers for a substantial period of time.

Of course, a manufacturer does not continue offering the same price to customers; prices change regularly, and because they do, one must be able to conclude, before a finding of discrimination is made, that the prices analyzed (or under Sections 2(d) and (e), advertising payments or facilities) are comparable. For example, if a manufacturer charges customer A one dollar for a product on January 1 and another customer fifty cents for the same product on December 31, it must be shown that the price difference is discriminatory and not the result of some intervening, and lawful, circumstance such as a lowering of price by fifty cents to all customers on December 31. If such pricing were considered discriminatory, sellers would be unable to adjust their prices in response to competitive pressures. *Atlanta Trading Corp. v. FTC*, 258 F.2d 365, 371-72 (2d Cir. 1958) (§ 2(d) allowance); *Valley Plymouth v. Studebaker-Packard Corp.*, 219 F.Supp. 608, 610-11 (S.D. Cal. 1963); *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968):

A substantial time interval indicates only that different prices might have been caused by different market conditions, rather than by an accomplished intent to discriminate. *Id.* at 357.

As Rowe in his *Price Discrimination Under The Robinson-Patman Act 50* (1962) puts it:

While in the serene sales context of the atomic reactor market even a price differentiation some months apart might create a cognizable discrimination, goods whose prices shuttle in rapid trading or competitive bidding may not do so even if the different prices are quoted only a few days apart. [103]

The office product market is more like the former than the latter situation. The comparisons in complaint counsel's charts are not of "trivial sales isolated in time," *Atlanta*, at 372, but of continuous sales made pursuant to an established policy under which Boise was granted a wholesale functional discount on the manufacturer's regular goods, and under which competing dealers invariably received a smaller discount. Under these circumstances, I conclude that the 1979 sales analyzed in complaint counsel's price charts were contemporaneous and may be compared to determine whether the manufacturers charged discriminatory prices.<sup>11</sup> *Century Hardware Corp. v. Acme United Corp.*, 467 F.Supp. 350, 354 (E.D. Wis. 1979).

A comparison of the manufacturers' contemporaneous sales to Boise and the selected competing dealers reveals that they regularly granted wholesale functional discounts to Boise which were unavailable to the dealers, and which resulted in discriminations in the price paid for their goods as between the favored customer, Boise, and the unfavored, competing selected dealers.

Boise urges, however, that even assuming it and the selected dealers paid different contemporaneous prices, complaint counsel have failed to prove that the goods whose prices are compared in the charts were sold by its seven distribution centers to commercial accounts or that the dealers sold those goods in [104] competition with Boise to commercial accounts and not from their stores (RPF, pp. 209-10). I disagree. Given the substantial sales to Boise and the selected dealers, and the substantial sales by the selected distribution centers to commercial accounts (F. 61), the only possible conclusion is that Boise and the dealers competed in the resale of the goods described in the chart. *See Tri-Valley*, at 1174.

<sup>11</sup> Where customers make regular purchases to maintain their inventory, it seems to me that contemporaneous sales are inevitable. Thus, even if there were price changes during the period of comparison, to find that no sales were contemporaneous one would have to infer that all sales were made to Boise before (or after) the price change and that no other sales were made to the selected dealers when sales were made to Boise. *Compare Tri-Valley Packing Ass'n.*, 60 F.T.C. 1134 (1962), *rev'd on other grounds*, 329 F.2d 694 (9th Cir. 1964), in which respondent argued that it was possible that all of its private label goods were resold by retailers only in stores which did not compete with the favored customer and not in stores which did. The Commission stated:

In so arguing, respondent is in effect saying that there is some likelihood that hundreds or thousands of items which have been commingled with a greater or lesser number of like items could be segregated by accident or chance. It would not be an overstatement to say that it would be virtually impossible for this to happen once, and respondent would have us believe that it happened on several occasions. *Id.* at 1174.

*B. Boise And The Manufacturers Have Been And  
Are Now Engaged In Commerce And Boise's Purchases  
Were And Are In Commerce*

Section 2(a) of the Robinson-Patman Act ("the Act") outlaws price discrimination by a person "engaged in commerce . . . where either or any of the purchases involved . . . are in commerce. . . ."

At least one of the transactions involved in a Section 2(a) case must, therefore, cross state lines, *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

Section 2(f) of the Act adds an additional requirement; that a buyer who is "engaged in commerce" must also have received a discriminatory price "in the course of such commerce."

Many of the 1979 sales by the six manufacturers to the Boise distribution centers and the selected dealers crossed state lines (F. 95, n. 2) and the manufacturers and Boise were thus engaged in commerce, and the former's sales and Boise's purchases were made in the course of commerce (F.'s 51, 108-13, 163-64, 223, 253-59, 292, 342).

Not all of Boise's purchases in the period of time covered by the price comparison charts crossed state lines; some were intrastate, but complaint counsel argue that these purchases satisfy Section 2(f) because they also occurred in the course of commerce.

These intrastate purchases include ones made by Boise's Pennsauken, New Jersey distribution center from the B&P, Rediform and Bates facilities located in New Jersey, and their resale in competition with selected dealers located outside of New Jersey (Hugh A. George, Hanby, Andrews and Pomerantz) (F.'s 96, 108-09, 253-54, 292).

Complaint counsel argue that while the "in the course of such commerce" language of Section 2(f) could be read strictly to require an interstate purchase by the buyer, this interpretation could lead to the "incongruous result that the seller could be [105] held liable for a discriminatory sale to an intrastate buyer<sup>12</sup> but the knowing buyer could not be held liable" (CPF, p. 122).

Since Section 2(f) liability derives from Section 2(a) liability, it would defeat the purpose of the Act to exculpate the buyer in a situation in which the discriminating seller could be held liable. Since Boise is "engaged in commerce" because of its many interstate purchases and sales and since the competing dealers' purchases are interstate, it is reasonable and does no violence to the statutory purpose to find an interstate involvement in such a situation even though Boise's purchases were intrastate. Rowe at 437:

<sup>12</sup> Because one sale—to a competing dealer outside of New Jersey—would have been made in interstate commerce.

To harmonize the seller's and buyer's liability in the identical transaction, courts may nonetheless construe the text of Section 2(f) to reach even such an "intrastate" buyer in a discriminatory local purchasing transaction with an "interstate" seller. . . .

The second set of intrastate transactions involves sales to Boise distribution centers and to competing dealers by manufacturers located in the same state. These include purchases from B&P and Rediform by Boise's Moonachie, New Jersey and Brisbane, California locations, as well as purchases by Boise's Pennsauken, New Jersey location from B&P and Rediform when the comparative sale was to Yorkship, a New Jersey dealer (F.'s 96, 109, 254).

Boise's purchases in these situations were also made "in the course of commerce," according to complaint counsel, because the products sold to Boise by B&P and Rediform were in the flow of commerce. Alternatively, complaint counsel argue that Boise's purchases meet the jurisdictional requirements of the Act because they coexist with other interstate sales arising from the same pricing practice (CPF, pp. 124, 126).

The latter argument derives from *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir.), *cert. denied*, 103 S.Ct. 57 (1982), where the court held that since some interstate discriminatory transactions were involved, it was proper to consider the legality of intrastate sales by ITT:

Since the price disparity between advertised and private label bread, about which Inglis [106] complains, was represented by some interstate sales, we affirm the district court's holding that it had jurisdiction to examine that same price disparity as it existed with respect to sales of the same products within California. *Id.* at 1044.

The "flow of commerce" argument is based on the origin of the products which are sold by the New Jersey and California locations of B&P and Rediform. Rediform distributes its products in California through its Los Angeles facility (F.'s 108-09) and obtains the products sold there from its parent's manufacturing plants in Oregon, Utah, Pennsylvania and Indiana (F.'s 110, 112). Products were sold in New Jersey from Rediform's Paramus facility, but they were obtained from its parent's plants in New York, Pennsylvania, Indiana and Kentucky (F.'s 110-11). B&P's facilities in Los Angeles serve customers located in California and its Elizabeth location serves customers located in New Jersey (F.'s 253-54). With the exception of heat seal products, those products sold in California were manufactured by B&P outside of that state as were those sold in New Jersey to Boise's Moonachie and Pennsauken centers (F.'s 256-58).

Since the products sold by B&P and Rediform were warehoused for further distribution to its customers, their coming to rest in New

Jersey and California interrupted but did not "necessarily terminate their interstate journey." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943).

In *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), the Court interpreted the reach of the "in commerce" language of the Robinson-Patman Act, and discussed the applicability of *Walling*. It held that the flow of commerce might cease after a sale by an interstate seller to a local distributor, but that it did not do so when an interstate seller brought goods from out-of-state for intrastate distribution by its own in-state facility. *Id.* at 237-38, n. 6. See also *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 677 (5th Cir.), *cert denied*, 382 U.S. 959 (1965); *Hardrives Co. v. East Coast Asphalt Corp.*, 329 F.2d 868, 870 (5th Cir.), *cert. denied*, 379 U.S. 903 (1964).

Like the sellers in *Standard Oil*, *Foremost* and *Hardrives*, Rediform's and B&P's facilities in New Jersey and California were designed to facilitate the flow of goods produced in other states to New Jersey and California customers, and the storage of products in those facilities did not interrupt the flow of commerce. In addition, these intrastate sales, as in *Inglis*, were an adjunct to, and the result of, the decision by the manufacturers to grant Boise a wholesale discount throughout the United States, and their intrastate sales cannot be viewed as distinct from their interstate sales. Thus, the sales to Boise and the New Jersey and California dealers were made in commerce [107] and Boise's purchases from facilities in these states were made in the course of commerce.

*C. The Commodities Sold By The Manufacturers  
At Discriminatory Prices To Boise And The Selected Dealers  
Were Of Like Grade And Quality*

Section 2(a) of the Act makes it unlawful "for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality. . . ." This language has led to complicated and sometimes inconsistent analyses of the comparability of products which differ in physical makeup or brand identification. Rowe, *supra*, at 66-73, but the summary of then-existing law contained in the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) provides a good working definition which can be used to determine whether products sold at different prices are comparable:

Actual and genuine physical differentiation between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act. *Id.* at 158.

See also *Quaker Oats Co.*, 66 F.T.C. 1131, 1192 (1964) (products are not comparable "if there are substantial 'physical differences . . . which affect consumer preference or marketability. . . .'").

Since the manufacturers offer Boise and the selected dealers products under the same brand, the "like grade and quality" issue arises only when the charts compare products which are physically different.

No problem of comparability exists when physically identical products are sold to the favored and unfavored customer, and the charts do contain such comparisons on a number of products (F.'s 269-71, 123-25, 178, 308, 339, 355-56). In other cases, the charts compare prices of a substantial number of products which fulfill the same function but vary in size, color, or format (F.'s 120-37, 139-41, 176-83, 185-87, 233-35, 305-06, 311-12, 314-15, 317-18, 320-21, 349-50, 352-53, 358-59). Since the variations in the latter class of products do not affect consumer preference or marketability, *Quaker Oats*, they are of "like grade and quality" and their prices may properly be compared for purpose of analyzing the extent to which Boise has been favored and the competitive impact of that favoritism. [108]

Some of complaint counsel's price comparisons may not match identical or similarly functional items but they claim that "the Act does not require that the plaintiff match products purchased on an item-by-item basis" (CPF, p. 131). The case law supports their claim, for "the courts have long held that goods need not be individually identified but need merely be part of the same line in order to be considered of 'like grade and quality.'" *Holiday Magic, Inc.*, 84 F.T.C. 748, 994 (1974) (initial decision).

The leading case recognizing this approach to the "like grade and quality" issue is *Moog Industries, Inc. v. FTC*, 51 F.T.C. 931 (1955), *aff'd*, 238 F.2d 43 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958). Moog was a manufacturer of three lines of replacement parts—leaf springs, coil actions, and piston rings—which sold them pursuant to annual volume rebates. A different rebate was given on each line and the rebate was computed on the basis of total annual purchases. 51 F.T.C. at 945-46.

Deciding that the products sold by Moog were of like grade and quality, the Commission emphasized that "respondent's customers do not purchase respondent's products as individual items. . . ." but as "part of a line designed to supply the needs of garages. . . ." and that the rebates "were not granted on the basis of the individual items purchased but on the basis of the total dollar purchases of a particular line." The Commission also found that Moog's customers carried substantially all of the items in a particular line. 51 F.T.C. at 949.

In affirming the Commission, the court stated that where:

[A] discriminatory rebate is paid upon all items in a line, the Commission may properly find that such items are "sufficiently comparable for price regulation by the statute."

The court went on to state:

[T]he question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the [109] line, whether exactly alike and interchangeable or not. 238 F.2d at 50.

By denying that the like grade and quality concept did not arise, the court recognized that since all products in a particular line were bought, or could be bought, it was inevitable that price discriminations as to each product in the line would occur; thus, there was no need to become involved in minute examinations of comparability. See *Continental Banking Co.*, 63 F.T.C. 2071, 2109 (1963) (initial decision).<sup>13</sup>

The same principle applies in this case. The manufacturers sell lines of products, and the purchasers buy these lines to maintain an inventory from which their customers choose those products which they need. While the prices of different products within a line may differ, the manufacturers grant different discounts to wholesalers and dealers on a broad line of products and Boise consistently receives a greater discount, and thus pays a lower price on *all* products in each manufacturer's line when compared with the selected dealers. Thus, the six manufacturers' lines of products are, as in *Moog*, of "like grade and quality." The further proof that Boise and selected dealers purchased identical or functionally similar products was thus unnecessary; however, it did establish that *Moog's* reasoning is correct: Where a manufacturer sells a line of products to all customers, it is inevitable that both favored and unfavored will buy identical or similar products within the line.

