

Complaint

IN THE MATTER OF
MCCORMICK & COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 7 OF THE CLAYTON ACT AND SECTION 2 OF THE
ROBINSON-PATMAN ACT

Docket C-3939; File No. 9610050
Complaint, April 27, 2000--Decision, April 27, 2000

This consent order requires Respondent McCormick & Company to cease and desist from price discrimination within the meaning of Section 2(a) of the Robinson-Patman Act, by selling its product at a net higher price than it does to any competing purchaser, where the discrimination may cause competitive harm. The order also makes available the statutory defenses provided in the Act and requires that for each instance that Respondent wishes to raise the provided defense, it must contemporaneously document all information that it believes entitles it to the defense.

Participants

For the Commission: *Patrick J. Roach, F. Martin Dajani, David Conn, Dana F. Abrahamsen, Cecelia M. Waldeck, Mark D. Peterson, Ara Jabagchourian, Dennis C. Harketts, Stephanie Langley, Veronica G. Kayne, Daniel P. Ducore, and BE.*

For the Respondents: *Lewis Noonberg and Kenneth Starling, Piper Marbury Rudnick & Wolfe, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by these Acts, the Federal Trade Commission, having reason to believe that McCormick & Company, Incorporated, a corporation (sometimes referred to as "respondent" or "McCormick"), has violated the provisions of these Acts, and it appearing to the

Complaint

Commission that a proceeding would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definitions

1. For purposes of this complaint, the following definitions apply:

a. "Core spice line" means a retail product line of basic spices, herbs, and blends of spices, herbs and other food products that are sold in similar packaging with the same brand or trade name. Generally, the product line is composed of 40 or more items or products.

b. "Gourmet spice line" means a retail product line of basic spices, herbs and blends of spices, herbs and other food products with the same brand or trade name that are generally of a higher ingredient grade than a core spice line. Gourmet spice lines are commonly packed in same-size glass jars.

c. "Dry seasoning mixes" means retail products consisting of blends of spices, herbs and other food products with the same brand or trade name that are used to prepare a specific dish, such as meatloaf or tacos, or to prepare gravy or other sauce. Dry seasoning mixes are generally sold in foil or paper packets and typically, the entire packet is used for one average-size dish.

d. "Competitive seasonings" means retail products other than dry seasoning mixes, such as meat tenderizers, monosodium glutamate (MSG), and garlic and other spice blends that are not part of a core or gourmet spice line. Competitive seasonings are frequently marketed by suppliers that do not offer complete core spice lines or gourmet spice lines.

e. "Full Line" means the McCormick product line or offering comprising the products described above in

Complaint

subparagraphs a through d.

f. "Net Price" means the list price of McCormick Products less advances, allowances, discounts, rebates, deductions, free goods and other financial benefits provided by McCormick and related to such products.

The Respondent

2. Respondent McCormick & Company, Incorporated., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business at 18 Loveton Circle, Sparks, Maryland 21152.

3. Respondent is now and has been engaged for many years in the production, distribution and sale of spice and seasoning products for resale, including the products that make up its Full Line. Respondent sells these products under the brand names McCormick, Schilling, Fifth Seasons, Spice Classics, Select Seasons, Mojave, Spice Trend, Royal Trading, Crescent, McCormick Schilling, La Cochina De McCormick, McCormick Collection and Old Bay, among others.

4. Respondent has manufacturing facilities in Hunt Valley, Maryland and Salinas, California. The Maryland facility generally serves customers in the Eastern portion of the United States, while the California facility generally serves customers in the West. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as defined in the Federal Trade Commission Act and the Clayton Act, by selling, distributing, shipping, or causing to be shipped spice and seasoning products produced in some states of the United States to customers located in other states and in the District of Columbia.

Complaint

5. With 1998 retail sales of \$623.7 million in the Americas, respondent is the largest supplier of spice and seasoning products in the United States. Respondent claims to be “the world’s largest spice company.”

6. Among firms supplying core or gourmet spice lines for sale in supermarkets in the United States, McCormick is by far the leading firm, accounting for the majority of such sales nationally. During the period pertinent to this complaint, McCormick faced competition in such sales from only one other national firm, Burns Philp Food Incorporated, and several much smaller independent regional or local firms. These circumstances, combined with the superior brand recognition of McCormick products, mean that supermarkets that purchase McCormick products have relatively few alternative sources for equivalent products from other suppliers at equivalent prices and terms.

