APPENDIX A

(C–1217) Standard Toykraft, Inc., "Petal Craft."
(C–1218) Pressman Toy Corp., "Loomatic."
(C–1219) Remco Industries, Inc., "Chemistry Science Kit."
(C–1220) Avalon Manufacturing Corp., "Paint on Color Velvet."
(C–1221) H. Davis Toy Corp., "Barrettes."
(C–1222) Lisbeth Whiting Co., Inc., "Bingle Bangle Hat."
(C–1223) Hassenfeld Bros., Inc., "Mary Poppins."
(C–1224) E. S. Lowe Co., Inc., "Hoodwink."
(C–1225) Ideal Toy Corp., "Snoop."
(C–1226) Kohner Bros., Inc., "Doll Craft."

IN THE MATTER OF

KING DISTRIBUTING COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C–1227. Complaint, June 26, 1967—Decision, June 26, 1967

Consent order requiring a Minneapolis, Minn., distributor of vending machines to cease misrepresenting that prospective purchasers will be specially selected, that their earnings will be any certain amount, that they will be given sales assistance, that the seller is a charitable institution, that purchasers will have exclusive territories and making other deceptive claims in selling its machines and supplies.

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 King Distributing Company, a corporation, and Richard J. Kennedy, individually and as an officer of said corporation, hereinafter referred to as respondents, have 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 King Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business located at 2500 39th Avenue, NE., Minneapolis, Minnesota.

Respondent Richard J. Kennedy is an individual and is an officer of King Distributing Company, and its principal stockholder. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of vending machines to the public.

PAR. 3. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused, their said vending machines and the supplies and equipment for use in connection therewith, when sold, to be shipped from the respective places of business of either the respondents, the supplier or the manufacturer thereof in the State of Minnesota to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said business, and for the purpose of inducing the purchase of their products, respondents advertise and offer the same for sale by means of advertisements in local newspapers.

Typical and illustrative, but not all inclusive of said advertisements, are the following:

BUSINESS OPPORTUNITY

For man or woman from this area to service and collect from coin-operated dispensers. We establish route. Car and references desirable. Party must have cash capital of $985.00. Good potential earnings part-time; full-time more. For personal interview, give phone number, etc. Write to: KING DISTRIBUTING CO., 7190 RIVERVIEW TERRACE, MINNEAPOLIS 32, MINNESOTA.

BUSINESS OPPORTUNITY

Man or woman in this area to own and operate a route of machines distributing nationally advertised products. We establish route, car and references desirable, minimum investment $985.00 required. Good opportunity for spare time income, or full time business. Write KING DISTRIBUTING CO., 3710 Central Avenue, Minneapolis, Minnesota 55421, include phone.

Business Opportunity—this area to own and operate a route of machines distributing nationally adv. products. We establish route, car and references desirable, minimum investment $985.00. King Dist. Co., 3710 Central Ave., Minneapolis, Minn., 55421. Include phone number.

VERY PROFITABLE!

Earn up to $10.00 per hour in your spare time: Service and collect from your own route of coin operated units. No selling; we establish all routes;

car and references desirable. Investment of $985.00 to $1,785.00 required. For personal interview in your area, write King Dist. Co., 2500 39th Ave. NE., Minneapolis, Minn. 55421. Include phone number.

Respondents employ sales agents or representatives in connection with their business who call on prospective purchasers responding to the foregoing and other advertisements. Respondents furnish advertising and promotional material and order blanks to said persons who exhibit them to prospective purchasers during the course of oral sales solicitations.

PAR. 5. By and through the use of the aforesaid advertising statements and representations and others of similar import and meaning, but not specifically set forth herein, and by means of said oral statements and representations made by respondents or their representatives, respondents represent, and have represented, directly or by implication that:

1. Respondents are making a bona fide offer to sell established businesses to persons who respond to their advertisements.

2. Purchasers of respondents' products must own an automobile, furnish references, have special qualities or be specially selected to qualify for purchase of respondents' products.

3. Persons who purchase respondents' products will not be required to engage in any type of selling activity.

4. Respondents grant exclusive territories to purchasers for the location of their vending machines and sales of respondents' machines will not be made to other persons in such territories.

5. Respondents' vending machines have a market value ranging from $50 to $100 each, or that the price at which respondents offer their vending machines is less than their fair market value.

6. Vending machines purchased from respondents will produce a net income of $9 per machine every 10 to 14 days; purchasers of said machines can reasonably expect a return of their investment of $985 from profits earned from the operation of 10 machines within a period of six to seven months; and one can reasonably expect an income ranging from $400 to $600 a month from the operation of fifteen machines, all in the ordinary and usual course of business and under normal conditions and circumstances and on the routes established by respondents.

7. Sales routes have been previously established by respondents for said purchasers; that satisfactory and profitable locations have been, or will be, secured for the purchaser; and that respondents will relocate the machines if the original locations are unsatisfactory.

8. Purchasers will be provided with continuing advice and as-

sistance by respondents in connection with the operation of said machines.

9. Persons who have previously purchased respondents' machines were making substantial earnings from the operation.

10. Machines purchased from respondents were of a specific structural type and had a specific capacity.

11. Respondents will repurchase machines at any time if the purchasers are not satisfied with the vending machine business.

12. Respondents are a nut and candy company and are seeking to establish future markets for said products and in so doing sell machines to purchasers at or near cost.

13. Respondents' prices for nuts and candies were 7% below normal wholesale prices in order to reimburse purchasers for freight charges on the delivery of said merchandise.

14. United Crippled Children Fund is a charitable institution similar in structural organization to other established charities engaged in research activities; said Fund is engaged in research activities for the prevention of children's diseases; and that said Fund is independent of and unconnected with respondents.

PAR. 6. In truth and in fact:

1. Respondents are not making a bona fide offer to sell established businesses to persons responding to their advertisements. Their sole purpose is to sell their vending machines and vending machine supplies and equipment to such persons.

2. It is not necessary for purchasers of respondents' products to own an automobile, to furnish references, have special qualities or be specially selected to qualify for purchase of respondents' products. The only requirement is that the purchase price be paid.

3. Persons who purchase said products are required to engage in extensive selling or soliciting in order to establish, operate and maintain locations for said products.

4. Purchasers of respondents' products are not granted exclusive territories within which machines purchased by them may be placed and operated, and sales of machines are made to other parties in said territories.

5. Respondents' vending machines do not have a market value ranging from $50 to $100 each but are regularly sold in the open market at prices that are substantially lower; and the price at which respondents offer their vending machines is not less than their fair market value.

6. $9 per machine is greatly in excess of the net sum that can be expected by purchasers of said machines every 10 to 14 days; purchasers do not regain their investment of $985 from net in-

come earned from the operation of 10 machines within a period of six to seven months; and amounts of $400 to $600 a month are greatly in excess of the net income purchasers make from the operation of fifteen machines. In most instances, persons who purchase respondents' products and engage in said vending machine business make little or no profit.

7. Neither respondents nor their agents have established sales routes for the purchasers prior to the purchase of respondents' machines, and in those instances where respondents' agents do locate or assist in locating the machines for the purchasers, the locations are generally found to be unsatisfactory and unprofitable. Respondents do not relocate machines for purchasers.

8. Respondents do not provide continuing advice and assistance to purchasers of their machines.

9. In most instances, persons who purchased respondents' products and engaged in said vending machine business did not make substantial earnings but made little or no profit.

10. Purchasers frequently find, upon delivery, that the machines sold to them by respondents are of a different structural design, or type, and of a smaller capacity than represented.

11. Respondents will not repurchase the machines sold by them in the event the purchasers are not satisfied or for any other reasons.

12. Respondents are not a nut and candy company seeking to establish future markets for said products but are primarily engaged in the sale of vending machines for profit.

13. Respondents' prices for nuts and candies are not seven percent below the normal wholesale prices and do not compensate purchasers for freight charges upon the delivery of said merchandise.

14. United Crippled Children Fund is not a charitable institution similar in structural organization to other established charities engaged in research activities; said Fund is not engaged in research activities for the prevention of children's diseases but is merely an organization of five persons established by respondents that makes charitable donations; and said Fund is not wholly independent of and unconnected with respondents who receive a percentage of all monies collected for said Fund as a fee for managing said Fund.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of the same or similar products.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in 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 the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent King Distributing Company, is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Minnesota, with its office and principal place of business located at 2500 39th Avenue, NE., Minneapolis, Minnesota.

Respondent Richard J. Kennedy is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents King Distributing Company, a corporation, and its officers, and Richard J. Kennedy, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of vending machines, vending machine supplies, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that established businesses are being offered for sale by respondents to persons who respond to their advertisements; or misrepresenting, in any manner, the nature of any business opportunity offered by any respondent.

2. Representing, directly or by implication, that purchasers of respondents' products must own an automobile, furnish references, have special qualities or be specially selected to qualify for purchase of respondents' products; or misrepresenting, in any manner, the qualifications or requirements for purchase of respondents' products.

3. Representing, directly or by implication, that selling or soliciting is not required of those investing in any product or business; or misrepresenting, in any manner, the amount of selling or soliciting required in connection with any business.

4. Representing, directly or by implication, that purchasers of respondents' products are granted exclusive territories within which their machines may be placed for operation or that sales will not be made to other persons in such territories: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that any exclusive territories granted by them are, in fact, in accordance with any represented offer.

5. Representing, directly or by implication, that the price at which respondents offer their vending machines is any amount or percentage less than their fair market value in the vicinity of their anticipated use; or misrepresenting, in any manner, the prices or fair market value of respondents' products in the vicinity of their anticipated use.

6. Representing, directly or by implication, that persons investing in any product or business offered by respondents will have profits or any percentage of profit or will earn any amount of income: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that any represented percentage of profit or any represented amount of income or profit is the percentage or amount generally realized by previous purchasers of such products or businesses as a result of such a purchase.

7. Representing, directly or by implication, that sales routes have been previously established by respondents for purchasers, or that respondents or their sales representatives have obtained or will obtain satisfactory or profitable locations for the purchaser's machines, or that respondents will relocate said machines; or misrepresenting, in any manner, the assistance that will be furnished in obtaining locations for the product or the business purchased.

8. Representing, directly or by implication, that purchasers of respondents' vending machines are given continuing advice and assistance in the operation of the machines: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such advice and assistance are actually furnished.

9. Representing, directly or by implication, that previous purchasers of respondents' vending machines are enjoying substantial earnings from the operation of said machines.

10. Representing, directly or by implication, that vending machines sold by respondents are of a specific structural design or type or of a specific capacity: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the machines sold are of the structural design or type and have the capacity represented.

11. Representing, directly or by implication, that respondents will repurchase vending machines or supplies

from purchasers thereof who are dissatisfied with the vending machine business.

12. Representing, directly or by implication, that respondents are a nut and candy company, or are seeking to establish future markets for said products, or are selling machines to purchasers at or near cost to establish a market for their nuts, candies or other products; or misrepresenting, in any manner, the kind or character of the business of any respondent or any company represented by any respondent.

13. Representing, directly or by implication, that respondents' prices for nuts or candies or any other product are seven percent or any other percentage or stated amount below normal wholesale prices: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that their prices are, in fact, any represented or stated percentage or amount below normal wholesale prices.

14. Representing, directly or by implication, that the United Crippled Children Fund is similar in organization to other established charities engaged in research activities, or that United Crippled Children Fund is a charitable fund engaged in research activities for the prevention of children's diseases or that United Crippled Children Fund is wholly independent of or unconnected with respondents; or misrepresenting, in any manner, the nature or kind or function of or the past or present relationship with any organization sponsoring, or affiliated with, any respondent.

15. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of the respondents' said products to purchasers; and failing to secure from each such person a signed statement acknowledging receipt of said order and agreeing to abide by the requirements of said order and to refrain from engaging in any of the acts or practices prohibited by said order; and for failure to do so, agreeing to dismissal or to the withholding of commissions, salaries and other remunerations or both to dismissal and to withholding of commissions, salaries and other remunerations.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

SOL TAMNY CO., INC., TRADING AS
DUFFIELD CLOTHES ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-1228. Complaint, June 26, 1967—Decision, June 26, 1967

Consent order requiring a New York City clothing manufacturer to cease misbranding its wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sol Tamny Co., Inc., a corporation, trading as Duffield Clothes, and Sol Tamny, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Sol Tamny Co., Inc., trading as Duffield Clothes, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Sol Tamny is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of wool products with their office and principal place of business located at 104 Fifth Avenue, New York, New York.

PAR. 2. Respondents now, and for some time last past, have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce, as "commerce" is defined in said Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a) (1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain coats stamped, tagged, labeled, or otherwise identified as containing "100% Wool" whereas, in truth and in fact, said coats contained a substantial amount of fibers other than wool.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a) (2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain coats with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool when said percentage by weight of such fiber was 5 per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in 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 the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Acts, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sol Tamny Co., Inc., trading as Duffield Clothes, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 104 Fifth Avenue, in the city of New York, State of New York.

Respondent Sol Tamny is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Sol Tamny Co., Inc., a corporation, trading as Duffield Clothes, or under any other name or names, and its officers, and Sol Tamny, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to or place thereon a stamp, tag, label, or other means of identification correctly showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

LEE ROGERS DOING BUSINESS AS S.I. RESEARCH COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C–1229. Complaint, June 26, 1967—Decision, June 26, 1967

Consent order requiring a Los Angeles, Calif., distributor of health pamphlets to cease using deceptive advertising in the sale of his publications.

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 Lee Rogers, an individual, doing business under the name and style of S.I. Research Company, hereinafter referred to as the 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 Lee Rogers is an individual doing business under the name and style of S.I. Research Company, with his principal office and place of business located at 8833 Sunset Boulevard, Los Angeles, State of California.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of a four page pamphlet, entitled "Surgical Techniques for Breast Enlargement," compiled by S.I. Research Company. This pamphlet very briefly described how the female breast may be enlarged by means of silicone breast implants and silicone injections both of which are surgical operations and neither of which can be legally performed by other than a duly qualified and licensed physician, or surgeon.

PAR. 2. Respondent causes the said pamphlet when sold to be shipped from his place of business in the State of California to purchasers thereof located in various other States of the United

States and in the District of Columbia and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said pamphlet in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of his aforesaid business, respondent has disseminated and has caused to be disseminated certain advertisements concerning the said pamphlet by the United States mails and various means in commerce, as "commerce" is defined in the Federal Trade Commission Act including, but not limited to, magazines and tabloids of general circulation, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said pamphlet; and respondent has disseminated and caused the dissemination of advertisements concerning the said pamphlet by various means including, but not limited to, the aforesaid media for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said pamphlet in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. A typical advertisement, containing the statements and representations set forth follows:

> *Learn How New Research Development*
>
> ADDS INCHES TO
> THE BUSTLINE!
> MONEY BACK GUARANTEE
>
> AT LAST! women are taking advantage of a major medical breakthrough to beautify and enlarge their bust size!
>
> YOU WILL BE AMAZED as you read how successful new technique has enlarged and beautified the bustline of movie actresses and showgirls.
>
> DON'T WASTE hard-earned money on creams, exercises and so-called remedies that do not work.
>
> ACT NOW! Mail this no-risk coupon today! —
> *S.I. RESEARCH Dept. 0000*
> *6311 Yucca St., Hollywood, Calif. 90028*
>
> YES! I would like to learn about new research development (sent in plain wrapper) which has enlarged and beautified the bustlines of movie actresses and showgirls. I enclose $2.98. I understand there is a 100% money back guarantee.
>
> Name ....
> Address ....
> City ....
> State .... Zip ....

PAR. 5. By and through the use of the statements contained in the aforesaid advertisements, and others similar thereto but not specifically set out herein, respondent has represented and is now representing, directly and by implication, that he is selling a product, a program of exercises or some other usable technique by the use of which the purchaser will, through her own efforts, be able to add inches to her bust. Said advertisements further represent that this is a new and scientifically developed product, set of exercises, or other usable technique which the respondent developed or was responsible for developing, and that this was developed in a research laboratory owned and/or operated by the respondent.

PAR. 6. In truth and in fact the respondent does not sell a product, set of exercises or other usable technique capable of increasing the female bust; rather, he sends to the purchaser a four page leaflet indicating that there are two surgical approaches involving the use of silicone inserts and silicone injections which may or may not be effective, or safe to undergo, and that the purchaser should consult her physician; he does not sell a product or set of exercises or other usable technique for increasing the size of the female bust which is new or scientifically developed by him or at his direction nor does he own and/or operate a research laboratory.

Therefore, the advertisements referred to in Paragraph Five herein are misleading in material respects and constituted and now constitute false advertisements as the term "false advertisements" is defined in the Federal Trade Commission Act.

PAR. 7. Dissemination by the respondent of the false statements, as aforesaid, constituted and now constitutes unfair and deceptive acts and practices, in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, 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 set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Lee Rogers is an individual doing business under the name and style of S.I. Research Company, with his principal office and place of business located at 8833 Sunset Boulevard, Los Angeles, California.

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

It is ordered, That the respondent Lee Rogers, an individual, doing business under the name and style of S.I. Research Company, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of his pamphlet entitled "Surgical Techniques for Breast Enlargement" or any other pamphlet or publication whether sold under the same name or any other name, do forthwith cease and desist from, either directly or indirectly:

1. Disseminating, or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement:

(a) Which represents directly or by implication: that the techniques set forth or referred to in his pamphlet entitled "Surgical Techniques for Breast Enlargement" or in any other pamphlet or publication containing substantially similar techniques, will cause or contribute to an increase in the size of, or otherwise bring about any reshaping of the female bust unless it is clearly, conspicuously and prominently disclosed that such procedures and/or techniques (1) cannot be utilized by the layman, and (2) can only be administered by a physician or surgeon.

(b) Which represents directly or by implication: that the respondent is engaged in scientific or medical research or that he owns, maintains or operates a scientific or medical research facility.

(c) Which represents directly or by implication: that the respondent has developed a new or revolutionary procedure, technique, product or device which is capable of enlarging or reshaping the female breast; or which misrepresents in any manner the capability or efficacy of any procedure, technique, product or device to enlarge or reshape the female breast.

(d) Which uses the word "Research" or any other word or words of similar import, in his trade or business name or in any other manner.

(e) Which misrepresents in any manner the nature of respondent's business, or the efficacy or capability of any product or device or any of the procedures or techniques used in connection therewith.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondent's pamphlet, publication or product in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited in paragraph 1 hereof.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

Commissioner Elman not concurring in the issuance of complaint.

IN THE MATTER OF

HERMAN SOMERSTEIN TRADING AS AMY-JOY NOVELTY COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1230. Complaint, June 26, 1967—Decision, June 26, 1967

Consent order requiring a New York City manufacturing furrier to cease misbranding and falsely invoicing his fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Herman Somerstein, an individual trading as Amy-Joy Novelty Company, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Herman Somerstein is an individual trading as Amy-Joy Novelty Company.

Respondent is a manufacturer of fur products with his office and principal place of business located at 365 Seventh Avenue, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in any such fur product.

2. To show that the fur products were composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such was the fact.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The disclosure that fur products were composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur, where required, was not set forth on labels, in violation of Rule 20 of said Rules and Regulations.

(b) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show that the fur products contained or were composed of used fur, when such was the fact.

2. To disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To show that the fur products were composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such was the fact.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) The disclosure that fur products were composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur, where required, was not set forth on invoices, in violation of Rule 20 of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in 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 the respondent that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondent has violated the said Acts, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Herman Somerstein is an individual trading as Amy-Joy Novelty Company, with his office and principal place of business located at 365 Seventh Avenue, New York, New York.

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

It is ordered, That respondent Herman Somerstein, an individual trading as Amy-Joy Novelty Company or any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding any fur product by:

1. Failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Failing to disclose on a label that such fur product is composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur.

3. Failing to set forth on a label the item number or mark assigned to such fur product.

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Failing to set forth the term "natural" as part of the information required to be disclosed on an invoice under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe such fur product which is not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Failing to disclose on an invoice that such fur product is composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur.

4. Failing to set forth on an invoice the item number or mark assigned to such fur product.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

SIDNEY BITTERMAN, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-1231. Complaint, June 26, 1967—Decision, June 26, 1967

Consent order requiring a New York City clothing manufacturer to cease misbranding its wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sidney Bitterman, Inc., a corporation, and Caroline Bitterman, Leonard Bitterman and Howard Bitterman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling 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 Sidney Bitterman, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Caroline Bitterman, Leonard Bitterman and Howard Bitterman are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of wool products with their office and principal place of business located at 240 West 37th Street, New York, New York.

PAR. 2. Respondents, now and for some time last past, have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were wool products stamped, tagged, labeled, or otherwise identified by respondents as "100% Wool," whereas in truth and in fact, said products contained substantially different fibers and amounts of fibers than as represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, was a wool product with a label on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool product, exclusive of ornamentation not exceeding 5% of the said total fiber weight, of (1) wool; (2) reprocessed wool: (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was 5% or more; and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in 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 the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Acts, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sidney Bitterman, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 240 West 37th Street, New York, New York.

Respondents Caroline Bitterman, Leonard Bitterman and Howard Bitterman are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Sidney Bitterman, Inc., a corporation, and its officers, and Caroline Bitterman, Leonard Bitterman and Howard Bitterman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture for introduction into commerce, the introduction into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

HOROWITZ & BIRNBACH, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1232. Complaint, June 26, 1967—Decision, June 26, 1967

Consent order requiring a New York City manufacturing furrier to cease misbranding its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Horowitz & Birnbach, Inc., a corporation, and Nathaniel Birnbach and Harry Birnbach, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Horowitz & Birnbach, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Nathaniel Birnbach and Harry Birnbach are officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of said corporate respondent.

Respondents are manufacturers of fur products with their office and principal place of business located at 146 West 29th Street, New York, New York.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder inasmuch as required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in 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 the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Acts, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Horowitz & Birnbach, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 146 West 29th Street, New York, New York.

Respondents Nathaniel Birnbach and Harry Birnbach are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Horowitz & Birnbach, Inc., a corporation, and its officers, and Nathaniel Birnbach and Harry Birnbach, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

Misbranding any fur product by:

(a) Representing, directly or by implication, on a label that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

(b) Failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

(c) Failing to set forth on a label the item number or mark assigned to such fur product.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MEIMAN MILLS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-1233. Complaint, June 27, 1967—Decision, June 27, 1967

Consent order requiring a Yantic, Conn., manufacturer of woolen yarn to cease misbranding and falsely guaranteeing its wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Meiman Mills, Inc., a corporation, and Sheldon Meiman, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Meiman Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its office and principal place of business located in Yantic, Connecticut.

Proposed individual respondent Sheldon Meiman is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of the corporate respondent.

Respondents are engaged in the purchase of wool and textile stock, blending and spinning such stock into yarns, and the sale of said yarns in interstate commerce.

PAR. 2. Respondents now, and for some time last past, have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale, in commerce, as "commerce" is defined in said Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were wool products, namely yarns, which contained substantially different amounts and types of fibers than were set forth on the labels thereto affixed.

Also among such misbranded wool products but not limited thereto, were wool products with labels using the word "Shetland" to designate, describe or refer to products not composed entirely of wool of Shetland sheep raised on the Shetland Islands or the contiguous mainland of Scotland.

PAR. 4. Certain of said wool products were misbranded within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder in that they were falsely and deceptively labeled with respect to the country of origin of such products.

Among such misbranded wool products but not limited thereto, were wool products labeled "100% Imported Shetland," whereas, in truth and in fact, most of the stock used in the manufacture of said products was obtained from domestic sources. Respondents by means of the aforedescribed labels falsely and deceptively represented, and contrary to fact, that the wool products to which they were attached originated on the Shetland Islands or the contiguous mainland of Scotland.

PAR. 5. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products with labels on or affixed thereto which failed to disclose the percentage of total fiber weight of the wool product, exclusive of ornamentation not exceeding five per centum of the total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool when said percentage by weight of such fiber was five per centum or more; and (5) the aggregate of all other fibers.

PAR. 6. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, in the following respects:

(a) The respective common generic names of fibers present in such wool products were not used in naming such fibers in required information, in violation of Rule 8 of said Rules and Regulations.

(b) Information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder was set forth on the stamp, tag, label, or other means of identification on or affixed to wool products, in abbreviated form in violation of Rule 9 of said Rules and Regulations.

(c) The term "mohair" was used in lieu of the word "wool" in setting forth required fiber content information on labels affixed to wool products, when certain of the fibers so described were not entitled to such designation, in violation of Rule 19 of the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939.

(d) The term "virgin" was used on a label affixed to a wool product when the wool product or the part thereof so described was not composed wholly of new or virgin wool which had never been used, or reclaimed, reworked, reprocessed or reused from spun, woven, knitted, felted, or otherwise manufactured or used products in violation of Rule 20 of said Rules and Regulations.

PAR. 7. Respondents have furnished false guaranties that certain of their wool products were not misbranded, when respondents in furnishing such guaranties had reason to believe that the wool products so falsely guarantied might be introduced, sold, transported, or distributed in commerce in violation of Section 9(b) of the Wool Products Labeling Act of 1939.

PAR. 8. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 9. Respondents are now, and for some time last past, have been engaged in the offering for sale, sale, and distribution of certain products, namely yarns. In the course and conduct of their business as aforesaid, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their place of business in the State of Connecticut to purchasers located in various other States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 10. Respondents in the course and conduct of their business have made statements on invoices to their customers, misrepresenting the fiber content of certain of their products.

Among such misrepresentations, but not limited thereto, were statements setting forth the fiber content thereof as "100% Shetland Wool," thereby representing the products to be composed entirely of wool of Shetland sheep raised on the Shetland Islands or the contiguous mainland of Scotland, whereas, in truth and in fact, the product was not 100% Shetland Wool, but contained substantially different fibers and amounts of fibers than represented.

PAR. 11. The acts and practices as set forth in Paragraph Ten have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in 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 the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Acts, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Meiman Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at Yantic, Connecticut.

Respondent Sheldon Meiman is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Meiman Mills, Inc., a corporation, and its officers, and Sheldon Meiman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products by use of the word "Shetland" or any simulation thereof, either alone

or in connection with other words, to designate, describe, or refer to any product which is not composed entirely of wool from Shetland sheep raised on the Shetland Islands or the contiguous mainland of Scotland.

2. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

3. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the country of origin.

4. Failing to securely affix to, or place on, each such product, a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

5. Failing to set forth the common generic name of fibers in naming such fibers in the required information on stamps, tags, labels, or other means of identification attached to such wool products.

6. Setting forth information required under Section 4(a) (2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in abbreviated form on stamps, tags, labels, or other means of identification on or affixed to wool products.

7. Using the term "mohair" in lieu of the word "wool" in setting forth the required information on labels affixed to wool products unless the fibers described as "mohair" are entitled to that designation and are present in at least the amount stated.

8. Using the term "virgin" as descriptive of a wool product or part of a wool product, when the part so described is not composed wholly of new or virgin wool which had never been used or reclaimed, reworked, reprocessed or reused from spun, woven, knitted, felted or otherwise manufactured or used products.

It is further ordered, That respondents Meiman Mills, Inc., a corporation, and its officers, and Sheldon Meiman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any wool product is not misbranded under the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, when there is any reason to believe that any wool product so guaranteed may be introduced, sold, transported or distributed in commerce.

It is further ordered, That respondents Meiman Mills, Inc., a corporation, and its officers, and Sheldon Meiman, individually and as an officer of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of yarns or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Shetland," or any simulation thereof, either alone or in connection with other words, to designate, describe, or refer to any product which is not composed entirely of wool of Shetland sheep raised on the Shetland Islands or the contiguous mainland of Scotland: *Provided, however*, That in the case of a product composed in part of wool of Shetland sheep and in part of other fibers or materials, such word may be used as descriptive of the Shetland wool content if there are used in immediate connection therewith, with at least equal conspicuousness, words truthfully describing such other constituent fibers or materials.

2. Misrepresenting the character or amount of constituent fibers contained in such yarns or other products on invoices, on shipping memoranda applicable thereto, or in any other manner.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

NATIONAL DAIRY PRODUCTS CORPORATION

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

Docket 8548. Amended Complaint, July 26, 1963—Decision, June 28, 1967

Order requiring a major food distributing corporation with headquarters in New York City to cease discriminating in price on a regional basis in the sale of its jellies, preserves and other food products.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that the party named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its amended complaint, stating its charges with respect thereto as follows:

COUNT I

Charging violation by National Dairy Products Corporation of subsection (a) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PARAGRAPH 1. Respondent named herein is National Dairy Products Corporation. Respondent is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 260 Madison Avenue, New York, New York.

PAR. 2. Respondent, through its Kraft Foods Division, for many years has been and is now extensively engaged in the business of manufacturing, processing, distributing, and selling various food products, including cheese and cheese products, margarine, mayonnaise, salad oil, "Miracle Whip" and other salad products, caramels, marshmallows, Kraft Dinners, and a complete line of jellies and preserves throughout the United States, Canada, and many foreign countries. Said respondent's total net sales of all products for the year 1960 exceeded $1,600,000,000 and its net sales have exceeded one billion dollars annually since 1951.

PAR. 3. Respondent's Kraft Foods Division sells and distributes jellies and preserves and its other products of like grade and quality to purchasers thereof located throughout the various States of the United States and in the District of Columbia for sale, consumption or resale therein.

Respondent's Kraft Foods Division maintains and operates branch sales offices in all principal cities of the United States and Canada from which it sells its said products to purchasers.

Kraft manufactures and processes jellies and preserves in three plants located at Buena Park, California; Garland, Texas; and Dunkirk, New York, from which said jellies and preserves are distributed by Kraft to purchasers located throughout the several States of the United States and the District of Columbia.

PAR. 4. In the course and conduct of its business, respondent is now, and for many years past has been, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed, and is now selling and distributing, its products to purchasers thereof located in States other than the State of origin of shipments and has, either directly or indirectly, caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States. There is now, and has been, a constant course and flow of trade and commerce in such products between said respondent in the State of origin and purchasers thereof located in other States and the District of Columbia.

Kraft has sales and distribution branches in all principal cities of the United States and Canada and said products are shipped and sold to purchasers with places of business located throughout the several States of the United States and the District of Columbia for resale to customers within the United States.

PAR. 5. Respondent, through its Kraft Foods Division, sells its jellies and preserves to retailers, cooperatives, wholesalers and other purchasers through company employed salesmen. Many of respondent's purchasers are in substantial competition with other purchasers of respondent.

Respondent, in the sale of its jellies and preserves to retailers, cooperatives, wholesalers and other purchasers, is in substantial competition with other manufacturers, processors, distributors and sellers of said products.

PAR. 6. In the course and conduct of its business in commerce, respondent has discriminated and is now discriminating in price in the sale of jellies and preserves by selling such products of like grade and quality at different prices to different purchasers.

Included in, but not limited to, the discriminations in price as above alleged, respondent has discriminated in price in the sale of said products to retailers, cooperatives, wholesalers and other purchasers in the Baltimore, Maryland, Washington, D.C., Richmond, Virginia, and Norfolk, Virginia trading areas by charging said retailers, cooperatives, wholesalers and other purchasers substantially lower prices than charged by said respondent for the sale of said products of like grade and quality to retailers, cooperatives, wholesalers and other purchasers located in the other of respondent's trading areas throughout the Nation.

PAR. 7. Respondent, through its Kraft Foods Division, has effected said discrimination between and among its customers in the manner and by the method hereinafter described.

During the first half of 1961 respondent sold to its purchasers, in the four aforementioned trading areas only, jellies and preserves on a buy one, get one free basis. For every case of said product purchased at the regular price respondent's Kraft Foods Division would deliver an additional case of said product free of charge. This discrimination amounts in effect to a 50% discount in price to the purchasers and is a substantially lower price than that price at which respondent sells said products to purchasers in other trading areas throughout the United States.

A sample comparison of respondent's net prices per case of jellies and preserves to purchasers in the various trading areas of respondent's "Eastern Division" other than the four aforementioned and described trading areas and the net prices per case of jellies and preserves to purchasers in the aforementioned four trading areas is hereinafter set forth:

Net price per case

Product	Eastern division (other than the Washington–Baltimore–Norfolk–Richmond trading areas)	Washington–Baltimore–Norfolk–Richmond trading areas
10 oz.:		
Apple Jelly	$2.00	$1.00
Apple-Mint Jelly	1.95	.875
Black Raspberry Jelly	3.30	1.65
Grape Jelly	2.25	1.125
Strawberry Jelly	3.15	1.575
12 oz.:		
Apricot Preserves	3.05	1.525
Blackberry Preserves	3.25	1.625
Cherry Preserves	2.67	1.575
Peach Preserves	3.05	1.525
Strawberry Preserves	3.27	1.875
20 oz.:		
Apple Jelly	3.30	1.65
Grape Jelly	3.65	1.825
Blackberry Preserves	4.75	2.375
Peach Preserves	4.45	2.225
Strawberry Preserves	5.95	2.975

In addition, respondent, in lieu of delivering the free goods due its customers as a result of purchases made on the buy one, get one free basis, paid many such purchasers in the aforementioned four trading areas an amount in cash equal to the normal list price per case of jellies and preserves. Said purchasers, to the extent that they received cash in lieu of merchandise, obtained an equivalent quantity of jellies and preserves absolutely free. In effect respondent, through its Kraft Foods Division, has given away a substantial quantity of jellies and preserves to its purchasers in the four aforementioned trading areas.

The above-described price discrimination and product giveaway was confined to the aforementioned four trading areas and was not granted by respondent in any of its other trading areas which span the Nation.

The above-described sales activity cost respondent in excess of $1,300,000. Respondent utilized its great size, geographical and product diversification, and great financial power to subsidize its losses in an effort to expand its sales at the expense of local, small, nonintegrated competitors. Respondent's small local competitors were not operating in a large number of markets; therefore, they were not in a position to subsidize sales at prices below cost in one market with funds secured from sales at higher prices in other markets as was respondent.

PAR. 8. The effect of such discrimination in price by respondent in the sale of jellies and preserves has been or may be substantially to lessen competition or tends to create a monopoly in the line of commerce in which said respondent is engaged, or to injure, destroy or prevent competition between respondent and its competitors in the manufacture, processing, distribution and sale of such products.

PAR. 9. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Charging violation by National Dairy Products Corporation of subsection (a) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PAR. 10. Paragraph One and subparagraph one of Paragraph Four of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PAR. 11. Respondent, through its Breakstone Foods Division, for many years has been and is now extensively engaged in the business of manufacturing, processing, distributing, and selling various dairy food products, including cottage cheese, cream cheese, and other soft cheeses, sour cream, yogurt, whipped butter, and other dairy specialties throughout the Eastern Seaboard and South Atlantic States of the United States from Massachusetts to Florida, including the District of Columbia.

PAR. 12. Respondent's Breakstone Foods Division sells and distributes yogurt and its other products of like grade and quality to purchasers thereof located throughout the various States of the Eastern and South Atlantic regions of the United States and in the District of Columbia for sale, consumption or resale therein.

Respondent's Breakstone Foods Division maintains and operates distributing branches in Somerville, Massachusetts; New Haven, Connecticut; Youngsville, Syracuse, and Walton, New York; Newark, New Jersey; Philadelphia, Pennsylvania; and Jackson, Tampa and Miami, Florida, from which it sells and distributes its said products to purchasers.

Breakstone manufactures and processes yogurt in plants located at Walton, New York and Youngsville, New York, from which said yogurt is distributed by Breakstone to purchasers located in various States of the United States and the District of Columbia.

PAR. 13. Respondent, through its Breakstone Foods Division, sells its yogurt and other dairy products to retailers, cooperatives, wholesalers and other purchasers through company employed salesmen.

Respondent, in the sale of its yogurt and other dairy products to said purchasers, is in substantial competition with other manufacturers, processors, distributors and sellers of said products.

PAR. 14. In the course and conduct of its business in commerce, respondent has discriminated and is now discriminating in price in the sale of yogurt by selling such products of like grade and quality at different prices to different purchasers.

Included among such sales at discriminatory prices were sales of yogurt to retailers, cooperatives, wholesalers and other purchasers in the New York metropolitan area at prices substantially lower than charged by said respondent for the sale of said products of like grade and quality to retailers, cooperatives, wholesalers and other purchasers located in the other of respondent's trading areas in the United States.

PAR. 15. Respondent, through its Breakstone Foods Division, has effected said discrimination between and among its customers in the manner and by the method hereinafter described.

For some time prior to May 1961, respondent sold its yogurt to retailers in the New York metropolitan area at a store-door price of 13¢ per half-pint container, plain, and 16¢ per half-pint container, flavored; and to jobbers and those retail chains which redistribute respondent's product to member stores from their own central warehouse at a price of 11¢ per half-pint, plain, and 14¢ per half-pint, flavored.

Beginning in May 1961, respondent lowered its yogurt prices in the New York metropolitan area by 3¢ per half-pint to its store-door customers and 2½¢ per half-pint to its jobber and warehouse customers, while continuing to sell said product in all other trade areas at prices which had existed for some time prior to May 1961.

In November 1961, respondent raised its yogurt prices to purchasers in all trade areas other than the New York metropolitan area. The price increase ranged from 1¢ to 1½¢ per half-pint container to jobber and warehouse customers and from 1¢ to 2¢ to store-door customers.

Thus, at all times since May 1961, respondent has sold its yogurt in the New York metropolitan area at prices which are substantially lower than the prices at which respondent sells said product to purchasers in its other trading areas.

A comparison of respondent's yogurt prices to purchasers in its various trading areas for the relevant time periods is hereinafter set forth:

		Prior to May 1, 1961		Subsequent to May 1, 1961		Subsequent to November 1, 1961	
Area		Jobber	Store door	Jobber	Store door	Jobber	Store door
New York metropolitan area.	Plain	.11	.13	.085	.10	.085	.10
	Flavored	.14	.16	.115	.13	.115	.13
The New England States—Excluding Fairfield County, Conn. (Also Albany, N.Y. after July 1961.)	Plain	.13	.15	.13	.15	.145	.165
	Flavored	.13	.15	.13	.15	.145	.165
The area served out of the Philadelphia, Pa., branch.	Plain	.11	.13	.11	.13	.12	.14
	Flavored	.14	.16	.14	.16	.15	.17
State of Florida and lower south Georgia.	Plain	.135	.16	.135	.16	.15	.18
	Flavored	.135	.16	.135	.16	.15	.18

(Breakstone's "Jobber" and "Warehouse" prices are the same. All above prices are for the half-pint container size.)