#### *D. The Discriminations In Price May Injure, Destroy, Or Prevent Competition*

Under Section 2(a) of the Act, only those discriminations in price are unlawful whose effect:

[M]ay 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

<sup>13</sup> In fact, the court in *Moog* expressly held that the Commission was correct in rejecting evidence offered by respondent that products bought by particular purchasers "were not uniformly for the same make, model and age of automobile." 238 F.2d at 50.

grants or knowingly receives the benefit of such discrimination, or with customers of either of them. [110]

Because the Act uses the word "may," courts and the Commission have held since its passage that where the effect of a price discrimination on competition between buyers is an issue, "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. . . ." *Tri-Valley*, at 1171; *FTC v. Morton Salt*, 334 U.S. 37, 50-51 (1948); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981) ("As our cases have recognized, the statute [§ 2(a)] does not 'require that the discriminations must in fact have harmed competition.'");<sup>14</sup> *Falls City Industries, Inc. v. Vanco Beverages, Inc.*, 103 S.Ct. 1282, 1288 (1983) ("for purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time.") Furthermore, the substantial difference in price need not affect a significant part of the products purchased by the unfavored customer. *Morton Salt* at 49.

Whether a price discrimination is substantial has been determined traditionally by analyzing the competitive vigor of, and the average net profits, in the industry in which the discrimination occurs. In *Moog*, the court found that discounts of up to 19% in a keenly competitive environment where profits were low was substantial. 238 F.2d at 51. In *United Biscuit Co. v. FTC*, 350 F.2d 615, 621 (7th Cir. 1965), the court agreed with the Commission that "considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6% . . . was clearly substantial." See also, *Kroger Co. v. FTC*, 438 F.2d 1372, 1379 (6th Cir.), cert. denied, 404 U.S. 871 (1971); *National Dairy Products Corp. v. FTC*, 395 F.2d 517, 522-23 (7th Cir.), cert. denied, 393 U.S. 977 (1968); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir.), cert. denied, 382 U.S. 959 (1965); *Mueller Co. v. FTC*, 323 F.2d 44, 46 (7th Cir. 1963), cert. denied, 377 U.S. 923 (1964); *Standard Motor Products v. FTC*, 265 F.2d 674, 676 (2d Cir.), cert. denied, 361 U.S. 826 (1959); *E. Edelman & Co. v. FTC*, 239 F.2d 152, 154 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958); *Whitaker Cable Corp. v. FTC*, 239 F.2d 253, 254-55 (7th Cir. 1956), cert. denied, 353 U.S. 938 (1957).

Since complaint counsel are not required to prove that a price discrimination has in fact adversely affected competition, diversion of trade to the favored customer need not be proved, and the inference of injury is sustainable even if unfavored customers insist that they have not been injured for "A witness cannot be allowed by conclusion

<sup>14</sup> The Court in *Truett Payne* distinguished between Commission suits under Section 2(a) and private suits and found that in the latter, "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *Id.* at 562.

to deny a mathematical fact," [111] i.e., that he was injured by paying substantially more for the same goods than his favored rivals. *Moog* at 51.

Underselling competitors is one way that a favored purchaser may use lower prices, but this is not the only way that such an advantage may be used to injure his competitors. *E. Edelman & Co.* at 155; *Foremost Dairies, Inc.* at 680; *Kroger Co.* at 1378-79; *National Dairy Products Corp.* at 522:

[I]njury may be inferred even if the favored customer did not undersell his rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers.

Boise employees and dealer witnesses testified to the intensely competitive nature of the office products industry (F. 408) and this conclusion is confirmed by evidence of the continual shifting of accounts from the disfavored dealers to Boise and from Boise to the dealers (F.'s 384-422). Net profits of the selected dealers and of other dealers in the industry are low (from 3-4%)<sup>15</sup> (F.'s 423-30), much less than the price advantage enjoyed by Boise on its substantial and sustained purchases,<sup>16</sup> from the six manufacturers (from 5-33%) (F.'s 313, 237), and Boise has used its advantage to underprice its competitors on occasion or to offer better services than its competitors (F.'s 384-406). Finally, Boise has enjoyed its price advantage on very substantial purchases from the six manufacturers (over \$10 million in 1979) (F.'s 145, 192, 239, 274, 324, 362).

The dealers have also underpriced Boise at times (F.'s 409-22), but they have had to do so in the face of its substantial price advantage, so that when a dealer lured a customer away from Boise, its success was accompanied by a significant impairment of profits.

Considering these facts, the only possible inference is that the effect of the substantial and sustained price discriminations favoring Boise may be to destroy or prevent competition with the disfavored dealers and I so find. See *E. Edelman* at 155: [112]

[T]he competitive opportunities of the less favored purchasers were injured when they had to pay substantially more for petitioner's products than their competitors had to pay.

<sup>15</sup> Net profits are the true measure of dealer success (CRB, pp. 64-68), and I reject Boise's claim that only gross profits of privately-held companies should be considered (RRB, p. 53).

<sup>16</sup> Which distinguishes this case from *American Oil Co. v. FTC*, 325 F.2d 101, 106 (7th Cir 1963) (RPF, pp. 215-19).

### E. *The Inference Of Competitive Injury Has Not Been Rebutted*

#### 1. Introduction

In an *amicus* brief filed in *Truett Payne* the Justice Department and the FTC supported the *Morton Salt* injury standard subject to rebuttal evidence,<sup>17</sup> *Brief For The United States As Amicus Curiae* 9, n. 7, and Boise argues that any inference of injury has been rebutted by evidence that the disfavored dealers' businesses (as well as that of the whole industry) have flourished, that the lower prices which it enjoyed are available to the dealers, and that any advantage it may have is justified by the resale functions which it performs.

#### 2. Dealer Success Does Not Negate The Inference Of Competitive Injury

Although I have found that the price differences summarized in the charts were substantial, Boise claims that they could not have been "competitively substantial" (RPF, p. 216) since the total number of dealers in the office products industry has increased over the past five years (F. 47), the selected dealers' sales from 1977-1980 increased an average of 22% (F. 431) and accounts lost to Boise were counterbalanced by accounts which Boise lost to the dealers (F.'s 433-34). [113]

Boise's emphasis on the apparent lack of effect of the discriminations on market structure is not appropriate in a Robinson-Patman case. This approach has not been adopted in the case law, and it ignores the language of the Act. See, Posner, *The Robinson-Patman Act, Federal Regulation of Price Differences*, 38-40 (1976):

For secondary-line price discrimination, the most critical issue in the interpretation of section 2(a) is what is to be required in the way of proof of competitive injury. The polar extremes are (1) to regard a price difference itself as conclusive evidence of anticompetitive effect, on the ground that any firm that pays more than its competitors for goods that it is trying to resell in competition with other firms is at a competitive disadvantage, and (2) to require, as in merger cases brought under the amended section 7 of the Clayton Act, proof that the discrimination is likely to create or contribute to an anticompetitive market structure. The first pole seems untenable in that it reads the competitive-injury requirement right out of the statute. The second may be objected to as giving no weight at all to the "destroy or prevent competition" clause of the competitive-injury standard, a clause that has no counterpart in the other sections of the Clayton Act and was apparently added to section 2(a) in an effort to create a standard of illegality stricter than the normal Clayton Act standard.

<sup>17</sup> See *Purolator Products, Inc.*, 65 F.T.C. 8 (1964), *aff'd*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968):

In the context of this case, therefore, where the evidence shows a highly competitive market with narrow profit margins, we conclude that complaint counsel has established . . . a prima facie case of competitive injury. . . . If not rebutted, it is our opinion that this showing is sufficient to establish the above-stated requirement of a likelihood of competitive injury. *Id.* at 28.

\* \* \* \* \*

Requiring the commission to prove a persistent and systematic price difference, as in the *American Oil* case, is in principle a method of distinguishing between discrimination that results from the exercise of monopoly power and discrimination that occurs in the process of adjusting to a new equilibrium. Arguably, the first sort of discrimination should be prohibited while the second should surely be permitted and indeed encouraged. Since the former is systematic, and the latter sporadic, an interpretation of the competitive-injury standard of section 2(a) that limited its reach to systematic price discrimination might narrow the act to practices that there is at least some economic basis for condemning. Thus the principle of the *Morton Salt* case [114] as reinterpreted in the *American Oil* case represented an important step toward bringing section 2(a) into line with the economic analysis of price discrimination.

Applying the correct Robinson-Patman standard, it is inconceivable that the substantial and sustained price differences documented in this record can have had no substantial effect on the ability of the dealers to compete with Boise. It is true that their businesses have grown, but their growth would have been even greater, and their profits would have increased substantially if they had enjoyed the pricing which the six manufacturers extended to Boise. It is the purpose of the Act, I believe, to ensure that equally efficient competitors who buy in similar amounts should start off on a relatively equal footing, and that one class of customers should not be handicapped by being forced to pay substantially more than another for the same regularly-purchased goods. That has not been the case up to now. The selected dealers have, for no economically sound reason, been forced to pay much more for the same goods than has Boise, and it would be a perversion of the Act to hold that these substantial price differences are lawful because the dealers' businesses have not been destroyed by them. The extent of their success in the face of these price discriminations is a testimony to their business acumen and establishes that they are as efficient, and perhaps more efficient, than Boise. Rewarding Boise by allowing it to receive the wholesale discount when it competes with dealers would, in effect, reward inefficiency.<sup>18</sup>

### 3. The Prices Which Boise Enjoys Are Not Available To The Selected Dealers

According to Boise, any injury to the selected dealers could have been avoided since the lower prices which it enjoyed were also available to them because: (1) If they perform wholesale functions, as does Boise, they are entitled to the wholesale discount; (2) Discounts equal to the wholesale discounts on large purchases, and discounts on private label goods, are available; (3) Buying groups and cooperatives can obtain wholesale discounts; and (4) Competitors of the six manufac-

<sup>18</sup> Boise's proposed findings agree that "dealers have competitive advantages over Respondent" [i.e., they are more efficient] (RPF 388-89).

turers offer dealers the same or greater discounts as Boise now obtains (RPF, pp. 211-12).

Boise's claims are both factually and legally incorrect. Some dealers asked the manufacturers for Boise's wholesale [115] discount; they were turned down (F. 448). The charts reveal that Boise paid much less than did the selected dealers for the same goods even when it purchased less than the dealers, and Boise's lower prices were in fact not available to the dealers, for if they were truly available, the price differences revealed in the charts would not exist. Some private label goods are available, but seller's label goods are desirable to the trade (F.'s 435-45), and the dealers should be able to obtain fair pricing on goods which they choose to resell; they should not be forced to seek out lower-priced goods from competitors of the six manufacturers or purchase products which do not have the same consumer appeal. In any event, there is absolutely no evidence that resorting to alternative sources of supply or to private-label merchandise would permit the dealer to enjoy Boise's price advantage on the same kind of goods which both now purchase.

Finally, while there are a few buying groups in the office products industry, the selected dealers cannot obtain all of the six manufacturers' products at the wholesale discount by joining such groups (F.'s 456-59). In any event, the Commission has rejected this "solution" to price discrimination. See *Dayton Rubber Co.*, 66 F.T.C. 423, 470-71 (1964), *rev'd on other grounds sub nom. Dayco Corp. v. FTC*, 362 F.2d 180 (6th Cir. 1966):

It is argued that the non-affiliated jobbers could join or form group buying associations of their own and thereby obtain the more favorable prices. As a result, the lower prices were "available" to all, thus obviating any finding of price discrimination, it is urged. We reject this argument. Lower prices are not "available" where a purchaser must alter his purchasing status before he can receive them. Patently, a lower price is not "available" to a merchant who must, in order to qualify, purchase more goods within a given time period. The same consideration applies here.

Although Boise cites later cases which it believes favor its position, these cases recognize that Dayco still represents the law on availability. For example, *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) merely states the obvious: that the lower price must be available "not only in theory but in fact." *Id.* at 1025. In fact, the lower prices which Boise enjoys are not available to the selected dealers. And, in *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981), the court held that a discount was available, but only because the purchaser "did not have to alter its independent purchas-

ing status to receive the discount, as was the case in *Dayco*." *Id.* at 107. [116]

The discount structures employed by the six manufacturers are designed to reward wholesalers for the functions which they perform and to prevent dealers from obtaining the wholesale discount despite their performance of equivalent functions (F. 522), and this structure ensures that the wholesale discount is *not* available to dealers who compete with Boise.

#### 4. The Lower Prices Which Boise Enjoys Are Not Justified By Its Resale Expenses

If Boise did not resell some of the products on which it receives a wholesale functional discount in competition with dealers who pay higher prices, its practices would not be subject to the prohibitions of the Act. *Doubleday & Co.*, 52 F.T.C. 169, 207-08 (1955).

Since Boise is a dual distributor and does compete with the dealers, however, traditional R-P doctrine ignores its functional status. The only relevant consideration is that it competes with dealers, yet pays lower prices for the same goods than they do:

[I]n the Ruberoid case, the Supreme Court stressed that actual competition in resale rather than nomenclature is decisive, and approved the Commission's disregard of "ambiguous labels, which might be used to cloak discriminatory discounts to favored customers." *Rowe* at 177.

In *Purolator Products, Inc.*, respondent granted a 4% redistribution discount to warehouse distributors (WDs) with branches; those without branches did not receive the discount. Cost studies which indicated that it cost WDs with branches more than 4% to redistribute the products were introduced to show that no competitive injury was suffered by WDs without branches. The Commission rejected this proof:

By granting to those distributors who reship to their branches a discount, respondent is, in effect subsidizing their internal operation. Funds normally used for internal reshipment are released for use elsewhere. Thus, by making available this discount, respondent is granting to the favored distributors a competitive weapon which they would not otherwise receive. We are not of the opinion that such price discrimination may be excused by proof that the buyer receiving the more favorable price has higher internal [117] expenses than his competition. 65 F.T.C. at 29.