McCormick's Pricing

7. During the period pertinent to this complaint, McCormick had a single national price list for its product lines sold to its direct customers, whether retail or wholesale. McCormick commonly referred to this price list as the “A” List. This list specified separate prices for each individual product or SKU. McCormick modified this price list from time to time, to reflect changes in McCormick’s costs to manufacture particular products, among other reasons.

8. Relatively few McCormick customers paid the “A” list price. Instead, McCormick commonly entered into written or unwritten supply agreements with customers that provided substantial discounts off the “A” list prices. These discounts have taken a variety of forms, including cash payments at the commencement of the agreement, free goods, off-invoice discounts, cash rebates, performance funds and other financial benefits that effectively reduced the Net Price of McCormick’s products. In addition, McCormick supply agreements have included payments for

Complaint

advertising and other promotional activities designed to help customers resell McCormick products. McCormick commonly referred to the aggregate percentage of discounts and benefits provided to a particular customer as the "allowance offer" or "deal rate." McCormick's aggregate discounts and benefits to some customers were substantially greater than to others.

9. Typically, McCormick individually negotiated with particular customers the amount of discounts and promotional payments. The discounts and promotional payments typically were for all or a substantial part of the existing McCormick product line and typically were not incentives to accept new McCormick products.

10. In its supply agreements with customers, McCormick has commonly included provisions that, much as is sometimes seen with slotting allowances, restrict the ability of customers to deal in the products of competing spice suppliers. Such provisions typically demand that the customer allocate the large majority of the space devoted to spice products -- in some cases 90% of all shelf space devoted to packaged spices, herbs, seasonings and flavorings of the kinds offered by McCormick -- to McCormick.

Discrimination in Price

11. Each of the spice and seasoning products that make up McCormick's Full Line is a commodity within the meaning of Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a).

12. In the course and conduct of its business in commerce in the period from at least 1994 to the present, McCormick has in no fewer than five instances discriminated in price by providing different deal rates consisting of preferential up-front "slotting"-type payments or allowances, discounts, rebates, deductions, free goods, or other financial benefits to some purchasers of

Complaint

McCormick products including, but not limited to, McCormick's core spice line, gourmet spice line, dry seasoning mixes and competitive seasonings. In these instances, through such discriminatory terms of sale, McCormick has sold McCormick products to some purchasers (the "favored purchasers") at a lower Net Price than to other purchasers (the "disfavored purchasers").

13. The favorable prices and terms McCormick provided to the favored purchasers were not justified by a good faith attempt to meet the equally low price of a competitor, nor were the favorable prices justified by cost savings associated with doing business with the favored retailer.

14. In each instance, McCormick engaged in contemporaneous sales of McCormick products of like grade and quality to the favored and disfavored purchasers.

15. In each instance, the disfavored purchaser competed with the favored purchaser who resold respondent's products at the same level of distribution.

16. In each instance, at least one of the discriminatory sales by McCormick involved commodities that crossed state lines.

17. Each instance involved a substantial price difference over a substantial period of time between competing purchasers in markets where profit margins are low and competition is keen.

18. In each instance, the disfavored purchaser had few, if any, alternative sources from which to purchase comparable goods at prices and terms equivalent to those McCormick provided to the favored purchaser.

19. The effect of these discriminatory acts and practices has been or may be substantially to lessen competition in the line or lines of commerce in which favored and disfavored purchasers are engaged, or to injure, destroy or prevent competition between favored and disfavored purchasers.

Decision and Order

20. The acts and practices of the respondent set forth in Paragraphs 11-19 above constitute unlawful price discrimination in violation of Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and will continue in the absence of the relief herein requested.

WHEREFORE, the Federal Trade Commission on this twenty-seventh day of April, 2000 issues its complaint against said respondent.