PAR. 16. The effect of such discrimination in price by respondent in the sale of yogurt has been or may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which said respondent is engaged, or to injure, destroy or prevent competition between respondent and its competitors in the manufacture, processing, distribution and sale of such product.

PAR. 17. The discrimination in price, as herein alleged, is in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT III

Charging violation by National Dairy Products Corporation of subsection (a) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PAR. 18. Paragraphs One, Two, and Four of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PAR. 19. Respondent's Kraft Foods Division sells and distributes a marshmallow cream topping (hereinafter referred to as Marshmallow Creme) and its other products of like grade and quality to purchasers thereof located throughout the various States of the United States, in the District of Columbia, and in Puerto Rico for sale, consumption or resale therein.

Respondent's Kraft Foods Division maintains and operates branch sales offices in all principal cities of the United States and Canada from which it sells its said products to purchasers.

Kraft manufactures Marshmallow Creme in a plant located at Palmyra, Pennsylvania, from which said product is distributed by Kraft to purchasers located throughout the several States of the United States, the District of Columbia, and Puerto Rico.

PAR. 20. Respondent, through its Kraft Foods Division, sells its Marshmallow Creme to retailers, cooperatives, wholesalers and other purchasers through company employed salesmen. Many of respondent's purchasers are in substantial competition with other purchasers of respondent.

Respondent, in the sale of its Marshmallow Creme to retailers, cooperatives, wholesalers and other purchasers, is in substantial competition with other manufacturers, processors, distributors and sellers of said product.

PAR. 21. In the course and conduct of its business in commerce, respondent has discriminated and is now discriminating in price in the sale of Marshmallow Creme by selling such product of like grade and quality at different prices to different purchasers.

Included in, but not limited to, the discriminations in price as above alleged, respondent has discriminated in price in the sale of Marshmallow Creme to retailers, cooperatives, wholesalers and other purchasers in the Philadelphia, Pennsylvania, and Boston, Massachusetts trading areas and in other New England States by charging said retailers, cooperatives, wholesalers and other purchasers substantially lower prices than charged by said respondent for the sale of said product of like grade and quality to retailers, cooperatives, wholesalers and other purchasers located in other of respondent's trading areas in the United States.

For example, respondent has effected discriminations between and among said purchasers by selling Marshmallow Creme in certain trade areas at prices 25% to 33⅓% higher than prices charged purchasers in other trade areas, and by granting other price reductions of from 30¢ to 60¢ per case in certain trade areas only.

PAR. 22. The effect of such discrimination in price by respondent in the sale of Marshmallow Creme has been or may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which said respondent is engaged, or to injure, destroy or prevent competition between respondent and its competitors in the manufacture, processing, distribution and sale of such product.

PAR. 23. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. F. P. Favarella, Mr. A. T. Witherington and *Mr. Alan Stone* of Washington, D.C., for the Commission.

Chadwell, Keck, Kayser, Ruggles & McLaren of Chicago, Ill., attorneys for the respondent, by *Mr. John T. Chadwell, Mr. Richard W. McLaren, Mr. Alan R. Kidston* and *Mr. Robert L. Day,* of counsel. *Messrs. William E. Nuessle* and *Paul Kerins* also participated as counsel.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

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The Federal Trade Commission charges National Dairy Products Corporation with violations of Subsection (a) of Section 2 of the Clayton Act as amended.[1]

PRIMARY-LINE AND SECONDARY-LINE CASES

The more frequent cases arising under this section are concerned with the sale of goods by a manufacturer, distributor or wholesaler, etc., at different prices to different persons who are in competition with each other. This type of price differential is said to be in the "secondary-line." The injury to competition in cases of this nature is that if Customer A, who is in competition with Customer B, is able to purchase goods of like grade and quality at prices lower than the prices at which Customer B can make such purchases, he is in a position to compete more effectively against Customer B. In such a case it is "self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected * * *" *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948) p. 50. This proceeding is *not* a secondary-line case.

The less frequent cases are those involving the granting of price differentials, not in the sense that individual customers who are in competition with each other may acquire advantages over their competitors such as those in the secondary-line just defined, but rather the granting of price differentials on a territorial basis. This occurs when a manufacturer, producer or distributor sells in two or more sections of the country (or two or more market areas) and undertakes to sell in one or more of those sections or areas at prices lower than the prices generally charged by him for goods of like grade and quality in the other or others. When he does this, he also may be violating Section 2 (a) of the Clayton Act as amended. Such conduct could "lessen com-

[1] 49 Stat. 1526; 15 U.S.C.A., Sec. 13, as amended, which, to the extent here pertinent, is: "Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such dicrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * * *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

petition or tend to create a monopoly" in the sense that the financial strength of the price cutter may be such as to enable him to drive out or weaken his own competition in the section or area in which he sells at the lower price. *Federal Trade Commission* v. *Anheuser-Busch, Inc.,* 363 U.S. 536 (1960). This is known as a "primary-line" case. A stronger showing of injury to or tendency to injure competition and create a monopoly is required to establish a violation in a primary-line case. Commission's Policy Toward Geographic Pricing Practices, 3 CCH Tr. Reg. Rep. (9th ed.) ¶10,412 (1948).

THE COMPLAINT IN THIS PROCEEDING

In this proceeding, National Diary Products is charged with violations in the primary-line. These are set forth in three counts in an amended complaint issued July 26, 1963. (The proceeding had been commenced in December 1962 by the issuance of a complaint alleging only one violation, what is now Count I of the amended complaint.)

In Count I, it is alleged that National Dairy, early in 1961, through its Kraft Foods Division in the Baltimore, Maryland, Washington, D.C., Richmond, Virginia and Norfolk, Virginia trading areas, sold jellies and preserves "on a buy one, get one free basis * * * in effect * * * a 50% discount in price" which was "a substantially lower price than that price at which (it sold) said products to purchasers in other trading areas throughout the United States."

In Count II, it is alleged that respondent's Breakstone Foods Division sold yogurt to various outlets in the New York metropolitan area at prices lower than the prices at which it sold that product in all other trade areas, both by lowering its prices in the New York metropolitan area beginning in May 1961 and by not increasing them in that area when, in November 1961, it increased its prices in other trade areas.

In Count III it is alleged that National Dairy's Kraft Foods Division sold a marshmallow cream topping, Marshmallow Creme, to its outlets in the Philadelphia, Pennsylvania and Boston, Massachusetts trading areas and in other New England States at prices lower than those at which it sold Marshmallow Creme in other trade areas.

The theory of the complaint, in all its counts, is that these price differentials "have been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which said respondent is engaged, or to injure, destroy or prevent competition between respondent and its competitors in the manufacture, processing, distribution, and sale of such products." (Pretrial Order of October 25, 1963, Part 1, Issues of Law.) This adaptation of the words of the statute, in plain English, means that National Dairy's resort to these price differentials and their effect tended to injure or did injure competition with other jelly, jam and preserve manufacturers in the areas mentioned in the first count, with other yogurt manufacturers in the areas mentioned in the second count, and with other marshmallow cream topping manufacturers in the areas mentioned in the third count, and that this sort of conduct would tend to give National Dairy a monopoly position in those products in those areas.

RESPONDENT'S POSITION

National Dairy admits that the price differentials alleged actually were allowed, but denies that they had the necessary adverse effect on competition to result in a violation of the Act as charged. Additionally, with respect to Count III, it invokes as a defense, one of the provisos quoted in Footnote 1 above, that some of the price changes were necessary by reason of "imminent deterioration of perishable goods."

INTERSTATE COMMERCE

All the jurisdictional prerequisites concerned with commerce are admitted.

COUNT I INTRODUCTORY

National Dairy Products Corporation, as its name implies, was basically a dairy products corporation. It is included among Fortune Magazine's 500 largest industrial corporations in the United States. According to this survey, it ranked 20th in both 1960 and 1961 and it has annual sales of over 1¾ billion dollars (CX 1). In about 1955, it went into the jelly and jam business by acquiring a manufacturer known as Bedford Products, Inc. Bedford, although its products were distributed on the eastern seaboard and as far west as Chicago, was engaged mainly in the production of these products for sale under private labels. National Dairy continued the Bedford business for only a short period. In 1956, it started distributing jellies and jams under the Kraft label. (Kraft is a major division of National Dairy.) (Tr. pp. 1637–1642.) This distribution was national and was from the Bedford plant, located in Dunkirk, New York. By 1962, what had started as a five or six million dollar business in Bedford sales in 1956 attained a national volume of $16,664,000 (Tr. p. 1644; CX 16).

This count is concerned with the Baltimore, Maryland, Washington, D.C., Richmond and Norfolk, Virginia areas, where respondent had had distribution for four years preceding 1961 (Tr. pp. 1551–1554). Apart from the competition given Kraft by chain store private label jellies and preserves, its major competitors in those areas were Old Virginia Packing Co., Inc., and M. Polaner & Sons, Inc., who, in this case, have been classified as regional producers (Tr. p. 1555). Other regional producers who competed with Kraft in these areas were Theresa Friedman & Sons, Inc. (Tr. pp. 393–394; CX 184–A and B), T. W. Garner Food Company, and C. H. Musselman Company (now a division of Pet Milk Company) (Tr. pp. 392–395, 600, 613; CXs 133–A, 146–A–H).

THE COUNT I PRICE CUT

On January 19, 1961, the Chicago general office of the respondent sent an explanatory memorandum (CX 30) to the heads of its divisions other than the Eastern and Southern Divisions, to which it attached an announcement of the promotional deal which had taken effect in the Washington and Norfolk districts of the Eastern and Southern Markets and the Baltimore district of the Eastern Market. The affected areas were described in the memorandum as the "Washington, Baltimore and Norfolk areas." The memorandum stated:

> I believe that most of you are aware that we have never been able to achieve adequate distribution of Kraft Jellies and Preserves in the Washington area. The attached program is put together as an all out attempt to achieve that distribution. Due to chain overlaps, it was necessary to cover the adjoining Norfolk area, as well as Baltimore.

As appears from the memorandum, the objective of this promotion was "to achieve adequate distribution" in the Washington area. The problem with which Kraft was confronted was its alleged inability to obtain authorizations in Giant Food Stores, Safeway and Grand Union, the leading chain stores in the Washington area. Only the small size grape jelly had been authorized in the A & P. Respondent's officer at that time in charge of this area stated, "In Washington * * * the chains run about 90% of the volume and without the authorization in those, you don't have any business." The word "authorization" has a technical meaning. No vendor can have his goods sold in a chain store unless the manager of that store is authorized in advance to stock the same by whatever authorizing official of the chain may have jurisdiction. Respondent places great reliance on this as demonstrating good business reason for taking the action which it did. It says that its national advertising as far as these areas were concerned was wasted. (Tr. pp. 127–128, 143, 1507–1509, 1518, 1551–1554, 1738.)

Additionally, respondent asserts, not only with respect to this count but also with respect to the other counts involving yogurt and marshmallow cream, that promotions and deals are customary and the regular, usual way of doing business in the grocery business. I see no need to discuss this at length other than to say that I have concluded that there is merit to this assertion. The record is replete with evidence that the competitors upon whom Commission counsel relied for the purpose of making their case in all three counts frequently resorted to promotions or deals of one kind or another to push sales and get distribution. I believe also that, although respondent did have authorizations in all the chains mentioned and in other chains in the areas involved in this count for many or most of its extensive line of products, it did not have authorizations to any material extent in any of the chains mentioned for jellies, jams and preserves and that resort to an attractive promotion or deal could be justified as good and reasonable business practice.

The issue in this count is whether the particular promotion or deal with which we are concerned ran afoul of the law. Ordinarily, the answer to this question would be found in the decision on remand in *Anheuser-Busch, Inc.* v. *Federal Trade Commission,* 289 F. 2d 835 (7th Cir., 1961). This is that there must be a finding that the differentials in price, in fact, have had an adverse effect on competition. Recently, in *The Borden Company,* Docket No. 7474, February 7, 1964 [64 F.T.C. 534], the Commission's majority opinion, while rejecting a contention that market share loss must be permanent, inclined to a recognition that there must be some adverse or probably adverse competitive effect of the price differential to support a conclusion that there has been a violation (opinion, pages 24 to 31) [64 F.T.C. 534, 566–571]. The dissenting Commissioner was not in disagreement in that respect.

The difficulty with this standard for ascertaining whether there was a violation by National Dairy in resorting to the promotion involved in this count is that the evidence upon which respondent relies to support its claim that there was no adverse effect on competition is a set of circumstances or a result which developed not in the ordinary and usual course of business following the price promotion, but by unanticipated events which interrupted and altered the original plan or scheme so that it did not progress to its contemplated and intended completion. This casts this count into an entirely different format from that found in *Anheuser-Busch* and in *Borden.*

There remains no sound basis for saying that this count must be decided on whether what National Dairy did actually had an adverse effect on competition. On the contrary, it must be decided on the basis of what could have happened and what reasonably might have been expected to happen had the plan or promotion as originally scheduled been permitted to run its full course. It seems irrelevant to argue that in this particular case there was no permanent adverse effect on competition when the resulting conditions which we are asked to consider are conditions which transpired under circumstances different from those which the plan, as originally conceived, probably would have caused. We must put ourselves back to the original plan and ask ourselves what would have been the probable effects on competition if it had been allowed to proceed to fruition, as originally conceived.

THE PROMOTION AS ORIGINALLY CONCEIVED

The promotion for Washington, Norfolk and Baltimore offered many different sizes or flavors of jellies or preserves, each of which (whether by size or by type of jelly or preserve) was regarded as a unit. Beginning January 16, 1961, and ending February 10, 1961, every purchaser (meaning reseller) was entitled to get one case free with every case of jellies or preserves that he purchased, provided that he purchased at least "6 varieties and/or sizes." The purchases had to be made during the time mentioned but the free goods were not to be delivered until the 30-day period beginning February 10, 1961, the last day that the "one free for one purchased" offer was in effect (CXs 31, 32).

This is very important. The purchases and deliveries of the purchased goods were to be made in the period January 16 to February 10, 1961, inclusive, but the free goods were not to be delivered until *after* February 10, 1961. In effect, a dealer buying goods during the January 16 to February 10, 1961, period, although he was paying for such goods so purchased and delivered, was put into a position where he was able to buy and receive whatever jelly and preserve requirements he might have for that period and for such additional period after that as his funds would permit.

He obtained, in addition, the position that beginning February 10, 1961, he would be receiving free goods in identical quantities, flavors and sizes, to stock him for an indeterminate time after his complete liquidation of the goods for which he had paid. The promotion contemplated this.[2]

The quantities which might have been purchased under this deal were completely unlimited. It was to be supported by a whole bag of promotional devices (CXs 33, 35–A–L). Two newspaper coupons were to be advertised and offered in the leading newspapers of Washington, Baltimore, Richmond, Staunton and Petersburg. These advertisements would be run during the weeks of February 13 and March 13 (both weeks *following* the conclusion of the purchasing period). One of the coupons was to be a "Save 10¢ coupon." The ultimate consumer or customer would present this coupon to the dealer and get a 10¢ reduction on the price of a jar of Kraft jelly or preserve, but the dealer would not absorb this 10¢ reduction. There was no reduction of his benefit from the promotion because Kraft agreed to reimburse him a full 10¢ in cash, plus 2¢ for handling. The other coupon entitled the ultimate customer or consumer to get a free 10-ounce jar of Kraft grape jelly if he bought any one of the various Kraft jellies or preserves. Again the dealer did not absorb this free deal because Kraft agreed to reimburse him the retail price of the jar of Kraft jelly and pay him a handling charge. I have concluded that these special consumer deals are not within the issues of this count. I cite them only as supporting efforts for the promotion itself.

In addition, Kraft jellies and preserves were to be featured on the Kraft Music Hall (the Perry Como television national network show), and a full-page advertisement in Life Magazine. This was not all. There were "two other plusses": A cooperative merchandising (or display) agreement was to be in effect from February 27 through April 28 under which an additional 50¢ on all purchases of 10- and 12-ounce sizes and an additional 75¢ on

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[2] Actually the promotion did not go forward as conceived. Two main factors were responsible for this. One was that some warehouses and stores gave effect to the arithmetical result and cut the prices in half,—contrary to respondent's intention (CXs 94–107, incl.; Tr. pp. 1527–1541; RXs 67, 68). The other was that the demands generated were so great that respondent could not supply them in the form of free goods (CX 80). It made good its promise by paying to buyers the cash equivalent of the goods they should have received free under the offer. (See page 1355 *infra.*) That these events transpired is immaterial in my opinion because, as I have said elsewhere, respondent's conduct must be judged by what was intended and not by the unexpected miscarriage of the promotion.

all purchases of 18- and 20-ounce sizes were to be paid during the contract period. This cooperative agreement was to be repeated from May 29 *through July 28*. The promotion literature added, "Other promotions will occur to assure rapid turnover. *Remember*: Kraft is the largest producer of Jellies and Preserves in the United States."

Thus, the promotion as conceived originally was intended to provide free goods following the end of the purchase period, February 10, 1961, and was intended (and this, although an inference, I believe is a fair inference from the materials in evidence) to put the dealer into sufficient goods whether by original purchase or subsequent delivery of free goods to carry him through at least the end of July 1961. The deal was *unlimited* as to quantities available and its effectiveness was to be for more than half of the entire calendar year 1961. (Respondent made efforts to restrict or limit orders after the price break [3] but these were an afterthought and were not in the carrying out of the promotion as conceived.) (Tr. pp. 1526–1542.) The objective of the promotion and its probable effect must be the basis for determining its legality under the Act and not the circumstances which actually developed following the unintended miscarriages. This view does not change, in any manner, the theory of the complaint. It is concerned only with respondent's arguments that Commission counsel failed to sustain their burden of proof and that the present health of primary-line competition is good.

When originally put into effect, the promotion was unauthorized by respondent, but, once in effect, it was approved retroactively (Tr. p. 1741).

It was intended only for Washington and Richmond. The extension to Norfolk was necessary because the overlap with Richmond resulted in Norfolk cancellations (Tr. p. 1740). The extension to Baltimore was to avoid discrimination between competing customers (Tr. pp. 1521–1522, 1781).

THE NATURE OF THE COUNT I PRICE CUT

Counsel supporting the complaint have characterized this promotion as a half-price sale since if one obtains a unit without cost for every unit purchased, in effect he is paying half price. Arithmetically, it works out this way. Respondent's attorneys have acquiesced in this view.

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[3] See Footnote 2, p. 1349.

THE MARKET RECEPTION OF THIS OFFER

The offer was received enthusiastically. In 1960, respondent had sold 14,483 cases of consumer-size Kraft jellies and preserves in Washington, 116,446 cases in Baltimore, 10,682 cases in Richmond, and 27,366 cases in Norfolk. In 1961, it delivered 156,876 cases in Washington, 301,083 cases in Baltimore, 120,603 cases in Richmond, and 121,845 cases in Norfolk. The totals for these years were 700,407 cases in all of 1961 as opposed to 168,977 cases in all of 1960. In the case figures for 1961 are included 153,909 cases of free goods. These free goods were included in a total of 554,712 cases *delivered as part of the promotion involved in this count.* If we subtract the 153,909 cases (free goods) from the 554,712 cases total delivered on the promotion, we find that 400,803 cases were bought and paid for at the regular price, more than twice as many in less than one month than had been purchased in the entire year of 1960. If we subtract the 554,712 cases (free goods plus paid goods) from the 1961 total of 700,407 cases, we have a remainder of 145,695 cases sold in more than 11 months in 1961, nearly 14% less than the total sales for 1960.

The dollar values of respondent's sales of consumer-size jellies and preserves in 1960 were $40,047 in Washington, $317,793 in Baltimore, $31,156 in Richmond, and $86,133 in Norfolk; or a total of $475,129. The dollar sales for 1961 were $186,984 in Washington, D.C., $463,748 in Baltimore, $116,241 in Richmond, and $144,832 in Norfolk; or a total of $911,805. Thus the dollar sales for 1961, $911,805, without counting payments in dollars in lieu of free goods (which will be discussed later), approached twice those for 1960. However, we are informed that the free goods which the customers received as a result of the promotion were valued at $516,577 and that the cash paid in lieu of free goods amounted to $829,005, which means that, had the promotion gone through as planned, the sales values for the year 1961 would have been the aggregate of these three or $2,257,387, almost 500% of the 1960 sales.[4]

The free goods alone, delivered as part of the promotion, would have sold for $516,577, more than 8% increase in dollar amount over all the actual sales for 1960. If we combine the free goods

[4] Counsel supporting the complaint, in their analysis of the 1961 dollar sales for these four areas, have interpreted CX 17 as including the $516,577 and so have come up with an aggregate figure of $1,740,810 as opposed to $2,257,387. If this is correct, the 1961 dollar figure was almost 400% instead of 500% of the 1960 sales. Either way, the increase is most substantial. The reason for the differences in figures is the ambiguity of footnote (b) to CX 17 but, if consideration be given to CX 93 and CX 108, it is more likely that the analysis in the text is nearer correct.

with the cash in lieu of free goods, we get $1,345,582 as contemplated or intended free goods, more than 2½ times the actual sales for all of 1960.

The magnitude of the promotion is further illustrated by a comparison of sales and deliveries (including cash paid in lieu of deliveries) in response to the promotion with the total 1959 and total 1960 sales of Old Virginia Packing Co., the largest brand-name competitor in the areas:

Kraft 26-day promotion		Old Virginia	
		Entire 1959 sales	Entire 1960 sales
Cases bought	400,803	483,812 cases	518,199 cases.
Cases free	153,909	(CX 176)	(CX 176)
Cases for which dollars were substituted	246,894		
Constructive total number of cases (CX 93)	801,606		

Consequently, in any way that one looks at the operation of this promotion, it certainly did receive a tremendous response. (The schedules on which the foregoing analysis is based are CX 17, CX 93 and CX 108.)

THE BELOW COST NATURE OF THIS PROMOTION

The actual prices resulting from this one-for-one promotion or 50% price cut were below respondent's costs. A glance at its cost data (CXs 88, 89) and a comparison with its list prices to its customers (CXs 38 to 53, incl.), when these are cut in half, show that respondent's manufacturing costs, in general, for each of the jellies, preserves and sizes, exceeded its real or constructive selling prices by approximately 35% to 50% of cost. This margin was even greater because to manufacturing costs must be added shipping expenses since list prices included delivery (CX 90). [Counsel supporting the complaint assert that this promotion was financed out of respondent's other business activities. They so conclude because, since the value of the "free goods" was $516,577 and $829,005 was paid out in cash in lieu of "free goods," the promotion cost respondent at least $1,345,582 (*cf.* CX 93). This is actually less than the total cost because counsel have disregarded the collateral aspects of the promotion such as "cents off," coupons and cooperative display agreements. There is no doubt that a company without financial resources approaching those of respondent could not have financed and survived a promotion like this one. Just how disproportionate it was becomes apparent when reference is made to others of respondent's local promotional expenditures on jellies and preserves during the period January through May 1961, excluding the areas involved in this case: Central Division $187,504, Eastern Division $289,-264, Eastern part of Southern Division $65,555 (CX 108).]

The public policy condemns the sale of "goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." [Robinson-Patman Antidiscrimination Act, Section 3, 49 Stat. 1526, 15 U.S.C., Section 13 (a).] Sales below cost are not regarded invariably as a violation of the cited section of the Act. Justification, however, must be found "in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor * * * Sales below cost in these instances would neither be 'unreasonably low' nor made with predatory intent. But sales made below cost without legitimate commercial objective and with specific intent to destroy competition would clearly fall within the prohibitions of § 3." *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 at 36 (1962). As far as jellies, jams and preserves are concerned (Count I), respondent does not claim the defenses indicated. This is a temptation to assume the intent and to rule that this promotion, since it was a below cost promotion, violated Section 2(a). I believe, however, that no such assumption need be made for the respondent's argument in defense actually provides the evidence of intent or of the promotion's tendency "substantially to lessen competition."

RESPONDENT'S ALLEGED PURPOSE
OR REASON FOR THE PROMOTION

Assuming, as respondent urges so strongly, that it is a legitimate objective of a promotion to obtain authorizations in chain stores, this is not an exception for a price differential under Section 2(a). Even though it be the policy of the Commission to require stricter proof of adverse effect on competition in the primary line, the statutory defenses afforded by Section 2(a) do not provide for a price differential for the purpose here suggested. Moreover, I am troubled considerably by the stated objective and the manner in which it was sought to be accomplished. It must be clear that what respondent sought specifically to avoid was a price break or reduced selling prices to the consumer by reason of this promotion. Its intention was that the primary-line customers were to be the sole beneficiaries of the promotion and its principal objective in the primary-line was the chain stores. Its objective was to induce "major accounts in the Washington-Richmond area to give Kraft jellies and preserves shelf space on which they could be displayed and from which they could be sampled by consumers." Section D, Part II, respondent's Proposed Findings. This suggests that what is asserted as a legal defense or a legitimate commercial reason in fact was neither legal nor legitimately commercial. It is very much like a practice which has been condemned as unfair business. In substance, the chains, the principal target, were being paid "push money" to advance the sale of respondent's jellies and preserves over the sales of those of its competitors. (See statement on behalf of the Federal Trade Commission H.R. Report Number 631, page 3, 67th Congress, 2nd Session;[5] *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F. 2d 582, 585.) [This is not the same as commercial bribery where a store buyer is bribed in secret to purchase goods from a particular supplier and thereby betrays the trust placed in him by his employer (*cf.* Tr. p. 2307).] Respondent admittedly was buying shelf space (R.P.F. p. 50) and any shelf space it acquired had to be taken away from its competitors. This constituted injury to them since, as respondent says in its Proposed Findings (p. 61), "[T]here is a definite relationship between share of sales that a particular brand has and the share of shelf space that it has." (See page 1355 below.)

EFFECT OF THE PROMOTION ON COMPETITION IN THE AREAS INVOLVED

I have said above that respondent's intention had been to limit this promotion strictly to a one-free-with-one offer. I accept respondent's position that it never intended that there be a retail

[5] "After the manufacturer's goods are in the hands of the retailer, a manufacturer of beds, for instance, who has conducted a nation-wide advertising campaign, has no power to protect his goods from the conduct or statements of a salesman who has received from a competing manufacturer a promise of a commission for the sale of his product. Herein is the difference between money expended for advertising purposes and money paid as commissions to salesmen, and in which the consent or absence of consent on the part of the employer plays no part. The advertiser has created the demand or has stimulated it to the point where a purchaser seeks to buy the goods advertised. At this point the commission-giving manufacturer reaches out and diverts the demand into his own channel. It is as though one person had carefully cultivated a fruit tree and at the point of ripening some one else gathers the fruit. Again the practice of commission giving, whether with or without the consent of the employer, has a disastrous effect upon the sales force of producers who do not use the practice." (67th Congress, 2d Session, H.R. Report No. 631, Page 3.)

price break and that the price break was financed by the dealers or distributors who relied on respondent's promise to deliver free goods to match goods purchased (Tr. pp. 127, 1521–1526, 1567–1568, 1745). I accept also respondent's position that the response to the offer was so overwhelming that its production facilities were inadequate to supply the free goods and that it was forced thereby to make the offer good with cash payments instead of free goods (CX 80; Tr. p. 1749). However, as I have said above at p. 1347, I regard these unintended events as justification for viewing the competitive market as it probably would have been affected and not as it actually was. While, perhaps, under *Anheuser-Bush,* 363 U.S. 536, 289 F. 2d 835, long-run effect on competition [6] should be considered in appraising legality of a territorial price discrimination in the primary-line, the long-run effect contemplated is that resulting from the promotion or price differential as conceived and put into effect and not that which followed by reason of fortuitous occurrences resulting in a change from what was conceived and intended originally.

Among the factors emphasized by respondent are its primary objective to attain shelf space in the chains which dominate the grocery business in Washington and the importance of special promotions or deals in the industry, due, in large part, to the fact that many wholesale buyers concentrate their purchases on promotions.

The first of these factors, if attained, can have no effect other than adverse competitors. If respondent had not brought it out by the evidence, we would have known, as a matter of common knowledge, that the modern grocery store has a limited amount of shelf space which it can allocate to the commodities sold by it. Availability on the shelf and area permitted on it is the all-important stratagem in getting the shopper to buy any product. As a necessary consequence, increased stocking and display of Kraft jellies and preserves had to result either in a decrease or in a complete elimination of shelf space for competing brands. The competing brands necessarily had to be those of the persons sought to be protected by the statute for the chain stores obviously would not have denied their shelf space to their own private brand goods. (The role of private brands is discussed in Section B of Part I of respondent's Proposed Findings.) This is injury.

The other of these factors, confinement of wholesale purchases to promotion or deal goods, *ipso facto*, eliminates purchases of

[6] But see *The Borden Company,* Docket No. 7474, February 7, 1964 [64 F.T.C. 534].

goods not promoted or not as favorably promoted. A combination of these factors sustained over a long period of time must have an adverse effect on competition. This is demonstrated by what actually transpired with respect to respondent's main competitors in the areas involved.

In the consideration of whether competition is or may be adversely affected, I have no sympathy for and do not condone any concept that a particular marketing area belongs to a particular company (Tr. p. 218). This is reminiscent of the days of the big rackets. A business concern established in an area should not adopt an attitude that a newcomer or a struggling competitor (however otherwise powerful) trying to build up sales in an area is "muscling in on his territory." Competition thrives on enterprise, whether the enterprise be that of a struggling competitor or of a newcomer trying to establish himself. (This does not authorize predatory price differentials directed against a company said to have a monopoly position in an area. *Maryland Baking Company*, F.T.C. Docket No. 6327, 52 F.T.C. 1679, 1689; *aff'd sub nom Maryland Baking Company* v. *Federal Trade Commission,* 243 F. 2d 716.) Consequently, any view that I take of what transpired here or of what might have transpired is not conditioned by an attitude that business concerns established in an area should be protected from competition by others not strongly entrenched or by newcomers.

Now let us see what happened to the sales of the principal packers of jellies, jams and preserves in the areas involved.

Old Virginia Packing Co., Inc. In the January to June 1961 period, in the Washington area, case sales declined about 23% and dollar values of sales declined about 18% from the same period in the prior year. The declines from the preceding half year were over 14% in both cases and dollar values. In the same area, in the July to December 1961 period, case sales declined about 5% and dollar value of sales declined about 3½% from the same period in the prior year. In the second half of 1961, there was a recovery from the first half of that year,—11½% in cases and nearly 13% in dollars. In the Baltimore area, for the first half of 1961, case sales declined by more than 30% and dollar values declined by more than 27% from the same period in the prior year and almost 34% in cases and more than 23% in dollar values from the preceding half year. In the second half of the same year, case sales declined by about 13% and dollar sales declined by more than 10% from the same period in the prior year, but recovered 31½% in cases and 16½% in dollars from the first half. For Richmond, in the comparable periods, the case sales declined by about 41% and the dollar sales values by about 40% in the first half and, in the second half there was a decrease of about 4.7% in cases, but dollar sales values increased 4.3%. For Norfolk, in the comparable periods, both the case sales and dollar sales values declined by about 35% in the first half. There were recoveries of about 23% in case sales and 31% in dollar sales values in the second half. The over-all totals of decreases for the comparable periods for the four cities ran more than 30% in cases and 27½% in dollar sales values in the first half of 1961 (CXs 175–176, inclusive, as modified by inclusion of 4-pound sizes). While the sales decreases percentage-wise for comparable periods were markedly lower in the second half of 1961 and the recoveries started in that half, we cannot ignore the fact that the promotion as conceived originally did not run its full course. If the 246,894 cases of Kraft jellies or preserves valued at $829,005 originally to be delivered as part of the promotion had been delivered, the arrest of the sales decreases would not have been as marked.

I assume that the case deliveries and sales would have been substantially less in the second half of 1961.[7] The assumption is supported by the fact that in the second half of 1961 Old Virginia was able to recover to some extent from the losses sustained in the first half. Sales of cases in each of the cities and dollar sales values increased as follows: Washington, cases more than 11% and dollar sales values more than 12%; Baltimore, cases more than 31% and dollar sales values more than 16%; Richmond, cases more than 49% and dollar sales values more than 43%; Norfolk, cases more than 79% and dollar sales values more than 75%. Overall, for the four cities the case sales increased about 35% and the dollar sales values about 30% during the second half of 1961 over the first half of 1961 (CX 175).

The substantial sales losses must have resulted both from cancellations of orders and substantially reduced sales to particular customers. The former is the subject of testimony by a food broker operating in Maryland, Delaware, the District of Columbia and a portion of Virginia adjacent to the District. He said that he had "quite a few cancellations due to the fact that (the customers) were forced, more or less, forced to such attractive deal, that they could not run (his) promotion." He included among cancellations chainstores like the A & P Tea Company

[7] In contrast, the national statistics, National Preservers Association Report, RX 139d, show a recession in the second half of 1960, a rebound in the first half of 1961, and a fallback, but not as much as in the prior year, for the second half of 1961.

and Jumbo Food Stores (Tr. pp. 468–469). Commission exhibits 180 A–M list particular customers, including chain stores, wholesale distributors and cooperative buying organizations, sales to which decreased substantially in the first half of 1961. These reductions were 44.9%, 50%, 38.4%, 51.6%, 42.1%, 38.4%, 52.1%, 39%, 29.8%, 72.3%, 39.5%, 17.8% and 22.9%. Of course, if, contrary to what has been shown above, there had been no rebound of sales, it is conceivable that a question might be raised as to whether it was the promotion which caused these losses. Although the question might appear to be frivolous in view of the particular nature of the promotion, the direct testimony of cancellations and the rebound in the second half of 1961 satisfy me that the losses in the first half of 1961 were the causal effect of respondent's promotion.

This is real and substantial injury and it would have been worse and more prolonged had the promotion run its full course as contemplated originally. Respondent, in its analysis of Old Virginia's sales losses in 1961, argues that Old Virginia's sales fluctuations are characteristic over the years. It emphasizes that sales peaks are reached in response to promotions and it presents a chart to demonstrate all this graphically (p. 80, Proposed Findings). While the chart does portray a series of intermittently recurring peaks and sharp drops, if the horizontal lines of the graph are drawn into the chart (as they are in Charts 5, 6, 7, 8, 9, pages 28, 29, 30, 31, 32, Respondent's Reply Brief), it becomes at once apparent that the prior pattern of peaks and drops is altered by the appearance of much lower drops during the first half of 1961.

Theresa Friedman & Sons, Inc. The staistical evidence for this competitor is less satisfactory than that for Old Virginia Packing Co., Inc., because the Friedman company is much smaller and its sales coverage of the areas involved was not as complete as that of Old Virginia. For example, in January 1960, before the Kraft promotion, Friedman made no sales in Richmond, Virginia, although its sales had been $4,500 in the same month in 1959. In February of 1959, 1960 and 1961, it made no sales at all in Richmond. Then, in March 1960, still before the Kraft promotion, it made no sales in Richmond, although it had sold $4,860 in March of 1959. No sales were made in 1959 or 1960 in Richmond in April, May, July, September and December. June 1960 sales were $135.50, whereas there had been none in June of 1959. Similarly, August 1960 sales were $1,250 in Richmond, whereas there had been none in 1959. In October 1959, the Richmond sales were $343.75, and in November 1959 they were $571, whereas there had been none in either of these months in the preceding year (CXs 184–A, 184–B). This sporadic picture can be expected for a small company which may not concentrate throughout a year in a particular area or may have limited distribution. Consequently, the summary figures for the four areas involved here, although presenting a general picture, may be regarded as one more accurate of what transpired. During the period of promotion, from January through June 1961, Friedman sustained an average 33⅓% loss of sales in dollars from those in 1960, the year immediately prior. Although there had been a growth of 42.8% from 1959 to 1960, the dollar sales for this January–June 1961 period were only $236,791.45, almost $12,000 less than those in 1959, and over $118,000 less than those in 1960. In the second half of 1961, there was a partial recovery. The sales loss in that period was only 17.8% of the sales in the same period in 1960, and the dollar value of sales exceeded those of the same period of 1959 by more than $4,000. The figure was $51,554.22 less than that for 1960 and almost as much as the 1960 increase over the 1959 sales. For the entire year of 1961, there was a percentage loss of 26.3% from the dollar sales of 1960, and that year's total was even less than the total for 1959. In dollars, the 1961 reduction of sales was $169,607 as opposed to the 1960 increase over the prior year of $162,341.27. (See reference to N.P.A. Report, RX 139–D, footnote 7, page 1357, this decision.) All the foregoing figures are for the Baltimore, Washington, Richmond and Norfolk areas combined (CX 184–A, CX 184–B). While Friedman testified that sales to Capital Wholesale Grocers of Baltimore amounted only to $3,575 in 1961 as opposed to sales exceeding $10,000 in both 1959 and 1960, and that no sales were made to that account in March, May, June, July, August, and September of 1961 (Tr. p. 457; CX 185–F), there is no direct evidence that this was due to Capital's purchase of Kraft goods on the promotion. The only evidence is Friedman's testimony that he saw the Kraft merchandise listed in Capital's catalog.

The evidence is more direct to the effect that Giant Food Stores reduced its purchases in the first six months of 1961 by 35.8%. Its Director of Grocery Purchasing told Friedman that Giant "just wouldn't be able to promote any Aunt Nellie preserves for a period of time" because Friedman had told him that he couldn't offer any promotion comparable to Kraft's (Tr. pp. 420, 422). The significance of Giant's reduction of purchase becomes greater when one recalls that Aunt Nellie was the private trade name of the preserves sold by Friedman to Giant (Tr. p. 395). The failure of Friedman to resort to promotions during the first half of 1961 is a dominant theme of respondent's effort to minimize the sales losses during that period (Proposed Findings, pp. 97 *et seq.*). However, here, as in all other situations confronted with a promotion like respondent's, a competitor reaches a point where it is futile or impractical to attempt to counter the attack.