The only Commission case which rejects the traditional refusal to consider functional status is *Doubleday & Co.* There, the Commission stated that:

[T]o relate functional discounts solely to the purchaser's method of resale without

recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed.

The Commission warned, however:

Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. 52 F.T.C. at 209.

The Commission overruled *Doubleday* in 1962. In *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964), regular jobbers received a 15% discount and stocking jobbers received one of 25%. The extra 10% discount compensated stocking jobbers for services not performed by regular jobbers and therefore did not injure the latter class of customers, according to respondent. The Commission rejected this argument because it "ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller;" in that case, the ability to serve their customers better because of their warehouses. *Id.* at 127.

The contradictory theories of *Doubleday* and *Mueller* would ordinarily have no significance in this case since *Mueller* states the law regarding the payment for services rendered by a buyer. However, when the Commission issued the present complaint, I was directed "to enter findings sufficient for disposition of the proceeding under both the *Mueller* and *Doubleday* rubrics." [118]

To that end, I received in evidence a study undertaken by a Boise consultant to determine its cost of sales to dealers. This study finds that Boise incurred operating expenses in 1979 totalling [I.C.] in making sales of the six manufacturers' products to dealers, or [I.C.] of its total cost of purchases from them in 1979 (F. 501). Complaint counsel present extensive arguments that this study should not be relied upon (CRB, pp. 117-28), the most convincing being the significant discrepancy between the actual 1979 net profits of several distribution centers which concentrate on wholesale sales and Boise's net profit on wholesale sales if the study's basic assumptions are used to calculate that figure (CRB, pp. 122-23).

The most serious flaw in the study is not its shaky methodology, however, but its failure to address the issue posed by *Doubleday*, (assuming for the moment that its legal theory is sound). *Doubleday's* defense was that the wholesalers who received extra discounts were

being compensated for services they performed and which were *not* performed by the disfavored customers, 52 F.T.C. at 199–200, and the Commission's acceptance of this argument was based on this assumption. This situation—that the favored buyer performed resale functions which the disfavored did not—is absent here. Dr. Nevins concluded from his reading of the record that the dealers perform the same functions as Boise and a report prepared for Boise reached the same conclusion (F. 522). Mr. Bertholdt's study does not, therefore, answer the central question in *Doubleday*, for it assumes that all of the costs Boise incurred were unique—i.e., that the disfavored dealers experienced *no* distribution costs.<sup>19</sup>

However, even if all of the problems in Boise's study were swept aside, and even if it performed distributional functions which the dealers do not, I would ignore the *Doubleday* theory and find, as the Commission did in *Mueller*, that a price discrimination cannot, as a matter of law, be justified as a "reward" to the favored dual-function buyer.

The *Mueller* approach is not, in my opinion, "profoundly anticompetitive" as Commissioner Pitofsky concluded when he dissented from the issuance of this complaint. Commissioner Pitofsky assumes that if *Mueller* is the law, dual-function buyers will abandon certain services for which they are receiving compensation. I believe these fears are misplaced, for *Mueller*'s assumption is correct: the services offered by any buyer—Boise or a dealer—are not performed as a favor to the seller but because they benefit the buyer by satisfying the needs of its [119] customers. If Boise is forced to forego the wholesale discount on sales it makes in competition with dealers, it may decide to abandon those sales, but dealers will take its place and, given the fragmented nature of the industry, there will still be vigorous competition in sales to commercial accounts.

On the other hand, if *Doubleday* were the law, I believe that it would permit a reward where none is earned. A favored buyer's competitive advantage is not "used up" when he is compensated for unique services, for the buyer furnishes those services because it is to his competitive advantage. I do not believe it is procompetitive to allow a seller to buy an advantage for a customer because it has chosen voluntarily to undertake certain resale functions.

In summary, because its resale functions are not unique, Boise's significant price advantage cannot be justified by resort to the *Doubleday* theory (F.'s 519–20, 522). Furthermore, even if Boise provided services which are not provided by dealers, I would find, in accordance

<sup>19</sup> Boise argues that its cost of selling to dealers "consumes" any difference in price (RRB, p. 88); however, Boise is still favored for it is being reimbursed by the six manufacturers for those costs, whereas the dealers, who perform the same functions, are not since they are paying a higher price for the same goods.

with *Mueller*, that it should not receive discriminatory compensation for those services; otherwise, Boise would be receiving an unwarranted competitive advantage for performing services which benefits it.

#### F. The Discriminations In Price Were Not Cost-Justified

Complaint counsel's burden of proving that the different prices charged by the six manufacturers to Boise and the selected dealers were not cost-justified has been met even though they have not offered a formal cost study. Such a study is not required, *Suburban Propane Gas Corp.*, 73 F.T.C. 1269, 1273 (1968); *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968), for, given the facts of this case, a formal cost-study would have been superfluous.<sup>20</sup> [120]

The price differences detailed in this record could have been cost-justified if the differences in the six manufacturers' costs of manufacture, sale or delivery resulting from different quantities or methods in selling to Boise and the selected dealers had equalled or exceeded the differences in price paid by Boise and the dealers, but given the large price disparities—up to 33%, there would have to have been a great difference in such costs. These differences simply did not exist in 1979 or any other period of time.

That these differences do not exist is evident from the way the manufacturers viewed the discounts which they gave Boise. It is true that some testified that the difference in the prices which they charged Boise and the dealers were based on cost differences (RPF 143-49) but their conclusory and undetailed testimony was to be expected, for this was the first time they had to account publicly for such large price discrepancies.

Since under the six manufacturers' pricing policies, wholesalers receive a larger discount than dealers regardless of the quantities purchased (F. 483), the manufacturers were pricing by function, not in recognition of differences in the cost of selling to Boise and dealers. Indeed, most manufacturers have separate quantity discount schedules (F.'s 9-10), a further indication that the discounts which are challenged here were not adopted because of cost savings, as is the fact that none of the manufacturers have undertaken studies to determine if their functional discounts were cost-justified (F. 484).

Turning to specifics, complaint counsel have established that there are no significant differences in the methods by which the manufac-

<sup>20</sup> That the Commission did not prove the costs of the suppliers is immaterial. Costs surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least where the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer "is not an unsuspecting recipient of prohibited discriminations." *Fred Meyer* at 364 (emphasis in original).

turers make, sell or deliver their products to Boise and the dealers. The products sold to Boise and the dealers are stock items; they are not specially made for Boise (F. 462). The manufacturers sell their products by dealing, not with headquarters, but with Boise's branches; salesmen call on each branch and each branch orders its own needs direct from the manufacturers (F.'s 463-64).

Orders from Boise and the dealers are treated identically; separate accounts are maintained for each Boise branch (F. 465); products are shipped to the branch which ordered them (F. 463); and the method of delivery is not selected because of any differences between Boise and dealers (F. 468). Thus, although Boise does have a central headquarters, it does not offer the manufacturers any opportunities to save costs because the manufacturers must deal with its branches, just as they do with dealers competing with those branches.

Regarding quantities purchased by Boise and the selected dealers, it is probably true that overall, Boise buys more from each of the six manufacturers than does any one dealer. However, because the manufacturers service Boise's twenty-seven branches [121] individually, only the purchases by each branch as compared with the purchases by dealers, and not Boise's total purchases, are relevant to the issue of cost savings which might arise because of different quantities sold to Boise and the dealers. This comparison reveals that the Boise's distribution centers and the selected dealers' purchase volumes are often similar (F.'s 469-83).

Although volume discounts are not involved in this case, the six manufacturers treat Boise as the buying groups were treated by their suppliers in the automotive parts industry. For example, in *Standard Motor Products, Inc.*, the court found that while buying groups of distributors were favored over nonmembers, they:

[O]rder and receive shipments direct from Standard exactly as if they did not belong to a buying group; but payments, made through the group office, are for list price, less a percentage discount equivalent to the rebate allowed under petitioner's uniform contracts for annual purchases equal to the aggregate purchases of the group. 265 F.2d at 675.

Despite the fact that the discounts in *Standard* were based on volume, and might have been adopted because the suppliers believed the different discounts reflected cost savings, the court realized that when one class of customers is served in the same way as another class, costs are identical, and aggregating the sales of one class to qualify them for a better discount does not reflect cost savings:

The volume discounts here—which relate to the amount of the customer's total annual purchases, and not to individual sales—do not reflect any cost savings which might

accrue to petitioner on large individual orders, but merely benefit the more powerful purchasers in the industry. *Id.* at 676.

The same situation is involved here, with one exception—the six manufacturers adopted the wholesale discount because of the functions performed by that class of customers; there is not even a hint in the record that cost savings were the motivating force behind that decision.

This evidence can lead to only one conclusion, as did similar evidence in *Standard Motor Products*: It is impossible that the discriminatory prices which Boise receives from the six manufacturers are cost-justified because there are no significant [122] differences in the methods by or quantities in which the products are sold or delivered to Boise and the selected dealers.

Boise suggests that complaint counsel have failed to “undertake appropriate customer classifications” (RPF, p. 239) as in *Borden Co.*, 62 F.T.C. 130, 179 (1963), where the Commission rejected a cost-justification study because the seller failed to use any customer classification in its study even though it sold to a wide variety of customer groups and costs differed as between those groups.

Boise’s argument ignores the significance of the fact that there are no differences in the way the six manufacturers sell to the dealers and the distribution centers. In this case, there can be no cost savings as between Boise and the dealers, and no cost study is necessary to confirm this conclusion. On the other hand, the Commission in *Borden* rejected the cost study which averaged costs because it believed that respondent realized different savings only when dealing with one class of customers as opposed to another. Given this situation, any cost study had to take account of different customer classifications. The two situations are different; thus, *Borden* imposes no burden on complaint counsel in this case.

#### G. The Lower Prices Were Not Given To Boise To Meet Competition

In *Great Atlantic And Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979), the Court held that if a seller has a meeting competition defense under Section 2(b) of the Act,<sup>21</sup> then “a buyer who has done no more than accept the lower of two prices competitively offered does not violate § 2(f). . . .” *Id.* at 81.

On cross-examination of the six manufacturers’ representatives, Boise elicited statements that they had adopted their pricing systems to meet competition (RPF 130–41), and it now claims that the adoption of such systems to meet competition is sanctioned by court deci-

<sup>21</sup> . . . nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . .

sions dealing with this issue, such as *William Inglis & Sons Baking Co., supra*, and *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966). In *Callaway*, the court stated:

We have found no authority which holds that in all circumstances the allowance of [123] volume discounts according to a plan or "system" as distinguished from "individual competitive" responses is condemned per se. Clearly, this is not a "basing point" case. . . . It is only when no "reasonable and prudent person" would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned. *Id.* at 442.

In an *amicus* brief filed jointly with the Justice Department in *Falls City Industries*, the Commission approved of the decisions in *Callaway* and *Inglis* and stated that "both discount and area pricing systems [are] legitimate means of meeting competition under Section 2(b)" (*Amicus Brief*, p. 7).

In *Falls City*, the Court reversed a court of appeals decision affirming a district court finding that Falls City, a beer manufacturer, was not meeting competition because it sold, pursuant to a pricing system, to all Kentucky wholesalers at a lower price than to all Indiana wholesalers. The Court held that the 2(b) defense can be established "by showing that a reasonable and prudent businessman would believe that the lower price he charged was generally available from his competitors throughout the territory and throughout the period in which he made the lower price available." *Id.* at 1297. The fact that the price discriminations were sustained "does not in and of itself demonstrate that [the] prices were not a good faith response to competitors' prices. . . ." *Id.* at 1293.

Complaint counsel do not deny that adoption of a pricing system can be a legitimate competitive response and can justify an otherwise unlawful price discrimination, but they emphasize that *Falls City* and its predecessors still demand that:

[T]he seller offer [sic] the lower price in good faith for the purpose of meeting the competitor's price, that is, the lower price must actually have been a good faith response to that competing low price. 103 S.Ct. at 1291 (Court's emphasis).

Complaint counsel have established that the manufacturers have given functional discounts to wholesalers because they sell to dealers, that the discounts are nationwide in application and do not vary from region to region, that they are given to all Boise distribution centers and that, in most cases, they have existed unchanged for many years (F.'s 489-95). Given these facts, the only reasonable conclusion is that the manufacturers' systems were not adopted for the purpose of meeting competition, but to reward a level of trade: [124]

If the seller's lower price was given *because* of lower prices by a competitor, it is cognizable under the Section 2(b) proviso; if, on the other hand, the seller's lower price was quoted *because* of a preconceived pricing scale which is operative regardless of variations in competitor's prices, as in the "basing-point" cases, his price was not genuinely made to meet a competitor's lower price and Section 2(b) cannot apply. Put another way, Section 2(b) presupposes a lower price *responsive* to rivals' competitive prices. Rowe, at 234<sup>22</sup> (emphasis in original).

Boise's attempt to rebut complaint counsel's proof consisted of eliciting undetailed statements from the manufacturers to the effect that their prices were adopted to meet competition. With one exception,<sup>23</sup> the testimony failed to answer the most basic questions which must be satisfied before one can conclude that a pricing system has been adopted to meet competition; therefore, I find that the six manufacturers did not adopt their pricing systems in good faith to meet the equally low prices of their competitors.

#### H. Boise's Knowledge That The Prices It Received Were Unlawful

##### 1. Introduction

Section 2(f) of the Act states that "it shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price which is prohibited by this section." The manufacturers' discriminatory pricing systems discussed above are illegal and prohibited by the Act, and while there is no evidence [125] that Boise induced the manufacturers to adopt those systems, it has received and enjoyed the benefits of those prices for many years.<sup>24</sup> The only question remaining is whether Boise knew or should have known that the prices which it received were illegal.