By the Commission, Commissioner Swindle and Commissioner Leary dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of McCormick & Company, Incorporated and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act and the Robinson-Patman Act Amendments to the Clayton Act; and

The respondent and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by respondent of all the jurisdictional facts set forth in

Decision and Order

the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. McCormick & Company, Incorporated., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business at 18 Loveton Circle, Sparks, Maryland 21152.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER**I.**

FOR THE PURPOSES OF THIS ORDER, the following definitions shall apply:

- A. "McCormick" or "Respondent" means McCormick & Company, Incorporated, its directors, officers, employees, agents, representatives, predecessors, successors, assigns,

Decision and Order

direct and indirect parents, subsidiaries, divisions, groups, joint ventures and affiliates controlled by or under common control with McCormick, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. "Product" means any spice, seasoning, sauce or gravy mix, marinade sauce, spice blend, meat tenderizer, monosodium glutamate, seasoning sold with cooking bags, or other product used to season or flavor foods, packaged for retail sale to consumers; provided, however, that "Product" does not include products that are packaged for sale to food service or industrial customers.
- C. "Purchaser" means any person or entity that purchases McCormick Products for resale.
- D. "Net Price" means the list price of McCormick Products less advances, allowances, discounts, rebates, deductions, free goods and other financial benefits provided by McCormick and related to such products.
- E. "Commission" means the Federal Trade Commission.

II.

IT IS ORDERED that Respondent, in connection with the sale of Products in commerce, as "commerce" is defined in the Clayton Act, shall cease and desist from discriminating, within the meaning of Section 2(a) of the Robinson Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), in the price of any Product of like grade and quality by selling such Product to any Purchaser at a Net Price higher than the Net Price charged to any competing Purchaser where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in

Decision and Order

any line of commerce or to injure, destroy, or prevent competition.

PROVIDED, that nothing herein shall prohibit respondent from discriminating in price where to do so would be lawful by reason of any of the defenses established in Sections 2(a) or (b) of the Robinson Patman Act amendments to the Clayton Act, 15 U.S.C. §§ 13(a) or (b).

III.

IT IS FURTHER ORDERED that for each instance in which Respondent wishes to avail itself of the meeting competition defense as set forth in Section 2(b) of the Robinson Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(b), Respondent, for a period of ten (10) years from the date this Order becomes final, shall contemporaneously document all information on which it bases its entitlement to the defense, within the meaning of such provision. For each such instance for which Respondent wishes to avail itself of the meeting competition defense, Respondent shall retain such documentation in its files for five (5) years after the lower price made to meet competition is no longer effective. Neither the presence nor absence of documentation of any specific information shall in itself be deemed to be dispositive of Respondent's compliance with Part II of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall, within sixty (60) days after service upon it of this Order, distribute a copy of this Order to each of its operating divisions involved in the sale of any Product to any Purchaser and to all current officers, employees, brokers, and agents of these divisions; and shall distribute a copy of this Order to any officer, employee, broker, or agent of these divisions within thirty (30) days of the commencement of such person's employment or affiliation with any such division.

Decision and Order

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent which may affect compliance obligations arising out of the Order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other such change.

VI.

IT IS FURTHER ORDERED that Respondent shall, within sixty (60) days after this Order becomes final, and thereafter annually for a period of five (5) years on the anniversary date of the Order, and at such other times as the Commission may by written notice to respondent require, file with the Commission a written report verified by an officer of Respondent setting forth in detail the manner and form in which Respondent has complied and is complying with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on April 27, 2020.

By the Commission, Commissioner Swindle and Commissioner Leary dissenting.

Statement of the Commission

**STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS SHEILA F. ANTHONY AND
MOZELLE W. THOMPSON**

The Analysis to Aid Public Comment fully describes the Commission action in this matter. Some comments by our dissenting colleagues, however, require a brief response.

The Commission has entered a final order in which McCormick & Company Inc. ("McCormick") has agreed to cease and desist granting discounts (partly in the form of up-front shelf-allocation payments) to large chains without making comparable payments available to other chains and independents that compete with the favored chains. Under the Supreme Court's controlling decision in *FTC v. Morton Salt Co.*,¹ injury to competition at the retailer (i.e., "secondary") level can be inferred where substantial and durable price discrimination exists between competing purchasers who operate in a market with low profit margins and keen competition.

McCormick is far and away the largest manufacturer and supplier of full lines of spices to grocery stores in the United States. In the early 1990s, it found itself in a price war with Burns-Philp Food Inc. ("Burns-Philp"), its only full-line competitor. Substantial discriminatory discounts were granted to favored chains, often accounting for many individual stores, and not to competing retailers.