The percentage decreases for the first half of 1961 from that of 1960 sustained by Friedman in chain stores and group or wholesale buying organizations ran 6.2%, 35.8%, 66.4%, 43.6%, 20%, 67.8%, 49.9%, as far as the Baltimore and Washington, D.C. areas were concerned. For the second half of that year, with the exception of Giant Food and Potomac Cooperators, the loss percentages involving the same customers and areas were about the same as those in the first half (CXs 185–A–G). That for Giant (for whom the private label, Aunt Nellie, was packed) was almost erased in the second half of 1961 and that for Potomac Cooperators was about 33⅓% greater than it had been in the prior half year.

The various decreases found show injury, and the decreases or losses would have been greater and would have had a more permanent or lasting effect had the promotion run its full course. Respondent points to RX 225, RX 226, RX 227, as proof of the fact that Friedman's sales increased in 1960 from 1959 and in 1961 from 1960. This, however, does not minimize or alter the losses sustained in the four areas involved. The figures alluded to are total figures for all areas in which Friedman operated. The fact that Friedman grew on an over-all basis in these years serves only to emphasize its competitive injuries in the particular areas with which we are concerned.

M. Polaner & Son. This company also was a relatively small competitor. Its sales figures are complicated by a special promotion package, a decorated drinking glass (Tr. p. 499) called "Mr. Magoo" aimed at children and their influence in persuading parents to make a purchase. If the Mr. Magoo sales are included in total sales figures for Polaner, it may be argued that its sales were not injured as much as contended. For this reason I give percentages excluding Mr. Magoo and percentages including it. Also, the exhibit on which the percentages are based, CX 885, includes pickles and relishes. CX 886 shows that the proportion of pickle and relish sales to total sales is practically constant except for the first half of 1961, the period of the Kraft promotion, when it jumped by several percentage points and also for the second half of 1961, when it was still up, if not as much. These dislocations of the relationship support a conclusion that the jelly and preserves sales were adversely affected in those periods. Consequently, the inclusion of pickles and relishes in CX 885, in my opinion, does not impair its statistical value as an index of the effects on Polaner of the Kraft promotion.

In January 1961, the first month of the advance publicized Kraft promotion, there were no Mr. Magoo sales and total sales dropped 29.2% from the January 1960 sales. The February 1961 sales, excluding Mr. Magoo, dropped 20.9% from February 1960, but Mr. Magoo was introduced. The result was that, instead of having a loss in February, the total, including Mr. Magoo, resulted in a 5.2% increase over the same month in 1960. Except for this introductory month of February 1961 for Mr. Magoo, Polaner sales kept going down for succeeding months in 1961. In March, the loss was 37.3% without Magoo and 34.6% with Magoo. In April the loss was 26.4% without Magoo and 17.7% with Magoo. In May, the loss was 30.2% without Magoo and 15.2% with Magoo. In June, the loss was 20.1% without Magoo and 6.2% with Magoo. Thus Magoo did help Polaner substantially but not sufficiently to even up its sales losses in the months of the first half of 1961 from those in the first half of 1960. The averages for the first half of 1961 show a 27.5% drop from the first half of 1960 if Mr. Magoo is excluded, and a 16% drop if it is included. For the second half of 1961, as opposed to the second half of 1960 (a recession period, N.P.A. Report, RX 139–D, footnote 7, above), there is a 12.4% decrease excluding Mr. Magoo, but, if Magoo is included, there is an increase of 8.2%. (The same N.P.A. Report shows a rebound in the first half of 1961 and the second half of 1961, although lower than the first half, is higher than the second half of 1960.) Overall, for the entire year, without Magoo, there is a decrease of 20.5% and, with Magoo, there is a decrease of 4.8%. It appears that the Magoo promotion helped to a certain extent to reduce Polaner's losses, but even with it, the losses were substantial and they would have been greater without it.

Here are my summary reflections on these three competitors, Old Virginia, Friedman and Polaner:

These firms, the latter two being relatively small and the first moderately large and dominant in the area, were aggressive, informed merchandisers. There was nothing critically wrong or inept about their activities. They had well-established positions in the affected areas. Not only is their failure to meet respondent's promotion with a counter attack irrelevant, but it is demonstrative of the serious anti-competitive character of respondent's promotion. There is testimony of the futility of any effort to meet this promotion, and even if there were no such testimony, a glance at the financial statistics of these three companies and a comparison of them with the cost of respondent's promotion strongly suggests that if Polaner and Friedman had engaged in a similar promotion, they might well have been out of business by the end of 1961, and if Old Virginia had engaged in a similar promotion, it would have been seriously and permanently injured. It needs little imagination to conclude that similar promotions by these well-established brands in these areas would have been met with much greater response than that with which the Kraft promotion was met, Kraft not having had that degree of retailer and consumer acceptance in the area which the others had. To paraphrase *Borden* (F.T.C. Docket No. 7474), page 29, opinion [64 F.T.C. 534, 570], "[T]he conclusion is inescapable that respondent's price reduction was made (presumably) with full knowledge that its competitors would not and, in fact, could not meet that price and remain in business." (The word "presumably" inserted by me.)

Although there is some evidence of impact on T. W. Garner and other regional sellers, I do not regard it as necessary to go into that in view of the detailed showing of injury to the three sellers discussed above. (Tr. pp. 613–615; CXs 133–A, 145–A–L, and 145–M–Q; RXs 31–A, B, C.)

The following is a quotation from respondent's brief in support of its Proposed Findings of Fact:

> Finally, Kraft's unexpectedly large sales were caused not by Kraft's promotion itself but by the totally unusual and unexpected decision by certain wholesalers and retailers to finance their resales below their then existing costs (RPF 52–54). But for this decision, Kraft's products, in accordance with usual practice in the trade, would have been resold at regular retail prices and would have moved out of stores at a normal rate; such retail movement would have generated no unusually large demand at the warehouse level for Kraft's products. To the extent that competitors' sales declined as the result of this movement of Kraft's products, this, not Kraft's promotion, was the cause.

This is the theme of respondent's defense, respondent's characterization of this promotion, respondent's entire argument and respondent's contention that even if a violation be found, no order should be entered. I cannot accept this reasoning and regard it as fallacious. The sales were large because of the promotion. Although there was testimony to the effect that the chains and distributors could not resist a promotion as good as this one, it seems to me that such testimony was quite unnecessary. No one engaged in business for the purpose of making money from the resale of goods could refuse rationally to take full advantage of an unlimited opportunity to buy a good, well-advertised brand name article at half price to the fullest extent of his financial ability and warehouse capacity. It was this half price and not the decision by certain wholesalers and retailers to finance their resales which resulted in the large sales. Kraft's experienced executives should have been aware of the distinct probability that such large sales would follow an offer of this nature.

COUNT II

WHAT IS YOGURT?

Yogurt is a cultured or fermented milk product having a custard like consistency. It is a refinement of home-made sour or clabbered milk and is produced commercially by the addition to milk of what is called a yogurt culture for the purpose of fermentation. It is an "old world" product introduced comparatively recently into the United States as an article of commerce. The record suggests that it first was sold commercially in about 1930 (Tr. pp. 1245–1246, 1278–1280). Its sour milk nature is made more palatable by the addition of flavors, syrups, extracts or fruits. Its sale is promoted as a food, or as a health food, or as a dessert.

THE CHARGE

This count is concerned with alleged price differentials at which respondent sold yogurt of like grade and quality to different purchasers in the New York metropolitan area. It, like the other counts, involves the "primary line."

Respondent's Breakstone Foods Division processes yogurt in Youngsville, New York, and distributes it to purchasers located in States of the Eastern Seaboard of the United States, South Atlantic States and the District of Columbia. The price comparisons upon which this case is based are concerned with the New York metropolitan area (hereafter referred to as New York), New England States excluding Fairfield County, Connecticut, the areas served out of respondent's Philadelphia, Pennsylvania branch, and the State of Florida and lower South Georgia.

It is not denied that price differentials were in effect from May 1, 1961, until sometime past the middle of 1962. It is conceded also that these resulted from reductions which became effective May 1, 1961, in New York, and a failure to increase prices there in November 1961 when respondent raised them in other areas (Supplement One to Pretrial Order dated February 15, 1963, Supplement entered October 25, 1963).

THE YOGURT MARKET

A consideration of all the facts leads me to conclude that yogurt is a sectional product having its greatest sales and popularity in cosmopolitan areas and that New York is the primary sales area for yogurt in the United States. This is the area in which it is alleged the unlawful price differentials were maintained by respondent.

Apart from respondent, which vends its yogurt through its Breakstone Foods Division, there are only two other processors and vendors of yogurt with which we are concerned. As a matter of fact, apart from respondent, they appear to be the only substantial firms in this business in the United States.

One is Dannon Milk Products, Inc., since 1959 a wholly owned division of Beatrice Foods, Inc. (Tr. pp. 1239–1241). Beatrice Foods, like respondent, is one of the 500 largest industrial corporations of the United States listed in The Fortune Directory (CX 1). Dannon was started in New York in October 1942 by immigrants who had been in the business in Europe (Tr. pp. 1241–1246).

The other is Lacto Milk Products Company, a company relatively tiny when compared to respondent and Beatrice Foods. It has been identified with the same family which started the business back in 1930 under the name Oxy-Gala. Oxy-Gala went into bankruptcy in 1937 but the business was continued by Lacto. It is said to have been the first yogurt manufacturing firm in this country (Tr. pp. 1278–1280). Since 1958, it has received financial backing from a very wealthy food broker, one of the foremost in New York (Tr. pp. 1321, 1341). He now owns 50% of the business (Tr. p. 1311).

I have said that yogurt appears to be a sectional product having its greatest acceptance in cosmopolitan areas. The sales statistics in this case emphasize this. Breakstone alone, of all three companies, sells it in any quantity in areas outside of New York. However, the bulk or concentration of its sales is in New York. These seem to have reached that proportion somewhat slowly in comparison with the growth of all sales. New York sales were 22.4% of all in 1959, 33.1% of all in 1960, and 47% of all in

1961. By 1962, more than half of all its sales, 51.4%, were made in that area. Proportionally, Breakstone's sales increases in the years 1960, 1961 and 1962 were greatest in New York (CX 868). On the other hand, Dannon, consistently since 1959 and presumably until the present time, has made more than 90% and as high as 95.5% of all its sales in New York (CX 869). With the exception of Baltimore, it seems that Lacto's sales are mainly in the boroughs of New York City other than Staten Island and, in addition, in Westchester County and Long Island, areas adjoining New York City (Tr. p. 1281).

THE AREA INVOLVED

The price differential giving rise to the charge of violation is confined to New York. It seems to me that we cannot disregard as a factor that this area in which the alleged violation is said to have been committed is the primary yogurt sales area in the United States. Indeed, it seems as though meaningful competition in yogurt exists only here (Tr. pp. 1242, 2097–2098).

THE DETAILS OF THE PRICE DIFFERENTIAL

The following is a comparison of respondent's yogurt prices to purchasers in the designated trading areas for the time periods set forth:

Area		Prior to May 1, 1961		Effective May 1, 1961		Effective November 13, 1961	
		Jobber	Store door	Jobber	Store door	Jobber	Store door
New York metropolitan area.	Plain	.11	.13	.085	.10	.085	.10
	Flavored	.14	.16	.115	.13	.115	.13
The New England States—excluding Fairfield County, Conn. (Also Albany, N.Y. after July 1961.)	Plain	.13	.15	.13	.15	.145	.165
	Flavored	.13	.15	.13	.15	.145	.165
The area served out of the Philadelphia, Pa., branch.	Plain	.11	.13	.11	.13	.12	.14
	Flavored	.14	.16	.14	.16	.15	.17
State of Florida and lower south Georgia.	Plain	.135	.16	.135	.16	.15	.18
	Flavored	.135	.16	.135	.16	.15	.18

(Breakstone's "Jobber" and "Warehouse" prices are the same. All above prices are for the half-pint container size.)

The prices for Breakstone yogurt in half-pints in the New York metropolitan area were increased April 23, 1962, and July 30, 1962:

	Effective April 23, 1962		Effective July 30, 1962	
	Jobber	Store-Door	Jobber	Store-Door
Plain	.10	.115	.11	.13
Flavored	.13	.145	.14	.16

These price differentials resulted from price reductions in New York in May 1961 and from a failure to increase prices in November 1961, when prices were increased elsewhere. There is no dispute about this. Respondent contends only that they did not have the required adverse or probably adverse effect upon competition within the meaning of Section 2(a) of the Clayton Act, as amended. In addition, not like in jellies and preserves, it appears that Breakstone made sure that the reduced prices were not below cost and that a profit would (and did) result (Tr. pp. 2078, 2099–2102).

THE SUPPORTING EVIDENCE

In support of the charge, Commission counsel rely mainly on a table of comparative prices of respondent's, Lacto's and Dannon's yogurt in the area involved (CX 866); a table of alleged "percentage increases" of Breakstone yogurt sales in New York during the period of price differential (CX 868); a table of alleged "percentage declines" of Dannon yogurt sales (CX 869); two tables of Lacto yogurt sales (CXs 870, 871); comparative sales by Dannon and Lacto to particular customers before and during the time when the differential was in effect (CXs 872–A to 872–H, 873–A to 873–J); a table of sales by respondent to jobbers for resale (CX 216–D); comparative sales of the three companies in 1961 and 1962 (CX 874); comparisons of Lacto's growth with that of Breakstone over a three or four year period (CXs 868, 871, 877, 879); and a considerable amount of oral testimony originating with Lacto, tied into certain statistical material (Tr. pp. 1278–1449, 1898–2004).

TREND OF BREAKSTONE SALES

The offending price differential, it is to be recalled, started May 1, 1961. Breakstone's New York share of its total yogurt sales had been 22.4% in 1959. Its New York share of all sales increased to 33.1% in 1960, and continued to increase at percentage rates between 27.6% and 30.8% in January, February, March and April of 1961. A much sharper increase of the New York share of all sales started in May 1961, the share leaping to 48.7%, and the generally proportionate share of just less than half or just more than half of all sales was maintained consistently during all succeeding months in 1961 and 1962. (A word of caution is necessary here. The percentages are not mere sales increases; they are the ratios of New York sales to all Breakstone yogurt sales.) Breakstone's 1960 sales in New York increased 138.6% over 1959. This sharp rate of increase was not maintained in 1961, the year in which eight months of the price differential prevailed. The rate of increase for that year dropped to 123.9%. However, in the first four months of 1962, while the price differential still was in effect, percentage increases ran from 175.3% to 231.8%. Beginning in May 1962, the percentages dropped sharply: 44.5% in May, 14.4% in June and for the balance of that year decreases ranging from 7.1% to 1.1% were encountered. However, when we compare these movements in New York with the statistics for areas elsewhere, we find that although the *percentages* are greater in the New York area, the *pattern* of both increases and decreases runs very much the same (CX 868).

These percentages or ratios do not represent adequately the trend of Breakstone's yogurt sales nor the effect of the price differential on them. If we examine the column for New York sales in CX 868, we find that, beginning with May 1961, the first month of the price differential, there was a striking increase of Breakstone sales to $58,000 from $23,000 in the prior month, which went to $91,000 in June (the best month for yogurt), but dropped back to $72,000 in July. Sales in succeeding months of 1961 were August, $67,500; September, $79,000; October, $58,700; November, $53,900; and December, $61,500. In 1962, sales were January, $51,700; February, $57,300; March, $84,600; and April, $71,200. Following the April 23 price increase, sales increased to $84,500 in May; $104,000, in June (the best month for yogurt); but they dropped to $66,700 in July. Following the July 30 price increase, sales in August were $63,000; in September, $73,000; in October, $56,600; in November, $53,400; and in December, $60,800. Thus, initially, the price differential might appear to have been responsible for a sharp increase in sales in May 1961. This increase did not continue materially following the peak attained in June 1961, the month following the price increase and a normally high month anyway. Those June sales never were exceeded except in the same month in the following year and, except for June in each year, making due allowance for overlappings between months, the position attained in May 1961 seems to have remained more or less constant until the end of 1962.

TREND OF DANNON SALES

CX 869, the chart concerned with Dannon yogurt sales, shows a 20.3% increase of sales in all areas in 1960 from 1959, but a much smaller percentage, 15.8%, in New York. Separating New York from the other areas, it appears that Dannon had a 63.9% increase in those *other* areas in 1960 over 1959. The significance of this is highlighted when one bears in mind that only 6.2% of all Dannon sales were in areas other than New York. Going on to 1961, we find that Dannon enjoyed percentage increases in and out of New York in January. But, beginning in February, which was before the effective price differential, it suffered sales decreases in every month not only in New York, but also in "all areas."

The prior sharp growth in sales in areas *other* than New York dropped from 63.9% in 1960 over 1959 to only 13.4% in January 1961, and sales fluctuated between decreases and increases in the succeeding months of 1961, both before and during the time of the price differential in New York. These fluctuations ranged from decreases as low as .7% and as high as 10.1% to increases as low as .5% and as high as 15.3%, almost equally divided in 9 of the remaining 11 months of 1961. (The table does not show percentage increases or decreases for "all areas" and areas other than New York in the months beginning and following November 1961. It does show, however, fluctuating or alternating percentage increases and decreases in New York following the month of October 1962.)

DANNON'S SALES AND BREAKSTONE'S PRICE DIFFERENTIAL

If we examine CX 869 for Dannon yogurt sales in the same manner that we examine CX 868 for Breakstone yogurt sales, we find that following June 1960, long before Breakstone's May 1961 price decrease, Dannon sales in New York started to decrease and continued to decrease until December 1960. In 1961, until the end of April 1961, just prior to when the Breakstone price differential became effective, sales continued to be lower than they had been in the months before July 1960. We find the following: July 1960, $412,500; August 1960, $419,120; September 1960, $396,-

000, a decrease from $419,120 in August; October 1960, a further decrease to $361,700; November 1960, a further decrease to $350,200; December 1960, a further decrease to $306,600; January 1961, a slight increase to $324,800; February 1961, a further increase to $334,600; March 1961, a further increase to $401,000; all still much lower than the August 1960 figure of $419,000. In April 1961, the month *before* the price differential, sales dropped to $372,700, but in May 1961, the month in which the Breakstone price differential started, the sales *increased,* rather than decreased, to $430,900.[8] In succeeding months the sales were June, $427,400; July, $341,900; August, $329,700; September $318,760; October, $307,200; November, $305,100; and December, $264,200. This pattern of Dannon's sales in New York was not significantly different from that of its sales in other areas because, beginning in July 1960 there had been almost a progressive decline of sales from $31,300 in June to $20,800 in December. In 1961, the sales in the other areas ran January, $24,000; February, $25,000; March, $32,000; April, $26,600; and in May there was a jump (as there had been in New York) to $33,300. This jump was not maintained and sales were considerably lower in the succeeding months of 1961. These patterns being what they were, *both in and out of New York,* it cannot be said with any positive assurance that such sales decreases as Dannon encountered in the New York area were attributed to the price differential.

DANNON & BREAKSTONE SALES TO THE CHAINS

The tables of comparative sales by Dannon to A & P, Bohack, Acme and Grand Union, while they do show uniform decreases of sales by Dannon to these chains, show that they actually started in about the middle of 1960, almost a year before the Breakstone price differential became effective. The comparatively large percentage increases for Breakstone, to the extent that they are shown in the tables, are not truly indicative of the trend. They are not month to month ratios but ratios of corresponding months in preceding years. The Breakstone sales to these chains had been relatively small in the prior years. Under such circumstances, a small dollar increase in sales could appear to be a very large percentage increase in sales. For example, in July 1961, Breakstone sales to The Bronx A & P dropped from $7,400 in the prior month to $5,700, but the table makes it appear that there was a

[8] One view of this increase in dollar sales may be that Dannon's price increase had to increase the number of dollars; another view may be that Dannon's sales were either maintained or increased despite its price increase and Breakstone's price decrease.

502% increase of Breakstone sales. In succeeding months, Breakstone sales to that Division of A & P hovered around $5,000 to $6,000. Similar patterns are found in its sales to other divisions of A & P. The large "corresponding month" percentage increases result only from the fact that in the months prior to May 1961, Breakstone's sales to these divisions had been quite small and there had been none to either the Newark or Paterson divisions. (CXs 872–A–E.)

As far as Breakstone sales to Bohack are concerned, we find them running February to December of 1960 from as low as about $1,100 to as high as $2,200. In 1961, in January, February, March, April and May, they ran about $1,100, $1,000, $1,300, $1,300, $1,500. In May, the beginning of the price differential, they had risen less than $300. In June (*the good yogurt month*), they almost doubled, but they started to fall back again during the remainder of that year with the exception of September. (CX 872–F.)

Sales to Acme during 1960, with the exception of *June* when they ran over $1,300, consistently were about or sharply below $1,000. They continued on the low side through January, February, March and April of 1961. Beginning in May, Breakstone obtained relatively better representation there. During the months following, while Dannon sales to Acme continued their more of less irregular drop and Breakstone's representation continued substantially higher than before, Dannon's irregular drop was only a continuation of the progressive drop which seems to have started in 1960. (CX 872–G.)

As far as Grand Union is concerned (CX 872–H), we find that what had been a wholly insignificant Breakstone representation during all of 1960 and until June of 1961, was increased from $585 sales in June 1961 to $2,650 in July; $2,100 in August; $2,500 in September; $1,700 in October; and $1,500 in November. The fallacy of the percentage method of argument by comparing "corresponding months" in a situation of this sort (not like that in Count I of this proceeding) becomes apparent when we look at CX 872–H and find that Breakstone sales, while they increased from $585 in June 1961 to only $2,650 in July of 1961, are portrayed as being an increase of 10,941.6%.

The doubt that the foregoing analysis casts on the alleged adverse effect of the Breakstone price differential on Dannon sales and the conviction that I have that such decreases of sales as Dannon might have encountered are ascribable probably to causes other than the price differential are fortified by a remark made by Dannon's Treasurer in a letter to the Federal Trade Commission, originally intended to be confidential (CX 338–A), transmitting various sales data: "Since we are not the original complainant, you must have other sources of information." I infer from this that Dannon's Treasurer, who must have had a better internal perspective of the reasons for its sales declines, wanted to be very careful not to pin the responsibility for them on the Breakstone differential. At the hearing (Tr. p. 1253), he testified that on the basis of "Personal observations in the stores, letters from consumers, reports from * * * drivers" the loss of business "was due primarily to the fact that a competitive product was being sold at a much lower price than our product." However, it was brought out later in his testimony that price fluctuations such as this are common (Tr. pp. 1262–1263) and that Dannon had just increased the price for its yogurt (Tr. p. 1263). He testified also that Dannon lost no authorizations, that its product "was sold in substantially all food stores in the metropolitan area" after Breakstone's price cut, and that Dannon's market share in New York was about or higher than 85% in 1959 and all years following (Tr. pp. 1271–1272).

TREND OF LACTO SALES

Lacto sales (CX 870) do not show a decrease in 1961, the year in which eight months of the price differential prevailed. During that year, sales increased by nearly $71,000 from the preceding year. It is only in the calendar year 1962, after the price differential had been in effect for eight months that we note a decrease in Lacto sales. While CX 870 shows a decrease of $74,200 in 1962 from 1961, this is only a neutralization of the sales increase during the year of price differential and merely a recession to just under the 1960 level of sales. (1960 sales had almost tripled those of 1959.) CX 871, which goes into a month by month analysis of Lacto sales in the five years 1958–1962, inclusive, shows "corresponding month" percentage increases for every month beginning in 1958 and until and including October 1961. [This was the period following the entrance into the firm of the wealthy New York food broker (p. 1364, this decision).] In May, June, July, August, September and October 1961, when the greatest spread of Breakstone's price differential existed over the longest period of time, Lacto's sales were May, $27,200; June, $27,300; July, $23,000; August, $23,300; September, $21,300; October, $22,100, all higher than all but two of the months in Lacto's history. It was only in November of 1961 that Lacto's sales started to decrease, but, during the succeeding months and until September of 1962, the monthly sales did not vary precipitately. (CX 874) However, this declining pattern does not seem to be very sharply different from the declining pattern experienced by both Dannon and Breakstone in corresponding months.

ALLEGED DECREASES OF LACTO SALES TO PARTICULAR CUSTOMERS

Next, in support of Count II, counsel supporting the complaint present a number of briefing charts (CXs 873–A–J, inclusive) purporting to show percentage decreases of Lacto sales to particular customers in 1961 from those to the same customers in 1960. Numerous customers are shown and the months dealt with in each of the years 1960 and 1961 are July, August, September, October and November. We are not informed of the sales trends in December 1960 and 1961 and in the months of January–June 1960–1961, inclusive. The customers are selected and, in general, decreases in particular months in 1961 are cited to corresponding months in 1960. Isolated increases are shown, but these may be disregarded. The decreases run in various percentages and, in some instances, as much as 100%. This means that no sales had been made in particular months of 1961 whereas sales had been made in those months in 1960.

These exhibits do not present a complete statistical picture. The Breakstone price decrease started in May 1961, but the charts fail to show any figures for May or June in either 1960 or 1961. There is no substantial or credible evidence that the sales decreases experienced by Lacto in these stores in the months shown resulted from the substitution of Breakstone yogurt for Lacto yogurt. Lacto's Sales Manager's glib and casual testimony that stores had been lost to Breakstone was fully discredited on cross-examination (Compare Tr. pp. 1374–1394 with 1401–1440 and 1899–1998).

For all we know, these stores substituted Dannon yogurt, not Breakstone, or perhaps just stopped selling Lacto yogurt or had decreased demands for it. Perhaps the shifting populations of New York had something to do with losses of particular stores.

The exhibits show that Lacto started to sell to most of these stores in May of 1960. Two first were sold in April of 1960, fourteen in May 1960, four in June 1960, two in July 1960, two in August 1960, and one in September 1960. Six stores are not designated as to time of first sale. The testimony is that when stores first were opened as Lacto accounts, they were given special promotions such as "one free with one" or "cents off" deals (Tr. pp. 1401, 1409). Commission counsel have stipulated, with respect to the underlying or source exhibits, that bulges in and prior to July 1960 "may be due to a one-free-for-one promotion and, after that date, due to a five-cent-off label" (Tr. p. 1308). It may be that the 1960 sales were merely store entries induced by special promotions and lost when the promotions ended.

These exhibits and an additional set, CXs 893–A, B, C, purporting to show "Customers lost by Lacto," became the subject of extended testimony by Lacto's Sales Manager. As noted above, his credibility was sorely discredited. It appears affirmatively that certain customers were lost because of personality differences, disputes between Lacto's drivers and the customers, or just because Lacto did not sell (Tr. pp. 1426, 1951, 1996, 2011–2012, 2023–2025, 2223–2225).

THE STOREKEEPER TESTIMONY

Commission counsel deprecate the purport and meaning of testimony by certain individual storekeepers called on behalf of the respondent. They confuse also the untutored inaccuracies of untrained witnesses with the precision found in the testimony of those well coached. (Incidentally, these storekeepers were the only storekeeper witnesses called during the entire hearing on this count. Commission counsel did not call any.) Proper interpretation of their testimony requires that allowances be made for their limited knowledge of the English language. The reporter's typewritten transcript of what they said is not enough. My personal familiarity with this type of witness and the fact that I heard the inflections of tone and observed the gestures while the testimony was being given justifies my making the following interpretations, which I have concluded are credible:

Storekeeper witness A testified that Dannon far outstripped all other yogurts in sales and that, for this reason, he discontinued selling both Lacto and Breakstone. As far as Lacto was concerned, it was discontinued because it just wasn't selling, had to be taken back and not because of Breakstone's price cut (Tr. pp. 2011–2012). Although Breakstone had been discontinued, it was restocked the week before he was called to testify (Tr. p. 2013). Breakstone does not sell well and it was stocked because a particular customer wanted it (Tr. p. 2015).

Storekeeper witness B testified that he is not selling Lacto now because Lacto stopped stocking him. This was because Lacto, which did not sell, spoiled and too much of it had to be taken back. His original stocking of Lacto was prompted by a special sale (Tr. pp. 2023–2025). Although an attempt was made to impair this witness's credibility by suggesting he was given a special deal to induce his testimony, it appears that he had not been called to testify by his jobber but by a representative directly connected with Breakstone. While he did get a deal, the deal was obtained from his jobber and not from Breakstone. Deals customarily are given to him when he asks for them (Tr. pp. 2026–2029).

Storekeeper witness C testified that he stocks only two brands of yogurt, Dannon and Lacto, and that the Lacto he stocks consists only of flavors or sizes not put out by Dannon. Dannon is by far the more popular brand. Lacto sold in quantity only when a half-price sale was in effect. He never discontinued Lacto because of the Breakstone price cut. During cross-examination, it was brought out that he had not even known the Breakstone representative who had requested him to testify. As far as either Breakstone or Lacto sales were concerned, these were a factor only when specials were run. Other than that, the name for yogurt sales is Dannon and it sells over other products "ten to one" (Tr. pp. 2031–2040).

Storekeeper witness D sells Dannon yogurt at this time. Some years ago, in response to a "five-cents off" special, he stocked some Lacto. He stopped handling it because he couldn't sell enough of it. On two occasions he had stocked Breakstone, which he acquired from a jobber. He stopped selling that for the same reason—it did not sell. He has an interest in another store in which Breakstone yogurt is sold and assumes that that store sells it because it has a demand for it. On cross-examination, he testified that his experience with Breakstone had been both prior and after his experience with Lacto (Tr. pp. 2117–2123).

Storekeeper witness E testified that he sells only Dannon yogurt in his store. For short intervals he had sold Lacto and also Breakstone. He started to stock Lacto in response to a "buy-one-get-one-free" deal. He stopped handling it about three weeks after the deal stopped. This was because the product did not sell and too much of it had to be taken back by the Lacto representative. It was not because of a Breakstone price reduction. He did not sell any Breakstone in 1961. His experience with Breakstone was the same as with Lacto—it just did not sell and he discontinued carrying it. The demand for Dannon is so good that even when Lacto was being given away "one free with one," Dannon's lead in sales, although they might have dropped 20%, was maintained (Tr. pp. 2125–2130).

Storekeeper witness F testified that he handles no yogurt except Dannon's, which he has handled for the past twelve years. Some years ago, in response to a one-free-with-one special, he had handled Lacto for about six months. Little by little his sales decreased when finally "the driver just quit serving" him. There was no connection between his stopping the handling of Lacto and any Breakstone price cut (Tr. pp. 2223–2225).

The principal family member of Lacto, at such times as he was asked to give any testimony with respect to the effect of the Breakstone price cut on his sales, invariably stated that his Sales Manager (the one whose testimony was discredited) was better qualified to testify (Tr. pp. 1320, 1335–1336, 1345).

LACTO'S ALLEGED LOSS OF OPPORTUNITY TO EXPAND

There is also a suggestion that an initial opportunity (*in 1960*) for Lacto to have an expanded yogurt production facility physically tied into the plant of a large milk distributor which would pipe the milk into the Lacto premises was lost because of alleged sales decreases due to the Breakstone price differential. This testimony is in extremely general terms as follows (Tr. pp. 1293–1294):

> Well, everything was going good until Breakstone cut the price on yogurt. Then we began dropping sales and we stopped negotiating, naturally, because our sales stopped and we didn't have to move. In fact we were getting ready to go out of business.

This is a most casual and unsatisfactory attempt to prove causal relationship between the Breakstone price cut and the cessation of negotiations for an expansion of facilities such as that claimed to have been envisioned. The statistics and the time sequence make the conclusion seem illogical. The same is true with respect to the statement, "In fact we were getting ready to go out of business," even though it was stricken on respondent's motion. Lacto sales increased in 1961 over 1960; its sales in 1961 were more than $70,000 better than in 1960; 1962 sales were almost the same as 1960 sales; and 1960 sales were almost three times those of 1959 (CX 870). May 1961 was the beginning of the Breakstone price cut. With sales increasing in 1961, the stated reason for terminating the *1960* expansion negotiations cannot be valid. And, assuming the decrease in 1962, if economies could have been effected by the expansion, it would seem that the expansion would have been pushed, not dropped (Tr. p. 1314). Alternatively if long-run effect on Lacto's sales could be reached as a consideration in this count, it may be observed that Lacto has now made arrangements for a somewhat similar relocation of its business so that it will be physically nearer to its supplier. The main difference is that the arrangements now being made are being made with a company which is the successor of the same supplier with which the prior arrangements had been in the course of negotiation (Tr. p. 1313). The unfortunate part of the record with respect to these 1960 negotiations for a plant move and enlargement and their later termination is the striking paucity of details concerning them. The lack of such details suggests that any negotiations, later terminated, were terminated for a reason other than the Breakstone price differential.

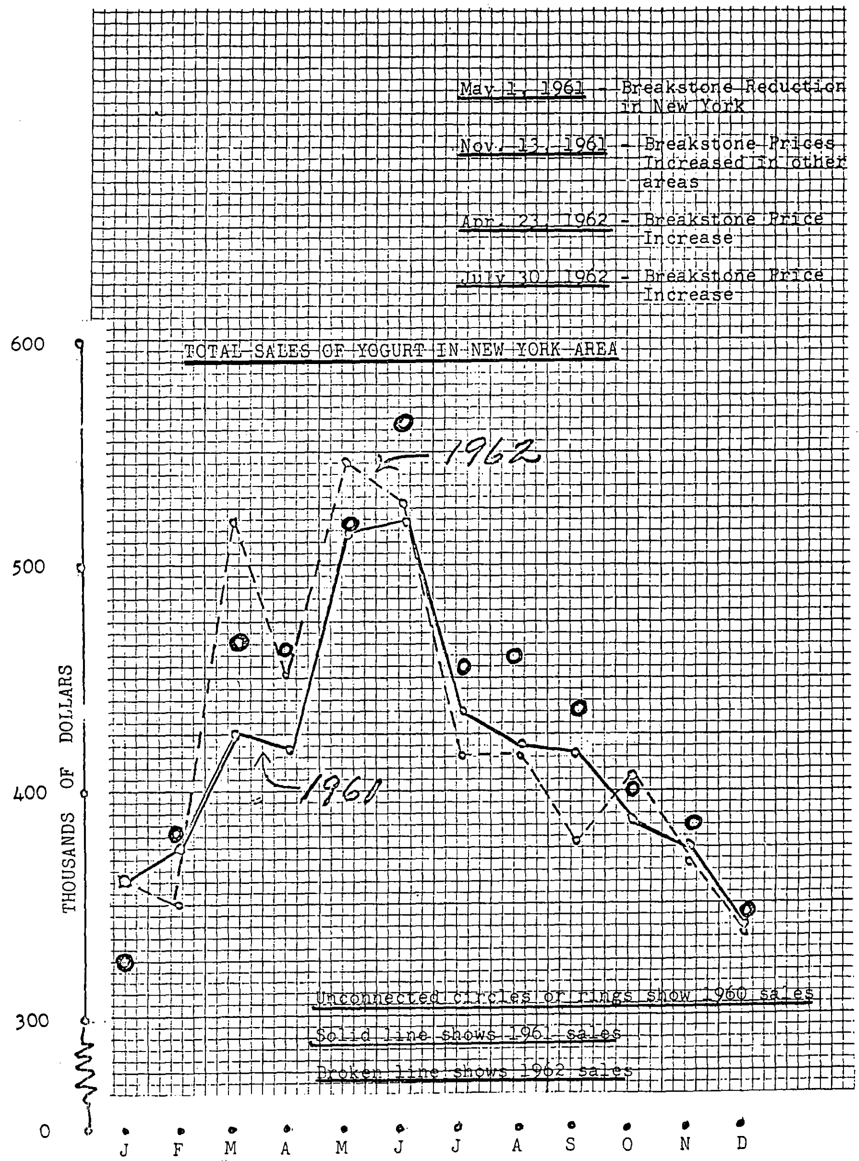
The evidence as far as Lacto is concerned, like that involving Dannon, is insufficient to constitute substantial proof that the price cut instituted by Breakstone in May 1961 had either the probability of an adverse effect or an actual, adverse effect on competition in the yogurt business in the metropolitan New York sales area.

ADDITIONAL COMMENT ON THE YOGURT SALES STATISTICS FOR THE NEW YORK AREA

On the basis of CXs 869, 871, 874 and 908–B, I have prepared a graph which appears on the page following. It shows total sales of yogurt in the New York area for the years 1960, 1961 and 1962. It has endorsed thereon the dates of Breakstone price changes so that they may be correlated to the graph lines.

The three years depicted on the following graph show a generally uniform pattern which confirms, as was mentioned during the giving of oral testimony, that yogurt is a seasonal product. We have no evidence at all, however, as to what part, if any, of the sales growth in each of the years in the months of February, March, April and May was attributable to Lent. If Lent had a bearing on the Spring rise in sales, how many of the Lent customers were new yogurt consumers, without old brand loyalties, just buying for price and prior familiarity with the Breakstone trademark? Could this also have been a factor in the rise of Breakstone sales?

The graph lines show quite persuasively that sales reach their peak in May and June of each year and that after June they decline quite sharply. It is clear, also, that yogurt sales, in general, during the three-year period, went into a declining trend. The unconnected circles or rings showing 1960 sales are higher than the solid line showing 1961 sales. The 1962 sales, represented by the broken line, are lower than both 1961 and 1960 except for the



period before June 1962. The patterns are more uniform in the periods beginning June of each year and the trend is uniformly down. In May, and in months prior to May, the pattern varies a little, and, as already mentioned, we do not know what effect, if any, the Lenten season had on yogurt sales during this period.

The 1962 continuing downward trend is broken in May of that year even though, only a week before, Breakstone's prices had increased. On the other hand, the July 30, 1962, Breakstone price increase starts a precipitate downward movement which is arrested for one month, October, and then continues until the end of the year all below 1961. The May 1961 Breakstone price decrease, instead of resulting in a sharp upward movement from May to June, as had been the case in the prior year, resulted only in a slight upward movement hardly better than a plateau from May to June 1961. The November 13, 1961, Breakstone price increase seems to have had no effect on the uniformly downward pattern which is found for all three years beginning in October. These downward trends, 1962 from 1961, and 1961 from 1960, cast additional doubts as to the meaning and weight to be given the alleged decreases of sales encountered by Dannon and Lacto.