Boise denies knowledge of illegality, arguing in essence that one can never know for a certainty that any fact is true. Thus, although Boise's files contain ample evidence that it was regularly informed by the six manufacturers of their wholesale and dealer discounts, it argues that it could not "know" as a matter of absolute certainty that the manufacturers charged dealers their list price less the dealer discount. This is not, however, the kind of knowledge to which Section 2(f) refers. Complaint counsel need not prove actual knowledge of illegality:

<sup>22</sup> This passage was quoted approvingly by the Court in *Falls City*.

<sup>23</sup> An important consideration in B&P's 1975 adoption of the WQPL prices for wholesalers was Wilson Jones, a competitor, but Wilson Jones classified only three Boise distribution centers as wholesalers prior to 1979; B&P, nevertheless, sold at the same discount to all Boise distribution centers (F.'s 494-95). Thus, even here, it is apparent that B&P's pricing system overreacted to Wilson Jones' threat and was not adopted in good faith.

<sup>24</sup> *American Motor Specialties Co. v. FTC*, 278 F.2d 225 (2d Cir.), cert. denied, 364 U.S. 884 (1960):

Thus, irrespective of whether the buying groups' efforts . . . constituted an improper *inducement* under Section 2(f), we hold that the Commission introduced sufficient evidence to fulfill the requirements of *Automatic Canteen* when it showed that petitioners knowingly received preferential price treatment. . . . *Id.* at 228-29 (emphasis in original).

Thus, the buyer's prima facie violation arises upon proof that the discriminatory concession in his favor was sizeable enough to create competitive injury, and that furthermore the nature of the discrimination placed him on notice of its probable illegality. Rowe, *supra*, at 438 (emphasis in original).

The appropriate standard is not actual, but constructive, knowledge. *Mid-South Distributors v. FTC*, 287 F.2d 512 (5th Cir.), cert. denied, 368 U.S. 838 (1961):

All persons—sellers or purchasers, corporate or animate—must now know, constructively or actually, that price discriminations which injure are prohibited. It is no defense either to sellers or buyers that either was ignorant of that much of the law's requirement. *Id.* at 517. [126]

*a. Knowledge Of Price Discrimination*

Since Boise's sales persons called on the same accounts as did the dealers, Boise should have known and did know that it was competing with dealers; and, because its files contained price lists which disclosed wholesaler and dealer discounts from list (F. 368), Boise knew that it received the larger wholesale discount and paid less for the same products offered by the manufacturers than did its dealer-competitors; any possible doubt that this conclusion is accurate is dispelled by Mr. Twietmeyer's stipulated testimony (F. 367).

*b. Knowledge Of Injury*

Boise's knowledge of its own profit structure, general conditions in the industry, and the extent to which it was favored over competing dealers has been established in this record. Given Boise's actual and constructive knowledge of these facts, it knew, or should have known, that the price advantages which it enjoyed were "of a kind which would cause or likely cause injury to competitors." *Mid-South*, 287 F.2d at 517.

*c. Knowledge Of Lack Of Cost-Justification*

Since Boise has acquired the businesses of dealers, it is aware of the quantities in and the methods by which the manufacturers have sold to them (F. 487), and it knew that its own distribution centers often buy in lesser, equal or only slightly greater quantities than its dealer-competitors (F. 488).

Boise is also aware that the six manufacturers have quantity discounts as well as functional discounts and that the latter were not intended by the manufacturers to reflect, and in fact do not reflect, any cost savings. The discounts are, instead, designed to encourage wholesalers to distribute the manufacturers' goods to dealers, and Boise dealt with the manufacturers pursuant to this understanding:

JUDGE PARKER: So, again, I'm saying you wouldn't go to a supplier, would you, and tell them that you're entitled to whatever the wholesale discount is if you, in fact, didn't sell to dealers, regardless of how much you bought?

THE WITNESS: Correct (F. 485). [127]

All of this evidence, and the reasonable inferences which can be drawn from it<sup>25</sup> leads to the conclusion that Boise knew or should have known that the discounts which it received could not possibly be cost-justified, especially in view of the very great differences in price (up to 33%) which resulted from the six manufacturers' pricing structures. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953):

Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified. But trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. *Id.* at 79-80.

*d. Knowledge That Manufacturers Did Not Adopt  
Their Pricing Schedules To Meet Competition*

Boise is well aware that the prices it received were granted pursuant to the manufacturers' formal pricing systems for wholesalers. The prices are often contained in published price [128] lists or discount schedules and Boise has received them for the approximately twenty years it has been in the industry, and thus cannot reasonably have viewed them as good faith responses to competitors' equally low prices. Boise knows it is the recipient of these prices not because each manufacturer is responding to a competitor, but because Boise is classified as a wholesaler by certain manufacturers and receives the manufacturers' normal discounts for customers classified as wholesalers (F. 485). No purchaser armed with knowledge of these facts could reasonably believe that the manufacturers had adopted their prices to meet competitors' equally low prices.

<sup>25</sup> The court in *Mid-South* at 517-18 recognized that proof a buyer had "reason to know" that a seller could not establish the cost-justification or meeting-competition defenses "may have to be established from indirect circumstantial inferences."

e. *Boise's Knowledge Of The Doubleday Defense*

Boise's knowledge of the *Doubleday* defense is not an issue in this case for *Mueller* rejected that defense and the law, as it now stands, ignores Boise's performance of wholesale functions as a justification for the receipt of illegal price discriminations. If the Commission overrules me and adopts the *Doubleday* rationale, Boise will have been given a defense which it could not have expected when it engaged in the practices which are the subject of the present complaint.

IV. SUMMARY

1. The Federal Trade Commission has jurisdiction over this matter. In the course and conduct of its business, Boise has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act. In the course of that commerce, Boise has been and is now purchasing office product supplies for resale within the United States from manufacturers also engaged in commerce, as "commerce" is defined in the Clayton Act.

2. In connection with such transactions, Boise is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and the resale of office product supplies of like grade and quality which are purchased from the same manufacturers.

3. These manufacturers are located in the various states of the United States, and they and Boise cause the products when purchased by Boise to be transported from their place of manufacture or purchase to Boise's distribution centers located in the same state and various other states of the United States.

4. In the course and conduct of its purchase of office products in commerce, Boise has knowingly received favorable discriminatory prices or discounts from some manufacturers. [129]

5. For example, Boise resells office products at both the wholesale and retail levels but receives a wholesale discount on all office products it purchases from certain manufacturers. These wholesale discounts, however, are not available to all of Boise's competitors who sell these products to end-users.

6. The favorable discriminatory prices or discounts were not granted by the manufacturers to all of Boise's competitors nor received by all of its competitors in connection with the purchase for resale of office products of like grade and quality.

7. When Boise received the discriminatory net prices from the manufacturers, it knew or should have known that such discriminato-

ry net prices constituted discriminations in price prohibited by Section 2(a) of the Clayton Act, as amended.

8. The effect of the knowing receipt by Boise of the discriminations in price has been, or may be, substantially to lessen, injure, destroy, or prevent competition between Boise and competitors who are paying higher prices than Boise for the same office products.

9. Boise's acts and practices are violations of Section 5 of the Federal Trade Commission Act and Section 2(f) of the Clayton Act, as amended.

## V. THE ORDER

An order is justified which will prevent Boise from receiving prices computed on the basis of its function as a wholesaler when it, in fact, competes with another level of trade which is not receiving a like discount. The same principle was upheld in *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952) in which the Court affirmed a Commission order requiring Ruberoid to:

[C]ease and desist from discriminating in price:

By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products. *Id.* at 472.

Boise can lawfully receive a wholesale functional discount on goods which it resells as a wholesaler—i.e., to dealers, [130] but if it chooses to remain a dual distributor by also reselling in competition with dealers, it will have to offer the Commission a compliance plan under which it will inform its suppliers as to the dollar volume of goods it purchases as a wholesaler and as a dealer. Compare *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1, 20 (1976).

Therefore, the record having established that Boise has been, and is now violating Section 2(f) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act, entry of the following order is appropriate:

## ORDER

### I.

A. *Boise Cascade* shall mean Boise Cascade Corporation, its divisions and subsidiaries, its officers, directors, agents and employees, and its successors and assigns.

B. *Office Products* shall mean furniture and supplies commonly used in offices such as those which are sold or distributed by Boise Cascade Corporation's Office Products Division.

C. *Net Price* shall take into account all discounts, rebates, allowances, deductions or other terms and conditions of sale.

## II.

*It is ordered*, That Boise Cascade, in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the Clayton Act, of office products for resale, cease and desist from directly or indirectly inducing, receiving or accepting from any seller a net price that Boise Cascade knows or has reason to know is below the net price at which office products of like grade and quality are being offered or sold by such seller to other purchasers with whom Boise Cascade is competing in the resale or distribution of said office products.

## III.

*It is further ordered*, That Boise Cascade shall, within sixty (60) days of the effective date of this order, distribute a copy of this order to each of its suppliers of office products. [131]

## IV.

*It is further ordered*, That Boise Cascade shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure of Boise Cascade, such as the creation or dissolution of subsidiaries or divisions, or any other change in the corporation, which may affect compliance obligations arising out of the order.

## V.

*It is further ordered*, That Boise Cascade shall, within ninety (90) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as may, from time to time, be required to assure compliance with the terms and conditions of this order.

## OPINION OF THE COMMISSION

BY CALVANI, *Acting Chairman*:

## I. INTRODUCTION

On April 23, 1980, the Commission issued a complaint charging that Boise Cascade Corporation ("Boise") had violated Section 2(f) of the Robinson-Patman Act (the "Act"), 15 U.S.C. 13(f), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.<sup>1</sup> After extensive discovery, hearings began on April 13, 1982, and the record was closed on August 17, 1983. Judge Lewis F. Parker, before whom the matter was tried, rendered his Initial Decision on February 14, 1984, finding Boise in violation of the Act. Boise has appealed from that decision.

Boise sells office products both as a wholesaler and as a retailer. Its combined wholesale and retail operations make it the country's largest distributor of office products, and Boise's resales to other dealers make it one of the two largest [2] wholesalers. I.D.F. 52-53.<sup>2</sup> Out of its total corporate sales of \$3 billion in 1980, largely in forest products, over \$850 million was attributable to its packaging and office products businesses. I.D.F. 1. The complaint alleged that Boise had received from certain suppliers a wholesaler's discount on products that Boise resold at retail, in competition with dealers to whom this wholesaler's discount was not available.

Thus, this case deals with claims about functional discounts. A functional discount occurs when a seller permits one buyer, *e.g.*, a wholesaler, to purchase a product at a lower price than another buyer, *e.g.*, a retailer, because of the marketing functions that the favored buyer performs for the seller's product. If the wholesaler does not sell to end-user customers in competition with the retailer, the difference in the [3] prices that the wholesaler and the retailer pay cannot support a claim of secondary line competitive injury under the Act. But the differing discounts may have legal consequences where the "wholesaler," or the favored buyer, sells not as a middleman reselling

<sup>1</sup> Although the complaint alleges violations of both the Robinson-Patman and Federal Trade Commission Acts, the latter count, in this case, is completely derivative, *i.e.*, Section 5 of the Federal Trade Commission Act would have been violated only because of a violation of the Robinson-Patman Act. Accordingly, there is but one question: Has Section 2(f) of the Robinson-Patman Act been violated?

<sup>2</sup> The following abbreviations are used in this opinion:

- I.D. - Initial Decision, February 14, 1984 (cited by page number of slip opinion).
- I.D.F. - Initial Decision, February 14, 1984 (cited by finding number).
- R.A.B. - Respondent's Appeal Brief, April 4, 1984.
- C.A.B. - Complaint Counsel's Answering Brief, May 11, 1984.
- R.R.B. - Respondent's Reply Brief, June 1, 1984.
- Tr. - Hearing Transcript
- C.P.F. - Complaint Counsel's Proposed Findings, September 16, 1983.
- C.L.A. - Complaint Counsel's Legal Argument, September 16, 1983.
- R.L.A. - Respondent's Legal Argument and Proposed Findings of Fact and Conclusions of Law, December 20, 1983.

to retailers, but acts itself as a retailer in selling to end-user customers, in competition with other retailers that could not obtain wholesaler discounts. Here, Boise is both a wholesaler and a retailer, but receives a wholesaler discount on all the goods it buys. In evaluating the effects on competition, does the Act require that an integrated entity's distribution level be determined by its buying function or by its selling function? Put differently, if a retail chain has its own wholesale unit, does the Act require—or permit—a supplier to give the chain a wholesaler discount or a retailer discount?

The Commission ordered that the Administrative Law Judge's findings be sufficient for disposition of the complaint under two apparently different legal theories, that is, under both *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964), and the case that *Mueller* had overruled, *Doubleday and Co.*, 52 F.T.C. 169 (1955). In *Doubleday*, the Commission had stated that a seller could offer a functional discount to a reselling buyer who performs "wholesale functions" if the amount of the discount was reasonably related to the expenses assumed by the buyer and did not exceed the cost of that part of the function that the buyer actually performed. 52 F.T.C. at 209. Under *Doubleday*, a purchaser's buying function and its reselling function could both be considered in judging [4] the legality of a functional discount, and the case appeared to sanction, or at least facilitate, granting wholesaler discounts to dual distributors even for goods resold in competition with retailers who did not receive the wholesaler discount. However, since 1962, when the Commission decided *Mueller*, *supra*, the competitive significance of a functional discount under the Act has been determined only by the capacity in which the purchaser resells. The Commission there rejected the argument that an additional discount to certain distributors was merely compensation for inventory services. It held that the additional discount, even if it was reasonably related to the cost of services provided, could still result in secondary line competitive injury, and that to allow the discount based on the customer's costs would create a defense not found in the Act.