In examining McCormick's discounts, the Commission did not simply apply the *Morton Salt* presumption in finding injury to competition, but examined other factors, including the market power of McCormick and the fact that discounts to favored chains were conditioned on an agreement to devote all or a substantial portion of shelf space to the McCormick line of products. Our dissenting colleagues applaud the fact that the Commission is

¹ 334 U.S. 37 (1948) (*Morton Salt*).

Statement of the Commission

willing to examine injury to competition by looking at factors beyond those narrowly described in the *Morton Salt* approach, but conclude that those factors do not justify a secondary-line price discrimination case here. We do not find their arguments persuasive.

1. The dissenting Commissioners observe that the discriminatory discounts were granted in the midst of, and possibly because of, a price war. But the Robinson-Patman Act limits on discriminatory pricing - including the rule that a seller can meet but not exceed prices offered by a competitor² - are not suspended during price wars.

2. Our colleagues suggest that this is a primary-line case (i.e., injury at the producer level) masquerading as a secondary line (injury at the retailer level) enforcement action. But that kind of distinction between primary-line and secondary-line anti-competitive effects is unduly rigid and mechanical -- particularly in light of the facts of this matter. It is true that part of the injury at the secondary level occurred because McCormick's behavior injured its only full-line competitor. But that is just one part of the secondary-line case. The fact remains that favored chain store buyers received from a dominant seller substantially better discounts than disfavored buyers, and they were injured, and competition at the secondary line was injured, as a result. Moreover, with Burns-Philp out of the picture as an aggressive competitor, chain stores and other retailers at the secondary level will be denied benefits of future competition.

² See *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 446 (1983) ("a seller's response must be defensive, in the sense that the lower price must be calculated and offered in good faith to 'meet not beat' the competitor's low price.")

Statement of the Commission

3. The Commission was influenced in the decision to enforce the Robinson-Patman Act here because McCormick is a dominant seller. Our colleagues' conclusion -- that market dominance by the discriminating seller should be irrelevant to secondary-line price discrimination -- flies in the face of commentary by leading scholars such as Herbert Hovenkamp suggesting that the dominance of the seller is exactly the factor that should be examined in the exercise of prosecutorial discretion.³

The essential feature of Commission action here should not be lost in a quarrel over particular facts. As the Analysis to Aid Public Comment points out, there will be circumstances in which the *Morton Salt* presumption is appropriate and dispositive. There may be other market settings in which it makes sense for the Commission, as a matter of prosecutorial discretion, or the Commission and Courts, in the process of considering whether there has been a violation, to look past the *Morton Salt* factors to a broader range of market conditions to determine whether there has been real injury to competition. Taking those additional factors into account, the majority concluded that there was injury not just to the disfavored buyers, but to secondary-line competition generally.

³ See, e.g., Herbert Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 Geo. L.J. 1157, 1170 (1983) ("Systematic, long-term price discrimination can be achieved only by a seller with market power. If the seller does not have market power, purchasers asked to pay the higher price will purchase from another seller willing to sell at a more competitive price.")

Dissenting Statement

**DISSENTING STATEMENT OF COMMISSIONERS
ORSON SWINDLE AND THOMAS B. LEARY**

We respectfully dissent from the Commission's decision to issue a final order to resolve allegations that McCormick & Company, Inc. ("McCormick") violated the Robinson-Patman Act. We recognize that the majority sincerely believes that this case will clarify a controversial statute and properly circumscribe its application. We are concerned, however, that this case will have precisely the opposite effect.

McCormick is the largest American supplier of spices to grocery stores, with more than 2,000 contracts¹ that account for a majority of spice sales in the United States. (Complaint ¶ 5). During the past decade, McCormick's main competitor has been Burns Philp Food Incorporated ("Burns Philp"). In the early 1990s, Burns Philp commenced a price war in which both it and McCormick offered increased discounts and other payments to try to win the business of grocery stores.² When the price war ended, McCormick remained the dominant spice supplier in the United States, and Burns Philp's ability to compete may have been impaired.³

¹ See McCormick & Company, Inc., Press Release, *McCormick Signs Settlement Agreement with the Federal Trade Commission* at 2 (Feb. 3, 2000), (McCormick has "more than 2,200 customer contracts").