Also, as mentioned elsewhere, the record provides us with no information as to possible population shifts which might have been responsible for sales decreases in particular neighborhood stores listed in the Lacto statistics. These are concerned with only a portion of the *total* of 700 stores sold by Lacto. These stores include not only the neighborhood stores, but the stores of chains (Tr. p. 1442–1443). Lacto's entire marketing operation must have changed following the leading New York food broker's entry into its business. Lacto's sales, it will be recalled, increased rapidly following his entry. Assuming that they did decrease in particular neighborhood stores or even stopped in certain of them, we must not overlook the fact that these were included in the 700 stores, more or less, which were Lacto outlets. According to Commission Exhibit 807–K, there were 11,207 independent grocers and 337 independent supermarkets in New York City in 1962. These do not include 2,136 stores in the leading chains and 699 in the voluntary and cooperative groups. This vast number of potential sales outlets for Lacto cannot be disregarded and the record is bare of any evidence as to what efforts, if any, Lacto made to extend its distribution in this vast market or as to what new outlets it served in replacement of outlets terminated or proved unprofitable.

Finally, we must not overlook the fact that all this transpired in an area where Dannon had and has a monopoly or near monopoly position in yogurt (Tr. pp. 1271–1272) and that this case bears no resemblance to *Maryland Baking Co.*, 52 F.T.C. 1679, 243 F. 2d 716 (4th Cir. 1957).

All this makes it unnecessary to deal specifically with respondent's arguments to the effect that the price differential was commercially proper and necessary to get authorizations in the chains and to acquaint the public with the better flavor attained for the Breakstone yogurt, or that the price differential, instead of having had an adverse effect, actually had a beneficial effect on competition in the New York area.

CONCLUSION AS TO YOGURT

I must conclude, therefore, that the evidence does not support a ruling that such price differentials as prevailed during and following May 1961 were of a nature to lessen competition substantially or to tend to create a monopoly in the sale and distribution of yogurt or to injure, destroy or prevent competition in the sale and distribution of yogurt.

COUNT III

This count, like the others, charges a violation of Section 2(a) of the Clayton Act, as amended, in the primary line. It is concerned with respondent's sale of a marshmallow cream topping in certain trading areas at prices different from the prices at which it sold the identical topping in other trade areas. To the extent that the actual selling prices in different areas are involved, respondent admits that there were differences. It defends by claiming that the differing prices resulted from promotions to introduce a new product and were not of such a nature as to have the requisite adverse effect or probable adverse effect on competition within the contemplation of the law. It alleges further that certain of the differing prices were "in response to changing conditions affecting the market for or the marketability" of marshmallow cream by reason of "imminent deterioration of perishable goods," one of the defenses provided by the statute. In its answer, it alleged, also, that, "in some cases," certain of its offerings were "to meet the equally low price of a competitor," another defense which may be pleaded under the law. Except to the extent that the general practice of promotions, reduced price labels and coupons in the marshmallow cream business (and the grocery business generally) was brought into the case no substantial evidence was offered to support this defense. The admissions that there were price differentials are hedged by the assertion that they were, in fact, promotional devices to which Kraft resorted for the purpose of introducing into the market its new product, marshmallow topping. The explanation for the time variances of the promotions is that, because the product was new, all could not be made simultaneously. They had to be keyed to distribution and had to vary in nature because of varying market reception in different geographical areas.

GENERAL MATTERS

Marshmallow cream topping is a white, creamy, sticky, amorphous confection, generally in a more or less fluffy form. It is made by a blending of sirups, eggwhite and flavoring. It is used as a topping, as a cake or fudge ingredient and, popularly, as a sandwich spread along with peanut butter. Normally it is sold in wide-mouth bottles or jars, seven ounces, seven and one half ounces or eight ounces in size. It is sometimes, but rarely, distributed in larger sizes, some even as large as a gallon. The Kraft jar is seven ounces, the smallest retail size. Although marshmallow topping may be affected by varying temperatures, its normal shelf life is about six months from the date of manufacture.

It is a seasonal product having its highest sales in November and December wherever it is sold. In New England, sales are greatest from September to April. Generally, sales begin to rise in September, but, as the weather tends to become milder after January, they begin to decline (Tr. pp. 930–935).

It is not unique, yet it is not a conventional, everyday household product. Kraft, the division of the respondent with which we are concerned here, is a comparative newcomer in the industry. It did not make or sell any marshmallow topping prior to 1960.

Only three manufacturers have been cited or called for the purpose of supporting the charge. They are Durkee-Mower, Inc., Tweet, Inc., and Cremo Manufacturing Company, all engaged in the business for many years prior to Kraft's entry. Durkee-Mower and Tweet have their plants in New England but Tweet's most important areas of distribution are Harrisburg and Pittsburgh, Pennsylvania (Tr. p. 1046). Cremo's plant is in Philadelphia. Its principal sales areas are Philadelphia, Harrisburg, Scranton and Wilkes-Barre in Pennsylvania. It sells small amounts in New Jersey and Maryland. An effort to sell in New England was completely unsuccessful. (Tr. pp. 1074–1075, 1106.) Durkee's dominant position in New England is the apparent reason for Tweet and Cremo not being there. Prior to Kraft's entry, Durkee had 92% of that market (CX 852).

In addition, there were and remain four large manufacturers in the business—A.E. Staley Manufacturing Company, Union Starch & Refining Company, Inc., Cracker Jack Company, and

Kidds, Inc. If there are others, they are minor. No effect was made to prove that competition with any of these four companies was in any way affected by Kraft's conduct.

DURKEE-MOWER, INC., TWEET, INC., AND CREMO MANUFACTURING COMPANY, THE COMPANIES CLAIMED TO HAVE BEEN ADVERSELY AFFECTED

Durkee-Mower, Inc., now a corporation, started its business in 1917 as a partnership. It introduced marshmallow cream topping in about 1920. It has been in the business continuously. At some time prior to 1935, it successfully promoted a combination sandwich of marshmallow cream topping and peanut butter. Its interest in this was only the sale of the topping as a combination product. It sold no peanut butter and no sandwich. This was very successful but was not capitalized, imaginatively until after Kraft's entry into the business. Then, in 1962, the sandwich was pushed under the tradename "Fluffernutter." Durkee's product generally is sold in a seven and one half ounce jar, but it packs a negligible number of gallon jars as well. (Tr. pp. 937, 941.)

Durkee's main marketing area is the New England States. In 1959, it controlled 92% of that market. After New England, it controlled 28% of the Middle Atlantic market (CX 852). Sales in Maine, Vermont, New Hampshire, Massachussetts, Rhode Island and Connecticut accounted for 55% to 60% of all its business. Passing from New England, Durkee's next most important areas are New York and Pennsylvania. It sells also in a belt along the northern part of the United States as far west as Wichita, Kansas. Some sales are made in Los Angeles and San Francisco.

Durkee's only product is marshmallow cream. Its brand name is Marshmallow Fluff and it recently has introduced a sales gimmick, the Fluffernutter, which is only the tradename for the old sandwich combination of marshmallow cream and peanut butter.

Tweet, Inc., seems to be a one-man firm, also with only the one product, marshmallow cream, sold in a seven ounce jar under the trade name, "Tweet." It packs no private labels. Although located in Massachusetts, Tweet's most important sales areas are Harrisburg, Pennsylvania and Pittsburgh, Pennsylvania, where it does 50% of all its business. In 1959 and 1960, the entire business was conducted through a total of only five brokers who communicated with the owner only when there were problems such as deals offered by competitors. (CX 837–B, C; Tr. p. 1048.) The testimony disclosed that Tweet regards Durkee as its principal competitor, next Hip-O-Lite and, after a nudge from counsel, there was added as to Kraft, "Recently, since 1959." (Tr. pp. 1045–1049.) (Hip-O-Lite is the Staley product.)

Cremo Manufacturing Company, a corporation since 1946, appears to have been a family venture since its beginning in 1927. It has about five employees, only two of whom are engaged in production. It is located in Philadelphia and most of its business is done in Eastern Pennsylvania. There is a little in Baltimore, less in New Jersey, but the majority is in Harrisburg and other parts of Eastern Pennsylvania. Its trademark is Cremo. In addition, it packs private labels for about seven concerns. Its principal private label business is done with Acme (American Stores). In 1960, it packed its Cremo label in a seven and one half ounce jar. Now it is being sold in an eight ounce jar. Private labels also are packed in eight ounce jars (Tr. p. 1078). In about 1959 or 1960, Cremo was packed also in a quart jar, possibly because of "a gigantic jar" sold by Kidd, but it did not sell (Tr. pp. 1108–1109). All Cremo's sales are exclusively through brokers (Tr. p. 1076), two being in Philadelphia and one in Williamsport, Pennsylvania. Most of its sales are to chains and wholesalers.

KRAFT AND MARSHMALLOW CREAM TOPPING

In 1958 and for a few years prior thereto, Kraft had been producing the familar piece of candy or cooking ingredient known as a "marshmallow." A dictionary defines this as a confection made from corn sirup, sugar, starch and gelatin, beaten to a creamy consistency. (Originally, it had been a sweetened paste made from the root of a European herb known as a "marsh mallow.") Kraft had marketed marshmallows successfully in a novel, miniature size which made them easily adaptable for cooking, baking or candy making.

It has a "New Products Committee" which exists for the purpose of discovering and exploring the possibilities of new products to be manufactured and sold by Kraft. On November 20, 1958, this Committee reported that the Research Department had submitted a marshmallow cream product which, tastewise, had been found acceptable. The Marketing Department was instructed to make a survey and to compare leading brands with that submitted by the Research Department. It was decided to add this as a new product to Kraft's 10-ounce line of sauces and toppings, but the size would be smaller, approximately seven ounces, in line with that of the chief competitors (RX 44). Kraft officials regarded this new business as being suitable to complement its marshmallow business, particularly because of the similarity of ingredients and manufacturing process (Tr. p. 891).

A market survey report was procured from the Nielsen Company (Tr. pp. 993, 1455; CX 853). This and other information obtained disclosed that consumer acceptance of marshmallow topping varied widely in different geographic areas but that about 40% of all sales were in the New England area which coincided with Kraft's Eastern Division. Consumer acceptance was less as one moved westward. It was negligible in portions of the South and West (CX 853-A-V; Tr. pp. 866–878, 907–908, 933–935, 1753–1764).

The seasonal nature of marshmallow cream sales also was disclosed. This meant that if Kraft was going to include this new product in its line, it would have to be able to market it by October, November or December in a coming year. Its original target was late August or early September 1959 (Tr. pp. 1755, 1765). The seasonal nature of the product also prompted Kraft to engage in studies as to what could be done to stabilize demand throughout the year. The hope for attaining an evening out of sales peaks was based on Kraft's prior experience with marshmallows which, although also subject to seasonal peaks, did not fluctuate as sharply as did marshmallow topping (Tr. p. 1766).

Production was undertaken first in Palmyra, Pennsylvania. The necessity for distributing in Kraft's Western Division prompted transfer of the marshmallow facilities from Palmyra to Kendallville, Indiana. The original plan, which included the startup at Palmyra, contemplated initial distribution in the Eastern, Central and Southern Divisions. This did not work out because of the large number of orders received by the Eastern Division at the very beginning (Tr. p. 906).

The plan to have production start by late August or September of 1959 did not materialize. As a matter of fact, there was no initial production until the end of January 1960. Even this did not become effective until about two weeks later, February 11 (Tr. p. 1761; RX 112). Thus, Kraft missed the peak months for sales and went into production when the historical decline was due to begin.

From this time on, various problems of supply and distribution developed. The ones with which we are concerned here are the price promotions. These varied from time to time and in different areas. The reason given for different types of promotions, uncontradicted, is that in different geographical areas, different types of promotions have varying acceptance (Tr. pp. 1808–1809, 1861–1862, 2249–2250; RX 205).

1960 PROMOTIONS

In the Eastern Division, initially for about a month, there had been 35 cents off per case promotions in six cities and one case free with two purchased in Boston and Washington, the latter being "test markets." There was none in Wilkes-Barre or Syracuse, and a one-free-case-with-two promotion came a little later in Hartford. Within a very short period, because, according to respondent, they did not get a good reception, the promotions for all of the Eastern Division (with the exception of Boston and Hartford which already had had it) were changed to one case free with every two. This time Wilkes-Barre and Syracuse were included. Pittsburgh later reverted to a 75¢ per case allowance. Toward the end of the year, a five cents off label [9] was promoted throughout the division. In summary, there were three different promotions in 1960,—the first roughly in February and March, with the exception of Boston, Hartford, Syracuse and Wilkes-Barre, having been either 35¢ per case allowances or one case free with two; the second roughly in April and May, with the exception of Boston and Hartford, having been uniformly one case free with two; and the final one roughly in September and October, having been a five cents off label in all the cities of the division.

In the Central Division (still 1960), there were four promotions. These seem to have lagged somewhat in time sequence behind those in the Eastern Division. During the time between Eastern's first and second promotions, with slight overlaps, a 35¢ allowance per case promotion was run in all cities except St. Louis, which had been part of the test run of the one-case-free-with-two promotion in the Eastern Division. A second line of promotions was run at about the middle or shortly after the middle of 1960. This was a 50¢ per case allowance in every city. It was run between the time of the second and third general promotions in the Eastern Division, but at the same time that an odd 75¢ per case promotion was running in Pittsburgh. Prior to the third line of promotions in the Central Division, there was a follow up of the promotions in Chicago, Cincinnati and Detroit, this being an allowance of 75¢ per case. The fourth run of 1960

[9] Cents off labels and coupon deals should be distinguished from allowances and free goods deals. The latter are direct inducements to stock the product while the former are inducements to the consumer to create consumer demand and acceptance.

promotions in each of the cities of the Central Division was at the end of the year while none was running in the other divisions. This was an allowance of 30¢ per case.

The Southern Division had only two main promotions in 1960. These coincided more with the first and third promotions in the Central Division. Roughly, however, its first promotion ran between the first and second in the Eastern Division and just ahead of the third there. Promotions were run in each of the cities in the Southern Division except Miami, all of them having been 35¢ off per case with the exception of Memphis and New Orleans. These were offered one case free with two. The second main line of promotions coincided roughly with Central's third line and Eastern's last line. Uniformly, with the exception of Miami, it was 30¢ off per case. There was a minor line of promotions in only 10 of the 31 cities of the Southern Division (one of which was Miami). This involved offerings of one case free with three, with an insignificant variation in one city. Miami started with a one-case-free-with-five promotion at this time but was changed later to one case free with three for the greater part of the promotion. The major second line of promotions was stopped after an interval in all cities except Houston, in which the 30¢ off per case was continued until the end of the year. Lubbock, Texas, had a somewhat longer 30¢ off per case promotion in this line than the others. Memphis had the 30¢ off per case promotion renewed for a short time before the end of the year and, at the end of the year, New Orleans was allowed, in addition to the two prior promotions, a one-case-free-with-ten promotion.

During the entire year, possibly because of the slow progress of distribution across the country and the lesser market there, the Western Division had only one promotion in all of 1960. This was a 30¢ off per case promotion in about the third quarter.

In essence, the differentials most relied on occur in this year of 1960 in the manners just depicted. During all times when promotions were not in effect, identical list prices, except for western freight adjustments, prevailed. This gives rise to the charge of unlawful price differentials.

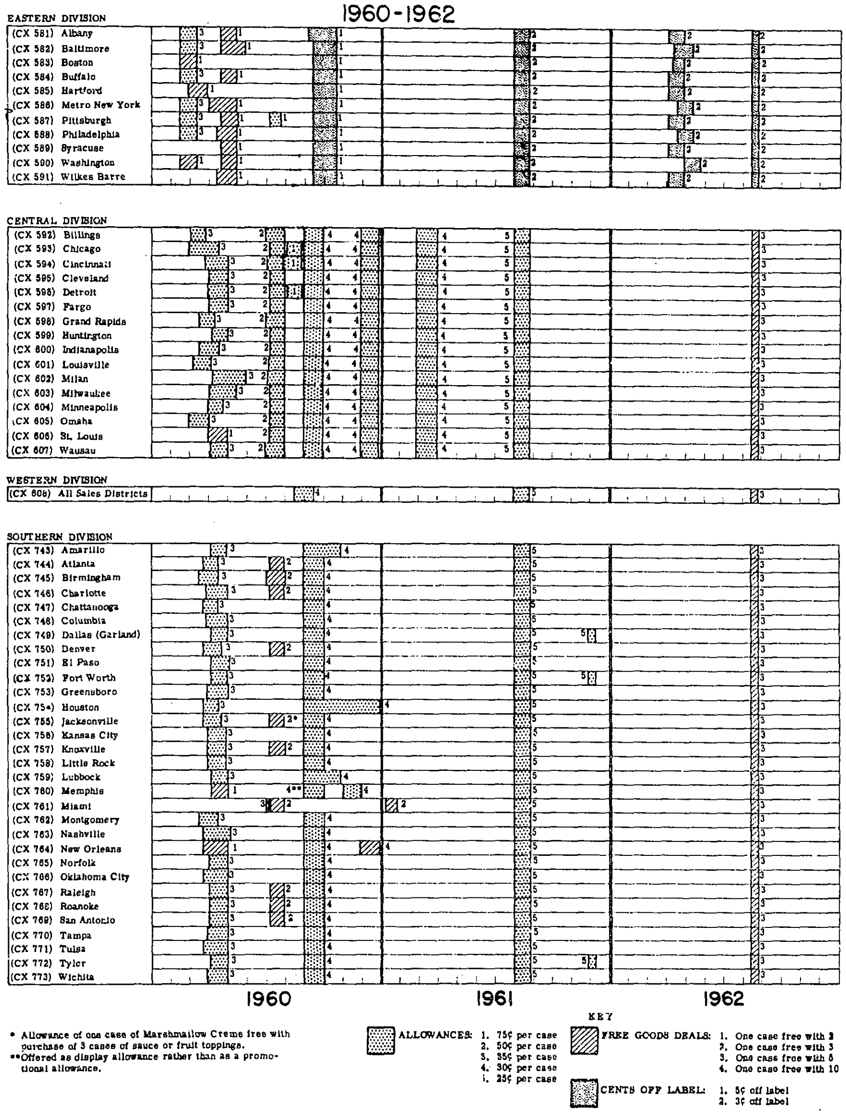
The forgoing analysis has been taken from a chart submitted at page 226 of the Proposed Findings of Fact offered by Counsel Supporting the Complaint. It is reproduced on the page following.

Respondent's attorneys have prepared two charts, generally to the same effect, which are reproduced on the pages following Commission counsel's chart.

NATIONAL DAIRY PRODUCTS, INC., DOCKET NO. 8548

KRAFT PRICE DISCRIMINATIONS IN SALES OF MARSHMALLOW CREME

1960-1962

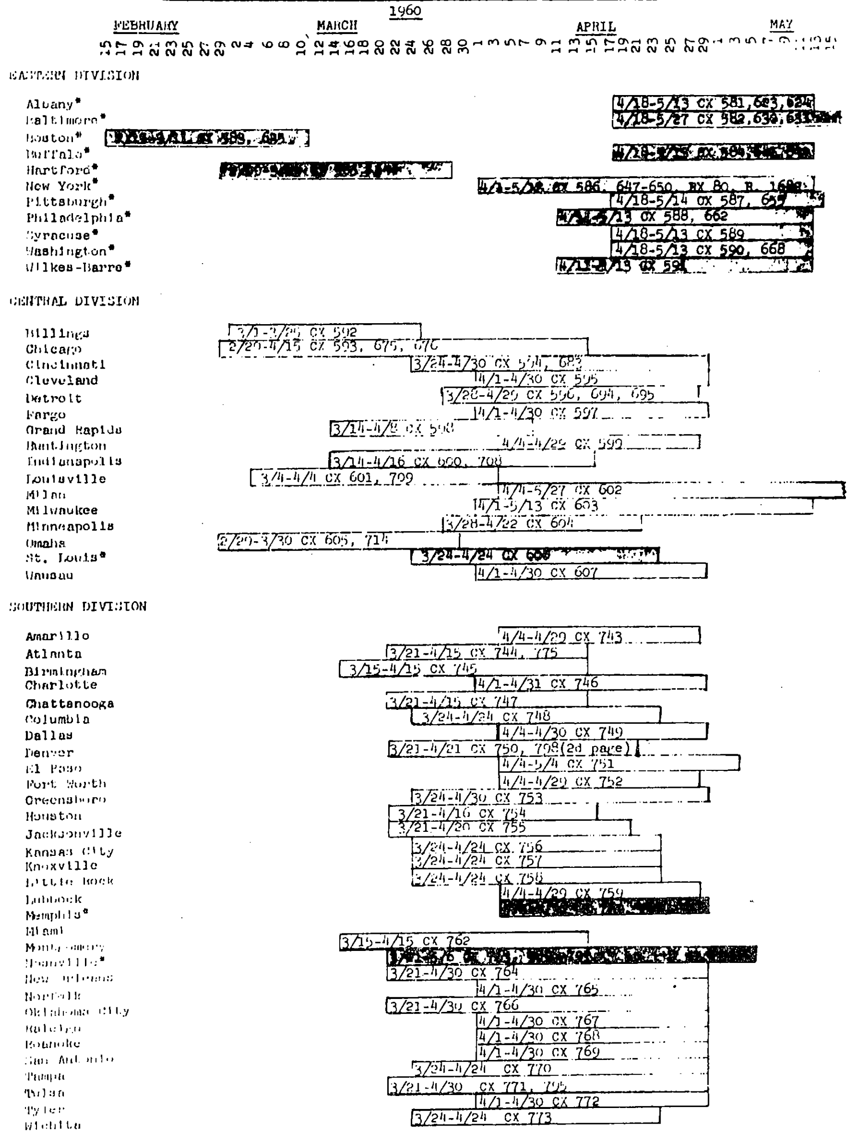


* Allowance of one case of Marshmallow Creme free with purchase of 3 cases of sauce or fruit toppings.

**Offered as display allowance rather than as a promotional allowance.

CHART NO. 2

BEGINNING AND ENDING DATES OF INTRODUCTORY MARSHMALLOW CREME PROMOTION, AS RESCHEDULED, IN EACH SALES DISTRICT OF KRAFT'S EASTERN, CENTRAL AND SOUTHERN DIVISION WITH SOURCE REFERENCES TO EXHIBITS OR TESTIMONY[a]



(a) Not including sales under original 35¢ per case introductory offer terminated on February 11, 1960. (See CX 901 A-D; Ferrow R. 1672-73).

/ / 35¢ per case introductory promotional allowance

* one free with two introductory promotional allowance

CHART NO. 3

SCHEDULE OF PROMOTIONS ON KRAFT MARSHMALLOW CREME - JULY 1960-DECEMBER 1961*

Month	WESTERN DIVISION (CX 608)	SOUTHERN DIVISION (CX 743-773)	CENTRAL DIVISION (CX 592-607)	EASTERN DIVISION (CX 581-591)
1960 July		1 cs free w/3 in 10 districts 7/5-7/31 1/	50¢/cs prom. allow. 7/5-7/29 2/	75¢/cs -Pittsburgh only 7/4-7/22 3/
Aug.	30¢/cs introductory allow. 8/15-9/16 4/	30¢/cs prom. allow. 8/29-9/30 5/	30¢/cs prom. allow. 8/29-9/30 6/	
Sept.				5¢ off label 9/12-10/21 7/
Oct.				
Nov.		1cs free w/10-New Orleans 11/28-12/30 8/	30¢/cs prom. allow. 11/28-12/30 9/	
Dec.				
1961 Jan.		1 free w/3-Miami only 1/9-1/27 10/		
Feb.			30¢/cs prom. allow. 2/27-3/31 11/	
March				
April				
May				
June				
July	25¢/cs prom. allow. & 25¢ coupon (booking deal) 7/31-8/25 12/	Same as Western Division 13/	Same as Western Division 14/	3¢ off label 7/31-8/25 15/
Aug.				
Sept.				
Oct.				
Nov.		25¢/cs-3 dist. only 11/27-12/8 16/		
Dec.				
1962 Jan.				
Feb.				
March				
April				3¢ off label 4/2-4/27 17/
May				
June				
July				
Aug.	1 cs free w/5 (booking deal) 8/13-8/24 18/	Same as Western Div. 19/	Same as Western Div. 20/	3¢ off label 8/13-8/24 21/
Sept.				
Oct.				
Nov.				
Dec.				

1/ CX 478, 480, 776, 778, 800-802
2/ CX 479, 677, 684, 696, 710, 718, 719; increased to 75¢ in some districts-see CX 678, 685, 699
3/ CX 656
4/ CX 481, 723, 725-727, 729-731, 735, 737, 815
5/ CX 482, 781, 790, 791, 796, 803 - in Houston, deal was extended thru December 1960
6/ CX 482, 686, 691, 697, 698, 700, 711, 712, 814
7/ CX 614, 615, 625, 632-634, 643, 651, 657, 663, 670
8/ CX 792
9/ CX 488, 679, 687, 701-703, 715, 808, 812
10/ CX 509
11/ CX 510, 673, 680, 688, 704, 716, 720, 809, 813
12/ CX 511, 724, 732, 736, 738
13/ CX 511, 777, 793, 804, 806
14/ CX 511, 674, 681, 689, 705, 717, 721, 806, 810
15/ CX 511, 616, 637, 652, 658, 664, 671
16/ CX 515
17/ CX 617, 620, 659, 665, 774
18/ CX 518, 728, 733, 734, 739, 740, 794, 805
19/ CX 518, 782, 797
20/ CX 518, 682, 690, 706, 707, 713, 722, 807, 811
21/ CX 518, 618, 627, 638, 639, 660, 666

*Insignificant variations in the actual starting and ending date in a few Sales Districts may exist but could not be charted. Reference to the exhibits cited will disclose such variations, if any.

1961 AND 1962 PROMOTIONS

Looking back at Commission counsel's chart, we find that in 1961 and 1962, with one exception in the Eastern Division and one exception in the Central Division, promotions uniformly were granted at the same time in all the cities of all the divisions. Thus, in August 1961, prior to the seasonal rise in sales, we find that in the Central, Western and Southern Divisions, a 25¢ allowance per case promotion was run in every city while a three cents off label was promoted in every city in the Eastern Division. In part of August or September 1962, a one-case-free-with-five promotion was run in every city of the Central, Western and Southern Divisions while a three cents off label was run in every city in the Eastern Division. The only exceptions for 1961 and 1962 are the three cents off label in either April or May 1962 in every city in the Eastern Division, and a 30¢ allowance per case for every city in the Central Division in March 1961. [This last was a non-seasonal promotion and Durkee admits that as far as it is concerned, its St. Louis and Midwest markets would not have been affected by it (Tr. p. 1014). The April or May 1962 exception was run in the most important area and both this and the March 1961 Central Division promotion are consistent with respondent's avowed purpose to even out demand and reduce sharp peaks.]

There were, in addition, three isolated promotions in November or December of 1961 consisting of a 25¢ per case allowance in Dallas, Fort Worth and Tyler, all almost adjacent to each other, in the Southern Division, and not involved in this case. (See CX 818.)

PRIOR PROMOTIONS OF MARSHMALLOW CREAM TOPPING BY DURKEE, TWEET AND CREMO

Promotions seem to be the rule, not the exception, in the grocery business. As far as this count is concerned, because Kraft's promotions are in issue, I refer briefly to those of the three firms with whom competition is alleged to have been adversely affected by Kraft's, particularly those run prior to Kraft's introduction of marshmallow topping.

Durkee had and has a practice of providing free goods to various consumers and consumer groups (Tr. p. 1000). It ran promotions involving 6,422 free cases in 1958 and 11,724 free cases in 1959. In general, Durkee agreed that promotions also had been run by its competitors before Kraft. These included Hip-O-Lite, Pennant and others. Pennant had offered 1,000 free cases to First National stores prior to Kraft's entry in the business (Tr. p. 1014–1016). RX 47–A shows that in the third and fourth quarters of 1958, Durkee ran numerous one-case-free-with-ten-cases-purchased promotions. In 1959, it ran one-case-free-with-five and one-case-free-with-ten promotions in different areas and at various times. (RX 47–B.) In 1960, the year of Kraft's entry, it ran numerous promotions. Significantly, in its Area No. 2, which included Milwaukee, Missouri and Kansas, in the first quarter, apparently before Kraft became effective there, Durkee ran one-free-with-ten-cases-purchased promotions and 10¢ or 25¢ off per case promotions. Durkee's reasons for these promotions varied—they were advertising allowances, or introductory allowances, or incentives for new brokers, or for the purpose of meeting promotions by other competitors such as Hip-O-Lite (Tr. pp. 1018–1025, 1028–1032). It did not promote as freely or as frequently in New England because it had a dominant position there (Tr. pp. 1025–1026). According to RX 50, furnished by Durkee, 90% of 6,422 cases of free goods involved promotions in 1958. The same percentage of 11,724 cases of free goods involved promotions in 1959. (Tr. p. 1036.)

Tweet ran numerous free goods promotions during 1959, before Kraft's entry into the market. Some of these concededly might have been run in response to similar promotions by Union Starch's Pennant (Tr. pp. 1056–1059).

Cremo also engaged in promotions prior to Kraft's entry into the business. Although Cremo's owner had testified that he had never run into off-label deals in the marshmallow cream business before Kraft started them (Tr. p. 1116), he admitted that, in the fall of 1958 and 1959, he had run one-case-free-with-ten promotions. He admitted also that he gave free goods to stores on store openings (Tr. p. 1119).

THE CLIMATE OF MARSHMALLOW CREAM COMPETITION PRIOR TO KRAFT

Everything was nice, sleepy and cozy until Kraft decided to get into the marshmallow cream topping business and sell in the areas sold by Durkee, Tweet and Cremo.

In New England, Durkee had 92% of the market. Naturally, this strength provided no incentive for it to become competitive. For an undisclosed time prior to June 30, 1960, its price was $2.36 per dozen delivered east of the Rockies and $2.50 west of the Rockies. Apart from the isolated promotions already mentioned, more or less responsive to promotions by Hip-O-Lite, Pennant and others, Durkee's only device to promote sales was a $0.15 per case cooperative advertising program. Other than competitive promotions, there were those limited to opening a new market or offering a buyer an incentive to open a new market (Tr. pp. 998–999).

Durkee had a single advertising agency which presumably was doing nothing much for it. For five or six years prior to 1960 it would have liked to make a change. It did not do so because nothing had happened on the competitive scene to provide the motivation (Tr. p. 1004). Its advertising seems to have been unimaginative and Marshmallow Fluff was plugged routinely as a combination product for a marshmallow and peanut butter sandwich (Tr. pp. 1004–1005).

In all New England, Durkee had one broker because, prior to Kraft's entry, retail coverage was unnecessary in the field. It was content because it had complete distribution and Fluff was on all the shelves. The broker used before Kraft's entry was a two-man firm augmented by two or three salesmen at the most, to cover all New England. This small brokerage firm had its work divided so that the wholesale men did no retail work. In Philadelphia, Durkee had one broker prior to 1960. This was a man whose primary business was the running of two restaurants. While he was loyal, his sales were only "as hard as he could" make them. Just what selling effort a lone operator primarily interested in running two restaurants could make is open to question. He apparently considered that he had a good thing going and rarely called on the buyers to push sales (Tr. pp. 1155–1157). Durkee admitted that its brokers at Harrisburg, Pennsylvania, and Lexington (Kentucky?) and presumably all the others listed in RX 47–A, B, C were "insignificant brokers." It "had no advertising going into the area" of those brokers (Tr. p. 1020). As far as Washington and Baltimore were concerned, Durkee was not much interested (Tr. pp. 1008–1010).

No market research had been done until after Kraft came on the scene. In areas west of New England, for example, St. Louis, Durkee relied on the utilization of marshmallow cream in the making of fudge during the Christmas holiday season (Tr. p. 1014).

The only incentive for promotions was in response to promotions of others such as Hip-O-Lite, for example (Tr. p. 1021). While the 15¢ cooperative advertising allowance was available in areas other than New England, it did not prove effective. When

Durkee eliminated this and went through the motion of reducing the price six cents a case, the real effect was a price increase of nine cents per case (Tr. p. 1024). When asked why a better than one-free-with-ten promotion had not been run in New England, its witness said "It would be economically impossible." He subsequently impliedly admitted that a better promotion was not necessary there (Tr. p. 1025). He was not even aware of the fact that old promotion goods still were being offered at the time of the hearing by a cooperative buying group in the Washington area (Tr. p. 1028).

Durkee's philosophy seems to have been that it could get along with its sales of Marshmallow Fluff without regard to what the retail price might be because of consumer unawareness of Marshmallow Fluff pricing. "Well, the consumer is not as aware; she could probably quote you the prices, retail prices of tuna fish or * * * soup whereas if you asked her in Philadelphia what marshmallow fluff was sold for, she wouldn't know." (Tr. p. 1043.)

Tweet's owner is an aging man. Its only product is marshmallow topping sold under the trade name, "Tweet." This nice man seemed to be uncertain, apart from the fact that his business was conducted through brokers, whether he made any direct sales to retail accounts. He indicated that any sales made by a broker would be to wholesale accounts and chain stores. He described his duties as "Looking at the sales end of it and the financial end of it." The complacent nature of the business was such that, when he was asked if his brokers reported to him, he said, "Not unless there is some, the only time they contact directly is when they have any business problems; otherwise we get the orders and we ship them and send their commissions." There were never any written reports. When, if ever, any contacts were made, the brokers just telephoned (Tr. pp. 1047–1048). The brokers were located at Harrisburg, Pennsylvania, Cambridge, Massachusetts, Reading, Pennsylvania, Charlotte, North Carolina, and Pittsburgh, Pennsylvania. This was Tweet's selling force (Tr. pp. 1051–1052).

Cremo's Secretary-Treasurer, who apparently is in control of the business, throughout his testimony seemed to have only a superficial knowledge of it. As mentioned already, it consisted of four or five people of whom the work force were only two (Tr. pp. 1072–1074). Except for production and bookkeeping, he ran the whole business. While the house product sells under the trade name "Cremo," the company seems to be more or less of a captive enterprise for various wholesalers and chains for which it packs private brand marshmallow creams (Tr. pp. 1075–1076). Its principal customers are Acme Stores and Food Fair (Tr. p. 1095). It treats "every private label as an individual agreement, * * * and an individual deal" (Tr. p. 1121).

It relies exclusively on brokers to promote its sales. When asked as to communication with them, the answer was, "I wouldn't say that we have a great amount of contact." (Tr. p. 1076.) Some years before Kraft entered the picture, Cremo had had a candy product in addition to Marshmallow Fluff, but it was discontinued (Tr. p. 1084).

Cremo's efforts to expand to more distant markets such as Pittsburgh were dropped because of freight-rate problems. Its only sales outside of the 100-mile radius of Philadelphia "might have been an isolated sale maybe in Connecticut or something like that." Sporadic contacts with brokers for New England were not long lived (Tr. pp. 1104–1105). This was because "Marshmallow Fluff (Durkee) was the big seller in New England."

As far as Cremo's main market, the Philadelphia area, was concerned, the witness indicated no knowledge at all as to the relative sales positions of his product and Durkee's. He was hazy about Hip-O-Lite and Pennant penetration in the area. At one time during the testimony he said, "I wouldn't want to be quoted on anything. I just don't recall that" (Tr. pp. 1105–1108).

Before Kraft's entry, Cremo lost two different A & P warehouses in the Scranton-Baltimore area (Tr. p. 1109). Cremo's peak sales year was 1946. Ever since then, sales have been lower due to "a lot of extenuating circumstances." There was no elaboration of these or as to what might have caused Cremo's decline before Kraft's entry. It has not advertised the Cremo label since 1953, has provided no point-of-sale material for the stores, and has relied entirely on the brokers for store visitation. Of the brokers in Philadelphia, two of them "had no retail men" (Tr. pp. 1112–1114).

Despite the fact that the chain accounts and private labels are such an important factor in Cremo's business, its executive officer never called on them or communicated with them for business. He relied entirely on his brokers for this (Tr. p. 1126). While testimony was given that Cremo, on numerous occasions, gave deals, it apparently never took the initiative. Any deal it gave "was always in answer to somebody else's deals. We made no deals on our own. It was always in answer to somebody else's deal" (Tr. p. 1135). An effort was made to justify this by referring to the Robinson-Patman Act. This does not explain the lethargy characterized by the failure to engage in such a general practice. Such deals can be and regularly are offered without violation of the Robinson-Patman Act.

This complacency in the marshmallow cream topping market suggests that it was ripe for a jolt and that it needed a little progressive competition.

SALES DECREASES SUFFERED BY DURKEE, TWEET AND CREMO

Durkee, Tweet and Cremo, prior to Kraft's entry, were riding a current or tide and they all appeared to be satisfied to let it carry them along just as it had been for years. Almost anything new could have disrupted their established sales patterns. As a matter of fact, for all this record shows, some parts of it might have been disrupted by Hip-O-Lite and Pennant (CXs 853–J, K, L, 854–N, O)—competitive products with respect to which the record is practically silent.

Durkee, Tweet and Cremo had to lose some sales to Kraft, the newcomer. Unless a market is expanded in an amount equivalent to that attained by a successful newcomer in that market and, by some bizarre quirk, the entire expansion goes to that newcomer, it is inevitable that established sellers will lose sales to the newcomer. This is the meaning of competition. It is also inevitable that established sellers, by reason of the accelerated competitive conditions, may lose sales to each other.

We take Durkee first. The New England and the Middle Atlantic areas are the primary market areas as far as this count is concerned. As a matter of fact the best understanding of the competitive elements of the case can be obtained from an analysis of what happened there.

Without using the word "monopoly," it is sufficient to note that prior to Kraft's entry, Durkee made more than 90% of the sales in the New England area and more than 28% of the sales in the Middle Atlantic area. In wrap-up testimony, Durkee testified that it has lost no authorizations in any of the chains in New England and that its 1963 sales were as high or higher than they had been since 1958, before Kraft came into the area (Tr. pp. 1011–1012).