Following the Commission's instruction, the Administrative Law Judge admitted evidence about the services and functions performed by Boise, in order to permit the case to be decided under both *Mueller* and *Doubleday* theories. Judge Parker found liability under the *Mueller* rule, which he concluded was the appropriate rule of law, but also found liability under *Doubleday* if that were the appropriate rule. I.D. 118–19. Boise has appealed the Initial Decision on numerous grounds, but primarily on whether *Mueller* or *Doubleday* states the appropriate rule to be applied, and whether other factors establish or rebut a finding of competitive injury. Thus, today the Commission

again confronts the *Mueller/Doubleday* issue. We adopt the Administrative Law Judge's findings and conclusions, and thus [5] affirm that Boise knowingly received unlawful discounts in violation of Section 2(f) of the Act.

## II. KNOWING RECEIPT OF PRICE DISCRIMINATION

Other than the determination of injury under the Act and the establishment of the Act's affirmative defenses, the basic elements of liability under Section 2(f) are not seriously in dispute. Boise does not challenge the ALJ's findings on the various jurisdictional interstate commerce requirements. Boise does not deny that it received wholesaler discounts on office products, both on merchandise that it resold to other dealers and on merchandise that it sold to end-user customers in competition with them. These dealers received smaller discounts from the manufacturers. Illustrating the effect of the discrimination, the trial record includes proof of typical transactions showing that some 23 retailers that compete with Boise regularly purchased goods made by six manufacturers at prices higher than those that Boise paid. Presenting detailed evidence about only six suppliers and a limited number of retailers was consistent with evidentiary standards applicable in complex Robinson-Patman litigation, and was also clearly dictated by considerations of litigation economy. Proof through such sampling techniques is preferred, and perhaps even mandatory, to avoid undue burden. See *United States v. Borden*, 370 U.S. 460, 466 n.6 (1962); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 n.3 (1953). Wholesaler "functional" discounts are prevalent throughout the industry, and most manufacturers, not just the six chosen for focus in the trial, treat Boise as a wholesaler. I.D.F. 11-14. [6] The record thus establishes that Boise has received the benefit of discriminatory prices.

Moreover, the record clearly discloses that Boise was aware that it was receiving discriminatory preferences. A common difficulty in buyer liability cases under Section 2(f) of the Act is proving that the buyer knowingly received favored treatment. See *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953). The Act does not impose liability on an "unsuspecting recipient" of an unlawful price, but a buyer's experience in the marketplace should be taken into account in determining what a knowledgeable buyer "should have known." *Id.* at 80-81. Here, however, Boise unquestionably had actual knowledge that it could purchase products at cheaper prices because it had been classified as a wholesaler rather than a retailer, and that the greater discounts gave it an advantage over disfavored dealers. Gerald Twietmeyer, a former Boise manager, testified:

As an employee of Boise Cascade in 1978, I supervised and participated in a study which showed that Boise received a substantial dollar amount of trade or wholesaler functional discounts from various office products vendors *and those discounts exceeded the discounts Boise would receive if those vendors did not classify Boise as a wholesaler but instead treated Boise as a dealer* or contract stationer.

I.D.F. 14 (emphasis added). George Harig, a Boise headquarters employee, told a Boston dealer that Boise's access to wholesaler discounts that would not have been available to it as a dealer would result in lower costs of goods sold and thus greater profit. I.D.F. 39. Boise received complaints from several dealers and from the National Office Products Association, the [7] primary industry trade association, that dealers could not purchase from manufacturers at prices as low as Boise's and that Boise was selling to their end-user customers at prices that dealers could not compete with. I.D.F. 36. In addition, some suppliers furnished wholesalers, including Boise, copies of price schedules that quoted their prices to retail dealers. I.D.F. 151, 195, 241, 363. The evidence thus shows directly that Boise was informed, and fully aware, of its price advantage. As Judge Parker observed, "Even if this conclusive evidence had not existed, it is inconceivable that Boise, which resells to dealers, would be unaware of the prices which manufacturers charge dealers, for other wholesalers who testified expressed keen interest in awareness of dealer prices [citation omitted], as did Boise employees." I.D.F. 368.

### III. SECONDARY LINE INJURY UNDER THE ACT

Boise's ability to purchase products at prices lower than those available to its retail competitors could enable it to undersell those competitors. The chief issue in this appeal is whether Boise's price advantage supports a finding of competitive injury as defined by Section 2(a) of the Act and the cases under that section. [8]

#### A. *The Injury Standards of Section 2(a)*

Boise claims that evaluating a Robinson-Patman claim of injury requires a competitive analysis like that used to analyze a merger under Section 7 of the Clayton Act, 15 U.S.C. 18.<sup>3</sup> However, Section 2(a) of the Act includes two somewhat different tests for assessing injury, one that parallels the test found in Section 7 and elsewhere in the Clayton Act, and another that permits a finding of illegal injury

<sup>3</sup> Respondent claimed, in the proceedings before the ALJ, that proof of injury under the Act requires a competitive analysis that includes the definition of the geographic markets, the definition of the product markets, examination of the size and market shares of each competitor, and determination of the point at which a price difference causes buyers to shift suppliers. Tr. 1820-25; R.A.B. 18. Boise asserted that the injury analysis under § 2 of the Clayton Act is the same as the injury analysis under § 7 of the Clayton Act and § 2 of the Sherman Act, and that actual injury must be shown to establish a § 2(a) violation. R.L.A. 214.

based upon effects on competitive relationships in the face of price discrimination.

Like the other sections of the Clayton Act, Section 2(a) is violated when the effect of the challenged practice "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." When it amended Section 2 of the Clayton Act in 1936, Congress added a second and separate injury formulation. Thus, as amended, the Section also proscribes discrimination that may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit" of price discrimination, or with their customers. These tests are stated as alternatives, and the history of the Act makes clear that Congress in 1936 was principally concerned about [9] possible effects on particular competitive relationships that were not adequately redressed by the Clayton Act's original injury formulation. Where the competitive effect described by this second test has been demonstrated under long-established interpretations of the Act, we cannot simply ignore it on the grounds that efficiency arguments might justify refusing to find liability under the first test. It is for Congress, not the Commission, to delete the second test from the Act if it so chooses. *Cf. Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983).

Characterizing the treatment of competitive injury can depend on the marketing level at which the discrimination occurs. Seller or "primary" level cases, involving competing sellers' impact on each other, often involve allegations of predatory or below-cost pricing, and the analysis often focuses on a firm's use of market power. Thus, such cases can closely resemble complaints of actual or attempted monopolization under Section 2 of the Sherman Act, and recent primary line cases have stressed the close relationship between the standards for Section 2 of the Sherman Act and Section 2(a) of the Clayton Act. See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1041 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *but see Zoslaw v. MCA Distributing Corp.*, 594 F.Supp. 1022, 1034 n.7 (N.D. Cal. 1984). Purchaser or "secondary" level cases focus on the effects of pricing on competition in the [10] middle of a distributional chain.<sup>4</sup> These cases typically involve numerous competing purchasing firms in markets with low price differences and low profit margins, where discrimination in favor of some firms permits them an unfair advantage in competition with others for resales. Determining secondary line injury does not depend on the effects of a pricing practice on competition at the primary level, just as determining a primary

<sup>4</sup> Buyer or purchaser level injury is termed "secondary" injury when it occurs in connection with the resale of products after purchase from the discriminating seller. In a distribution system with several levels of resale, there can be several levels of potential purchaser injury, to tertiary levels and beyond. For simplicity, all of these levels will be termed "secondary."

line case need not depend on the effects of a seller's different prices on secondary line competition. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). Analysis of competitive effects in primary line situations typically involves a focus on effects in the overall market, similar to the analysis used in Sherman Act cases. Secondary line analysis, based on the second injury test added by the 1936 Robinson-Patman amendments, typically assesses the effects of a practice on competitive relationships among firms at the reseller level. Both standards involve assessments of competition, but from different perspectives. In secondary line situations, the concern of the law, especially in light of the 1936 amendments, is on competition as fairness.

To claim that the second statutory test can be ignored, or that it must be interpreted as subsumed in the first, and thus that it added nothing to the original Clayton Act, is to read the [11] Robinson-Patman Act out of the law. That view is not the law and never has been. Even Judge Richard Posner, noted for his emphasis on economic analysis as a guide to antitrust policy, has characterized Boise's approach as a "polar extreme" view. R. Posner, *The Robinson-Patman Act* 38-40 (1976). None of the cases Boise cites in its brief mandates, or even employs, the analysis Boise advocates. In *Fred Bronner Corp.*, 57 F.T.C. 771 (1960), the Commission recognized that, in determining competitive effect under the Act, the magnitude of the discrimination "must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal." *Id.* at 782. But the Commission did not hold that a market power analysis is the only way to examine "the actual competitive situation." Instead, the Commission examined the claims about the size of the preferential discount (both absolute, and as a percentage) and competitors' claims about their profitability, but was unpersuaded that there was injury. There is no suggestion that the record's lack of a market power analysis was fatal, or even significant. In *Sun Oil Co.*, 55 F.T.C. 955 (1959), *rev'd on other grounds*, 294 F.2d 465 (5th Cir. 1961), *rev'd on other grounds*, 371 U.S. 505 (1963), the Commission considered evidence of competitive effect that included price differences, direct evidence of lost sales, and similarity of costs, operations, and geographic location that tended to support the inference of injury. 55 F.T.C. at 974-76. This evidence was not considered as a substitute for an inference based on the conditions of the discrimination, but as a [12] supplement to it. Again, there was no full market power analysis and no hint that such analysis is necessary. The other cases Boise has cited similarly fail to demonstrate a need for market power analysis. *United Biscuit Co. v. FTC*, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); *Quaker Oats Co.*, 66 F.T.C. 1131 (1964).

The interpretation and application of the Act should be consistent

with the interpretation and application of the other antitrust laws whenever possible. The Supreme Court has directed that interpretations of the Act requiring or condoning clearly anticompetitive results are to be avoided. Thus, Robinson-Patman compliance goals do not justify price-fixing, *United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978), or abandoning vigorous price bargaining, *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 80-81 (1979). The Supreme Court has rejected constructions and applications of the Act that are contrary to its plain meaning, that extend beyond its prohibitions, and that lead to anticompetitive results "in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953); *Great Atlantic & Pacific Tea Co., supra*. The Commission has recently declined to use Section 5 to extend the Act's reach, where the effect would be in conflict with the competition goals of the other antitrust laws. *General Motors*, 103 F.T.C. 641, 700-01 (1984). [13]

But in counseling consistency and the avoidance of clearly anticompetitive results, the Court has never required that the purpose of the Robinson-Patman Act be disregarded. The Court has recognized the Act's legislative purpose to be "to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

#### B. *The Morton Salt Standard for Inferring Secondary Line Injury*

We turn now from the definition of competitive injury to its measurement. The Act's purpose to assure a "level playing field" for businesses at the same functional level has been incorporated in a long line of precedents establishing rules for inferring injury in secondary line situations like the one presented here. Rather than engage the full apparatus of a rule-of-reason analysis, the cases have evaluated the likely effects of price discrimination on competitive conditions by the use of reasonable and rebuttable inferences, supported by experience and legal precedent.

In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the Court has very recently reaffirmed the use of this inferential approach, as announced in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).<sup>5</sup> The *Falls City* Court held that Section 2(a) does not require proof of actual harm to competition, [14] because the Act is aimed at discriminations that "may" have the proscribed anticompetitive effects. Justice Blackmun, writing for the Court, observed:

<sup>5</sup> In an amicus brief in *Falls City*, the Commission expressly endorsed the *Morton Salt* test as *prima facie* evidence of competitive injury. Brief for the United States as Amicus Curiae in Support of Reversal at 9 n.7 (May 1982).

In *Morton Salt* this Court held that, for the purposes of §2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the casual connection between a price differential and lost sales or profits.

460 U.S. at 435 (citations omitted). If Complaint Counsel had presented direct evidence to establish displaced sales, liability might have been shown directly and conclusively, absent the presence of affirmative defenses. But Complaint Counsel here has relied upon inference to show injury, and thus Boise has an opportunity to rebut the *prima facie* case by “breaking the causal connection” between its favored price treatment and lost sales or profits of its competitors.

Boise urges that Complaint Counsel has failed to establish the fundamental *Morton Salt* factor, substantial differences in price persisting over time. Complaint Counsel’s proof of this factor is a series of charts showing differences between discounts granted to Boise and those granted to its retail competitors. These charts summarize data from thousands of individual invoices. Boise claims that because the sample invoices were not selected at random and because non-discriminatory transactions were intentionally excluded, the charts are unreliable. We reject this argument. The invoices could not have been randomly drawn, but instead had to be [15] selected by supplier and product, to satisfy the Act’s requirement of like grade and quality. 15 U.S.C. 13(a). Boise also complains that Complaint Counsel excluded a few invoices that show Boise not getting a better deal. The evidence includes fewer than a dozen instances of dealers receiving as good a discount as Boise, but evidence based on some 5800 instances showing Boise getting the better discount, with the advantage ranging from 5 to 33 percent. This is reliable evidence of substantial price differences.

Boise also attacks the use of invoice price as an appropriate way to measure the cost of goods sold, because “there is no way of knowing whether an invoice was paid and in what amount.” R.A.B. 20. The Commission has considered and rejected this argument before. In *Fred Meyer, Inc.*, 63 F.T.C. 1, 48 (1963), *modified*, 359 F.2d 351 (9th Cir. 1966), *rev’d in part*, 390 U.S. 341 (1968), the Commission stated: “Respondents’ argument that the prices appearing on invoices are not ‘evidence’ of the price actually paid is rejected . . . these documents are records kept in the ordinary course of business and are thus *prima facie* evidence of the business facts they purport to show.” See also *Guyott Co. v. Texaco, Inc.*, 261 F.Supp. 942 (D. Conn. 1966); 16C J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 27.03[3][a] (1985).

Boise next urges that even if a difference in price for the six manufacturers has been shown, its magnitude is competitively [16] insignificant. The thrust of Boise’s argument is that the total dollar

amount of discrimination is inconsequential, the six discriminating suppliers are unimportant to the dealers, and any discrimination is trivial in light of the full range of office products sold to commercial accounts. On the contrary, the facts are that the price discriminations in this case are among the largest found in any case.<sup>6</sup> The differences in prices paid by Boise and the dealers here ranged from 5 to 33 percent. The amount of commerce affected was hardly trivial; Boise's purchases from the six manufacturers in 1979 exceeded \$10 million. Boise's effort to isolate particular products at individual dealers to compute allegedly trivial gross discriminations ignores the obviously substantial impact of the pattern of such large discriminations in the market as a whole. Boise apparently believes that the Commission cannot prove secondary line injury except by painstaking summation of thousands of affected commercial transactions, so that the Commission's failure to make that calculation means that its method is unsound. On the contrary, sampling techniques are expressly sanctioned by the courts in cases like this one. Moreover, Boise is wrong when it suggests that the survey of 5800 invoices shows only trivial differences. Boise cites examples of total sales from one [17] manufacturer to two different dealers of a few hundred dollars or less, R.A.B. 24, but fails to note that in another situation the same manufacturer made sales to another dealer and Boise where the price *differences* on the disfavored dealer's purchases amounted to over \$20,000, CX 2A. There are numerous transactions recorded in these exhibits where individual price differences amounted to thousands of dollars.

As to the law, the Supreme Court recently reaffirmed its decision in *Morton Salt*, which rejected an argument like the one Boise is now making. Salt is a very insignificant single good when compared with the full range of grocery products sold, but the Supreme Court explicitly rejected the contention that no injury could result from the discriminatory pricing of salt because "salt is a small item in most wholesale and retail businesses and in consumers' budgets." 334 U.S. at 49. The Court pointed out that "there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store." *Id.* *Accord*, *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 797 (10th Cir. 1970); *United Biscuit Co. v. FTC*, 350 F.2d 615, 622 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). This is equally true in the office products industry where dealers and respondent stock thousands of individual products from hundreds of suppliers. Complaint Counsel has demonstrated illegal discriminations involving multiple products

<sup>6</sup> See *Kroger Co. v. FTC*, 438 F.2d 1372, 1379 n.4 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), where the court gave six specific examples of substantial illegal discounts in secondary line cases. None of these examples exceeded 12% except in *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), where the discount was 33% but was given only once per year.

from six of these suppliers, and the record establishes that similar functional discounts are "prevalent" in the industry. In [18] these circumstances, Complaint Counsel is not obligated to test the legality of pricing practices for each of the thousands of individual articles. Such a "plethora of cumulative evidence" is an unnecessary burden on the record, see *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 n.3 (1953).

Boise next urges that there has been no causal connection established between the price differences and competitive injury. Once again, we look to *Morton Salt*. That decision, as reaffirmed by the Supreme Court in *Falls City*, makes clear that the connection is established by the inference, and thus it is Boise that is required to rebut the inference by "evidence breaking the causal connection between a price differential and lost sales or profits." 460 U.S. at 435. Thus, in particular industry circumstances, evidence that other market conditions explained the effects on the disfavored competitor could break the normally expected, logical connection. See *Falls City*, *supra*, 460 U.S. at 437; Rowe, *Price Discrimination Under the Robinson-Patman Act* 186-95 (1962). The inferred causal link between price discrimination and injury can be broken by evidence demonstrating and documenting specific market causes that explain lost accounts or shifted sales. See, e.g., *Dean Milk Co. v. FTC*, 395 F.2d 696, 703-08 (7th Cir. 1968). But Boise does not adduce any such evidence; indeed, Boise does not address the causal connection at all. Instead, it cites evidence that tends to show that competition in the industry has not disappeared. [19]

This argument fails to rebut the "self-evident" inference of causation, as contemplated by *Falls City*. Instead, this is an attempt to prove the absence of actual injury. The Act, however, is addressed to the threat of injury, as well as to its accomplished fact. Boise's insistence that "actual injury must be shown to satisfy the competitive injury requirement of the statute," R.L.A. 214, is wrong. Rather, the competitive injury requirement of Section 2(a) is satisfied by a showing of "a reasonable possibility that a price difference may harm competition." *Falls City*, *supra*, 460 U.S. at 434-35. In keeping with the Act's prophylactic purpose, Section 2(a), and hence Section 2(f), do not require that the discriminations must in fact already have harmed competition. *Id.* at 435, citing *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). These recent cases restate and reaffirm principles laid down in *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945).<sup>7</sup> The Administrative Law Judge correctly

<sup>7</sup> The injury to competition element of a government enforcement action is different from the fact of injury or damages elements of a private treble damage action. Even in a private action, actual injury need not be shown to make out a violation of Section 2(a); however, Section 4 of the Clayton Act requires a showing of actual injury caused by defendant's violation of the Act as a predicate for the award of damages. *J. Truett Payne*, *supra*, 451

(footnote cont'd)

concluded that respondent's approach "has not been adopted in the case law, and it ignores the language of the Act." I.D. 113. [20]

#### IV. TREATMENT OF FUNCTIONAL DISCOUNTS

Boise's major argument against liability is the claim that the prices it pays include a discount that represents the value of distributional functions it performs. The discounts in question are the ones Boise receives as a wholesaler. There is no dispute that Boise performs wholesaler functions in its middleman capacity, such as warehousing inventory, handling credit and bookkeeping, publishing product catalogs, and providing sales assistance to dealers in promotional activities. Discounts to compensate Boise for its performance of these functions as a wholesaler are not at issue here.

However, about half of Boise's sales are at retail, not at wholesale. In purchasing these goods that it resells at retail, Boise still gets the wholesaler discount. Those retail sales are made in competition with dealers who generally cannot get the wholesaler discount because they do not make wholesale sales. I.D.F. 375, 446-54, 522. Yet the record shows that the dealers, many of which are substantial operations, also perform distributional functions similar to Boise. They thus incur distributional costs, but cannot obtain the discounts Boise receives to compensate for them, and thus cannot price competitively with Boise at retail.

This disparate treatment is the gravamen of the complaint. The fundamental question presented is whether the "functional" discounts Boise receives on the goods it resells at retail are [21] illegal because they cause injury to competing retailers who are denied these discounts.

The Act does not expressly address functional discounts, and the legislative history is inconclusive. Early drafts of what became the Robinson-Patman Act had dealt explicitly with functional discounts, and the Senate Report suggested that a specific exemption was needed to maintain their legality. See S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936). The special exemption was dropped from the final text. In light of the Senate Report, this deletion might thus be viewed as legislative disapproval of functional discounts. On the other hand, functional discounts were a common business practice when the Act was passed, and it might be presumed that Congress would not have acted merely by omission if it truly wanted to forbid such a common practice.

U.S. at 561-62; *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 19 (1st Cir. 1981); Calvani, "The Mushrooming Brunswick Defense: Injury To Competition, Not To Plaintiff," 50 *Antitrust L. J.* 319, 326-28 (1981); E. Kintner, *A Robinson-Patman Primer* 299 (1970).

In the absence of an explicit instruction from the legislature on this issue, the general terms of the Act's text, understood in the context of the Act's purposes, must be applied. The major legislative purpose behind the Robinson-Patman Act was to provide some measure of protection to small independent retailers and their independent suppliers from what was thought to be unfair competition from vertically integrated, multi-location chain stores, see *General Motors Corp.*, 103 F.T.C. 641, 693-96 (1984). Accomplishing this purpose can be inconsistent with the goals of the other antitrust laws, so the Commission will eschew efforts to broaden the Act's application beyond that established by law, *id.* at 696, where such [22] inconsistencies would result. But the Commission may not refuse to apply the Act to accomplish Congress' purposes where the law is well established.

Both the *Mueller* rule and the *Doubleday* rule are glosses on the competitive injury tests of Section 2(a). As such, neither is clearly required or clearly forbidden by the Act's text. Properly applied, we believe that the *Mueller* rule is consistent with the Act's purposes, and we are not persuaded that it should be overturned.

#### A. The *Mueller* Rule

*Mueller* holds that a favored distributor cannot avoid the inference of competitive injury by claiming that its costs equal its discriminatory advantage. The Commission in *Mueller* rejected the contention that functional discounts to a distributor no greater than the distributor's cost of providing middleman services could never cause competitive injury to other distributors not receiving the same discount. The Commission also rejected the alternative formulation, construing the argument as a claim for a defense, that such discounts ought to be legal in spite of possible competitive injury. Instead, the Commission explained that a favored distributor could have a competitive advantage over its competitors even if the price impact of its favored purchasing position were consumed by its cost of handling the items sold in competition with them. In *Mueller*, the stocking jobbers, who received a 25 percent discount, could provide more rapid service than their nonstocking competitors, who received a 15 percent discount, in an [23] industry where service was a critical competitive factor. Even if the extra 10 percent discount did no more than cover the stocking jobbers' inventorying costs, the Commission concluded that the stocking jobbers were still in a better competitive position than their nonstocking competitors.

The Commission also suspected that the cost-reimbursement rationalization was not the discount's principal justification. Although the extra discount was allegedly justified as compensation for providing inventory services, the favored stocking jobbers received the

greater discount even on products that were ordered only in response to customer orders, and thus were never warehoused or inventoried. There could be no justification for granting a special discount to compensate for services that were never rendered. 60 F.T.C. at 128. Moreover, the greater discounts were denied to many non-stocking jobbers who could qualify by performing the inventory service. Instead, the Commission concluded that Mueller was using the greater discount to protect and reward certain favored distributors. 60 F.T.C. at 129-30. Such unjustified favoritism is precisely what the Robinson-Patman Act is intended to prevent.

Thus, the case reinforces the standard inference in secondary line cases that substantial, persistent price differences may have the effect of injuring, destroying, or preventing competition. *Mueller* tends to reinforce clear roles and distinctions between different levels of trade, and thus arguably to preserve independent wholesaling and retailing entities, as Congress intended. Under *Mueller*, the likelihood is [24] increased that businesses "at the same functional level would start on equal competitive footing so far as price is concerned." *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

One criticism of the *Mueller* rule is that it has been used against cooperative purchasing ventures of small business entities that have banded together to compete more effectively with large integrated concerns. Application of *Mueller* to bar purchasing ventures by small independents would seem to work a perverse result given the Act's protectionist purpose.<sup>8</sup> Mechanical application of *Mueller*, such as against some kinds of group purchasing entities, could be inappropriate. *But see National Parts Warehouse*, 63 F.T.C. 1692, 1730 (1963), *aff'd sub nom. General Auto Supplies, Inc. v. FTC*, 346 F.2d 311 (7th Cir.), *cert. dismissed*, 382 U.S. 923 (1965). However, Boise is not such a group purchasing entity, and there is no need to resolve this dilemma in order to decide this case.

*Mueller* does not foreclose the theoretical possibility that an inference of competitive injury could be rebutted in a dual distribution situation. The Commission there rejected a claim that discounts no greater than the costs incurred must be *per se* legal; it did not hold that across-the-board discounts to dual distributors are *per se* illegal. As a practical matter, it may be difficult in most common commercial settings for a favored [25] dual distributor to rebut the inference of injury. As a legal matter the inference is nonetheless rebuttable.

Under *Mueller*, if the costs of sale or delivery being compensated by the discount are truly the supplier's own costs, then those cost savings could support a cost justification defense. Thus, Boise's reliance on

<sup>8</sup> See Calvani, "Functional Discounts Under the Robinson-Patman Act," 17 B.C. Ind. & Com. L. Rev. 543, 555, 567-75 (1976), for a discussion of this problem and a collection of group purchasing cases.

showing its *own* costs of performing services to avoid the inference of injury is not probative. Boise sells to end-user customers in competition with other dealers, yet purchases at lower prices than are available to those dealers. Its claim that the price difference is no greater than its costs of performing services and therefore that there can be no competitive injury due to its discriminatory advantage is rejected by *Mueller*, and by this Commission.

### B. The Doubleday Doctrine

The *Doubleday* doctrine, as originally formulated, would hold almost as a matter of law that discriminatory discounts no greater than the costs borne in providing services could not cause competitive injury under the Act. The justifications offered for the doctrine are distributional efficiency and [26] promotion and toleration of diverse distribution methods.<sup>9</sup> *Doubleday* would permit a discount justified not by the supplier's cost savings but by its customer's. The cost justification defense in Section 2(a) refers to the differences in costs of the discriminating seller, not to the differences in costs of favored and disfavored buyers. Thus, if the *Doubleday* rule is construed as a defense to a statutory violation, there is no textual support for it.

The rule can be difficult both to understand and to apply. The costs of the manufacturer's customers in performing certain functions will surely vary, depending on differences in customer operations, efficiency, location, and product mix. C.P.F. 815. Hence the discounts allowable under *Doubleday* could vary from customer to customer. A manufacturer almost certainly could not know in detail each customer's costs to perform certain functions.<sup>10</sup> Granting the different discounts based on guesses [27] about individual customer costs could easily lead to discriminatory prices. Even if the discounts accurately reflected each customer's costs, under any variable discount system the less efficient firms with higher costs would receive higher discounts—an economically unfortunate reversal of desired incentives.

Even if we were to reject *Mueller* in favor of the *Doubleday* doctrine, we would still affirm the Initial Decision. Under *Doubleday*, the amount of the discount must be reasonably related to the expenses assumed by the buyer and should not exceed the cost of that part of

<sup>9</sup> It is, perhaps, misleading to refer to *Doubleday* as a "doctrine." Chairman Howrey, who authored the principal opinion, was joined on this issue only by Commissioner Mason. Commissioner Gwynne concurred in the result, but did not join an opinion. Two other Commissioners each wrote opinions concurring in the result but explicitly disagreeing with Chairman Howrey about the functional discount rule. More importantly, the *Doubleday* rule was short lived. Less than six months later, Commissioner Gwynne, having assumed the Chairmanship, authored the Commission's unanimous decision in *General Foods Corp.*, 52 F.T.C. 798 (1956), which rejected arguments similar to those involved in *Doubleday* albeit without mentioning that decision.

<sup>10</sup> Indeed, the customers might not be able to isolate and identify the relevant costs either, because of problems of analyzing joint costs. J. Clark, *Studies in the Economics of Overhead Costs* (1923); L. Telser, *Economic Theory and the Core* ch. 2 (1978).

the function it actually performs. 52 F.T.C. at 209. The record does not show that Boise's discounts met that standard.

Boise claims that under *Doubleday* "an integrated wholesaler is entitled to a wholesale discount on all the goods it purchases." R.A.B. 10. That is not the holding of *Doubleday*. A more careful reading of that case limits the availability of wholesale discounts.

Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. . . . On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.

52 F.T.C. at 209. Finding that the discounts granted were not [28] reasonably related to the expenses, the Commission found *Doubleday* in violation.

Here, as in *Doubleday*, the evidence does not show that the cost to Boise of performing the services is equal to or greater than the discounts it receives, purportedly as compensation for them. The cost study Boise offered is methodologically questionable, as demonstrated by its prediction of results contrary to actual experience. I.D. 118. Moreover, the study does not address the *Doubleday* issue. Instead, the study focuses on Boise's costs of reselling to dealers and ignores the costs incurred on goods resold to end-users. Thus there is no way to determine from this study whether the favorable discount Boise enjoyed on its sales to end-users was equal to the costs it assumed in selling to them—the very issue under the *Doubleday* rule. Further, the evidence does not identify or isolate the costs shifted from manufacturers to Boise, nor the costs to Boise of services not performed by disfavored dealers.

There is a further reason why Boise does not meet the *Doubleday* standard. Under *Doubleday*, a manufacturer could grant functional discounts to encourage and compensate customers choosing to take on certain marketing functions. Competing customers who chose not to perform those functions would not get the discount. As Judge Parker observed:

*Doubleday's* defense was that the wholesalers who received extra discounts were being compensated for services they performed and which were *not* performed by the unfavored customers, 52 F.T.C. at 199–200, and the Commission's acceptance of this argument was based on this assumption. This situation—that the favored buyer performed resale [29] functions which the unfavored did not—is absent here.

## I.D. 118.

The record shows that dealers often performed the same functions as Boise. I.D. 118. Dr. Kenneth Elzinga, Boise's expert, made it clear that large dealers, which buy in large quantities from manufacturers, hold inventory, break bulk, and sell to large end-user accounts, are also vertically integrated. Elzinga Tr. 6430-33; I.D.F. 520. In other words, a firm need not be a dual distributor to be vertically integrated. (Indeed, Dr. Elzinga also testified that if respondent ceased selling to dealers and sold only to end-users, that would not necessarily mean Boise had ceased performing the wholesale function. Elzinga Tr. 6431-33; C.P.F. 823.) However, these vertically integrated dealers received no similar discounts to compensate them for performing these similar functions.

The major differences between Boise and these large, vertically integrated dealers are that Boise operates on a much larger scale and that Boise also sells to other dealers as well as to end-user customers. Putting aside the question of scale of operation, the unique "function" Boise performed was "selling to dealers." Under *Doubleday* the amount of the discount "should not exceed the cost of that part of the function he actually performs *on that part of the goods for which he performs it.*" 52 F.T.C. at 209 (emphasis added). Therefore, even if the "marketing function" were viewed as "selling to dealers," respondent should receive the greater discount only on those goods resold to dealers. But Boise received the discount on all of its [30] purchases. By contrast, dealers competing with Boise and performing the same distributional functions received the discount on none of their purchases.

Both *Mueller* and *Doubleday* address the conflict between the law's requirement of non-discriminatory prices and the seller's desire to compensate for shifting selling functions to distributors. Criticisms of the two doctrines stress their different "preferences." *Mueller*, favoring the legal goal of non-discriminatory prices, is alleged to prohibit compensation for valuable marketing functions, thereby penalizing efficiency. *Doubleday*, favoring the goal of distributional efficiency, is alleged to produce prices that differ widely from competitor to competitor, with discriminatory impact contradicting the Robinson-Patman amendments.

But neither *Mueller* nor *Doubleday* prohibits compensation for marketing functions performed to encourage efficiencies. There are at least three specific circumstances where a seller could offer compensation consistent with the requirements of the Act and with *Mueller* and *Doubleday*. First, functional discounts may usually be granted to customers who operate at different levels of trade, and thus do not compete with each other, without risk of secondary line com-

petitive injury under the Act. Second, even a customer that operates at more than one level of trade may still receive some functional discounts. There will ordinarily be no violation of the Act if the dual distributor receives the wholesaler discount only on the goods it resells to other dealers and receives a retailer discount on the goods it sells in [31] competition with other retailers. A customer who performs more than one reselling function can receive different discounts depending on the function. See *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977). Obviously, it may be necessary to keep detailed records to identify transactions at different functional levels. Finally, a customer that operates at more than one functional level might even receive a uniform discount on all of its purchases, if such a discount is practically available to this dual distributor's competitors. A supplier is free to "purchase" wholesale and inventory services for goods that actually receive the benefit of those services, as long as such payment or consideration is available on proportionally equal terms to all other customers competing in distribution. See *General Foods Corp.*, 52 F.T.C. 798, 824-25 (1956); cf. *Century Hardware Corp. v. Acme United Corp.*, 467 F.Supp. 350, 355-56 (E.D. Wis. 1979).

### C. The "Availability" Defense

Boise argues that the prices it receives are available to dealers and therefore there is no statutory injury. In this context, Boise really makes two arguments. First, it urges that wholesale functional discounts are available to all purchasers that perform the wholesale function. In other words, a retailer who feels disadvantaged can simply become a wholesaler too. Boise's suggestion that all dealers could become dual distributors or wholesalers is impractical on its face, and contradicted by the record. The courts and the Commission have [32] long required that availability be practical. See *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025-26 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977); *Dayton Rubber Co.*, 66 F.T.C. 423 (1964), rev'd on other grounds sub nom. *Dayco Corp. v. FTC*, 362 F.2d 180 (6th Cir. 1966). Lower prices are "unavailable" where a purchaser must alter his purchasing status before receiving them. *Dayton Rubber Co.*, 66 F.T.C. at 470.

The record shows that dealers do, in fact, perform wholesaler functions but do not receive the functional discounts that Boise enjoys. I.D.F. 375, 446-54, 522; I.D. 114-16. Moreover, some dealers have explicitly requested wholesaler discounts and have been denied them. The record identifies two dealers who specifically requested from three suppliers the discounts Boise receives, but were specifically denied them, on the grounds that the requesting dealers were not

wholesalers. I.D.F. 448. One manufacturer, Kardex, will not give dealers its wholesale functional discount unless they change their functional status, and will not give dealers this discount even when, as a courtesy, they sell to other dealers. I.D.F. 449.

The second prong of Boise's argument is that equally low prices were available to competing retail dealers from other suppliers. In essence, respondent urges an "alternative source" defense. *See generally*, 1 ABA Antitrust Section, The Robinson-Patman Act 110-16 (1983). Although a few courts appear to have recognized the defense, *see, e.g., Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974), other courts have rejected it, *see*, [33] *e.g., Fowler Manufacturing Co. v. H. H. Gorlick*, 415 F.2d 1248, 1253 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *Wholesale Auto Supply Co. v. Hickok Mfg. Co.*, 221 F.Supp. 935 (D.N.J. 1963).<sup>11</sup> The defense "has not been successful in any of the dual function buyer cases." Beringer, "The Validity of Discounts Granted to Dual Function Buyers Under the Robinson-Patman Act," 31 *Bus. Lawyer* 783, 795 (1976). The alternative source defense presumes that businessmen act irrationally, by choosing to pay more to a supplier that discriminates against them than they could pay to an alternative source for the same goods. Instead, the continued purchases even in the face of discriminatory prices suggest that the alleged alternative sources are not competitive. If an alternative source defense is legally recognized, despite its presumption of buyer irrationality, it is critical to examine whether the alternative sources are, in fact, competitively equivalent. [34]

We need not reach the issue of whether an available alternative source negates a finding of price discrimination.<sup>12</sup> The record shows that equivalent goods were not available on equivalent terms from alternative suppliers. In the first place, even respondent's view of the matter does not show that alternative prices available to dealers were as low as the wholesale prices available to Boise that are the focus of this case. I.D.F. 11-14. Most of respondent's "evidence" on alternative suppliers was based on unsupported testimony that was vague and unreliable. *See, e.g., Williams Tr.* 2364-68; I.D.F. 378-79, 382. Such evidence as there was did not show the availability of equivalent

<sup>11</sup> The Ninth Circuit in *Fowler* retreated from an earlier apparent acceptance of a version of an alternative source defense. *See Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 703-704 (9th Cir. 1964). The Seventh Circuit in *Purolator Products, Inc. v. FTC*, 352 F.2d 874, 882 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968), accepting the alternative source defense *arguendo*, found it inapplicable in that a different brand of products did not constitute an acceptable alternative source of supply. According to that reasoning, the "availability" defense would not insulate Boise here.

<sup>12</sup> The Commission's previous decision in *Ark-La-Tex Warehouse Distributors, Inc.*, 62 F.T.C. 1557 (1963), cannot be construed as acceptance of the alternative source defense by the Commission. In that matter the Commission simply requested that a hearing examiner determine whether an alternative source of supply was available to the disfavored customers. While indicating that the Commission wished evidence taken on the issue, the case cannot be read as reflecting anything more.

products in terms of quality, brand recognition, or consumer acceptance. I.D.F. 435–36, 442–44. There was no evidence showing that such alleged alternative supplies were available on the same terms found in existing seller/buyer relationships. Such vital terms include minimum order requirements, delivery times, order fill rates, promotional assistance, and sales personnel services. I.D.F. 68; C.P.F. 118–120. Judge Parker found, and we agree, that Boise had failed to prove the availability of alternative sources of goods of like grade and quality at equally low prices. Here, as in *Purolator [35] Products, Inc. v. FTC*, *supra*, at least some of the products had no commercially accepted substitutes. I.D.F. 435–45.

#### V. THE AFFIRMATIVE DEFENSES

Lastly, Boise urges that even if Complaint Counsel has established a *prima facie* case, it has failed to prove the absence of seller's defenses.

Assigning the burden of proving the absence of affirmative defenses has plagued buyer-liability litigation under Section 2(f) of the Act. The Commission has acknowledged that it has the burden of presenting evidence as to the absence of cost justification. See *National Parts Warehouse*, 63 F.T.C. 1692 (1963), *aff'd sub nom. General Auto Supplies, Inc. v. FTC*, 346 F.2d 311 (7th Cir.), *cert. dismissed*, 382 U.S. 923 (1965). However, the Commission does not have the burden of proving the absence of a meeting competition defense. *National Parts Warehouse*, *supra*, 63 F.T.C. at 1736–37; *but see Mid-South Distributors v. FTC*, 287 F.2d 512, 517 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); *cf. Great Atlantic & Pacific Tea Co. v. FTC*, 557 F.2d 971 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 69 (1979). The Commission today reaffirms its prior decision in *National Parts Warehouse*, *supra*. The buyer is in the better position to know whether it has in fact received better offers from other sources. Nonetheless, even if we were to assign the burden to Complaint Counsel, that burden has been carried. Thus, [36] assignment of the burden of proof makes no difference to the determination of either issue.

##### A. Meeting Competition Defense

In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the Supreme Court stated that the meeting competition defense *cannot* be invoked by simply proving “facts that would have led a reasonable person to believe that a lower price was available to the favored purchaser from a competitor.” 460 U.S. at 439. Rather:

The showing required is that the “lower price . . . was made in good faith to meet” the

competitor's low price. 15 U.S.C. § 13(b) . . . Thus, the defense requires that the seller offer the lower price in good faith *for the purpose* of meeting the competitor's price, that is, the lower price must actually have been a good-faith response to that competing low price.

*Id.* (emphasis in the original). One commentator has phrased the test as follows:

If the seller's lower price was given *because* of lower prices by a competitor, it is cognizable under the Section 2(b) proviso; if, on the other hand, the seller's lower price was quoted *because* of a preconceived pricing scale which is operative regardless of variations in competitor's prices, as in the 'basing-point' cases, his price was not genuinely made to meet a competitor's lower price and Section 2(b) cannot apply. Put another way, Section 2(b) presupposes a lower price *responsive* to rivals' competitive prices.

Rowe, *Price Discrimination Under the Robinson Patman Act* 234 (1962) (emphasis in the original). Boise urges that the Rowe test was rejected by the Supreme Court in *Falls City*, R.A.B. 45, [37] ignoring the fact that the Supreme Court cited Rowe's passage with approval, 460 U.S. at 439. Boise fails to meet this standard. It was accorded the favored discount because it was functionally characterized as a wholesaler.

The "benchmark" for evaluating whether discriminatory discounts were granted to meet competition is the good faith standard. *United States v. United States Gypsum Co.*, 438 U.S. 422, 455 (1978). Boise places considerable reliance on undetailed and conclusory statements from manufacturers to the effect that their prices were adopted to meet competition. Mere recitation of a meeting competition formula does not prove the requisite good faith, which is more than a sworn-to state of mind. In any event, Judge Parker was not persuaded by the manufacturers' statements, and neither are we. See I.D. 123-24. In *Falls City*, *supra*, the Supreme Court stated:

This Court consistently has held that the meeting-competition defense "'at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.'" *United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978), quoting *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760 (1945).