² Anthony Hughes, *Burns Philp Was Inept, Says ASIC*, *The Age* at 2 (Mar. 11, 1999).

³ *Id.* ("Inadequate financial reporting to the board of directors and its failure to question overstated valuations were largely behind the near-collapse of the food group Burns Philp & Co., a report by the Australian Securities and Investments Commission has found.").

Dissenting Statement

A supplier may violate Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), if it engages in price discrimination that causes so-called “primary-line” injury. Primary-line injury under the statute occurs when a difference in price causes harm to competition between *suppliers*. A case predicated on primary-line injury to Burns Philp or other suppliers of spices would require proof that the discriminatory prices that McCormick charged grocery stores were below cost and that McCormick had a reasonable prospect of recouping its losses. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In other words, primary-line injury to suppliers is actionable only when there is a threat of ultimate injury to buyers. The Commission’s complaint does not allege that McCormick engaged in price discrimination that caused primary-line injury to suppliers such as Burns Philp.

Instead, after more than three years of investigation and the commitment of substantial resources, the majority of the Commission has alleged that McCormick engaged in price discrimination that caused “secondary-line” injury, *i.e.*, harm to competition between *buyers*. Specifically, out of McCormick’s more than 2,000 contracts, the complaint alleges that in five instances McCormick charged higher prices to certain grocery stores than it charged to their competitors. (Complaint ¶ 12). The higher prices that the disfavored grocery stores paid McCormick for spices allegedly harmed their ability to compete against other grocery stores for customers. (*Id.* ¶ 19).

The majority statement conveys the impression that there was actual secondary-line injury in this case. But the Commission does not rely on direct evidence of secondary-line injury to the disfavored grocery stores. Rather, the Commission relies on the so-called “*Morton Salt* inference” of competitive harm. (*Id.* ¶ 17). For more than 50 years, courts have used the *Morton Salt* inference that “injury to competition is established prima facie by proof of a substantial price discrimination between competing

Dissenting Statement

purchasers over time.”⁴ In essence, the *Morton Salt* inference permits a court to infer injury to a disfavored purchaser from a persistent and substantial discriminatory price in a market where profit margins are low and competition is keen, and then to infer injury to competition from the injury to the disfavored purchaser.

We question whether the facts in this case support the application of the *Morton Salt* inference. The Robinson-Patman Act was primarily intended to prevent price discrimination in favor of large buyers at the expense of small buyers.⁵ When a small buyer pays more than a large buyer for an item in an industry with low profit margins and keen competition, the *Morton Salt* inference may make sense. In such circumstances, it is reasonable to infer that the purchasing power of the large buyer will cause the price discrimination to be repeated across many items, with consequent competitive injury to the small buyer.

The complaint does not allege that the favored grocery stores were larger than the disfavored grocery stores⁶ or that they purchased more spices from McCormick. Since the favored stores here were not necessarily purchasing larger quantities of spices than the disfavored stores, it is unlikely that McCormick

⁴ *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (citing *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46, 50-51 (1948)).

⁵ In enacting the Robinson-Patman amendments, the Congress addressed the concern that large buyers could secure a competitive advantage over small buyers solely because of the large buyers' quantity purchasing ability. H.R. Rep. No. 2287, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 4-6 (1936).

⁶ To the extent that the majority tries to suggest that the disfavored stores are “mom-and-pop” operations, in fact only one of the disfavored stores could be so characterized; the rest of the disfavored stores are all large or relatively large grocery store chains.

Dissenting Statement

granted lower prices to the favored grocery stores because of their buying power. In fact, the most plausible explanation for the lower prices granted in the five instances alleged in the complaint is that they were the almost fortuitous and incidental result of McCormick's responses during its price war with Burns Philp. If the favored stores were not accorded lower spice prices because of their buying power, there is little reason to believe that the favored stores generally would receive lower prices from the suppliers of the thousands of products sold in the typical grocery store. It follows that it is unlikely that the ability of the disfavored grocery stores to compete with favored stores would be harmed – the underlying rationale for use of the *Morton Salt* inference.

The Commission is not relying on the *Morton Salt* inference *by itself* to support bringing a case. The use of the *Morton Salt* inference in this case is considered to be particularly appropriate because McCormick is the largest supplier of spices in the United States and because the company typically demanded that grocery stores allocate to McCormick a large majority of the shelf space they devoted to spices. See Complaint ¶¶ 6, 10, 18. Although we share the majority's apparent view that the public interest generally would be better served if the Commission did not bring Robinson-Patman cases based only on the *Morton Salt* inference, the majority has not identified additional facts that warranted bringing this case.