Considering that Kraft entered into the business in the spring of 1960, considering Durkee's dominant position in New England, considering that all its business in 1963, after Kraft's promotions and competition in 1960, 1961, and 1962 was as good or better than it had been before Kraft entered the picture, it can hardly be argued that Kraft's promotions either tended to or did impair Durkee's effectiveness as a competitor.

A basic question is whether Durkee's sales losses were attributable to Kraft's promotions, assuming that the promotions resulted in price differentials such as those contemplated by the Act. The burden of proving this is on Commission counsel. Without a consideration of sales statistics for Staley, Union Starch, Cracker Jack and Kidds (CXs 853–J, K, L, 854–N, O), to say nothing of minor local distributors, there is no justification for pinning the responsibility for these sales losses on Kraft. If, however, it be suggested that these others were not factors in the areas with which we are concerned, then the following chart prepared by respondent's attorneys showing case sales by Durkee and Kraft to major New England accounts in the years 1958 to 1962, inclusive, ought to be instructive. [Page 1396.]

This chart shows: (1) Despite Kraft's entry into this market, it failed to make an entry into 14 outlets, including Stop and Shop, the major chain after the A & P and First National stores. (2) Although Durkee's case sales in the outlets where Kraft made an entry decreased with some exceptions in 1960, the year of Kraft's entry, they generally have shown a consistent recovery thereafter. (3) Although Kraft made no entry in the Hartford stores of First National until 1961, Durkee's sales to the stores in that city decreased in 1960 but increased in 1961, after Kraft came in. (4) The same is true for the East Hartford stores of the A & P except that instead of an increase in 1961, there was a very slight decrease. (5) For a smaller outlet, Gaer Bros., sales decreased in 1960 before Kraft, but increased in 1961, after Kraft. (6) Out of 14 outlets, including Stop and Shop, where Kraft made no entry, Durkee's 1960 sales dropped in 10. These drops, (3), (4), (5) and (6), cannot be assigned to a displacement of Durkee by Kraft.

The chart shows Kraft entry or penetration in all the A & P stores and First National stores and in seven other outlets. A comparison of the Durkee sales in all these shows: (1) After the initial impact of Kraft's entry, Durkee's sales recovered in most instances. (2) What is more important, sales or consumption of marshmallow topping have been increasing consistently since Kraft's entry. Assuming that Kraft's promotions and advertising were as effective as is here contended, the present peak of marshmallow topping consumption in this area may be credited to Kraft. Durkee could not help being a beneficiary of generally wider acceptance of marshmallow topping. The chart proves this.

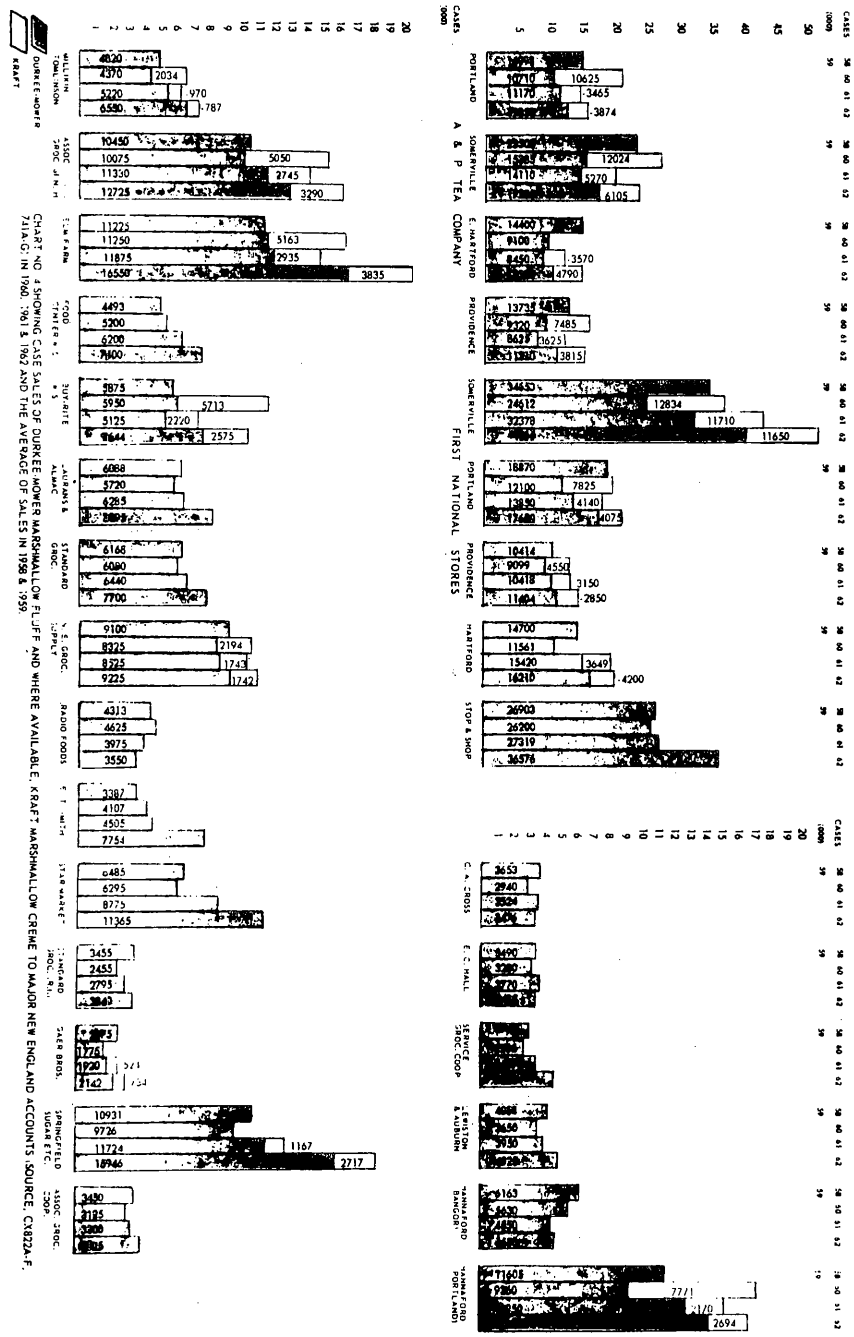


CHART NO. 4 SHOWING CASE SALES OF DURKEE-MOWER MARSHMALLOW FLUFF AND WHERE AVAILABLE, KRAFT MARSHMALLOW CREME TO MAJOR NEW ENGLAND ACCOUNTS (SOURCE, CX822A-F, 731A-G) IN 1960, 1961 & 1962 AND THE AVERAGE OF SALES IN 1958 & 1959.

In each of 1960, 1961 and 1962, Durkee's sales to the Somerville, Providence and Hartford Divisions of First National stores increased to the point where they are now at their highest level. The same result has been reached in Stop and Shop, plus nine other outlets in which Kraft made no entry. The same result has been reached in seven outlets where Kraft did make an entry.

Consequently, while, as was to be expected, Durkee lost some sales initially to the new product and, while it has not recovered all sales and has not increased sales in some instances, in general, the competitive climate in New England has been benefited by Kraft's entry, and Durkee today is in as good or better position than prior to Kraft's entry.

As far as the Philadelphia situation is concerned, the primary complaint seems to be that the *Philadelphia* Acme stores and *Philadelphia* Food Fair were lost permanently by Durkee because of Kraft's promotions. Of course, if they were not lost because of Kraft's promotions, the fact that Kraft had promotions would be immaterial.

The correspondence between Durkee and Acme at the time involved (CXs 836, 851; RXs 48–A, 49–A) shows that Acme did not discontinue Durkee because it had received either a promotion or a better promotion from Kraft than Durkee offered. The simple reason for Acme's discontinuance of Durkee's Marshmallow Fluff is that Kraft had better consumer demand than Fluff. Acme had no room for a third brand. Fluff, being lowest in sales, was discontinued. Acme persisted in rejecting Fluff despite Durkee's reminder in its letter of Nov. 16, 1960, RX 49–A, that it could have had Fluff on a one-free-with-five promotion. Commission counsel's chart (page 1386, above) does not show that Kraft was offering any promotion after the last week of October in 1960. Additionally, although in RX 48–A Durkee said, "Marshmallow Fluff has been discontinued by your Kearny and Philadelphia warehouses," whatever the reason for the Kearny discontinuance might have been, there is nothing in the record to show that Kraft ever sold its topping to that warehouse in 1960 and, according to CX 741–C, Kraft made no sales there in either 1961 or 1962. Also, as noted elsewhere, Durkee lost no other Acme accounts.

Whether Food Fair Philadelphia can be regarded as an account lost by Durkee is questionable. There is a difference between loss of a long-standing account and loss of a new account. Food Fair Philadelphia was a new account for Durkee in December 1958. It had obtained this account in response to a free goods offer of

1,200 cases at a time when Cremo already had been established there. Durkee did not lose other Food Fair accounts (Tr. pp. 1031–1032). According to Food Fair, Durkee's Fluff, which it had stocked for only about 20 months, "was discontinued in August of 1960 because of a continued decline in customer demand for this product." Food Fair's primary reason for stocking Kraft Marshmallow Creme was the heavy consumer demand for it, but this was not significant because the real objection to Durkee was "its decline in sales in" Food Fair stores (RX 53). If it is sought to be implied that Food Fair stocked Kraft's Marshmallow Creme in response to a Kraft promotion to Durkee's detriment, the implication is not justified. If Food Fair were that responsive to promotions, it would not have rejected Durkee's one-free-with-five deal plus 25¢ a case merchandising allowance, which Durkee held out as bait in RX 49–A. Durkee's broker's effort to sell this deal to Food Fair also was completely unsuccessful. He testified that they were "perfectly satisfied with what their decision had been, and that was just to have Kraft and Cremo; that there wasn't any reason for having a third marshmallow, as far as (Food Fair) could see." (Tr. p. 1168.)

Next, we consider Tweet's sales. Tweet's owner testified to an awareness that Tweet's sales had declined after Kraft's promotions but nothing he said can be regarded as demonstrating that the cause for these declines was the Kraft promotions.

One of Tweet's brokers was called to testify, the one who handled Tweet's sales in the Harrisburg area. Prior to Kraft, the principal marshmallow toppings in the area were Tweet, the leader, Cremo, Pennant, Hip-O-Lite, and a private brand like Buddy and possibly Aunt Nellie. In 1960, this array was augmented by Kraft. He was unable to provide records for 1959, the year prior to Kraft's entry and a crucial year, the reason being given that they were destroyed.

A principal account was a chain, Weis Markets. According to his best judgment, sales to that chain in the years prior to Kraft's entry were similar to those in the year when Kraft entered. He contradicted himself on whether the number of Tweet orders declined after Kraft's entry, stated there had been no cancellations and that authorization was not lost in the major chain. He said that Tweet's sales declined after Kraft's entry and that this was because shelf spacings had been lost, resulting in loss of sales, all due to Kraft's competition. He admitted that even though shelf spacings had been lost, the customers had not been lost.

In summary, his entire testimony (Tr. pp. 1139–1152), construed most favorably in support of the charge, is that Tweet's sales went down because of Kraft competition. However, Kraft competition is not in issue here. The question is: Did Kraft's alleged price differentials cause Tweet's sales to go down? This has not been demonstrated by anything in the Tweet testimony. Moreover, here, like elsewhere throughout the record, there is no evidence from which we may conclude that competitive brands other than Kraft did not contribute to Tweet's sales losses. On the contrary, Tweet's owner admitted that in 1959 the Pennant brand had made an entry coupled with a free merchandise offer (Tr. p. 1059).

To the extent that Tweet sales figures are available, they suggest a continuing down trend commencing with the calendar year 1953, in which sales had been $106,600, down to $57,623 in 1959, the year before Kraft's entry. The down pattern continues in 1960, 1961 and 1962 when it ultimately reached $22,800 (CX 843). [Respondent poses a question about the sharp drop in 1960 from 1959, 1960 being the year of Kraft's entry. It says that if the totals of Tweet's brokers' sales for these years are considered, the drop would not be from $57,623 to $33,730, but would be from $52,566 to $38,227 (CXs 837–B, C, 857, 858). This, however, is not of any great importance because, regardless of what the drop might have been in 1960 from 1959, the drop has not been linked to Kraft's promotions by any substantial evidence.]

In summary, Tweet seems to be a lagging company. This has been a continuous process for many years. While losses are admitted or claimed for the years 1961 and 1962, if the financial exhibits in evidence had included officers' salaries and labor or wages, similar or greater losses probably would have shown up for years preceding Kraft's entry (CXs 838–842, inclusive). Nothing in the evidence justifies a conclusion that Kraft's promotions had an adverse competitive effect or probably would have had such an effect on Tweet. On the contrary, the evidence affirmatively shows that whatever financial troubles Tweet may have today are only a continuation of troubles which started many years ago.

Finally, we consider Cremo's alleged sales losses. Here again we have a company that has been experiencing a sales decline for many years. Its best year was in 1946, and sales have never been as high since because of "a lot of extenuating circumstances" (Tr. p. 1113). In the three years before Kraft's entry, fiscals ending May 1958, 1959 and 1960, Cremo sales decreased from

$153,679 to $126,375, then to $118,918. Surprising as it may seem, although the decrease continued in the year ending May 31, 1961, that being the year of Kraft's entry (disregarding a slight overlap in February, March and April of 1960), the continuing decrease over the years was halted. In fact, in the second full fiscal year after Kraft's entry, Cremo had a slight increase in sales (CX 844–A).

Cremo's pattern of decreases is reflected in the 1958, 1959 and 1960 sales figures to its five largest brand name customers. Its biggest loss, almost $10,000, was its 1959 sales to Food Fair Philadelphia. That was before Kraft's entry but in the year when Durkee started to sell Food Fair with a free goods promotion deal (CXs 883, 844–A, B; RX 47–G). Cremo started to lose A & P accounts before Kraft came on the scene. It had lost the A & P Scranton and Baltimore warehouses and its loss of the Philadelphia warehouse, after Kraft's entry, in 1962, was only because Cremo did not sell as well as other competitive brands (Tr. pp. 1108–1109). An attempt to link Kraft to declining or lost sales in 16 particular accounts failed. There is no proof that Kraft sold to 10 of them and there is proof that Kraft did not sell an 11th (CXs 844–B, C, 741–F). Food Fair in Baltimore, which was not lost until late 1963 or early 1964, seems to have been lost because Hip-O-Lite was taken on there (Tr. p. 1108). Cremo's relations with Acme, its principal private brand customer, show that sales losses there started as far back as 1958, fully two years before Kraft's entry, and that Cremo could and did meet the competition offered by Kraft in the Acme stores (RX 57; Tr. pp. 1187–1188).

Thus, while the financial records do show decreasing sales in the year of Kraft's entry and years following, this pattern of decreases is a continuing pattern which had prevailed for some years before. While a sharp drop in sales coincident with a competitor's promotion but following a record of rising sales in the prior years is evidentiary of causal relationship, a continuing drop over a long period of years antecedent the promotion in issue may be explained by or attributed to factors other than the promotion.

CHANGES IN THE COMPETITIVE PICTURE FOLLOWING KRAFT'S ENTRY

At pages 1390 to 1394, I have set forth the complacent nature of the marshmallow cream business prior to Kraft's entry and concluded that it needed a jolt. Unquestionably, it got that jolt when Kraft entered the business, but the jolt was not harmful. It was, on the contrary, beneficial in several respects. Durkee is the best example of this. Although it had never engaged in any market research, it contracted and paid $18,000 for this in the second half of 1960 (Tr. p. 991). Its sales for 1963 in New England were as high or higher than they had ever been. This was true also of its "Area 1 other than New England." Total company sales for 1963 also were as high or higher than they had been ever since 1958.

Durkee had been wanting, for a period of five or six years, to rid itself of its advertising agency, but Kraft's entry into the market provided it with the necessary motivation so to do. An auxiliary effect of this change in advertising agencies was a development of the catch name or sales gimmick, "Fluffernutter" (Tr. pp. 1003–1005). An aggressive advertising compaign was announced in the October 22, 1962, issue of the "Yankee Grocer," a trade paper. This advertisement featured the Fluffernutter and was entitled "Fall Offensive." It announced "A barrage of live TV to kids," a "Blockbuster in 'Good Housekeeping,'" a full-scale drive including five advertisements in a home economics magazine "Directed at Home Economists, to win tomorrow's young homemakers (and customers!)," all to be supplemented with point-of-sale colorful display pieces. This advertisement, in addition to featuring a picture of a display card for Fluffernutter and a television depiction of Durkee's Fluff alongside the sandwich using it also gave the impression that ads would be placed in at least four magazines other than the two mentioned (RX 46).

There was a change of broker in New England because Durkee recognized that retail coverage, which had been regarded as not necessary because of prior complete distribution, now was necessary. The new broker was able to provide the necessary manpower for this, the former broker having had only two or three men.

The restaurant man in Philadelphia who moonlighted as Durkee's broker also was replaced because Durkee realized that he was not adequate to do the job. Several changes have been made in the Washington area and "generally" since 1960.

These changes in brokers and in the advertising agency resulted in Durkee becoming stronger (Tr. pp. 1007–1010). No chain authorizations have been lost and sales to them are as high or higher than they were since 1958 (Tr. p. 1012).

In general, Kraft's entry stimulated and provided competition when little or none had prevailed before and, in many instances, gave the consumer a second choice where previously she had had only one or, in others it gave her an additional choice.

EXISTING MARKETS, NEW ENTRANTS
AND PROMOTIONS INCIDENTAL THERETO

We must not lose sight of the fact that where there had been three, Fluff, Tweet and Cremo, after Kraft there were four. (This, of course, disregards the others as to whom no proof was offered.) The entry of a newcomer into a market, accompanied by price differentials resulting from promotions, should not be a reason in and of itself for ruling that there has been a violation within the meaning and intent of Section 2(a) of the Clayton Act as amended.

To market any product today, be it old or new, be it an established product or an old product introduced by a newcomer, a trilogy is necessary. There is always, of course, the producer or manufacturer. There must, after that, always be a user or consumer. But these two alone are not sufficient. There must be a distribution process, whether it be from the producer or manufacturer directly to the retailer or indirectly through wholesalers, brokers or buying organizations. (Factory to consumer arrangements are the exception, not the rule.) No matter how much the manufacturer or producer may do for the purpose of exciting or inducing in the consumer or user a desire or demand for the product, all is to no avail if the user or consumer is unable to buy the product. This is where the wholesalers, distributors, buying organizations and retail stores come into the picture. They must be induced to stock the product and have it available in time to meet the demand or desire created in the user or consumer.

Throughout the hearing of this case, witness after witness, in all the counts, has made it quite clear that the prevailing, conventional, recognized and successful way to get a product on the shelves of the retail stores is to offer promotions of one kind or another. However necessary this may be for established products and old manufacturers of such products, it is immeasurably more so for the newcomer in an area or for a new product not previously on the market.

Kraft, for the first time, went into production of marshmallow cream topping. As far as it was concerned, this was a new product. As far as every area in which it might desire to sell this product, it was a new entrant. It could have spent millions on television and radio advertising, newspaper advertising, cents-off coupons, five-cents-off labels, and all of it would have been wasted if it did not get its product on the shelves of the retail stores where the consumer targets of this advertising might buy it. All the cooking schools it might run, all the recipe books it might publish, all the new uses it might invent would be to no avail. All that Kraft did in this case was to engage in normal, not unusual, promotions (not like that in Count I, an unlimited one-free-with-one offer). The promotions here were "cents off" per case, or one-case-with-five, or one-case-with-ten offers, plus a few relatively more liberal free goods deals and direct consumer inducements such as three cents-off labels and five cents-off labels. The mere giving of these promotions, bearing in mind that they were incidental to the introduction of this new Kraft product in many different areas all over the country, even though they resulted in price differentials, is not a *per se* violation. They cannot, without a substantial, not speculative, showing of predatory intent, be regarded as a violation of Section 2(a) of the Clayton Act as amended. Sales losses by complacent old timers are not enough.

Commission counsel recognize that something more than just the sales losses is necessary to demonstrate that respondent's promotions here, undeniably made to introduce a new product, prevented competition, substantially lessened competition, or tended to do either or to create a monopoly. They assert that Kraft sales were below cost. The charge of sales below cost is based on figures disclosed in Commission Exhibits 523–A and 524. Before looking at these exhibits, we should recall that sales below cost, in and of themselves, are not illegal and are not always evidentiary of predatory intent (see pages 1353 and 1354 of this decision). Certainly, the introduction of a new product, even by an old company, is a legitimate commercial objective. If losses are incurred in that venture, as they most certainly are in almost every instance, the mere fact that they are incurred is not a demonstration of predatory intent to justify a conclusion that the conduct was of a nature tending to lessen competition, create a monopoly or to injure, destroy or prevent competition in any market.

Referring to these exhibits, counsel suporting the complaint says that in 1960 Kraft lost $0.4043 per dozen, in 1961, $0.2495, and in 1962, $0.1854. These conclusions fly in the face of the exhibit on which they rely, for this exhibit shows gross profits of $0.1979 per dozen in 1960, $0.5435 per dozen in 1961, and $0.4975 per dozen in 1962. If we do not overlook the fact that this was a new product, we must recognize that much of the allocated expenses, in fairness, have to be regarded as start-up costs and, before making a determination that the ultimate loss figures shown actually are losses incurred for predatory purposes, we must ask ourselves what the loss figures might have been if an entirely new company without any established plants or selling organizations or advertising organizations would have lost in the first three years while it was introducing its new product. As a matter of fact, Commission counsel's very last proposed finding, "Entry in the Marshmallow Creme (sic) Business," seems to be a justification for any losses incurred by Kraft in connection with its entry into this business. Durkee was entrenched in and controlled New England. Tweet had to go elsewhere for its business and Cremo did not dare enter there. Only a company like Kraft seemed to have been willing to use the risk capital to make the entry. It did. Its successful entry, at the cost incurred by it, creating competition where none had existed effectively before, should not be cause for saying that it violated Section 2(a) of the Clayton Act, as amended.

SUMMARY COMMENTS ON RULINGS, FINDINGS, CONCLUSIONS AND ORDER TO BE ENTERED HEREIN

Both sides have submitted carefully prepared abstracts of the record, comments, arguments addressed thereto, and occasional ultimate findings and conclusions, all of which have been very helpful. In the foregoing analysis of the case, I have sought to give full consideration to all contentions of the respective parties. Numerous facts which are not in dispute are set forth. For those no record citations have been given. Record citations have been given at many places throughout the analysis, but these are intended not to be all inclusive. The mere fact that a record citation has been given does not mean that the record does not support elsewhere any statement made.

Because of the manner in which the proposals have been submitted, I have found it most difficult, if not impossible, to make specific rulings on proposed findings of fact as is contemplated by Section 8(b) of the Administrative Procedure Act and Section 3.19 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings. I have sought, however, wherever I have made a ruling, to set forth adequately my reasons therefor. To the extent that any proposal is not specifically the subject of comment or ruling, my failure to refer thereto is because I have regarded it as irrelevant, immaterial or merely repetitious or of a class similar to a proposition upon which I have ruled expressly. Any requests inconsistent with any rulings made are denied. Any open motion on the record is either denied or granted in accordance with the text of this decision.

The findings of fact and conclusions of law which will follow this section are mere ultimates. They are to be read in connection with the analysis, and the analysis and recital of facts in the text of the decision, together with the ultimates, are to be regarded as the basis and reasons for the results attained.

Counts II and III are being dismissed for the reasons set forth in the text. No affirmative findings of fact other than the facts set forth in the decision are necessary for the reason that no remedial action is being taken against the respondent as to them.

While the order will run against the respondent, it is my considered opinion that it should not be as broad as that sought by Commission counsel. The nature of the food and grocery business is such that an extremely broad order such as that requested would result in insurmountable problems, both with respect to the economics of the industry and enforcement. I believe that an order is appropriate and necessary but that it should be tailored to the particular conduct which caused the bringing of this proceeding.

There are numerous practices prevalent in the food and grocery business which have been brought out in the evidence presented. The fact that I make no comments with respect to such practices has no bearing on the merits of this case. It should be understood quite clearly that whatever is said with respect to Counts II and III should not be regarded as either condoning or approving any practices in the industry. It may be that these practices are more properly a matter for an industry-wide review. It may be, also, that some are the subject of pending legislation such as Senator Hart's "Truth in Packaging Bill," S. 387, 88th Congress, Second Session. Nothing in this case suggests the desirability of a consideration of those practices in determining the merits involved herein.

Upon the whole record and for the purpose of supplementing the text of this decision, and within the area noted, the following are my

FINDINGS OF FACT

1. Respondent, National Dairy Products Corporation, is a cor-

poration organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 260 Madison Avenue, New York, New York.

2. Respondent is organized and operates under a division structure consisting of seven operating divisions, each with its own president and staff personnel. The seven operating divisions are Kraft, Sealtest, Breakstone, Sugar Creek Creamery, Humko Products, Metro Glass, and Research and Development.

3. Respondent, through its Kraft Foods Division, for many years has been and is now extensively engaged in the business of manufacturing, processing, distributing, and selling a vast variety of food products, including cheese and cheese products, margarine, mayonnaise, salad oil, salad dressing, and other salad products, caramels, marshmallows and other confections, Kraft Dinners, cooking oils and shortenings, fruit salads, sauces and dessert toppings, condiments, and a complete line of jellies and preserves. It sells these products throughout the United States and in Canada and many foreign countries.

4. In the course and conduct of its business, respondent is now, and for many years past has been, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed and is now selling and distributing, its products to purchasers thereof located in States other than the State of origin and, either directly or indirectly, has caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States and districts or territories of the United States. There is now, and has been, a constant course of or flow in trade and commerce in such products between respondent in the State of origin and purchasers thereof located in other States and in the District of Columbia.

5. Respondent's Kraft Foods Division maintains and operates branch sales offices in most, if not all, the principal cities of the United States from which it sells its products to purchasers. In 1961, respondent had 71 sales offices in the United States through which jellies and preserves and other Kraft products were sold.

6. Respondent's Kraft Foods Division manufactures and processes jellies and preserves in plants located at Buena Park, California; Garland, Texas; and Dunkirk, New York. It sells and distributes these jellies and preserves of like grade and quality to purchasers located throughout the various States of the United States and in the District of Columbia for sale, consumption or resale therein. The jellies and preserves when sold are for the most part distributed directly from its plants at Buena Park,

Garland, or Dunkirk to distribution centers of retail outlets. In some cases smaller shipments are assembled in district branches and then delivered to customer warehouses. Very little business of the Kraft Division is done by store-door delivery sales.

7. The Dunkirk, New York, plant supplies jellies and preserves to sales districts serving all or part of 34 States and the District of Columbia from Maine to Florida and west to Montana.

8. The jellies and preserves manufactured and sold by respondent under its Kraft label are of like grade and quality.

9. The jellies and preserves sold by respondent under its Kraft label are sold for use, consumption, or resale in the various States of the United States and in the District of Columbia.

10. Respondent, in the sale of its consumer size jellies and preserves to retailers, cooperatives, wholesalers, and other purchasers, is in substantial competition with other manufacturers, processors, distributors, and sellers of jellies and preserves. Old Virginia Packing Company, Theresa Friedman & Sons, Inc., and M. Polaner and Son, Inc., are and at all times herein involved were, among others, respondent's major competitors in Baltimore, Maryland, Washington, D.C., Richmond, Virginia, and Norfolk, Virginia. Their business was, in general, mainly in those areas.

11. Respondent entered the jelly and preserve industry in September, 1955, when it acquired Bedford Products, Inc., of Dunkirk, New York, a regional producer and distributor of jellies and preserves. Although it distributed all along the Eastern Seaboard to Florida and west to Chicago, Bedford's primary sales areas were the New England States, New York, and the Chicago area. Bedford was primarily a private label house and at the time of the acquisition was packing between 150 and 200 private labels and its own label with annual sales of from $5,000,000 to $6,000,000. The Kraft label was introduced in 1956.

12. Respondent continued to sell private label and Bedford label jellies and preserves for some years but it now has discontinued that practice. Since 1956, it has been selling jellies and preserves under the Kraft label in individual portions to the institutional trade. Except for one grape jelly producer, it is the only national manufacturer and distributor of jellies and preserves in the United States.

13. Its sales of consumer size jellies and preserves grew rapidly until by 1959, if not earlier, it was the largest producer and seller of jellies and preserves in the United States. Its annual sales volumes under the Kraft label for the years 1959, 1960, 1961, and 1962, were about or more than:

Sales of consumer size jellies and preserves	*Cases*	*Dollars*
1959	3,926,874	$10,814,140
1960	4,639,730	12,756,409
1961	(a) 5,408,216	(b) 14,405,011
1962	5,651,027	16,663,982

(a) Includes free goods.
(b) Net sales after payments in lieu of free goods. (See Footnote 4.)

14. In 1956, respondent introduced its Kraft label consumer size jellies and preserves in the Washington, D.C., Baltimore, Maryland, Richmond and Norfolk, Virginia, trade areas. By the end of 1960, approximately four years later, its sales in these areas totalled 168,977 cases with a dollar volume of $475,129. This compared with Old Virginia's sales of 518,199 cases for $1,462,195 which had been promoting, selling, and merchandising its jellies and preserves in these areas for more than 50 years. In the Baltimore, Maryland trade area, respondent, after only four years, had 1960 sales of 116,446 cases for $317,793 as compared with Old Virginia 1960 sales of 127,337 cases for $344,836 after more than 50 years.

Respondent's 1960 sales in the four trade areas compared favorably with those of the two other leading regional manufacturers in the area, exceeding those of M. Polaner and Son, Inc., at $339,868 and approaching those of Theresa Friedman & Sons, Inc., at $644,568.

15. In the latter part of 1960, respondent, not satisfied with its sales to the leading supermarket chains in the Washington, D.C. area (which, because of their size and competitive positions or situations, overlapped to Baltimore, Norfolk and Richmond) embarked upon a sales promotion which, in substance, provided for the unlimited giving of one case of jellies, jams or preserves free with every case purchased at regular list price by any chain, distributor, retailer, or buying organization in the four areas mentioned, commencing January 16, 1961, and ending February 10, 1961. The free goods were to be delivered after February 10, 1961.

16. The net price per unit for goods sold on the basis of one unit given free of charge for each unit purchased at regular price is arrived at by dividing the regular or list price per unit by two. The net price so resulting (half of the regular or list price) is substantially below the manufacturing cost per case and, if the cost of delivery is taken into consideration, the actual cost is even greater.

17. During the same time respondent sold its consumer size Kraft label jellies and preserves at substantially higher prices in its other trade areas in the United States.

18. Respondent, in lieu of delivering the free goods due to its customers in accordance with the terms of the sale, paid many such purchasers an amount in cash equal to the regular or list price per case of jellies and preserves purchased by such customers in response to the offer. The result of such cash payments was that the goods previously ordered and paid for became free goods. These cash payments had not been contemplated in the original plan. They became necessary because respondent was unable to supply all the free goods which, under the plan as intended, were to have been delivered beginning February 10, 1961.

19. During the months of January and February 1960, respondent delivered a total of 27,994 cases to purchasers in the four trade areas. As a result of the 26 day sale from January 16 through February 10, 1961, respondent sold and delivered 400,803 cases for $1,519,137 and delivered 153,909 cases at no charge. This resulted in a total of 554,712 cases delivered into the four trade areas. The effect of respondent's one with one below cost price cut can be visualized when it is compared with sales of Old Virginia Packing Company, Inc., the regional manufacturer doing 50% of its total jelly and preserve business in the four areas. Old Virginia had annual sales in the four areas of 483,812 cases for $1,367,101 in 1959 and 518,199 cases for $1,462,195 in 1960.

20. Also indicative of market response to respondent's price cut is the following comparison of its sales in the four trade areas for the years 1960 and 1961:

	1960		*1961*	
Area	*Cases*	*Dollars*	*Cases*	*Dollars* (a)
Washington, D.C.	14,483	$ 40,047	156,876	$186,984
Baltimore, Md.	116,446	317,793	301,083	463,748
Richmond, Va.	10,682	31,156	120,603	116,241
Norfolk, Va.	27,366	86,133	121,845	144,832
Total	168,977	475,129	700,407	911,805
				829,005
				(b) 1,740,810

(a) Net sales after deduction of payments made in lieu of delivering free goods.

(b) The dollar amount for each of the four areas is the net sales volume after deduction of the payment made by respondent in lieu of delivering the free goods due customers. This amount, which is $829,005, has been added back to show the total dollar volume of respondent's sales in the four areas in 1961. (See Footnote 4, above.)

21. Respondent's sales for the 26 day period exceeded the annual sales of the regional seller for which the four trade areas comprise the primary market. Respondent actually delivered a case volume of jellies and preserves exceeding by 70,900 cases the 1959 annual volume and by 36,513 cases the 1960 annual volume of Old Virginia Packing Company, Inc. Had respondent not paid cash in lieu of free goods due, it would have delivered a total of 801,606 cases in the Washington-Baltimore-Richmond-Norfolk areas in 1961, by reason of this sale.

22. The response of purchasers in the Washington-Baltimore area to respondent's one free with one "below cost" prices was as should have been expected. Purchasers took advantage of the prices by buying uncommonly large quantities.

23. The direct result of respondent's sale at half price during the period involved and under the conditions provided in the areas involved was great and damaging losses to Old Virginia Packing Company, Inc., Theresa Friedman & Sons, Inc., and M. Polaner and Son, Inc., in those areas (all as set forth in greater detail in the text of this decision), which losses would have been greater and would have had an even more injurious and probably permanent effect on them had respondent's plan been completely effectuated in the manner originally contemplated.

24. Respondent either deliberately intended and was aware that such losses and results would eventuate or, if it did not so intend deliberately and was not so aware, in the exercise of ordinary business judgment, it should have had that awareness and for that reason I find that, in law, it did have that intent.

25. The price discrimination cost respondent in excess of $1,300,000. Its jelly and preserve product line represents only one of a vast number of different product lines sold by respondent's various operating divisions throughout the United States and in other parts of the world. During the period January 16 through February 10, 1961, respondent sold its jellies and preserves at higher prices in the other trade areas of the Eastern and Southern Divisions of its Kraft Foods Division than in the four trade areas of Washington, D.C., Baltimore, Maryland, Richmond and Norfolk, Virginia, where the "below cost" prices had prevailed. The cost of this price difference was subsidized from income and profits earned by respondent in its operations elsewhere and its sales of other products in the areas involved.

26. Regional competitors of respondent in the sale of jellies and preserves in the Washington-Baltimore-Richmond-Norfolk areas lost sales and profits for a period of from six months to

more than a year following respondent's one-free-with-one price discrimination in those areas.

From all of which I make the following

CONCLUSIONS

A. The respondent is engaged in commerce within the meaning of Section 2(a) of the Clayton Act as amended.

B. All acts and practices which are the subject of the order to be entered were committed in the course of such commerce.

C. Although Kraft Foods Division is a division of the respondent, it is and was, at all times involved herein, respondent's agent and, for that reason, the respondent is responsible and liable for any of the acts or practices of Kraft Foods Division.

D. The one-free-with-one promotion in the Washington, D.C., Baltimore, Maryland, Richmond, Virginia and Norfolk, Virginia areas was a discrimination in price in favor of those areas as opposed to prices for the same goods in other areas, and was in commerce, and the goods involved were commodities sold for use, consumption or resale within the United States.

E. The effect of that discrimination could be and was substantially to lessen competition or tend to create a monopoly in the jellies, jams and preserves business in those areas.

F. It tended to injure, destroy or prevent competition with other companies engaged in that business in those areas and it did, in fact, injure such competition as might have been offered by such firms.

G. The respondent has failed to offer any evidence sufficient or of a nature substantial enough to support any defense for which provision is made in the Act.

H. This proceeding is in the public interest.

* * * * * * *

I have concluded that it is necessary and appropriate to effectuate proper enforcement of the law to enter the following

ORDER

It is ordered, That respondent, National Dairy Products Corporation, and its several divisions and its officers, representatives, agents and employees, directly or through any corporate device, do forthwith cease and desist from discriminating, directly or indirectly, in the price of jellies, jams and preserves of like grade and quality by selling such jellies, jams and preserves to any purchaser or purchasers in any trading area where respondent or any of its divisions is in competition with another seller or sellers, at a price which is lower than the price charged any purchaser at the same level of trade in another trading area: *Provided, however,* That the foregoing shall not be construed to prevent respondent from defending any alleged violation of this order by establishing any of the statutory defenses contained in any law applicable thereto; and

It is further ordered, That Counts II and III of the complaint be and the same hereby are dismissed because there is a lack of reliable, probative and substantial evidence in support thereof.

OPINION OF THE COMMISSION

JUNE 28, 1967

BY DIXON, *Commissioner*:

The amended complaint in this matter, in each of three counts, charges respondent with price discriminations in violation of Section 2(a) of the Clayton Act, as amended. In Count I, it is alleged that respondent, through its Kraft Foods Division, sold its jellies and preserves in the Washington, Baltimore, Richmond and Norfolk areas at prices 50% lower than it sold these items in other trade areas. Count II alleges that respondent, through its Breakstone Foods Division, sold its yogurt in the New York metropolitan area at prices lower than the prices at which it sold that product in other trade areas. Count III alleges that the Kraft Foods Division sold marshmallow cream topping in the Philadelphia, Pennsylvania, and Boston, Massachusetts, trading areas, and in other New England states at prices lower than it sold that product in its other trade areas. In each of the three counts, it is alleged that the effect of the respective price discriminations has been or may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition between respondent and its competitors in the manufacture, processing, distribution and sale of the respective products.

The hearing examiner found that the charge under Count I was sustained by the evidence. However, he concluded that complaint counsel had not sustained their burden of proof under Counts II and III and he ordered these counts dismissed. The case is before us on cross-appeals, and we will consider each count separately.