460 U.S. at 438. These conclusory statements do not adequately demonstrate "that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors." *Id.* The key to showing that such a belief is held in good faith is the requirement that a seller undertake steps to verify the [38] actual existence of

competitive offers, short of direct communication with other sellers. *United States v. United States Gypsum*, 438 U.S. 422, 454–55 (1978); see also *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1044–47 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

Judge Parker found that the manufacturers provided functional discounts to wholesalers because they sell to dealers, and that the discounts were nationwide and do not vary from region to region. I.D. 123. Moreover, the discounts were provided to all Boise distribution centers and, with few exceptions, they had remained unchanged for many years. I.D. 123. These discounts thus do not appear to be responsive to particular competitive circumstances, or even to a regional market function as in *Falls City*; instead, they are part of a “preconceived pricing scale which is operative regardless of variations in competitor’s prices,” see Rowe, *supra*, at 234. If the prices Boise paid were based on meeting competition on an areawide or even nationwide basis, there would still be need for proof that Boise’s suppliers had verified the existence of lower competitive offers. There is no evidence of any such effort; the evidence is that Boise and other wholesalers received a wholesale functional discount not available to dealers that competed with Boise in sales to end-user customers. Accordingly, we agree with Judge Parker that under these facts, the only reasonable [39] conclusion is that the manufacturers’ discounts were not adopted for the purpose of meeting competition, but to reward a level of trade.

Boise argues that “[c]omplaint counsel offered no evidence to establish Respondent’s knowledge of the absence of the meeting competition defense.” R.A.B. 51. Boise’s argument is based on the mistaken belief that direct evidence of the absence of the defense must be presented. It need not. The Fifth Circuit in *Mid-South Distributors v. FTC*, 287 F.2d 512, 517–18 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961), noted that the proof of respondent’s knowledge of the absence of statutory defenses may have to be established from “indirect circumstantial inferences” because buyers will rarely have “committed the crudities to permit categorical and direct proof.” Here, Boise knew of the systematic nature of its wholesaler’s discount, because Boise had been receiving price lists showing the system for twenty years. Boise employees knew it received the discount because it had been classified as a wholesaler, I.D. at 127–28, and Boise offered not probative evidence that its discounts were otherwise responsive to lower competing offers. Manufacturers were obviously aware that Boise resold both as a wholesaler and retailer, and Boise knew that wholesaler discounts were not available to dealers with which it competed in making retail sales. A sophisticated buyer might be presumed to be culpable with

respect to the absence of the meeting competition defense where the more probable explanation of a discount was the wholesale function attributed to Boise but not its retail dealer competitors. Buyer Boise also [40] was best positioned to know if the price it was receiving was to meet a competing seller's price. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 79 n.23 (1953). A direct confession from Boise is not necessary to support a finding that Boise knew it could not support a meeting competition defense.

### B. Cost Justification Defense

Judge Parker found "there are no significant differences in the methods by or quantities in which the products are sold or delivered to Boise and selected dealers." I.D. 121-22. The goods are not specially manufactured for Boise and hence do not yield savings in manufacturing cost. I.D.F. 462. Possible economies that could result if Boise purchased from or took delivery at a central location do not exist, because manufacturers deal separately with each of Boise's locations. See *National Dairy Products Corp. v. FTC*, 395 F.2d 517, 526 (7th Cir.), cert. denied, 393 U.S. 977 (1968); *American Motor Specialties Co. v. FTC*, 278 F.2d 225, 227-28 (2d Cir.), cert. denied, 364 U.S. 884 (1960); *Moog Industries, Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958).

Judge Parker correctly observed:

Although the totality of the purchases of all of Boise's distribution centers from a particular manufacturer over a certain period of time may, and probably does, exceed the purchases of any one of the selected dealers over the same period from the same manufacturers, such comparison is meaningless for purposes of analyzing cost savings since the products are sold and delivered to the individual centers. Thus, the proper comparison for this purpose is between each Boise distribution center which competes with [41] each selected dealer. CX's 1-6 reveal that in many cases dealers purchased quantities equal to or greater than those purchased by a competing Boise distribution center yet paid higher per unit prices than did the center.

### I.D.F. 469.

Boise's distribution centers order individually, are individually served by salesmen on a regular basis, are billed and accounted for individually, and individually receive deliveries directly from manufacturers. I.D.F. 463, 464, 467; C.P.F. 699-700. Boise's distribution centers order by the same methods as dealers do, and manufacturers process and fill orders in the same manner, whether received from dealers or wholesalers. I.D.F. 465-66. Indeed, Judge Parker observed that Boise's purchases from its distribution centers, on which it receives a wholesale functional discount, on occasion are no greater, and may even be smaller, than the volume purchased during equivalent

periods of time by dealers. I.D.F. 469–83. Despite this evidence showing that manufacturers' dealings with Boise and with dealers are similar, and hence should involve similar costs, manufacturers offered conclusory testimony that the price differences were explained by cost differences. That testimony, unsupported by any analytical detail, can be discounted. Were the manufacturers to testify that the differences were not cost-justified, that admission could expose them further to seller liability under Section 2(a), *cf.* I.D. 120. [42]

There is no substantial support for the claim that Boise or anyone else believed that the additional wholesaler discounts were adopted only to make due allowances for cost differences. The demonstrated similarity in manufacturers' methods of dealing with Boise and with dealers shows that the only conceivable cost difference would be related to volume. However, most manufacturers have separate volume discount schedules in addition to the wholesaler discount. Nevertheless, Boise would receive wholesaler discounts even on purchases in smaller quantities than its disfavored dealer competitors. I.D.F. 484–85. Even where an order by a Boise distribution center is larger than an order by a dealer, the supplier's cost of filling such an order does not differ between these customers. I.D.F. 466. Boise's acquisitions of office supply dealers made it aware that suppliers were granting it a functional discount unrelated to volume.

For example, [Boise] acquired a Boston dealer, Dennis Office Supply (Tr. 4435–36) which was receiving dealer prices. After Boise meshed its buying practices with those of Dennis (CX 970, p. 124), it is a reasonable inference that it became aware that although the new distribution center's volume of purchases and method of buying from the six manufacturers (Tr. 4443–45) did not differ from when Dennis was given the dealer price, the center immediately qualified for the wholesale discount, a discount which it knew could not be cost-justified.

I.D.F. 487. Clearly, Boise, with its twenty years of experience in the industry, knew it was receiving a favored price because of its functional classification as a wholesaler and not because its favored treatment was cost-justified. Indeed, Boise's Product [43] Planning and Development Manager testified that he could not identify any aspect of a manufacturer's cost that differed in processing two similarly sized orders from a dealer and from a Boise distribution center. Bazant Tr. 4906–11. We find that Boise had knowledge that the cost justification defense was unavailable.

Nonetheless, Boise asserts that it is "enigmatic" how a customer who performs selling and delivery functions for a manufacturer could accurately estimate the cost savings to the manufacturer. R.A.B. 52. Costs, according to respondent, are "subjective in their character;" a customer could not be privy to the seller's managerial decision-mak-

ing since it necessarily involves "experience and hunches and acumen." R.A.B. 52. It is important to understand that Boise's argument, if accepted, would mean that Section 2(f) of the Robinson-Patman Act would be effectively repealed. Neither the Government nor a private plaintiff could ever successfully wage a buyer liability case since they could never prove that a buyer knew its receipt of favored treatment was not cost-justified. Congress has not repealed Section 2(f), and we decline Boise's invitation to do so by disparaging cost estimates as "subjective."

The Supreme Court addressed this very issue of assessing costs in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 79-80 (1953). There the Court observed:

Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified. But *trade experience* in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a [44] buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only show, to establish its *prima facie* case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. (Emphasis added.)<sup>13</sup>

The six manufacturers deal with each of Boise's distribution centers individually, selling to, accounting for, delivering to, and billing each center separately. Methods of service to Boise and dealers do not differ. Likewise, the quantities in which Boise's distribution centers purchase are often similar to the quantities that the dealers purchase. Boise is familiar with the methods used to serve dealers and the quantities purchased by dealers from its acquisition of office supply dealers, and from its own experience in selling to and competing with dealers as a [45] dual distributor. This trade experience fully supports the inference that Boise knew there was no basis for a cost justification defense.

<sup>13</sup> Even if the costs of manufacture, sale and delivery to Boise were somewhat less than the costs of manufacture, sale and delivery to dealers, it would be of no avail to Boise. The Supreme Court stated in *Automatic Canteen*, *supra*, 346 U.S. at 80, that:

The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated. A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient.

Here the price differential is exceptionally large, generally ranging from 5% to 33%. Such substantial discriminations could not reasonably be thought to be justified by any slight cost savings to the manufacturer in dealing with Boise.

## VI. ORDER

Boise's objections to the order entered by Judge Parker are not well-taken. We perceive no serious questions as to the meaning and application of this unremarkable order. It is not a company-wide order, but instead is limited to Boise's office products business, the part of Boise's corporate operation that was the subject of the trial. The division affected is only a small part of Boise's total operation. Boise is not required to police thousands of suppliers' other dealings; instead, its obligations are determined by what it knows about prices to other dealers, not what it might find out through detective work. The application to all of Boise's office products business, rather than just the particular suppliers and distribution centers that were the focus of detailed proof at the trial, is fully supported by the record and the precedents. The practices are not isolated, but endemic. Finally, in a case such as this dealing with violation of a clear conduct prohibition, we believe it is not necessary or advisable to limit the order's duration.

We modify the Administrative Law Judge's order in two respects, however. Paragraph II, read literally, could be thought erroneously to apply to office products other than those Boise buys for sale to end-users. Boise has requested that the order be modified to make clear that it applies only to office products Boise sells to end-users in competition with other [46] retailers, and does not apply to goods ultimately resold to dealers. R.A.B. 56. Complaint Counsel has not objected to this requested modification. Accordingly, to eliminate the suggestion of overbreadth, Paragraph II of the order will read as follows:

*It is further ordered, That Boise Cascade shall, in connection with the offering to purchase or purchasing in commerce, as "commerce" is defined in the Clayton Act, of office products for resale, cease and desist from directly or indirectly inducing, receiving or accepting from any seller a net price that Boise Cascade knows or has reason to know is below the net price at which office products of like grade and quality are being offered or sold by such seller to other purchasers with whom Boise Cascade is competing in the resale or distribution of said office products to end-users.*

Finally, Paragraph V does not clearly assign responsibility for determining when compliance reports should be submitted, after the first one. Clearly, this should be a matter for the Commission to determine. Therefore, Paragraph V of the order will read as follows:

*It is further ordered,* That Boise Cascade shall, within ninety (90) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as the Commission may from time to time require to assure compliance with the terms and conditions of this order.

#### VII. CONCLUSION

For the foregoing reasons, we adopt the findings, conclusions, and order of the Administrative Law Judge issued February 14, 1984, except for the modifications to Paragraphs II and V of the order described immediately above.

#### FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to affirm the Initial Decision. Accordingly, the appeal of Boise Cascade Corporation is denied, and

*It is ordered,* That the following order to cease and desist be, and the same hereby is, entered:

#### I.

The following definitions shall apply in this order:

A. *Boise Cascade* shall mean Boise Cascade Corporation, its divisions and subsidiaries, its officers, directors, agents and employees, and its successors and assigns.

B. *Office Products* shall mean furniture and supplies commonly used in offices such as those which are sold or distributed by Boise Cascade Corporation's Office Products Division. [2]

C. *Net Price* shall take into account all discounts, rebates, allowances, deductions or other terms and conditions of sale.

#### II.

*It is further ordered,* That Boise Cascade shall, in connection with the offering to purchase or purchasing in commerce, as "commerce" is defined in the Clayton Act, of office products for resale, cease and desist from directly or indirectly inducing, receiving or accepting

from any seller a net price that Boise Cascade knows or has reason to know is below the net price at which office products of like grade and quality are being offered or sold by such seller to other purchasers with whom Boise Cascade is competing in the resale or distribution of said office products to end-users.

III.

*It is further ordered,* That Boise Cascade shall, within sixty (60) days of the effective date of this order, distribute a copy of this order to each of its suppliers of office products.

IV.

*It is further ordered,* That Boise Cascade shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure of Boise Cascade, such as the creation or dissolution of subsidiaries or divisions, or any other change in the corporation, which may affect compliance obligations arising out of the order.  
[3]

V.

*It is further ordered,* That Boise Cascade shall, within ninety (90) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as the Commission may from time to time require to assure compliance with the terms and conditions of this order.

Complaint

107 F.T.C.

IN THE MATTER OF  
SUNBEAM CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-3181. Complaint, Feb. 11, 1986—Decision, Feb. 11, 1986*

This consent order requires a Pittsburgh, Pa. marketer of Oster brand air cleaners, among other things, to cease misrepresenting the ability of air cleaners to eliminate or help eliminate indoor pollutants. Additionally, respondent is required to have competent and reliable substantiation for all future claims about its products' efficacy.

*Appearances*

For the Commission: *Jeffrey Klurfeld* and *Harold G. Sodergren*.

For the respondents: *Edward J. Momkus*, in-house counsel, Oak Brook, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sunbeam Corporation, a corporation, hereinafter sometimes referred to as "Sunbeam" or as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a Delaware corporation with its principal place of business at 2 Oliver Plaza, Pittsburgh, Pennsylvania.

PAR. 2. Respondent, through its Oster Division, manufactures, advertises, offers for sale and sells electric air cleaning appliances, including but not limited to the Oster Models "402" and "404" (hereinafter referred to as "air cleaning appliances").

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent has disseminated and caused the dissemination of advertising for air cleaning appliances in national magazines, newspapers and catalogues, and radio and television broadcasts. In addition, respondent has distributed product brochures and other