McCormick's alleged market power as a supplier and its alleged discriminatory prices may have harmed the ability of Burns Philp and other suppliers to compete with McCormick. But this does not make it any more plausible that McCormick's alleged discriminatory prices harmed the ability of the *disfavored grocery stores* to compete with the *favored grocery stores*.

In the long run, if McCormick's pricing has harmed the ability of Burns Philp or other suppliers to compete, the loss of alternative suppliers would harm *both* the disfavored grocery stores *and* the favored grocery stores (once their present contracts with McCormick expire). A loss of alternative suppliers is a

Dissenting Statement

classic consequence of primary-line injury, but such a loss does not necessarily have a *differential* impact on buyers that will cause secondary-line injury -- the relevant level of commerce in this case.⁷

We recognize that there has been much controversy over the years concerning the use of the *Morton Salt* inference and that the inference has not been uniformly applied.⁸ Overall, the concern has been that the inference makes violations too easy to prove.⁹ It is laudable that the majority has tried to limit the use of the *Morton Salt* inference. We do not believe, however, that evidence of *supplier* market power justifies bringing cases in which the *Morton Salt* inference is used as the basis to prove competitive harm among *buyers*.¹⁰ Because the majority has no other basis on which to show secondary-line competitive injury in this case, we dissent.¹¹

⁷ We do not suggest that market power of the supplier is irrelevant in a Robinson-Patman Act case – in fact, it is likely to be present in all cases of economic price discrimination. However, supplier market power is not dispositive of whether secondary-line injury is likely to have occurred. Our agreement with the majority that McCormick is the dominant spice seller does not overcome the lack of proof of secondary-line injury in this case.

⁸ See ABA Section of Antitrust Law, Antitrust Law Developments 450-51 (4th ed. 1997).

⁹ See, e.g., LaRue, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule Be Retired?*, 48 S.M.U.L. Rev. 1917 (1995).

¹⁰ As noted above, McCormick's alleged discriminatory prices were offered during a price war with its main competitor. We assume without deciding that a "meeting competition" defense under the Robinson-Patman Act would not have insulated McCormick from liability.

¹¹ We do recognize that the narrowly circumscribed order would be appropriate in a proper secondary-line case.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order from McCormick & Company, Incorporated ("McCormick"), the world's largest spice company, that is designed to resolve claims, set forth in the accompanying Complaint, that McCormick discriminated in the pricing of its products to certain competing supermarket purchasers in violation of Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a). The Consent Order requires McCormick to refrain from unlawfully discriminating in the prices at which it sells its products to competing purchasers in the supermarket channel. In addition, in those instances in which McCormick believes that its pricing is lawful because its prices were offered to meet competition from a competing supplier, the Consent Order requires McCormick, for a period of ten years, to contemporaneously document the information on which it bases its entitlement to the statutory "meeting competition" defense.

The proposed Consent Order has been placed on the public record for 30 days so that the Commission may receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed Consent Order.

McCormick's Business. McCormick, with its principal office and place of business in Sparks, Maryland, has been engaged for many years in the production, distribution and sale of spice and seasoning products for resale. Its products sold through supermarkets include core and gourmet spice lines, dry seasoning mixes, and so-called "competitive seasonings" such as meat tenderizers, monosodium glutamate (MSG), and garlic and other spice blends. Respondent sells these products under the brand names McCormick, Schilling, Fifth Seasons, Spice Classics, Select Seasons, Mojave, Spice Trend, Royal Trading, Crescent,

Analysis to Aid Public Comment

McCormick Schilling, La Cochina De McCormick, McCormick Collection and Old Bay, among others. With 1998 retail sales of \$623.7 million in the Americas, McCormick is the largest supplier of spice and seasoning products in the United States, and claims to be “the world’s largest spice company.”