COUNT I

The price discrimination with which this count is concerned took place in 1961, about five and a half years after respondent entered the jelly and preserve business through the acquisition of Bedford Products, Inc. Bedford, which was primarily a private label packer, produced jellies and preserves at its plant in Dunkirk, New York, and distributed on a regional basis.

In 1956, respondent began reducing the private label business and started selling jellies and preserves under the Kraft label on a national basis. By 1961, respondent had doubled Bedford's sales volume at the time of the acquisition and was the largest producer and seller of jellies and preserves in the United States.

The price discrimination here involved resulted from an offer made by respondent to purchasers in Washington, Baltimore, Richmond and Norfolk. Specifically, for the period from January 16, 1961, through February 10, 1961, respondent offered one case free with every case of jellies or preserves purchased. The free goods were to be delivered after February 10, the close of the promotion. In the Baltimore area the offer was announced by respondent on January 4, 1961, and was limited to six sizes and varieties. There was no restriction on the product line in the announcement to the trade in the other areas on December 28, 1960. In both of these announcements, respondent set forth additional promotional activities to follow after termination of its one-free-with-one offer. These included two newspaper coupon advertisements, one to be run the week of February 13 and the second to be run the week of March 13. In both of the offers, respondent was to absorb the cost of redeeming the coupons as well as pay the retailer 2 cents for each coupon handled. Additionally, respondent offered a cooperative merchandising agreement whereby, for the period of February 27 through April 28, it agreed to pay 50 cents per case on purchases of all 10 ounce and 12 ounce sizes of its jellies and preserves and 75 cents per case on the 18 ounce and 20 ounce sizes. This offer was to be repeated for the period May 29 through July 28.

For the year 1960, just prior to this offer, respondent's volume of sales of jellies and preserves in each of the four areas was as follows:

	Cases	Dollars
Washington	14,483	$ 40,047
Baltimore	116,446	317,793
Richmond	10,682	31,156
Norfolk	27,366	86,133
Total	168,977	475,129

Respondent states that it was not satisfied with its sales volume in the areas served by its Washington and Richmond branches and that the purpose of its one-free-with-one offer was to "achieve adequate distribution" in those areas (CX 30). More specifically, respondent states that it had no authorizations [1] in the major chains (Giant, Safeway and Grand Union) in the two areas, that these chains do a substantial percentage of the grocery business in these areas, and that its purpose was to obtain such authorization (tr. 1507–1508). Respondent further states that it was necessary to extend the offer to Norfolk because the overlap with Richmond resulted in Norfolk cancellations. Also, it states that the offer was extended to Baltimore to avoid discrimination between competing customers.

Respondent further states that early in 1960, it attempted to increase its sales volume in Washington by submitting a program to Giant and Safeway. Basically, this program provided for the payment of promotional allowances on two occasions over about a 10-month period and was limited to the purchase of four varieties of jellies and preserves. Giant and Safeway rejected the plan and it was therefore not offered to the rest of the trade. In the fall of 1960, respondent's Washington-Richmond district manager requested his sales supervisors to propose plans that would obtain authorizations. It was allegedly out of these proposals that the January 1961 offer developed.

This offer was unlimited as to the quantities that could be purchased during the 26-day period. However, the purchaser would not receive his free goods until after this period. The reason advanced by respondent for this delayed delivery of the free cases is that by so doing, retailers would maintain regular retail prices on Kraft jellies and preserves. However, on January 19, three days after the program was instituted, certain retailers began offering these Kraft products to the public at half price. With the exception of Safeway, Acme and Kroger, and Giant part of the time, all of the stores in the four market areas followed suit. About two weeks later, respondent cancelled the additional promotional activities which had been scheduled as part of the offer but continued to sell on a one-free-with-one basis to the end of the offer period. Then, on April 18, 1961, it announced to the trade an alternative whereby purchasers could accept payment in cash for all undelivered free goods.

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[1] The term "authorization" as used throughout this proceeding means that the headquarters of a chain group has approved a product so that the product may then be ordered by individual stores of the group.

The examiner's conclusion that this offer was received "enthusiastically" is somewhat of an understatement. The head buyer for Giant, after characterizing the Kraft product as being "highly promotable" under this offer, stated that "That is the best sale [of jellies and preserves] that I have ever known * * *. I have never seen one as good" (tr. 349). That this opinion was shared by the other buyers in the four areas is reflected in their purchases. Orders received during the 26-day period totaled 400,803 cases. Had the program been carried out as originally planned, the same number of cases would have been delivered free of charge. Thus, respondent would have delivered 801,606 cases as a result of this three week offer as compared to the 168,977 cases (for a total of $475,129) which it sold in these areas in the entire year of 1960.

Respondent actually delivered 153,909 free cases which, together with the number sold during the period of the offer, made a total of 554,712 cases delivered to purchasers as a direct result of its offer. Cash payments totaling $829,005 were made in lieu of delivery of the remaining 246,894 free cases. For the remaining 11 months of 1961, respondent sold 145,695 cases for a total of 700,407 cases of jellies and preserves actually delivered by respondent in the four areas for the year 1961.

The regular list price of the 153,909 cases that respondent delivered free of charge was $516,577. This, together with the $829,005 respondent paid in lieu of delivering free goods gives a total of $1,345,582 that this offer cost respondent. The examiner found that the net prices per unit of goods sold under the offer were substantially below respondent's manufacturing costs and, if the cost of delivery is taken into consideration, respondent's actual costs were even greater. This finding is not disputed.

We next consider the competitive situation as it existed in the four areas at the time of respondent's offer. As is characteristic of the jelly and preserve industry, the manufacturers selling in these areas were all regional distributors, with their sales concentrated within a radius of about 250 miles of their plants. The three principal sellers in the complaint areas were Old Virginia Packing Company, Theresa Friedman & Sons, Inc., and M. Polaner and Son, Inc.

Old Virginia, which has been in business since 1906, has its plant in Front Royal, Virginia. About 50 percent of its sales are made through brokers in Maryland, District of Columbia and Virginia, with between 30 percent and 40 percent of these sales being made to chain stores and the rest to independent grocers.

Its total volume of sales of jellies and preserves in the four areas for the year 1960 was $1,462,195. The Friedman plant is located in Philadelphia and about 75 percent of the company's business is in the sale of jellies and preserves. About 95 percent of its sales are private label goods with the Giant and Food Fair chains being two of its accounts. The Washington and Baltimore areas are part of its primary market and its sales in these two areas in 1960 totaled $629,797. It also made some sporadic sales in Richmond and Norfolk, totaling $14,772 in 1960. Polaner's plant is located in Newark, New Jersey. Its sales of jellies and preserves, which accounted for about 75 percent of its business, were about $300,000 in the four complaint areas in 1960.

As we consider the effect that respondent's offer had on these, its largest competitors in the four areas, it is important to note that after only four years, respondent's sales volume exceeded that of Polaner, was closely approaching that of Friedman and was ⅓ of the annual volume of Old Virginia which had been selling in these areas for over 50 years.

The uncontradicted evidence establishes that all three competitors sustained drastic sales losses in 1961. Old Virginia's dollar sales declined by over 27 percent in the first six months of 1961 as compared to the same period in 1960. By areas, the decline was 18 percent in Washington, 27 percent in Baltimore, 40 percent in Richmond and 35 percent in Norfolk. In the second half of 1961, Old Virginia's sales declined by about 2 percent as compared to the second half of 1960 which, as shown by the record, was a period of business recession. As has been noted, respondent actually delivered over 554,000 cases of jellies and preserves in the complaint areas as a result of its 26-day offer. This was more than Old Virginia's total sales of 518,199 cases in these areas in the entire year of 1960.

Friedman's losses were sustained principally in the Washington-Baltimore areas since these were the two complaint areas in which its sales were concentrated. The record establishes that in the four areas, Friedman's dollar volume of sales declined by 33⅓ percent in the period of January through June 1961 as compared to the same six months in 1960. In the second half of 1961, Friedman's dollar volume of sales was down 17.8 percent as compared to the second half of 1960. For the year 1961, its sales volume was down 26.3 percent over 1960.

Polaner's losses are complicated somewhat by the fact that in February 1961 it introduced a special decorative drinking glass container for some of its jellies. This line, known as Mr. Magoo, was priced higher than Polaner's regular line. Complaint counsel maintain that sales of this line should not be included in determining Polaner's 1961 sales volume. However, as found by the examiner, even if the Magoo sales are included, Polaner's sales declined each of the first six months of 1961, except February when Magoo was introduced, as compared to the respective months in 1960. Without the Magoo sales, Polaner's sales in the first half of 1961 declined 27.5 percent from the first half of 1960. If Magoo is included, the drop was 16 percent. There was a decrease of 12.4 percent in the second half of 1961 as compared to the same period in 1960 if Magoo is excluded and an increase of 8.2 percent including Magoo.

The hearing examiner found that the sales losses sustained by these companies constituted real and substantial injury which would have been greater and more prolonged if respondent had delivered all of the 400,803 free cases.

Respondent does not dispute the size of these sales losses. It does, however, contend that its January 16, 1961, offer was not the cause of such losses. In the first place, it argues that the losses were the result of the fact that retailers did not maintain the usual retail price on Kraft jellies and preserves, but three days after the offer was initiated, purchasers began offering these Kraft products to the public at half price. The short answer to this argument is that at least a week before the offer period was to begin, respondent was aware of the intent of certain retailers to sell at half price (tr. 1531). Nevertheless, respondent continued to accept orders for immediate and future delivery and buyers who had cut prices reordered and received delivery under the terms of the offer. Moreover, we fully agree with the examiner's conclusion that "no one engaged in business for the purpose of making money from the resale of goods could refuse rationally to take full advantage of an unlimited opportunity to buy a good, well-advertised brand name article at half price to the fullest extent of his financial ability and warehouse capacity." [2] Accordingly, respondent's argument that it was the buyers' decisions to finance their resale of the Kraft products, and not respondent's half price sale, which caused the competitors' losses, is rejected.

Respondent next contends that the competitors' losses were due to their failure to conduct their usual promotional offers. In

[2] Initial Decision, p. 1363. This conclusion is fully supported by the testimony of the buyers. As an example, the buyer for three grocery stores doing $22 million worth of business in the Norfolk area stated that "* * * it was my function to buy the commodities at the lowest price possible, the quality considered. When a preserve of that nature is offered at such a price as that, a buyer cannot refuse it" (tr. 699).

this regard, the evidence establishes that prior to 1961, each of the three principal competitors engaged in certain promotions and deals for specific periods each year in an effort to increase sales and gain distribution.

Representatives of each of respondent's three principal competitors testified as to the reason for their failure to conduct their usual promotions in the first half of 1961. It is clear from their testimony that the management of these regional companies, which were experienced sellers in the complaint areas, determined that it would be futile for them to attempt to combat the below cost offer of this national company (tr. 341, 422, 531). The situation with which they were faced is well illustrated when respondent's offer is compared with the best promotional deal offered by Old Virginia, the principal independent seller in the area. Briefly, in its so-called "mix or match" offer, Old Virginia grants an allowance to purchasers who buy at least five designated varieties of its jellies and preserves. Using one such offer as an example (RX 10), the average list price per case of the five varieties was $2.37. The average per case allowance was $.37 as compared to respondent's half price offer.[3]

The examiner found that respondent's competitors were aggressive, informed merchandisers, that it was futile or impractical for them to attempt to counter respondent's offer, and that their failure to promote is demonstrative of the serious anticompetitive character of respondent's promotion. This is borne out by the testimony of respondent's own witnesses that promotions are important competitive tools in the sale of grocery food products. The significance of the competitor's inability to promote in the face of respondent's price cut is emphasized in Friedman's experience with Giant. Friedman packed a private label jelly under the name Aunt Nellie, for this customer. In response to an inquiry from a Giant representative, Friedman advised Giant that anything he could do would be so small compared to the Kraft deal that it wouldn't pay. Friedman was then informed that Giant would not be able to promote its own private label goods for a period of time. Consequently, Friedman's sales to Giant declined 35 percent in the first six months of 1961 as compared to the same period in 1960.

The examiner's findings and conclusions concerning the com-

[3] It is to be noted that Old Virginia's mix or match promotion was usually offered on a count and recount basis (RX 3, 5, 8, 10 and 12). Under this system, a buyer's inventory is taken at the start of the promotion period and his purchases during the period are counted and added to the opening inventory. The closing inventory is subtracted from this total and the allowance is paid on the goods physically moved during the promotion period (tr. 1574). Respondent had no such limitation.

petitors' failure to promote are fully supported on this record and respondent's argument is rejected.

Respondent's basic contention throughout this count is that its objective in initiating the one-free-with-one offer was to obtain chain store authorizations for its jellies and preserves. To this end, it devotes considerable argument to the validity of the use of promotions by members of the food industry to obtain such authorizations. As used in this context, promotions involve discounts and allowances to grocery store purchasers as well as coupons, prizes, "cents off" labels, etc., to the consuming public. It is respondent's position that promotions "are carried on usually with a view to getting people to try a product, and if they try it once perhaps they will try it again; to get consumer acceptance, and with that acceptance an extended period of purchase." [4] In substance, respondent argues that with the change in the structure of the food marketing system since World War II, resulting in a significant reduction in the number of retail buying points, promotions have become one of the primary means by which food manufacturers wage competition.[5]

As the hearing examiner has properly stated, the statutory defenses afforded by Section 2(a) do not provide justification for a price differential solely on the ground that it resulted from a promotion. More to the point, however, it is our conviction that respondent's offer was neither conceived nor conducted as a "promotion" within respondent's own definition of that term. In our opinion, this record clearly establishes that respondent's one-free-with-one offer was a price discrimination calculated and intended to destroy and prevent competition with respondent in the sale of jellies and preserves in the complaint areas.

The very nature of the offer indicates that it was devised for a predatory purpose. None of the buyers or competitors who testified in this proceeding had ever heard of an offer such as this in the sale of a regular brand of jellies and preserves, even on an introductory basis.[6] And respondent was not attempting to intro-

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[4] Respondent's Brief on Appeal, p. 8.

[5] The validity of this argument is somewhat weakened by a 1957 marketing study introduced by respondent wherein it is stated "While all of these things * * * product quality, packaging, pricing, distribution, promotion and merchandising are all vital parts of the successful marketing pattern, yet perhaps the most important of all is *advertising* * * * advertising that pre-sells the customer before she enters the store * * * helps her with the many split-second buying decisions she must make inside * * * advertising that implants a strong brand image and preference in her mind, * * *" (emphasis in original). (RX 209, p. 52.)

[6] The feature of this one-free-with-one promotion which distinguished this from the other one-free-with-one promotions that were mentioned in this record is the fact that the quantity of jellies that could be purchased under the deal was unlimited. Kraft, for example, had used a one-free-with-one deal on three other occasions to introduce brand new items. On only one

duce a new product in these areas, having sold Kraft jellies and preserves therein for four years.

It is unreasonable to assume, as respondent would have us do, that it was necessary to cut the price of these Kraft products in half to a below cost price and permit delivery over an extended period of time simply to gain authorization to sell to chain stores. In this regard, to characterize this offer as a "three week" promotion is completely unrealistic. The offer on its face was set up to extend for a six month period. And the only limitation as to the amount a purchaser could buy at half price was the amount it chose to warehouse.

Another factor to be considered in establishing respondent's intent is the prices which existed in the four areas prior to respondent's offer. The list prices of Old Virginia, the predominant independent seller in this area, were lower than respondent's. Had respondent's only purpose been to obtain authorizations, it could properly have reduced its prices to meet those of this regional competitor. The buyer for a three supermarket group specifically testified that he had not bought Kraft jellies and preserves prior to 1961 because respondent had a "price at an average of 15 to 20 cents a dozen higher than comparable grades." This buyer's purchases under respondent's offer totaled about $35,000 (tr. 698–699). Thus, respondent's drastic price cut clearly indicates that it was not interested in attempting to obtain authorizations by fair price competition but was willing to sustain substantial losses on its sales of jellies and preserves to increase its market share.

Respondent further argues that it could not have reasonably foreseen the consequences of its offer. We disagree. Respondent is a knowledgeable and experienced marketer of food items, particularly through its Kraft division. It had had four years experience in marketing jellies and preserves in the complaint areas. The record establishes that it used the knowledge acquired in these four years by its marketing divisions as well as the experience of

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of these—Italian Lo-Cal dressing—was the quantity unlimited (CX 117–A). No limit was placed on this item because Kraft had had no "past experience in that type of dressing" and they were, therefore, playing it "by ear" (tr. 1574).

The record indicates one instance when Old Virginia utilized a one-free-with-one promotion. It involved one relatively small wholesaler in Scranton, Pennsylvania, an area in which Old Virginia had not sold for the previous eight years. Furthermore, Old Virginia limited the free goods to be given to the initial order placed by this customer (tr. 293). The value of the free goods that moved in the promotion was $694.63 (RX 19).

An unprecedented price, an established label, and the opportunity to buy an unlimited quantity resulted in the extraordinarily large quantities of jellies that Kraft's deal moved into the market. It is apparent that Kraft did not retain adequate control—and under the circumstances, therefore, lost control—over the quantity sold.

its field personnel in devising this offer. Moreover, in the previous year, respondent's Kraft division had instituted a one-free-with-two promotion in the Boston area in the sale of marshmallow cream. Despite the fact that this product has primarily a seasonal demand and less storage capability than jellies and preserves, the Kraft division was forced to curtail shipments to other areas because of the unprecedented demand for the product. Additionally, the testimony of Old Virginia's president and vice president concerning conversations with a Kraft representative when this offer was initiated indicates that the consequences were readily apparent both to Old Virginia and to Kraft (tr. 177, 219).

Respondent's actions subsequent to the initiation of its offer fully support a finding that its purpose was to injure and prevent competition. Thus, respondent states that after retailers began selling Kraft jellies and preserves at half price on January 19, 1961, it began screening orders and made "strong" efforts to limit orders received during the period of the offer. However, the testimony relied upon by respondent is vague and inconclusive, and is not supported by any documentary evidence. The only evidence as to the amount of orders that were cancelled is the testimony of respondent's Washington district manager that close to twelve truckloads were turned down. Accepting this as an approximate figure, the insignificance of respondent's "strong" effort is readily apparent when it is considered that a truckload consists of about 2,000 cases and respondent actually delivered over 554,000 cases under its offer. Although certain customers were mentioned as having had orders curtailed, there is no evidence as to the specific amount cancelled as to any customer. Respondent's division products sales manager did testify that Food Fair, which was one of the large purchasers under the offer, attempted to place an order for ten carloads which was cut back. However, this order was placed just prior to the close of the deal.

It is the testimony of respondent's Washington district manager that its purpose in cutting back orders was for purchasers to be out of deal merchandise within thirty to sixty days. The reliability of this testimony is best reflected in the experience of two such customers. District Grocery Stores, a retailer-owned cooperative with members principally in the Washington metropolitan area, reduced its prices in *December* 1963 in order to move out of its warehouse about 500 cases of certain varieties of Kraft jellies and preserves which it had purchased under the offer in 1961. Farm Fresh Supermarket, in Norfolk, had purchased jellies and preserves primarily from Old Virginia in 1960.

It purchased 13,180 cases from respondent under its half price offer and made no purchases from Old Virginia until March 1962.

As we have previously noted, respondent, on April 18, 1961, gave all purchasers under the offer the option of taking the free goods or receiving payment of the normal purchase price for all undelivered goods. The hearing examiner accepted respondent's position that this option was provided because the response to the offer was so overwhelming that respondent's production facilities were inadequate to supply the free goods. The examiner did not analyze the evidence on this point and we think he erred in his conclusion.

The evidence not only indicates that respondent had adequate production facilities but that it had, in fact, geared its production to provide for anticipated demands under the offer.

Respondent rests its position on an allegedly low inventory and the fact that a third production line was to be added to the two existing lines in its Dunkirk plant. With respect to inventory, a comparison of the December 31, 1959, inventory of the three sizes involved in the offer with the amount on hand on December 31, 1960, just prior to the offer, shows the following:

Dunkirk	Dozens	
	Dec. 31, 1959	Dec. 31, 1960
10 ounce	59,503	108,057
12 ounce	56,242	108,126
20 ounce	22,884	64,762

Source: RX 70.

Respondent has attempted to explain the substantial increase in the December 1960 inventory by claiming that it was due to increase in business and anticipated shutdown of production due to installation of the third line. The evidence will not support either reason. Thus, respondent's business increased from $10,814,140 in 1959 to $12,756,409 in 1960. Yet its inventory at the end of 1959, prior to this increase, was somewhat less than its December 31, 1958, inventory. Respondent could hardly have anticipated such an increase as that reflected in its 1960 inventory without some substantial inducement in sales.

Rather than an anticipated slow-down in production, we think respondent specifically timed its offer to coincide with the added production from a third line.

Respondent's plan to install a third production line was conceived in mid-1960 (tr. 1611). A letter dated November 11, 1960, from the Dunkirk plant superintendent to Kraft's Eastern Division manager discloses that at most, the only down time anticipated for installation of the third line was on weekends.[7] This letter further states that "it is very imperative that the third line be in operation by February first." That it was not even necessary to use weekends for installation of the third line is disclosed in a subsequent weekly report dated January 31, 1961, wherein the plant superintendent advised that "it was necessary for us to operate two lines two eight-hour shifts on Saturday and one line two six-hour shifts on Sunday" (RX 75–A). He further reported on the progress of the new line, stating that he intended to put it into production on February 20th. More importantly, however, this report which is dated in the middle of the offer period, states that the Dunkirk plant has "been able to fulfill all the orders within the allotted time except in the case of some of the preserve items, which will be run next week." This report is dated twelve days after the retail price break on Kraft jellies and preserves at which time according to respondent, orders began to pile up.

The only reference to any production problem appears in a subsequent report dated February 7, 1961. Therein, the plant superintendent states that he was encountering "short delays" on some Kraft items due to low inventory condition. This report and the previous report of January 31st are detailed statements concerning production at the Dunkirk plant. There is absolutely no reference to any production problems created by the one-free-with-one offer. Moreover, it is obvious that any "short delay" experienced on February 4th could readily be compensated for two weeks later when production started on the third line.

Finally, we note that respondent delivered over 554,000 cases under its offer, principally through production from two lines. We cannot accept respondent's argument that its facilities were inadequate to permit delivery of an additional 247,000 free cases, particularly with the added production from a third line.

In our opinion there are two related reasons why respondent offered cash in lieu of free goods. First, it had determined that the market was flooded with Kraft jellies and preserves which

[7] This letter states in part:

"Therefore I do not feel we should depend upon our Saturdays during January and February as production days. It is also a possibility that they (Engineering) could require down time on production days, although we believe this should be kept to a very minimum.

"In view of all this I recommend that we go to five line shifts a day beginning in January and continuing until the third line is put into operation." (RX 72–A) had already been delivered under the offer. Second, it was aware that its half price offer was under investigation by the Commission.

Kraft's marketing manager for jellies and preserves took a trip into the four trade areas where he learned that some stores had "tremendous" inventories of these Kraft products. However, this trip was not taken until late February or early March, after the close of the offer and well after the retail price cut of January 19th.

It was about the time the marketing manager returned from his trip, on March 10, 1961, that respondent was notified of the Commission's investigation. Respondent's notice of the cash offer was distributed to the trade on April 18, 1961. This was just five weeks after learning of the Commission's investigation and the purchasers' large inventories but more than two months after respondent was fully aware of the extensive purchases by customers throughout the four trade areas. The inference is clear that respondent's offer to pay cash in lieu of free goods was not motivated by a desire to curtail the effect of its half price sale.

We turn next to respondent's argument that its "short term" territorial price difference could not have the required adverse competitive effect. In substance, respondent contents that any diversion of trade from its competitors as a result of its half price offer is insufficient to establish the requisite degree of injury required by the statute to support a charge of violation.

The statute makes it unlawful to discriminate in price "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who * * * grants * * * such discrimination * * *." [8]

In support of its position, respondent relies in part on the recent decision in the *Borden* case [9] where the court stated that:

> It often has been pointed out that differences in price without competitive injury are not illegal. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 550. Unless the adverse competitive effect may be "substantial" as required by the language of the Act, the Commission's burden has not been met.

In considering respondent's argument, we start with the premise stated in the Commission's decision in the *Fry Roofing* case [10] that there is nothing inherently or *per se* unlawful in territorial or area price differences. We must add, however, that

[8] 49 Stat. 1526, 15 U.S.C. 13(a).

[9] *Borden Co.* v. *Federal Trade Commission*, 339 F. 2d 953, 956 (7th Cir. 1964).

[10] *In the Matter of Lloyd A. Fry Roofing Co.*, July 23, 1965 [68 F.T.C. 217], *aff'd*, 371 F. 2d 277 (7th Cir. 1966).

there is no provision in the statute which makes the length of time of a territorial price discrimination a *per se* criterion in determining legality. As the court has stated in the *Forster* case,[11] a violation is shown if it is reasonably possible that a price discrimination may have the required adverse competitive effect.

The Supreme Court's recent decision in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), is in point on this issue of the likelihood of competitive injury as a result of short term price discriminations. In that case, the market position of one of the defendants, Continental Baking Co., in the sale of frozen pies in the Salt Lake City market, was analogous to that of the Kraft Division in its sales of jellies and preserves in the areas here involved. Neither company was satisfied with its market share and both took steps to improve it, Kraft through its one-free-with-one offer and Continental through short-term price concessions in the Salt Lake City market.

Continental's price cut, which was characterized as the heart of its competitor's complaint, was for a two week period and, as was true with respect to Kraft, reduced its prices to below cost. As a result of this two week price cut, one of the major buyers in the area, Safeway, purchased a five-week supply of frozen pies from Continental. This is far short of the supplies of jellies and preserves purchased by both chains and independents as a result of the Kraft offer.

In considering the effect on competition in Salt Lake City as a result of Continental's two week price cut, the Supreme Court stated that the jury was entitled to consider the potential impact of this price reduction absent any responsive price cut by its local competitor, Utah Pie Co. One of the factors relied upon by the Court on the issue of possible competitive injury was the fact that the purchase of a five-week supply by Safeway temporarily foreclosed the proprietary brands of Utah and other firms from the Salt Lake City market. The Court further held that the jury could rationally have concluded that Continental would have again repeated its offer, that Safeway would have continued to buy from Continental and that other buyers would have followed suit.

Additionally, the Court referred to the consequences to other sellers in the Salt Lake City market who lost market shares. Thus, in the case before us, complaint counsel adduced evidence with

[11] *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

respect to certain other sellers of jellies and preserves which establishes that they sustained sales losses as the result of Kraft's offer in the complaint area.

Considering these facts with respect to Continental's short-term price reductions, the Court concluded that there was sufficient evidence from which the jury could find a violation of § 2(a) by Continental. In reaching its conclusions, the Court expressed its view that the Act does not only come into play to regulate the conduct of price discriminators when their discriminatory prices consistently undercut other competitors. Of particular significance is the Court's statement that when viewed in the context of the Robinson-Patman Act, "radical price cuts themselves discriminatory" do not fall within the category of "only fierce competitive instincts," and the fact that a local competitor has a major share of the market does not make him "fair game for discriminatory price cutting free of Robinson-Patman Act proscriptions."

In the case before us, the facts establish that respondent, the only national seller of jellies and preserves, for three weeks in 1961, offered to sell these products at half price with no limitation on the amount that could be purchased and with delivery over an extended period of time. Respondent's only competitors in the four areas in which this offer was made were regional sellers whose incomes were derived primarily from the sale of jellies and preserves. Respondent's prices under this offer were below its cost of manufacture and were subsidized by its higher prices elsewhere as well as by its sales of many other diversified products on a national basis—a source of income not available to its competitors. In brief, respondent could not wait to develop a larger share of the market [12] by a legitimate means but used the power of its treasury to appropriate a share of its competitors' business by a below cost offer which it knew these competitors could not meet.

We have found that respondent's regional competitors sustained drastic sales losses as the direct result of respondent's offer and that their ability to compete was greatly impaired.[13]

[12] It had taken Old Virginia fifty years to develop its business in these four areas. Furthermore, this was the most successful independent seller in the areas and it did not sell to Giant, one of two accounts which respondent named as essential for success.

[13] Respondent contends that the evidence in this respect is deficient in that it relates to only three of the numerous sellers in the four areas. This argument is rejected. In the first place, the sales of the great majority of these competitors were so small as to be insignificant (RX 200). Moreover, the three competitors to whom the evidence relates were the largest independent sellers in the areas. Clearly, if these three companies were unable to compete due to respondent's below cost offer, the competitive ability of the smaller sellers would be even more impaired.

Furthermore, we have found that the evidence does not support respondent's contention that the sole purpose of its drastic price cut was to obtain chain store authorizations. The facts in this record establish that respondent could reasonably foresee the consequences of its offer and that its purpose in selling at half price was to injure and prevent competition in the sale of jellies and preserves in the four complaint areas.

It is, of course, not necessary to find predatory intent to establish a violation of Section 2(a) for, as the Commission said in the *Fry Roofing* case,[14] "The Act speaks of the effect of the discrimination, not the intent of the discriminator." However, it is now well settled that the existence of predatory intent is relevant in determining whether a price discrimination may have the effect of substantially lessening competition.[15] The Supreme Court in commenting on predatory price discriminations in its decision in the *Utah Pie* case, *supra,* has stated that "On the question of injury to competition such cases present courts with no difficulty, for such pricing is clearly within the heart of the proscription of the Act." Additionally, the court in the *Fry* case, *supra,* has pointed out that "An intent to harm competitors distinguishes anticompetitive price cutting from competitive activity not meant to be prohibited *per se* by the Robinson-Patman Act. An illicit intent serves to show the substantiality and probability of the competitive effects that may result from the price reductions. * * * Since the Commission's finding of Fry's predatory intent is supported by the record, we conclude that it was unnecessary for the Commission to engage in an elaborate market study."

Under the circumstances, respondent's argument that there is no likelihood of competitive injury because the sales losses of its competitors were temporary, is rejected. The evidence establishes that respondent, if not satisfied with its market share, could and would engage in offers that not only substantially divert trade but are so designed that other sellers cannot compete. As so motivated, the probability of an adverse effect from respondent's price cuts is established and a close study of the market is not required. *Lloyd A. Fry Roofing Co.* v. *Federal Trade Commission,* 371 F. 2d 277 (7th Cir. 1966). Faced with such a competitor, there is no incentive on the part of other sellers to

[14] N. 9, *supra.*

[15] *Ibid. Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929), *cert. denied,* 279 U.S. 858 (1929); *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960); *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967).

compete for business if they will lose market shares at the will of respondent. The test of competitive injury is "one that necessarily looks forward on the basis of proven conduct in the past." *Utah Pie Co.* v. *Continental Baking Co., supra.* Surely, respondent's below cost offer is an effective means of preventing and destroying competition within the meaning of Section 2(a). As the Supreme Court has stated, "This section, when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use of financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." [16] In our opinion, the evidence fully supports the examiner's conclusion that respondent must be restrained from continuing the localized price-cutting tactic shown under this count of the complaint. Accordingly, respondent's appeal under Count I is denied.

COUNT II

This count charges that respondent, through its Breakstone Foods Division, discriminated in price in violation of Section 2(a) by selling yogurt at lower prices in the New York metropolitan area than in other trading areas.

It is not disputed that on May 1, 1961, respondent reduced its prices on yogurt in the New York metropolitan area while maintaining higher prices in other areas in which it sold this product. Then, on November 13, 1961, respondent raised its yogurt prices outside the New York area but did not change the prices in effect in that area. On April 23, 1962, respondent partially restored the price cut in New York and on July 30, 1962, it raised the New York prices to the level existing prior to May 1, 1961. The following table sets forth respondent's price changes. [Page 1429.]

At the time of its price reduction, respondent had two competitors in the sale of yogurt in the New York area, which the examiner found was the primary area for yogurt in the United States. One of these was Dannon Milk Products, Inc., which started business in New York in 1942 and which became a wholly owned division of Beatrice Foods, Inc., in 1959. In 1960, this company's sales of yogurt in New York totaled about $4,700,000, which constituted about 91 percent of all yogurt sold in that area. The other competitor was Lacto Milk Products Corporation which had been in business in New York since early 1930. It had about 4 percent of the New York yogurt market in 1960, its

[16] *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543 (1960).

Breakstone Yogurt Prices for ½ Pint Containers

Area	Prior to May 1, 1961		Effective May 1, 1961		Effective November 13, 1961		Effective April 23, 1962		Effective July 30, 1962	
	Jobber*	Store door	Jobber	Store door	Jobber	Store door	Jobber	Store door	Jobber	Store door
New York metropolitan area:										
Plain	$0.11	$0.13	$0.085	$0.10	$0.085	$0.10	$0.10	$0.115	$0.11	$0.13
Flavored	.14	.16	.115	.13	.115	.13	.13	.145	.14	.16
The New England States:										
Plain	.13	.15	.13	.15	.145	.165				
Flavored	.13	.15	.13	.15	.145	.165				
The area served out of the Philadelphia, Pa., branch:										
Plain	.11	.13	.11	.13	.12	.14				
Flavored	.14	.16	.14	.16	.15	.17				
State of Florida and lower south Georgia:										
Plain	.135	.16	.135	.16	.15	.18				
Flavored	.135	.16	.135	.16	.15	.18				

* Breakstone's "Jobber" and "Warehouse" prices are the same.

sales totaling about $194,000. The remainder of this market (5 percent) was thus held by respondent, whose New York yogurt sales in 1960 totaled $281,000.

Prior to its price cut, respondent's wholesale list prices for yogurt in New York were lower than its competitors'. Dannon's wholesale price was the highest in this market. At the same time that respondent lowered its New York yogurt prices, Dannon raised its prices while Lacto maintained the same prices throughout the period of respondent's price reduction. The following table sets forth a comparison of the wholesale prices of the three companies in New York during the relevant period:

Schedule of comparative yogurt prices in the New York metropolitan area (half pints)

	Breakstone	Dannon	Lacto	Amount Breakstone under— Dannon	Lacto
I. Prior to May 1, 1961:					
Store door:					
Plain	$0.13	$0.15	$0.135	$0.02	$0.005
Flavored	.16	.185	.17	.025	.01
Jobber:					
Plain	.11	.12	....	.01	....
Flavored	.14	.15	....	.01	....
II. After May 1, 1961:					
Store door:					
Plain	.10	.157	.135	.057	.035
Flavored	.13	.192	.17	.062	.04
Jobber:					
Plain	.085	.13	....	.045	....
Flavored	.115	.16	....	.045	....
III. After April 23, 1962:					
Store door:					
Plain	.115	.157	.135	.042	.02
Flavored	.145	.192	.17	.047	.025
Jobber:					
Plain	.10	.13	....	.03	....
Flavored	.13	.16	....	.03	....
IV. After July 30, 1962:					
Store door:					
Plain	.13	.157	.135	.027	.005
Flavored	.16	.192	.17	.032	.01
Jobber:					
Plain	.11	.13	....	.02	....
Flavored	.14	.16	....	.02	....

Statistical evidence introduced by complaint counsel establishes that in 1961, respondent's yogurt sales in the New York area increased to about $629,000 and that its share of the market increased to 12 percent. In 1962, its sales volume of $827,000 represented about 16 percent of the New York yogurt market. Dannon's sales volume declined during these two years, going to $4,159,000 in 1961 and to $4,076,000 in 1962. This represented a drop in its market share to 83 percent and 80 percent in the respective years. Contrary to Dannon's experience, Lacto's sales in 1961 increased to $265,000 giving it 5 percent of the market. However, beginning in November 1961, Lacto's sales began to decline and by the end of 1962 its sales volume and market share were about the same as in 1960.

Complaint counsel relied on this evidence as to the volume of sales losses by respondent's two competitors to establish the adverse competitive effect required by Section 2(a). The hearing examiner dismissed this count, holding in part that complaint counsel had failed to establish that the decreases in sales by Dannon and Lacto were attributable to respondent's price differential.

With reference to Dannon, the examiner concluded that its sales losses in 1961 and 1962 were but a continuation of a decrease in sales in New York which began in July 1960. One of the factors relied upon by the examiner in support of this conclusion was a comparison of Dannon's sales volume by consecutive months in the last half of 1960. This comparison shows a steady decline in sales volume from $510,000 in June 1960 to $307,000 in December 1960. However, since the examiner found that yogurt is a seasonal product with highest sales in the summer months and the peak month in June, complaint counsel contend that the examiner erred in comparing sales volume by consecutive months. It is their contention that the only valid method of determining sales gains or losses is to compare the sales volume in any month with the volume in the corresponding month of the previous year. We agree with complaint counsel. However, using complaint counsel's method of comparison, we find that, in fact, Dannon did begin to sustain its sales losses prior to respondent's price cut. In each of the three months preceding respondent's price cut, Dannon's sales volume declined from the corresponding months in 1960, dropping almost $45,000 in April 1961, as compared to April 1960. This was a loss of over 10 percent in the month before respondent's price reduction.

Another important factor in considering Dannon's sales decline is that it raised its yogurt prices at the time respondent reduced its prices and maintained this price increase throughout the entire period of respondent's lower prices. While this increase was about two-thirds of a cent per half pint cup, at least one large chain retailer reflected this increase by raising its retail prices two cents per cup (CX 460).

In considering Lacto's sales losses, we note first that its sales decline did not begin until November 1961 and that, in fact, for the year 1961 when respondent's price cut was in effect for eight months, Lacto's sales increased by 36 percent over 1960. Its 1962 sales receded to about its 1960 level. Also, the evidence establishes that at the same time Lacto's sales began to decrease, Dannon, by far the most popular brand on the market, had just introduced a coffee flavored yogurt to compete with that of Lacto which up to that time had enjoyed substantial market acceptance and had been the only brand of that flavor available on the market.

Complaint counsel introduced certain exhibits (CX 873A–J) purporting to show Lacto's loss of sales to particular customers in 1961 as compared to sales to the same customers in 1960. As the hearing examiner properly found, there is no substantial or credible evidence that the sales decreases experienced by Lacto in these accounts resulted from the substitution of Breakstone for Lacto yogurt. The only storekeepers who testified on this count, called on behalf of respondent, specifically denied that they had discontinued Lacto because of respondent's price cut. Most of them carried only Dannon yogurt and testified that they discontinued Lacto because it didn't sell.