Among those firms that supply core or gourmet spice lines for sale in supermarkets in the United States, McCormick is by far the leading firm, accounting for the majority of such sales nationally. Since the early 1990’s, McCormick has faced competition in such sales from only one other national firm, Burns Philp Food Incorporated, and several much smaller independent regional or local firms. These circumstances, combined with the superior brand recognition of McCormick products, mean that supermarkets that purchase McCormick products have relatively few alternative sources for equivalent products from other suppliers at comparable prices and terms.

McCormick’s Pricing. During the period pertinent to the Complaint, McCormick had a single national price list for its products sold to direct customers, whether retail supermarkets or wholesalers reselling to independent supermarkets. McCormick modified this price list from time to time, to reflect changes in McCormick’s costs to manufacture particular products, among other reasons. However, relatively few McCormick customers paid the list price. Instead, McCormick commonly entered into written or unwritten supply agreements with customers that provided substantial discounts off the list prices. These discounts took a variety of forms, including cash payments at the commencement of the supply agreement, free goods, off-invoice discounts, cash rebates, performance funds and other financial benefits that effectively reduced the net price of McCormick’s products. Typically, McCormick individually negotiated with particular customers the amount of discounts and payments; the aggregate percentage of discounts and benefits provided to a

particular customer was commonly known as the “allowance offer” or the “deal rate.” McCormick’s aggregate discounts and financial benefits to some customers were substantially greater than to some other competing customers.

Frequently the McCormick discounts included up-front cash payments that resembled the payments sometimes called “slotting allowances” in the supermarket industry. However, the McCormick discounts and payments typically were for all or a substantial part of the existing McCormick product line and typically were not incentives to accept new McCormick products. McCormick’s supply agreements with customers commonly include provisions that, as is sometimes seen with slotting allowances, restrict supermarket customers’ ability to deal in the products of competing spice suppliers. Such provisions commonly require that the customer allocate to McCormick the large majority (as much as 90%) of the shelf space devoted to spice products.

Price Discrimination. The Complaint alleges that in the period from at least 1994 to the present, McCormick has on no fewer than five instances discriminated in price by providing different deal rates consisting of preferential up-front “slotting”-type payments or allowances, discounts, rebates, deductions, free goods, or other financial benefits. Through such discriminatory terms of sale, McCormick sold its products to the favored purchasers at a lower net price than to the disfavored purchasers, in violation of Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a).

The Complaint alleges that, in each instance of discrimination, McCormick made contemporaneous sales of McCormick products of like grade and quality to a favored and a disfavored purchaser; the disfavored purchaser competed with the favored purchaser which resold respondent’s products at the same level of distribution; and at least one of the discriminatory sales by McCormick involved commodities that crossed state lines. The Complaint also alleges that each of the spice and seasoning

Analysis to Aid Public Comment

products that make up McCormick's product line is a commodity within the meaning of the statute.

The Complaint alleges that McCormick's price discrimination threatened injury at the "secondary line" level of competition, that is, at the level of the favored and disfavored purchasers. It alleges that each instance of discrimination involved a substantial price difference over a substantial period of time between competing purchasers in markets where profit margins are low and competition is keen. These circumstances give rise to an inference of competitive harm within the meaning of the statute, pursuant to the reasoning of the Supreme Court in Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 50-51 (1948), and subsequent cases. While that inference may not be sufficient, by itself, in some circumstances to warrant bringing a case, in this instance the inference is strengthened by McCormick's position as the largest supplier of spice and seasoning products in the United States and by the fact that McCormick typically demanded that customers allocate to McCormick the large majority of the space devoted to spice products -- in some cases 90% of all shelf space devoted to packaged spices, herbs, seasonings and flavorings of the kinds offered by McCormick. As alleged in the Complaint, disfavored purchasers consequently had few, if any, alternative sources from which to purchase comparable goods at prices and terms equivalent to those which McCormick provided to the favored purchasers.

The Complaint also alleges that the favorable prices and terms McCormick provided to the favored purchasers were not justified by good faith attempts to meet the equally low price of a competitor; nor were the favorable prices justified by cost savings associated with doing business with the favored retailer. The instances of price discrimination were therefore not within the scope of either the statutory "meeting competition" or "cost justification" defenses established by Sections 2(a) and (b) of the

Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a) and (b).