In an effort to tie Lacto's losses to respondent's pricing, complaint counsel introduced as an exhibit (CX 893A–C), a list of names of accounts allegedly lost by Lacto to Breakstone. However, the examiner held, and we agree, that the testimony of Lacto's representative concerning the loss of these accounts was fully discredited on cross-examination. In brief, his testimony disclosed that of 122 stores listed, over 45 were lost by Lacto in 1960 and several were lost after respondent fully restored its price cut. As to the remaining accounts, the dates on which they were allegedly lost was not supplied by the Lacto representative. As the examiner found with reference to this exhibit, the evidence affirmatively establishes that Lacto lost certain customers because of personality differences, disputes between Lacto's drivers and customers, or, as we have previously noted, because Lacto didn't sell.

Complaint counsel have advanced another argument in addition to their reliance on the percentage test of sales losses by respondent's competitors. They contend that the examiner erred in failing to find that respondent reduced its prices with the intent of injuring its competitors. In support of this argument, they rely on the fact that although respondent obtained authorizations for the sale of yogurt in the largest chain stores within about three weeks of its price reduction, it continued its low prices for about fifteen months.

The facts establish that in an effort to increase its yogurt sales, respondent substantially increased its advertising expenditures in New York in 1960. While respondent did gain additional sales in that year, the president of its Breakstone division testified that it obtained no new authorizations and, in fact, it lost money on its New York yogurt sales in 1960 (RX 217). In March and April of 1961, its sales were below the corresponding months of 1960. Respondent was faced with a competitor whose product enjoyed tremendous popularity and who controlled 90 percent of the market. According to respondent, this competitor, Dannon, "had a stranglehold on the distribution of yogurt in this market" and respondent's purpose in reducing its prices was to gain distribution and consumer acceptance. At no time were respondent's reduced prices below its costs and, as the examiner found, respondent made sure that a profit would result.

On this record, we find that the fact that respondent maintained reduced prices for fifteen months under the competitive conditions with which it was faced in the New York yogurt market does not warrant a holding that respondent intended to injure its competitors.

As this record stands, complaint counsel rely on the percentage of sales losses by respondent's competitors as proof that respondent's price cuts in the sale of yogurt may have the required adverse effect on competition. It is undoubtedly true that respondent's price reduction contributed to some extent to its competitors' losses, at least those of Dannon. However, we agree with the hearing examiner that complaint counsel have failed to establish that the volume of sales which they rely upon as having been lost by the respective competitors, was lost due to respondent's reduced prices. Moreover, it cannot be determined from the evidence whether any substantial loss of sales by competitors was attributable to respondent's price differentials. Since this is the test relied upon by complaint counsel, we cannot find on this record that respondent's price reduction on yogurt in the New

York area may have the requisite adverse competitive effect. Accordingly, complaint counsel's appeal is denied.

COUNT III

The third count, like the previous two, alleges possible injury to competition with respondent as a result of respondent's price discriminations. The product is a marshmallow cream topping sold by respondent through its Kraft Foods Division under the name "Marshmallow Creme."

Although marshmallow cream topping had been sold by other companies for a number of years, it was a new product in the Kraft line in 1960, the year the alleged price discriminations were initiated. The Kraft division had developed its product in late 1958 at which time it caused a market survey on this type of product to be conducted, including obtaining a report from the A. C. Nielsen Company.

As the hearing examiner found, information obtained by respondent disclosed the seasonal nature of marshmallow cream topping sales, with the largest volume of sales being made in the winter months. Additionally, respondent determined that of the marshmallow cream topping sold in the United States, about 40 percent was consumed in the geographic area coinciding with Kraft's Eastern Division, and that the New England area accounted for almost 40 percent of the topping sold in that eastern area. In the New England area, topping is used in sandwiches and the season demand corresponds generally with the months of the school year. As in other geographical areas, the peak demand is in the months of November and December. However, in New England, the decline is not as sharp in the following months as it is in the remainder of the country.

Respondent had planned to begin production of its topping in August or September 1959 which would permit it to begin sales at the start of the seasonal demand. The evidence establishes that with sales to begin at that time, respondent would offer the product in its Eastern, Southern and Central Divisions with an allowance of 35 cents per case off the list prices it had set.[17] However, there were several delays in getting into production and, although respondent began soliciting orders in January, no product was available for shipment until February 11, 1960.

Respondent's officials testified that they received virtually no authorizations or orders as a result of their solicitations in mid-

[17] Under a volume discount schedule employed by respondent, the list price ranged from $2.45 to $2.25 per case of a dozen 7 ounce jars.

January which was after the period of peak demand. Respondent then decided to attempt a stronger introductory offer, one case free with two purchased, on a test market basis. The test markets selected were Boston and Washington in the Eastern Division, St. Louis in the Central Division and Memphis and Nashville in the Southern Division. The one-free-with-two offer was made in these markets for the period February 15 to March 11, 1960, while the 35 cents per case allowance was continued throughout the remainder of the three divisions.

Orders were solicited in the test market cities prior to the offer period. Authorizations and orders received from Boston far exceeded respondent's expectations to the point that it could not supply the demand from that market. Therefore, on February 11, 1960, respondent directed all sales districts in its Eastern Division, other than Boston, to suspend sales of marshmallow cream topping. Also, respondent was unable to fill orders in its Central and Southern Divisions due to the demand on production in Boston. After the expiration of the offer period in Boston, respondent reopened the other districts in its Eastern Division on a one-free-with-two basis. It is respondent's position that this offer was necessary because its 35 cents allowance in the Eastern Division had been unsuccessful and because the area was then further into the season of declining sales. The offer period was thirty days in each district and the districts were reopened on a staggered basis in the months of February, March and April. In each district, the price reverted to respondent's standard list price at the close of the offer period. Throughout this time, respondent continued to offer its product in the Central and Southern Divisions on the basis of a 35 cents per case allowance, except for the test cities.

After its above-described introductory offers, respondent engaged in various promotional offers for its topping in 1960, 1961 and 1962 in its Eastern, Central and Southern Divisions. These offers include case allowances of varying amounts off the list price, the granting of a free case with a varying number of cases purchased, and off-label price reductions. In several instances, the promotion period was the same in each of the Divisions and although the type of promotion varied, the resulting price difference was small.[18]

The chart set forth on page 1386, prepared by complaint counsel and reproduced in the initial decision, sets forth respondent's

[18] Thus, one of the two promotions offered by respondent in 1962 was in the period from August 13 to August 24 in all of its divisions. The Eastern Division offer was 3 cents off label which amounted to 36 cents per case. In all other divisions, the offer was one case free with five which is a net reduction of 37.5 cents per case.

various promotional offers in each of Kraft's divisions for the years 1960–1962.

In support of the charge that the effect of the price discriminations resulting from respondent's various offers may be substantially to lessen competition, complaint counsel introduced testimony and documentary evidence concerning three of respondent's competitors. The largest of these three is Durkee-Mower, Inc. This company began selling marshmallow cream topping in 1920 under the name "Marshmallow Fluff." Its plant is located in Lynn, Massachusetts, and its dollar volume of sales in 1959 was about $1,553,000. Durkee had over 92% of the marshmallow cream topping business in New England prior to respondent's entry, which accounted for 55 percent to 60 percent of its total sales. Its second most important market area was the Middle Atlantic region where it accounted for 28 percent of all sales in 1959. Durkee also made some sales in the midwest states and in two cities in California.

Tweet, Inc., a second competitor, has been in business since 1945 and sells its topping under the "Tweet" label. Although its plant is located in Massachusetts, about 60 percent of its sales are in Pennsylvania, with Pittsburgh and Harrisburg being its primary markets. Its sales volume in 1959 was about $57,600.

The third competitor, Cremo Manufacturing Company, in addition to selling topping under its Cremo brand, also sells under private labels to a number of customers. It began business in 1927 and its plant is located in Philadelphia, Pennsylvania. It sells some topping in New Jersey and Maryland but its major area of distribution is eastern Pennsylvania. Its sales volume in the year before respondent's entry was about $120,400.

In their appeal, complaint counsel contend that in dismissing this count, the hearing examiner failed to consider statistical data showing declines in sales by these three competitors after respondent's entry. While we think it obvious that the examiner gave full weight to this data (initial decision, pp. 1394–1400), we will consider these statistics.

As to Durkee, its total sales volume of $1.5 million in 1959 declined to $1.4 million in 1960 and to $1.2 in 1961. However, in 1962, its sales volume increased to $1.3 and its executive vice president testified that in 1963, Durkee's sales volume was higher than it had been since 1958. In its most important trading area, New England, Durkee's case sales dropped from 411,293 in 1959 to 334,647 in 1960. In the following year, this decline halted and case sales increased to 360,423. In 1962, Durkee sold 431,635 cases of marshmallow topping in New England, some 20,000 cases more than the year before respondent's entry.

Complaint counsel also introduced an exhibit showing Durkee's experience with its major New England accounts. While its case sales to these accounts declined from an average of 296,940 in 1958–59 to 244,730 in 1960, in 1962 these accounts purchased 332,466 cases from Durkee. Respondent's case sales of 83,268 in 1960 when it entered the market, dropped to 59,733 in 1962.

Complaint counsel further contends that the examiner misinterpreted a chart (initial decision, p. 1396) purporting to show Durkee's and, where available, respondent's case sales to major New England accounts, from an average in 1958 and 1959 through 1962. We agree with complaint counsel that the examiner erred in concluding that where no sales are shown for respondent to specific accounts, respondent failed to enter these accounts. It is obvious from the exhibit upon which this chart is based that no sales are shown by respondent to certain accounts for the reason that information as to the volume sold was not available. However, it is likewise obvious that the examiner did not err in finding from this chart that in over three-fourths of these major accounts, Durkee's sales volume has increased since respondent entered the market.

In the remainder of the area covered by respondent's Eastern Division, Durkee's sales declined from 106,697 cases in 1959 to 89,204 in 1960 and to 78,152 cases in 1961. In 1962, its case sales increased to 91,533 and in the first quarter of 1963, the latest figure available in the record, Durkee's sales were 6,000 cases higher than in the first quarter of 1959. It is to be noted that in the year in which Durkee's sales were lowest, 1961, the principal decline took place in the first quarter when respondent had no promotion.

In Durkee's Area II, which corresponded to the area covered by respondent's Central Division, Durkee's sales declined each year from 1960 through 1962. However, Durkee's sales in this area had declined from 1958 to 1959, the year before respondent entered. Also, Durkee's sales were higher in each of the first three quarters of 1960 as compared to the same period in 1959 although respondent's strongest 1960 promotions were in that period. The evidence also shows that at the same time that respondent was conducting two of its three promotions in its Central Division in 1961 and 1962, it was conducting other promotions in all divisions. The chart set forth on page 1365 shows that respondent's net price in its Central Division during these two promotions was its highest price. Respondent did grant a 50 cent per case allowance in its Central Division in March 1961 which was unmatched in other areas. However, Durkee's sales decline in 1961 was not confined to this period but extended to all four quarters of 1961 as compared to the previous year.

Although respondent offered no promotions in Durkee's Areas III and IV, the western states, Durkee's sales there declined continually from 1958 through 1962.

Turning next to the sales record of Tweet, the evidence discloses that its sales declined in 1960 from 1959. However, the record is not clear as to the exact extent of this decline. In any event, this decline continued each succeeding year through 1962. However, as the examiner found, this company's sales began to decline in 1953 and within four years, it had lost half of its business. Although Tweet registered slight increases in sales in 1958 and 1959, it has not been established in this record that its subsequent losses were other than a continuation of the general trend beginning in 1953.

As to the third competitor, Cremo, complaint counsel rely on the fact that its sales declined from $118,918 for the year ending May 31, 1960, to $89,475 for the year ending May 31, 1962. However, as the examiner found, Cremo's best year was in 1946 and its sales have not been as high since then. The available statistical data on a fiscal year basis, ending on May 31, shows Cremo's sales volume to be:

Year	*Sales*
1958	$153,679
1959	126,375
1960	118,918
1961	89,239
1962	89,475

Source: CX 844–A.

Respondent's strongest promotion, its one-free-with-two offer, took place in fiscal year 1960. Cremo's sales decline in that year was less than one-third as great as in the previous year. Moreover, as the examiner found, Cremo reversed its declining sales trend the second fiscal year after respondent's entry and showed a slight dollar volume increase. The statistical data as to Cremo's sales to its five largest customers follows its over-all sales pattern. In three of these five accounts, Cremo's losses were greater from 1958 to 1959 than they were in the year respondent entered.

Finally, there is an apparent lack of correlation between Cremo's monthly sales losses and respondent's promotions.[19]

In our opinion, the foregoing statistical data is not sufficient evidence to support a finding that respondent's alleged price difference may have the required adverse competitive effect. In the first place, this data relates to only three of respondent's competitors. The evidence establishes that there were other companies with substantial sales of marshmallow cream topping outside of the area covered by respondent's Eastern Division.[20] However, complaint counsel made no effort to prove that competition with these other companies was in any way affected by respondent's conduct in these other areas. While Durkee made some sales in the areas covered by respondent's Central and Western Divisions, there is a lack of correlation between any losses sustained by Durkee in these areas and respondent's promotional offers.[21] Accordingly, the statistical data relied upon by complaint counsel has relevance only to respondent's pricing practices in its Eastern Division.

Reviewing this statistical data, we find that two competitors, Tweet and Cremo, lost sales each of the first two years after respondent entered the market. However, as the examiner found, neither of these companies had exhibited any competitive vigor prior to respondent's entry. Moreover, these sales losses were but a continuation of a trend which started many years before respondent began selling marshmallow topping in their areas. Obviously, the entry of a new seller in their areas would divert some sales from these companies. However, considering the past sales history of these companies, we cannot determine the extent of such diversion nor is it possible to determine to what extent any sales losses were the result of respondent's special promotions.

Turning to Durkee, we find that it sustained a substantial sales loss in its primary market, New England, the year respondent entered. However, Durkee had a virtual monopoly in this area, controlling 92 percent of the sales in 1959. It had been effective in

[19] Thus, in the months of June, July and August 1960, and from February through May 1961, when respondent had no promotions in Cremo's territory, Cremo showed a sales decline in each month (CX 845–A).

[20] A. E. Staley Company, whose primary market for marshmallow topping is in the Southern and West Coast States, and Union Starch & Refining Company, which sells topping primarily in the east central, southeast and western areas, together account for about 38% of the national market for marshmallow topping (CX 853).

[21] Thus, in each of the first three quarters of 1960 when respondent had its strongest promotional offers in its Central Division, Durkee's sales in that area were higher than in the corresponding quarters of 1959. Durkee lost sales each year from 1958 through 1962 on the west coast but respondent had no promotional offers in this area during that period.

excluding other sellers, as witnessed by the fact that Tweet, with its plant in Massachusetts, had turned to Pennsylvania for its principal sales volume.

Any successful entrant into the marshmallow topping business in New England would of necessity take some business from Durkee. However, in the first year after respondent's entry, and despite respondent's promotional offer. Durkee regained a substantial part of its sales losses. And, in 1962, when respondent conducted two promotional offers in New England, Durkee not only regained its entire 1960 losses, but its sales were higher than the year before respondent entered. In the Middle Atlantic area, Durkee's second most important market, there is a lack of correlation between its sales losses in 1961 and respondent's promotions. In any event, Durkee had regained most of its 1959 business in 1962 and its first quarter 1963 sales far exceeded any previous first quarter sales. Furthermore, in response to respondent's entry, Durkee made certain changes in its business operations, including replacing its advertising agency and its brokerage firm, and its president testified that his company was stronger as a result of the changes.

As we have stated in our decision in the *Fry* case, *supra*, Section 2(a) is concerned with injury to the health or vigor of competition, including injury to a single firm's ability to compete. Considering the fact that respondent was a new entrant into Durkee's market and viewing Durkee's subsequent sales experience, its initial sales losses, standing alone, will not support a finding that respondent's price differences substantially impaired Durkee's ability to compete, within the meaning of Section 2(a).

Complaint counsel have also argued that the examiner erred in failing to find that respondent intended to injure its competitors by its promotional offers on marshmallow topping. In support of this argument, complaint counsel contend that respondent sold its topping at a loss the first three years after it entered the market.

To the extent that the examiner held that respondent's price differences could not be regarded as a violation of Section 2(a) in the absence of a substantial showing of predatory intent, he was in error as a matter of law. However, we cannot agree that he erred in failing to find intent to injure on the facts of this count.

The facts relied upon by complaint counsel show that, although respondent earned a gross profit in 1960 through 1962, it sustained net losses for each of these three years. Respondent, however, points out that it earned a substantial net profit before advertising in 1961 and 1962, and its representative testified that the Kraft Division traditionally regards advertising on a new product for the first three to five years as part of its capital investment. In any event, it does not appear to be unusual for a company introducing a new product to sustain a net loss. We are not convinced that the net losses sustained by respondent, particularly since it would have to employ extensive advertising in the primary marshmallow topping market, dominated by a competitor, in order to gain consumer acceptance, is sufficient to warrant a finding of predatory intent.

We hold that there has been a failure of proof that respondent's price differences in the sale of marshmallow cream topping may have the required adverse competitive effect, and complaint counsel's appeal on this count is denied.

THE ORDER

The hearing examiner has proposed an order which would require respondent to cease selling jellies and preserves to any purchasers in any trading area where respondent is in competition with another seller or sellers at a price which is lower than the price charged any purchaser at the same level of trade in another trading area. Both parties have appealed.

Complaint counsel contend that the examiner erred in limiting the order to a single product line of respondent. They point out that there is no precedent in previous Commission cases for such a limitation and argue that the order should extend to all products sold by National Dairy Products Corporation.

We agree with complaint counsel that an order limited to a single product is not an adequate remedy in this case. It is now well established that the Commission has a wide discretion in its choice of a remedy and that it may frame its order broadly enough to prohibit a respondent from using identical illegal practices in the sale of any and all products. *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960). However, we do not believe that an extension of the order to cover the products sold by all of respondent's divisions is justified. It appears from the record that respondent's various divisions are separately managed, that they handle different products and that, in general, they employ different distribution systems. The pricing practice herein found to be illegal is that of respondent's Kraft Foods Division whose food products are of such a nature, and distributed in such a manner, as to be susceptible to the same type of illegal pricing. Accordingly, our order will extend to all of the products sold by the Kraft Foods Division.

In substance, respondent contends that the examiner's order would require uniform national pricing and would bar any promotional offers. In this latter connection, respondent places considerable emphasis on the use of promotional offers by other companies in the food industry. Be that as it may, a promotional offer which results in a price concession from regular prices in one area while regular prices are maintained in other areas is a price discrimination. And, as we have previously stated, the statute provides no exception for a discriminatory price on the grounds that it resulted from a promotional offer.

On the facts of this case, respondent effected a drastic price discrimination amounting to 50 percent of its regular price for jellies and preserves by offering one case free with one purchased in the complaint areas. Moreover, it is obvious from this record that the type of promotional offer, and hence the amount of a price discrimination, is limited only by the ingenuity of a company's marketing officials, who are responsible for placing a product on the shelves of retailers. The fact that a company chooses some form of a price concession offer rather than an outright reduction from its regular price in order to sell its product does not thereby remove that practice from the proscription of Section 2(a).

It is our responsibility to "take such reasonable action as is calculated to preclude the revival of the illegal practices." [22] However, despite respondent's flagrant disregard for the law as evidenced by its below cost price cut in the sale of jellies and preserves, we do not believe that the broad prohibition of the hearing examiner's order is necessary to assure fair competition and prevent resumption of the illegal price cut shown in this record. Accordingly, we have included two provisions in the order which will permit respondent to engage in pricing practices, including promotions, while at the same time assuring that these practices do not result in the likelihood of competitive injury.

Finally, respondent argues that the order should extend only to the sales of products for resale. We agree, and the order will be so limited.

On the basis of the foregoing, the initial decision as supplemented and modified herein will be adopted by the Commission. An appropriate order will be entered.

[22] *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957).

Commissioner Elman dissented and has filed a dissenting statement.

Commissioner MacIntyre concurred in part and dissented in part and has filed a separate statement.

Commissioner Jones concurred in part and dissented in part and has filed a statement.

DISSENTING OPINION

JUNE 28, 1967

BY ELMAN, *Commissioner*:

The Commission's decision in this case seems to me to turn the antitrust laws upside down. The fundamental policy of these laws is to preserve *competition*, not to protect businessmen against the inevitable risks and losses resulting from competition. We must not forget what competition is all about: it is a rivalry, a contest. If *A*, by substantially lowering his price or improving the quality of his product or advertising it effectively, draws business away from *B* and *C*, they will not be very happy about it and may even complain to the Federal Trade Commission about "unfair" competition. But the test of whether competition is unfair is not whether it diverts business from competitors. All successful competition necessarily diverts business from rivals. The essence of competition, fair as well as unfair, is that some competitors will win and some will lose. Competition is a turbulent sea, not a snug harbor. The notion that competition is "fair" only when everybody wins and nobody loses is patently absurd. At any rate, it finds no support in any provision of the antitrust laws enacted by Congress.

What is most disturbing about the Commission's decision in this case is that it obliterates the line between (1) competition which is fair and legitimate, though successful in diverting business from rivals, and (2) what Brandeis called the "competition that kills." Where a seller systematically discriminates in price between competing customers in the same market, the injury to competition at the buyer's level is palpable. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). But the relatively simple criteria applicable to secondary-line price discriminations are inappropriate in dealing with geographic price differences or local promotions involving no discrimination among buyers in the same market. See dissenting and concurring opinions in *Dean Milk Co.*, FTC Docket 8032 (decided October 22, 1965) [68 F.T.C. 710]. As to these, attention must be focused on the competitive character and significance, the fairness or unfairness, of the practice—not on whether it has drawn business away from competitors.

The right to compete is the right to compete effectively. No competitive tactic is more effective than a reduction of price. If there is any area in which businessmen should not only be allowed but encouraged to compete vigorously, it is in regard to price. A businessman may strike a hard blow at his competitors by making a substantial reduction in his price. But a hard blow is not necessarily a foul blow.[1] It is true, as we stated in *Quaker Oats Co.*, F.T.C. Docket 8112 (decided November 18, 1964), p. 5 [66 F.T.C. 1131, 1193–1194], that "In the hands of a powerful firm, selling at unjustifiably low prices may be a potent weapon of predatory and destructive economic warfare, and hence unfair, especially where such sales are subsidized out of profits made in other product lines where the seller is strong and his competition weak." On the other hand, there are circumstances in which even below-cost selling for a limited period is neither unfair nor destructive in nature or probable effect. Suppose a firm that operates in a number of geographical markets desires to enter a market where it has not sold before and where one or a few firms are dominant. New entry into such a market would stimulate competition. But to gain a foothold in a market of well-entrenched sellers, a new competitor may be obliged to sell his brand at a low price, at least initially. Non-discriminatory price reductions or promotions aimed at prying open such markets surely are not forbidden by the antitrust laws.

Selective local price cutting may also be a necessary first stage in a general lowering of prices. A national seller is often reluctant to initiate a uniform price reduction, especially if he is so large a factor in the markets in which he sells that he can expect his competitors to match any such reduction. In such a situation, where an across-the-board price reduction might be hard to reverse should it prove unwarranted, a national seller may want to experiment with a projected price reduction in one or several local markets before establishing it throughout his entire marketing area. Such experimentation or test marketing is not anti-

[1] It does not advance analysis to discuss this problem in terms of "increasing concentration" or "changing market structure." Whenever a businessman fails, and for whatever reason, there is necessarily to that extent an "increase in concentration." But such a "change in market structure" may be merely the result of vigorous and fair competition; and it is surely a contradiction in terms (as well as a rejection of the basic premises of our economic system) to condemn as "injurious to competition" even a fair and non-discriminatory price cut, promotion, or other competitive tactic which may, if sucessful, tend to produce a "change in market structure."

competitive. In addition, there are occasions when a local or regional firm may become dominant in its market area and set a high, monopoly price. Where local price cutting by a geographically diversified seller may pose the only real threat to the monopoly power of the entrenched local or regional competitor, plainly it is beneficial to competition. In general, when a firm sells in a number of different markets, there need be nothing unfair, abnormal, or anticompetitive in the fact that its prices vary from market to market. Such lack of uniformity may simply reflect the seller's promptness and flexibility in adjusting his price to meet different competitive conditions in different markets, and insistence on price uniformity in such situations could lead to high, rigid, and unresponsive prices and thereby hurt competition.[2]

Thus, the fact that a seller does not charge the same price in every area in which he does business does not *ipso facto* render him suspect as a violator of the antitrust laws. That is why, in cases where competitive injury only at the seller's level is alleged to result from an area price difference, Section 2(a) requires proof not merely of the discrimination but of its probable adverse effect on competition, and why actual or probable injury to competition does not inhere in, and cannot be presumed to flow automatically from, the mere existence of such price difference.

In the present case the Commission holds under Count I that it is "predatory" for a national seller to make a non-discriminatory, limited 26-day "free goods" offer to retailers as a promotion device for bringing its products into a new market. The only thing "predatory" or even unusual about the "free goods" promotion involved in Count I is that it turned out to be far more successful than anyone had reason to anticipate. Had it proved less successful, like those involved in Counts II and III, the Commission would likewise have found it to be lawful. Because of its unexpected success, the Commission now finds the promotional offer to have been "devised for a predatory purpose."

This seems to me to put national sellers in an impossible dilemma. In order to enter a new market and compete against other sellers already established there, may a national marketer make attractive and non-discriminatory promotional offers to retailers in that market? The holding in this case seems to be that it is safe for a national seller to engage in such competitive pro-

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[2] See *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 367 (9th Cir. 1955); Henderson, *The Federal Trade Commission* 251 (1924); Edwards, *The Price Discrimination Law* 637 (1959). *Cf. Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 63.

motions, but only up to the point where they do not succeed in diverting sales from other competitors.

The record establishes, and the hearing examiner found, that "the prevailing, conventional, recognized and successful way to get a product on the shelves of the retail [grocery] stores is to offer promotions of one kind or another." (I.D. 1402.) The term "promotion" embraces a variety of devices, including discounts and allowances to retailers, and special inducements to consumers in the form of coupons or prizes. All these devices are commonly used by suppliers in the food industry to obtain or expand retail-store shelf space and to stimulate consumer purchases. The low-cost, high-turnover food products, such as are involved here, require widespread supermarket distribution; and manufacturers must obtain adequate shelf space or "facings" in supermarkets in order to get their goods before the consumers.

Ordinarily, many brands of the same product compete for the limited shelf space available. The struggle for shelf space is made more acute by the prevalence of chain store operations in food retailing. Generally, before a supplier can sell to any individual store in a chain, the chain's buying headquarters must authorize purchase of the product by store managers.[3] Chain buying officers are often reluctant to authorize a new brand, even if it has been the subject of considerable advertising and consumer promotion. It is not always sufficient for a manufacturer simply to create consumer demand; further steps in the form of promotions directed to the retailer must often be taken in order to obtain the authorizations. The hearing examiner summarized the evidence on this subject as follows:

> Throughout the hearing of this case, witness after witness, in all the counts, has made it quite clear that the prevailing, conventional, recognized and successful way to get a product on the shelves of the retail stores is to offer promotions of one kind or another. However necessary this may be for established products and old manufacturers of such products, it is immeasurably more so for the newcomer in an area or for a new product not previously on the market. (I. D. 1402.)

Respondent initiated the promotion which is the subject of Count I of the complaint because its Kraft Foods Division had been unable, after four years of effort, to obtain any significant number of authorizations for its jellies and preserves in the

[3] The producer's opponents in the effort to obtain shelf space are not only competing marketers but include the private brands of the chain supermarkets themselves. For example, with reference to jellies and preserves, in Washington in 1963, Safeway's "Empress" brand comprised 38.9% of its facings; A & P's "Ann Page" and "Sultana" had a total of 63.6% of its facings; and "Kroger" and "Embassy" had a total of 72.5% of Kroger's facings. (RX 200.)

areas served by Kraft's Washington and Richmond branches. Kraft's district manager for the Washington area testified that in 1960 it had no authorizations at all in Giant, Safeway, and Grand Union (Tr. 1508, 1551), and only insignificant authorizations in other chain stores.[4] Realistically viewed, Kraft was still very much a new entrant in 1960.

Lacking these crucial authorizations, Kraft's total sales of jellies and preserves in the Washington and Richmond sales areas in 1960 amounted to a miniscule $71,203 (I.D. 1351; CX 17). In contrast, for the same year, sales of Kraft's major competitors in these markets, Old Virginia and Theresa Friedman, were $808,814 (CX 176) and $233,633 (CX 184B) respectively. Kraft's third principal competitor in the Washington and Richmond area, M. Polaner & Son, had total sales in the Washington-Baltimore-Richmond-Norfolk trade areas of over $300,000 (CX 885). Polaner, however, had only minor distribution in Norfolk and Richmond (Tr. 491), and thus Polaner, too, had considerably greater sales than Kraft in the Washington and Richmond areas.[5]

In short, respondent was doing very poorly in the Washington and Richmond markets. If Kraft was to succeed, it had to find some way to get its jellies on supermarket shelves. Kraft sought the shelf space by means of a one-free-with-one promotion. Initially, the promotion was intended for the Washington and Richmond areas; it was subsequently extended to Norfolk because of distributional overlaps, and to Baltimore in order to avoid secondary-line discrimination. (I.D. 1350.)

The majority opinion concludes that respondent's competitors sustained "drastic sales losses" as the direct result of respondent's three-week-long promotion and that their ability to compete was "greatly impaired." The facts in the record, however, demonstrate that, after the promotion, respondent's three major competitors showed little or no ill effects. In fact, respondent seems to have been unable to consolidate the brief gains obtained by its promotion, with the result that the long-term market effects were practically nil.

In terms of total sales, the record fails to reveal any injury to Old Virginia. In its fiscal year ending June 30, 1960, sales in all areas amounted to $3,791,932; for the following year, its

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[4] A 1962 "Supermarket News" report on food store sales stated that the leading chains in the Washington area accounted for 79% of sales, with an additional 9% accounted for by large cooperatives for a total of 88%. Giant, Safeway, and Grand Union accounted for 59% of total sales in the area. (CX 907.)

[5] About 75 other jam and jelly manufacturers accounted for about 67% of the total market (RX 200).

sales dropped 12.12% to $3,332,126 (CX 895, 897); its sales for the fiscal year ending June 30, 1962, were $3,868,628 (CX 899), an increase over its sales in the fiscal years 1958–1961 (CX 895M). At the time of the hearings, sales for fiscal 1963 had increased to a rate which would amount to about $4,000,000 for the year (Tr. 213).

Old Virginia's sales in the four cities of the complaint area in 1959 amounted to $1,367,101; in 1960, $1,462,195; and in 1961, $1,206,172 (CX 17b). Although there was a decline in sales in 1961, it falls far short of indicating that Old Virginia's viability or effectiveness as a competitor had at all been impaired.

Although in 1961 Theresa Friedman & Son, Inc., experienced a decline in sales from its 1960 level in the complaint areas—$474,960 in 1961, and $644,569 in 1960—its 1961 sales approximated its 1959 sales of $482,227 (CX 184). The abrupt increase in sales in 1960 may be explained by the fact that Friedman engaged in a promotion in the first half of 1960 which boosted its sales considerably. (Tr. 432–33.) In terms of overall sales, Friedman shows no sign of being less capable of competing after the Kraft promotion. Friedman's total sales in 1959 were $4,533,364; in 1960, $4,931,696; in 1961, $5,178,569; and sales in 1963 were at a rate approaching $6,000,000 for the year. (I.D. 1360, RX 225–27, Tr. 392, 429.)

The record indicates that Kraft's third major competitor, M. Polaner & Son, experienced a very slight decline in sales in 1961. Polaner's total sales in the complaint areas in 1959 amounted to $306,433; in 1960 to $339,868; in 1961 to $323,550; in 1962 to $392,900; and through September in 1963 to $282,368 (CX 885, 886).

A shelf space survey of retail food stores in the relevant areas, conducted by a market research organization in April 1963, two years after the promotion, revealed that respondent's competitors, which were allegedly injured in their ability to compete, each held larger shares of shelf facings than Kraft. Old Virginia accounted for 15.8%, Theresa Friedman for 11.9%, Polaner for 6.1% and Kraft 5.9% (RX 200).

Although these facts do indicate that there was a temporary diversion of business from its competitors to Kraft during and shortly after the promotion, there is no evidence in this record of any injury to competition, and it is probable injury to competition, not mere temporary diversion of business from other individual competitors, which is the standard of illegality. *Borden Co.* v. *Federal Trade Commission,* 339 F. 2d 953 (7th Cir. 1964);

Lloyd A. Fry Roofing Co., F.T.C. Docket No. 7908 (decided July 23, 1965) [68 F.T.C. 217], *aff'd*, 371 F. 2d. 227 (7th Cir. 1966); *American Oil Co.* v. *Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1963). The fact that there were temporary shifts of sales among competing sellers does not show either that the promotion was unfair or that competition was injured. It was inevitable that respondent's competitors should have sold less jelly during and for some time after the promotion—it could scarcely have been otherwise.[6] But that is the essence of healthy competition.

Moreover, even if this shift of business among competing sellers were permanent, instead of merely short-term, it would be insufficient in itself to establish a *prima facie* violation. See, *e.g.*, *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 289 F. 2d 835, 840 (7th Cir. 1961); *Atlas Building Prods. Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959).

Changes of sales shares among competitors cannot, in themselves, be equated with the substantial lessening of competition required by the statute. The concern of Section 2(a), as I wrote in dissent in *Borden Co.*, F.T.C. Docket No. 7474 (Feb. 7, 1964) [64 F.T.C. 534, 577], *rev'd*, 339 F. 2d 953 (7th Cir. 1964), "is not to freeze the competitive *status quo* and require complete pricing rigidity, but to preserve the capacity to compete. Price discriminations are therefore unlawful only if they impair that capacity. Neither the size of the discrimination nor its immediate impact upon the sales of the affected firms will ordinarily provide a sufficient answer to the question of whether their capacity to compete vigorously and effectively has been injured as the result of the discrimination."

By the same token, as the Supreme Court pointed out in *Utah Pie*, it is not correct to say that there "is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit." (Slip opinion, p. 16.) Thus, the possibility that there has been injury to competition is not precluded by evidence that the price cut was not deep, or that competitors enjoyed increasing sales; but neither is the converse true—evidence of reduced sales or a deep price cut, standing

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[6] As the Commission points out in its discussion of Count III, "Obviously, the entry of a new seller in these areas would divert some sales from these companies." (P. 1439.) And, "Any successful entrant into the marshmallow topping business in New England would of necessity take some business from Durkee." (P. 1440.)

alone, is likewise insufficient to establish that competition has been injured.

This reasoning is properly applied by the Commission to the facts in Count III, leading to the conclusion that no violation of Section 2(a) was established under that count. According to the majority, "initial sales losses, standing alone, will not support a finding that respondent's price differences substantially impaired Durkee's ability to compete, within the meaning of Section 2(a)." (P. 1440.) The majority's failure to draw the same conclusion in Count I, in which the operative facts relating to injury to competition are the same, is baffling and unexplained.

In finding that respondent's one-free-with-one offer resulted in injury to competition, the majority opinion tries hard to squeeze the facts here into *Utah Pie*. Its analysis completely ignores one of the most crucial facts in that case, relied upon by the Supreme Court and reiterated many times throughout its opinion: a general and drastic decline in price structure attributable to the respondent's price discrimination.

At the very outset of its discussion of competitive effects, the Court held that "there was ample evidence to show that each of the respondents contributed to what proved to be a deteriorating price structure over the period covered by this suit * * *." (Slip opinion, p. 4.)

In the section of its opinion dealing with the case against Continental, the Court emphasized that Continental's drastic price discrimination caused Utah Pie to make comparable reductions of its price. The Supreme Court concluded that the jury could have found that a competitor "who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force." (Slip opinion, p. 14.)

Further, the Court stressed the evidence of "a drastically declining price structure which the jury could have rationally attributed to continued or sporadic price discrimination" by each of the defendants. (Slip opinion, p. 17.)

The question before the Court in *Utah Pie* was essentially factual, *i.e.,* whether the evidence was sufficient to support the jury's finding of probable injury to competition. In answering the question in the affirmative, the Court's opinion emphasized the presence of the following facts, all of which are absent here: the "predatory intent" of each respondent; "in an expanding market where price proved to be a crucial factor," "each of the respondents contributed to what proved to be a deteriorating price structure"; respondents made "persistent unprofitable sales below cost" and "radical price cuts themselves discriminatory"; their competitors were "damaged as a competitive force" because they were "forced to reduce [their] price to a new all-time low in a market of declining prices"; and evidence of "a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination."

The importance of these evidentiary factors to the decision in *Utah Pie* is emphasized in footnote 15 of the Court's opinion, distinguishing the cases relied on by the defendants:

In *Anheuser-Busch, Inc.* v. *F.T.C.*, 289 F. 2d 835, 839, there was no general decline in price structure attributable to the defendant's price discrimination, nor was there any evidence that the price discriminations were "a single lethal weapon aimed at a victim for predatory purposes." *Id.*, at 842. In *Borden Co.* v. *F.T.C.*, 339 F. 2d 953, * * * the Commission's charge regarding the other market failed to show any lasting impact upon prices caused by the single, isolated incident of price discrimination proved. * * * In *Uarco, Inc.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶16,807 [64 F.T.C. 924], there was no evidence from which predatory intent could be inferred and no evidence of a long-term market price decline. Similar failure of proof and absence of sales below cost were evident in *Quaker Oats Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶17,134 [66 F.T.C. 1131]. *Dean Milk Co.*, 3 Trade Reg. Rep. ¶17,357 [68 F.T.C. 711], is not to the contrary. There in the one market where the Commission found no primary line injury there was no evidence of a generally declining price structure.

It is important to note that the Court's opinion in *Utah Pie* by no means casts doubt upon the validity of any of the cases which it distinguished in footnote 15. Nor did the Court suggest that it was dispensing with the necessity for showing injury to competition as a prerequisite to finding a violation of Section 2(a). *Utah Pie* then boils down to this: Persistent below-cost price discriminations, evidencing predatory intent and damaging competitors as an effective competitive force by compelling them to reduce their prices radically in a drastically declining price structure, supporting a finding of probable injury to competition.

The Supreme Court's holding in *Utah Pie* is wholly inapplicable to the facts of this case. Kraft engaged in a special and limited promotion, offering its goods on a one-free-with-one basis. There is a big difference between this type of promotion and the outright price reductions involved in *Utah Pie*. The significance lies in the fact that while a deep price cut will ordinarily lead to a declining price structure, a special and limited free goods offer will not. This is borne out by the record in the instant case.

Most important is the fact that there was no price decline in the jams and jellies market involved here. (Tr. 688–89, 1534–35.) Although there was some price decline on Kraft jellies, the evidence is clear that this was not intended by respondent. (Tr. 129–30, 1745.) In fact, Kraft went to considerable effort to prevent or minimize any price break on its products. The free goods promotion was specifically designed to induce retailers to sell the merchandise at normal retail prices. (See I.D. 1349, n. 2; I.D. 1353; Tr. 127; 1521–26.) A number of the supermarket buyers, called as witnesses by complaint counsel, testified that it was their understanding that it was Kraft's desire that regular retail prices would prevail during the promotion. (Tr. 351–52; Tr. 668–69; *cf.*, Tr. 734–35.) When, contrary to respondent's expectations, certain wholesalers and retailers financed the sale at half-price of Kraft jellies, and orders began to pile up far beyond Kraft's original estimates, the promotional program was immediately cancelled. Obviously, cut-rate prices would be inimical to Kraft's marketing plans for three reasons. The first is that lower prices, which would lead to faster turnover of the merchandise, would not be consistent with Kraft's purpose in undertaking the promotion, which was to get its product on supermarket shelves for as long a period of time as possible. Second, Kraft attempts to surround its jellies with an image of high quality, and deep price cuts would tend to make its product appear as a cheap item. Third, the consumer resents an increase in price over the introductory price. (Tr. 1543–44.)

The evidence in the record demonstrates that Kraft's competitors in the market suffered no long-term economic injury as a result of Kraft's promotion. It also demonstrates that Kraft's promotion did not lead to a declining price structure in the market, from which competitive injury might be found, and, indeed, that the promotion was specifically designed not to generate a decline in the market price. The Commission's finding of competitive injury is thus completely unsupported by the evidence, and cannot find any parallel in the Supreme Court's decision in *Utah Pie*.

The majority bases its "conviction" (p. 1419) that respondent's promotion was "intended to destroy and prevent competition" on a few ephemeral "facts" which are also present in the other two counts of this case as to which the Commission found no violation. Why these "facts" are sufficient to show a violation as to Count I but not as to Counts II and III is puzzling. The fact that respondent engaged in this promotion for less than a month, and for the purpose of getting a foothold in a market where it was all but shut out, is completely ignored by the majority in finding a violation of Count I, although as to Count III the same fact that respondent was a new entrant struggling for a share of the market is the basis for finding no violation. No explanation is offered for the difference in result.

The Commission says that "the very nature of the offer indicates that it was devised for a predatory purpose," and that the "drastic price cut" on jellies indicates that Kraft did not simply want store authorizations, as it claims, "but was willing to take substantial losses on its sales of jellies and preserves to increase its market share" (pp. 1419–1420).[7]

The question of respondent's motive is, after all, the heart of this case. Did Kraft engage in the promotion in order to get a foothold in the market or did it offer free goods in an effort to kill competition? The majority opinion gets off on the wrong foot by insisting that Kraft engaged in a "drastic price cut." To be sure, a free goods promotion may be technically a price reduction, for purposes of testing its legality under Section 2(a) of the Clayton Act. But that does not change its nature as a special and limited promotion, having competitive effects far different from a "drastic price cut." Kraft's one-free-with-one promotion is not only wholly consistent with its asserted motive of merely obtaining shelf-space authorizations, but is wholly inconsistent with an intent to destroy competitors. A free goods promotion is designed specifically to reach retailers, especially chain store buyers, not the consumer. A price cut, which is likely to precipitate a general price break in the market, is much more likely to injure competition than a free goods promotion which can achieve its objective of obtaining shelf space without bringing down market prices.

The Commission adds nothing to the case by its assertion that "Respondent's prices under this offer were below its cost of manufacture and were subsidized by its higher prices elsewhere as well as by its sales of many other diversified products on a national basis—a source of income not available to its competitors." (P. 1426.) There is absolutely nothing in this record as to who or what "subsidized" the free goods promotion involved in Count I.

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[7] The Commission's statement on this point as to Count I is contradicted by the view it expresses in dismissing Count III of the complaint. As to that count, the majority opinion correctly points out that it is not unusual for a company introducing a new product to sustain a net loss and that losses in themselves are insufficient to warrant a finding of predatory intent (p. 1439).

It is a moot question, wholly unillumined by the record, as to how respondent made up the losses sustained in the promotion. It is no more reasonable to assume that it drew on one part of its corporate treasury than another. The essential fact is that respondent's financial resources were large enough to enable it to conduct such a promotion. But does the size of its "deep pocket" prove that respondent acted with a predatory motive? In any event, I fail to see the relevance of the Commission's speculations in this regard. Suppose, for example, a group of wealthy men organized a new corporation to sell jams and jellies in the Washington market, and that the corporation was so well-capitalized that it could afford to sell the product at a below-cost introductory price for a limited period, in order to gain a foothold in the market. Would this be predatory? I cannot believe that the Commission would so hold. Should it make any difference—in determining the existence of predatory intent—whether the funds to sustain an initial, expensive promotion come from bank loans, private savings, profits from sales of the same product in the same area, or profits from sales of the same or different products in other areas? Standing by itself, such evidence of "subsidization" from whatever source proves nothing in regard to predatoriness.

Further, the majority is incorrect in stating that none of the buyers or competitors who testified had ever heard of an offer such as this, even on an introductory basis. The record shows that one-free-with-one promotions are common in the food industry (Tr. 643A–44; 659–60; 694; 738; 1070–71; 1744), and promotions are a characteristic of the jelly and preserves business (Tr. 692). In fact, at least one of respondent's competitors in the complaint areas had conducted a one-free-with-one jellies and preserves promotion in another marketing area (Tr. 282–99; see Tr. 273–75).

Nor is the majority correct in maintaining that respondent was not introducing a new product in the complaint areas because it had sold there for four years. This ignores the fact that in 1960 Kraft was, for all practical purposes, out of the ball park when it came to selling jelly in Washington. A producer with only $70,000 in sales and no authorizations from the major chain stores is, in every real sense, an entrant who has not yet gained entry into the market.

Thus, in my view, there is insufficient evidence in this record on which to base a finding of predatory intent, and there is considerable evidence showing that the challenged promotion was undertaken by respondent merely for the purpose of getting its product on retailers' shelves.

The net result of the Commission's decision is to force respondent to compete in the market with one hand tied behind its back. This, I suppose, is calculated to insure that respondent will patiently wait 50 years, as the majority opinion states its Washington area competitor did, to develop a significant share of the market. And this is ordered in the name of promoting competition.

Under the order, respondent is confined to promotional price cuts that are no lower than the promotional cuts offered by a competitor in the same trade area within the previous 12 months. In addition, respondent may engage in promotional price cuts, not prompted by a competitor's promotion, only to the extent of not undercutting the lowest price offered to the purchaser by any other competitor with smaller annual sales in that product than respondent.

In effect, under this order, respondent may only react to the promotions of its rivals—a far cry from being an active competitor. If respondent wishes to expand an insignificant market share in, let us say, an oligopolistic market in which its competitors are satisfied with the *status quo* and therefore reluctant to "rock the boat," it will be handcuffed by the failure of its competitors to engage in price-cutting promotions. And if no promotions take place in the market, respondent's ability to promote is tied to the lowest price offered by any other seller with a smaller annual volume than respondent. It makes no difference that respondent may have the smallest volume in the area in which it wishes to promote—its ability to compete may be eliminated by the least efficient and least competitive seller in the market. Such a result is plainly anticompetitive.

The order issued here would be unjustified even if the facts supported the Commission's conclusion. If the Commission is concerned here, as it asserts it is, with predatory, below-cost price cutting "so designed that other sellers cannot complete," the order should be tailored to avoid that danger, not to prohibit virtually all local promotions and geographical price differentials by a national marketer. *Cf. Lloyd A. Fry Roofing Co.,* F.T.C. Docket No. 7908 (July 23, 1965) (concurring opinion) [68 F.T.C. 217, 266]; *Foster Mfg. Co., Inc.,* F.T.C. Docket No. 7207 (July 23, 1965) (concurring opinion) [68 F.T.C. 191, 211].

While we should be alert to prevent a powerful and widely diversified seller from engaging in unfair or destructive competitive attacks on weaker competitors, we must carefully distinguish—as the Robinson-Patman Act requires us to do—fair and legitimate competitive tactics by which a seller may seek to enlarge its share of a market or expand into new markets. See, *e.g., Utah Pie Co.* v. *Continental Baking Co.; Anheuser-Busch, Inc.* v. *Federal Trade Commission,* 289 F. 2d 835 (7th Cir. 1961); *Quaker Oats Co.,* F.T.C. Docket No. 8112 (decided November 18, 1964) [66 F.T.C. 1131]. The antitrust laws are also designed to encourage free entry into new markets (see, *e.g., Federal Trade Commission* v. *The Procter & Gamble Co.,* 386 U.S. 568 (1967)). And large, diversified firms are often the only firms able to overcome the barriers to entry created by modern conditions of marketing consumer products. See *Beatrice Foods Co.,* F.T.C. Docket No. 6653 (decided April 26, 1965), pp. 38–39 [67 F.T.C. 473, 723–724]. While these firms should not be permitted to use their great strength selectively to smash smaller competitors in local markets, we are not warranted in adopting an interpretation of the price discrimination law that will as a practical matter make impossible new entry by large firms such as respondent. The long-run interest of the public would not be served by applying the antitrust laws so as to rob large firms of competitive initiative, for the sake of providing greater security to their smaller competitors. Such a policy would retard, not advance, attainment of the basic goal of antitrust: the preservation and strengthening of the free competitive system.

The Commission has heretofore recognized that the Robinson-Patman Act does not require national sellers to maintain uniform prices throughout the country, and that price differentials may be made in local markets to reflect differences in competitive conditions. *Maryland Baking Company* v. *Federal Trade Commission,* 243 F. 2d 716 (4th Cir. 1957). The Commission has also recognized that there is a crucial difference "between normal and legitimate pricing activities designed to obtain a larger share of business in a marketing area and those which represent a punitive or destructive attack on local competitors and impair the vitality and health of the processes of competition." The *Quaker Oats Company,* F.T.C. Docket No. 8112 (decided November 18, 1964), p. 5 [66 F.T.C. 1131, 1193]. The Commission should frame orders so as to prohibit anticompetitive price discriminations, not to forbid legitimate and necessary flexibility of pricing necessary for sellers to compete. If a respondent has been guilty of unlawful price discriminations, and it is necessary to issue an order, we should not prescribe a remedy that is worse than the disease. Pricing decisions are "the central nervous system of the economy." (*U.S.* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 224, n. 59.) It is one thing to "fence in" a respondent so as to prevent him from continuing to engage in unfair trade practices. It is quite another to put him in a straitjacket, crippling his ability to respond fairly and flexibly to the needs of competition. Our objective should be to promote fair competition, not restrict it.

SEPARATE STATEMENT

JUNE 28, 1967

BY MACINTYRE, *Commissioner:*

I do not concur in the decision of the Commission to dismiss Count II and Count III of the complaint in this case. However, I wish to make it clear that I join in and support the Commission's Findings of Fact that respondent's price discriminations violated Section 2(a) of the Clayton Act, as amended. Therefore, I join in and support the decision of the Commission to enter the order under Count I of the complaint. I cannot agree that the order framed by the majority adequately prohibits future discriminations of a nature similar to those documented by this record and which may be reasonably anticipated in the future.

There are serious limitations in the reach of the order. For example, it has no application in any event to discriminations which may be practiced by the respondent and reflected regularly in its price list. Moreover, even within those limitations, the order may prove difficult to apply because by its terms defenses against the application of the order are accorded the respondent but not provided by law. For example, in the order it is stated:

> * * * *Provided, however,* That in addition to the defenses set forth in Sections 2(a) and 2(b) of the statute it shall be a defense in any enforcement proceeding instituted hereunder for respondent (1) to establish that its lower price was the result of a promotional offer involving a price concession which does not undercut the lowest net price and/or the terms and conditions resulting from a promotional offer made to the purchaser receiving the lower price by any seller of a competitive product within the previous 12 months, or (2) to establish that such lower price does not undercut the lowest price concurrently offered generally throughout the same trading area by any other seller of a competitive product having a substantially smaller annual volume of sales of such products than respondent's annual volume of sales of the product on which the discriminatory price was granted.

In the recent case of *Utah Pie Company* v. *Continental Baking Co.,* 386 U.S. 685 (decided April 24, 1967), a case which arose under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the Supreme Court stated that:

> * * * Sellers may not sell like goods to different purchasers at different prices if the result may be to injure competition in either the sellers or the buyers market unless such discriminations are justified as permitted by the Act.
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> * * * * * * *
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> Courts and commentators alike have noted that the existence of predatory intent might bear on the likelihood of injury to competition. In this case there was some evidence of predatory intent with respect to each of these respondents. There was also other evidence upon which the jury could rationally find the requisite injury to competition.

Here the Commission had before it a record of evidence showing an abundance of injury to other sellers in the market resulting from the respondent's discrimination in price. Indeed, the Commission made findings concerning the injury flowing from respondent's discriminations. In doing so it stated:

> In the case before us, the facts establish that respondent, the only national seller of jellies and preserves, for three weeks in 1961, offered to sell these products at half price with no limitation on the amount that could be purchased and with delivery over an extended period of time. Respondent's only competitors in the four areas in which this offer was made were regional sellers whose incomes were derived primarily from the sale of jellies and preserves. Respondent's prices under this offer were below its cost of manufacture and were subsidized by its higher prices elsewhere as well as by its sales of many other diversified products on a national basis—a source of income not available to its competitors. In brief, respondent could not wait to develop a larger share of the market by a legitimate means but used the power of its treasury to appropriate a share of its competitors' business by a below cost offer which it knew these competitors could not meet.

From the foregoing it is clear that the Commission had an adequate basis for an order which would have prohibited respondent from continuing its unlawful discrimination in price but as I view it, the Commission's order is designed to prohibit only some of such discriminations.

In my opinion, what the Commission has done could well be described as an incomplete job. If the task were one of building a bridge instead of formulating an order, it could be described as a bridge built of substantial spans but only to midstream. Also it may be said that even though the Commission has bridged half of the stream to protect competition from the unfair and illegal discriminations of respondent, nevertheless those who must compete with respondent are left to do so beyond midstream through a maze of an obstacle course the Commission has created by writing into its order defenses not provided for by law.

Subsequent to the preparation of my separate statement commenting as above outlined upon the action of the Commission in this case, I have been afforded the opportunity of reading the dissenting statement. The position of the dissenter is not surprising to me. What does surprise me is the use of the words in the dissenting statement that the Commission's decision turns the "antitrust laws upside down." It seems to me that these words are at war with the general argument and the position of the dissent which fails to take into account that Section 2(a) of the Clayton Act, as amended, is part and parcel of not only our antitrust laws but also of our public policy against anticompetitive acts and practices. The Commission recognizes and has attempted to give effect to this public policy. Commentators and others have disagreed with this public policy and what it provides but we are taught that the Commission isn't free to disregard the Congressional mandates entrusted to it.

STATEMENT CONCURRING IN PART AND DISSENTING IN PART

JUNE 28, 1967

BY JONES, *Commissioner:*

A majority of the Commission has determined that respondent's discriminatory one-for-one promotion resulted in the proscribed injury. I agree.

Section 2 and Section 7 of the Clayton Act are in a sense two sides of the same coin, both designed to prevent any substantial lessening of competition. The Courts have consistently taken note that competition is likely to be substantially lessened as concentration increases and that the antitrust laws are designed to prevent such increases in concentration in their incipiency whether the adverse change in market structure was generated directly by a merger or indirectly by discriminatory pricing activities. The only issue which the Commission must determine under the Robinson-Patman Act is whether the discriminatory pricing activity has the capacity to impair competition and whether under the circumstances characterizing the market affected by the discrimination such an impairment is likely to occur.

A promotion is of course an indirect price concession (not requiring any general lowering of list prices) offered either to consumers or to retailers as an inducement to purchase. Promotions are increasingly being used today by marketers, along with advertising and other product differentiation techniques, in preference to overt price cuts. We would be derelict in our responsibility under the law to hold that promotions as such can never be within the compass of Section 2(a). To do so would enable marketers to take short-range bites at the competitive apple which could have just as injurious an effect on competition as overt price cuts. It is obvious that the seriatim use of promotions or the use of a single promotion whose impact or design extends over a significant period of time can have as devastating an effect on market structure as any overt price cut which frequently is also of a temporary nature and certainly has no inherent sustained duration. Indeed, in my opinion, there are differences in the competitive impact of an overt price cut and of a retailer-oriented promotion which if anything highlight the greater anticompetitive potential of a promotion over an overt cut in the retail price. Moreover, since overt price cuts can be precisely matched or even exceeded, their immediate impact on competitors can today be fairly accurately predicted even though their long-range costs and ultimate impact on price levels is far more uncertain. For this reason, the aggressive competitor desiring to increase its market share at the expense of its rivals is increasingly employing marketing strategies which cannot be so easily countered. Thus particularly in the consumer products industries where buyer sophistication and power are relatively weak, competition is more and more taking the form of promotions, advertising campaigns and other product differentiation tactics whose immediate cost and duration to the initiator, as well as the ability of his competitors in terms of their known resources to meet or match these tactics, can be almost exactly measured.

One other characteristic of retailer-oriented promotions must also be considered in any assessment of the competitive impact and ability of promotions to effect changes in market structure. Competition effected through promotions which are directed to retailers does not necessarily yield the same immediate benefit to the consumer in the traditional competitive terms of improved quality, better services or lower prices. Retailer-oriented promotions are, as this one was, frequently designed to secure position on the coveted and limited shelf space of the retailer. Because of the built-in limitations of available shelf space, a retailer-oriented promotion must by definition eliminate or reduce the amount of shelf space allocated to a competitor. Thus it can produce a change in market structure which is not directly related either to consumer choice or to product quality. Indeed the instant case represents an excellent example of the use of promotions for this very purpose under circumstances which suggest that on the basis of price and quality alone, respondent's product, although nationally advertised and well known in the particular area, had been persistently rejected by the market.[1] Thus retailer-oriented promotions may effectuate changes in market structure which are unrelated in their origin to increases in efficiency, or to improvements in quality or services and which come about not as a result of the consumer having been *induced* to select one product over another but because consumers were foreclosed or limited in the market choices available to them. Thus I suggest that promotions which are likely to cause products to disappear off the coveted shelf not because consumers failed to purchase but because retailers were induced to remove products of competitors of the promoter can have far more likely anticompetitive potential than other types of promotions.

The use of these promotions by national, multi-product firms against their regional or local and frequently more specialized competitors increases their potentially anticompetitive impact. The very structure of diversification which characterizes the national, multi-product firm enables it to move aggressively against its competitors by selecting a competitive target and concentrating all of its offensive or defensive capabilities upon it. The regional and specialized firms which do not have a comparable capacity either to subsidize losses or to distribute risks and withstand reduced profit margins over comparable periods of time find their own market position highly vulnerable to such concentrated attacks. At the same time these companies find it increasingly difficult if not impossible to launch any affirmative attacks on the market position of their national, multi-product rivals either in their own markets or in their efforts to penetrate new markets. It is this imbalance in the relative capabilities of the diversified national company and the more specialized regional firms to effect market entry or defend existing market positions which highlights the potential vulnerability of these latter companies to an impairment of their competitive abilities and

[1] The longer a firm tries without success to crack a particular market the more likely it is that its failure can be attributed to understandable and valid reasons and the more probable it is that the market is rationally rejecting the aspiring entrant. This would seem to be especially true where the firm is as well known and established in other lines as is National Dairy.

potential by the competitive tactics of their larger and more diversified rivals.

It is obvious, therefore, that promotions, especially those directed to the retailer rather than to the consumer, have the capacity to change market structure. When wielded by national, multi-product companies against their regional, more specialized competitors, they have the capability of impairing their competitors' ability to compete and of effecting the proscribed statutory injury and to do so under circumstances which may yield no immediate benefit to the consumer or to the effective functioning of the competitive process. The use of retailer-oriented promotions may ultimately deprive the consumer of any opportunity to select or reject the product in question on the basis of his choice and preference by simply reducing the number of products available to him from which to choose. Moreover, the reduced ability of regional and more specialized companies to match or counter these types of marketing tactics is without reference either to their productive efficiency or to the technological excellence of their products. Rather their survival in the marketplace in the face of these marketing practices can be totally dependent on their financial ability to withstand attacks by competitors upon their market position and to mount attacks of their own.

It is against the background of these general observations about the nature of promotions and the competitive problems generated by the structural imbalances of consumer product industries that the criteria by which to determine the legality of a specific promotion must be considered. It is clear, of course, that despite the anticompetitive potential of promotions, they can also play an important procompetitive role in stirring up and increasing competition. Accordingly, it is important to set out clearly the criteria by which I believe their impact on competition should be evaluated.

An important consideration in evaluating the potential anticompetitive impact of a promotion is the extent to which the promotional price is below cost. In the case of prices below out-of-pocket costs particularly, it is reasonable to assume that the promotion is likely to result in competitive injury as a result of the sheer inability of companies to price their own products at or below costs in order to meet such a competitive promotion. Similarly, where the time required by the promoting company to recoup its own costs or losses occasioned by the promotion is relatively long, it is not unreasonable to assume that such promotions are more likely to injure competition than less costly promotions. The longer the recoupment period required the more likely it is that the promoting company is in fact using its national, multi-product status to subsidize its losses to the competitive detriment of its regional and local competitors who again simply are unable to match the promotion solely because of their size and not because of any disparity in efficiency or technological excellence. If there is evidence that even the promoting seller could not in all probability have afforded to offer the promotion if he had been compelled to offer it throughout his entire market area, then in my judgment again it is reasonable to assume that his regional competitors will not be able to counter the promotion and that their competitive abilities may be impaired as a result.

Again, if the promotion is unlimited as to quantity and is designed for a relatively long-term period, its likelihood of causing competitive injury is far greater than promotional offers of limited quantities of product for a short-term period. In the latter case, competitors can measure the impact of the competition and can determine their own marketing strategies by which to counter the attack. In the former case, they cannot and hence their ability to compete can be severely impaired.

Where a seller has been attempting to expand its share of a particular geographic or product market for a relatively long period of time without success, it is reasonable to assume that the market is rationally rejecting the aspiring entrant. In this context, a reduction of market shares or profit margins, brought about as a result of a discriminatory promotion, is less likely to be a reflection either of the operation of consumer choice between competing products on the basis of quality, price or product differentiation or of the play of competitive forces.

On the other hand, if no such prior history of unsuccessful penetration existed and the market into which entry was sought via promotions had been characterized by relatively static patterns of conduct and competitive inactivity, any reduced market shares or profit margins resulting from a promotion would be far less likely to give rise to any inference of competitive impairment. In this situation, it would be more reasonable to assume that in such oligopolistic or noncompetitive markets the entrenched market occupants have a heightened capability or potential to counter promotional activity by price or cost reductions or increased efficiency and that their failure to do so with a resultant loss of profits or market share was due to their own inefficiencies or unwillingness to compete rather than to their inability to compete.

Finally I believe that the question of whether other competitive strategies were open to the promoting company to achieve its ends must also be taken into account in considering whether injury is likely to result.

The facts of this case offer a particularly dramatic illustration of an abuse of these criteria. The record makes it clear that the promotion offered here by National Dairy had without any doubt the likelihood and indeed the probability that it would substantially lessen competition.

National Dairy was a large national, multi-product company which had sought unsuccessfully for some five years to enlarge its share of the Washington market.[2] It was not a new entrant in this market. On the contrary, it was already a significant factor in the four-city area that was affected by the promotion.[3] National

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[2] The record suggests several reasons why National Dairy was experiencing such difficulty. First, Old Virginia had established its position over a fifty-year period during which it apparently provided a satisfactory product at a reasonable price. National Dairy's wholesale price was higher than Old Virginia's [Tr. 698–699, 1555]. Second, private labels were important in the market and it is doubtful that National Dairy could effect permanent changes in this marketing pattern of the chains. Theresa Friedman, the second largest supplier to the four-city area, produced predominantly for private labels [Tr. 394]. And third, Polaner, which rated fourth, was considered somewhat of a quality item; its wholesale price was higher than National Dairy's [Tr. 493].

[3] While it can be said that National Dairy occupied only a miniscule position in the lesser Washington-Richmond area, it cannot really be said that it was an insignificant factor in the four-city area—the area affected by the deal. It ranked third in this area behind Old Virginia and Theresa Friedman and was the only national, multi-product firm in the four-city area as well as in the Nation.

Furthermore, it seems relevant to note that National Dairy's preoccupation was with the Washington market and, even more particularly, with the Safeway and Giant accounts. It is fair to observe that the deal was aimed almost exclusively at these two accounts [CX 30, Tr. 1518, 1581]. Being compelled to extend the deal to the three other cities, it was still apparently willing to incur the enhanced cost of this "all-out" effort in the four-city area in order to take aim on the two major accounts in Washington.

This would appear to be a variant of "zeroing-in"; National Dairy zeroed-in by designing a maximum inducement aimed at two accounts in one city and compounded the total impact by its willingness to accept the necessity to offer it in the greater four-city area. A firm that was an insignificant factor throughout the area affected by a deal probably could not be said in this sense to be zeroing-in. A firm that was a significant factor throughout the affected area could probably find no legitimate need for an all-out promotional effort. And I believe that a firm like National Dairy with an uneven distribution of positions within an area in which it can be said to be a significant factor should also be under some restraint when it concentrates its power on those submarkets in which it is not significant. Although it is a matter of degree, I judge this aspect of the significance of a promoting seller's market position to be both relevant and substantive in the determination of legality. See "Competitive Injury Under the Robinson-Patman Act," 74 *H.L. Rev.* 1597, 1610 (1961).

Dairy's competitors were successful regional and local companies offering quality products which apparently fully satisfied the needs of the market.[4] Although National Dairy had unsuccessfully experimented with a variety of promotional offers, it does not appear that the company had exhausted its alternatives short of the one-for-one deal.[5] Nevertheless, it offered the instant promotion which was unlimited as to quantity and was originally designated to have a continuing impact on the market in excess of six months.[6] The magnitude of the promotion was such that National's competitors could only meet it if they reduced their own prices below their out-of-pocket costs.[7] Moreover, even National Dairy itself would have required five years to recoup the costs of

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[4] See note 1 *supra*. Promotional deals have been defended where the promoting seller is attempting to enter or expand into a rigidly structured and abnormally resistant market. Suffice it to say that National Dairy did not attribute its difficulties in the four-city market or in Washington to the fact that its competitors or even its reluctant customers represented a well-organized, entrenched, stable oligopoloid situation in which its members basked in the quiet life of recognized mutual interdependence.

[5] National Dairy insisted on charging a higher wholesale price under non-promotional circumstances than did its major competitor, Old Virginia. Apparently National Dairy never attempted to bring its normal wholesale price into line with Old Virginia. Such a price policy may or may not have worked. But the reluctance to try such a price change mitigates against the necessity for or justification of the drastic one-for-one deal.

[6] National Dairy limited the period during which purchases could be made to three weeks. No such limitation was placed on delivery [CX 33, 34, 35C; *cf.* CX 31, 32]. The promotion was designed, however, to be a continuing influence on the market for more than six months. In addition to two consumer coupon promotions that were planned, two successive cooperative merchandising agreements were to run from February 27 to April 28 and from May 29 through July. National Dairy had planned this further promotion to cover all but about five weeks of the period from the end of the one-for-one promotion to August 1. In addition, National Dairy indicated in its publicity to the trade that after August 1: "Other promotions will occur to assure rapid turnover" [CX 33]. And in another circulation National Dairy noted: "Each month for the remainder of 1961, [National Dairy] will offer additional display allowance of 50 cents per case on 12 oz. items and 75 cents on 20 oz. items in addition to your regular 30 percent mark-up" [CX 194]. A National Dairy official testified that "it was a continuing program that would run through the year to continue the movement" [Tr. 1521].

The fact that National Dairy abandoned the consumer coupon promotion because the low retail prices rendered the coupons useless and never did activate the contract display promotions does not reduce the thrust of the fact that the design of this promotion was for a period of more than six months to a year.

The duration of the actual impact of this promotion was even longer. The magnitude of the amount of Kraft jellies that entered the market is some measure of the duration of the impact. National Dairy delivered as many cases under the deal as Old Virginia sold in 1960 and delivered in all of 1961 as many cases as both Old Virginia and National Dairy had sold in 1960 [CX 93, 17, 176]. As can be expected, it took some time for this glut to move through the market to consumers. Prices of Kraft jellies were depressed for over a year in some areas or stores [Tr. 689–690]. And in one case, related in the majority opinion, the inventory was not finally sold until December 1963—almost three years after the promotion [Tr. 360].

[7] CX 32, 38A, 38B, 39A and 88A indicate that for the six sizes and varieties covered by the deal the one-for-one price was below out-of-pocket costs (costs of raw materials, packaging supplies, and direct labor) in each instance. And for both sizes of strawberry preserves the one-for-one price was below raw material costs alone. Mr. Friedman of Theresa Friedman & Sons, Inc., testified that to have met the National Dairy deal would have forced price "below [his] actual cost of materials alone" [Tr. 402–403].

this promotion from any reasonably anticipated return from sales in the four-city area.[8] And it is doubtful that National Dairy could have afforded this scale of a promotion over its total market area.[9]

Under these circumstances, I have no trouble in agreeing with the majority's conclusions that National Dairy's promotion had the probability of substantially lessening competition and violated Section 2(a) of the Robinson-Patman Act. Promotions can alter structure. And promotions of this magnitude have the probability of altering structure so as to injure the quality of competition and hence, to violate either the Robinson-Patman Act or the Federal Trade Commission Act.

II

While I concur with the majority in its opinion respecting the illegality of this promotion under Section 2(a) of the Robinson-Patman Act, I am unable to agree to the order which the majority is entering here. Accordingly, I dissent from this portion of the majority's decision.

In my view the basic vice in the order being entered is that it restricts National Dairy both as to the amount of the promotional expenditures it can make in the future as well as the *timing* of these expenditures and keys the operation of the prohibition in the order to the promotional activities of its competitors. Thus

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[8] The recoupment period—the approximate time it takes to recover the cost or loss associated with a promotion out of earnings—must be an estimate even after the fact. Any such estimate depends upon the assumptions that are made. It seems reasonable to assume that National Dairy could not have expected to do more than double its sales in the four-city area: to have tripled its sales National Dairy would have had to trade places with Old Virginia, eliminate both Theresa Friedman and Polaner, or induce major chains to abandon private labels. Assuming, then, 1962 sales of $950,000 and a mark-up based on list price of 27% [CX 38A, 38B, 39A, 88A] National Dairy could have expected an annual return of about $256,500. Reducing the cost of the promotion [$1,345,582] by the same mark-up, National Dairy would require about five years to recoup the cost of the promotion. And based on its actual 1962 sales that were about 58 percent above 1960 sales, it would have taken about six years. Such a recoupment period would seem to require or indicate indirect subsidization if not direct subsidization.

[9] In the four-city area National Dairy's local promotional expenditures in 1960 on jellies for the period January through May were $11,545. In 1961, as a result of the one-for-one promotion, they were $1,345,582. This was an increase of 11,600%. In comparison from January through May in 1961 National Dairy spent on jelly promotions $289,264 in its Eastern Division (this excludes the cost of the one-for-one promotion), $187,504 in its Central Division, and $65,555 in the eastern part of its Southern Division [CX 108–109]. The total amount spent in these three divisions that cover all or part of 35 states was less than one-half of the cost in the four-city area of Washington-Baltimore-Richmond-Norfolk. If the expenditures in these divisions had been increased by 11,600% as were those in the four-city area, National Dairy would have expended over $60,000,000 in promoting jellies in the 35-state area. This would have been more than four times their total sales of jellies in 1960 and more than their total expenditures on all advertising. This is but another view of the sledgehammer proportions of this promotion.

the order prohibits National Dairy from ever exercising any initiative in offering promotions with respect to all products sold by respondent's Kraft Foods Division, and in my judgment could prevent National Dairy from competing effectively.

To prevent National Dairy from ever initiating promotions might be defensible with respect to jams and jellies, of which it is the sole *national*, and the largest producer. On the basis of National Dairy's market position and the record in this case it could be argued that any regional promotions or price reductions which it might initiate in the future, unless limited in some way, would be more likely to have anticompetitive than competitive effects, even taking into account the possibility that National Dairy promotions with respect to these products might stir up competition in markets in which regional brands have been enjoying "the quiet life." However, absent any knowledge of National Dairy's market position with respect to the other food products sold by its Kraft Foods Division, we cannot make this same assumption with respect to promotions and price reductions initiated for those other products where National Dairy's competitors may be equally large or larger (*e.g.*, Borden's re cheeses, etc.) Indeed, the major impact of the present order might be to *curtail* National Dairy's ability to compete rather than to prevent it from acting anticompetitively.

I believe that there are several alternative ways by which we could impose essential limitations on the promotional activities of National Dairy to prevent it from exploiting its market power so as to injure competition which would not limit it in its pricing initiative by tying its actions to those of its competitors. Therefore, I am constrained to dissent to the order entered here.

In my judgement the major objective of the order which should be entered here would be to prevent respondent in the future from "zeroing-in" on its competitors with promotions which in all likelihood cannot be countered by its competitors and which can be anticipated therefore to occasion the substantial lessening of competition prohibited by the statute. Following are some examples of various alternatives which could be included in an order so as to limit National Dairy's promotions rather than curtailing its initiative in offering promotions:

1. The order could limit the value of the promotion or price reduction to a percent of respondent's higher selling price to other purchasers (for example, the net price reduction could be limited to 25%).

2. The order could limit the dollar per case value of any pro-

motion or price reduction in any one trade area to X percent above the respondent's national dollar per case average promotional expenditure. For example, if within a given 12-month period National Dairy spends an average throughout the United States of 50 cents per case on promotions, the order could limit respondent's promotion in any area to 50% above this figure, or 75 cents per case.

3. The order could prescribe a minimum geographical territory within which respondent must apply its promotions. Presumably, the smaller the area the more dollars per case the respondent could afford to spend and the greater the impact on local competitors. A minimum promotional area (such as an area encompassing at least 10% of the U.S. population) would prevent the respondent from "zeroing-in" on smaller areas. This area could be described in terms of National Dairy's present regional sales divisions.

4. The order could prohibit promotions or price reductions which result in a net price below cost ("cost" should be defined in such a provision) for the product in the promotional area.

5. The order could limit the quantities of product which respondent could sell to any one purchaser under a promotional offer. For example, if only a one-month supply of product could be sold under such an offer to any one purchaser within a six-month period, the impact of the promotion would be relatively short-lived.

The instant promotion which gave rise to this case has long since been terminated. Hence, the delay in reaching this decision has not had any prejudicial effect on any competitor. Since an order limiting a company in its freedom to offer promotions is novel and of great significance, I believe that it would have been preferable for the Commission before entering any order here, to have invited the parties to submit comments and proposals for the type of order which should be entered here including specific comments on the above alternative provisions. By this means, the Commission would have had the benefit of the expertise of the respondent here and would have had an opportunity to devise an order which would have placed reasonable and effective restraints on respondent's power to offer promotions without limiting its initiative as to when and where it desired to compete by means of promotions.

FINAL ORDER

This matter having been heard by the Commission upon cross-appeals from the initial decision; and the Commission, for the reasons stated in the accompanying opinion, having determined that the appeals should be denied, and having modified the initial decision to the extent necessary to conform to the views expressed in its opinion:

It is ordered, That the following order be substituted for the order set forth in the initial decision:

ORDER

It is ordered, That respondent National Dairy Products Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate device, in connection with the sale or offering for sale of jellies, preserves and any other food product in the product line of its Kraft Foods Division, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling such products to any purchaser for resale at a price which is less than the price charged any other purchaser for resale at the same level of distribution when such lower price is either the result of a reduction from the regular list price of the products or is the result of a promotional offer involving a concession from regular list price: *Provided, however,* That in addition to the defenses set forth in Sections 2(a) and 2(b) of the statute it shall be a defense in any enforcement proceeding instituted hereunder for respondent (1) to establish that its lower price was the result of a promotional offer involving a price concession which does not undercut the lowest net price and/or the terms and conditions resulting from a promotional offer made to the purchaser receiving the lower price by any seller of a competitive product within the previous 12 months, or (2) to establish that such lower price does not undercut the lowest price concurrently offered generally throughout the same trading area by any other seller of a competitive product having a substantially smaller annual volume of sales of such products than respondent's annual volume of sales of the product on which the discriminatory price was granted.

It is further ordered. That Count II and Count III of the complaint be, and they hereby are, dismissed.

It is further ordered, That the initial decision of the hearing examiner, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, National Dairy Products Corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

Commissioner Elman dissented. Commissioner MacIntyre concurred in part and dissented in part. Commissioner Jones concurred in part and dissented in part.

IN THE MATTER OF

CROWN CENTRAL PETROLEUM CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8539. Complaint, Oct. 19, 1962—Decision, June 30, 1967.

Order dismissing complaint which charged a Baltimore, Md., petroleum company with fixing prices of gasoline at retail and suppressing competition by selling below cost to certain dealers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (U.S.C., Title 15, Sec. 45), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Crown Central Petroleum Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 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 with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Crown Central Petroleum Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its