The Order Provisions. The Consent Order provides relief for the violations alleged in the Complaint. The Order applies to McCormick's sale of products, broadly defined to include spices, seasonings and other products used to season or flavor foods, packaged for sale to consumers. The Consent Order does not apply to products packaged for sale to food service or industrial customers, which are beyond the scope of the conduct at issue in the Complaint. Order, ¶ I.B. The Order applies to McCormick's sales to persons or entities that purchase McCormick products for resale. Order, ¶ I.C.

The principal relief is contained in Paragraph II of the Consent Order, which requires that McCormick cease and desist from price-discriminating, within the meaning of Section 2(a) of the Robinson-Patman Act, by selling its products to any purchaser at a net price higher than that charged to any competing purchaser, where the discrimination may cause competitive harm as contemplated by the statutory language. "Net Price" is defined as the list price of McCormick Products less advances, allowances, discounts, rebates, deductions, free goods and other financial benefits provided by McCormick and related to such products. Order, ¶ I.D.

The inclusion of competitive harm language in Paragraph II ensures that the remedy established by the Consent Order is not over-broad and does not enjoin instances of price discrimination otherwise lawful under the statute. This paragraph also includes a proviso that makes applicable under the Order the statutory defenses set forth in Sections 2(a) and (b) of the Robinson-Patman Act, thus accomplishing explicitly what otherwise would be implicit pursuant to the Supreme Court's decision in Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 475-78 (1952).

As further relief, Paragraph III orders that for each instance in which McCormick wishes to avail itself of the "meeting

Analysis to Aid Public Comment

competition” defense of Section 2(b) of the Robinson Patman Act,¹ McCormick is required to contemporaneously document all information on which it bases its entitlement to the defense, and to retain such documentation in its files for five years after the lower price made to meet competition is no longer effective. This provision is “fencing-in” relief² that should ensure the existence of a reliable evidentiary basis in future instances where McCormick invokes the defense.

In addition to these principal relief provisions, the Consent Order requires that McCormick distribute a copy of the Order to all officers, employees, brokers, and agents of its operating divisions involved in the sale of products covered by the order, and in the future to new employees, brokers, and agents. Order, ¶ IV. McCormick is required to inform the Commission of corporate changes that may affect its compliance obligations under the Order (Order, ¶ V), and to file reports concerning its compliance under the Order (*id.*, ¶ VI). The term of the Order is twenty years (*id.*, ¶ VII); the obligations under ¶ III to document the “meeting competition” defense and under ¶ VI to file annual compliance reports extend for ten and five years, respectively.

The purpose of this analysis is to facilitate public comment on the proposed Consent Order, and it is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify in any way their terms.

¹ Section 2(b) of the Robinson-Patman Act permits a seller to rebut a prima-facie case of price discrimination by showing that his lower price “was made in good faith to meet an equally low price of a competitor.” 15 U.S.C. §13(b).

² See Federal Trade Commission v. National Lead Co., 352 U.S. 419, 430 (1957).

Complaint

IN THE MATTER OF

MOTOR UP CORPORATION, INC., ET AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT**

Docket D-9291; File No. 9723034
Complaint, April 8, 1999--Decision, May 3, 2000

This consent order addresses representations by Respondents Motor Up Corporation, Inc., Motor Up America, Inc, and Kyle Burns, individually and as an officer of Motor Up Corporation, Inc. Regarding its products ability to improve performance over just motor oil. The order prohibits Respondent from making any engine treatment, fuel treatment, motor oil, grease, transmission fluid, or break fluid, and any additive intended to be used with or substituted for any of these products, unless they can support the claim with competent and reliable evidence. Respondent is also prohibited from misrepresenting in advertising the existence, contents, validity, results, conclusions, or interpretations of any studies on its product and its performance. In addition, Respondent is prohibited from providing false demonstrations, pictures, experiments, illustrations, or tests of an engine oil additive or similar product.

Participants

For the Commission: *Edwin Rodriguez, Jonathan Cowen, Robert M. Frisby, Mary K. Engle, Elaine D. Kolish, Keith B. Anderson, Gerard R. Butters, and Paul A. Pautler.*

For the Respondents: *Steven Fellman and Ira Kasdan, Galland, Kharasch, Morse & Garfinkle, and Edward Glynn, Venable, Baetjer, Howard & Civiletti.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Motor Up Corporation, Inc. and Motor Up America, Inc., corporations, and Kyle Burns, individually and as an officer of Motor Up Corporation, Inc. ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing