

Complaint

70 F.T.C.

IN THE MATTER OF

H. P. HOOD & SONS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a)
AND 2(d) OF THE CLAYTON ACT

Docket 7709. Complaint, December 30, 1959—Decision, August 2, 1966

Order removing case from suspense calendar where it was placed by order of Commission dated June 18, 1962, and dismissing complaint which charged a Boston, Mass., distributor of dairy products with price discriminations in violation of Sections 2(a) and 2(d) of the Clayton Act, in view of the lapse of time since the complaint was issued and relatively small amount of adjudication which has taken place.

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 subsections (a) and (d) 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 complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent named herein is H. P. Hood & Sons, Inc. Respondent is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office and place of business located at 500 Rutherford Avenue, Boston, Massachusetts.

PAR. 2. Respondent is extensively engaged in the business of purchasing, processing, manufacturing, and selling fluid milk and other dairy products through the six New England States of Maine, New Hampshire, Rhode Island, Connecticut, Vermont, and Massachusetts. Hood's annual net sales are in excess of \$125 million.

PAR. 3. Respondent sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located throughout the States of Maine, New Hampshire, Rhode Island, Connecticut, Vermont, and Massachusetts for sale, consumption or resale therein.

Respondent owns, maintains and operates a large number of re-

ceiving stations, processing and manufacturing plants, and distribution depots located in the above-named States, from which it sells and distributes its said products to purchasers.

PAR. 4. In the course and conduct of its business, respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported, from dairy farms and other points of origin to respondent's receiving stations, processing and manufacturing plants, and distribution depots located in States other than the State of origin.

Respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported, from the State or States where such products are processed, manufactured or stored in anticipation of sale or shipment, to purchasers located in other States of the United States.

Respondent also sells and distributes its said fluid milk and other dairy products to purchasers located in the same States and places where such products are processed, manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales, and distribution by respondent of its said fluid milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PAR. 5. Respondent sells its fluid milk and other dairy products to retailers and consumers. Respondent's retailer-purchasers resell to consumers. Many of respondent's retailer-purchasers are in competition with other retailer-purchasers of respondent.

Respondent, in the sale of its fluid milk and other dairy products to retailers and consumers, is in substantial competition with other manufacturers, 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 fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

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 and consumers in the Boston and Springfield, Massachusetts market areas by charging said retailers and consumers substantially lower prices than charged by said respondent for the sale of said products of like grade and

quality to purchasers and consumers located in Connecticut, Rhode Island and other towns and cities in the State of Massachusetts.

Respondent has further discriminated in price in the sale of said products by charging many retailer-purchasers substantially higher prices than respondent charged to other retailer-purchasers, many of whom are competing purchasers. Such differences in price have ranged as high as 22 percent for cream and 13 percent for fluid milk.

PAR. 7. The effect of such discriminations in price by respondent in the sale of fluid milk and other dairy products has been or may be substantially to lessen, injure, destroy or prevent competition:

1. Between respondent and its competitors in the processing, manufacture, sale and distribution of such products.

2. Between retailers paying higher prices and competing retailers paying lower prices for respondent's said products.

PAR. 8. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

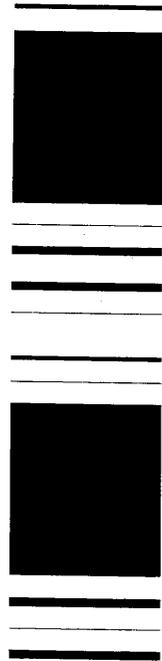
COUNT II

Charging violation of subsection (d) of Section 2 of the Clayton Act, the Commission alleges:

PAR. 9. Paragraphs One through Five 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. 10. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or contracted for the payment of, money, goods, or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers, in connection with the handling, sale, or offering for sale of respondent's dairy products and respondent has not made or contracted to make such payments, allowances, or consideration available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Included among such discriminatory and disproportionate allowances, respondent has paid and allowed advertising, promotional and other allowances in connection with the resale of its



said products to some of its customers while not offering or otherwise making available on proportionately equal terms such payments and allowances to other competing customers. As illustrative of such practices, respondent has paid certain amounts of money to selected customers, principally to large grocery store chains, for promotional advertising, in-store promotions, demonstrations, supplementary displays, and new store openings. Respondent has not offered or otherwise made available on proportionately equal terms such allowances and payments to many of its customers who compete with those who receive such benefits. Many of such discriminatory payments and allowances, as herein alleged, have been made by respondent to its customers located and doing business in the States of Massachusetts and Connecticut.

PAR. 11. The acts and practices as alleged in Paragraph Nine above are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act.

ORDER PLACING PROCEEDING ON SUSPENSE CALENDAR

JUNE 18, 1962

The hearing examiner upon motion of complaint counsel having certified to the Commission the question whether this proceeding should be placed on the Commission's suspense calendar, and respondent having taken no position on the question; and

It appearing that the respondent H. P. Hood & Sons, Inc., together with other corporations and certain individuals has been indicted in the United States District Court for the District of Massachusetts for practices which allegedly violate Section 1 of the Sherman Act; that charges made in said indictment will require proof similar in scope and content to the evidence to be adduced in this proceeding; and that certain of the defendants in said criminal action are necessary witnesses in this proceeding; and

The Commission having determined that the simultaneous active trial of this matter and the Sherman Act proceeding may give rise to needless complications and possible conflict, and that, therefore, the public interest would best be served by the temporary deferment of further hearings in this proceeding:

It is ordered, That this matter be, and it hereby is, placed upon the suspense calendar until further notice.

Commissioner Kern and MacIntyre not participating.

ORDER WITHDRAWING COMPLAINT

The complaint in this matter was issued by the Commission on December 30, 1959. Hearings were held intermittently in 1960 and were suspended November 18, 1960, during the presentation of the case in chief in support of the complaint. By order of June 18, 1962, the matter was placed upon the suspense calendar until further notice.

By order of June 13, 1966, the hearing examiner certified to the Commission a motion of counsel supporting the complaint requesting the Commission to remove the case from the suspense calendar and to withdraw the complaint issued against respondent herein. Respondent has filed an answer concurring in this request.

The Commission is of the opinion, particularly in view of the lapse of time since the complaint was issued and the relatively early stage to which the proceeding has advanced, that the complaint should be withdrawn without adjudication of the issues raised therein. The motion of counsel supporting the complaint will therefore be granted:

Accordingly, *It is ordered*, That (1) the matter be, and it hereby is, removed from the suspense calendar and (2) the complaint be, and it hereby is, withdrawn without prejudice to the right of the Commission to bring a new proceeding if the facts should so justify.

Commissioner MacIntyre not participating.

IN THE MATTER OF

H. P. HOOD & SONS, INC., AND THE GREAT ATLANTIC &
PACIFIC TEA COMPANY, INC.

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

Docket 8273. Complaint, January 11, 1961—Decision, August 2, 1966

Order removing case from suspense calendar and dismissing complaint which charged a Boston, Mass., distributor of dairy products and a national retail food chain store with conspiring to fix prices, discriminating against competitors, and attempting to monopolize the dairy products market in New England, in view of the lapse of time since the complaint was issued.

H. P. HOOD & SONS, INC.
AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

307

306

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C.A., Sec. 41 *et seq.*, 52 Stat. 111), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that H. P. Hood & Sons, Inc., a corporation; and The Great Atlantic & Pacific Tea Company, Inc., a corporation, more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby names the previously mentioned corporations, each and all, as respondents herein, and issues its complaint against each of the named parties, stating its charges in that respect as follows.

PARAGRAPH 1. Respondent named herein is H. P. Hood & Sons, Inc. (hereinafter referred to as Hood). Respondent is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office and place of business located at 500 Rutherford Avenue, Boston, Massachusetts. Respondent Hood is the dominant dairy concern in New England.

Respondent named herein is The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A & P). Respondent is a corporation organized and existing under the laws of the State of Maryland with its principal office and place of business located at 420 Lexington Avenue, New York, New York. Respondent A & P is the largest retail food chain in the United States.

PAR. 2. Respondent Hood is extensively engaged in the business of purchasing, processing, distributing and selling fluid milk, cream, ice cream, other dairy products and food products at wholesale to retailer-purchasers, such as respondent A & P, and at retail to home delivery purchasers or consumers, through the six New England States of Maine, New Hampshire, Rhode Island, Connecticut, Vermont and Massachusetts. Respondent Hood's annual net sales are in excess of \$160 million. There has been and is now a pattern and course of interstate commerce in the purchasing, processing, distribution and sale of fluid milk, cream, ice cream, other dairy products and food products by respondent Hood within the intent and meaning of the Federal Trade Commission Act.

Respondent A & P, through fifteen (15) subsidiary corpora-

tions, is engaged in the operation of retail grocery stores located in a number of the various States of the United States, including the six New England States of Maine, New Hampshire, Rhode Island, Connecticut, Vermont and Massachusetts. Respondent A & P had sales in excess of five (5) billion dollars in 1959. Respondent A & P, in connection with the operation of its retail grocery stores, including those stores located in the six New England States listed above, handles fluid milk, cream, ice cream, other dairy products and food products for resale to the consumers. There has been and is now a pattern and course of interstate commerce in the purchase, distribution and sale of said products by respondent A & P within the intent and meaning of the Federal Trade Commission Act.

PAR. 3. Respondent Hood sells its fluid milk, cream, ice cream, and other dairy products at wholesale to A & P and other retailer-purchasers, and at retail to home delivery purchasers or consumers. Respondent Hood is in competition, both at wholesale and retail, as herein described, with numerous other dairy concerns operating in the six New England States of Maine, New Hampshire, Rhode Island, Connecticut, Vermont and Massachusetts, in the purchasing, processing, distribution and sale of said products, except to the extent that competition has been hindered, lessened, restricted, restrained, destroyed and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

Respondent A & P is in competition with other grocery concerns, or retailer-purchasers of fluid milk, cream, ice cream, other dairy products and food products, located in the various States of the United States, including those competitors located in the six New England States of Maine, New Hampshire, Rhode Island, Connecticut, Vermont and Massachusetts, except to the extent that competition has been hindered, lessened, restricted, restrained, destroyed and eliminated by the unfair acts and practices hereinafter set forth.

PAR. 4. Since February 1937, and continuing to the present time, respondents Hood and A & P have effectuated and maintained a conspiracy, combination, agreement, understanding and planned common courses of action in the purchase, processing, distribution and sale of dairy products in restraint of trade of said dairy products, as is more fully set out in Paragraphs Five and Six hereof.

PAR. 5. As a part of, pursuant to and in furtherance of the

aforesaid conspiracy, combination, agreement, understanding and planned common courses of action, respondents have, since February, 1937 and to the present time, pursued and performed, among other things, the following acts, policies and practices:

1. Fixed prices for dairy products;
2. Fixed in-store wholesale and out-of-store retail prices for dairy products;
3. Charged consumer-purchasers of dairy products in some areas substantially higher prices than charged consumer-purchasers elsewhere;
4. Engaged in price wars in the sale of dairy products by charging consumer-purchasers in some areas substantially lower prices than charged consumer-purchasers located elsewhere; including sales that were below cost;
5. Fixed and maintained arbitrary and artificial out-of-store retail prices for dairy products unrelated to prices paid farmer-producers for raw fluid milk;
6. Coerced or forced competitors of respondent Hood to sell dairy products to respondent A & P and competitors of A & P at prices fixed by respondents, including sales at prices that were below cost;
7. Denied to competitors and potential competitors a reasonable opportunity to compete for respondent A & P's purchases of dairy products by making preferential payments to respondent A & P;
8. Agreed to and adhered to certain discounts, terms and conditions such as agency commission, agency adjustment, inflation payments, normal list prices, agency prices, and other formula pricing systems upon which dairy products were sold to A & P and to the purchasing public;
9. Tended to destroy home delivery competition by increasing the differential between home delivered and out-of-store prices; which diverted dairy product sales to retail stores, including those owned by respondent A & P;
10. Attempted to monopolize the dairy products industry in various marketing areas in New England.

PAR. 6. The conspiracy, combination, agreement, understanding and planned common courses of action, and the acts, policies and practices pursuant to and in furtherance of same, as alleged herein, may have and have had the effect of hindering, lessening, restricting, restraining, destroying and eliminating competition in the

purchasing, processing, distribution and sale of dairy products; may have and have had a tendency to unduly lessen competition or a tendency to create a monopoly in respondents in the purchasing, processing, distribution and sale of dairy products; may constitute and have constituted an attempt to monopolize the dairy products industry in various marketing areas in New England; may foreclose and have foreclosed markets and access to markets to competitors engaged in the purchasing, processing, distribution and sale of dairy products; are all to the prejudice of competitors of respondents and to the public; and all of the aforesaid constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER PLACING PROCEEDING ON SUSPENSE CALENDAR

JUNE 18, 1962

The hearing examiner upon motion of complaint counsel having certified to the Commission the question whether this proceeding should be placed on the Commission's suspense calendar, and respondents having taken no position on the question; and

It appearing that the respondent H. P. Hood & Sons, Inc., together with other corporations and certain individuals, has been indicted in the United States District Court for the District of Massachusetts for practices which allegedly violate Section 1 of the Sherman Act; that charges made in said indictment will require proof similar in scope and content to the evidence to be adduced in this proceeding; and that certain of the defendants in said criminal action are necessary witnesses in this proceeding; and

The Commission having determined that the simultaneous active trial of this matter and the Sherman Act proceeding may give rise to needless complications and possible conflict, and that, therefore, the public interest would best be served by the temporary deferment of further hearings in this proceeding:

It is ordered, That this matter be, and it hereby is, placed upon the suspense calendar until further notice.

Commissioner MacIntyre not participating.

ORDER WITHDRAWING COMPLAINT

The complaint in this matter was issued by the Commission on



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Complaint

January 11, 1961. Prior to commencement of hearings the Commission, by order of June 18, 1962, placed the matter upon the suspense calendar until further notice.

By order of June 9, 1966, the hearing examiner certified to the Commission a motion of counsel supporting the complaint requesting the Commission to remove the case from the suspense calendar and to withdraw the complaint issued against respondents herein. Respondent H. P. Hood & Sons, Inc., has filed an answer concurring in this request.

The Commission is of the opinion, particularly in view of the lapse of time since the complaint was issued and the relatively early stage to which the proceeding has advanced, that the complaint should be withdrawn without adjudication of the issues raised therein. The motion of counsel supporting the complaint will therefore be granted:

Accordingly, *it is ordered*, That (1) the matter be, and it hereby is, removed from the suspense calendar and (2) the complaint be, and it hereby is, withdrawn without prejudice to the right of the Commission to bring a new proceeding if the facts should so justify.

Commissioner MacIntyre not participating.

IN THE MATTER OF
KNOLL ASSOCIATES, INC.*

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

Docket 8549. Complaint, Dec. 27, 1962—Decision, Aug. 2, 1966

Order requiring a New York City manufacturer of contemporary furniture to cease discriminating in price between competing resellers of its products in violation of Sec. 2(a) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Knoll Associates, Inc., the party respondent 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,

*Case set aside by Court of Appeals, Seventh Circuit, 397 F. 2d 530 (8 S.&D. 772), June 18, 1968, on grounds that use of stolen documents violated the Fourth Amendment. Order withdrawing complaint dated Dec. 8, 1969.

Complaint

70 F.T.C.

Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

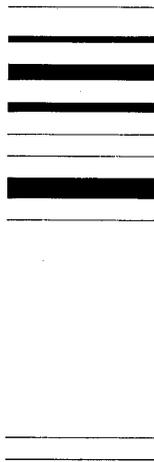
PARAGRAPH 1. Respondent Knoll Associates, Inc., sometimes hereinafter referred to as Knoll, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 320 Park Avenue, New York, New York.

PAR. 2. Respondent is now, and for many years past has been engaged in the manufacture, sale and distribution primarily of furniture and furniture products. Respondent sells its furniture and furniture products to a large number of customers located throughout the United States. Respondent's sales are substantial, amounting to over \$6,000,000 for the year of 1960.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended. Respondent sells and causes its furniture and furniture products to be transported from the respondent's principal place of business to the purchasers thereof located in the District of Columbia, and States other than the State wherein said shipments originated. There has been at all times mentioned herein a continuous course of trade in commerce in said products across State lines between said respondent and the purchasers of such products.

PAR. 4. In the course and conduct of its business in commerce, respondent has been, and now is, discriminating in price between different purchasers of its furniture and furniture products of like grade and quality, by selling said products at higher and less favorable prices to some purchasers than the same are sold to other purchasers, many of whom have been, and now are, in competition with the purchasers paying the higher price.

Respondent Knoll has separated its customers into various classification. For example, purchasers of respondent's said furniture and furniture products are classified as architects, interior designers, contract house, interior decorators, office furniture dealers and furniture or department stores. Included among, but not limited to, the discriminations in price as above alleged, respondent, in its sales of said furniture and furniture products, has arbitrarily granted discounts of 50% off the list price to some of its purchasers, while at the same time has granted discounts of 40% off the list price to others. These different discounts have been granted by respondent in the sale of said products to competing



purchasers located in each of the market areas of Detroit, Michigan, Cleveland, Ohio and Washington, D.C.

PAR. 5. The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said furniture and furniture products of like grade and quality, sold in manner and method and for the purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the aforesaid favored purchasers are engaged, or to injure, destroy, or prevent competition with said favored purchasers.

PAR. 6. The aforesaid acts and practices of respondent constitute violations 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.

Mr. Peter Dias, Mr. Bernard Turiel and Mr. Ernest Brod, for the Commission.

Mr. Jacob Imberman and Mr. Samuel V. Greenberg of the firm of Proskauer Rose Goetz & Mendelsohn, of New York, N. Y., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER*

FEBRUARY 25, 1965

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INTRODUCTORY STATEMENT OF THE ISSUES

Knoll's Defenses

In this proceeding under Section 2(a) of the Clayton Act, as amended,¹ respondent Knoll Associates, Inc., a manufacturer of modern contemporary furniture, seeks to defend its admitted price discriminations² by asserting:³

¹ 15 U.S.C.A. sec. 12, *et seq.*

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * 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: * * *"

² Knoll admitted in its answer that it sold to some customers at 40% off list price and to other customers at 50% off list price. The Supreme Court of the United States has held that sales or products of like grade and quality to competing customers at different prices is a price discrimination. *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549. "Rather, a price discrimination within the meaning of that provision is merely a price difference."

³ Knoll, on page 12 of its proposed findings of fact, asserts:

(a) its favored and nonfavored customers do not compete with each other; or (b) if they do compete, there is no proof of probable competitive injury in this record; and even though (a) competition and (b) probable injury are proven, nevertheless (c) Knoll's price discriminations are excused under the "meeting competition" defense.⁴ These defenses will be characterized as: (a) the "no competition," (b) the "no injury," and (c) the "meeting competition."

Unreasonable Search and Seizure Issue

Knoll's counsel has vigorously attacked Commission Exhibits 1914A through 1959B upon the grounds that such exhibits came into the Commission's possession in violation of Knoll's immunity against unreasonable searches and seizures guaranteed in the fourth amendment to the Constitution of the United States. After exhaustive administrative and court hearings which held against Knoll, the hearing examiner admitted the exhibits into evidence. *Commission Exhibits 1914A through 1959B have not been used or referred to in writing this initial decision.* Appendix I, which is attached, incorporated herein by reference and made a part hereof, contains copies of papers relevant to this issue, including a supplementary ruling based upon the entire record after its reopening by the Commission's order of November 19, 1964.

Burden—Of Proof—Of Going Forward

Section 7(c) of the Administrative Procedure Act provides,

"Respondent's basic contention in this case is that it has not violated Section 2(a) of the Robinson-Patman Act when it grants a 50% discount off its list price in order to meet the lower prices of its competitors. Since sales in the furniture industry are sometimes made through designers, respondent also points out that the evidence in this proceeding demonstrates that designers do not compete with retailers in the purchase and sale of furniture. In any event, there has been no proof of any competitive injury to designers as a result of respondent's pricing practices."

On page 1 of its original brief, Knoll states that the following are the legal issues involved:

"1. Whether interior designers who, as part of the professional services which they render to their clients, specify and sometimes order furniture for their clients are in competition with retailers of office furniture. In the words of the Supreme Court, are they 'at the same functional level?' *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

"2. Whether there is any proof in this case of competitive injury to a designer resulting from the fact that, acting as agent, he can order furniture for his client at a discount of 40% off the respondent's list price if the respondent, as the result of competitive pressures, sells furniture to some retail furniture dealers at a discount of 50% off the list price.

"3. Whether the respondent has established, as a matter of fact and law, that in granting a 50% discount to some retailers it acted in good faith to meet the equally low price of one or more competing furniture manufacturers."

⁴15 U.S.C.A. sec. 12, *et seq.* Section 2(b) *inter alia* provides:

"(b) Upon proof being made * * * that there has been discrimination in price * * * nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor, * * *"

inter alia, "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. * * * no * * * order [shall] be issued except * * * as supported by * * * reliable, probative, and substantial evidence."

Section 3.14 of the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission provides "Counsel supporting the complaint shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."

Complaint counsel's prima facie case was established when Knoll admitted in its answer that during 1960-1962 it sold to some of its customers in New York City, Cleveland, Detroit and Washington, at 40 percent off list price, and to other customers in the same cities at 50 percent off list. Section 2(b) of the Clayton Act provides that "the burden of rebutting the prima facie case thus made * * * shall be upon the person charged with a violation * * *"—in this proceeding, upon Knoll. Having admitted a prima facie case of price discrimination in its answer, the legal burdens of "going forward" and "burden of proof" in the matter of Knoll's defenses to the prima facie case, were and are upon Knoll.⁵

As a result of decisions in a long line of cases of which *Morton Salt v. Federal Trade Commission*, 334 U.S. 37 (1948) is one of the most frequently cited, it is generally accepted that when there is an admitted price discrimination in sales to the secondary line of competition (those who sell to the ultimate consumer), competitive injury *may* be, but does not necessarily have to be, inferred. See, e.g., the Commission's decisions in the *United Biscuit*, Docket 7817 [64 F.T.C. 586]; *Tri-Valley Packing Association*, Dockets 7225 and 7496 [p. 223 herein], and *American Oil Company*, Docket 8183.⁶

Upon appeal, *Tri-Valley*, 329 F. 2d 694 (9th Cir. 1964), the Court pointed out:

⁵ The hearing examiner, even at this late date, fails to understand why Knoll's counsel compelled Commission counsel to consume approximately 1,720 pages of transcript and put in evidence approximately 1,890 exhibits to prove laboriously, and at great expense, a fact which was admitted in Knoll's answer at the outset.

⁶ The Court of Appeals for the Fifth Circuit reversed in *American Oil*, 325 F. 2d 101, 104, on the grounds "The price discrimination, no matter if substantial, must in the *particular factual situation* involved be capable of raising a reasonable probability of substantially lessening ability to compete." (Emphasis added.) *Certiorari denied*, 377 U.S. 954 (1964). Mr. Justice Douglas was of the opinion that certiorari should have been granted. The Court of Appeals (9th Cir.) remanded in *Tri-Valley*, 329 F. 2d 694, but *not* on the grounds that the Commission had erred in articulating the standards by which probable competitive injury is to be evaluated.

There was testimony that those engaged in the resale of such products operate on a very narrow margin—so narrow, in fact, that it is essential to take advantage of a 2% discount for cash. The price discriminations, on the other hand, ranged from 2% to 10%.

In *Sun Oil Co.*, 55 F.T.C. 955, 962 (1959), the Commission held:

It seems self-evident that where a producer is selling a homogeneous product, such as salt, automotive parts or gasoline, where competition is extremely keen among retailers, and where margin of profits or markups are small, a lower price to one or some of such competing retailers not only "may" but must have the effect of substantially lessening competition.

Mueller Co. v. Federal Trade Commission, 323 F. 2d 44, 46, (7th Cir. 1963), held that it is sufficient if there is a finding that the effect of discrimination in discounts "may be substantially to injure competition."

In *Purolator Products, Inc.*, Docket 7850 (April 3, 1964) [65 F.T.C. 8] the Commission ruled:

In the context of this case, therefore where the evidence shows a highly competitive market with narrow profit margins, we conclude that complaint counsel has established through the stipulation a prima facie case of competitive injury, the effect of which "may be substantially to injure competition." (at p. 28)

In *Universal-Rundle Corporation*, F.T.C. Docket 8070 (June 12, 1964) [65 F.T.C. 924, 959] the Commission stated:

One test for determining the substantiality of a price differential in a secondary line case is whether, in the competitive situation shown to exist, the differential is sufficient, if reflected in the resale price of the commodity, to divert business from one dealer to another. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726 (1945).

"Price discrimination does not *per se* constitute a violation of Section 2(a)," ⁷ but, one a prima facie case has been made out the burden of rebutting such prima facie case is by statute upon Knoll.

In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis. * * * ⁸

In furtherance of such "adequate probative analysis" it is appro-

⁷ *American Oil Company*, 325 F. 2d 101, 104, (1964) citing *Anheuser-Busch Inc. v. Federal Trade Commission*, 7 Cir. 289 F. 2d 835.

⁸ *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 527 (1963).

appropriate to make some general observations about (1) the industry here involved; (2) the product line; (3) marketing and distribution practices; (4) pricing practices in the industry of the particular product line, and (5) the nature of competition. The years of alleged violation are 1960-1962, inclusive, and the trade areas are the cities of New York, New York; Cleveland, Ohio; Detroit, Michigan, and Washington, D.C.

The Modern Contemporary Furniture Industry

The furniture business, as ordinarily conducted by retail furniture stores and the furniture departments of retail establishments, requires a large capital investment in inventory, display space, and warehousing facilities. Furniture is not subject to quick turnover such as can be achieved by promoting a sale of men's shirts, women's dresses, or children's play suits. Persons not needing furniture at a particular moment will not buy it simply because it is sold at bargain prices. The capital invested in furniture inventory is tied up for longer periods of time than the capital tied up in inventory of quick turnover lines. Furniture requires much more floor space for display purposes and much more warehouse space for storage. This space is very expensive in today's real estate market.

Broadly speaking, we are dealing here with the furniture industry, but for purposes of our analysis, such a statement sheds little light. We are dealing with modern contemporary furniture. "Modern contemporary" furniture is in contrast to "traditional" furniture, but the distinction must be more precise than that. Traditional furniture is familiar to all persons who have visited George Washington's home at Mount Vernon, Thomas Jefferson's home at Monticello, the duPont's beautiful collection at Winterthur outside Wilmington, Delaware, Mrs. James Ward Thorne's⁹ miniature rooms at the Art Institute in Chicago and, of course, the White House.

Modern contemporary furniture, which had a very limited appeal until recently, may be seen now in many of our modern public buildings, including, among others, Dulles International Airport in Virginia, the United Nations Building in New York, the new State Department Building in Washington, the new Columbia Broadcasting Building on West 52nd Street in New York, and the Michigan Consolidated Gas Company Building in Detroit.

⁹ Mrs. Thorne does have one or two rooms done in modern contemporary.

“Traditional” decor and “modern contemporary” decor each have their staunch enthusiasts. “Modern” architecture has been criticized as being monolithic, unimaginative, and cold. Since modern architects have participated actively in designing modern contemporary furniture, the same criticism has been levelled against the furniture. *De gustibus non disputandum*. The modern contemporary furniture here involved is used much more extensively in furnishing commercial, as contrasted with residential building. Knoll’s estimate is that approximately 15 percent of its sales are for residences and 85 percent for nonresidential use. (Tr. 41)

The enormous increase in modern contemporary architecture in building all over the world, has produced a corresponding increased demand for modern contemporary furniture. Modern contemporary furniture manufacturers, such as Knoll, utilize the services of world renowned artists in the fields of design, architecture and sculpture. Knoll has furniture pieces in its line designed by (Ludwig) Mies van der Rohe, Eero Saarinen, Harry Bertoia, and Florence Schust Knoll. Knoll’s competitors have utilized the services of equally renowned artists in styling their lines. For instance, Herman Miller, Inc. has pieces designed by Charles Eames and George Nelson. Jens Risom is the head of the furniture manufacturing company that bears his name. Modern contemporary furniture sometimes is made from materials different from the conventional materials usually associated with furniture construction. A particular item of modern contemporary furniture may have several factory prices, depending, among other things, upon the fabric and other interchangeable feature, *i.e.*, the same basic chair may come in several differently priced fabrics, finishes, and colors—and the particular fabric, finish, or color determines the factory price of the finished chair.

At its top level in quality and appeal, modern contemporary furniture manufacturing is, generally speaking, highly competitive, highly styled, and, in many aspects, highly artistic. Good modern contemporary furniture is well made and well designed. Because of its preponderant use in public buildings it must withstand great wear.

The following news articles* from the New York Times of September 1, 1964, and October 16, 1964, are *not* findings of fact by the hearing examiner, but are included at this place in the initial decision because they illuminate Knoll’s participation in the mod-

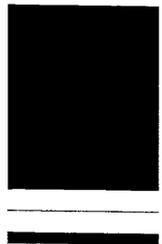
*News articles with pictures were omitted in printing.

ern contemporary furniture business, and contain informative background material.

The increased demand for modern contemporary furniture has increased, correspondingly, the demand for the services of qualified interior designers and decorators capable of utilizing and selling modern contemporary decor. Knoll has its own self-contained interior design department. Retail furniture firms, such as W. & J. Sloane, Inc., B. Altman & Co., R. H. Macy & Co., Inc., Bloomingdale Bros., Inc., Itkin Bros., Inc., or Braun & Rutherford, Inc., of New York City; Wagner-Henzy-Fisher Company, Higbee Company, and F. W. Roberts Company of Cleveland; Robinson Furniture Company of Detroit; and Marshall Field & Company of Chicago, have interior design departments within their furniture departments, as do many other furniture stores and furniture departments of retail department stores.

Retail furniture firms and the furniture departments of department stores who maintain their own interior design departments do so to furnish a service to a prospective customer, which they hope, will increase furniture sales. These interior design departments are, of course, also used to promote the sale of traditional as well as modern contemporary decor. Retail furniture establishments with self-contained interior design departments prefer not to offer their design services separately from the sale of their furniture. The cost of such interior design departments is treated as part of the general furniture department overhead. A prospective retail customer interested in buying only design services, without furniture, could not ordinarily obtain such design services from a retail establishment basically interested in selling furniture. On the other hand, such a customer may obtain interior design services, without buying furniture, from interior design firms. The fees of interior design firms for design services which are not tied in with the sale of furniture may be computed on a different basis than if such services were incidental to promoting the sale of furniture. However, the record in this case demonstrates and the examiner finds that interior design firms do sell furniture, and furniture departments of retail department stores and retail furniture stores do sell design services—albeit very subtly. The interior design firm holding itself out chiefly as a design firm competes vigorously with retail furniture establishments having interior design departments.

If a prospective purchaser were to obtain design services from a New York retail furniture store or department store and should



later decide that he or she was not interested in buying the furniture which the design department specified, such furniture store would endeavor to recapture from that prospective purchaser the cost of such design services, or the cost plus a profit.

Interior design services which are purveyed by interior design firms are priced on differing bases, *e.g.*, a flat fee; a percentage computed upon and added to the overall cost of the entire package, including the cost of the furniture and furnishings; a percentage markup added to the cost of the furniture and furnishings to the ultimate consumer; a dollar charge computed on a time spent basis; a flat fee for the completed job; a percentage based upon the overall cost of all furnishings—furniture, wall hangings, floor coverings, incidental pieces, lamps, pictures, works of art, and maintenance and replacement after installation. This is not a complete description of the various pricing contracts of interior design firms, but it is illustrative of some of their more frequent pricing practices. Design firms definitely take into account in pricing their design services whether they will or will not also order and buy the furniture which they have recommended.

An interior design firm may be the controlling factor in the sale of modern contemporary furniture. Assuming no extraordinary budgetary limitations and a fixed decision to use modern contemporary decor in a building, the interior designer may cast his presentation in such manner that a prospective purchaser is convinced that a particular furniture line of a specific manufacturer is the only furniture that will effectively carry out the buyer's intentions and artistic purposes. The interior designer, may, of course, and frequently does, present several alternatives for the buyer's final decision. It is not helpful to assert that one manufacturer's modern contemporary chair, desk, or table is just as suitable as another manufacturer's chair, desk, or table. Artistic tastes may be, and are, gratified by more than one—albeit—very subtle, alternatives. A desired interior decorating decor is capable of achievement by buying from several competing furniture manufacturers. However, a purchaser who is determined to have a Saarinen chair or an Eames piece is not easily switched to substitutes.

Knoll asserts that architects do not buy or sell Knoll furniture. The uncontradicted evidence in this record is that the architectural partnership of Perkins & Will, Chicago, Illinois, owns an interior design corporation called I.S.D., Incorporated, (Interior Space Design). The president of Interior Space Design, Arthur

H. Arms, a registered architect in seven States, is a member of the American Institute of Architects. Louis M. S. Beal, respondent's witness, vice-president of Interior Space Design, is not an architect. He was educated as an interior designer and testified that his speciality is contract interior design work. He characterized his firm as purveying ". . . a design service to carry out the concept that has been established by architects in the interiors of the building, of the buildings, whether it be for Perkins and Will, other architects, or jobs that we get on our own." (Tr. 2399) Joseph Dworski (Tr. 3892, *et seq*), a registered architect in the State of Michigan, was in charge of Knoll's Birmingham, Michigan, sales showroom for approximately ten years, ending December 31, 1963. (Tr. 3892) During the entire period his "job was to promote sales; to aid customers in designs, do color work, help them select the proper furniture * * *." (Tr. 3894) His compensation for his design services was based on a commission on the Knoll furniture he sold. At the same time, Dworski practiced as an architect. (Tr. 3897) Dworski acted in a dual capacity as a specifying architect as well as a salesman for Knoll furniture. (Tr. 3931)

Most manufacturers of modern contemporary furniture named in this record, priced their merchandise during the period covered by this proceeding at a percentage discount from list price. In Knoll's case the discounts were usually 40 percent off, but during 1960-1962 in the four cities involved in this proceeding there were at least twenty-seven Knoll customers who received 50 percent off list. These are termed "favored" customers in this initial decision. Such favored customers were not in any one category of retailer, *i.e.*, they were not all architects, nor interior designers, nor retail furniture establishments, nor the retail furniture departments of department stores. Some Knoll customers in each category received the 50 percent discount during the relevant period. There is some testimony concerning Knoll's cash discounts for prompt payment of bills, but such cash discounts are irrelevant to the issues in this proceeding, except that all Knoll customers who could, tried to obtain the cash discount because the *net* profit margin is not great.

Knoll sold its furniture, during the relevant periods, directly from factory to user (the General Motors' sale); to architects; to interior design firms; to interior design firms principally engaged in rendering interior design services; to interior design firms simultaneously engaged in interior design services and in buying

and selling furniture; to large department stores which carried no Knoll furniture in their inventory; to retail firms engaged almost exclusively in selling, at retail, office equipment and furniture; to retail furniture stores engaged almost exclusively in selling only furniture and furnishings; to contract houses which specified Knoll furniture in bids submitted in response to written specifications; and to various retail outlets whose sole activity in promoting the sale of Knoll furniture was to keep Knoll catalogues and price lists on their business premises, along with the catalogues and price lists of other manufacturers of modern contemporary furniture. Some retail outlets had Knoll floor displays and warehoused Knoll inventory. Others spent no money for floor displays or warehousing. The record does not reflect that Knoll sales necessarily increased in proportion to the amount of money spent by the retailer in promoting such sales. The cost of floor-display space and warehousing could be substantial. Some Knoll retail sales firms rendered valuable and costly follow-up services after the sales were consummated. These services included among others, assembling the furniture and placing it in the most appropriate place consonant with the decor; replacing unsatisfactory pieces; adjusting customer complaints with the factory; harmonizing color, texture, and design; and, generally, obtaining and maintaining a satisfied customer. Such services were, and are, rendered to an equal extent by retailers on behalf of other modern contemporary furniture manufacturers who are Knoll competitors, as well as on behalf of types of furniture other than modern contemporary.

Knoll's marketing and distributing structure is not symmetrical. There are overlaps, by-passes, and interweavings. [Overlaps—several separate selling procedures emanating from the same retail furniture establishment. By-passes — sales directly from factory to user. Interweavings — architects, interior designers, and retail furniture departments, all working together on the same sale.] A furniture department may sell more Knoll furniture by submitting written bids through its contract division than it sells directly from an elaborate floor display and large warehouse inventory.

Legal Precedents

Knoll's No Competition Defense

Knoll's "no competition" argument reflects an over-simplification of its thinking about the evidence and the legal precedents

applicable thereto. Prior to the introduction of evidence, Knoll argued that a small interior design firm in New York, Cleveland, or Detroit, with a minimum business overhead, receiving a 40 percent discount, and conducting its business chiefly by showing Knoll catalogues and price lists to prospective customers, did not, in fact, compete for the Knoll retail dollar with the furniture departments of large retail establishments (such as B. Altman, Bloomingdale's or Macy's). Knoll likewise argued that an office equipment and supply house selling Knoll furniture did not compete with the furniture departments of large retail department stores which had interior design departments, nor with interior design firms. The evidence shows that interior design firms sell Knoll furniture through several differing procedures: Some are merely order takers and have the furniture drop-shipped to the ultimate consumer; some do not pledge their own credit to Knoll in payment of the furniture but pledge the credit of the ultimate consumer; some buy directly from Knoll, take title to the furniture, and resell it much as do the furniture stores and furniture departments of retail establishments. However, interior design firms themselves vary substantially in composition and modus operandi. Albert Herbert, for instance (Tr. 2061), an interior designer and industrial designer conducted his business from his place of residence, 340 East 74th Street, New York, New York, and used one full-time employee and one part-time employee. On the other hand, S. J. Miller & Associates Corp. of the same city occupied 2,000 feet of space at 20 East 49th Street, and had thirteen employees.

Today, a high percentage of the retail furniture establishments—whether the furniture departments of large retail stores, or stores devoted exclusively to the sale of furniture and furnishings, or a combination office equipment and furniture establishments—maintain their own interior design departments as sales aids. Knoll has its own interior design department. Competition for the retail furniture purchaser's dollar may be and sometimes is between the interior design services rendered by an interior design firm which holds itself out chiefly as an interior design firm vis-a-vis the interior design services rendered by a retail establishment holding itself out chiefly as the purveyor of furniture at retail.

A housewife having in mind nothing more significant than the purchase of an occasional modern contemporary desk, chair, or table, may buy that chair, desk, or table from an interior design



firm, from a furniture store, or from the furniture department of a large retail establishment. When that housewife sets out to purchase that chair, desk, or table she may not have in mind the name "Knoll" or the name of any other manufacturer. She may be interested solely in price, or in price plus style, or in style without regard to price. A small business or professional firm, refurnishing comparatively small business quarters and believing that it cannot afford the services of an interior designer, may buy directly from an office equipment retailer or from the furniture department of a retail establishment without reference to any particular manufacturer's line; or the interior design department of a retail establishment may suggest several alternative manufacturers. This record does not show what percentage of Knoll's gross sales dollar comes from occasional purchasers of individual pieces and what percentage is attributable to large contract sales to sophisticated purchasers who insist upon interior design services as a concomitant to the purchase of the furniture.

Complaint counsel need not have proven in this record that all of Knoll's favored customers competed with each other, or that all of the favored customers vied with the nonfavored customers for the purchaser's dollar, or that architects competed vis-a-vis interior designers and retail establishments, or that retail establishments competed vis-a-vis interior designers and architects.

The record establishes conclusively that there is substantial cross-competition between the various classes of Knoll's retail sellers, *i.e.*, (a) architects vis-a-vis architects, interior designers, and retail stores; (b) interior designers vis-a-vis interior designers, architects, and retail stores, and (c) retail stores vis-a-vis retail furniture stores, architects, and interior designers.

An oft-repeated cliché in antitrust law is that Congress was concerned "with the protection of *competition*, not *competitors* * * *."¹⁰ Even where all of the facts are thoroughly exposed, the nature of competition in a particular industry is not always easy to articulate. This is particularly true in this case where we are not dealing with a fungible product, such as milk, ice cream, gasoline, bread, canned fruits, etc., but are dealing with an entire line of furniture which may include as many as 200 different items, some of which are seating pieces, some case goods, some tables, some desks, etc. It does not illuminate the subject to say, "Well, a chair is a chair; a table is a table; a desk is a desk." Nor can we overlook the fact that the one housewife (alluded to

¹⁰ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320.

above) seeking to purchase a modern contemporary chair, desk or table, is as likely a prospect for Knoll furniture (even though she has never heard of Knoll by name) as the owner of a public building who may solicit bids for hundreds of thousands of dollars of modern contemporary furniture for just one building. Nothing in the legislative history, or the Commission's or courts' interpretations of Section 2(a) suggests that Congress intended to protect competition only between little vis-a-vis big business, or little business vis-a-vis little business, or only big business vis-a-vis big business from unlawful competition. Insofar as Knoll is charged here with violating Section 2(a), it is just as unlawful for Knoll to employ a pricing system which may injure "little" competition as to use a pricing system which may injure "big" competition. A bidder on Knoll furniture on a million-dollar contract—or on a hundred-dollar contract—buying at 40 percent off list and competing with a bidder buying at 50 percent off list has suffered the injury proscribed by the statute.

Complaint counsel is under no legal compulsion to prove that for every price discrimination alleged the evidence reflects a corresponding potential for injury to competition. On page 8 of the Federal Trade Commission's original opinion in *Tri-Valley Packing Association*, Docket Nos. 7225 and 7496, reversed and remanded for different reasons in 329 F. 2d 694, the Commission, *inter alia*, held that the respondent's price discriminations "may result in injury to competition regardless of whether there is actual competition in the resale and distribution of the products involved * * *." [60 F.T.C. 1134, 1175]

Upon appeal, the Ninth Circuit, in *Tri-Valley inter alia*, stated (329 F. 2d 694 at 697):

There is, as petitioner concedes, no requirement that there be favored and unfavored purchasers who compete with each other in the resale of the seller's products, [citing *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 731] or, indeed, that they compete with each other at all. [Citing *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, at 542.] (Emphasis added.)

Continuing at page 698, the court in *Tri-Valley* stated:

As indicated above, this competition need not be in the resale of the seller's products, nor need it be competition between favored and nonfavored purchasers from the accused seller.

In this record, witnesses testified to actual competition between favored and nonfavored customers in the sale of Knoll furniture and named the competitors.

Knoll's No Injury Defense

Knoll contends that despite its price discriminations and despite the competition which has heretofore been described, there is, nevertheless, no injury. This particular position of Knoll was not taken during the hearings but was asserted more or less for the first time in its brief. Knoll's counsel rely especially upon the Commission's decision in *Frank G. Shattuck, Company, et al.*, Docket No. 7743, dated April 22, 1964, [65 F.T.C. 315] dismissing as to Wallace & Co. The *Shattuck* case was heard by this hearing examiner. The *Shattuck* proceeding was against four separate corporations, each of which was dismissed for separate reasons as a reading of the initial decision will reveal. The hearing examiner's dismissal as to Wallace & Co., one of the respondents, was based upon a finding in the initial decision that "Wallace & Co.'s lower prices to some purchasers were made in good faith to meet the equally low prices of its competitors." However, upon appeal to the Federal Trade Commission the Chairman, writing for the Commission, *inter alia*, stated [p. 359-360]:

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

The product line in *Shattuck* was fungible, unlike the product line here involved, and *the factual situation was so entirely different that Shattuck does not support in any way the no injury contention of respondent herein. Moreover, as with Knoll's no competition contention, there is positive uncontradicted testimony of competitive injury in this record.*

Knoll's Meeting Competition Defense

In *Continental Baking Company*, Docket No. 7630 [63 F.T.C. 2071, 2163], the Commission stated, *inter alia*,

Section 2(b) of the amended Clayton Act enables a seller to justify a price discrimination by showing that it was made in good faith to meet a competitor's equally low price. The burden of justifying discriminatory conduct in such fashion is, of course, on the respondent.

At the heart of Section 2(b) is the concept of "good faith." This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60; see *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 249-50. Such a standard, whether it be considered "subjective" or "objective," is inherently *ad hoc*. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application. Thus, the same method of meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such an inference in others.

Knoll's meeting competition defense in this proceeding poses issues that never had to be decided before by the Commission or the courts. Where a product line consists of *more than 100 non-fungible items*, may a price discriminator meet its competitors' highest discount by granting the price discriminator's highest discount? Is this "meeting" "the equally low price" permitted by Section 2(b)? If a discount is merely a function of net price, and the net prices of competitor and discriminator are easily computed, it has been assumed that such a discount may, in fact, produce an "equally low price" with which to match that of competitors. Complaint counsel argue that Knoll's furniture is so unique¹¹ that the furniture of other manufacturers does not, in fact, compete. They assert that the Knoll furniture line being non-interchangeable and nonfungible, a discriminator cannot equal the price of a peach with the price of a pear even though both are fruit. Complaint counsel assert further that none of Knoll's competitors produce a chair like the Bertioia or the Saarinen chair. Therefore, if Knoll sells a customer a Saarinen chair or a Bertioia chair at 50 percent off list, instead of 40 percent off list, Knoll is not meeting the equally low price of one of its competitors for the Saarinen or Bertioia chair. Knoll replies that, granting that none of Knoll's competitors produce a chair precisely like the

¹¹ They sought, without success, to introduce copies of patents which had been issued covering some of the Knoll pieces.

Bertoia or Saarinen chair, nevertheless one or more of Knoll's competitors do produce a chair which would satisfy the decorating decor into which a Saarinen or Bertoia chair might be placed. Knoll's counsel argue that all of Knoll's competitors combined do, in the aggregate, manufacture furniture pieces which are interchangeable with Knoll pieces and capable of producing the same decor as Knoll furniture. Knoll asserts that such competitive furniture pieces, although not identical, are reasonably similar. Therefore, argues Knoll, the only way it can meet the collective price challenge of its competitors is to allow *its* highest discount to customers who are getting its *competitors'* highest discount.

Knoll's counsel is "hoist with his own petar"¹² in the meeting competition argument. For purposes of this lawsuit they assert that any other modern contemporary furniture of good quality and design is as good as, and interchangeable with, even though not identical to, Knoll. For sales purposes they would argue there is nothing like Knoll. Complaint counsel's reply is that it would be very simple for Knoll to take itself out of this dilemma by adopting a net-pricing system in which the same net factory price is quoted to all Knoll customers who resell directly to the ultimate consumer.

Complaint counsel offered evidence that some Knoll competitors did and do use a net-pricing system.

The factual situation which sheds most light upon the meeting competition defense as asserted in this proceeding is *Callaway Mills Company*,¹³ *et al*, Docket No. 7634 [64 F.T.C. 732]. There *Callaway*, a late comer to the floor and carpet covering industry, sought to enter a business in which volume discounts had been granted on an industry-wide basis over a period of years. *Callaway* asserted that, in order to get into the market at all, it had to adopt the discount practices of its competitors, or else not sell its products. The hearing examiner found that *Callaway* was, in fact, meeting competition, but the Commission reversed on appeal and issued a cease and desist order. In its opinion, *inter alia*, (opinion of February 10, 1964, pp. 739-741) the Commission said:

* * * It is equally incumbent upon the proponent of a meeting competition defense to *identify with particularity* both his goods and the competing goods whose price was met so that the fact finder can determine the validity of the defensive claims. (Emphasis added.)

Continuing, the Commission said:

¹² *Hamlet*, Act III.

¹³ Petition to review filed May 4, 1964, in CA 5, No. 21499.

Initial Decision

70 F.T.C.

* * * There is no showing in this record that respondents' carpets at various price levels were comparable in materials and construction to the carpets of competitors at similar price levels. Rugs and carpets are not fungible goods of the nature of cement, oil or glucose. The quality and saleability of carpeting depend upon many variables and it offends our common sense to completely ignore all such possible differences and hold, sans affirmative evidence, as did the hearing examiner, that carpeting made by Callaway to sell at a certain price level is similar in grade and quality to all carpeting made by Callaway's competitors to sell at approximately the same level. As a matter of fact, there is some evidence in this record that certain of the favored buyers did not consider the goods they were buying from Callaway as either "competitive" or "comparable" with goods they were buying from others. Respondents should have introduced proof as to the comparative quality and saleability of their goods and the competitive goods allegedly defended against. Lacking such proof the finding that Callaway was meeting the price of its competitors is speculative.

* * * * *

Respondents failed to meet their burden in other particulars. We have searched this record in vain for some showing that on any particular grade of carpeting the respondents' *price* was set to match a competitor's *price* on a similar grade. There is a good deal of evidence concerning respondents' and competitors' discounts, but discounts can only be compared in conjunction with gross prices on equivalent merchandise. The discounts here involved are not overly large and a slight variation of gross price or, perhaps, wool content makes it impossible to compare transactions. Certainly buyers are not so unsophisticated as to prefer a rug selling for \$10 per yard less 5 percent discount over a rug of equal quality selling for \$9.50 per yard. And it seems equally obvious that they will not blindly select a rug because of an available discount over a rug of superior quality, color or design in the same price range but without discount. Buyers are concerned with buying the best possible quality rugs at the lowest available prices. Where discounts are involved, all other things being equal, they will undoubtedly select the supplier offering the "longest" discount. This is respondents' position, but they haven't introduced proof from which we could find that in fact all other things *are* equal. Without this necessary showing, proof that their discounts met a competitor's discounts is meaningless.

If Knoll's extra ten percent discount in this case had been granted to only one class of its customers (*e.g.*, the furniture departments of large department stores which must have a higher markup in order to make a profit) this examiner might, by some strained application of the *Shattuck* (see *ante*, p. 327) *ratio decidendi* find a slight indication of meeting competition. But here Knoll readily admits and ardently argues that because its discriminations did and do *not follow a definite pattern—i.e.*, does not discriminate in favor of one class of purchaser as against another class, that the discriminations are excused. Not so. The lack

of pattern or design in the discrimination may rule out a finding of predatory intent—but Knoll's unfavored customers may be competitively injured by the discriminations, with or without, predatory intent. The case law does not prescribe predatory intent as an essential element of unlawful price discrimination. “* * * There are no overtones of business buccaneering in the § 2(a) phrase ‘discrimination in price’” (*FTC v. Anheuser-Busch*, 363 U.S. 536, 549).

Proposed findings, conclusions and briefs have been filed and argued. The hearing examiner heard and observed the witnesses in the hearing room and on the witness stand. He observed their demeanor and their manner of answering questions. He was able to, and did, form an opinion as to their reliability and credibility. He was also able to, and did, form a judgment as to the weight and probative value of the testimony of each of the witnesses. He has considered the reliability, credibility and probative value of the witnesses' testimony in making his findings of fact, as well as their respective interest in the outcome of this proceeding. Proposed findings not made herein in the form proposed, or in substantially that form, are rejected. Any motions heretofore made and not previously ruled upon are denied. The undersigned hearing examiner has carefully considered the entire record, including the exhibits, pleadings, and the testimony of the witnesses. Based upon the entire record in this proceeding, the hearing examiner makes the following:

FINDINGS OF FACT

Historical Background and Development of Knoll Associates, Inc.

Respondent, Knoll Associates, Inc. (hereinafter referred to as Knoll), is a New York corporation with its principal office and place of business located at 320 Park Avenue, New York, New York (Ans.; Tr. 39, 51). It is now, and for many years past has been, engaged in the manufacture, interstate sale, and distribution of furniture and furniture products to a large number of customers located throughout the United States.

Hans Knoll and Florence Schust founded Knoll Associates, Inc., in 1943 (Tr. 3742, 3744–3745) as a partnership, with Louise Myers its sole employee. (Tr. 3746) Three years later, Hans Knoll and Florence Schust married, and in June, 1946, the business was incorporated. (Tr. 3746) Hans Knoll was president of the company continuously until his death in 1955 (Tr. 3742, 3760); and

after his death, Florence Knoll became president of the company. (Tr. 3760)

Hans Knoll came to the United States in 1937 at the age of twenty-three. (Tr. 3742) He was the son of a furniture manufacturer in Herrenberg, Germany, a community near Stuttgart. (Tr. 3743) The Knoll family had strong artistic interests. While touring the United States, Hans Knoll was particularly interested in observing the manner in which the furniture industry functioned in the United States. (Tr. 3743) He was interested in improving the artistic content of American interiors and furniture. After his visit to the United States, he immigrated to this country and eventually established permanent residence here. (Tr. 3743-3744)

Hans Knoll, who was intimately acquainted with architects and designers outside the United States, acquired a few designs which he considered good, and began to show them to American architects (Tr. 3744) and to encourage these architects to specify these designs. (Tr. 3744) When he first started in business, Mr. Knoll, upon getting an order for a few chairs, had them made up by someone else. (Tr. 3744) He was president and general manager of the small company and handled the financial, administrative, and selling phases of the business. (Tr. 3759) Florence Knoll handled the artistic and design requirements of the business.

Florence Schust Knoll, a graduate architect at the time Hans Knoll met her (Tr. 3745), worked with Hans Knoll from the inception of the company. (Tr. 3744-3745) A graduate of Cranbrook Academy, a design and art school near Detroit (Tr. 3744-3745), she had studied under Mies van der Rohe, and, to some extent, her education was guided by Eero Saarinen, one of the great architects of this era. (Tr. 3745) Florence Schust, before her marriage to Hans Knoll, spent time abroad with the Saarinen family, and studied in London and other places. (Tr. 3745) Mrs. Louise Myers, the first employee of Knoll Associates, Inc., is still the secretary of the company and has been with it continuously from the beginning. (Tr. 3746) Florence Knoll headed up the design end of the business and her husband devoted himself to the sales, financial, and administrative end of the business. (Tr. 3759)

The Knoll Planning Unit was established in the early years of the company by Florence Knoll to educate prospective furniture buyers in the appreciation and use of modern contemporary furniture, and, thereby, to increase substantially the demand for furniture of modern contemporary design in the United States. (Tr.

3747) Today Knoll's Planning Unit is used for somewhat the same purpose except that the demand for modern contemporary furniture and genuine artistic interest in such decor is a fait accompli. The Planning Unit now is more directly part of Knoll's sales techniques.

In the early days, Knoll operations were not particularly successful from a financial point of view, although it made a small profit in 1953 and 1954. (Tr. 3760) Beginning with limited resources, the partnership set up business in a small, six-story, old-fashioned building in New York City, with a small showroom and offices combined. (Tr. 3748-3749) Two years later, in 1945, the partners purchased for \$28,000 a woodworking plant in Pennsburg, Pennsylvania and installed machinery for the manufacture of furniture. (Tr. 3749) In the early 1950's, Hans and Florence Knoll used their accounts receivable as security for loans (Tr. 3754-3755), and factored textile invoices. (Tr. 3754-3755) In 1953, the Knolls closed the Boston and Washington showrooms because they did not make enough money in those areas to justify the expense. (Tr. 3755-3756) The Boston and Washington representatives worked out of their apartments. (Tr. 3757) In 1952, the company lost money, and Mr. W. Cornell Dechert was hired as comptroller to assume responsibility for the financial aspects of the business. (Tr. 3759)

In 1953, the total billings reached approximately \$3 million, but there was no cash. The profits were small, but the business was growing. (Tr. 3750) During the early years of Mr. Dechert's tenure, he had an ever-present problem of lack of working capital (Tr. 3750) and had difficulty in finding cash with which to pay bills. (Tr. 3750-3751)

Knoll's sales for fiscal 1960 were in excess of \$6 million, and for fiscal 1963 between \$9 million and \$10 million. (Ans.; Tr. 58) The principal place of business of Knoll's parent, Art Metal, Inc., also a New York Corporation, is Jones and Gifford Avenue, Jamestown, New York.

Knoll was one of the early, leading manufacturers of modern contemporary furniture in the United States. (Tr. 3761-3763) and aided greatly in developing the present large public demand for this particular decor. During the past decade its volume of sales and its profits have increased substantially. (Tr. 3753-3760, 3764)

Knoll International, Ltd., is a wholly-owned subsidiary corporation of Art Metal, Inc. (Tr. 79-80, CX 1871-1873; and Win-

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ner Manufacturing Company of West Trenton, New Jersey, is a wholly-owned subsidiary company of Knoll Associates, Inc. (Tr. 52, 80, 595-597)

The pricing policies of Knoll are controlled and directed by its parent corporation, Art Metal, Inc., and the pricing policies of Art Metal, Inc., and Knoll are coordinated by the same individual, W. Cornell Dechert, the chief executive of both corporations. (Tr. 82-91)

During the years 1960-1962, Knoll products were sold through Art Metal, Inc., and in such instances the Knoll price lists were used for establishing resale prices. (Tr. 86-90; CX 350-358, 678-825, 1018-1130)

Consolidated net sales for Art Metal, Inc., and wholly-owned subsidiaries for the fiscal years ending May 31, were:

1961	\$32,991,210	
1962	34,567,178	
1963	86,334,175	(CX 1870-1873)

At all times relevant to these proceedings, Knoll has maintained a continuous course of trade in commerce in its products. (Ans.; Tr. 49-50; CX 193-1863) In the course and conduct of its business, Knoll has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended. In addition to its principal place of business at 320 Park Avenue, New York, New York, Knoll maintains manufacturing plants in New Jersey and Pennsylvania and showroom sales offices in Boston, Philadelphia, Washington, Atlanta, St. Louis, Chicago, San Francisco, Dallas, Los Angeles and Cleveland. Knoll causes its furniture and furniture products, when sold, to be transported in interstate commerce from Knoll's principal place of business and manufacturing plants to the purchasers thereof located in various States of the United States and the District of Columbia.

The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding. This proceeding is in the public interest.

Knoll, in the manufacture and sale of its furniture and related products, is in substantial competition with other manufacturers and interstate sellers of furniture and furniture products of like grade and quality.

Witnesses

Witnesses who testified in this proceeding, their business

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affiliations and the transcript pages at which their testimony begins are:

WITNESSES

Knoll Associates, Inc. Docket 8549

<i>Name</i>	<i>Transcript Page Numbers</i>
Adams, Robert H. ----- comptroller, W. B. Ford Design Associates, Inc., Detroit, Michigan.	1096
Alessi, Joseph H. ----- president and salesman of Alessi Bros., Inc., 17 South William Street, New York City.	216, 2540
Allen, Robert F. ----- department manager, Revere Furniture & Equipment Co., 950 Upshur Street, N.W., Washington, D.C.	2955
Anderson, Diana ----- who does interior design office planning for Planned Office Interiors, a partnership, 24 E. 38th St., New York, N.Y.	2447
Aronoff, Irving B. ----- buyer of modern furniture for Abraham and Straus, department store, Fulton Street, Brooklyn, N.Y.	2317
Baiardo, William ----- president, Revere Furniture & Equipment Co., 950 Upshur St., N.W., Washington, D.C.	2910
Bass, William ----- clerk, Gregory, Mayer & Thom Co., office furniture supply company, Detroit, Michigan.	2764
Beal, Louis M. S. ----- a resident of New York City, vice-president of I.S.D. Incorporated [Interior Space Design], a wholly-owned corporation of Perkins & Will, architects, principal office, 609 W. Jackson Blvd., Chicago, Illinois.	2396
Beals, Gary A. ----- regional manager, Detroit Territory of Knoll Associates, Inc.	4455, 4553
Beitel, Vernon ----- owns Benon Products Co., Detroit, Michigan.	1015, 1044, 2550
Brown, Chilton P. ----- director of sales, Directional Contract Furniture Corporation, 41 E. 57th Street, New York, N.Y.	4239
Buck, Albert ----- accountant, Capitol Office Supply Co., Inc., 1621 L Street, N. W., Washington, D.C.	3130
Burgham, Frank H. ----- general sales manager, Thonet Industries, Inc., 1 Park Avenue, New York, N.Y.	4014

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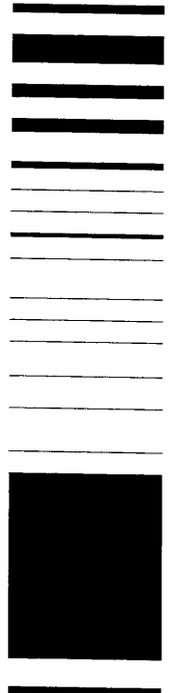
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<i>Name</i>	<i>Transcript Page Numbers</i>
Burton, Almon	3002
president, R.C.M. Burton & Son, 911 E Street, N.W., Washington, D.C.	
Copeland, Paul R., Jr.	3831
national sales manager, Knoll Associates, Inc., since December, 1958.	
Cutler, Philip	2259
manager of modern occasional furniture, R. H. Macy & Co., Inc., Herald Square, New York, N.Y.	
Dechert, W. Cornell	37, 3741
president of Art Metal, Inc., and its wholly-owned sub- sidiary, Knoll Associates, Inc.	
Demant, Harry G.	1307
interior designer for Walter Herz Interiors, Incor- porated, 18647 Livernois, Detroit, Michigan.	
Dworski, Joseph	3892, 4382
3311 Dogwood Court, Birmingham, Michigan, architec- tural and interior designer. From 1954-December 31, 1964, regional manager of Birmingham, Michigan, show- room of Knoll Associates, Inc.	
Finsterwald, Maier B.	764, 820
formerly president, C. A. Finsterwald Company, Detroit, Michigan.	
Giesey, Maria G.	3227
owns M. G. Associates, 110 South Fairfax St., Alexandria, Va.	
Goldman, Morris	4168
president, J. G. Furniture Company, 160 E. 56th St., New York City, N.Y.	
Gregory, William M.	1497
manager, office furniture division, Capitol Office Supply Co., Inc., 1621 L Street, Washington, D.C.	
Haspel, Donald P. (see Homer Lay)	1562
employee of National Stationery & Office Equipment Association, 1511 K Street, N.W., Washington, D.C.	
Heminway, Mrs. Nan F.	2877
president, Design Specifications, Inc., a corporation, 903-20th Street, N.W., Washington, D.C.	
Herbert, Albert	2061
interior designer and industrial designer, Albert Herbert Design, business and residence in same address, 340 E. 74th St., New York, N.Y.	
Horwitz, Joshua	1150
operations manager, Robinson Furniture Company, Detroit, Michigan.	
Humphrey, W. L.	2820
vice president and general manager, Wagner-Henzy- Fisher Company, retail furniture, 1852 Euclid Avenue, Cleveland, Ohio.	

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<i>Name</i>	<i>Transcript Page Numbers</i>
Itkin, Abe	317, 2132
vice-president and treasurer, Itkin Bros., Inc., 290 Madison Avenue, New York City, N.Y.	
Jomo, Donald R.	581, 622, 3245,
treasurer, Knoll Associates, Inc.	3343, 3414, 3862, 4585
Kaufman, Austin, J.	1430
vice-president in charge of sales, F. W. Roberts Com- pany, 1009 Rockwell Ave., Cleveland, Ohio.	
Keillor, James A., Jr.	170, 2194
furniture buyer, B. Altman & Co., Fifth Ave., & 34th St., New York, N. Y.	
Kirby, William K.	4304
Flintman, Kirby and Company, business and financial consultants, 6615 East Jefferson Street, Detroit, Michigan.	
Kohr, William E.	1176
staff attorney for Michigan Consolidated Gas Company, Detroit, Michigan.	
Kovacs, Stephen	2215
salesman, contract department, W. & J. Sloane, Inc., 414th Fifth Avenue, 38th Street, New York City, N.Y.	
Lay, Homer B.	1521
assistant general manager, National Stationery & Office Equipment Association, a trade association, 1511 K Street, N.W., Washington, D.C.	
Linden, Leonard G.	1622
owner, Linden-Kickleigher, a gift and furniture shop, 10608 Carnegie Avenue, Cleveland, Ohio.	
Long, Rita	242, 2524
Rita Long Interiors, interior designer, 20 East 49th Street, New York, New York.	
Major, Edgar	4445
Retail sales agent for Herman Miller, Inc., 970 East Maple St., Birmingham, Michigan.	
Malino, Emily	2001
owner of Emily Malino Associates, Inc., 509 Madison Avenue, New York, N.Y., interior and color design con- sultant.	
Merzin, Aaron	1354
secretary-treasurer Detroit Office Suply, Inc., Detroit, Michigan.	
Miller, Leon Gordon	707, 750, 3266,
of Leon Gordon Miller & Associates, Inc., 1220 Huron Road, Cleveland, Ohio.	3337
Miller, Lillian	378, 2467
office manager, S. J. Miller & Associates Corp., 20 E. 49th Street, New York, N.Y.	

<i>Name</i>	Initial Decision	70 F.T.C.
<i>Name</i>	<i>Transcript Page Numbers</i>	
Mills, Beaven W. -----		4028
sales manager, Jens Risom Design, Inc., 444 Madison Avenue, New York, N.Y.		
Murray, David -----		4058
sales merchandise manager, Thayer Coggin.		
Niedringhaus, Charles W. -----		3768
in charge of New York sales district for Knoll Associates, Inc., Park Avenue, New York, N.Y.		
Nolan, William J. -----		590, 634
vice-president and general manager of Knoll Associates, Inc.; executive vice-president of Art Metal, Inc.		
Osetek, Jesse -----		3609, 4476
1204 Kensington, Grosse Point, Michigan, formerly Knoll Associates, Inc., agent in Birmingham, Michigan, showroom, 1080 north Woodward, Birmingham, Michigan, and also worked for Joseph Dworski (Tr. 3611), presently owner of Contract, Inc.		
Peratt, Valentine -----		1128
interior decorator for Irvin & Co., Incorporated Cleveland, Ohio.		
Prosser, Herbert -----		4500
employer of Gary Beals and Joseph Dworski, who operated Birmingham, Michigan, showroom for Knoll Associates, Inc.		
Race, William Keith -----		3057
former manager of the executive department for Gregory, Mayer and Thom Co. Detroit, Michigan.		
Risom, Jens -----		4048
president, Jens Risom Design, Inc., 444 Madison Avenue, New York, N.Y.		
Robinson, Morris -----		2701
of Robinson Furniture Company Detroit, Michigan, one of largest furniture companies in Detroit, \$9,000,000+ per year.		
Ross, Donald -----		118, 1806
of Architectural Interiors, Inc., 160 East 56th Street, New York, N.Y.		
Rutherford, Charles F. -----		484, 2374
of Braun & Rutherford, Inc., retailer of office equipment, 164 William Street, New York, N.Y.		
Sanborn, Charles C. -----		1389
salesman, Charles G. Stott & Co., Inc., 1310 New York Ave., N.W., Washington, D.C.		
Sander, Mrs. Kathryn -----		4493
employee in Birmingham, Michigan, office of Knoll Associates, Inc.		
Schmelzer, Stephen F. -----		2336
president, Business Equipment Sales Co., Inc., 300 Park Avenue South, New York, N.Y.		



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<i>Name</i>	<i>Transcript Page Numbers</i>
Schnee, Edward	2655
Adler-Schnee Associates, Inc., owns his own furniture company, 16805 Livernois Street, Detroit, Michigan.	
Schwander, Jack G.	4188
sales representative for B. L. Marble Furniture, Inc., Bedford, Ohio.	
Schwartz, Joseph Norman	4149
Eastern regional sales manager, Herman Miller, Inc., Zeeland, Michigan.	
Sens, Ralph D.	440, 1904, 1976
secretary-treasurer, Desks, Inc., dealers, retailers and jobbers of office furniture, 71 Fifth Avenue, New York, New York.	
Sherman, Bernard	2782
owner of Casual Living Modes, 22961 Woodward Avenue, Ferndale, Michigan.	
Short, Ben	3691
regional manager, Washington, D.C., office, Knoll Associates, Inc., 1640 Wisconsin Avenue, Washington, D.C.	
Smith, Walter	667
purchasing agent, Wayne State University, Detroit, Michigan.	
Stevens, Mary	4421
saleslady, Herman Miller, Inc., 970 East Maple Road, Birmingham, Michigan.	
Stovering, Frank	826
manager, Contract Division, Higbee Company, Cleveland, Ohio.	
Thom, George H.	1235
president of Ideas, Incorporated, 10004 Freeland, Detroit, Michigan.	
Tombs, Lucille E.	2298
buyer of modern furniture Bloomingdale Bros., Inc., New York, N.Y.	
Urdang, Jack	2086
salesman, National Hospital Supply Co., Inc., 38 Park Row, New York, N.Y., (a contract furniture and hospital supply house).	
Ursell, Erich	3150
president of Ursell's, Inc., retail contemporary furniture, 3243 Q Street, N.W., Washington, D.C.	
Wagner, F. W.	930, 1003
secretary-treasurer, Wagner-Henzy-Fisher Company, Cleveland, Ohio.	
Wiley, George W.	3558
regional manager, Knoll Associates, Inc., Cleveland, Ohio, region; lives in Chesterton, Ohio.	

Wilkoff, William L.	1661, 1691
former owner of Decor Associates, Inc., 3131 M Street, N.W., Washington, D.C., a furniture accessory and interior decorating shop.	
Wilmot, Francis E.	4375
commercial manager, Michigan Bell Telephone Company, Detroit, Michigan.	
Wiseman, Irving Henry	4339
former general manager (1959-1963), C. A. Finsterwald Company, Detroit, Michigan.	

Business Firms Whose Representatives Testified

The businesses whose officers, employees or representatives testified, listed by the names of business, are:

*Businesses Whose Officers or Employees Testified
(Knoll Associates, Inc., Docket 8549)*

Abraham & Straus	Co-ordinated Interiors, Inc.
Irving B. Aronoff	Irving Henry Wiseman
Adler-Schnee Associates, Inc.	Decor Associates, Inc.
Edward Schnee	William L. Wilkoff
Alessi Bros., Inc.	Design Specifications, Inc.
Joseph H. Alessi	Mrs. Nan F. Heminway
B. Altman & Co.	Desks, Inc.
James A. Keillor, Jr.	Ralph D. Sens
Architectural Interiors, Inc.	Detroit Office Supply, Inc.
Donald Ross	Aaron Merzin
Art Metal, Inc.	Directional Contract
W. Cornell Dechert	Furniture Corporation
Benon Products Co.	Chilton P. Brown
Vernon Beitel	C. A. Finsterwald Company
Bloomingtondale Bros., Inc.	Maier B. Finsterwald, Vernon
Lucille E. Tombs	Beitel, Irving H. Wiseman
Braun & Rutherford, Inc.	Flintman, Kirby & Company
Charles F. Rutherford	William K. Kirby
R.C.M. Burton & Son	W. B. Ford Design Associates Inc.
Almon Burton	Robert H. Adams
Business Equipment Sales Co., Inc.	Gregory, Mayer & Thom Co.
Stephen F. Schmelzer	William Bass
Capitol Office Supply Co., Inc.	William Keith Race
Albert Buck	Albert Herbert Design
William M. Gregory	Albert Herbert
Casual Living Modes	Walter Herz Interiors, Incorporated
Bernard Sherman	Harry G. Demant
Contract, Inc.	Higbee Company
Jesse Osetek	Frank Stovering

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Ideas, Incorporated	Joseph Norman Schwartz
George H. Thom	Mary Stevens
Irvin & Co., Incorporated	Leon Gordon Miller & Associates, Inc.
Valentine Peratt	Leon Gordon Miller
Itkin Bros., Inc.	S. J. Miller & Associates Corp.
Abe Itkin	Lillian Miller
I. S. D., Incorporated, (Interior Space Design)	National Hospital Supply Co., Inc.
Louis M. S. Beal	Jack Urdang
J. G. Furniture Company	National Stationery & Office Equip- ment Association
Morris Goldman	Donald P. Haspel
Linden-Kickleighter	Homer B. Lay
Leonard G. Linden	Perkins & Will [Architects]
Knoll Associates, Inc.	Louis M. S. Beal
Gary A. Beals	Planned Office Interiors
Paul R. Copeland, Jr.	Diana Anderson
W. Cornell Dechert	Revere Furniture & Equipment Co.
Joseph Dworski	Robert F. Allen
Donald R. Jomo	William Baiardo
Charles W. Niedringhaus	F. W. Roberts Company
William J. Nolan	Austin J. Kaufman
Jesse Osetek	Jens Risom Design, Inc.
Herbert Prosser	Beaven W. Mills
Mrs. Kathryn Sanders	Jens Risom
Ben Short	Robinson Furniture Company
George W. Wiley	Joshua Horwitz
Rita Long Interiors	Morris Robinson
Rita Long	W. & J. Sloane, Inc.
R. H. Macy & Co., Inc.	Stephen Kovacs
Philip Cutler	Charles G. Stott & Co., Inc.
Emily Malino Associates, Inc.	Charles C. Sandborn
Emily Malino	Thayer Coggin
B. L. Marble Furniture, Inc.	David Murray
Jack G. Schwander	Thonet Industries, Inc.
M. G. Associates	Frank H. Burgham
Maria G. Giesey	Ursell's, Inc.
Michigan Bell Telephone Company	Erich Ursell
Francis E. Wilmot	Wagner-Henzy-Fisher Company
Michigan Consolidated Gas Company	W. L. Humphrey
William E. Kohr	F. W. Wagner
Herman Miller, Inc.	Wayne State University
Edgar Major	Walter Smith

Knoll's Price Discriminations

During the years 1960-1962, inclusive, in the cities of New York, New York; Cleveland, Ohio; Detroit, Michigan; and Washington, D.C., Knoll discriminated and now is discriminating in price between purchasers of its furniture and furniture products

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of like grade and quality who compete in the resale at retail of said furniture and furniture products. Knoll grants to its "favored" customers a discount of 50 percent off its catalogue list prices, and to its "nonfavored" customers a discount of 40 percent off the list prices. (Ans.; CXs 142, 193 through 1863, inclusive.) Among others, the favored purchasers, and some of the nonfavored purchasers, were and are:

*Favored Purchasers**Nonfavored Purchasers**Detroit*

Benon Products Co.
C. A. Finsterwald Company
Alder-Schnee Associates, Inc.
Casual Living Modes
Contract, Inc.
Robinson Furniture Company (1960)
Gregory, Mayer & Thom Co. (1960)
Rayhaven Equipment Co. (1960)

Detroit Office Supply, Inc.
Ideas, Inc.
Walter Herz Interiors, Incorporated
J. L. Hudson Company
Gregory, Mayer & Thom Co. (1962)
Eastern Cabinet Works
Robinson Furniture Company (1962)
Rayhaven Equipment Co. (1962)

Cleveland

Wagner-Henzy-Fisher Company
Leon Gordon Miller & Associates, Inc.
Interior Craft, Inc.

F. W. Roberts Company
Higbee Company
Linden-Kickleigher
Irvin & Co.
Holzheimer
Wirtschaftler's

Washington

Capitol Office Supply Co., Inc.
Revere Furniture & Equipment Co.
Decor Associates, Inc.
R. C. M. Burton & Son
Ursell's, Inc.

Charles G. Stott & Co., Inc.
W. D. Campbell Co.
Chase Furniture
Lord & Taylor
The Door Store
Keyes, Lethbridge & Condon

New York

W. & J. Sloane, Inc.
B. Altman & Co.
R. H. Macy & Co., Inc.
Itkin Bros., Inc.
Bloomingdale Bros., Inc.
Alessi Bros., Inc.
Braun & Rutherford, Inc.
Desks, Inc.
Business Equipment Sales Co., Inc.
Abraham & Straus
National Hospital Supply Co., Inc.

Architectural Interiors, Inc.
Rita Long Interiors
S. J. Miller & Associates Corp.
Emily Malino Associates, Inc.
Designs for Business

Following are examples of Knoll sales of identical items to competing purchasers at discriminatory prices in violation of Sec. 2(a) (footnote 2 *supra*). In some instances the same sale to one purchaser is repeated on the next line in order that it may be juxtaposed to the sale of the identical item to a different purchaser at a differing price. These illustrations do not include all of the price discriminations which are proven in this record, but establish that Knoll's price discriminations permeated all of its distribution and sales channels and were *not* limited to one class of Knoll customer, *i.e.*, architects, interior designers, furniture stores, the furniture departments of retail department stores, and office equipment and furniture retail stores.

NEW YORK, NEW YORK

Model No.	Non-Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.	Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.
71USC-1 Chair	S. J. Miller	\$ 94.80	9/26/62		CX1763	Itkin Bros.	\$ 79.00	9/19/62		CX1187
657 Chair	Rita Long	150.00	11/26/62		1772	W & J Sloane	125.00	9/26/62		1506
167MC Table	Rita Long	327.00	12/ 5/62		1773	B. Altman	272.50	9/19/62		1312
421AP-1 Chair	Architectural Interiors	39.60	11/13/62		1599	Braun & Rutherford	33.00	11/28/62		1356
71ULB-1 Chair	Art-Decor	93.60	10/19/62	43190		Braun & Rutherford	78.00	11/16/62	44611	
72ULB-1 Chair	Friedin-Studley	48.60	7/30/62	39444		Itkin Bros.	40.50	7/11/62	38485	
72URC-1 Chair	Paul Conrad Assoc.	49.80	7/27/62	39850		Itkin Bros.	41.50	7/12/62	38590	
72URC-1 Chair	Gerhard Karplus	49.80	8/21/62	40045		Braun & Rutherford	41.50	8/28/62	40199	
72URC-1 Chair	S. J. Miller	49.80	9/10/62	40335		Itkin Bros.	43.00	9/26/62	41804	
151-1 Chair	S. J. Miller	51.60	10/19/62	43256		Macy's	43.00	9/10/62	40834	
151-1 Chair	Ferrenz & Taylor	51.60	11/28/62	44999		B. Altman	43.00	11/21/61	44802	
71URC-1 Chair	S. J. Miller	94.80	8/22/62	38788		Itkin Bros.	79.00	8/28/62	40199	
71URC-1 Chair	Emily Malino Assoc.	94.80	9/25/62	40070		Itkin Bros.	79.00	9/19/62	41439	
71URC-1 Chair	S. J. Miller	94.80	10/16/62	41824		Itkin Bros.	79.00	10/10/62	42599	
71URC-1 Chair	Saphier Assoc.	94.80	11/13/62	43012		Itkin Bros.	79.00	11/ 6/62	43992	
71URC-1 Chair	Interior Space Design	94.80	12/13/62	44389		Bus. Equipment	103.50	12/18/62	45958	
71SBC-2 Chair	F. G. Frost & Assoc.	124.20	8/21/62	45703		Bus. Equipment	103.50	9/26/62	41805	
71SBC-2 Chair	Gerhard Karplus	124.20	10/24/62	43522		Braun & Rutherford	63.00	11/ 2/62	43925	
46SPC-1 Chair	W. D. Teague Assoc.	75.60	8/28/62	45005		Itkin Bros.	63.00	10/11/62	45004	
46SPC-1 Chair	Designs For Business	75.60	8/28/62	40214		Braun & Rutherford	63.00	10/11/62	42672	
46SPC-1 Chair	Designs For Business	75.60	12/ 6/62	45444		Braun & Rutherford	61.00	12/ 6/62	45425	
72USBC-2 Chair	Smyth Urquhart	73.20	8/29/62	40357		Itkin Bros.	61.00	9/19/62	41439	
72USBC-2 Chair	J. Gallin & Son	73.20	9/ 4/62	40527		Bus. Equipment	61.00	10/16/62	42930	
150-1 Chair	Gerhard Karplus	66.00	11/ 9/62	44323		Macy's	55.00	9/10/62	40834	
150-1 Chair	Albert Lefcourt	66.00	7/27/62	44325		Macy's	55.00	11/ 2/62	43961	
150-1 Chair	W. D. Teague Assoc.	66.00	10/24/62	33522		B. Altman	55.00	11/21/62	44801	
151S-1 Chair	Ferrenz & Taylor	66.00	11/28/62	44399		Bloomingdale Bros.	49.50	9/27/62	41876	
151S-1 Chair	Dolly Scharf	59.40	10/27/62	42292		Macy's	49.50	11/13/62	44349	
76S Chair	Bloom-Zetloff	59.40	12/10/62	44954						
160F Table	E. L. Brine	62.40	7/16/62	33983		Desks, Inc.	46.50	9/25/62	41682	1284
160F Table	Designs For Business	62.40	8/16/62	38688	1719	Nat'l Hosp. Supply	34.00	9/17/62	41296	1302
160F Table	Emily Malino	40.80	7/27/62	33914	1685	Braun & Rutherford	32.50	7/16/62	38679	1361
71URC Chair	Designs For Business	39.00	8/16/62	33952	1722	Braun & Rutherford	34.00	9/ 7/62	40723	1368
76S Chair	Emily Malino	40.80	8/16/62	33914	1685	Braun & Rutherford	34.00	9/21/62	41583	1374
71URC Chair	Designs For Business	34.50	7/16/62	38688	1719	Braun & Rutherford	46.50	9/21/62	41583	1377
71WS Chair	Emily Malino	62.40	8/22/62	40070	1686	Desks, Inc.	90.00	8/28/62	40299	1280
160W Table	Designs For Business	39.00	10/10/62	42577	1687	Itkin Bros.	108.00	7/11/62	38485	1161
160W Table	Designs For Business	39.00	7/27/62	33952	1722	Itkin Bros.	32.50	7/18/62	38247	1163

Initial Decision

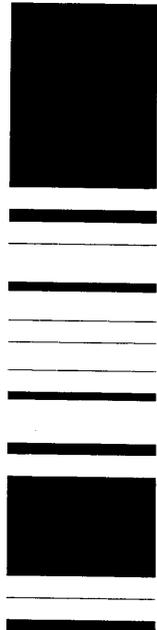
WASHINGTON, D. C.

Model No.	Non-Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.	Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.
420-3N Chair	U. S. Mchdse. Mart	\$ 22.00	4/21/60	--	CX138	Revere Furn.	\$ 18.75	3/21/60	845	CX 127
70 Chair	William L. Dove	171.00	5/19/60	--	139	R.C.M. Burton	142.50	6/9/60	--	125
72 USB Chair	Charles G. Stott	45.00	7/24/62	--	585	Revere Furn.	37.50	7/18/62	--	421
71SBC-1 Chair	Charles G. Stott	111.00	7/24/62	--	585	Revere Furn.	37.50	9/26/62	--	422
150-1 Chair	J. R. Andrews	66.00	4/4/62	33722	--	Capitol Office	92.50	9/21/62	--	437
71ULB-1 Chair	E. L. Daley	93.60	9/25/62	41683	--	Ursell's	55.00	4/2/62	33556	400
151S-1 Chair	William L. Dove	59.40	12/7/62	45532	--	Revere Furn.	78.00	9/26/62	41776	--
151S-1 Chair	Brown & Wright	59.40	10/30/62	45736	--	R.C.M. Burton	49.50	12/4/62	45310	--
46SHC-1 Chair	Campbell Co.	73.20	7/27/62	39349	--	Ursell's	49.50	9/26/62	41778	--
151-1 Chair	Satterlee & Smith	73.20	6/19/62	37288	--	Capitol Office	61.00	6/21/62	37471	--
150S-1 Chair	Lord & Taylor	51.60	10/30/62	43761	--	Ursell's	43.00	10/22/62	43338	--
150S-1 Chair	Perkins & Will	73.80	11/13/62	44352	--	Ursell's	61.50	5/24/62	36124	--
150S-1 Chair	Satterlee & Smith	73.80	6/19/62	37288	--	Capitol Office	61.50	5/4/62	35026	--
71SBC-2 Chair	H. Millman	73.80	3/5/62	32084	--	Ursell's	103.50	3/20/62	32335	--
	W. H. Metcalf	124.20	4/2/62	33530	--					
			1/25/62	29844	--					

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DETROIT, MICHIGAN

Model No.	Non-Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.	Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.
150S Chair	George D. Mason	\$ 67.20	3/28/60		CX78	Finsterwald	\$ 56.00	3/11/60		
76S Chair	Ideas, Inc.	66.60	5/31/60		61	Finsterwald	55.50	5/25/60		CX1
71UBC Chair	Nathan Johnson	66.60	4/21/60		58	Finsterwald	55.50	3/23/60		14
71UBC Chair	Rayhaven	94.80	5/17/60		82	Finsterwald	79.00	5/17/60		15
71UBC Chair	Ideas, Inc.	94.80	5/26/60		63					
71S Chair	Nathan Johnson	111.00	5/31/60		61					
421 Chair	J. L. Hudson	39.60	6/27/60		82	Finsterwald	92.50	5/25/60		
421 Chair	Sheldon Ginn	39.60	3/23/60		67	Casual Liv. Modes	33.00	5/31/60		14
150 Chair	Detroit Office	60.00	2/ 2/60		73	Adler-Schnee	33.00	2/23/60		56
151 Chair	Detroit Office	60.00	2/ 2/60		69	Finsterwald	50.00	2/11/60		44
422RC Chair	Edmund London	45.90	2/ 2/60		70	Casual Liv. Modes	38.25	2/29/60		23
421-2N Chair	Math. Searles	95.40	3/ 3/60		76	Finsterwald	70.50	2/24/60		57
151S Chair	George D. Mason	24.30	3/ 3/60		77	Finsterwald	20.25	2/24/60		25
150S Chair	George D. Mason	53.10	3/28/60		78	Casual Liv. Modes	44.25	3/23/60		57
72US Chair	Gretmel & Morris	66.60	1/28/60		87	Finsterwald	55.00	3/11/60		1
420L Chair	Gretmel & Morris	40.50	1/28/60		87	Finsterwald	55.00	3/11/60		21
421AP Chair	Robinson Furn.	39.60	4/26/62		967	Adler-Schnee	33.75	2/28/60		25
71UBC Chair	Herz Interiors	39.60	4/ 2/62		982					672
71UBC Chair	Robinson Furn.	94.80	6/12/62		969	Benon Products	79.00	3/29/62		832
71SBC Chair	Robinson Furn.	111.00	6/12/62		969	Finsterwald	92.50	3/28/62		897
51-1 Chair	Herz Interior	148.80	7/24/62			Finsterwald	92.50	9/14/62		918
151S-1 Chair	Clifford Wright	59.40	11/ 6/62		981	Benon Products	14.00	7/30/62		852
151S-1 Chair	Herz Interiors	59.40	8/28/62	44059		Finsterwald	\$ 49.50	10/16/62	42921	
151-1 Chair	Great Lakes Hosp.	51.60	3/29/62	40213		Finsterwald	49.50	8/ 1/62	39635	
71SBC-1 Chair	J. L. Hudson	111.00	12/13/62	33468		Finsterwald	65.00	3/ 2/62	31874	
71UBC Chair	Detroit Office Equip.	101.10	2/ 2/60	45720		Finsterwald	73.00	10/29/62	43612	
71UBC Chair	Detroit Office Equip.	101.10	2/ 2/60	54025	69	Robinson	73.00	3/23/60	965	9
71UBC Chair	Detroit Office Equip.	101.10	2/ 2/60	54025	69	Gregory-Mayer & Thorn	76.75	2/ 2/60	1425	40
151S Chair	Walter Herz	53.10	3/10/60	354	64	Casual Liv. Modes	44.25	3/23/60	54032	32
										57 (a)



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CLEVELAND, OHIO

Model No.	Non-Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.	Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.
71S Chair	Irwin & Co.	\$108.00	2/ 2/60	--	114	Wagner-Henzy	\$90.00	1/22/60	--	89
71ULB Chair	Gift & Gallery	90.00	1/29/60	--	110	Wagner-Henzy	75.00	3/ 3/60	--	91
421-2N Chair	Modern Trend	24.60	5/31/60	--	109	Interior Crafts	20.50	6/23/60	--	94
160M Table	Higbee Co.	58.20	4/12/62	--	294	Wagner-Henzy	48.50	1/22/62	--	206
151S Chair	Higbee Co.	59.40	5/21/62	--	302	Wagner-Henzy	51.00	5/15/62	--	225
71UBC Chair	Higbee Co.	94.80	8/20/62	--	290	Wagner-Henzy	79.00	4/12/62	34158	222
161F Table	Higbee Co.	46.80	8/20/62	--	290	Wagner-Henzy	79.00	6/26/62	--	234
72ULB-1 Chair	Carol Industries	48.60	6/15/62	37101	--	Wagner-Henzy	39.00	7/12/62	38623	239 (b)
71ULB-1 Chair	Design Service	93.60	11/12/62	44298	--	Wagner-Henzy	39.00	12/12/62	45606	257
71ULB-1 Chair	Wirtschaftler's	93.60	2/19/62	31892	--	Leon G. Miller	40.50	5/16/62	35696	--
151S-1 Chair	Irwin & Co.	59.40	7/ 5/62	38247	--	Wagner-Henzy	78.00	10/16/62	42989	--
72USBC-2 Chair	S. Rose, Inc.	73.20	7/ 2/62	38057	--	Wagner-Henzy	78.00	2/ 9/62	30785	--
72USBC-2 Chair	R. Traves	73.20	11/13/62	44299	--	Leon G. Miller	49.50	6/20/62	37434	--
71S Chair	Irwin & Co.	108.00	2/ 2/60	54038	114	Leon G. Miller	61.00	7/27/62	39282	--
420 2EN	Irwin & Co.	21.60	5/23/62	36103	305	Wagner-Henzy	103.50	10/16/62	42989	99
71ULB	Wirtschaftler's	93.60	2/19/62	31892	331	Leon G. Miller	18.00	4/14/60	1318	233
							89.00	6/25/62	37629	195 (a)
								2/22/62	31520	

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Following the sales of substantially the same, but *not always identical*, Knoll furniture pieces to competing customers at differing prices. In some instances, the sales are of identical items:

NEW YORK, NEW YORK

Model No.	Non-Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.	Model No.	Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.
421-AP-1 Chair	Architectural Interiors	\$ 39.60	11/13/62	44308	CX1599	421AP-1 Chair	Macy's	\$ 33.00	11/28/62	--	CX1356
71UPC-3 Chair	S. J. Miller	115.20	7/11/62	--	1748	71SBC-3 Chair	W. & J. Sloane	103.50	7/24/62	--	1498
160MC Table	S. J. Miller	78.00	7/18/62	--	1750	160MC Table	Itkin Bros.	65.00	9/4/62	--	1178
71UBC-1 Chair	S. J. Miller	94.80	7/18/62	--	1751	71ULB-1 Chair	Itkin Bros.	78.00	7/11/62	--	1161
72USBC-1 Chair	S. J. Miller	67.80	7/18/62	--	1751	72USPC-1 Chair	Itkin Bros.	58.50	7/24/62	--	1164
72USBC-1 Chair	S. J. Miller	49.80	9/10/62	--	1762	72ULB-1 Chair	Itkin Bros.	40.50	7/11/62	--	1161
71USC-1 Chair	S. J. Miller	94.80	9/26/62	--	1763	71UBC-1 Chair	Braun & Rutherford	79.00	9/21/62	--	1374
151-1 Chair	S. J. Miller	51.60	10/19/62	--	1764	151-1 Chair	Itkin Bros.	43.00	7/27/62	--	1167
163 F Table	S. J. Miller	49.20	10/19/62	--	1764	163 M Table	Braun & Rutherford	68.00	9/21/62	--	1379
421-2AB-1 Chair	Rita Long	25.20	8/2/62	--	1767	421-2BN-2 Chair	Itkin Bros.	24.00	7/11/62	--	1160
163 F Table	Rita Long	49.20	11/20/62	--	1771	163 W Table	Itkin Bros.	38.00	11/26/62	--	1206
167MC Table	Rita Long	327.00	11/20/62	--	1771	167MC Table	B. Altman	272.50	9/26/62	--	1312
657 Chair	Rita Long	150.00	11/26/62	43681	1772	657 Chair	W. & J. Sloane	125.00	9/26/62	40912	1506
71USC-1 Chair	S. J. Miller	91.80	10/29/62	--	1763	71USC-1 Chair	Itkin Bros.	76.50	9/10/62	--	1187
167MC Table	S. J. Miller	94.80	9/26/62	--	1773	167MC Table	Braun & Rutherford	79.00	9/19/62	--	1492
421 AP Chair	Architectural Interiors	28.54	11/13/62	44308	1599	421 AB Chair	Braun & Rutherford	19.36	9/19/62	--	1429
160 W Table	Designs for Business	39.00	7/27/62	39352	1722	160 F Table	Nat'l. Hosp. Supply	34.00	11/28/62	44985	1429
76S Chair	Designs for Business	62.40	7/16/62	33688	1719	76 SBC Chair	Itkin Bros.	53.00	9/17/62	41296	1302
									8/28/62	40199	1173

WASHINGTON, D. C.

Model No.	Non-Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.	Model No.	Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.
151 Chair	The Door Store	\$ 51.60	4/4/62	--	CX631	151S Chair	Ursell's	\$ 47.00	1/22/62	--	CX471
151 Chair	The Door Store	51.60	4/4/62	38949	CX631	151S Chair	K. C. M. Burton	49.50	7/30/62	--	369
46SBC-1 Chair	Campbell Co.	73.20	7/27/62	39138	--	46SBC-1 Chair	Capitol Office	61.00	6/21/62	37471	--
72USB-1 Chair	Charles G. Stott	45.00	7/24/62	39138	--	72USB-1 Chair	Revere Furn.	37.50	7/17/62	38795	--
71SBC-1 Chair	Charles G. Stott	111.00	7/24/62	39138	--	71SBC-1 Chair	Revere Furn.	103.50	7/18/62	38795	--
71USB-1 Chair	Charles G. Stott	90.00	7/24/62	39138	--	71ULB-1 Chair	Revere Furn.	78.00	9/26/62	41776	435
151 Chair	Chase Furn.	45.90	3/23/60	948	136	151-S Chair	Burton	47.00	5/25/60	3501	123

DETROIT, MICHIGAN

Model No.	Non-Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.	Model No.	Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.
51W-4 Chair	Ideas, Inc.	\$145.20	2/15/62	--	CX958	51-1 Chair	Benon Products	\$124.00	3/29/62	--	CX832
52W-4 Chair	Ideas, Inc.	252.60	2/15/62	--	958	52-1 Chair	Benon Products	214.00	3/29/62	--	832
71SBC-1 Chair	J. L. Hudson	111.00	12/13/62	--	955	71SBC-1 Chair	Benon Products	92.50	10/29/62	--	864
421-2AN-1 Chair	Ideas, Inc.	24.80	1/17/62	--	957	421-2BN-1 Chair	Benon Products	24.00	2/22/62	--	886
71UBC Chair	Ideas, Inc.	94.80	5/31/60	3959	--	71UBC Chair	Finsterwald	79.00	5/17/60	3143	
76S Chair	Ideas, Inc.	66.60	5/31/60	3959	--	76S Chair	Finsterwald	55.50	5/17/60	3143	
76S Chair	J. L. Hudson	68.40	2/10/60	54462	--	76S Chair	Finsterwald	57.00	2/25/60	--	
76S Chair	Ideas, Inc.	66.60	4/21/60	54462	58	76S Chair	Finsterwald	55.50	3/23/60	55081	
151 Chair	Detroit Office Equip.	45.90	2/ 5/60	54281	70	151S Chair	Finsterwald	44.25	4/14/60	1773	
150 Chair	Detroit Office Equip.	60.00	2/ 2/60	54025	69	150S Chair	Robinson	59.00	4/ 6/60	1508	

CLEVELAND, OHIO

Model No.	Non-Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.	Model No.	Favored Purchaser	Price	Inv. Date	Inv. No.	Exh. No.
151S Chair	F. W. Roberts	\$ 59.40	3/ 5/62	--	CX289A	151S Chair	Wagner-Henzy	\$ 49.50	4/12/62	--	CX222
161F Table	F. W. Roberts	46.80	8/20/62	--	290	161F Table	Wagner-Henzy	49.50	6/20/62	37434	257
71UBC Chair	F. W. Roberts	94.80	8/20/62	--	290	71ULB-1 Chair	Wagner-Henzy	39.00	12/12/62	--	203B
190-2 Chair	F. W. Roberts	67.80	8/20/62	--	290	190S-1 Chair	Leon G. Miller	78.00	8/ 2/62	44930	256
71UBC-1 Chair	F. W. Roberts	94.80	9/13/62	41049	--	71ULB-1 Chair	Leon G. Miller	61.50	11/26/62	39738	--
160M Table	Higbee Co.	58.20	4/12/62	--	294	71UPC-1 Chair	Wagner-Henzy	78.00	8/21/62	40040	--
151S Chair	Higbee Co.	59.40	5/21/62	--	302	160M Table	Wagner-Henzy	48.50	1/22/62	--	206
71UBC Chair	Higbee Co.	94.80	8/20/62	--	290	151S Chair	Wagner-Henzy	49.50	4/12/62	--	222
161F Table	Higbee Co.	46.80	8/20/62	--	290	71UBC Chair	Wagner-Henzy	79.00	4/12/62	--	234
150 Chair	Kicklighter	66.00	10/22/62	43284	--	161F Table	Wagner-Henzy	39.00	6/26/62	--	239
						150S Chair	Wagner-Henzy	39.00	7/12/62	--	257
							Wagner-Henzy	61.50	11/26/62	44930	--

Knoll's No Competition Defense

The contention by Knoll's lawyers that there is and was no competition between any of Knoll's favored and nonfavored customers reflects total ignorance of or disregard for the law and the facts relating to Knoll's way of doing business.

The competition referred to in Section 2(a) of the Clayton Act, as amended, is not esoteric. Section 2(a) competition involves a "struggle between rivals," *Lipson v. Socony Vacuum Corporation*, 87 F. 2d 265, 270; or a "contest" for sales, *U.S. v. Standard Oil Co. of New Jersey*, 47 F. 2d 288, 297; or a vying for trade, *Brown Shoe Co., Inc. v. U.S.*, 179 Fed. Supp. 721; *aff'd* 370 U.S. 294; or a "contest for trade" *Federal Trade Commission v. Anheuser Busch, supra*. Webster's New International Dictionary, 2d Edition, defines "competition" as an "act of competing, especially of seeking, or endeavoring to gain, what another is endeavoring to gain at the same time. . . ."

In its original answer, filed March 11, 1963, Knoll

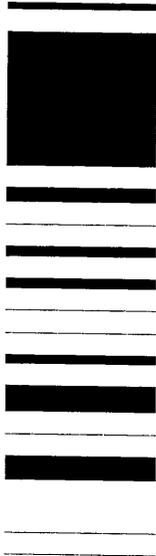
admits that respondent sells furniture to architects, interior designers, contract houses, interior decorators, office furniture dealers and furniture or department stores, among others, and admits that in the cities of Detroit, Michigan; Cleveland, Ohio; and Washington, D. C., some customers receive discounts of 50 percent (50%) off list price and other customers receive discounts of 40 percent (40%) off list price. (Italic supplied.)

However, after extensive prehearing conferences, Knoll counsel shifted their position, and, upon appeal from an adverse ruling by the hearing examiner were given leave to, and did, file on August 30, 1963, an amended answer stating that Knoll

4. *denies* the allegations contained in Paragraph Four, and specifically denies that respondent sold furniture to, or for resale by, architects, interior designers and interior decorators (except for possible sales to them as consumers); but admits that respondents sold furniture to contract houses, office furniture dealers and furniture or department stores, among others, and admits that in the cities of Detroit, Michigan; Cleveland, Ohio; and Washington, D. C., some customers received discounts of 50 percent (50%) off list price and other customers received discounts of 40 percent (40%) off list price. (Italic supplied.)

The evidence proves overwhelmingly that Knoll's original answer stated the facts. Knoll's allegation in its amended answer that it does not sell its furniture to architects, interior designers, and decorators for resale has been proven false.

Interior design firms buy furniture, including Knoll furniture,



and resell it to the ultimate users, the consumers. See the testimony of the following witnesses:

DONALD ROSS, Tr. 125-26, 1846, 1848, 1852;
 LILLIAN MILLER, Tr. 380-81, 385-87, CX 1744-1766; Tr. 2521;
 RITA LONG, Tr. 245, 253;
 EMILY MALINO, Tr. 2029;
 LEON GORDON MILLER, Tr. 723-745-46, 3322-23;
 HARRY G. DEMANT, Tr. 1311;
 EDWARD SCHNEE, Tr. 2672, 2679, 2680;
 LOUIS M. S. BEAL, Tr. 2419-24;
 ROBERT H. ADAMS, Tr. 1126, 1127;

Representatives of furniture manufacturers who are Knoll competitors: Thonet, Industries, Inc., Herman Miller, Inc., J. G. Furniture Company, and Directional Contract Furniture Corporation, testified and it is found that they sell their furniture to designers, decorators and architects. (Thonet, Tr. 4019-4020; Herman Miller, Tr. 4156; J.G. Furniture, Tr. 4174; Directional, Tr. 4249).

Interior designers testified that the terms of the sales from Knoll to them are negotiated exclusively between the interior designers and Knoll. See the testimony of:

ALBERT HERBERT, Tr. 2084;
 DIANA ANDERSON, Tr. 2466;
 NAN F. HEMINWAY, Tr. 2894;
 MARIA GIESET, Tr. 3238

Retail furniture establishments which sell furniture (including Knoll furniture) to the ultimate consumer, the user, also render to their customers services which are, in effect, the same services rendered to retail furniture buyers by architects, interior designers, and interior decorators. Charles F. Rutherford of Braun & Rutherford, Inc., a retail furniture establishment in New York, summarized the situation accurately in his testimony.

A. Yes. I don't know that we used it on all of those jobs but I am pretty sure we used some on General American Investors and some at National Distillers.

Q. What about White & Case?

A. Yes, we have used some Knoll in there.

Q. And Drew Chemical?

A. No. I think there is Knoll furniture in their lobby. That's right, the lobby is Knoll.

Q. You say you employ a designer on your staff. Does he have any training in this field?

A. Well, he is a graduate of a design school.

Q. Would you know which school?

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A. Parson's, I believe.

Q. You stated that you sell Knoll furniture?

A. That's right.

Q. Have you utilized your design service in conjunction with the sale of Knoll furniture?

A. Yes.

Q. Do you sell most of your Knoll furniture through the design department?

A. Most of it? Well, we sell a good deal of it through the design department. Of course, there is quite a little that is not sold through the design department. What I mean is that a man may be opening up an office and may come in and look at a few desks on the floor, select a Knoll desk. He doesn't have a designer. It is just a case of fitting up an office. He doesn't feel he needs a designer. We sell quite a little of it that way.

Q. Did General American Investors utilize the services of your design department?

A. I believe so; to the best of my knowledge, yes.

Q. What about White & Case?

A. No.

Q. Drew Chemical?

A. Yes, they used our designer.

Q. National Distillers?

A. Yes, they used the designer.

HEARING EXAMINER GROSS: Mr. Rutherford, you have been in this business for 45 years. When did you first add the designer to your staff, approximately?

THE WITNESS: I guess a matter of about six or seven years ago.

HEARING EXAMINER GROSS: Prior to that?

THE WITNESS: Prior to that we had no design service except what we did ourselves and we weren't too bad.

Q. Why did you add a designer to your staff?

MR. IMBERMAN: Objection, immaterial.

HEARING EXAMINER GROSS: Overruled. Why did you add a designer to your staff?

A. Well, there is a lot of detail in designing. Braun and myself used to do a certain amount of designing. The thing got too voluminous so that we had to have a designer and we put him on. Of course, I might also add that because of changing trends in the office field, it was necessary to have a designer.

Q. Which trends are you talking about?

A. Pardon me?

Q. Which trends are you referring to, Mr. Rutherford?

A. Well, I am talking about new buildings with all contemporary fittings and furnishings and so forth and so forth. Those are the trends that changed in our line. Years ago we would sell a man a desk, a table and a chair. It would be a wood chair, a wood desk and a wood table. If he bought a leather chair, it would be black. It was the exception to buy leather pieces. The trend changed. Today we are in the design business. As well as being merchants of office furniture, we are in the design business. The trend has changed, making it necessary for us to survive.

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Q. During this change in the trend, have you been getting competition from other designers?

MR. IMBERMAN: Objection.

HEARING EXAMINER GROSS: Overruled.

A. I suppose so. (Tr. 492-94).

For the same testimony, in substance, regarding other retail furniture establishments, see:

W. & J. Sloane, Inc., Tr. 2241-42, 2246, 2257-58.

Desks, Inc., Tr. 444-51.

B. Altman & Co., Tr. 171-78.

Bloomingtondale Bros., Inc., Tr. 2315-16.

Alessi Bros., Inc., Tr. 220-23.

Charles G. Stott & Co., Inc., Tr. 1397-98.

Capitol Office Supply Co., Inc., Tr. 1508-10.

Decor Associates, Inc., Tr. 1677-86.

Ursell's Inc., Tr. 3207-13.

Wagner-Henzy-Fisher Company, Tr. 934-37.

Higbee Company, Tr. 830-35.

F. W. Roberts Company, Tr. 1437-40.

The competition may be easy to discern when it is, for instance, between two large retail establishments rendering an interior design service such as Macy's and Altman's. The competition may be subtle when it is between an architect or interior designing firm, designing an interior with Knoll furniture specifically in mind, vis-a-vis a retail furniture store with an interior design department which suggests several alternative lines of furniture. Between the two extremes, the obvious—and the subtle—there are varying aspects of competition, but within the context of Section 2(a) it is all competition, vying for the dollar spent by the ultimate consumer—the retail user—of Knoll furniture.

The evidence proves and the hearing examiner finds that in the contest for the sale at retail of Knoll furniture to the ultimate consumer—the user—the following classes of Knoll customers compete with each other and with members of each of the other classes:

1. Architects
2. Interior Designers
3. Interior Decorators
4. Retail Furniture Stores
5. The Furniture Departments of Department Stores
6. Office Equipment and Furniture Stores
7. Knoll Associates, Inc.
8. Art Metal Inc.

However, in order to dispel a continuing misconception by Knoll's counsel, it may be helpful to reiterate that complaint counsel need not, in order to obtain an order in this case have proven (as he has) that all of the classes above named compete within the class, and with each other class. Discrimination in price as between two department stores, or furniture stores, or interior designers, or architects, who compete with each other in the sale of Knoll furniture would have been sufficient for a prima facie case. However, complaint counsel have proven—not a bare bones case, on this issue—but have adduced preponderant proof—sometimes from the mouths of Knoll's own witnesses.

A resume of some of the evidence of competition follows:

JAMES A. KEILLOR, Jr., of B. Altman & Co. testified that his firm's competitors are, "Anyone who sells furniture." (Tr. 178)

RALPH D. SENS of Desks, Inc., was asked: "In recent years, Mr. Sens, have you been getting any competition in the sale of furniture from decorators and designers?" He replied: "I think in New York you get competition from everybody. As a general answer, yes, we get competition of all types." (Tr. 455)

ABE ITKIN, of Itkin Bros., Inc., stated that if designers and decorators did not handle any furniture for clients, ". . . we would be in a better position, yes. We would be in a wonderful position." (Tr. 337)

AARON MERZIN, of Detroit Office Supply, Inc., a 40 percent purchaser (Tr. 1359), testified that his firm engaged in contract work (Tr. 1360) and listed among his competitors Benon Products and C. A. Finsterwald—both 50 percent purchases, and Robinson Furniture and Gregory, Mayer & Thom, which were 50 percent accounts in 1960. He also named as competitors Ideas, Inc., J. L. Hudson, Triangle Furniture and Art Metal, Inc. (Tr. 1362-63)

GEORGE H. THOM, of Ideas, Incorporated, named as competitors Benon Products; C. A. Finsterwald; Adler-Schnee Associates; Robinson Furniture Company; Gregory, Mayer & Thom; J. L. Hudson; Detroit Office Equipment Mart; Service Office Supply; Sables; General Fireproofing; Shaw-Walker; Contract, Inc., and Art Metal. (Tr. 1250)

HARRY G. DEMANT, of Walter Herz Interiors, Incorporated, named as competitors Benon Products; C. A. Finsterwald; Adler-Schnee Associates; Casual Living Modes; Robinson Furniture Company; J. L. Hudson Company; Ideas, Incorporated; and Englander Furniture Company. (Tr. 1320-24)

BERNARD SHERMAN, of Casual Living Modes, included Walter Herz Interiors and Adler-Schnee among his several competitors. (Tr. 2792)

MAIER B. FINSTERWALD, of C. A. Finsterwald Company, mentioned the following 40 percent purchasers as his competitors J. L. Hudson; Ideas, Incorporated; Detroit Office Supply; and Gregory, Mayer & Thom. (Tr. 798-99)

VERNON BEITEL, of Benon Products Co., classified only C. A. Finsterwald and Jesse Osetek's firm, Contract, Inc., as his sole competitors in the resale of Knoll products during 1960 through 1962. Beitel stated that Robinson Furniture Company and Gregory, Mayer & Thom were competitors in the resale of Knoll furniture only during the time that they were receiving the 50 percent discount, but not when their discount was reduced to 40 percent. (Tr. 1027-28) Beitel testified Ideas, Incorporated, J. L. Hudson, and Robinson Furniture Company, were not his competitors in the resale of Knoll products because of his price advantage in purchasing products from Knoll Associates (Tr. 1020-31):

Q. What about the J. L. Hudson Company?

A. J. L. Hudson Company did not buy Knoll furniture at fifty off, so I do not consider them a competitor with Knoll furniture.

Q. What about Ideas, Incorporated?

A. Same.

Q. So your basis—what about Detroit Office Equipment?

A. The same. (Tr. 1028)

* * * * *

Q. Your definition of a competitor on the Knoll line depends on the type of discount that the particular purchaser is getting is that correct?

A. Correct. Yes.

Q. If the purchaser is getting a forty per cent discount, you do not consider him a competitor?

A. No, I do not.

Q. Why is that?

A. How can he compete when I am buying at a twenty per cent edge? (Tr. 1028-29)

In connection with furniture sold on a "bid" basis, Benon Products' competitors included such 40 percent purchasers as J. L. Hudson and Ideas, Incorporated. (Tr. 1030)

WALTER SMITH, purchasing agent for Wayne State University, solicited bids for some modern contemporary furniture from C. A. Finsterwald, a 50 percent purchaser; Benon Products, a 50 percent purchaser; and J. L. Hudson, a 40 percent purchaser. (Tr. 670) Robert H. Adams, of W. B. Ford Design, solicited bids from

the same three firms on specifications for the McDonnell job. (Tr. 1108)

AUSTIN J. KAUFMAN, of F. W. Roberts Company, Cleveland, a 40 percent purchaser, named as competitors two 50 percent purchasers in Cleveland: Wagner-Henzy-Fisher and Leon Gordon Miller & Associates. He also named as competitors the Higbee Company, Irvin & Co. and Wirthshafter's. (Tr. 1441-42) Mr. Kaufman testified that his company is in competition "at the local level" with Ohio Desk Company, Wagner-Henzy-Fisher, the contract departments of the Higbee Company and Halle Brothers department stores, Ace Desk Company, Wirthshafter's and Irvin & Co. (Tr. 1441) and that "... our biggest competitor in the design work is Leon Gordon Miller Associates, Arthur Lawrence Associates, who is a more recent competitor, and I am not really familiar with any others in the Cleveland area." (Tr. 1442)

WILLIAM M. GREGORY, of Capitol Office Supply Co., Inc., included W. D. Campbell, a 40 percent purchaser, in his list of competitors.

WILLIAM L. WILKOFF, of Decor Associates, Inc., in Washington, D.C., a 50 percent purchaser, testified that his firm competes with Knoll 40 percent discount accounts in Chase Furniture and The Door Store in the Greater Washington area. Mr. Wilkoff testified that Burton's, Ursell's, and Modern Design are retail outlets for contemporary furniture in the Washington area, and compete with Decor Associates and with one another. (Tr. 1665-69)

DONALD ROSS, of Architectural Interiors, Inc., a 40 percent purchaser, included the following 50 percent purchasers among his competitors: W. & J. Sloane, B. Altman, Macy's and Itkin Bros. Ross, an interior designer, stated that all interior designers, decorators, and wholesale or retail stores with a design department are his competitors. (Tr. 123, 124)

He further stated that both Macy and Itkin furnish services to their prospective Knoll purchasers which correspond to those of his own firm—Architectural Interiors, Inc. (Tr. 123-125) Ross had observed Itkin ads, advertising the same services that Architectural Interiors renders. (Tr. 1869-70) Ross testified: (Tr. 123 *et seq.*)

Q. Who are your competitors, in a general manner?

A. Well, our competitors, to my knowledge, are other designers, possible

decorators and retail stores or wholesale stores or establishments that maintain a design department, their own design department.

Q. Can you name some retail stores or wholesale stores that fit into the category that you just described?

A. Well, in the New York area, there are many. Some that come to mind would be some of the stores which—for example, I would say W. & J. Sloan[e]; B. Altman; Macy's; some of the office furnishing specialists such as Itkin Brothers; Charles Nathan. They are numerous. I would really have to spend a long time to think and enumerate them.

LEON GORDON MILLER, head of Leon Gordon Miller & Associates, Inc., an industrial and interior designing firm in Cleveland, Ohio, and Chairman of the Board of the Industrial Designers Institute, testified (Tr. 708 *et seq.*) that he had held every elected office in the Institute, a nationwide organization with approximately 350 senior professional industrial and interior designers, with four or five international associates. His own firm had employed as many as 32 professionals, and had been the interior designers for Sunny Acres Tuberculosis Hospital, Western Reserve Medical School and Institute of Pathology, Cleveland Institute of Music, Fairview Park Hospital, Cleveland, Ohio, and had supplied Vanderbilt University in Nashville, Tennessee, with design and planning services for an \$18 million health-science development program. His firm purchases furniture for its clients. (Tr. 716 *et seq.*) He knew that the furniture departments of “department stores around the country have contract departments with design staffs.” (Tr. 721) “. . . Marshall Field in Chicago is nationally known for its contract department.” (Tr. 722) The Higbee Company in Cleveland, a department store, had a furniture department which furnishes services similar to those of Mr. Miller's firm. Mr. Miller testified in substance that the contract divisions of retail furniture establishments compete not only with each other, but also with industrial and interior design firms. This competition includes other Knoll customers in Cleveland who resell Knoll furniture at retail to the ultimate user. “. . . in the interior field, I would say, our prime competition are furniture dealers that supply some type of a professional service.” (Tr. 728-29) Naming Wagner-Henzy-Fisher as an example—Mr. Miller testified that department stores around the country have contract departments with design staffs (Tr. 729, 721)

CHARLES C. SANBORN, of Charles G. Stott & Co., Inc., a 40 percent purchaser, named as competitors: W. D. Campbell Office Furniture, Inc., Stern Office Furniture, Capitol Office Supply, R. P. Andrews Office Equipment Company, General Fireproofing

Company, Shaw-Walker, Sloane-Mayer & Company, Revere Furniture Company, the contract department of the Hecht Company, Design Specifications, the architectural firm of Keyes, Lethbridge & Condon, and "local designers, architects." (Tr. 1399-1402; CX 641-644)

RITA LONG, of Rita Long Interiors, a 40 percent purchaser, named as competitors: W. & J. Sloane, B. Altman, Macy's, Itkin Bros., Bloomingdale's, Alessi Bros. and Braun & Rutherford—all 50 percent customers. (Tr. 248-49) She testified ". . . anybody who offers the services that I offer and the merchandise that I can offer is a competitor." (Tr. 252) She stated that firms such as Itkin Bros., B. Altman, and Sloane's are "involved in the same work I am involved in, essentially. That's it." (Tr. 253) She stated that Bloomingdale's, Macy's, Lord & Taylor, Alessi Bros., and Braun & Rutherford offer design and planning services just as she does. (Tr. 252, *et seq.*)

LILLIAN MILLER, of S. J. Miller Associates Corp., another 40 percent purchaser, named as competitors Itkins, Alessi Bros., Braun & Rutherford, W. & J. Sloane, Art Metal, Inc., and Knoll Associates. (Tr. 381-82) Mrs. Miller testified:

We prefer to think that other design firms only are our competitors, but unfortunately many firms that supply furniture are also within recent years in our field as well.

* * * * *

. . . They are doing decoration and planning and layout as well as selling furniture. (Tr. 381)

A young lady, a colorist, with W. & J. Sloane, Inc., for years, performed the same professional services for S. J. Miller & Associates, Corp., on an occasional, free lance basis as she had been doing for Sloane. (Tr. 382)

JACK URDANG, of National Hospital Supply Co., Inc., testified to being in competition on bids with Designs for Business. (Tr. 2107)

DIANA ANDERSON, of Planned Office Interiors (a 40 percent discount) testified:

Q. Do they [Itkin] render services which are similar to yours?

* * * * *

THE WITNESS: Itkin, I guess, is in the retail furniture business. But they do have a planning service, and this is the only rub that we have with them, really.

Q. In the rendering of this service, you are in competition with each other?

A. Yes, in that respect.

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Q. So that a potential client of yours could go to Itkin's and obtain similar services that you would render?

* * * * *

A. It's difficult. They are not the same quality that we are. But the average office person doesn't realize this. I don't know how to answer this (Tr. 2463-64).

LOUIS M.S. BEAL, of I.S.D., Incorporated (Interior Space Design), testified:

MR. IMBERMAN: Concerning these questions about Itkin Brothers, do you consider that Itkin Brothers is a competitor of yours in interior design services?

THE WITNESS: They have been in the past. I don't consider them now. (Tr. 2445)

F. W. WAGNER, secretary-treasurer of Wagner-Henzy-Fisher Company, a retail store in Cleveland, which was a 50 percent Knoll customer in 1960 and 1962, testified that the store employed the services of interior designers or interior decorators and that interior design services were rendered on about half of their furniture sales (Tr. 936)—75 percent of their Knoll sales were made when their design service was supplied. (Tr. 944) He named as competitors Ohio Desk Company, Ace Desk Company and the contract department of Higbee Company and Halle Brothers—also The Roberts Company. (Tr. 947) Wagner-Henzy-Fisher competes with Wirtshafter's only in metal furniture (Tr. 948)—Mr. Wagner further testified:

My understanding and our understanding of our arrangement with Knoll was that at all times they reserved the right to sell to the architect and to the interior decorator or any other furniture dealers directly, and that those people would have the privilege of using our showroom where we have a display of Knoll on the floor, in that Knoll can sell to the architect and the interior decorator direct or we can sell them, but we are put in competition in that respect. (Tr. 950)

Mr. Wagner stated his company was in competition with Leon Gordon Miller "more on design service than we are on furniture." (Tr. 958) Wagner-Henzy-Fisher "would be in competition with designers on design service" (Tr. 958) and such design service "is usually rendered in conjunction with the sale of furniture. . . ." (Tr. 959) Wagner-Henzy-Fisher competes with interior decorators—Irvin & Company and Holzheimer. (Tr. 961) In connection with the Bailey Meter job, which used Knoll furniture, four companies received invitations to bid—the Higbee Company, The

Ohio Desk Company, F. W. Roberts Company and Wagner-Henzy-Fisher. (Tr. 986)

FRANK STOVERING, of the Higbee Company, stated that his firm's competitors are office furniture firms, interior design firms, and interior decorating firms (Tr. 845) He further testified that on the basis of his experience in the furniture field, interior designing firms compete with office furniture dealers and that the same is true of interior decorating firms. (Tr. 846) He named Wagner-Henzy-Fisher (Tr. 835) and Leon Gordon Miller (Tr. 847) as competitors. Stovering testified to losing \$50,000 to \$60,000 worth of business on one job to Wagner-Henzy-Fisher on a bid for the Bailey Meter contract. (Tr. 874) "[W]e could not sell as someone who could buy at a wider margin of discount." (Tr. 875)

STEPHEN KOVACS, of W. & J. Sloane, Inc., testified that his firm competes with interior designers. (Tr. 2248-49)

Interior and industrial designers on the one hand, and stores, dealers and contract houses on the other, cross-compete in that designers buy and sell furniture in addition to their design service; and stores, dealers, and contract houses provide design services in addition to buying and selling furniture.

Knoll's No Injury Defense

Knoll's price discriminations among its customers who are competing sellers to the ultimate consumer have had the effect of lessening and injuring competition and will continue "to lessen competition" or "to injure, destroy, or prevent competition" between its favored and nonfavored customers.

All the witnesses who were questioned on the subject, testified that competition for the Knoll retail purchasers' dollars is very keen. [See for example the testimony of Donald Ross (Tr. 123); Lillian Miller (Tr. 381); Leon Gordon Miller (Tr. 727); F. W. Wagner (Tr. 964); Jack Urdang (Tr. 2094); W. L. Humphrey (Tr. 2862); Diana Anderson (Tr. 2463); Frank Stovering (Tr. 849); Charles G. Sanborn (Tr. 1405); William M. Gregory (Tr. 1517); William L. Wilkoff (Tr. 1675).] Knoll's counsel have not disputed this fact nor offered evidence to contradict it. The price at which the retail sellers of Knoll furniture are able to buy from Knoll is a very important element affecting the ability of such retail sellers to compete with other retail sellers of Knoll furniture. [See the testimony of Donald Ross (Tr. 131); Rita Long (Tr. 261); Lillian Miller (Tr. 391); Ralph Sens (Tr. 461); F. W.

Wagner (Tr. 964); George Thom (Tr. 1258); Aaron Merzin (Tr. 1362); Austin Kaufman (Tr. 1455); Leonard Linden (Tr. 1635); Emily Malino (Tr. 2030); Louis Beal (Tr. 2429); W. L. Humphrey (Tr. 2865-66); William Baiardo (Tr. 2940); William Race (Tr. 3073); Leon Gordon Miller (Tr. 3294).]

Knoll's nonfavored customers in some instances did not submit written bids on contract solicitations because they knew they would be competing with favored Knoll customers who could buy from Knoll for \$100 the same item for which the nonfavored customers had to pay Knoll \$120.

Several favored customers went out of business. C. A. Finsterwald in Detroit went into bankruptcy. This coincidental fact does not legally minimize the likelihood of competitive injury attributable to Knoll's price discrimination. Knoll's counsel did not show any causal nexus between being a favored Knoll customer and lack of business success. The silence of the record on the reasons for Knoll's few favored customers going out of business cautions against any findings or conclusions to be drawn therefrom.

In *Forster Mfg. Co.*, 335 F. 2d 47 (1 Cir. 1964) [7 S.&D. 943] the first circuit, reversing and remanding for other reasons, *inter alia*, states (p. 952):

Additionally the respondents contend that the record does not support the Commission's conclusion that their above price discriminations had the defined effect upon competition, which, they say, is that the discriminations were "likely to result in injury to competition." This contention rests upon the erroneous interpretation of the Act pointed out herein above. As we have shown it does not need to appear in order to establish violation of the Act that a discrimination in price is "likely" to have the effect of substantially lessening competition, or of tending to create monopoly or of injuring, destroying or preventing competition. It is enough to show violation of the Act if it is "reasonably possible," (not even "reasonably probable") that price discrimination "may" have an effect.

Although the above-quoted section referred to the standard for ascertaining adverse competitive effect, in primary line cases, it is an equally suitable guidepost for measuring competitive injury in this—a secondary line case—where the proof of anticompetitive effect need not be as strong and, where there is respectable decisional authority to the effect that in a secondary line case anticompetitive effect, *i.e.*, competitive injury, may be inferred. (See ante p. 316 *et seq.*)

Lillian Miller testified that a 50 percent discount from Knoll, instead of her present 40 percent discount, would permit her to

compete more effectively by being able to provide "the most fully well-designed office" possible within a given budget. (Tr. 391-92)

Donald Ross emphasized the importance of being able to purchase Knoll products at a 50 percent discount: "Naturally, if we were obtaining a larger discount and if we were selling on a percentage basis, certainly we would be in a better position in certain instances to retain a client or make a client." (Tr. 136-37) The cost of Knoll furniture to Ross' firm is a significant factor in effectively competing for the job. (Tr. 158-59) Ross testified that clients with whom he has discussed the respective merits of his firm's (a non-favored customer) services and those of Itkin (a favored customer) have been concerned with price. (Tr. 157-58)

Rita Long testified that a 50 percent discount by Knoll would place her in a better competitive position with regard to competitors such as Itkin, Sloane, etc. (Tr. 266), and would enable her to stretch her clients' budgets farther. Cost is particularly important in Miss Long's business because she depends chiefly upon word-of-mouth recommendations for business. (Tr. 261, 299)

Charles Sanborn testified that a 50 percent discount from Knoll would put Charles G. Stott & Co., Inc., in a better competitive position, and enable it to do a better job for its customers on Knoll products. (Tr. 1406) Aaron Merzin opined that with a larger discount Detroit Office Supply could "compete with anybody." (Tr. 1383-84)

Austin Kaufman, of F. W. Roberts Company, stated that his design department frequently must apologize to clients and point out that although it recommends that Knoll furniture be used, the client cannot buy it from his company as cheaply as it can from someone else in the market. He said that Knoll furniture ". . . is well designed particularly favored by our designers who we feel are knowledgeable about contemporary furniture and we would like to use more Knoll. But we feel on the one hand it will give the client design but he is going to pay a penalty premium, I would say, for that merchandise." (Tr. 1492-94) Vernon Beitel, of Benon Products Co., a 50 percent purchaser, stated that "J. L. Hudson Company did not buy Knoll furniture at fifty off, so I do not consider them a competitor with Knoll furniture." He said the same is true about Ideas, Inc., and Detroit Office Supply. (Tr. 1028) Beitel did not consider any other firm as his competitor for Knoll business, unless that firm was getting the same 50% discount that Beitel was getting. "How can he compete when I am buying at a twenty per cent edge?" (Tr. 1029)

Austin J. Kaufman stated that his (F. W. Roberts Company's) normal markup range on bid jobs was from 10 to 25 percent.

... We don't try to hide from them that we buy Knoll at 40 off and Wagner-Henzy-Fisher buys Knoll at 50 per cent off, and as a direct result of this we will almost take ourselves out of getting bids on that particular segment of a job because it is not to the client's best interest to buy Knoll furniture from us because with our normal margin or markup over cost on it would be higher than Wagner-Henzy-Fisher's would be on a direct bid. Because of this I feel and I am sure that we would have had more invitations to bid on Knoll equipment, whether it be substantial or not as to the percentage of the total job if we were buying Knoll on a 50 percent off list basis. . . . (Tr. 1492-93)

Aaron Merzin stated that there were occasions when Detroit Office Supply was invited to bid on Knoll furniture but failed to submit a quotation. "I didn't stand a chance to get even part of the job." (Tr. 1382) Merzin's firm did not bid on Knoll merchandise on the Wayne State University job because: "We felt we didn't stand a chance to get it with our discount they are giving to us." (Tr. 1362)

Harry G. Demant of Walter Herz Interiors, Incorporated, testified:

Well you have two strikes against you when you have to pay twenty per cent more on cost for the merchandise than the next guy who would get the maximum discount. (Tr. 1325)

He continued:

If I was offered a larger discount by a manufacturer [Knoll], I would go back into bidding more of the jobs, yes. . . . I have practically quit. I have not bid any Knoll furniture lately because it is senseless. . . . contract bids in this town go possibly for less than ten per cent over cost, and when we have to pay 20 per cent above cost, it is very obvious that it doesn't pay to bid. (Tr. 1349-50)

George Thom, commenting upon his firm's (Ideas, Incorporated), lack of success in bidding Knoll furniture on the Wayne State University, Parke-Davis, and Pontiac Motor Car contracts testified:

... it is ridiculous to try and bid against people who do get a fifty per cent. We have already a twenty per cent differential, at a forty per cent discount. . . . if you buy something for fifty off, it is twenty per cent less than you buy if for forty off, so if you already have twenty per cent difference you can't add much to it and be competitive. There is no use being in business to go broke. You are in business to make a profit. (Tr. 1259)

Frank Stovering of the Higbee Company testified:

... it is taken for granted that if they are buying at a better price, they most certainly could sell at a better price.

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Stovering pointed out that Higbee could not bid successfully against a competitor paying 20 percent less than it does. For this reason Higbee was unable to bid Knoll furniture on the Bailey Meter job. (Tr. 860-65)

Vernon Beitel of Benon Products, testified that although his usual markup on bids was approximately 25 percent, his average markup in the Wayne State University job was 10 percent.

Walter Smith, purchasing agent for Wayne State University, testified that the Knoll furniture was purchased from Benon Products even though bids had been solicited from Benon, Finsterwald, Robinson Furniture, J. L. Hudson, Englander, Eastern Cabinet and Knoll Associates, and quotations were received from Benon, Finsterwald, Englander and Knoll. Seven months later, the University purchased another group of Knoll chairs based upon the bid submitted by Benon in the earlier solicitation. The prices arranged with Benon for these chairs were lower than the prices quoted by Benon's competitors in the earlier solicitation (Tr. 670, 677 & 679), so Benon got the business.

Complaint counsel's substantial proof of the anticompetitive effect of Knoll's price discrimination (which proof abounds in this record) is not contradicted by specific testimony or exhibits cited by Knoll's counsel. The only "proof" is the statement by Knoll's counsel at the oral argument that interior decorators and designers do not compete with other retail sellers of Knoll furniture, *ergo* there was no Robinson-Patman anticompetitive effect resulting. The hearing examiner sought, unsuccessfully, at the oral argument, to impress upon Knoll's counsel that proof of price discrimination between *any* two competitive retail sellers of Knoll furniture would be sufficient to make operative the *ratio decidendi* of *Morton Salt*, *United Biscuit*, and *Forster Mfg. Co.*, all *supra*. The hearing examiner pointed out to Knoll's counsel that if all testimony by and about interior decorators and interior designers were removed from the record, there would remain overwhelming proof of both price discriminations between other Knoll customers, and anticompetitive effects resulting therefrom. However, Knoll's counsel insists upon maintaining erroneously to the bitter end that the inclusion of interior designers and interior decorators in the evidence in this record somehow immunizes Knoll from long-established and well-recognized decisional authority.

Knoll's Meeting Competition Defense

The key words of the meeting competition statute are "meeting" and "equally low price." Those are the words in the statute, and, no matter how persuasively Knoll's counsel may argue, nor how strongly they may feel, the evidence does not prove that the 10 percent additional discount which Knoll gave to its favored customers "was made in good faith to meet an *equally low price* of a competitor, * * *." Knoll's 2(b) defense boils down to this: When Knoll felt it would promote the distribution and sale of its furniture, it gave its highest discount (50 percent) to Knoll customers who demanded it as a condition precedent for marketing Knoll furniture aggressively—with floor displays and minimum purchases. Customarily, Knoll's customers, so favored, usually were receiving, coincidentally, the highest discounts granted by Knoll's competitors.

Some categories of Knoll's customers, *e.g.*, retail department and furniture stores, would not aggressively promote the sale of Knoll furniture, *i.e.*, stock it and display it on the floor, unless they did receive the maximum discount. It cost such retailers so much money to stock Knoll and maintain a floor display that they had to have a 100 percent markup to make a reasonable profit.

Nothing in the text of the meeting competition statute, says specifically, or by inference, that a price discriminator has proven his meeting competition defense by granting his highest *discount* to match the highest *discount* of a competitor. Stocking and floor displays were not Knoll's conditions precedent for interior designers obtaining the maximum discount. Other subtle factors determined which interior designers and decorators received the extra 10 percent discount. Moreover, there are instances in this record of the extra 10 percent discount being taken away after it was originally granted even though competitors' discounts remained at a maximum.

* * * The seller has the burden of bringing himself within the exculpatory provision of §2(b), which has been interpreted to afford an absolute defense to a charge of violating §2(a), notwithstanding the existence of the statutorily prohibited anticompetitive effect, *Standard Oil Co. v. Federal Trade Comm'n*, 340 U.S. 231.¹⁴

Knoll's meeting competition defense will exculpate its discriminatory higher discount only if such discriminations were made in good faith to meet individual competitive situations. Good faith is

¹⁴ *Federal Trade Commission v. Sun Oil Co.*, *supra*, 371 U.S. 505, 514.

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not present if a seller adopts the unlawful discriminatory pricing system of a competitor. The meeting competition defense is not available to justify higher discounts on the basis of an inherently discriminatory pricing system. The "equally low price" of a competitor must be the equally low "lawful" price for a given quantity of an identified item. If a seller increases his discount so as to establish a discriminatory lower price to some customer such seller must have reasonable grounds upon which to conclude that the competitor's "lower price" does exist and what that price is. Good faith is not proven in a record if the seller acts entirely on unsupported, unverified verbal statements, nor is good faith established if the seller knew or should have known that his competitor's price or pricing system was unlawful or inherently illegal.¹⁵

Inasmuch as meeting competition is an affirmative defense, the burden of going forward and the burden of proof are upon Knoll. The statute does not speak in terms of rebates or discounts, and Knoll was therefore under the burden of putting in this record the best evidence available from which this examiner could ascertain the competitor's price which was being met, proof that such price was a lawful, lower price, and proof that such price was not part of an inherently discriminatory pricing system.

In that connection, it should be noted that in the modern contemporary furniture business, marketing practices include, among other things, the so-called "protected" bid. In other words, on large orders which are worked up by a specific furniture dealer and upon which written bids are submitted, the manufacturer did, and does, endeavor to protect the sales representative who worked up the bid, and prevent such sales representative from losing the contract because of price cutting by some other sales representative. In the case of Herman Miller, this was called "Job Registration." At page 2593 of the transcript, Vernon Beitel of Benon Products Co. testified:

HEARING EXAMINER GROSS: Mr. Beitel, every time one of your competitors would give a bid for Herman Miller Company, would you be notified by the Herman Miller Company that you better not bid on that contract because if you did you would have to pay more for the merchandise than the fellow that had worked it up?

¹⁵ See *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *F.T.C. v. Standard Oil Co.*, 355 U.S. 396 (1958); *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948); *F.T.C. v. National Lead Co.*, 352 U.S. 419 (1957); *F.T.C. v. Standard Brands, Inc.*, 189 F. 2d 510 (2nd Cir. 1951); *Standard Oil Co. v. Brown*, 238 F. 2d 54 (5th Cir. 1956); *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951); *Corn Products Ref. Co. v. F.T.C.*, 324 U.S. 726 (1945).

THE WITNESS: Yes, sir.

William Kirby, former president of Eastern Cabinet Works, and for twenty years a member of the City Council of Grosse Pointe Farms (Michigan) testified:

A. We had bid a job which I will refer to as the Ferndale High School job. A portion of the job involved a substantial amount of Knoll furniture. We were the successful bidders on the job, and subsequently, within a matter of a day or two, I was visited by Mr. Osetek, who was the Knoll representative in Michigan, at which time he advised me they would not sell me Knoll furniture at the 50 percent discount.

He further advised me they would not even sell me the furniture for the Ferndale High School job at the 50 percent discount, at which time I told him, or reminded him that I had always purchased at the 50 percent discount and had never been advised to the contrary.

He advised me that he was changing it at that time. I told him that unless he would put it in writing, and so advise me I would assume that I was going to buy it at the same discount I always had. He suggested that I cancel the contract with Ferndale High School so that it could go to the next bidder. I, of course, advised him we had—as I remembered it, put up a performance bond or bid bond and that I would take no further action on any part of it until I received a letter from him telling me that they would refuse to sell it to me, and when I received the letter I would then decide what action to take.

Q. Did Mr. Osetek tell you why he would not sell you that furniture for 50 off?

A. He stated that he was surprised that we were even bidding that job; that somebody had been doing the work on it and they were the ones that were supposed to have gotten the job.

Q. Were you eventually able to buy the furniture to fill that job?

A. Yes. Apparently they decided that—it was Mr. Osetek who decided that it was inopportune to cancel my contract at the 50 percent discount at that time.

MR. IMBERMAN: May I object to the answer?

HEARING EXAMINER GROSS: All after the word "Yes" may go out. (Tr. 4310-4311)

In *Forster Mfg. Co. v. F.T.C.*, 335 F. 2d, 47 (1964) page 361, *supra*, the court, in reversing and remanding, held in substance that the Commission had laid down an overly strict standard by which the discriminator's "good faith" in meeting competition should be judged. In the instant case, however, other more basic questions must be answered in Knoll's favor before we reach the "good faith" issue.

The Supreme Court's decision in *Sun Oil Co.*, *supra*, contains a summary of the criteria by which Knoll's meeting competition evidence must be judged if it is to exculpate Knoll's price discriminations. The Commission's decision in *Callaway Mills Company*,

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Docket 7634, (*supra*, pp. 329-330) was issued February 10, 1964, after the *Sun Oil Co.* decision.

The following furniture manufacturers, among others, do, and did, compete during the relevant period with Knoll for the retail dollar in the sale of furniture to the ultimate user—the consumer: (RX 57 as corrected)

<i>Name</i>	<i>Address</i>
Herman Miller, Inc.	Zeeland, Michigan
Lehigh Furniture Corporation	New York, N. Y.
Directional Contract Furniture Corporation ..	New York, N. Y.
Stow & Davis Furniture Co.	Grand Rapids, Michigan
B. L. Marble Furniture Inc.	Bedford, Ohio
Taylor Chair Co.	Bedford, Ohio
American Chair Co.	Sheyboygan, Wisconsin
Do More Office Furniture	Elkhart, Indiana
Dux, Inc.	Burlingame, Cal.
Laverne Originals	New York, N. Y.
Jens Risom Design, Inc.	New York, N. Y.
Founders Furniture Co.	Pleasant Garden, N. C.
J. G. Furniture Company	New York, N. Y.
Robert John Co.	Philadelphia, Pa.
Thonet Industries, Inc.	New York, N. Y.
Standard Furniture Co.	Herkimer, N. Y.
Dunbar Furniture Corporation	Berne, Indiana
Thayer Coggin	High Point, N. C.

However, each of the competitors named does not compete with Knoll in the retail sale of each and every item in the Knoll line. Some compete only in one category (*e.g.*, seating pieces, desks, etc.); some compete in several categories. A few may compete as to the entire line. As a group they represent tough and sharp competition for Knoll.

During the years involved, and in the cities involved, it was and is Knoll's usual practice to attempt to sell its furniture to its customers at a 40 percent discount from its published list price. In no instance in this record has Knoll sold its furniture at a price less than 50 percent discount of its list price. The extra 10 percent discount—the subject matter of this proceeding—was not granted exclusively to any class or category of Knoll customers, *i.e.*, architects, interior designers, retail department stores, office equipment and supply houses, etc.

Most of Knoll's competitors named above, during the period involved, also priced their furniture to Knoll customers at stated, but varying, discounts from list prices. A few instances of manu-

facturers using net prices have been mentioned in this record, but, as a general rule, most of the manufacturers of modern contemporary furniture price their lines to their customers, as Knoll does, at a stated discount from the published list price.

Complaint counsel have not proven any predatory intent on Knoll's part which prompted it to grant the extra 10 percent discount in those instances in which it did so. Likewise, Knoll's counsel have not proven in a single instance as to a specifically identified item of furniture that Knoll met a competitor's price with an equally low price.

Knoll did not, without exception, always grant the highest 50 percent discount to any customer who demanded it to meet another manufacturer's highest discount. Knoll's 50 percent customers were selected because it was believed they would put forth a better effort to sell Knoll furniture, *i.e.*, they would stock the furniture, display it on the floor, carry a minimal inventory, push the line when possible, and at the same time, not impair the public image of prestige which Knoll sought and seeks to create. Even after giving the 50 percent discount, Knoll's prices for its furniture are still higher than most competitors for comparable items. Dealers have indicated that the reason why they have done such a small volume in Knoll furniture is that Knoll does not charge as low a price as other companies. (Respondent's proposed findings, p. 44; Tr. 109, 1003, 1981-82.) The furniture manufacturing industry was characterized by witnesses as one marked by sharp price competition. (Respondent's proposed findings, p. 21; Tr. 2100.)

Interior designers and decorators are customarily compensated for their services on one or more of the following bases: (1) a flat fee fixed in advance with the client; (2) a fee measured by the number of square feet of space in the client's premises; (3) an hourly rate for the services of the designer and his staff; (4) a percentage of the cost of all work done in and about the client's premises; (5) a percentage of the cost of the furniture and furnishings the designer specifies and/or acquires for the client. (Respondent's proposed findings, p. 12.)

Knoll's extra 10 percent discount to its favored customers was not granted to such favored customers so that Knoll might meet or match an identified or identifiable competitor's price for an identified or identifiable item of merchandise. Knoll seeks to exculpate its price discriminations by asserting, contrary to decisional authority, that it may meet or match its competitor's high-

est discount with its own highest discount, irrespective of what such action may mean when translated into terms of price.

A resume of some of the evidence relating to the granting of the extra 10 percent discount by Knoll to its favored customers follows:

Detroit, Michigan

C. A. Finsterwald Company—Vernon Beitel, a Finsterwald salesman, and Raymond Werbe, the Finsterwald vice president and general manager, negotiated the 50 percent discount from Knoll in 1955 with Mrs. May Festa who was in charge of Knoll's Birmingham, Michigan, showroom. Finsterwald had decided to get into modern contemporary furniture lines. It negotiated its first contract with Herman Miller, Inc., at 50 percent off list. (See Tr. 2555, *et seq.*) Beitel testified:

* * * but I can say this: That all in a bunch, within roughly a six-month to a year period, we took on the Lehigh line, the Risom line, the Dux line, Knoll, and two or three others, I think. They don't come to mind. (Tr. 2558)

Beitel further testified:

* * * * *
The only one I can remember of ever talking to, and I don't remember if they had a representative, was a woman whose name was Mrs. May Festa, who was primarily in charge of the showroom, functioning as a showroom manager and office person rather than a traveling sales person. (Tr. 2560)

Q. Now, you knew this lady, Mrs. Festa?

A. Right.

Q. Was she the lady who ran the showroom and the office and with whom people talked to when they wanted to talk about Knoll furniture?

A. She was the only one, very much on the ball.

Q. She ran the whole place at that time?

A. Yes, sir.

Q. Did you and Mr. Werbe go to see her?

A. Specifically on such and such a day and at such and such an hour, I cannot say yes. But we made many visits in that area. I would have—yes, yes, but when I couldn't tell you.

Q. All right. We realize you are talking now about something that occurred in 1955, am I right?

A. Yes.

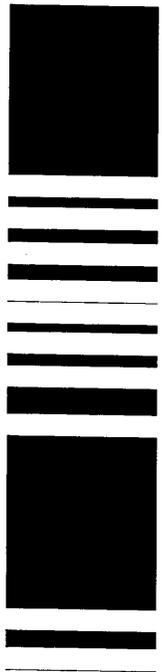
Q. You do have a recollection of having gone to see her with Mr. Werbe?

A. Yes.

Q. Do you recall talking with her about the Finsterwald Company taking on the Knoll line of furniture?

A. Yes.

Q. Now, in the conversations that you and Mr. Werbe had with Mrs. Festa, did you talk to her about the discount that the Finsterwald Company wanted to take the line on at?



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A. Definitely, yes.

Q. What was that discount?

A. Fifty.

Q. Did you tell her that Finsterwald was then carrying Herman Miller furniture?

A. Yes.

Q. And you had either taken on or were in the process of taking on these other lines of furniture?

A. Yes.

Q. Did you tell her at what discount you were carrying the Miller line of furniture?

A. Yes.

Q. And at what discounts you were either than carrying the other lines or were talking about carrying the other lines?

A. Yes.

Q. Were each of these lines at a 50 and 10 discount off the list price?

A. Yes.

Q. All of this was communicated by you and Mr. Werbe to Mrs. Festa, am I right?

A. Yes.

Q. Now, prior to the time that you had talked with Mrs. Festa, had you bought occasional pieces of Knoll furniture if you needed them to fill in on a job?

A. I don't think so. I can't remember specifically, no.

Q. All right. Did there come a time when Mrs. Festa told you, in words or in substance, that Knoll Associates was willing to sell Finsterwald its line of furniture?

A. Yes.

* * * * *

Q. Was that at a 50 percent discount off the published list price?

A. Yes.

Q. And from that time on until you left the Finsterwald Company, did they continue to carry the line of Knoll Furniture at a 50 percent discount off the list price?

A. Yes.

Q. During all that time and until you left was Finsterwald carrying the Miller line and the Lehigh line and Dux and the others that you mentioned?

A. Yes.

Q. Were they also carried at a discount of 50 or 50 and 10 off the list price?

A. Yes. (Tr. 2561-64)

Irving Wiseman, general manager of Finsterwald from 1959 to 1963 and the man responsible for final decisions on purchasing from furniture manufacturers, testified that he never asked anyone from Knoll Associates to match or meet the discount of any other manufacturer (Tr. 4347); never discussed discounts with Joseph Dworski (Knoll's representative) during that period (Tr.

4343) ; only knew Dworski casually ; might have met him in person once or twice in a period of ten years ; and Dworski had never been in Finsterwald's place of business.

Beitel testified that when the original 50 percent discount was negotiated with Knoll, the Finsterwald organization was seeking to buy furniture at what was known to be the established maximum Knoll discount. (Tr. 2602-04) Beitel further testified that Finsterwald would have purchased from Knoll regardless of the discount so long as it could buy at Knoll's lowest prices. (Tr. 2637-38)

The evidence does not indicate what identifiable items of their competitors Knoll was seeking to match in price when it allowed the 50 percent discount to Finsterwald.

Benon Products Co.—Three years after Vernon Beitel had negotiated the 50 percent discount for Finsterwald, he started his own company (1958)—Benon Products Co. where, from its inception, he received Knoll's highest (50 percent) discount.

Jesse Osetek, Knoll's representative, testified that in his conversations with Benon's representatives no specific items or specific prices were compared. (Tr. 3648-49) Benon's primary price consideration was to buy at the lowest available prices from the manufacturers, irrespective of discount. (Tr. 1093-94) Beitel's testimony (Tr. 2623) was to the effect that the Knoll and Miller lines are interchangeable if one wishes to achieve a certain effect, motif or decorating decor, even though the lines may not be the same. The Knoll line might appeal to different esthetic tastes, and this would be true if the Knoll line were being compared with the lines of its competitors other than Herman Miller who have been mentioned in this record. (Tr. 2623) The interchangeability of the various manufacturers' lines of furniture boils down to a question of the decorator's and customer's personal taste. (Tr. 2607)

Jesse Osetek, Knoll's representative, testified, *inter alia*, concerning Vernon Beitel's Benon Products :

A. Yes. His major supplier at that time was Herman Miller, Inc. He told me, and Mr. Werbe told me, they were receiving a discount of fifty and ten.

Q. From Herman Miller?

A. Yes.

Q. Is Herman Miller one of Knoll's principal competitors?

A. I would say so.

Q. Did Mr. Beitel tell you he would not buy Knoll furniture except at fifty percent?

A. Yes, he did.



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MR. TURIEL: Objection. This is a leading question.

HEARING EXAMINER GROSS: Yes. Please try to refrain from leading. Just ask the witness what was stated. Otherwise, it diminishes the value of his testimony.

By Mr. Imberman:

Q. Tell us in your own words, to the best of your recollection, what Mr. Beitel told you at that time about this topic.

A. Again, starting a new business, he indicated *he was interested in handling Knoll if he could receive a fifty-percent discount*. In no uncertain terms he said he would not consider selling Knoll unless he received the fifty-percent discount inasmuch as he was getting a fifty-and-ten percent discount from Herman Miller. (Emphasis supplied.)

I think it was the same fifty-and-ten percent from Simmons Manufacturing Company. He had quite a few: Lehigh Furniture Company, I think, was fifty and ten, and Dux. I can't recall any more, but I am sure there were.

Q. Did you have occasion, from the time of this first conversation that you had with Mr. Beitel, to go to his showroom from time to time?

A. Yes.

Q. Did you call on him from time to time, from the time of this first conversation until 1960, when you left?

A. Yes.

Q. And did he have furniture on display in his showroom?

A. Yes.

Q. What manufacturers?

A. Herman Miller, Simmons, I think some Dux, or some Danish-type wood furniture.

Q. Did you continue to sell him at a fifty-percent discount from the time of this first conversation until 1960, when you left?

A. After we agreed to the fifty-percent discount, which was maybe four or five months after the initial talk, yes, we did.

Q. You negotiated this thing out with him about giving him the fifty-percent discount?

A. I recommended it to Mr. Dworski. He went along with the discount.

Q. Why did you continue to sell him at a fifty-percent discount?

A. Well, at one time we did suggest that maybe we should not have the fifty-percent discount for Mr. Beitel, at which time he unequivocally again stated that he would not sell our furniture at any discount less than fifty percent.

Q. Did he say to you at that time what he was getting from others?

A. That I couldn't recall specifically, but I assume there was no change in most of the discounts. Judging from the maintenance of his display that he had in there, he maintained the Herman Miller equipment. I assume that he had the same discount.

Q. Is that your judgment from everything you knew about the business?

MR. TURIEL: I object and move that the last answer be stricken.

HEARING EXAMINER GROSS: That part of the question as to what the witness assumed?

MR. TURIEL: Yes.

HEARING EXAMINER GROSS: Yes, that may go out.

By Mr. Imberman:

Q. Well, did you make a judgment as a marketing man and knowledgeable in the furniture business, and based on everything you had heard from Mr. Beitel, as to whether or not he was continuing to get a fifty or a fifty-and-ten discount from Knoll's competitors?

MR. TURIEL: I object, your Honor. The question is vague and ambiguous. Furthermore, the witness stated he doesn't know and he doesn't recall.

MR. IMBERMAN: He has not said that at all.

HEARING EXAMINER GROSS: You say what you want to say, sir. Go right ahead. I will overrule both of you and let the witness talk.

A. I am sure that he maintained the fifty-and-ten percent discount at least from Herman Miller, because he had bid on several jobs against other people who handled the fifty-and-ten with Miller and he was successful in it. It is not possible that he could not be getting that maximum discount. I knew he was getting the maximum discount from all these people.

Q. Let us go on to C. A. Finsterwald, Mr. Osetek. When you started to work for Mr. Dworski, was Finsterwald then an account?

A. Yes.

Q. That is, to whom Knoll was selling furniture?

A. That's right.

Q. At what discount?

A. At fifty percent.

Q. Did you continue to sell them a fifty percent until 1960, when you left?

A. Yes, I did.

Q. Did you ever have a conversation with anyone at Finsterwald during these years with respect to the discount that they were either getting from Knoll or getting from other competitors of Knoll?

A. Yes, I did.

Q. With whom did you have such conversations?

A. Well, initially, with Mr. Werbe, who was there before they started Benon Products; and after that with Mr. Irving Wiseman. (Tr. 3621-25)

Robinson Furniture Company—Robinson Furniture Company negotiated with furniture manufacturers for a number of lines of modern contemporary furniture about 1959. (Tr. 2751-52) During the conversations with Knoll's representatives, Robinson's representatives mentioned that they were getting at least 50 percent off list from other furniture manufacturers (Tr. 3617), and showed Knoll's representatives a Dux invoice reflecting a 50 percent discount. (Tr. 3617-18) Robinson Furniture Company, one of the largest furniture companies in the Detroit area, operates several retail outlets (Tr. 2701-02) and also engaged in bid and contract solicitations. In several instances bids were solicited on Knoll furniture. (Tr. 2723-28) In 1959, Robinson negotiated its 50 percent discount from Knoll with Jesse Osetek. Morris Robin-

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son testified that he never asked Osetek to match or meet the discounts of any of Knoll's competitors. (Tr. 2714-15)

At Tr. 2711 Mr. Robinson testified:

Q. In your conversations with Osetek, did you tell him that you would consider taking the Knoll line for a certain discount?

A. No. I didn't tell him that I would consider taking it at a certain discount. He advised me of what the discounts were. I didn't bargain with him as to discount. He advised me that there was a certain discount for a dealer who would show merchandise on the floor and that he had a lower discount for people who didn't show it on the floor.

Q. You mean he told you that decorators and designers—

A. Architects.

Q. —would get one discount, and that he was offering you, or you were negotiating with him, on the basis of another discount?

A. That's right. And the reasons for that was that he called this type of operation with us a stocking dealer, one who would show samples on the floor, whereas the lesser discount was being quoted to people who did not stock or did not show samples.

(Continuing at Tr. 2712):

We sold a lot of furniture, sir, that we did not show on our floor. In other words, we sold it from a catalogue as well, without representation of the merchandise on our floor.

(Continuing at Tr. 2715):

Q. What was the principal consideration for getting the 50 percent discount?

A. To display merchandise on our floor and offering the same merchandise to the public at large.

Q. So that you were required to display and stock merchandise in order to get the 50 percent discount?

A. We were required to display. The requirement, as I understood it then, was to stock as well, but they had agreed to make a concession from the standpoint of stocking and limit it to display.

In 1961, the discount granted by Knoll to the Robinson Furniture Company was reduced from 50 percent to 40 percent. At Tr. 2721 Morris Robinson testified:

Q. Do you know, Mr. Robinson, why the discount was reduced?

* * * * *

The question of the volume of business was approached and it was brought to my attention that the Knoll Company did not consider the volume of business that the Robinson Furniture Company was producing for them sufficient to warrant the 50 percent discount.

Q. And, in turn, they reduced your discount to 40 percent?

A. And they told me from that time on that our discount would be 40 percent.

Gregory, Mayer & Thom Co.—Gregory, Mayer & Thom Co. was engaged in selling furniture at retail, and on a bid or contract basis in the Detroit area. (Tr. 3062, 3074-75) Knoll furniture was sold by them on a bid or contract basis in competition with other Knoll dealers. Prior to 1957, Gregory, Mayer & Thom purchased Knoll furniture at a 40 percent discount. In 1957 and 1958, Jesse Osetek of Knoll and William Keith Race of Gregory, Mayer & Thom discussed that firm's discount from Knoll. At Tr. 3065 Mr. Race testified:

Occasionally we would have a customer in a job in which the Knoll furniture would work very, very well. We could not buy it at a maximum discount. We bought it at a 40 percent discount. I believe the maximum at that time, was 50 percent.

At Tr. 3071, Mr. Race testified:

Q. Mr. Race, in response to Mr. Imberman's question with regard to the upshot of the conversations that you had with Mr. Osetek, you indicated that you became a Knoll dealer—is that correct?

A. I believe I said that, yes.

Q. And the Knoll dealers were entitled to a 50 percent discount to your knowledge, isn't that correct?

* * * * *

THE WITNESS: I believe at the time, a dealership—so-called—the name you call a dealer or a company who is promoting and displaying and receiving a 50 percent discount.

Q. And that was Knoll's maximum discount, isn't that correct?

A. To my knowledge.

Q. Yes, and what you were seeking was Knoll's maximum discount. Isn't that correct?

A. Well, obviously.

Q. And you were interested in buying products from Knoll at their lowest available prices, isn't that correct?

A. Well, are we not saying the same thing?

Knoll continued to sell its furniture to Gregory, Mayer & Thom at the 50 percent discount until sometime in 1960 when the discount was reduced from 50 percent to 40 percent. (Tr. 2778, 3071, 3093)

During 1960, Knoll was never asked by Gregory, Mayer & Thom to meet or match the price granted by any of Knoll's competitors to Gregory, Mayer & Thom for an indented item.

Joseph Dworski, Knoll's representative, testified that no one at Gregory, Mayer & Thom ever told him what discounts the firm was receiving from Knoll's competitors, although he did know

what discount they were receiving from Jens Risom during the period 1960 to 1962.

At Tr. 2777, William Bass testified:

Q. Well, did you ever discuss with Mr. Osetek the purchase price at which furniture would be sold by Knoll to Gregory, Mayer & Thom?

A. Yes.

Q. Did you ever discuss discounts with him?

A. Yes.

Q. Now, there was an occasion when the discount to Gregory, Mayer & Thom was reduced from 50 percent to 40 percent; isn't that correct?

A. That's when I—

Q. Discussed prices?

A. —discussed it, yes.

Q. Did he tell you why the discount was being reduced from 50 to 40?

A. Well, as I recall, his answer to that was that the amount of business that we were doing, we didn't warrant the maximum discount.

* * * * *

Q. That was the only reason given for the reduction of the discount?

A. That's all that I recall.

Q. Was any issue relating to competitive prices of any other manufacturers brought up during this conversation?

A. No, I don't recall. No, I don't recall.

Q. Do you recall ever asking Mr. Osetek to match the discount of any other manufacturer who was in competition with Knoll Associates?

A. No, I didn't because I didn't think it was necessary because we were particularly interested in the Knoll line. The items that I was interested in was Knoll.

Q. And the thing that you were interested in was buying the Knoll items at the lowest available prices; is that correct?

A. Right.

Adler-Schnee Associates, Inc.—Adler-Schnee Associates, Inc., has been purchasing Knoll furniture at a 50 percent discount since 1950. It is engaged in the business of selling home furnishings at retail and rendering interior design services in the Detroit area. Adler-Schnee's interior design services are interwoven into a substantial portion of its furniture sales. Approximately 85 percent of Adler-Schnee sales are made as a result of or in conjunction with its design services. Only 15 percent of its furniture sales are made at retail. Adler-Schnee submits bids on furniture and furnishings in response to solicitations therefor.

Edward Schnee testified that he discussed his discount in conversations with Knoll sales people in Knoll's New York office in 1950: (Tr. 2659 *et seq.*)

A. Well, in substance the pricing policy of Knoll at that time was 40 percent to anyone in the trade with a 50 percent discount to people who were

particularly active or who showed some of the furniture on the floor, on the sales floor, and we felt we had furniture of theirs on the floor and were active with Knoll Associates, and we thought we were entitled to a better discount than an architect who had no showroom or anything.

Q. Did you tell them that you were carrying other lines at 50?

A. It might have come up. I don't recall exactly. We were principally concerned with a better discount from Knoll.

Q. Isn't it true, Mr. Schnee, that in your discussions it was mentioned what other lines you carried?

A. Right. It was almost common knowledge at that time. I am sure it was discussed at one point or another.

Q. Did you tell them what discounts you were getting from these people?

* * * * *

A. Well, it's difficult to remember after 13 years. My best recollection is too vague at this point. I can't say actually whether we discussed other discounts or not.

* * * * *

Q. When you came back to Detroit had you achieved your purpose?

A. Yes. We were on a 50 percent discount from that point.

Q. So that really is the upshot of the thing, am I right?

A. *How we achieved it, I don't honestly recall, but we did get a 50 percent discount from Knoll. (Emphasis supplied.)*

Casual Living Modes—Casual Living Modes, 22961 Woodward Avenue, Ferndale, Michigan, is located just outside the Detroit city limits. It operates a furniture shop and provides interior design services in conjunction with the sale of furniture and furnishings in the Greater Detroit area. The firm employs two interior designers who also act as sales persons. (Tr. 2282-84) Casual Living Modes competes with Adler-Schnee Associates, Inc., Walter Herz Interiors, Incorporated, Shorewood Furniture Company, Triangle Furniture and Englanders. (Tr. 2792) Prior to 1959, Casual Living Modes was buying Knoll furniture at a 40 percent discount. Bernard Sherman, the owner of Casual Living Modes, (at Tr. 2782) testified: "It is primarily a furniture shop. It offers interior design services, and it is a gift shop as well, accessories. We service communities nearby with a full range of furniture and we offer our design services as a tool or a means of exposing furniture to the folks who are primarily residential customers." Casual Living Modes has about 4400 square feet, and Bernard Sherman is the sole owner. He has two interior designers, a secretary, a driver-handly man, and a part-time bookkeeper. The designers are sales personnel as well.

Mr. Sherman was buying furniture from Thayer Coggin, Dux,



Knoll, Metropolitan and Glenn of California at a discount of 50 percent off.

At Tr. 2787, Mr. Sherman testified that he would not have bought Knoll during the years in question if he had received only a 40 percent discount. He first started to carry Knoll in late 1959 or early 1960, and had previously sold Knoll at a 40 percent discount. (Tr. 2788) In 1959, Mr. Sherman told a Knoll representative ". . . I would be very much interested in stocking their merchandise if I were given the normal 50 percent discount that we were accorded by other manufacturers of similar type merchandise, and he agreed to proceed on a 50 percent discount and had hopes and expectations that we would feature enough of a display to make it a worthwhile situation. And that was the best I can recall regarding that conversation." This conversation was with Jesse Osetek who ran the Birmingham, Michigan, showroom of Knoll. (Tr. 2789)

At Tr. 2790, in response to a question as to whether he mentioned the discounts that he was receiving from other manufacturers, Mr. Sherman testified:

A. Yes. I would say that I did mention it, because I also mentioned, I am sure, that *I wouldn't carry* stock unless we got the maximum discount of at least 50. (Emphasis supplied.)

At Tr. 2794, Mr. Sherman testified, ". . . I didn't get to buy Knoll merchandise at 50 off until the latter part of '59 or early part of '60. I think it was '60."

At Tr. 2797, in response to the question ". . . do you on occasions charge a customer a design fee?":

A. Only if they do not purchase their merchandise through us. We have a policy that they are entitled to free design and decorating service if there is a minimum purchasing arrangement of \$250, and there have been possibly two or three occasions in all the years I have been in business where they have reneged on their purchasing agreement and they bought and paid for our time that we have involved ourselves in decorating and setting up some plans for them.

At Tr. 2808 the following colloquy took place:

Q. Mr. Sherman, when you sought the 50 percent discount from Knoll, were you seeking the so-called dealer's discount?

* * * * *

A. I wasn't aware of anybody as a fact receiving 50 or 40. It wasn't my normal nature to check other dealers to see as to what discount they received. All I was really concerned with is what I was getting and how could I profitably operate my enterprise.

At Tr. 2812, Sherman testified:

A. My interpretation, as I pointed out earlier, is one that if a store displays one of half a dozen or a dozen pieces of furniture from said manufacturer, he is entitled to be called stocking dealer. There has been no situation other than one that I can recall in almost 11 years of business where there has been any stipulated amount required before being called a stocking dealer.

And at Tr. 2813, in response to a question of whether that also applied to Knoll, Mr. Sherman testified:

A. Yes, with reservations. I say that nothing specific has been insisted upon by Knoll or their representatives. There was an overall conversation at the time that the 50 percent was inaugurated as a standard condition that they would hope that I would bring and show more furniture, as much as our space would allow. At that particular time I had a smaller shop than I am in right now and space was even more of a factor than it is now.

Mr. Sherman testified that he was getting "the stocking dealer's discount." At the time that the 50 percent discount was negotiated he testified (Tr. 2814) that the conversation involved:

A. Not so much the display but carrying a few pieces that would be truly representative of the type merchandise we wanted, and, of course, truly representative of the popular pieces that Knoll was featuring.

Cleveland, Ohio

Leon Gordon Miller & Associates, Inc.—Leon Gordon Miller & Associates, Inc., 1220 Huron Rd., Cleveland, Ohio, an industrial and interior design and decorating firm, purchases and resells furniture as a part of the professional services which the firm renders. (Tr. 723-25) Approximately 65 to 70 percent of the firm's gross income is from interior design planning and furniture sales. Of this percentage, approximately 60 percent of the firm's income results from the sale of merchandise. Its purchase and resale of furniture is an important and significant aspect of the firm's operations. (Tr. 745-47) The firm has been buying products from Knoll Associates, Inc., at a discount of 50 percent since prior to 1960. (Tr. 3607-08)

Mr. Miller testified that his firm does purchase furniture at discounts of less than 50 percent, and that it generally specifies contemporary furniture and "very little" period or traditional furniture for its clients. (Tr. 758) The firm has bought furniture from Brunswick at no discount. (Tr. 759)

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Leon Gordon Miller testified:

Q. Let me ask you this: Would you in those years buy furniture from a supplier who would not give you a price for at least 50 percent off list?

A. Yes, we would under certain conditions.

Q. You mean where the manufacturer had something you couldn't get anywhere else?

A. If two items were competitive in quality design, and other factors involved, in what is in a specification, we would obviously for the interest of our clients purchase it at the lowest price, see.

But there are times when a specific item is received that meets a specific need, and there is no alternate period.

Q. But in general, in buying furniture from suppliers, didn't you buy from suppliers who gave you a discount of 50 per cent or better off published list price?

A. I would say that this has been our discount from most suppliers.

Q. Isn't it true that you tell your suppliers that this is your policy of purchasing, and this is what you expect?

A. No, we don't tell them that this is the policy of purchasing. This is what has been offered to us by the manufacturers, you see, as a purchasing discount for our type of a business. (Tr. 755-56)

By Mr. Turiel:

Q. Are there some Knoll items that cannot be replaced in a similar manner?

A. Well, to some degree, yes. It depends to what degree a designer is a purist. I would say that if he is a purist he couldn't replace the Mies Vander-Rohe chair with another, but if you are pressed hard enough to meet a budget and you want a similar type of chair, you will buy somebody else's, as I was compelled to do in this period of 1960 and '62 for one of my clients.

Q. How many Eames chairs have you bought through your firm since you have been in business?

MR. IMBERMAN: Objection.

HEARING EXAMINER GROSS: He may answer.

A. I can only answer many. I have no way to know except many.

Q. Did you ever tell Knoll that you would not buy any of their furniture products unless they sold you at 50 per cent off list?

A. No, I did not.

Q. Did you solicit a 50 per cent discount from Knoll?

A. No, I did not. (Emphasis supplied.)

Q. Mr. Miller, isn't it a fact that you're actually interested in knowing the net price that you will be paying for a particular item rather than the discount that you will be getting from a manufacturer?

MR. IMBERMAN: Well, I am going to object to that, Your Honor. You come out at the same place. It is simple arithmetic.

HEARING EXAMINER GROSS: Overruled.

A. I think that you're basically interested in a net price, but I think anybody who is honest himself in business today also wants to be assured that he is receiving a competitive price. I think both of these items are essential to know.

Q. You say you are interested in a competitive price, is that correct, Mr. Miller?

A. That is right.

Q. Why are you interested in a competitive price?

A. Because I have an obligation to my clients.

Q. To do what, Mr. Miller?

A. To see that when they have a contract with me that they are not penalized as a result of buying a contract through a professional organization.

I don't know whether you understand this, but this is very basic to our business, at least in our community. As I explained, we are in competition—really not in competition. I shouldn't say that. We are bidding the same type of products with the same clients as stores that have design or professional services.

Q. And that includes Wagner, Henzy, Fischer?

A. Yes.

Q. And the Higbee Company?

MR. IMBERMAN: Oh, I am going to object.

A. No, I have not named the Higbee Company because I have not come personally in contact with the Higbee Company, You see (Tr. 761-63)

Wagner-Henzy-Fisher Company—Wagner-Henzy-Fisher, 1852 Euclid Avenue, Cleveland, Ohio, an office furniture store, purchased Knoll furniture in the years 1960 through 1962 at a 50 percent discount off list. (Tr. 933) The business of Wanger-Henzy-Fisher is evenly divided between walk-in customers, large institutions, large corporations, and institutions like colleges and hospitals. (Tr. 933) The company sells chiefly for commercial use. Five percent of its sales are residential sales. The company characterizes itself as a retail store (Tr. 934), but it handles a lot of contract business. The company has employed as many as four interior designers or interior decorators. An interior decorator knows colors and designs, but an interior designer actually knows how to design furniture, rooms, or areas, and knows what to put in them. An interior designer is qualified to sketch furniture to scale so that a manufacturer may manufacture furniture from the drawing. The interior designer also makes color renditions, floor plans, and floor layouts. On approximately 50 percent of the sales which Wagner-Henzy-Fisher made in 1960 and 1962, they rendered their interior design and interior decorator service. (Tr. 936-39) During the two years in question, the annual volume of business of the firm was around \$800,000. The company has been in business since June 1923. It carries other modern contemporary furniture lines: Herman Miller, Inc.; B. L. Marble Furniture, Inc.; Designcraft; and Jens Risom.

F. W. Wagner, secretary-treasurer of Wagner-Henzy-Fisher, (Tr. 944-45) testified:

. . . I would say probably seventy-five per cent of the design service jobs use Knoll, and . . . in the design department, in about seventy-five per cent of the cases it has some Knoll furniture in it.

The firm sold about \$40,000 worth of Knoll furniture a year. The firm's competitors in the Cleveland area include Ohio Desk Company, Higbee Company, Ace Desk, F. W. Roberts Company and Halle's Contracting Department (Tr. 946) Holzheimers and Irvin & Co., Incorporated. (Tr. 961) Wirtschaffter's competes in the metal furniture line. F. W. Wagner testified in substance that Knoll itself competes with them sometimes. (Tr. 949-50) Wagner-Henzy-Fisher is in competition with Leon Gordon Miller on design services. (Tr. 958) Design services are usually rendered by Wagner-Henzy-Fisher in conjunction with the sale of furniture. (Tr. 959) The firm is also in competition with interior decorators in certain phases of the interior decorator's work. Mr. Wagner testified:

A. Well, we can do most anything that they can do, and they can't always do anything that we can. We work with them more than we are in competition with them, I would think. (Tr. 959)

The price the firm pays for an item is a significant factor in its ability to compete effectively. (Tr. 964) Some of the contracts which Wagner-Henzy-Fisher bid upon were the Bailey Meter job, Cuyahoga Savings and Loan Association, and the Cleveland Clinic. In response to the question, how is your firm paid for its professional services? The witness (Tr. 927-73) testified:

THE WITNESS: A lot of the large architects today are asking for bids on a cost plus basis, and a lot of them, they just send out the specifications and ask for your best bid. It really doesn't make too much difference on the final outcome, because as far as we are concerned we only get about the same answer.

It costs so much money to do business, and that is what we have to bid it at.

On the design work, as I have said, we have to spend a certain amount of money to get business. If a job comes up and there is more than the average design service, we discuss it with the customer and tell them that there is going to be a fee for it.

He can take the job out and shop at anywhere that he wants to shop, when he pays us that fee, or if he decides to give us the business, why that we will make him some kind of a credit against this design fee, and on that there is no tried and true formula.

Mr. W. L. Humphrey, vice-president and general manager of Wagner-Henzy-Fisher, testified (Tr. 2823 *et seq.*) to the effect that the firm began to get a 50 percent discount from Knoll about 1958. Prior to that time, it had purchased occasional Knoll pieces at 40 percent when it had a specific need for a particular item. But Wagner-Henzy-Fisher was not carrying Knoll furniture in the regular course of its business because it could not get enough of a discount on the line. Mr. Humphrey testified as to the circumstances under which the 50 percent discount was originally obtained from Knoll in 1958. He stated that Jesse Osetek had been calling on him for a matter of about three years to try to get them to use the Knoll line and insisted that the discount would be raised from 40 to 50 percent. Mr. Humphrey testified that the firm could not "sell the line at a discount like that [40%]; it had to be competitive with our other lines. So we just weren't interested." (Tr. 2826) And, that after many, many conversations, Jesse Osetek stated that Knoll was interested "in having a dealer in the City of Cleveland, and they would give us a 50 percent discount so we could sell the line profitably." (Tr. 2826)

I wanted a 50 and 10 percent discount, the same as we had from other manufacturers, and had been fighting with them ever since, but never could get it.

Q. You asked for a 50 and 10 and the best you could get after all of this bargaining was 50; am I right?

A. 50 off, yes.

At Tr. 2829, Mr. Humphrey testified that Wagner-Henzy-Fisher was ordinarily getting 50 plus 10 from Herman Miller (a Knoll competitor) however:

A. If there was another Herman Miller dealer in town that worked on a job and had the furniture specified, Herman Miller would automatically take the 10 percent discount away from any other dealer to give that particular dealer protection. (Tr. 2832)

(See *ante* finding concerning protected bid, p. 366.)

Knoll's additional 10 percent discount was not granted to Wagner-Henzy-Fisher in order to meet the equally low, lawful price of a Knoll competitor for an identified item, or items, but as an inducement to Wagner-Henzy-Fisher to become a Knoll "dealer" in the Cleveland area. Knoll believed that having the firm as a dealer would promote the sale of Knoll furniture with an appropriate prestige image and would furnish the interior design and

interior decorating services which Knoll prefers to have as an integral elements in its retail selling technique.

New York, New York

Knoll sold its furniture to approximately 3,000 accounts in the New York sales area, but granted its additional 10 percent discount to only eleven out of 3,000: B. Altman; Bloomingdale's; Macy's; Abraham & Straus; Alessi Bros.; W. & J. Sloane, Inc.; Desks, Inc.; National Hospital Supply; Braun & Rutherford; Itkin Bros.; and Business Equipment Sales Co. These eleven accounts possess substantial economic power as sellers of Knoll furniture. B. Altman, Bloomingdale's, Macy's, and Abraham & Straus, are multi-unit, large department stores with furniture departments, and use aggressive selling techniques. Alessi Bros., Braun & Rutherford, Itkin Bros., and Business Equipment Sales Co. are retail office furniture and equipment firms and they also are aggressive merchandisers. W. & J. Sloane, Inc. is basically a retail furniture store. National Hospital Supply Co., Inc., is a "contract furniture house and hospital supply house" (Tr. 2087), and Desks, Inc., "are dealers, retailers, and jobbers of office furniture" (Tr. 441) with a most impressive list of clients, *infra*. A common characteristic which the favored customers possess is their capacity to furnish, in depth, interior design and interior decorating services to their furniture customers. These services increase the cost of selling their furniture. Such additional cost must, as a business necessity, be recouped through higher mark-ups. Ergo, they insist on a 50 percent discount before they will display and stock a furniture line.

Itkin Bros., Inc.—290 Madison Avenue, New York, New York. Abe Itkin, vice-president and treasurer, testified that during the pertinent period his company handled a line of furniture manufactured by Lehigh, Herman Miller, Founders, Thonet, Alma Desk, Design Craft, Shelbyville Desk Company, Scerbo and that all of these companies were pricing their furniture lines at a discount from the list price. Itkin had been selling Knoll furniture occasionally prior to 1961 and was buying it at a 40 percent discount ". . . before we had the line, yes." (Tr. 2134-37)

Mr. Itkin had several discussions with Charles W. Niedringhaus who was in charge of the New York sales district for Knoll Associates, Inc. Mr. Itkin's brother had some of the conversations.

The substance of Mr. Itkin's testimony is not to the effect that

Knoll granted the 50 percent discount to Itkin in order to meet a 50 percent discount, or more, which Itkin was getting from competitors of Knoll, but rather that Itkin needed at least a 50 percent discount from the list price in order to have the markup necessary to be a dealer. His testimony (Tr. 2138 through 2140) can be best understood if reproduced in full:

THE WITNESS: The gist of the conversation was that unless we got the maximum discount which was the normal discount given to a dealer, we cannot handle the line in any quantity or in any substance.

By Mr. Imberman:

Q. Were you talking about a specific amount, when you said the "maximum discount"? In your conversations did you discuss forty or fifty and ten?

A. Fifty.

Q. Fifty?

A. Yes.

Q. That was the discussion that you had with the Knoll people?

A. Yes.

Q. Was there anyone else in addition to Mr. Niedringhaus who was there?

A. It might have been Mr. Copeland. I know it was mostly with Mr. Niedringhaus.

Q. Did you, during these conversations, mention to the representatives of Knoll the discounts that you were getting from other manufacturers?

A. I must have. I mean, that is common knowledge. It is common knowledge what we get from the other manufacturers.

Q. Did you tell them that you wanted at least a fifty percent discount if you were going to handle the line and do anything with it?

A. Yes.

Q. As a result of these various negotiations, did there come a time when Knoll reached some conclusion about this matter, the request that you had made?

A. Yes. We obtained the line.

Q. They agreed to sell it to you at a fifty-percent discount off list price?

A. Yes.

Q. Have you been getting that discount since then?

A. Yes.

Q. Would you purchase Knoll furniture, Mr. Itkin, if you could not get a discount of fifty percent off list price?

A. Well, I would go back to the old basis. I mean, it is just odds and ends, if we needed for a specific purpose. But we would not sell it the way we are selling it now. We will go back to the original way we did business: odds and ends pieces occasionally.

Q. You mean you would buy it if someone came in and made a special demand for Knoll furniture?

A. Or if I needed it.

Q. If you needed it to fill a job?

A. Yes; otherwise, no.

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Q. Since you have been getting the fifty percent discount, do you then make an effort to sell Knoll furniture?

A. Yes.

Q. I mean, what do you do?

A. We specify it on jobs. Our salesmen sell it. Our decorators sell it. We sell it to other—

Q. Do you carry it on your floor?

A. Yes, we do carry it on the floor.

Q. Is it true that you would not do these various things if you did not get a fifty-percent discount?

A. No; oh, yes.

Q. It is true?

A. It is true.

Q. Of the lines of furniture which you mentioned, Mr. Itkin, in the beginning of your testimony, could you tell me in your opinion which are the lines most comparable to Knoll in style and quality?

A. Well, the lines that I carry or the lines that I know of?

Q. No, the lines that you carry.

A. Rison—I'm sorry; not Risom; Herman Miller and Lehigh.

Q. These are two lines that you have a discount of fifty and ten?

A. Fifty and ten, yes.

Q. Are these two lines also competitive with the Knoll line in price? I am talking about the line generally.

A. Well, I think they are priced in the same category, the same type of line, yes. I would not say item-for-item, but it's the same broad base, I imagine.

Q. In other words, all three lines are well-designed contemporary lines of modern furniture?

A. Yes.

Q. Of good quality; am I right?

A. Yes.

MR. TURIEL: Objection, your Honor.

HEARING EXAMINER GROSS: Overruled. He may answer. What is your answer to that question?

THE WITNESS: Yes. As far as I am concerned, yes.

HEARING EXAMINER GROSS: Would you want to read that question and answer back to me, please?

(Question and answer read.)

By Mr. Imberman:

Q. If somebody came into your store and wanted to buy a good contemporary desk, the desk made by either one of these three manufacturers would do? Am I right?

A. Yes.

Knoll has failed to prove by credible, probative, and substantial evidence in this record that it granted a 50 percent discount off its list price to Itkin Bros., Inc., "in good faith to meet an equally low price of a competitor." The evidence does not show that Itkin

ever requested Knoll to meet or match an identifiable price for an identifiable item, or that Knoll did so.

R. H. Macy & Co., Inc.—Knoll's meeting competition witness from R. H. Macy & Co., Inc., was Philip Cutler, department manager of modern occasional furniture, upholstered and occasional furniture. Macy's, Herald Square, New York, New York, is the "Largest [department store] in the United States," and need not be described again for this record. The size of its operations is a matter with which most persons are acquainted. Mr. Cutler, testified that he had been buying furniture for that particular department since 1959 and had been with Macy's for two years prior to that. During 1960 to 1962, Macy's was buying modern contemporary furniture from Founders Manufacturing Company at 50 percent off list price; from Thayer Coggin; from Knoll Associates, Inc.; and from Herman Miller, Inc. Mr. Iatrides, Knoll salesman, calls upon Cutler at Macy's, and Cutler is well acquainted with Knoll's Charles Niedringhaus. On page 2267, Mr. Cutler refused to testify that he negotiated the 50 percent discount from Knoll because he was getting a similar discount from Knoll's competitors. Mr. Cutler testified that it is axiomatic that he must buy furniture at the "best possible price."

Mr. Cutler's testimony concerning the interchangeability of the Knoll line is particularly illuminating and is produced at length here, commencing at Tr. 2268:

A. As I stated before, either fifty percent off the list price or the doubling of a cost price is general in the furniture industry. So it's obvious that that would be the situation in most cases.

In the case of Herman Miller—and offhand I don't remember any others—there might have been one period that I was getting or Macy's was getting a discount of fifty and ten. Does that answer the question?

Q. Yes. Mr. Cutler, would you say that, considered as a line generally, the furniture manufactured by Thayer-Coggins, Miller and Founder's is comparable to Knoll in quality and style and competitive in price?

* * * * *

A. There are a group of manufacturers in various price brackets that have furniture that is distinctively styled. They attempt to have furniture that is unique. When I say unique, it's not the same design as other furniture. I think you put it very well this morning. That was exactly what was going through my head, if I may refer to your statements. As such it is very difficult to compare one or two designs. Two or three or four chairs might be the same price. But they could each be different in design.

These companies that you mentioned do not copy per se, as far as I can tell—?

Q. I did not mean copy, Mr. Cutler.

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A. No.

Q. I am talking about the line as a whole.

A. But they are comparable in terms that each one designs distinctive furniture. They don't tend to follow any particular trend in the market. They tend to set trends rather than follow. From that point of view they are similar.

In the price bracket there are certain points where they are similar, also.

Q. Would you say, for instance, that the Miller line and the Knoll line are directed toward the same kind of customer?

A. I would say so, yes.

Q. What?

A. Yes, I think so.

Q. Would you say the same for Thayer-Coggins, also?

A. In certain instances, yes.

* * * * *

HEARING EXAMINER GROSS: He wants to know in addition to Thayer Coggins, Founder's, Herman Miller and Knoll, if there were any other lines that you also handled that might have been overlooked.

THE WITNESS: My first thought that I feel would answer your question properly is that I think that it would fall into our imports. We buy imported furniture that they sell.

Q. Any from domestic manufacturers?

A. That the moment I can't think of any, sir.

Q. Do you buy furniture from a company called Selig?

A. I have in the past.

Q. Would you consider that to be generally in the same category as these other manufacturers whose names you have mentioned?

A. I would say more so in the past years than currently.

Q. From 1960 to 1962?

A. More toward 1960, I would say, yes.

Q. At that time you say their line of furniture was comparable to the Knoll line?

A. Well, I would like to repeat again. That's a very difficult question for me to answer. Selig was one of those companies that attempted to have an image, if you will excuse the phrase. In doing so they would have to create things that were not like other things that were exactly being created, that would have a feeling of Selig.

I feel that they were doing that more at that time than they are now. As such they would be comparable from that point of view.

HEARING EXAMINER GROSS: Is this S-e-l-e-y?

THE WITNESS: S-e-l-i-g.

Q. Was their furniture in 1960, their line of furniture, directed to the same kind of customer who, from your knowledge, would be interested or would buy Knoll or Miller or Thayer-Coggins?

A. Well, I can only answer these questions from the point of view of a department store buyer. I am not familiar with the other phases of it. I put something on my floor with the idea of its selling. The prices of their chairs were comparable to Thayer-Coggins' chairs. They were comparable to the

Bertoia chairs that I get from Knoll, and some of the chairs that at one time that I bought from Herman Miller.

Q. Did you find that the same sort of customer that might be interested, say, in the Bertoia chair, would also be interested in the kind of chair that Selig was making or Miller was making?

A. I think, to a certain extent, yes.

Q. You bought chairs from Knoll, have you not?

A. Yes.

Q. Have you bought chairs from Miller?

A. Yes.

Q. Would you say that although they are not exactly alike—and I don't mean that, but would you say that they are comparable in quality, design and price?

A. I think so, yes. (Tr. 2268-73)

Knoll evidence fails to establish that the additional 10 percent discount which was and is granted to Macy's was granted for the purpose of meeting the equally low price of a competitor for a specific identified item.

The strongest meeting competition evidence should be found in the testimony of Knoll's own witnesses. Charles W. Niedringhaus, who was in charge of Knoll's New York sales region and a Knoll employee for 18 years, testified that between 25 and 30 percent of Knoll's total business is done in the New York region and that area had "probably about 3,000" accounts. Reproduced below are excerpts from the testimony of Mr. Niedringhaus, concerning the reasons why the Knoll favored customers in the New York area received the 50 percent discount. (Tr. 3779, *et seq.*)

Itkin Bros. Inc.

Q. Did you eventually come to a decision with respect to the request of the Itkins?

A. Yes.

Q. What was that decision?

A. To allow them our fifty-percent discount.

Q. Why?

A. Because I thought he could sell much more furniture for us, and, also, I wanted to get the sales that we were losing to our competition.

Q. Did these manufacturers whom you mentioned, whose furniture you had seen on the Itkin floor, made furniture competitive to Knoll's?

A. Yes, they did. (Tr. 3779)

W. & J. Sloane, Inc.

Q. Why did you sell them furniture at 50 percent off the list price if your company has a policy of ordinarily selling furniture at 40 percent off the list price?

A. Well, I knew that they were selling many competitive lines and that

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this is the only way we were going to get them to handle and move any of our furniture.

Q. Did you ever have any conversations with anybody at Sloane's with respect to discounts?

A. I can't remember any. (Tr. 3780)

Business Equipment Sales Co., Inc.

Q. Tell us the substance of what he said to you.

A. He said he was getting a 50 percent or a 50 percent and 10 discount from other manufacturers who were competing with us, and in order to do a job for us he had to have a better discount.

Q. And if he didn't get the better discount?

A. Well, he would go on as he had in the past. Maybe he would buy a chair occasionally to fill a job.

Q. How many conversations did you have with Mr. Schmelzer?

A. Well, three or four.

Q. When did they occur?

A. In 1961, I believe.

Q. Did you come to a decision with respect to this request of Business Equipment Sales?

A. Yes, I did.

Q. What was that decision?

A. To allow him 50 percent discount.

Q. Why did you make that decision?

A. So we could meet our competition and get orders that we were losing.

Q. Have you continued to sell them at that discount since 1961?

A. Yes, we have. (Tr. 3784)

Braun & Rutherford, Inc.

Q. Are you familiar with the firm of Braun & Rutherford?

A. Yes.

* * * * *

Q. In 1959, when you took over your present position, were they a customer of Knoll's?

A. Yes, they were.

Q. At what discount were they buying off the published list price?

A. Fifty percent.

Q. Did you have anything to do with establishing that discount?

A. No.

Q. Why did you continue to sell them at 50 percent off the published list price if your standard discount was 40?

A. Well, because they were selling our competitors' lines. I knew this was the only way we were going to get them to move our equipment. (Tr. 3784-85)

Desks, Inc.

Q. And were they a customer of Knoll Associates when you became the head of the New York office?

A. Yes, they were.

Q. At what discount off the published list price were they buying?

A. Fifty percent.

Q. Did you continue to sell them at a discount of 50 percent off the published list price from 1959 to the end of 1962?

A. Yes, I did.

Q. Why did you do that if your regular discount was 40 percent?

A. I had to sell them at this discount to meet our competition that they were handling, the other lines they were handling.

Q. Do you know what other lines they were handling from 1960 through 1962?

A. They were handling Miller, Risom, Lehigh and many other lines.

* * * * *

Q. Specifically with respect to Desks, Inc., how did you know that you had to continue to sell them at a 50 percent discount or lose the business? How did you know that? How was it communicated to you?

A. I knew that all the other lines they had, they were getting at least a 50 percent discount.

Q. How did you know that?

A. From just knowing some of the lines that they handled and from what my sales people told me. (Tr. 3790, 3792)

Abraham & Straus

Q. During the time that you were running the New York sales office, was Abraham & Straus a customer of Knoll Associates?

A. Yes, they were.

Q. At what discount were they being sold in 1959, when you got there?

A. At 50 percent.

Q. And did you continue to sell them furniture at 50 off the published list price?

A. Yes.

Q. Why, if your standard discount is 40?

A. Because I was sure this was the only way they were going to buy it.

Q. What made you so sure?

A. Just through conversations and just knowing what they have on their floor, the type of merchandise they sell.

Q. Conversations with whom?

A. With Mr. Aranoff.

Q. What was Mr. Aranoff's position?

* * * * *

A. He was buyer of contemporary furniture.

Q. I think before the recess you said that you had had conversations with Mr. Aranoff. Were these at the store?

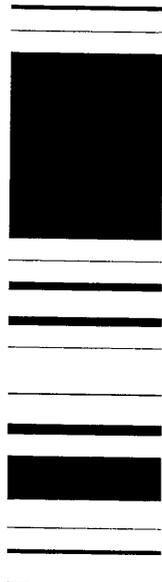
A. No, they were telephone conversations and in our showroom.

Q. Can you tell me why you continued to sell to A&S at fifty percent off the published list price if the standard discount was forty?

A. Well, I know that it is department store policy not to buy unless they can buy at fifty percent off list.

Q. You mean this department store, A&S, right?

A. Yes. (Tr. 3792-93, 3795)



Bloomingtondale Bros., Inc.

Q. Let's take Bloomingtondale's. Were they a customer of Knoll's when you started to head up the New York office?

A. Yes, they were.

Q. At what discount off the published list price were they buying?

A. Fifty percent.

Q. Did you continue to sell them at that discount?

A. Yes, I did.

Q. Why?

A. Because it was their policy not to buy unless they could buy at fifty percent off list.

Q. How do you know that?

A. Just from the reports that I had from our sales people who called on different buyers there. (Tr. 3796)

R. H. Macy & Co., Inc.

Q. Was Macy's a customer of the firm when you came there in 1959 as sales manager?

A. Yes, they were.

Q. At what discount were they buying?

A. Fifty percent.

Q. Did you continue to sell them at fifty percent?

A. Yes.

Q. Why did you continue to sell them at fifty percent if the standard discount was forty?

A. Well, I know that Macy's has a policy of buying at fifty percent off list. I knew that was the only way I was going to sell them. (Tr. 3801)

National Hospital Supply Co., Inc.

Q. Is the name National Hospital Supply Company familiar to you?

A. Yes, it is.

Q. What business are they in?

A. They are hospital suppliers.

Q. Do they also sell furniture?

A. Yes, they do.

Q. And were they a customer of Knoll Associates in 1959, when you headed up the New York regional office?

A. Yes, they were.

Q. At what discount were they buying?

A. At fifty percent.

Q. Did you continue to sell them at fifty percent discount?

A. Yes.

Q. Why did you sell them at a fifty percent discount if your standard discount was forty?

A. I knew that they only bought at fifty percent off list. (Tr. 3802)

Alessi Bros., Inc.

Q. Do you know the firm of Alessi Brothers, Inc.?

A. Yes.

Q. What business are they in?

A. They are furniture dealers.

Q. Where are they located?

A. Way downtown. I don't know the exact address. I have never been in their showrooms.

HEARING EXAMINER GROSS: Would 17 South William Street sound right to you?

THE WITNESS: That sounds right, yes.

Q. During the period 1960 to 1962, did you sell them office furniture?

A. Yes, we did.

Q. At what discount?

A. At fifty percent.

Q. Were they buying at fifty percent in 1959, Mr. Niedringhaus?

A. Yes, they were.

Q. Why did you continue to sell them at fifty percent off the list price if your standard discount was forty?

A. Well, because they were buying from competing manufacturers at at least fifty percent, sometimes fifty and ten. (Tr. 3803-04)

B. Altman & Co.

Q. Was B. Altman a customer of Knoll Associates when you come there in 1959?

A. Yes.

Q. That is, as the head of the New York office?

A. Yes they were.

Q. At what discount off the published list price were they buying?

A. At fifty percent.

Q. Did you continue to sell them at a discount of fifty percent off the published list price?

A. Yes, I did.

Q. Why did you sell them at fifty off the published list price when your regular discount was forty?

A. Well, I knew it was their policy to buy at only fifty percent off list. (Tr. 3805)

The testimony of Charles Niedringhaus falls far short of proving that Knoll's extra 10 percent discount to its favored customers in New York "was made in good faith to meet an equally low price of a competitor[']s" product which has been identified either as to item or price.

Desks, Inc.—Ralph D. Sens, (Tr. 441 *et seq.* and Tr. 1904 *et seq.*) secretary treasurer of Desks, Inc., 71 Fifth Avenue, New York City, testified as a witness in support of the complaint, and also testified as a Knoll witness, that "we are dealers, retailers and jobbers of office furniture." "We show some lamps and ash trays." The furniture part of the business is confined primarily to commercial desks and chairs. The business was incorporated in

New York State in 1936. The firm can buy "any furniture product" from Knoll at a 50 percent discount. (Tr. 458) Mr. Sens stated:

[W]e call ourselves retailers and jobbers, retailers in the sense that our show room is open to anybody who walks off the street. We maintain salesmen on the floor to accomodate these people and jobbers in the sense that we do sell—the primary source of our business is large corporations, one of which is Western Electric, which actually buys on a jobbing basis. They sign a contract and they buy for their various affiliates, and other corporate accounts.

* * * * *

Our corporate accounts principally, besides The Bell System, would be Metropolitan Life Insurance, Prudential Life Insurance, Mutual Benefit Life Insurance, Standard Oil of New Jersey, Olin-Mathieson Chemical, to name a few. (Tr. 443-44)

At Tr. 1918 *et seq.*, Mr. Sens testified:

Well, let me just give you a little background. We, of course, have a reputation for many years of being a quality house and a reputable organization in New York. When we look on a new product to show, just like any retailer does, there must be certain specifications that they meet in order to fit our pattern or fit our company and our firm. One, of course, is that the product must be a product that is of quality and, since we guarantee the workmanship on everything, it must be something compatible with those things. It must also be a product that has a market or is readily salable.

Third, and not the least important, of course, is that not only ourselves as a firm but our salesmen can sell it competitively and make a profit, make a profit or a living. We felt back in the middle fifties or around that time, when we were first approached by Knoll, to take the line on. We refused them for the very reason that they would not give us a discount within which we thought we could sell it and make a profit.

Through many months of negotiation and talking with the young salesman whom they had on the account who was very interested in having us, who thought that we could do a job with Knoll, in talking to him and eventually to the principals of the company, we finally reached an understanding where they would give us the fifty off if we would try to do a job for them.

This was, as I say, some place in the middle fifties and probably took at least six months negotiation.

As to William Jordan, the Knoll salesman who first approached Desks, Inc., in the middle 1950's, Mr. Sens testimony was:

Q. Did Mr. Jordan approach Desks, Incorporated to try to get that company to sell more Knoll furniture?

A. That's right.

Q. Is it true that at that time you were occasionally selling some Knoll furniture?

A. We were occasionally, as accommodation sales, where we had to.

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Q. Did Mr. Jordan come to you and ask you to try to sell more Knoll furniture?

A. Yes. As I said, that was Mr. Jordan's job with Knoll, to try to promote sales with the dealers.

Q. At what discount were you at that time buying Knoll furniture?

A. Forty percent.

Q. When Mr. Jordan asked you to buy more Knoll furniture from him, what was your answer?

A. Well, we told him that we could not market it at a forty off discount. (Tr. 1922)

* * * * *

Again, to tell you how you work on something like this, I said that we are very careful on what lines we take. In our business nearly every day of the year you have somebody come in who is trying to ask you to market their product. We are very careful. All the principals in the firm are very careful to look over everything as to how it is made and so forth.

This is done not by one man alone but done through our management committee and through a series of negotiations between one or more of the principals with the representative.

When Mr. Jordan first approached us with the Knoll line, we frankly did not give him much time. We told him that we liked it and we thought that it would fit well into our selling pattern but there was no sense in talking to him because we just could not buy it at that price and sell it in our markets.

Bill was persistent and came back many more times over a period of time. And he eventually brought some of the principals of his firm in to talk. In these negotiations with several of the principals, we finally reached the discount of fifty off which they agreed to give us, and we agreed to do a job selling his line.

HEARING EXAMINER GROSS: Do you remember the name of any of those principals?

THE WITNESS: Mr. Copeland was one.

HEARING EXAMINER GROSS: Do you recall where these conversations chiefly took place?

THE WITNESS: In our showroom, generally; in our offices.

HEARING EXAMINER GROSS: Is that the same address that you presently are at?

THE WITNESS: Yes.

Q. Do you recall anyone else in addition to Mr. Copeland who joined in these conversations?

A. I don't recall. I know Mr. Niedringhaus has been down more recently in the more recent attempts to get a better discount. But I don't recall back in 1955 myself meeting anybody else. (Tr. 1926-28)

* * * * *

Q. Prior to your getting the 50 percent discount from Knoll, you were buying furniture at a 40 percent discount, is that correct?

A. Yes. If we ever had the occasion to have bought it, I guess we bought at 40 percent off.

Q. Did you induce Knoll to give you the 50 percent discount?



Did you initiate it, Mr. Sens?

THE WITNESS: Did I personally? No.

Q. Did your firm, to your knowledge, initiate negotiations for the 50 percent discount?

A. Did we? No it was a matter of Knoll's representative originally coming to us and wanting us to sell his product at a 40-off basis which—

Q. Were you buying—

MR. IMBERMAN: Just a minute. Let him finish his answer.

HEARING GROSS: Let him finish his answer.

THE WITNESS: We were not buying Knoll as a product that we sell and market, no, prior to this time.

Q. But you were buying Knoll at 40 off for resale, were you not?

A. On occasion we did, yes.

Q. You were permitted to buy or it was available to you at a 40 percent discount, was it not, that is, the Knoll line?

A. If we had an occasion to sell it, it was available to us at 40 off.

Q. And then someone from Knoll came in and said "Let's increase the volume" is that correct?

A. I think you have—let me explain it a little bit. Knoll came to us and asked us to do a selling job. The idea of getting a dealer to sell your product is to increase your distribution in a given market. Knoll themselves only can hire and can control so many salesmen in this vast market of New York. One of the means of expanding their ability to cover the market is by getting a reputable dealer who has a highly trained sales force to go out and market their line.

They came to us and wanted us to do it. By "marketing" I mean by our firm actively training the salesmen in the product, showing the product, stocking the product, advertising in trade magazines that we have this product to sell and doing a real active job in selling.

When we bought this product at 40 off, it is true that we may have bought an occasional piece here and there. But this was only bought and it was sold at little or no profit as an accomodation in some particular job.

Q. You say at little or no profit?

A. That's right.

Q. What do you mean by "little or no profit"?

A. I mean that in an office where we would naturally try to sell the product of, say, Standard Furniture Company, if the customer had happened to have seen or liked the design of a Knoll chair, in this case we would buy this at 40 off and sell it at whatever markup we are selling the product. But obviously the items that we were buying at 50 and ten we were getting substantial—enough money on that to make a profit. But at Knoll, when you buy at 40 off, you have to pay the freight from the factory. You have to pay the delivery charges in New York and the warehousing costs. So I think last time I said that the average markup that we need, or that we feel we need to be profitable, is someplace around 40, 42 percent. So obviously, on a product that we bought at 40 off, we would not be able to sell and make our normal 40, 42 percent gross mark up on it.

That's what I mean by being non-profitable. Actually we put some mark-up on it. (Tr. 1945-49)

Washington, D.C.

R.C.M. Burton & Son—Almon Burton, the owner of this retail store at 911 E Street, N.W., in downtown Washington, stated that his is a small business, his floor space is very limited, and he does not like to carry lines of furniture unless he can display samples upon the floor. He testified:

We run a small operation. We have a small display area. The profit in our business is very small. It is impossible for us to run a line of furniture and show the pieces on the floor, that we don't get a 50% discount on.

The purpose in my writing Knoll, and being persistent with Knoll, to secure this 50% discount, is that we like their line of furniture. Our customers wanted it but we could not afford to sell it at 40% discount.

* * * * *

We have this very limited space and as I say, we could not show anything that we did not get at least 50% discount on it in our display space. I was anxious to get this discount from Knoll so that we could show these pieces on the floor and could sell them. (Tr. 3010-11)

Now, all companies are competing for space on our floor. We have had some that made an offer to even put the pieces there on consignment but we have to decide what we can make the best use of the space of. (Tr. 3010-11)

During the relevant period Burton's principal purchases from Knoll involved "the Bertoia chairs and the Saarinen, No. 70 series of chairs, and occasional purchases of the Saarinen pedestal chairs . . . the 150 series." (Tr. 3026) The witness, in substance, testified that ". . . these items are unique and none of the other companies from which Burtons purchases furniture, manufacture or sell similar items." (Tr. 3036)

It is true that these things are unique—beautiful. That is just one of the parts of doing business. We like to have unique things. Some of these other large lounge chairs, and smaller chairs, that we have, we think are unique. In fact, some of the customers come in and say, "Do people really buy this stuff?" (Tr. 3038)

* * * * *

. . . They don't think anybody really buys it [the Saarinen No. 70 chair] and puts it in their home. (Tr. 3038)

In comparing a so-called competitor (Founders line) with Knoll, Mr. Burton stated:

I can say no, it was not the same. In the early 50's, contemporary was just getting started. As a matter of fact, the bulk of the companies that we did business with, say, in the early 50's, are out of business. Their products served their purpose. It was a developing thing. They sold for maybe two, three, or four years; then there was no demand for it. These people just went out of business. They were not able to come out with new products, to meet the public's demand.

HEARING EXAMINER GROSS: Would new products, as you used it Mr. Burton, refer more to styling?

THE WITNESS: Yes, sir. The styling. (Tr. 3042)

At Transcript 3052-53, Mr. Burton testified:

HEARING EXAMINER GROSS: * * * Now, as you sit there under oath, sir, we would like to know whether Knoll Associates or any person representing them, stipulated that in order for you to know whether Knoll Associates or any person representing them, stipulated that in order for you to get a 50% discount at the time that you first got the 50% discount, it was necessary that you buy a minimum amount of furniture from them?

THE WITNESS: No sir, It was never presented to me in that manner.

As I said, I had been attempting for some little while to get a better discount from Knoll so that I could show some of their pieces on my floor. There were several other stores in Washington in the same line of business that I was in, that had these pieces on their floor, and I knew they were getting a 50% discount because I was told so.

When the Knoll salesman came into my show room, he was impressed with the show room. He said, "You should have the 50% discount." That was it. (Emphasis supplied.)

We sat down. We talked it over, and being to familiar with the line, or with contemporary furniture, I asked his advice about what he would suggest that we show—the colors to put them in. He worked it out for me and I agreed; the pieces he selected, I liked. I liked the colors he picked out. That is what we ordered. As to whether they had some minimum that they require people to buy, it was never discussed with me. (Tr. 3052-53)

Mr. Burton further testified:

Q. . . . Now didn't you state, Mr. Burton, that Knoll was not asked to meet the prices or the discounts of other manufacturers or distributors of furniture? Was that not your statement, Mr. Burton?

A. *We don't ask any company to meet anybody else's prices. (Emphasis supplied.)*

Q. All right.

A. As I explained to you, if we don't get the maximum discount we do not show this furniture on the floor.

If the company wants us to show it, they have to give us the maximum discount for us to show it.

Q. That is what you were seeking from Knoll—the maximum discount?

A. Yes.

Q. And as a matter of fact, you also indicated that the Knoll items that you purchased are so different from those of other companies, that comparison cannot be made?

Those were your own words, were they not, Mr. Burton?

A. Not on specific items, no.

Q. May I be sure that I understand your answer, sir?

HEARING EXAMINER GROSS: Where I am confused, I guess, Mr. Burton, is whether you meant that, no, a comparison may not be made, or no comparison may be made.

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THE WITNESS: Well, sir, I would have to go back—

HEARING EXAMINER GROSS: Well, you go ahead and explain it.

THE WITNESS: And say about the only way I can explain that is this:

If you take it item for item, it is very difficult to compare most any manufacturer—

HEARING EXAMINER GROSS: You are talking about the contemporary furniture, I take it?

THE WITNESS: Yes, sir. As I said several times before, we have a small area for showing furniture. We try to show on the floor, what will sell, and what we can make a profit on. (Tr. 3034-35)

Knoll's granting of the extra 10 percent discount to R.C.M. Burton & Son was not made in good faith to meet an equally low, lawful price of a Knoll competitor for an identified item of merchandise.

Ursell's, Inc.—Erich Ursell and his wife operate a retail store at 3243 Q Street, N.W., Washington, D.C., and have operated it for a little over 15 years. They sell furniture, basically of contemporary design, to people who are purchasing for residential use. (Tr. 3153)

The store furnishes design service as part of its business (Tr. 3207-08) and a decorating service (Tr. 3209). The store sells "Accessories, china, stainless steel, gifts, ties, everything in the contemporary range, jewelry, upstairs furniture, fabrics and lamps." (Tr. 3207)

In 1956, in conversation with Taylor Simmons of the Knoll organization, Mr. Ursell told Mr. Simmons that he wanted his Knoll discount increased from 40 percent to 50 percent. (Tr. 3157)

Mr. Ursell and his wife were interviewed by complaint counsel prior to testifying. Complaint counsel reduced the substance of the conversation to writing, submitted it to Mr Ursell and his wife for corrections, and ultimately for signature. A copy of the signed statement was furnished to Mr Ursell and his wife. Nevertheless, in spite of the extreme care taken by Commission counsel in obtaining the statement, the witness Ursell repudiated it on the witness stand and the examiner rejected the statement (CX 1912-A-E rejected) on the grounds that the witness was not on trial and that, being present on the witness stand, he could testify without the restraint of the signed statement. Mr. Ursell's testimony included the following:

Q. Would you have purchased Knoll furniture, and carried it in your store, in the regular course of your business, the way you have just described it, since 1956, if you had not received the discount of 50 percent off the list price?



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MR. TURIEL: I must object to the question.

HEARING EXAMINER GROSS: Overruled. He may answer.

THE WITNESS: I would not have bought it. I would not have bought it in the regular course of my business. I might have used it in decorating, if I ever needed it, but I would not have displayed it.

By Mr. Imberman:

Q. Are you telling you would have bought, if you had a particular need for it?

A. In our decorating.

Q. Or if a customer came in and asked for a piece of Knoll furniture by name, or by number?

A. That is right.

Q. But you wouldn't have carried it in the regular course of your business, and tried to promote the sale?

A. I would not have stocked it.

Q. And you would not have displayed it. Am I right?

A. That is right. (Tr. 3167-68)

In substance the witness testified Ursell's would not have stocked or displayed Knoll furniture without the extra 10 percent discount being allowed. It is a fair inference that *stocking* and *a floor display* were Knoll's prerequisites for granting its extra 10 percent to Ursell's type of operation and that Knoll was not under compulsion to meet the lower, lawful price of a competitor for an identified item.

HEARING EXAMINER GROSS: Mr. Ursell I think in fairness to you, to the best of your recollection, just taking the years 1960, 1961, and 1962, would you be able to recall, as you sit there now, what, generically, what class of furniture you were buying from Knoll? Do you understand what I mean?

THE WITNESS: Yes. I know what you mean, but I don't know the details as much; for instance the orders do not come through my hands, if it pertains to furniture. Mostly they were Bertioia pieces and Saarinen pieces and all I remember is when I was more active there were quite a few Knoll sofas we sold. Now whether they fell into '60 and '62 I can not remember. (Tr. 3181-82)

Q. The basis for receiving the 50 percent discount from Knoll was the amount of furniture to be displayed and also the amount of promotion that would be given to the Knoll products and not what other manufacturers were doing, price-wise, isn't that correct?

THE WITNESS: That is only one aspect of it. I know this is what you wrote in your note, which I only got the other day. We discussed other things at the time which you didn't write down. I am not a lawyer. And I probably should have, should know more about law, but that was one aspect of it. The fact was that I was getting 50 percent before we opened upstairs, from other manufacturers. (Tr. 3184)

Q. Were you required to purchase approximately or to order approximately

\$1,000 to \$2,000 worth of furniture from Knoll in order to qualify for the 50 percent discount?

* * * * *
THE WITNESS: I can't remember whether we were required a certain amount. I know we did buy it and in order for use to sell it, we had to display it. And \$1,000 to \$2,000 isn't very much to display. I can't remember whether we were required or not. (Tr. 3185)

* * * * *
"Q. Mr. Ursell, but it was common knowledge that dealers who displayed and stocked merchandise would get the fifty percent discount from Knoll, was it not? You were aware of that?"

THE WITNESS: As I said, I didn't study law. It was common knowledge of the industry. I assumed of Knoll, too, I assumed that *if stores would stock and show Knoll furniture, they would get fifty percent.* (Emphasis supplied.)

By Mr. Turiel:

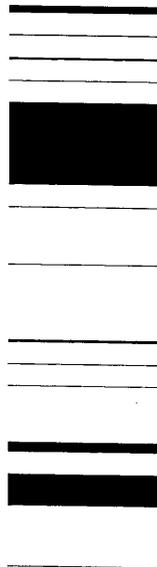
Q. And that was the basis of your getting the fifty percent, to your knowledge, was it not?

MR. IMBERMAN: I object to the form of that question.

THE WITNESS: I don't know what the basis, I really don't know what the basis of us getting the fifty percent. I don't know what came first. I don't know—as I said, it is how many years ago. I don't know what the basis is. We had a contemporary furniture store and we were expanding and that was the basis of it, and I guess Knoll wanted to be in it. (Tr. 3191-92)

The above excerpts from Mr. Ursell's testimony and his testimony as a whole do not establish that Knoll's additional 10 percent discriminatory discount to Ursell's was granted by Knoll in good faith to meet the equally low, lawful price of a Knoll competitor for a specific identified item; and the examiner so finds.

Decor Associates, Inc.—William L. Wilkoff, a former student at Ohio State University and graduate of the Pratt Institute of Design in New York, (Tr. 1661, *et seq.*) formerly owned and operated Decor Associates, Inc., 3131 M Street, N.W., Washington, D.C., which ceased doing business at the beginning of 1963. It sold, at retail, modern contemporary furniture, accessories, and interior decorating services. Mr. Wilkoff, at the time of his appearance, was working for another store, Chase Furniture of Silver Spring, Maryland, but Chase Furniture is not involved in this proceeding. Mr. Wilkoff liquidated Decor Associates, Inc., because he was not making any profit. The store was not large enough for a big volume operation and was not small enough for him to conduct his business at a minimal overhead. His competitors at the retail level included R.C.M. Burton & Son, Ursell's, Inc., and Modern Design across the District line—Wisconsin Circle. (Tr. 1665) In addition to himself, Mr. Wilkoff employed two other in-



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terior designers. (Tr. 1664) Mr. Wilkoff testified, " I assumed I was in competition with any furniture store in Washington." (Tr. 1667)

At Tr. 1673 Mr. Wilkoff was asked :

To the best of your knowledge or recollection were you offered the 50 per cent by Knoll or did you ask for it? * * *

to which he replied :

I will be honest with you, I don't know which came first. I really don't know.

I know I have enjoyed it since I have been handling the line, but I can't tell you whether I asked for the 50 percent or whether they said if I stocked it I would get 50 per cent. (Tr. 1674)

Did you ever tell Knoll that you would not handle or purchase any items in their line if you did not get a 50 per cent discount?

* * * * *

I don't recall that any mention was ever made at that point, because I never enjoyed anything else but the 50 per cent discount. (Tr. 1674)

A Knoll dealer, to my understanding, enjoyed a 50 per cent discount as a displaying and retail dealer.

In other words, we stocked a certain amount of it to enjoy the 50 per cent privilege. (Tr. 1671)

Nothing in Mr. Wilkoff's testimony gives the slightest support to Knoll's contention that the additional 10 percent discount it granted to Decor Associates, Inc., was made in good faith to meet the equally low, lawful price of Knoll competitor for an identified item or items.

Revere Furniture & Equipment Co.—William Baiardo, president of Revere Furniture & Equipment Co., 950 Upshur Street, N.W., Washington D.C., testified. (Tr. 2910 *et seq.*) He discussed his firm's discount with Taylor Simmons, the Knoll salesman.

Did you tell him that you would buy—that you want to buy Knoll, if you could get it at fifty off the list price?

I guess so, yes. (Tr. 2919)

At Transcript 2922 Mr. Baiardo testified that he did *not* ask Knoll Associates or Mr. Simmons to match the discount of any other manufacturer from whom Revere Furniture was purchasing. Revere is run as a "contract business." (Tr. 2927) It renders a design service as part of its contract business; develops layouts of space. The business employs "about 110 people" (Tr. 2929) and has 40,000 square feet of space. Most of the Knoll furniture purchased by Revere is for commercial use in offices and institutions. (Tr. 2937)

Revere's primary interest in purchasing items from Knoll is to buy at the lowest net prices available. (Tr. 2940) Revere would not object to buying furniture from a manufacturer at less discount than 50 percent if it were being granted the maximum discount available (Tr. 2941-42), provided it is "competitive" with other manufacturers. (Tr. 2943)

During 1958-1962, Revere did not ask Knoll to meet or match the price of any other specific product manufactured by any one of Knoll's competitors. (Tr. 2945)

Knoll's granting of its 50 percent discount to Revere Furniture & Equipment Co., was not made to meet the equally low, lawful price of a Knoll competitor for an identified item or product.

Capitol Office Supply Co., Inc.—Robert F. Allen (Tr. 2955) formerly manager of the office furniture department of Capitol Office Supply Company (from February 1958 until the early part of 1962) testified Capitol, a combination office stationery and office furniture house sells office furniture at retail in the Washington area. (Tr. 2957). Mr. Allen was responsible for purchasing office furniture when he was at Capitol. He negotiated Capitol's 50 percent discount with Ben Short of Knoll over a period of six months. Capitol's annual volume of sales of office furniture while Allen was with them was about \$225,000.

In connection with Allen's purchase of particular Knoll products for Capitol Office Supply Company he did *not* ask Knoll to meet or match the price of any other specific product manufactured by any one of Knoll's competitors. (Tr. 2972) Mr. Allen testified during the period of time he was with Capitol the desks and seating which he purchased from Knoll competitors could be sold interchangeably with the desks and seating which he purchased from Knoll. (Tr. 2985) If this is a fact, Knoll's meeting competition evidence, in order to conform to the criteria established in recognized decisional authority, should have established that the discriminatory prices at which Knoll sold its desks and seating to Capitol were granted to meet the lawful lower price of a competitor for an identified item which was, at that time, interchangeable with the Knoll item. Knoll's evidence falls far short of such proof.

The hearing examiner finds that Knoll has completely failed to establish by reliable, credible and preponderant evidence in this record that the discriminatory discounts which it granted to its favored customers during the relevant time and in the relevant cities were granted "in good faith to meet an equally low price of



a competitor" for an identified or identifiable item. Knoll had and has the burden of going forward and the burden of proof as to this, its meeting competition, defense. It has failed to sustain its burden of proof.

Knoll produced no evidence that it discriminated in the price for a specific item in its furniture line to meet a competitor's lower price for the same or a similar item. Knoll gave its extra discount across the board on all items in its line. There is no evidence that any one of the hundreds of items in the Knoll line vied for the retail dollar on an "eyeball-to-eyeball" basis with the same or a similar item in a competing line. The record contains some generalizations, and comparisons of Knoll chairs with competing chairs. It is possible (although the record is silent) that most of the other items in the Knoll line (aside from seating) sold at the extra 10 percent discount did, or did not, have any competition—utilitywise, designwise, stylewise, or pricewise from any competitor's products.

Knoll seeks absolution in this proceeding for price discriminations covering tens and possibly hundreds of different items on a "blank check" basis. The most extreme of the meeting competition defenses which have heretofore been asserted in such proceedings have not sought such unrestricted exculpation.

Knoll's pricing practices permit a few of Knoll's customers, selected to suit Knoll's purposes, to buy for \$100 items for which most of its customers must pay \$120. This is not being done by Knoll "in good faith to meet the equally low price of a competitor."

CONCLUSIONS OF LAW

1. Respondent Knoll Associates, Inc., a New York corporation, a manufacturer of modern contemporary furniture and furniture products during the years pertinent to this proceeding sold and is now selling its products in "commerce," within the meaning of Section 2(a) of the Clayton Act, as amended.

2. In the course and conduct of its business in commerce Knoll has discriminated in price between purchasers of Knoll products of like grade and quality.

3. Knoll's favored customers compete with its unfavored customers for sales of Knoll products to the consumers—the ultimate users.

4. The effect of Knoll's price discriminations has been, and will continue to be, to lessen competition substantially, or to injure,

destroy, or prevent competition between Knoll's favored and unfavored customers.

5. Knoll's price discriminations were not made in good faith to meet the equally low lawful price of a Knoll competitor.

6. Although Knoll originally pleaded a cost justification defense under Section 2(a) it has not offered any evidence of cost justification of its price discriminations, and such cost justification defense is found to have been abandoned.

7. Knoll's price discriminations did and do violate Section 2(a) of the Clayton Act, as amended, and should be enjoined.

8. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this proceeding. This proceeding is in the public interest.

ORDER

It is ordered, That respondent, Knoll Associates, Inc., a corporation, its officers, representatives, agents and employees, directly, or through its parent corporation, Art Metal, Inc., or through any corporate or other device in, or in connection with, the sale of furniture and furniture products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such furniture and furniture products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price.

APPENDIX

KNOLL ASSOCIATES, INC., DOCKET NO. 8549

The Unlawful Search and Seizure Issue:

1. The Hearing Examiner's Ruling on Respondent's Motions to Suppress Commission Exhibits CX 1914 A Through CX 1959 B, For Identification, dated March 24, 1964.

2. Federal Trade Commission's Order Denying Application to File Interlocutory Appeal, issued May 11, 1964.

3. Opinion of Judge Irving Ben Cooper of the United States District Court for the Southern District of New York filed July 14, 1964, in Civil No. 1676.

4. Order by the United States Court of Appeals (second circuit) denying Knoll's Motion for a stay of proceedings, dated September 11, 1964.

5. Hearing Examiner's Certification to the Commission, dated November 30, 1964.

6. Federal Trade Commission's Order Ruling on Hearing Examiner's Certification, dated December 15, 1964.

7. Federal Trade Commission's Order Clarifying and Amending [the December 15, 1964] Order Ruling on Hearing Examiner's Certification, dated December 16, 1964.

8. Hearing Examiner's Order for Inspection and Copying of Documents and for Additional Hearings, dated December 16, 1964; and Order Amending Hearing Examiner's Order of December 16, 1964, dated December 18, 1964.

9. Hearing Examiner's Order Closing Record After Reopening by Federal Trade Commission, dated January 11, 1965.

10. Hearing Examiner's Supplementary Ruling upon Respondent's Motion To Suppress Based Upon Record as Reopened, dated February 25, 1965 [page 1739 herein].

OPINION OF THE COMMISSION

AUGUST 2, 1966

By REILLY, *Commissioner*:

Respondent herein has been charged with violation of Section 2(a) of the amended Clayton Act. The matter is now before us on respondent's appeal from an initial decision of the hearing examiner, holding that the allegations of the complaint had been sustained by the evidence and ordering respondent to cease and desist from the practices found to be unlawful.

The complaint specifically alleges that respondent, a manufacturer of contemporary furniture, has discriminated in price in the sale of products of like grade and quality by arbitrarily granting discounts of 50 percent off list price to some purchasers and discounts of 40 percent off list to others. The complaint further alleges that the favored customers are engaged in competition with purchasers paying the higher price and that such competition may be injured as a result of respondent's price discriminations.

The hearing examiner found that respondent sells its furniture to users, to architects, to interior design firms principally engaged in rendering interior design services, to interior design firms simultaneously engaged in rendering interior design services and in buying and selling furniture to large department stores which carry no Knoll furniture in their inventory, to retail firms engaged almost exclusively in selling office equipment and furniture, to retail furniture stores engaged almost exclusively in

selling only furniture and furnishings to contract houses which specify Knoll furniture in bids submitted in response to written specifications, and to retail outlets that sell Knoll furniture through Knoll catalogs. He further found that there is substantial cross competition between the various classes of respondent's retail sellers, *i.e.*, (a) architects vis-a-vis architects, interior designers, and retail stores; (b) interior designers vis-a-vis interior designers, architects and retail stores; and (c) retail stores vis-a-vis retail furniture stores, architects, and interior designers.

The examiner also found that respondent had discriminated in price between competing purchasers of its products and that the amount of the differential was sufficient to have the statutorily prescribed effect on competition. According to the initial decision, this finding is based upon testimony of numerous witnesses who testified as to the keenness of competition in the resale of furniture acquired from respondent and as to the significance of the differential insofar as their ability to compete was concerned. The examiner also held that respondent had failed to establish a meeting competition defense under the Section 2(b) proviso.

During the course of this proceeding, the examiner admitted into evidence over respondent's strenuous objection certain documents obtained by counsel supporting the complaint from a former employee of respondent's agent in Detroit, Michigan. Although the examiner expressly stated in his initial decision that he had placed no reliance on this disputed evidence in making his findings of fact, respondent has filed a separate appeal from the ruling which permitted the documents to be placed in the record. This argument will be considered later in the opinion. We will deal first with the issues raised by respondent's appeal from the examiner's findings, conclusions, and the order to cease and desist.

We note at the outset that respondent does not contest the examiner's holding that it had discriminated in price between competing purchasers and that certain of these discriminations would have the requisite adverse effects on competition. As to such price discriminations, respondent apparently agrees that an order should issue unless the discriminations were shown to be justified under the Section 2(b) proviso.¹ Respondent argues on this

¹ Respondent states in its brief that it has no quarrel with the conclusion that evidence relied on by the examiner demonstrates competition among retailers, and in that portion of the brief in which it discusses the issue of probable competitive injury it states, "We emphasize here that we are not now discussing the question of probable competitive injury to retailers of furniture, *i.e.*, furniture stores, department stores, or furniture dealers generally."

phase of its appeal, however, that the examiner erred in finding competition between designers and retailers in the resale of Knoll furniture and in finding injury to such competition as a result of the price discriminations.² It is respondent's contention that designers and retailers are engaged in entirely different types of business operations and consequently "do not operate in the same arena of the market place." In making this argument respondent relies upon evidence to the effect that designers render services which are ordinarily not performed by dealers. Such services include preparation of space plans, designing built-in cabinets and furniture, obtaining cost estimates from contractors, selection of colors, selection of floor and wall coverings, and selection of furniture and furnishings. Respondent also points to evidence that many designers, unlike retailers, receive compensation for their services which is not measured by a percentage of the cost of the furniture specified and some others, whose compensation is based on the cost of the furniture or furnishing specified, receive this fee regardless of whether their services are used to procure the furniture. There is also testimony cited by respondent that some designers act merely as purchasing agents for their clients and that others are not engaged in the purchasing and selling of furniture. On the other hand, according to respondent, dealers who purchase Knoll furniture perform the classic function of the retailer; they purchase furniture at wholesale, maintaining a stock and inventory in a warehouse, display the merchandise in their stores for sale, advertise it for sale, and sell it at retail. Respondent contends therefore that the record conclusively establishes that the functions performed by a dealer differ so widely from those performed by a designer that there can be no meaningful competition between these two types of businesses.

In determining whether respondent's discriminations between designers and dealers may result in injury cognizable under Section 2(a), we must consider whether the favored and non-favored customers are in fact engaged in competition and not whether they normally operate at different functional levels or whether they may be classified as different types of business entities, as respondent seems to contend. As one commentator has stated, ". . . the actualities of competition in the resale of the supplier's

² Respondent also contends that the examiner erred in finding that architects sell furniture when engaged in the normal practice of their profession. We agree that the evidence does not support this finding. Respondent concedes, however, that an architect may in addition to his professional practice also engage in the business of selling furniture as a completely separate endeavor.

products rise superior to nominal customer categorizations.”³ The fact that a seller’s favored and non-favored customers normally do not perform the same redistribution function, for example, does not preclude a finding of competition or injury to such competition within the meaning of Section 2(a) if there is an area of competitive contact between them, *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, or between the favored purchaser and a customer of the non-favored purchaser, *Federal Trade Commission v. Morton Salt*, 334 U.S. 37. And it has been held that competition exists between persons on the same level of distribution even though there is great dissimilarity in the manner in which they conduct their businesses, *General Foods Corporation*, 52 F.T.C. 798 (1956), *Mueller Co.*, 60 F.T.C. 120 (1962), *aff’d*, 323 F. 2d 44 (1963) or in their reason or motivation for selling a particular product. *Federal Trade Commission v. Simplicity Pattern Co., Inc.*, 360 U.S. 55. In the latter case, which is closely analogous to this matter, the favored customer sold the product for profit and the non-favored customer handled the product at no profit or at a loss as an accommodation to its customers and for the purpose of stimulating the sales of other products. Although this case was brought under Section 2(d), the Court, in finding competition, stated, “While the giving of discriminatory concessions to a variety store on any one isolated item might cause no injury to competition with a fabric store in its overall operation, that fact does not render non-existent the actual competition between them in patterns. It remains, and, because of the discriminatory concessions, causes further losses to the fabric store. As this Court stated in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 49 (1948),

There are many articles in a grocery store that, considered separate, are comparatively small parts of a merchant’s stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the act to each individual article in the store.

While the evidence relied upon by respondent in the matter now before us demonstrates a dissimilarity in certain of the functions ordinarily performed by interior designers and retail dealers and indicates an absence of competitive contact between them

³ Rowe, *Price Discrimination under the Robinson-Patman Act* (1962).

in certain aspects of their operations, it does not in any manner nullify or rebut the clear showing in the record that there is an extensive area in which designers and dealers compete by offering the same products and services to the same general class of customers. The hearing examiner so found, and his finding is supported by such overwhelming evidence that we see no necessity for reiterating it in detail here. Stated briefly, the testimony of manufacturers and designers establishes that many designers buy and sell furniture, including Knoll furniture. The record also contains uncontradicted evidence that there are dealers located in each of the relevant market areas who offer design services in connection with the sale of furniture and that these services are virtually identical to those performed by designers.⁴ There is also considerable testimony by both designers and dealers that they are engaged in competition with one another. Respondent's argument that there is no competitive nexus between them is wholly without merit.

Respondent further contends that even if there is competition between designers and dealers, there is a failure of proof that its price discriminations may cause substantial injury to such competition since, according to respondent, it makes no difference to designers whether they buy at a 40 percent or a 50 percent discount. The record does not support this contention, however. Designer Lillian Miller, for example, testified that her firm, S. J. Miller & Associates, competes with retail establishments such as W. & J. Sloane, Inc., Itkin Bros., Inc., and Braun & Rutherford, Inc. Her testimony with respect to the competitive significance of a low purchase price is as follows:

Q. In the purchase of furniture and furniture products from Knoll, as well as other furniture products that you buy, is it necessary or essential to purchase them at the lowest available price?

* * * * *

A. Yes, it is necessary in order to remain competitive, for one thing. Secondly, we are usually given a budget by a client, and within this budget we try to produce the most fully well-designed office that we can. (Tr. 391)

Similar testimony was given by representatives of design firms Architectural Interiors, Inc., and Emily Malino Associates, Inc.

⁴ The difference between a designer selling furniture in connection with its sale of design services and a dealer providing design services in connection with the sale of furniture seems in some instances to be non-existent. For example, respondent classified Adler-Schnee Associates, Inc., of Detroit, Michigan, as a design firm on its invoices but argues in its brief that it is a retail furniture establishment.

The record further shows that an important area of competition between designers and dealers is in the field of contract or bid business. This relatively new concept of merchandising involves the sale on a bid basis of a combination of design planning and furniture to institutions and large companies. The significance of the differential between 40 percent off list and 50 percent off list to firms competing for this type of business is reflected in the testimony of representatives of design firms, contract houses and department stores. Mr. Thom of Ideas, Inc., testified as follows in answer to an inquiry as to the importance of the 50 percent discount in competing for bid work:

A. Bid work, it is ridiculous to try and bid against people who do get a fifty percent. We have already a twenty percent differential, at a forty percent discount.

Q. What do you mean by a twenty percent differential?

A. Well, if you buy something for fifty off, it is twenty percent less than if you buy it for forty off, so if you already have twenty percent difference you can't add much to it and be competitive. There is no use being in business to go broke. You are in business to make a profit. (Tr. 1259)

Mr. Demant of Walter Herz Interiors, Incorporated, testified that he had practically quit bidding Knoll furniture because "contract bids in this town go possibly for less than ten percent over cost, and when we have to pay twenty percent above cost, it is very obvious that it doesn't pay to bid." (Tr. 1350) Mr. Beitel of Benon Products Co., a favored purchaser, gave the following testimony:

Q. If the purchaser is getting a forty percent discount, you do not consider him a competitor?

A. No, I do not.

Q. Why is that?

A. How can he compete when I am buying at a twenty percent edge? (Tr. 1029)

Respondent also makes the argument, "[I]f interior designers can procure furniture for their clients at 50 percent off list price, and if the designers' percentage fee of anywhere from 1 to 15 percent is then considered a 'markup,' no retailer operating on an equal price basis could compete or remain in business."⁵ It is respondent's position that the retailer's cost of doing business is sub-

⁵In making this argument, respondent loses sight of the fact that it is asking the Commission to hold that designers do not compete with dealers. It also overlooks completely the undisputed evidence that it sells to some designers at a lower price than it sells to competing dealers. Thus, if we accept respondent's assertion at face value, we have ample reason for not doing that which respondent specifically requests, i.e., issue an order which would permit respondent to discriminate in price between designers and dealers.

stantially higher than that of the designer and that a retailer therefore needs a price advantage in order to compete on equal terms. Similar arguments have been rejected by the Commission in prior decisions. *In the Matter of Mueller Co., supra, Purolator Products, Inc.*, Docket 7850 (1964) [65 F.T.C. 8]. In passing the Robinson-Patman Act "Congress intended to insure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing *so far as price is concerned.*" (Emphasis added.)⁶ Having elected to sell through different types or classes of purchasers, a seller may not penalize one by price discriminations intended to underwrite the other's cost of doing business. The competition which the Act protects at the secondary level is that which exists when there is equality of price treatment; not the competition which the seller may wish to create by engaging in discriminatory pricing practices. We find nothing in the Act or in its legislative history which indicates that Congress intended to permit sellers to regulate competition among buyers by discriminating in price. Such arbitrary interference by the seller may certainly injure the normal competitive rivalry among its customers. As stated by the Supreme Court in *Sun Oil*, "We discern in § 2 neither a purpose to insulate retailers from lawful and normal competitive pressures generated by other retailers, nor an intent to authorize suppliers, in response to such pressures created solely at the retail level, to protect, discriminatorily, sales to one customer at the expense of other customers."⁷

For all of the foregoing reasons we agree with the hearing examiner's conclusion that there is a competitive nexus between designers and retailers and that in that area in which these businesses compete there is a reasonable possibility that respondent's price discriminations will substantially injure, destroy, or prevent competition with the customer receiving the benefit of such discriminations.

Respondent next contends that the hearing examiner erred in holding that it had failed to establish that its lower prices to some customers were granted in good faith to meet the equally low prices of its competitors. The principal basis for this holding, as we read the initial decision, is that respondent did not prove that it was in fact responding to competitors' lower prices when it sold to some customers at a 50 percent discount. The examiner specifically held in this connection that "When Knoll felt it would

⁶ *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505.

⁷ *Federal Trade Commission v. Sun Oil Company, supra*, at 523.

promote the distribution and sale of its furniture, it gave its highest discount (50 percent) to Knoll customers who demanded it as a condition precedent for marketing Knoll furniture aggressively—with floor displays and minimum purchases. Customarily, Knoll's customers, so favored, usually were receiving, coincidentally, the highest discounts granted by Knoll's competitors."

In *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, the Supreme Court held that "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's." And we have defined the standard of good faith as "simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *In the Matter of Continental Baking Company*, Docket 7630 (December 31, 1963) [63 F.T.C. 2071].

In any case in which the meeting competition defense is pleaded, we think it incumbent upon the seller to prove that he was responding or reacting to a competitive situation; that he discriminated in price because the lower price of a competitor made it necessary for him to do so. "Section 2(b) presupposes a lower price responsive to rivals' competitive prices" (*Rowe, Price Discrimination Under The Robinson-Patman Act*). And as we said in *Forster Mfg. Co.*, Docket 7207 (January 3, 1963) [62 F.T.C. 852, 909], Section 2(b) does not sanction the fortuitous meeting of a competitor's price nor is there a good faith meeting of competition when price concessions are "granted as a matter of course, irrespective of what other sellers were offering." Consequently, in any case in which a seller claims justification under the 2(b) proviso, if it appears from the evidence that he would have sold to favored purchasers at the lower discriminatory price regardless of the price at which his rival sold, it cannot be said that he was meeting a competitor's price in good faith even though it can later be established that his competitor was also selling at the lower price. In other words, the seller must show not only that the favored customer received a lower price from a competing seller but that its price reduction to that customer was made to meet in good faith the competitor's equally low price.⁸

⁸ See *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 244, wherein the Court stated that the discussion of the 2(b) defense in *Staley* "proceeds upon the assumption, applicable here, that if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2, in making a counter offer provided the seller proves that its counter offer is made to meet in good faith its competitor's equally low price." (Emphasis added.)

We are in full agreement with the examiner's finding that respondent extended its maximum discount to favored customers not in a good faith response to competitors' equally low prices but to compensate them for displaying and promoting Knoll furniture, buying in larger quantities, or simply because the customer demanded a lower price. Although respondent's favored customers usually were receiving the maximum discounts granted by respondent's competitors, respondent failed to demonstrate that there was a causal connection between its own lower prices and those of its competitors.

Respondent's reasons for granting the greater discount are clearly revealed in the testimony of its customers, as well as in the statements of its own officials.⁹ In some instances, respondent voluntarily granted the maximum discount. Mr. Burton, owner of RCM Burton & Son, Washington, D.C., testified:

When the Knoll Salesman came into my show room, he was impressed with the show room. He said, "you should have the 50% discount." That was it. (Tr. 3053)

* * * * *

He also testified:

Q. Now, didn't you state, Mr. Burton, that Knoll was not asked to meet the prices or the discounts of other manufacturers or distributors of furniture? Was that not your statement, Mr. Burton?

A. We don't ask any company to meet anybody else's prices. (Tr. 3034)

Other customers were able to obtain the 50 percent discount only after extended negotiations with respondent's representatives. Mr. Sens, secretary-treasurer of Desks Inc., New York City, testified, "Through many months of negotiation and talking with the young salesman whom they had on the account who was very interested in having us, who thought that we could do a job with Knoll, in talking to him and eventually to the principals of the company, we finally reached an understanding where they would give us the fifty off if we would try to do a job for them." (Tr. 1919) Some customers couldn't remember how they obtained the maximum discount. Mr. Schnee of Adler-Schnee Associates, Inc., Detroit, Michigan, gave the following testimony:

A. Well, in substance the pricing policy of Knoll at that time was 40 percent to anyone in the trade with a 50 percent discount to people who were particularly active or who showed some of the furniture on the floor, on the sales floor, and we felt we had furniture of theirs on the floor and were active with Knoll Associates, and we thought

⁹ See *infra* pages 443-446.

we were entitled to a better discount than an architect who had no showroom or anything. (Tr. 2659)

* * * * *

Q. When you came back to Detroit, had you achieved your purpose?

A. Yes. We were on a 50 percent discount form that point.

Q. So that really is the upshot of the thing, am I right?

A. How we achieved it, I don't honestly recall, but we did get a 50 percent discount from Knoll. (Tr. 2661)

In some instances, respondent reduced the discount from 50 percent to 40 percent. Mr. Bass of Gregory, Mayer & Thom, Detroit, Michigan, testified:

Q. Now, there was an occasion when the discount to Gregory, Mayer and Thom was reduced from 50 percent to 40 percent; isn't that correct?

A. That's when I—

Q. Discuss prices?

A. —discussed it, yes.

Q. Did he tell you why the discount was being reduced from 50 to 40?

A. Well, as I recall, his answer to that was that the amount of business that we were doing, we didn't warrant the maximum discount. (Tr. 2778)

And Mr. Robinson of Robinson Furniture Company, Detroit, Michigan, gave similar testimony:

Q. Do you know, Mr. Robinson, why the discount was reduced?

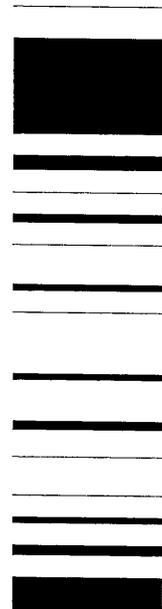
* * * * *

THE WITNESS: . . . The question of the volume of business was approached and it was brought to my attention that the Knoll Company did not consider the volume of business that the Robinson Furniture Company was producing for them sufficient to warrant the 50 percent discount.

Q. And, in turn, they reduced your discount to 40 percent?

A. And they told me from that time on that our discount would be 40 percent. (Tr. 2721)

The record shows that respondent also discriminated in favor of certain customers that demanded a 50 percent discount. These customers were obviously desirable accounts and other manufacturers sold to them at 50 percent or more off list. But the testimony of respondent's own officials clearly reveals that respondent was meeting the demands of these purchasers rather than the lower prices of its competitors who may have been selling to them at comparable low prices. For example, Mr. Niedringhaus, who was in charge of Knoll's New York sales region, testified as follows as to respondent's reason for granting a lower price to R. H. Macy and Co., Inc.:



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Q. Why did you continue to sell to them at fifty percent if the standard discount was forty?

A. Well, I know that Macy's has a policy of buying at fifty percent off list. I knew that was the only way I was going to sell them. (Tr. 3801)

And as to B. Altman and Co.:

Q. Why did you sell them at fifty off the published list price when your regular discount was forty?

A. Well, I knew it was their policy to buy at only fifty percent off list. (Tr. 3805)

And as to National Hospital Supply Co., Inc.:

Q. Why did you sell them at a fifty percent discount if your standard discount was forty?

A. I knew that they only bought at fifty percent off list. (Tr. 3802)

It may be argued that respondent was responding to competitors' prices in these instances on the theory that the customer could not maintain a policy of buying at a 50 percent discount unless some manufacturers sold to them at such a discount. But to hold that under such circumstances a seller's lower discriminatory prices are excused by the 2(b) proviso would be to largely emasculate the prohibitions of Section 2(a). The basic purpose of the Robinson-Patman Act was to insure that competing purchasers "from a single supplier . . . would not be injured by that supplier's discriminatory practices" *Sun Oil, supra* and this purpose would be effectively frustrated if the seller is permitted to discriminate in favor of certain buyers on the mere showing that these buyers insisted on receiving a lower price.

As stated above, it is incumbent upon the seller to establish that its lower prices were made in good faith to meet a competitor's, *Staley, supra*. And bearing upon the good faith of the seller claiming this defense is the legality of its competitors' prices. As held by the Supreme Court in *Standard Oil*¹⁰ a discrimination made in a genuine defensive response to the "lawful lower price of a competitor" is permitted by Section 2(b). While it has been held that the seller does not "carry the burden of proving the actual legality of the sales of its competitors in order to come within the protection of the proviso"¹¹ we are of the opinion that he must show that he had reason to believe that the prices he was meeting were lawful or, at least, that he had no reason to believe they were unlawful. *Tri-Valley Packing Association, Docket 7225*,

¹⁰ *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 242.

¹¹ *Standard Oil Co. v. Brown*, 238 F. 2d 54, 58 (5th Cir. 1956).

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remanded on other grounds, *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F. 2d 694 (9th Cir. 1964).¹² Respondent has not made this showing. As a matter of fact, respondent's knowledge that a customer received lower prices simply because it was its policy not to pay a higher price should have indicated to respondent that the lower prices of its competitors to that customer may have been discriminatory and probably not justified by savings in cost in dealing with that customer. As we recently held in *National Dairy*,¹³ it was incumbent upon respondent to present evidence showing that under these circumstances it had no reason to believe that the lower prices of these competitors were not lawful.

From our review of all the evidence, we agree with the hearing examiner that respondent failed to sustain the burden imposed by 2(b). Respondent's appeal from the examiner's ruling rejecting the meeting competition defense is therefore denied.

RESPONDENT'S CONSTITUTIONAL ISSUES

I

Respondent also urges two constitutional defenses. Initially, it contends that certain documents admitted into evidence were the product of an unreasonable search and seizure in contravention of its rights under the Fourth Amendment. This issue was first raised during complaint counsel's rebuttal to Knoll's defense. Second, respondent contends that its right to counsel, guaranteed by the Fifth Amendment, has been impaired by the actions of the attorneys supporting the complaint. This argument was first made after the record had been closed.

The search and seizure allegation has been the subject of extensive testimony and voluminous pleadings. The issue of impairment of the right to counsel has been particularly stressed by respondent in its briefs and argument on appeal. Both issues dom-

¹² Rowe comments as follows with respect to Congressional concern that the 2(b) proviso might be interpreted to permit the reciprocal meeting of sellers' illegal discriminatory prices: ". . . where a seller's price reduction produced competitive repercussions on the customer level, as in the typical price discrimination in favor of the individual 'big buyer,' the legality of the competitor's price was a focal concern. Here to permit an illegal price cut by one supplier to a particular chain store to be justified under the statute by reference to an illegal price discrimination procured by such a buyer from another supplier could have legalized the very discriminatory pricing in favor of big buyers which the Robinson-Patman Act was designed to check. As Representative Utterback put it, such a device to exonerate illegal discriminations to big buyers by one supplier because of comparable illegal prices by others could 'nullify the act entirely at the very inception of its enforcement.'" *Price Discrimination under the Robinson-Patman Act* at 215.

¹³ Docket No. 7018 (July, 1966) [p. 79 herein].

inate what, in our experience, is a relatively uncomplicated Robinson-Patman Act proceeding. They levy serious charges against the attorneys supporting the complaint. Accordingly, we treat of the issues in depth.

II

At the commencement of their rebuttal to respondent's "meeting competition" defense, complaint counsel moved to introduce in evidence forty-six documents principally pertaining to Knoll's reasons for granting fifty percent discounts. The documents had been supplied to counsel by one Herbert Prosser, a former employee of respondent's agent for the Detroit-Cleveland area. Knoll responded to complaint counsel's motion by filing an affidavit with the hearing examiner alleging that Prosser had stolen the documents from its files "on or about the same date that he had a telephone conversation with Bernard Turiel, Esq., counsel supporting the complaint." Much in the way of motions and appeals followed respondent's initial objection to use of the forty-six rebuttal documents. A chronology and description of these pleadings is contained in the hearing examiner's decision. For the purposes of our review, the following summary of the pleadings is sufficient:

On the strength of respondent's initial affidavit, the hearing examiner convened a special hearing in Detroit in March of 1964 to inquire into the circumstances surrounding complaint counsel's possession of the documents. Testimony was given by Prosser's employer and a number of witnesses who either worked with Prosser or to whom Prosser had made statements concerning the challenged documents. Prosser testified and was examined by respondent as an adverse witness. He readily admitted taking the documents and other papers from his files and those of his employer, and he admitted that he had a number of conversations with complaint counsel. Respondent, however, did not inquire into the circumstances concerning Prosser's possession of the documents nor did it probe the nature of the communications between Prosser and complaint counsel. After his very limited examination of Prosser, respondent's counsel asked the complaint attorneys to testify. Previously, respondent had sent a telegram to the Commission requesting authorization of such testimony. This motion was denied on the ground that it did not afford a sufficient basis to understand the nature of the relief sought by Knoll and its grounds for relief. Accordingly, complaint counsel declined to

testify on the ground that Section 10 of the Federal Trade Commission Act and the Commission's Rules of Practice prohibited such action without Commission authorization. Instead, counsel offered to make a statement for the record, but the offer was rejected upon the objections of Knoll's attorneys.

Thereafter, the hearing examiner ruled that the documents supplied by Prosser were properly admissible into evidence. Respondent then petitioned the Commission for permission to file an interlocutory appeal from the hearing examiner's ruling. Its petition stressed, among other things, the refusal of complaint counsel to testify. Noting that the case was ripe for a decision on the merits by the hearing examiner, the Commission, on May 11, 1964, Commissioner Elman dissenting, denied respondent's motion on the ground that it did not present sufficient grounds to justify an immediate decision as to the correctness of the examiner's ruling.

Upon denial of its petition for appeal, Knoll filed a motion in the United States District Court for the Southern District of New York requesting a stay of the proceedings on the complaint until a further hearing was held at which the attorneys supporting the complaint would be required to testify, and at which respondent would have use of all communications between Prosser and the Federal Trade Commission or its employees. That motion, and a subsequent motion by the respondent to dismiss the instant proceeding, were denied by the court in an opinion filed on July 13, 1964.¹⁴ The court found that "not a scintilla of evidence" existed to indicate any impropriety in complaint counsel's acceptance of the documents from Prosser.¹⁵ In reaching its decision, the court emphasized the fact that respondent made no attempt to elicit testimony from Prosser concerning his communications with complaint counsel. Respondent, thereafter, appealed to the Second Circuit. During oral argument on the matter, the court strongly indicated that respondent was entitled to the testimony of the Commission attorneys. Accordingly, the Commission immediately vacated the hearing examiner's ruling on the documents and ordered reopening of the record for the purpose of receiving complaint counsel's testimony and such other evidence as the examiner deemed pertinent.¹⁶

¹⁴ *Knoll Associates v. Dixon*, 232 F. Supp. 283 (S.D.N.Y., 1964).

¹⁵ *Id.* at 286.

¹⁶ On June 9, 1965, the Second Circuit, pursuant to stipulation of the parties, dismissed respondent's appeal and vacated the District Court's judgment without prejudice to respondent's right to raise the same issues in a subsequent proceeding.

Gary Beals, the "outside person," and told him that he had called Turiel and offered himself as a witness. Beals asked him why and Prosser replied, "well, I am just telling you that if I get knifed by Knoll, and they don't make me the kind of offer for employment, I will make myself available for the Federal Trade Commission." (Tr. 4462) The record reveals that in addition to Dworski's other employees and Beals, Dworski and William Nolan, respondent's vice-president, were aware of Prosser's conversation on the 9th with Turiel.

Turiel could recall having only one conversation with Prosser in December but did not deny that there could have been two. His recollection of his communication with Prosser during the relevant period was that Prosser informed him that he was terminating his employment with Dworski; claimed that he had been unfairly treated by Knoll; and offered to testify on behalf of the complaint. Prosser also claimed he had some papers that would be of assistance to complaint counsel and offered to mail them to the Commission. Turiel did not inquire about the papers and rejected Prosser's offers. He told Prosser that if complaint counsel wanted to talk to him they would get in touch with him.

Prosser acknowledged calling Turiel on December 9 and 10. He admitted offering to testify for the complaint and admitted offering to provide relevant documents. Upon questioning by the hearing examiner, he stated that Turiel expressed a "very indifferent attitude" and told him he had "no interest" in the proffered documents "whatsoever." (Tr. 5521-22)

On January 2, Prosser called the Federal Trade Commission offices in Washington and found that Turiel was visiting his parents in New York City. After some difficulties in finding for himself the correct phone number, Prosser called Turiel in New York. He repeated his offer to supply documents relevant to the proceeding. According to Turiel, Prosser stated: (1) that he was no longer scheduled to testify for Knoll, (2) that instead, Dworski and Osetek, a former employee of Dworski, would testify regarding the question of meeting competition, (3) that the offered documents would negate the testimony of these men, (4) that he, Prosser, was responsible for maintaining certain files for Dworski and that he had himself authored certain documents in the files, and (5) that the proffered documents were obtained as a result of an instruction he received from Knoll officials and Knoll's counsel to weed out documents that were damaging and harmful to Knoll's defense. On the basis of these statements and after re-

ceiving assurances from Prosser to the effect that the documents were from his own personal files and were not the property of respondent, Turiel agreed to look at the offered material. In doing so, he went against the advice of his immediate superior and that of a senior attorney in his particular trial division. Both men, prior to the January 2 offer of assistance by Prosser, had advised Turiel to have nothing to do with Mr. Prosser. Turiel acknowledged this fact but claimed that Prosser's statements on January 2 modified his original distrust of Prosser and convinced him that he had a professional obligation to examine the documents.

The testimony of Prosser and another witness establish that he took some of the documents on the morning of December 10 from Dworski's showroom. Prior to his actions of the day before and until Knoll took over the lease of the premises on January 1, 1964, Prosser had, and was permitted to retain, keys to the showroom. Prosser also testified that he took the remainder of the documents from the showroom during the period from December 9 through 19. He said the documents were obtained from his own office files and those of Dworski.

The testimony of several witnesses shows that Prosser displayed or spoke of the documents to others prior to sending them to complaint counsel. Shortly after December 9, he took documents into the Detroit showroom of Herman Miller, Inc., a competitor of Knoll, and asked help in wrapping them from Mary Stevens, an acquaintance employed in the showroom. Miss Stevens testified that Prosser told her that he had taken the papers from Dworski's showroom and that he intended to mail them to the "government attorney in Washington." She further testified that Prosser, using his credit card, attempted to call a Commission attorney from her office but was unable to make the connection. He then called the Federal building in Detroit in order to find out the address of the Federal Trade Commission in Washington to which he could mail the documents. However, he did not mail the documents on that date. On December 13, Prosser informed Jesse Osetek, a former employee of Dworski and a man scheduled to testify for Knoll in January, that he had records at home that would be damaging to Knoll's position in this proceeding. Finally, on January 4, 1964, Prosser returned to the Herman Miller showroom, wrapped documents before an employee of the Miller company, and stated that he was going to send them to the Federal Trade Commission. The documents were received through the mail by complaint counsel several days later.

IV

Concurrent with his Initial Decision on the merits of the complaint, the hearing examiner filed a separate opinion affirming the admissibility into evidence of the forty-six challenged documents. He declined consideration of Knoll's claim of impairment of its right to counsel on the ground that this issue was first raised after the record had been closed and without notice to counsel supporting the complaint. With respect to the search and seizure issue, he found that: (a) the record did not demonstrate that the documents were stolen; and (b) respondent, in any event, did not own the documents. In conclusion, he characterized respondent's Fourth Amendment argument as a "red herring" and an "Alice-in-Wonderland fantasy." Although he expressly disclaimed reliance on the challenged evidence in reaching his decision on the complaint, the hearing examiner cautioned that by such action he did not "wish, even by innuendo, to indicate that there is in this record, the slightest proof that . . . complaint counsel or anyone else at the Federal Trade Commission induced their theft; or that Knoll's constitutional rights have, in any way, been abridged by the conduct of anyone directly employed by or indirectly associated with the Federal Trade Commission."¹⁷

In its appeal, Knoll argues that the forty-six rebuttal documents should be suppressed and the complaint dismissed because the circumstances behind complaint counsel's possession of this evidence compels a finding that Knoll's rights under the Fourth Amendment have been violated. The fact that the documents were not used in finding against Knoll on the complaint is claimed to be unimportant since Knoll alleges that they were used by complaint counsel in trial preparations prior to their introduction into evidence, and thus infected the record to an indeterminable extent. Additionally, respondent contends that its claim of impairment of its right to counsel was timely and must be considered.

V

Initially, we consider respondent's claim that it has been the victim of an unreasonable search and seizure:

The core of the Fourth Amendment is the protection of one's privacy against arbitrary intrusion by the police. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). Basic to any demand that relevant evidence be excluded from consideration because of a violation of this Amendment is the burden of the petitioner to demonstrate

¹⁷ Supplementary Ruling upon Respondent's Motion to Suppress, p. 27.

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that his privacy has been invaded by those entrusted with enforcement of the law.¹⁸ Respondent contends that it has carried this burden. Its argument in this respect is both intricate and unique. It may be summarized by the following six contentions, each of which we shall thereafter consider in sequence.

(1) Prosser stole the documents from Knoll's files;

(2) Alternatively, Prosser stole the documents from another for the purpose of harming Knoll. Under recent cases, respondent argues, this is sufficient to give Knoll standing to claim that it had been a victim of an unreasonable search and seizure;

(3) This case is materially different on its facts from *Burdeau v. McDowell*,¹⁹ wherein the Supreme Court held that courts are not to be precluded from receiving relevant evidence which a private individual has acquired by a tortious act so long as there is no government complicity in the act. The degree of cooperation present here between Prosser and complaint counsel would, according to respondent, have required suppression of the challenged evidence in *Burdeau*;

(4) The proper case to be applied in this matter is *Gambino v. United States*.²⁰ Therein, the Supreme Court held that documents seized without authority for the sole purpose of aiding a federal prosecution are inadmissible. According to respondent, Prosser stole the challenged documents for the sole purpose of assisting complaint counsel;

(5) Upon acceptance of the contested documents, complaint counsel knew or should have known that they were stolen. Therefore, respondent contends, their acceptance of the documents amounted to ratification of an "illegal search and seizure"; and

(6) The *Burdeau* holding has been overruled by *Elkins v. United States*.²¹ Therein, the Supreme Court held that "federal officials may not use evidence illegally obtained by others, whatever their purpose or their relationship to federal authorities, without compromising the integrity of the federal proceeding."

(1) We agree with the hearing examiner that the record does not establish that the disputed documents were stolen from Knoll's files. For the most part the documents are communica-

¹⁸ See, e.g., *Silverman v. United States*, 365 U.S. 505, (1961); *Jones v. United States*, 362 U.S. 257 (1960); *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616 (1886).

¹⁹ 256 U.S. 465 (1921).

²⁰ 275 U.S. 310 (1927).

²¹ 364 U.S. 206 (1960).

tions from Jesse C. Osetek, Herbert Prosser and Joseph Dworski to Knoll officials, and communications from the latter to the same three men. Osetek was an employee of Dworski when he authored or received those of the documents bearing his name. So too was Prosser. The latter admitted that he took some of the documents from his own files within the showroom and the remainder from Dworski's files. He denied taking any files from Knoll. Dworski, who owned the showroom, identified the documents as papers coming from his files. These facts, the nature of the relationship between Dworski and Knoll, and the fact that a number of the documents are responsive to one another convinces us that Knoll maintained copies in its own offices and that the documents in the record were Dworski's copies.

Respondent, however, points to the testimony of its employee, Gary Beals, to the effect that the documents belonged to Knoll. Beals first testified after Dworski's appearance and was not questioned concerning ownership of the documents. After both sides had rested, the hearing examiner indicated to respondent's counsel that there had been no showing of Knoll's possessory interest in the challenged documents. Although counsel on several occasions said he would recall Dworski for testimony, he never did. Instead, Beals, who was present in the hearing room during legal argument concerning ownership of the documents, was asked to testify further. In his second appearance, Beals stated his opinion that the documents belonged to Knoll. However, he also admitted that he had not seen the papers.

(2) According to respondent, a finding that the documents were not its property does not preclude it from requesting their exclusion as the product of an unreasonable search and seizure. We agree. Since 1960, federal court decisions have broadened the category of those aggrieved by violations of the Fourth Amendment. In that year, the Supreme Court in *Jones v. United States*,²² rejected sole reliance on "subtle distinctions" drawn from the body of private property law in considering a citizen's standing to request invocation of the exclusionary rule. Subsequent decisions since *Jones* establish that it is sufficient that a citizen demonstrate that an illegal search and seizure had been directed against him and that the fruits of the search could only be used to his detriment.²³

²² 362 U.S. 257, 266 (1960).

²³ See *Villano v. United States*, 310 F. 2d 680 (10th Cir. 1962); *Harlow v. United States*, 301 F. 2d 361 (5th Cir. 1962); and *Henzel v. United States*, 296 F. 2d 650 (5th Cir. 1961).

Respondent argues that even if it has not established that the documents were its property it has standing to request their exclusion under the aforementioned cases. It is no more specific in this claim than mere reiteration of the statement that Knoll was "one against whom the search was directed," a statement found in the cited cases each of which involved a direct physical seizure of property by government agents. In view of the fact that respondent does not contend that complaint counsel participated in any seizure herein, and in consideration of Knoll's other arguments, we must assume that Knoll claims that Prosser stole Dworski's documents; that this "seizure" was directed against Knoll; and that the government was (through Prosser's communications, his purpose, or complaint counsel's knowledge) sufficiently involved with the "seizure" to render it one proscribed by the Fourth Amendment.

The first step in this claim is proof that Prosser took the documents from Dworski without authority. The hearing examiner found, however, that such was not the case. In so holding, he pointed out that Prosser had wide latitude in the use of the documents; that Dworski never directly testified that Prosser's possession and submission of the documents was unauthorized; and that Dworski, though fully aware of Prosser's intention to offer documents and testimony to support the Commission's complaint and Prosser's subsequent action in this regard, never undertook preventive or punitive action against Prosser. Our review of the record, however, convinces us that it is more reasonable to believe that Prosser took the documents from Dworski without authority and that this "seizure" was directed against Knoll.

Although he never directly stated that Prosser's taking of the documents was unauthorized, the general tenor of Dworski's testimony was to this effect. He testified that the documents came from his files; that he considered them valuable business records; and that he was unaware of their disappearance until informed that they were to be used in evidence against Knoll. Moreover, as a willing witness for Knoll's defense who testified, as the documents show, in direct contradiction to his written word, it is extremely unlikely that he would have authorized Prosser's actions. The latter, after his self-publicized offer of assistance to complaint counsel on December 9, 1963, was, for all practical purpose, finished as an employee in the Detroit showroom. By his own admission, he took the documents from the showroom during the period from December 9 through 19. While he was authorized to



take documents home with him in connection with his job, he did not remove the challenged papers for the purpose of assisting Dworski in the sale of Knoll furniture. Instead, his purpose in taking the documents was "to hang Knoll" for what he considered to be unfair treatment. If Prosser's actions were those of the government, Knoll has not only established "standing" to challenge the documents, but has made out a case requiring their exclusion from the record.

(3) Special counsel for the complaint attorneys argues that, in any event, Prosser acted solely upon his own initiative and, therefore, could not have committed an unconstitutional search and seizure under the Supreme Court's holding in *Burdeau v. McDowell*.²⁴ Respondent disputes this claim. It contends that *Burdeau* is distinguishable on its facts; that the proper case to apply in the instant situation is *Gambino v. United States*;²⁵ and that, in any event, the *Burdeau* holding has been overruled by the Supreme Court.

In *Burdeau*, the petitioner was discharged by his employer, Cities Service, for alleged fraudulent conduct. His employer then took charge of his office, blew open safes, forced open desks, and seized, in addition to its own papers, private documents belonging to the petitioner, McDowell. Some three months later, Cities Service, after communication with the Department of Justice, turned over to the government papers belonging to McDowell. The company's communication to the Attorney General stated that McDowell had made fraudulent use of the mails in the transmission of various letters; "that some of such letters, or copies of them taken from McDowell's file, were in the possession of the Cities Service Company; [and] that the Company also had in its possession portions of a diary of McDowell . . . and other data which . . . would be useful in the investigation of the matter before the grand jury and subsequent prosecution should an indictment be returned."²⁶ When the government filed a criminal information against McDowell based on the papers supplied by the employer, McDowell petitioned for return of the documents on the ground that they were the product of an unreasonable search and seizure in violation of his rights under the Fourth Amendment. The Supreme Court ultimately held against him after finding that no government official had anything to do with the theft

²⁴ 256 U.S. 465 (1921).

²⁵ 275 U.S. 310 (1927).

²⁶ *Burdeau v. McDowell*, *supra*, at 474.

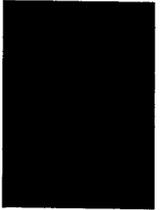
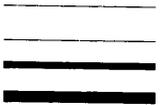
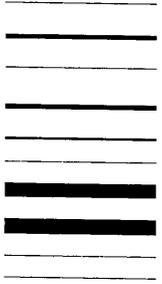
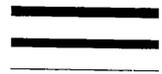
or any knowledge of the matter until several months after the fact. According to the Court, it was manifest that "there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals, taking the property of another."²⁷

Burdeau is claimed to be distinguishable in a number of ways. According to respondent, the government attorneys therein unlike their F.T.C. counterparts herein (1) "did not, before and after the theft, accept the assistance of the private person who illegally obtained the evidence," (2) "They were not in constant communication with him," (3) they knew nothing of the theft of the documents until months thereafter and, (4) they "could properly be said to have nothing to do with the thief or the theft." In sum, respondent argues that the evidence would have been excluded in *Burdeau* if the authorities there "had been acting in cooperation with the private person" as the record shows in this matter.

Our reading of *Burdeau* convinces us that the evidence would have been excluded in that case if the facts had established complicity between the government and McDowell's former employer. Here, however, the examiner has made a finding that complaint counsel did not induce or encourage Prosser's actions. At one point in its brief, respondent claims that it was not necessary for the hearing examiner to make such a finding, as government complicity in the taking of the documents is not required for a holding that respondent has been victimized by an unlawful search and seizure. Whatever the merits of this latter claim, a claim which we consider *infra*, it is clear from respondent's pleadings that a finding concerning the extent of Prosser's "cooperation" with complaint counsel was in order.

During the special hearings, the complaint attorneys asked respondent's counsel on several occasions whether they were being charged with complicity in the alleged theft of the documents. They never received a direct answer, nor did the hearing examiner who made a similar inquiry. Thereafter, respondent's briefs to the hearing examiner, as its motions resulting in the special hearings, never directly charged complicity but stressed "cooperation" between complaint counsel and Prosser in such a manner that "cooperation" could only be read as "complicity." Respondent's briefs on appeal are to the same effect. Its method of distinguishing *Burdeau* is an example of equating cooperation and

²⁷ *Id.* at 475.



complicity. Another is the manner in which it indirectly attacks the testimony of complaint counsel by carefully placed references to record statements by the hearing examiner expressing dissatisfaction with this testimony. Further, respondent's appeal briefs contain such statements as: "the Hearing Examiner evidently decided to protect complaint counsel at the respondent's expense and wrote a decision whitewashing him completely"; "Prosser switched from the defense team to the Commission team on October 9"; and ". . . the lengths to which the Examiner has gone in writing his decision to protect Commission counsel at any cost."

During oral argument we asked respondent's counsel on two occasions whether he was charging the complaint attorneys with complicity or subornation of larceny, and stated that if this were so we were ready to hear his arguments. Counsel denied making such charges and instead stressed the contentions that another case controlled the decision herein and that *Burdeau* had been overruled.

In its appeal brief, respondent refers to the attorneys supporting the complaint as "defendants." The appellation is an apt one. In any matter wherein the issue of unreasonable search and seizure is raised the category of accused properly includes not only those charged with violation of the law, but also those entrusted with enforcement of the law. Both are, in effect, charged with action contrary to the public interest. The former are clearly entitled to direct accusation instead of innuendo and coloration of fact. It may be debatable whether the latter, because of their profession, are entitled to equal treatment. There can be no question, however, that both are entitled to a judgment on all charges that have been made against them.

Prosser first offered to aid the government after a violent quarrel with respondent's officials. He contrived to have this offer overheard by others. A witness produced by respondent testified that she heard Prosser's offer to Turiel. She heard Prosser inform Turiel that he then *had* documents that were relevant to the complaint against Knoll, not, as respondent has implied, that he *could secure* such information.²⁸ After complaint counsel refused this offer, Prosser told respondent about it. When this failed to invoke the response expected, he took documents from the show-

²⁸ In the proceeding before the United States Circuit Court of Appeals, respondent represented that this witness testified that she had heard Prosser tell Turiel that "he had, or could get possession of, incriminating documents which he would turn over to the Commission . . ." Affidavit of Jacob Imberman, Esq., *Knoll Associates v. Dixon*, Case No. 29078, Second Circuit, Sept. 3, 1964.

room. However, he continued to publicize his intention to assist the Commission. He told a woman employee of another furniture company that he had quarreled with respondent's officials and that he had offered to testify against Knoll. He returned several days later to the same woman's office with the documents; said that he was going to mail the papers to the Commission; called Washington and could not locate Turiel; and then called the Federal Building in Detroit in order to ascertain the address of the Commission. Thereafter, he told Jesse Osetek, a man he knew was scheduled to testify in respondent's defense, that he had documents at home which he intended to submit to the government. Finally, on January 2, 1964, Prosser called Turiel, described the documents for the first time, and again offered them for government consideration.

We find that complaint counsel did not accept the assistance of Prosser prior to the unauthorized removal of the documents from Dworski's showroom. They did accept Prosser's offer after the taking of the documents as did the government attorneys in *Burdeau*. The communications here, five in number and sporadic rather than "constant," were all initiated by Prosser. The last communication here, in contrast to the initial communication in *Burdeau*, was the government's first intimation of the nature of the proffered evidence.

It is true, as respondent contends, that the hearing examiner occasionally expressed dissatisfaction with Turiel's testimony. The record shows that from the outset he adopted a skeptical attitude toward this testimony. From time to time, he urged Turiel to be more specific and responsive in his answers. He was successful in this regard. Unlike both parties, he was not interested in legalistic parrying but was rather outspoken in his demand for the facts. Throughout the special hearings on the documents, he conducted examinations of the witnesses that were, at times, more searching than those conducted by respondent's counsel. After hearing all the testimony and observing the demeanor of the witnesses, he concluded that there was not the "slightest proof" that complaint counsel participated in or encouraged the taking of the challenged evidence. Our review of the record fully substantiates this conclusion.

(4) The main thrust of respondent's argument, however, is that government participation in or inducement of Prosser's action is not a requisite for a finding that its rights under the Fourth Amendment have been violated. In this regard respondent

relies upon *Gambino v. United States*.²⁹ In that case, New York State troopers searched petitioners' automobile without probable cause and seized a quantity of Canadian liquor. Upon conviction in a subsequent federal proceeding under the National Prohibition Act, petitioners appealed to the Supreme Court on the ground that the troopers were to be considered federal agents under the terms of the prohibition statute. Although the Court ruled against this contention, it framed the issue before it as follows: "whether, although the state troopers were not agents of the United States, their relation to the federal prosecution was such as to require the exclusion of the evidence wrongfully obtained."³⁰ After finding that the seizure was made solely for the purpose of aiding in a federal proceeding and that the subsequent federal prosecution was a ratification of an improper seizure made on behalf of the United States, the Court excluded the challenged evidence.

In contending that the instant matter comes within *Gambino*, respondent seizes upon certain sentences to the exclusion of the underlying basis of the opinion. It first draws a parallel between the purpose of the state troopers and that of Prosser. *Gambino* is said to be controlling here because Prosser's sole purpose in taking the documents was to assist in a federal prosecution. We cannot agree.

In *Gambino*, the Court pointed out that the New York prohibition act was repealed several years prior to the challenged seizure. Concurrent with his approval of the bill repealing this law, the Governor of the state ordered all peace officers, including state troopers, to aid in the enforcement of the federal prohibition statute "with as much force and as much vigor as they would enforce any State law or local ordinance."³¹ The only change that repeal of the state law would bring, the Governor instructed, was that thereafter the state officers were to take offenders to federal authorities. Immediately after repeal of the state statute, the Federal Prohibition Director for New York announced that he would seek the aid of every New York state police officer in arresting violators of the National Prohibition Act. Thereafter, he met with various state peace officers for the purpose of soliciting such assistance. According to facts judicially noticed by the Court, "Aid so given was accepted and acted upon by federal

²⁹ 275 U.S. 310 (1927).

³⁰ *Id.* at 314.

³¹ 275 U.S. 310, at 315.

officials.”³² Following repeal of the state statute, “arrests for violations of the Volstead Act in Northern New York were commonly made by state troopers.”³³ The Court further found that immediately after the arrest of the petitioners, they and the seized evidence were turned over to the Federal officers. Upon these and other facts, the Court concluded that the statement of one of the troopers that no federal officers were present at the time of the seizure “must be taken to mean merely that the specific arrest and search was not directly participated in by any federal officer.”³⁴

In *Gambino*, a “working arrangement” existed between state and federal officials to enforce a federal statute.³⁵ It had become a regular practice in which both sides were knowledgeable before the fact. While federal officers did not directly participate in the challenged seizure, they had encouraged it. The petitioner’s privacy had been arbitrarily invaded by the police through the urging of the federal officials responsible for enforcement of the Volstead Act.

There was no working arrangement between the party seizing the challenged evidence here and the federal government. There was no encouragement by the government of Prosser’s actions. There was no invasion of respondent’s privacy under color of law. In plain fact, rather than being encouraged or directed to assist the public interest in this proceeding, Prosser used the fact that there was such a proceeding to serve his own purposes. In order to ensure his business future, he threatened to help the Commission’s case. When this threat did not bring the results desired, he moved to “get back” at Knoll by exposing that which it wished to remain undiscovered.

(5) Respondent further contends that complaint counsel “knew or should have known that they were accepting stolen property” when they told Prosser to send the documents. Accordingly, it argues that their subsequent use of the documents was a “ratification” of an unlawful search and seizure.

We are persuaded that Turiel, upon acceptance of the documents in January, 1964, was unaware of the fact that Prosser had only recently taken possession of them as a result of his quarrel with Knoll’s officials. He had been led to believe that Prosser had the documents in his possession prior to his initial

³² *Ibid.*

³³ *Ibid.*

³⁴ *Id.* at 316.

³⁵ See *Anderson v. United States*, 318 U.S. 350, 356 (1943).

offer of assistance in December and that he had obtained them as a result of instructions to destroy papers damaging to Knoll's defense. Prosser also told Turiel that the documents were not Knoll's property; that he had authored many of them; and that they came from his files. Notwithstanding this, there appears little question that when Turiel accepted the documents he had reason to doubt the legality of Prosser's possession. Prosser stated that he was no longer employed by Dworski. He told Turiel that Dworski and Osetek were to testify in his stead for Knoll's defense and that the documents would negate this testimony. He gave Turiel a verbal description of the documents and, as we have already noted, many of the documents were authored or received by Dworski and Osetek. Nevertheless, our review of the law convinces us that Turiel's on-the-spot decision to examine the documents did not convert Prosser's actions into an unreasonable search and seizure.

The most recent federal case following the *Burdeau* ruling is *United States v. Goldberg*.³⁶ Therein, the defendant was convicted of income tax evasion in part on the basis of testimony and records submitted by three of his former employees. The latter, all accountants, assisted the defendant in rewriting the cash and sales journals of his company in order to reduce the cash receipts. All three accountants retained the original journals within Goldberg's plant instead of destroying them as ordered by the defendant. The three men subsequently left Goldberg's employ. One, Ferrari, shortly after terminating his relationship with the defendant, telephoned the Internal Revenue Service and made an appointment with government agents. Two days later, Ferrari, along with another of the accountants, Dombkiewicz, discussed the pending tax evasion case against Goldberg with Internal Revenue officers. On the next day, both men returned to the government's offices, filed applications for informers' fees and turned over to the government the original journals they had taken from defendant against his express orders. Rudy, the third accountant, had been indicted along with Goldberg. Several years after the other two accountants had delivered the journals to the government, Rudy agreed, in return for a promise of leniency from the United States Attorney, to turn over whatever documentary evidence he had. He delivered the original copies of Goldberg's journals that he had taken without authority. On appeal to the Third Circuit, Goldberg claimed that admission of the journals supplied

³⁶ 330 F. 2d 30 (3d Cir. 1964), cert. denied, 377 U.S. 953 (1964).

by the three accountants violated his rights under the Fourth Amendment. The court, however, ruled that in the case of the first two accountants "the Government had no part or knowledge that they were going to take the records they turned over."³⁷ With respect to Rudy alone, the court pointed out that "neither the United States Attorney nor the Government agents knew what the documents were, which he had in his possession and which he turned over, until they examined them."³⁸

Certainly in the case of Ferrari and Dombkiewicz, the Government knew that it was receiving documents taken without authority after it discussed the case with the informers and both men returned to its offices to file for informers fees. At the least, the Government officials in *Goldberg* knew or should have known after receipt of the journals from these two men that the documents were taken without authority. The charge was income tax evasion. The submitted documents were originals. The suppliers of the documents were no longer employed by Goldberg. In the case of the journals supplied by Rudy, there can be no doubt that the tax officials and the U.S. Attorney knew upon examination of the documents that they had been taken without authority. Some three years prior they had accepted similar documents from the other two accountants.

In *Burdeau*, the U. S. Attorney who received the documents attacked by petitioner McDowell "admitted at the hearing that as the representative of the United States . . . he had papers which he assumed were taken from the office of McDowell."³⁹ Indeed, the communication between the employer and the Department of Justice that led to the latter's acceptance of the contested papers informed the government that some of the papers had been taken from petitioner's files. Moreover, the same communication offered the government portions of a private diary of the petitioner. When the agents in *Burdeau* accepted the proffered documents they, at least, had reason to believe that the petitioner did not agree to the disclosure of the papers. In summary, therefore, the "knowledge" mentioned in *Burdeau* and *Goldberg* means knowledge on the part of the government that the documents, prior to the fact, were to be taken without authority. There was no such knowledge here. Furthermore, there was here not even the inducement offered the suppliers of the documents in *Goldberg*.

³⁷ *United States v. Goldberg*, *supra*, at 35.

³⁸ *Ibid.*

³⁹ 256 U.S. 465, at 474.

Prosser testified that he was never promised anything by complaint counsel. "No one, to my knowledge, has ever suggested that I do anything. I did everything on my own volition at the time because of my highly agitated state about my future with Knoll Associates and Mr. Dworski." (Tr. 5406, 5521, 5523.)

(6) Finally, respondent urges that whether or not Prosser cooperated with complaint counsel, and whether or not he took the documents for the sole purpose of assisting a government proceeding, we still must avoid consideration of the challenged evidence. In this respect, Knoll argues that *Burdeau* has been overruled by *Elkins v. United States*,⁴⁰ wherein the Supreme Court held, according to respondent, that the "imperative of judicial integrity" required the suppression of all illegally obtained evidence. In other words, the fact that Prosser took the documents without authority is sufficient to require operation of the exclusionary rule.

We see nothing in the *Elkins* decision that indicates a departure from the law of the *Burdeau* case. Assuredly, the Court listed as one of the reasons for invoking the exclusionary rule "the imperative of judicial integrity." At the conclusion of its opinion, it stated that federal courts should not "be accomplices in the willful disobedience of a Constitution they are sworn to uphold."⁴¹ However, the Constitutional disobedience to which the Court had reference was not that of a private individual but that of state police officers. In *Elkins*, the Court re-examined the so-called "silver platter" doctrine and found that it could no longer be accepted. It held that evidence obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, was excludable on timely objection by the defendant. Writing for the majority, Justice Stewart observed that the basis for the "silver platter" doctrine was the belief that the Fourth Amendment was not directed to the misconduct of state officials. This underpinning was removed in 1949, Justice Stewart stated, when in *Wolf v. Colorado*⁴² "it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers."⁴³ Accordingly, the Court stated that "no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment

⁴⁰ 364 U.S. 206 (1960).

⁴¹ *Id.* at 223.

⁴² 338 U.S. 25 (1949).

⁴³ *Elkins v. United States*, *supra* at 213.

and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or a state officer."⁴⁴

Instead of overruling its holding in *Burdeau*, the Court, in *Elkins*, reinforced this holding. It recognized the practical demands of effective law enforcement and cautioned that "it must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures,"⁴⁵ and, according to the Court, a seizure was unreasonable when it amounted to arbitrary police intrusion, be it by federal or state officers.

In arguing that a tortious act by an individual is by itself sufficient cause for invocation of the exclusionary rule, respondent ignores the reason for the rule and fails to consider the effect of its contention upon practical law enforcement. In effect, respondent likens the exclusionary rule to an absolute evidentiary privilege irrevocably barring otherwise admissible evidence solely because a tort was committed against a third party doing business with respondent. The rule is not of such a nature. Rather, it is one of judicial discretion, "imposed only upon the basis of considerations which outweigh the general need for untrammelled disclosure of competent and relevant evidence in a court of justice."⁴⁶ As Justice Frankfurter pointed out in the introduction to his dissent in *Elkins* (an introduction which would certainly receive the approval of the entire Court), the history of the rule and its application is one of a continuing evaluation of what is best for the general good.⁴⁷ Society's need for every man's evidence and its interest in the efficient administration of its laws represent the general principles involved in such an evaluation. Limitations are placed upon the operations of these principles only when they serve a transcendent public good. Thus, evidence obtained through improper police procedure, though relevant and competent, is excluded from consideration in order to promote observance of the Constitution not to repair violations of the Constitution. The rule is invoked for a transcendent public interest—the observance of our Constitution—and it is invoked only because reason dictates that this interest can be protected only by removing the incentive for its non-observance. Efficient administration of the law, how-

⁴⁴ *Id.* at 215.

⁴⁵ 364 U.S. at 222.

⁴⁶ *Id.* at 216.

⁴⁷ *Id.* at 234.

ever, is not injured in the process. Government officers are not fettered in their service but, correctly, are reminded of the proper limits of their service.

Applying the exclusionary rule to relevant evidence obtained through the tortious action of an individual, without a demonstration of government inducement of the theft, would, at the most, serve to deter a miniscule number of torts and larcenies. It would not promote the observance of the Constitution, for to steal from one's neighbor is not to violate his constitutional rights. Instead, it would merely blunt the possible purpose of the tortfeasor at the expense of preventing the underlying aim of judicial inquiry—the ascertainment of truth—and at the expense of penalizing efficient administration of the law.

To obtain evidence of law violations, government agencies are equipped with various forms of compulsory process. This agency is no exception; its subpoena powers are generally conceded to be more extensive than most. However, compulsory process only lies for information known to exist or reasonably believed to exist. Frequently, the government is directed to the existence of evidence of law violation through the efforts of individuals, such as Prosser, who are motivated to assist for reasons varying from interest in law observance to interest in righting some real or supposed personal wrong. From early times, law enforcement authorities have needed to rely on such assistance. This need is recognized by the law through the observance of the privilege against disclosure of the informers' identity. Further encouragement is given to the citizen to perform his obligation of reporting law violations through statutes containing provisions for awarding the informer a share of subsequently recovered fines.⁴⁸

The broad application of the exclusionary rule urged by respondent would seriously impair government's reliance on the assistance of the individual citizen. Doubtlessly, informers would continue to offer assistance. The question, however, would be whether the government could accept their offers. Documents and information would continue to be offered to law enforcement officials and assurances would be demanded by the latter that authority existed for disclosure of such information. However, under respondent's view of the exclusionary rule, what government officer would be willing to accept assurance in such cases? Upon examining the documents, he might find that they had been

⁴⁸ See, *e.g.*, 21 U.S.C. § 183 (1964) (narcotics); 26 U.S.C. § 7623 (1964) (taxes); 31 U.S.C. § 232 (fraudulent claims against the government).

submitted without the approval of the owner. The acceptance of the documents, therefore, would forever foreclose this evidence from the public's notice and open any pending or contemplated proceeding to the claim that it had been tainted with knowledge gained through an unreasonable search and seizure. Were the officer to reject the proffered evidence upon examination only to subpoena its production by the same individual or its owner, would not the same result follow? It is the logical extension of respondent's reasoning that a subsequent subpoena would not prevent exclusion of the evidence in a subsequent proceeding. In appeal before the Commission respondent has so argued. Further, it is also the logical extension of respondent's contention that an employee, former employee or private individual could prevent the government from using or ordering the production of relevant information simply by orally disclosing it without respondent's authority. How then can the government protect itself against entrapment into an "unreasonable" search and seizure that will prevent public scrutiny of relevant evidence and the adjudication of matters worthy to be heard, and, at the same time, continue to rely on informers?

Consider a situation wherein the government is proceeding against a corporation for alleged violation of the law. In the corporation's files and those of its agent are documents damaging to the corporation's defense against the government's charges. These documents have been properly demanded by the government, but have been represented by the corporation as not being in existence. A third party, on his own initiative and in a bid to ensure his future employment, takes the documents and threatens the corporation with their disclosure to the government. This threat offers certain alternatives. The corporation could succumb to blackmail. It could inform the government of the threat and face a full inquiry. It could ignore the threat or even encourage the individual to follow through on his contemplated action. Under respondent's view of the exclusionary rule, would it not be more beneficial, and therefore more tempting, for the corporation to choose the last alternative? If the government accepted the documents, the corporation could have them excluded from consideration not only in the pending proceeding but in any further proceeding. Additionally, the pending proceeding would be subject to dismissal on a charge of being infected with the fruits of an unreasonable seizure. If the government rejected the documents only to request them anew from the corporation, the latter



could claim that the documents were illegally seized from its files and were, therefore, not capable of being produced, and, in any event, were forever barred from judicial consideration.

In conclusion, we find that *Burdeau v. McDowell* is controlling here. We do not believe that a third party, through commission of a tort of his own undertaking, can prejudice the public's interest in the ascertainment of truth. Nor do we believe that the government should, in the interest of preventing private controversies, reject relevant evidence or provide a tempting escape route for those whose actions the public has determined to be deserving of judicial review. As one court has recently stated, "The interests of justice will not be promoted by the announcement by the courts of new exclusions, since the process of investigating the truth in courts of justice is an indispensable function of society and since 'judicial rules of evidence were never meant to be used as an indirect method of punishment' of trespassers and other lawless intruders."⁴⁹

VI

The challenged documents were properly received in evidence. We find that they clearly rebut the testimony of Knoll officials that 50 percent discounts were granted to meet competition. The following example will suffice:

Early in the trial, respondent's Vice President, William J. Nolan, testified that competition was the only factor taken into consideration when his company determined that a dealer qualified for a fifty percent discount. (Tr. 635) Later, in the defense presentation, Joseph Dworski testified that fifty percent discounts were granted to seven particular dealers because they had been offered the same discounts or better by other manufacturers and would not buy Knoll products unless they received Knoll's maximum discount. (Tr. 3906) However, correspondence between Nolan and Dworski tell a different story than their authors' testimony. On January 23, 1961, Nolan informed Dworski that Federal Trade Commission investigators had been reviewing discounts granted to certain Knoll dealers within Dworski's area. (CX 1915 A-B) He asked Dworski to forward information on the dealers, including the reasons for granting them 50 percent discounts. The specified dealers were the same customers about whom Dworski later testified. On January 26, 1961, Dworski replied to Nolan. (CX 1916 A-D) This reply shows that the dis-

⁴⁹ *Sackler v. Sackler*, 255 N.Y.S. 2d 83, 85, 203 N.E. 2d 481 (Ct. App. 1964).

criminatory discounts were in no way occasioned by the need to meet competition.

Not only do the documents rebut respondent's meeting competition defense, but they also, when examined in connection with the testimony and other facts of record, disturbingly indicate that this defense was fabricated. Paul Copeland, respondent's national sales manager testified that in each instance where there was a change in the discount classification of a customer, the person recommending the change was required to submit a form to the head office giving the reasons for his recommendation. (Tr. 5377-78) Certainly these forms would be the best evidence of respondent's affirmative defense, for the appropriate reasons for upgrading a dealer to the 50 percent bracket would be the fact that the dealer was being offered the same discounts from competing manufacturers and would not purchase from Knoll unless it extended the same discount. These forms, however, were not offered into evidence by respondent. In fact, their existence was denied until after the forty-six documents supplied by Prosser were received into evidence. Respondent's reluctance in using these forms to establish its defense is understandable from a reading of the Prosser documents, many of which establish that the fifty percent discounts were based on services to Knoll and were not given to meet competition, several of which are dealer classification requests giving reasons for recommended discounts other than those reasons appropriate for the defense, and one of which is a memorandum from Mr. Copeland calling for the altering of dealer classification requests and the insertion of appropriate reasons for the granting of the discounts:

I am returning to Gary the requests for change in account classification for Trefzger's, Lewis, Cincinnati Office Outfitters, Wuebbold's, and Interior Design. We cannot under any circumstances use as reason for dropping the discount a "poor sales record." These request forms will have to be re-done, omitting sales record as a determining factor. This is in direct violation of FTC regulations. Please have them re-submitted to me in duplicate. Lack of promotional effort, poor design service, inadequate sales coverage, unsatisfactory floor displays, are all good reasons for reverting a dealer to 40%. *When we change an account from 40% to 50% it is a requirement of our attorneys that we also be informed of the new dealer's other lines of furniture and the discounts he receives from them. A statement by our regional manager should also indicate that unless we offer our maximum discount to that dealer, he will not purchase from us.* (CX 1951, A, emphasis supplied.)

There is also the fact that even if we disregard Prosser's statements to Turiel, his written statements show that he was aware that respondent's 50 percent discounts in the Detroit area in 1962

were not given to meet the competition of other furniture manufacturers. On October 5, 1962, D. R. Jomo, Knoll's Treasurer, requested Dworski to forward information on certain accounts in the Detroit area. (CX 1917) Among other things, Jomo wanted to know the reasons for granting 50 percent discounts to any of the specified dealers. Among the dealers specified were six whose discounts Dworski had explained to respondent's Vice President, Nolan, on January 26, 1961, and about whose discounts Dworski had testified in respondent's defense. Prosser answered Jomo's request on October 16, 1962. In his reply he stated that the discounts were granted or reduced on the basis of the dealer's sales and service aid to Knoll. (CX 1918 A-G) Approximately two months after the initial hearings on respondent's search and seizure claim and the hearing examiner's initial ruling against this claim, respondent's counsel delivered to the examiner an affidavit signed by Jomo on May 21, 1962. This document swears to the fact that Nolan wrote his January, 1961, memo to Dworski, and Jomo wrote his October, 1962, memo to Dworski in order to obtain information for Knoll's counsel in preparation "for litigation which seemed about to ensue." On the strength of this affidavit, respondent's counsel moved to strike the Nolan and Jomo memoranda and Dworski's and Prosser's replies thereto on the ground that they were subject to the attorney-client privilege or the "work-product doctrine." (Tr. 4678-96) According to counsel, "we told the client, 'Now, get this information together for us. This is precisely what we want to have.' That is why these documents were written" (Tr. 4695). The hearing examiner denied the motion to strike and respondent has not since pressed the point.

It is, thus, apparent from the record that Prosser knew that Knoll's 50 percent discounts in the Detroit area were not granted to meet the competition of competing furniture manufacturers. Knoll officials, who had to approve all discounts granted by Prosser and Dworski, were aware of this fact. Prosser's answer to Jomo's October, 1962, memorandum refreshed their memory. Respondent's attorneys apparently knew of Prosser's answer to Jomo's memorandum. Yet, Prosser, prior to termination of his employment with Dworski, was being prepared by respondent to testify in connection with its defense of meeting competition. A letter from respondent's counsel, dated October 25, 1963, and addressed to Prosser and Gary Beals, contains the following: "we will, of course, need Herb's testimony with respect to the fact

that a 50% dealer would not purchase Knoll furniture except at this discount and that it was necessary for us to meet the competition of the manufacturer. . . ." (RX 223 A-B.) When questioned about his understanding of this letter, Prosser testified, "my understanding . . . is that Knoll's attorney, Mr. Imberman, desired that I would testify in a favorable fashion as he so desired and directed, or elicited from me." (Tr. 5485)

Finally, we agree with the hearing examiner that the forty-six documents could have been secured by subpoena under the authority of the Federal Trade Commission Act. In this regard, it is significant that complaint counsel, during the prehearing conferences, expressed an intention to subpoena certain information from respondent. However, the hearing examiner suggested that respondent would voluntarily supply any relevant material. Respondent agreed to this procedure. Accordingly, in lieu of a subpoena, complaint counsel requested Knoll to provide various papers pertaining to its pricing operations. By this request, counsel sought, among other things, to arrive at the reasons why Knoll classified some customers as 50 percent dealers while others were only granted 40 percent discounts. It was complaint counsel's theory that the requested documents would show that Knoll's discriminations were the result of a "systematic and well-planned method of pricing" that had been "continuously and perpetually carried on by this respondent." (Tr. 160-61)

The forty-six documents conclusively demonstrate the validity of counsel's theory. The hearing examiner noted that "these documents appear to be of such a nature that they should have been turned over to Commission counsel before the hearings began. Instead, they were concealed from complaint counsel contrary to outstanding requests from Commission counsel and direct order of the hearing examiner."⁵⁰

Our review of the record reveals that a number of the documents did not come within the technical wording of the request and a modification subsequently negotiated by respondent's counsel. A number of the papers pertaining to Knoll's reasons for classifying dealers in one or the other discount brackets are written on form-letter stationery carrying headings such as "Inter-Office Communication" or "Inter-Office Memo." Nolan and Jomo's requests, alluded to above, carry such headings. While respondent's counsel knew of the existence of these documents, they were not required to produce them as a result of their negotia-

⁵⁰ Supplementary Ruling upon Respondent's Motion to Suppress, p. 27, n. 5.

tions with complaint counsel. The discovery request called for "all . . . inter-office memoranda . . . relating to prices, discounts, rebates and allowances utilized by Knoll," but after respondent's counsel argued that the production of such memoranda would be "extremely onerous and burdensome," complaint counsel agreed to strike that portion of his request. (Tr. 66-69)

Nevertheless, we find that certain of the documents should have been produced, and that all of the documents came within the spirit and purpose of the discovery motion and the examiner's order.

RESPONDENT'S CLAIM OF IMPAIRMENT OF ITS RIGHT TO COUNSEL

I

After two lengthy hearings on the nature of complaint counsel's communications with Herbert Prosser; after voluminous motions and appeals and proceedings in the U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals; and after respondent declined an offer by the hearing examiner to hold the record open for further evidence, Knoll, one month after the record was closed, first raised the issue that its right to counsel guaranteed by the Fifth Amendment had been impaired by complaint counsel's "improper communications" with Mr. Prosser. In affidavits signed by its counsel, Jacob Imberman and Samuel Greenberg, and filed concurrently with its proposed findings on its search and seizure claim, Knoll alleged that complaint counsel had intruded upon attorney-client communications and upon trial preparations "supposedly open only to the most loyal." The affidavits include the following averments:

(1) From the summer of 1963 until December of the same year, respondent's counsel accepted the aid and suggestions of Herbert Prosser in their defense of this proceeding;

(2) Respondent's counsel explained to Herbert Prosser the issues involved in this proceeding;

(3) Respondent's counsel made Herbert Prosser privy to all their "thoughts, plans, ideas and strategy concerning the defense of this case"; and

(4) Respondent's counsel up to termination of the association in December of 1963, always considered Herbert Prosser their client and a "member of the defense 'team.'"

The hearing examiner declined to review respondent's "due process" issue, holding: "If such argument could have been made,

Knoll's lawyers have waived it by intentionally withholding it until it was too late for opposing counsel to deal with properly. Knoll's lawyers would deny complaint counsel the same due process they advocate, too late." ⁵¹ Respondent, however, argues that its claim of impairment of the right to counsel was timely as it first learned of the extent of complaint counsel's communications with Prosser during the second special hearings on the search and seizure issue in December, 1965. It apparently means to explain its failure to raise the issue during those hearings by referring to the fact that transcripts of the testimony were not received until more than two weeks after the hearings concluded.

II

The record reveals that respondent knew, prior to the initial hearings on the documents, that Prosser had been in communication with complaint counsel. The testimony shows that respondent knew of Prosser's initial offer of assistance to complaint counsel the day it was made. During the initial special hearings on the documents, respondent's counsel were not concerned with informing the hearing examiner that Prosser was privy to their defense plans and was their "client." Instead, they chose to describe him as a "thief" and a "former employee," and were interested not in probing the nature of his contact with the government, but rather only in establishing that he had such contact. They also established that Prosser marked portions of the contested documents prior to submitting them to complaint counsel. Employing this fact, they represented to the hearing examiner that Prosser could only know what was relevant to a meeting competition defense in a Robinson-Patman proceeding through instruction received from complaint counsel. (Tr. 4525) Thereafter, in arguing for a stay of proceedings upon the complaint pending Knoll's appeal from the District Court decision against its request for dismissal of the complaint, respondent's counsel, Mr. Imberman, stated to Judge Hays, representing the United States Court of Appeals for the Second Circuit, that Prosser was a "former employee of ours" who had stolen documents and "marked them up for the benefit of the Federal Trade Commission and how a layman would know what portions of a document to mark so they would be relevant in a Robinson-Patman proceed-

⁵¹ Supplementary Ruling, p. 28.

ing is not quite clear.”⁵² Subsequently, in its brief to the Second Circuit, respondent maintained:

... an uninstructed layman could not be expected to make an intelligent selection of documents for use in a complex Robinson-Patman Act case. The selection of documents by Prosser would have provided a basis for determining whether Prosser had been informed by Turiel of the nature of the issues involved in the price discrimination proceedings in order that he could select documents from the files or provide other assistance to the Commission.⁵³

During the second set of hearings on the documents, respondent's counsel were again not concerned with informing the hearing examiner that Prosser was privy to their every thought on Knoll's defense and was their “client.” During these hearings, Prosser admitted to special counsel for the complaint attorneys that he had frequent contact with respondent's counsel during 1963. The special counsel, Mr. Dias, then asked Mr. Prosser:

Q. Did Mr. Imberman and/or Mr. Greenberg explain the proceeding to you?

Mr. Imberman. Mr. Gross, I'm going to object to this line of questioning. It seems to me that we're getting very foggy on the purpose of this hearing, which is a search and seizure.

Hearing Examiner Gross. What's the purpose of this line of questioning, Mr. Dias?

Mr. Dias. The purpose is that this Respondent has made a representation that because of the number of meetings and telephone conversations this witness had with Mr. Turiel and with Mr. Brod, and because he's a layman, Turiel and Brod must have told him all about this case, and that he could only get such information from Mr. Turiel and Mr. Brod. And, I'm trying to establish—

Hearing Examiner Gross. Your objection is overruled. Proceed, Mr. Dias.

Mr. Imberman. I object. This is now beyond the search and seizure issue.

Hearing Examiner Gross. Your objection is noted. However, I will say that we can all accept as a certain amount of common sense that the firm representing Knoll Associates contacted Mr. Prosser, one way or another, the way any reputable and diligent law firm would, and as long as—

Mr. Imberman. I certainly don't deny that. Of course, we discussed this matter with Mr. Prosser.

Hearing Examiner Gross. As long as that statement is in the record, why don't you go to another line of questioning, Mr. Dias.

Mr. Dias. Yes, I will. (Tr. 5501-02)

We agree with the hearing examiner that respondent's claim that its right to counsel has been impaired is an afterthought. Nevertheless, we have considered the charge and have found it to be without merit.

⁵² Appellant's Argument, Motion For Stay Pending Appeal, p. 9, *Knoll Associates v. Dixon*, Case No. 29078, Second Circuit (Sept. 9, 1964).

⁵³ Brief for Appellant, p. 13, *Knoll Associates v. Dixon*, Case No. 29078, Second Circuit (Sept. 25, 1964).

The Fifth Amendment guarantees that no citizen may be deprived of life, liberty or property without due process of law. "Such due process includes the right of one accused of crime to have the effective and substantial aid of counsel."⁵⁴ An accused does not enjoy the effective aid of counsel, if, through government intrusion, he is denied the right of private consultation with his attorney.⁵⁵ Prejudice resulting from the government's denial of this basic right need not be demonstrated by the petitioner. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amounts of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942).

The cases cited by respondent concern charges of deliberate and secretive intrusion by the government into consultations between defendants and their lawyers. In *Coplton*, the intrusion took the form of FBI wiretapping of telephone conversations between the defendant and her attorney prior to and during her trial on charges of aiding a foreign power. In *Caldwell v. United States*,⁵⁶ the Department of Justice hired an individual named Bradley to obtain information concerning the defendant's principals. While so employed, Bradley accepted employment from the defendant in the preparation of the latter's defense. The testimony showed "that for some months prior to the trial and up to the morning of the trial, Bradley reported to the Assistant United States Attorney conversations by him with the defendant, his co-defendants and defendant's attorney." *Id.* at 881. In *United States v. Denno*,⁵⁷ defendants charged unsuccessfully, that the government assigned a Yiddish speaking police officer to sit close enough to their counsel table so that he could overhear their private conversations in Yiddish with their counsel. In *Fusco v. Moses*,⁵⁸ the only case we are aware of that held the Fifth Amendment's guarantee of effective counsel applicable to non-criminal proceedings, an informer attended private deliberations between the defendants and their counsel under instructions given by a responsible agent of the prosecuting New York State government.

According to respondent, Prosser terminated, for all intent and purpose, whatever relationship he had with Knoll on December 9, 1963. This was the day that he first offered to testify on behalf of

⁵⁴ *Coplton v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951).

⁵⁵ *Ibid.*

⁵⁶ 205 F. 2d 879 (D.C. Cir. 1953).

⁵⁷ 221 F. 2d 626 (2d Cir. 1955).

⁵⁸ 304 N.Y. 424 (1952).

the complaint and made his offer well known to certain Knoll officials. Prior to this time, he had two conversations with the government in the person of complaint counsel. Both conversations he initiated. He never offered to cooperate with complaint counsel and complaint counsel never asked him for assistance. At no time during these two conversations, did Prosser mention anything that he discussed with respondent's counsel. The only reference he made to the defense was to inquire about Turiel's opinion of it. In a phone conversation of apparently less than a minute's duration, Turiel told Prosser that he thought the defense was "worthless" and then hung up, Prosser also testified that he took the action he did "on my own volition" and that at no time was he offered anything by the government. Further, the record shows that Prosser, only after a violent argument with respondent, came forth to make his charges and offer assistance to the government. These facts do not place respondent within the cases it cites to establish its claim that complaint counsel's communications with Prosser constituted impairment of its right to counsel.

After his initial offer of assistance on December 9, 1963, Prosser had a number of other conversations with complaint counsel. Respondent makes general reference to these communications in its briefs. Surely, however, it cannot urge that these communications establish a violation of respondent's right to due process? If Prosser was ever a member of respondent's "defense team" prior to his actions in December, he certainly was in a different position thereafter. Whatever his motives for providing information to the government, he was in the position of a citizen who was making allegations to the government that documents previously denied to exist did in fact exist; that he had been ordered by respondent and its counsel to get rid of these documents; and that he was scheduled to testify in behalf of the defense but that documents he and others had authored showed the defense to be a lie. These are the things Prosser and complaint counsel talked about after he terminated his association with Mr. Dworski.

We have considered the other arguments advanced by respondents and are of the opinion that they are also without merit.

Respondent's appeal is denied and the initial decision, as modified by this opinion, is adopted as the decision of the Commission.

Commissioner Elman dissented and has filed a dissenting opinion.

Dissenting Opinion

70 F.T.C.

DISSENTING OPINION

AUGUST 2, 1966

By Elman, *Commissioner*:

I

I do not think the Commission should enter an order here. The Prosser incident has cast too large a cloud on the record of these proceedings. The atmosphere created by this unfortunate incident has not been one in which findings of violation of law should be made and an order issued. As a result of the unsatisfactory way in which the matter was handled by complaint counsel, the hearing examiner, and the Commission, there has been engendered too much acrimony, too much heat and emotion, and too many accusations and cross-accusations of wrongdoing and bad faith on the part of all concerned. Adjudication should be made in a climate of cold detachment—and such a climate never existed in this case after the Prosser incident.

Let me state at once that, like the other members of the Commission, I find no evidence in the record that complaint counsel induced, or otherwise aided or abetted, Prosser in his unauthorized "taking"¹ of the disputed documents. Nor do I believe that the questions raised by the incident are of constitutional dimensions. The lengthy exposition of "constitutional law" in the majority opinion seems to me to be wholly beside the point.

In my view, the Commission's disposition of this case should be governed by a fundamental consideration: its obligation to maintain public confidence in the fairness and integrity of the agency's processes and personnel. That confidence may be as much undermined by acts of apparent impropriety as actual impropriety. Government officials must look at themselves through the eyes of those on the outside; and the public's range of vision is necessarily limited. An official, in his dealings with the public, may not in fact transgress the bounds of fairness and propriety; but the public knows only what it sees, and it must be convinced of the fairness and propriety of the official's actions by what it sees. The standards of conduct appropriate for government officials must therefore be designed to prevent not only evil but the appearance of evil; and officials must remember at all times that the appearance of things will be the basis on which they are judged by the public.

In this case, unfortunately, complaint counsel were not as sensi-

¹ I am deliberately using the most neutral verb that comes to mind.

tive as they should have been to these basic considerations. They naively assumed that because they were in fact guilty of no misconduct, everyone else would have no doubt about it. What they should have realized was that their backroom dealings with Prosser would inevitably give rise to the suspicions and accusations of wrongdoing that have so beclouded and entangled these proceedings.

Consider the circumstances: In the middle of a fiercely contested lawsuit, Prosser—who to all appearances was an active member of respondent's defense team—secretly came to complaint counsel with an offer to switch sides. Prosser was an employee of respondent's Detroit agency. He was scheduled to testify as a witness for respondent. When he was introduced to complaint counsel on the first day of the Detroit hearings, they understood him to be respondent's local sales representative. Naturally, when Prosser approached complaint counsel late at night in their hotel room, they were suspicious and hesitant. They did not know what might be concealed by his professed offer of cooperation and assistance. They suspected that he might still be working the other side of the street. They nevertheless engaged in private conversations with Prosser over a period of several months. Respondent was aware that these conversations were taking place, but did not know the details. It was during this period that Prosser unauthorizedly "took" the disputed documents and turned them over to complaint counsel, who considered it to be their "professional obligation" to accept the documents.

It seems obvious in retrospect that what complaint counsel should have done, on hearing from Prosser that he had "a lot of incriminating evidence" and "enough papers to hang" respondent, was to bring the matter to the immediate and urgent attention of the hearing examiner and respondent's counsel. Had this been done, the whole matter would have been brought out into the open, and the cloud of impropriety and misconduct hanging over these proceedings would not have been raised. Whatever Prosser's motives in deciding to cross sides in the middle of the case, it was absolutely essential—in order not to compromise the integrity of the proceedings—that complaint counsel not act in any way that might give the impression, rightly or wrongly, that they induced or otherwise aided and abetted Prosser in an improper "taking" of the disputed documents.

It must be emphasized again that complaint counsel should have been governed by the appearance of things. When Prosser

approached complaint counsel, their suspicions and fears that he was secretly working for the other side were justified by the appearances. In fact, however, these suspicions and fears were not well-founded. Prosser was actually on his own. On the other hand, the suspicions and fears of respondent's counsel that complaint counsel may have been improperly involved in Prosser's "taking" of the documents were likewise justified by the appearances. From their vantage point, and because they did not know what was actually going on between complaint counsel and Prosser, respondent's counsel could well suspect some degree of complicity between them. In fact, however, these suspicions and fears of respondent's counsel were not well-founded. Actually, complaint counsel—as the record now shows—were dealing with Prosser at arm's length. The point is, however, that neither side knew these facts at the time, and each justifiably had misgivings and doubts about the other's actions. We know all the facts now, two and one-half years later, but only after a lengthy and extensive inquiry into every detail of the incident.

These proceedings would not have become so fouled up by the Prosser incident if complaint counsel had perceived the unwisdom of their covert dealings with Prosser. As soon as he approached them, complaint counsel should have recognized that it was their "professional obligation" not merely to obtain the evidence he was offering but to make sure that it was obtained in a completely open and aboveboard fashion. It was their duty to keep the Commission's skirts absolutely spotless. Their prime concern should have been to preserve the integrity of the proceedings, and to make certain that their actions would appear to give no basis whatsoever for any fears or suspicions that they were in cahoots with Prosser. This could easily have been accomplished by laying the whole thing out in the open, and on the record, before the hearing examiner, who had ample authority to issue subpoenas or to take such other action as was necessary to secure relevant evidence. Regrettably, this was not done. And regrettably, too, the Commission's disposition of this case—which may appear to outsiders to apply a thin coat of whitewash on the whole incident, putting all the blame on respondent's counsel—will do little to prevent similar mishaps from occurring again in other cases.

II

While I would not reach the merits, the Commission has done so and it is necessary to comment on the aspect of its decision

which precludes a manufacturer from granting legitimate functional discounts as compensation for the performance of distribution functions valuable to him. The Commission assesses the competitive effect of such functional discounts by uncritically applying the narrow and limited standards used in conventional *Morton Salt*-type "second-line injury" cases. I disagree, however, with the Commission's doctrinaire and unrealistic approach to this problem.

The Commission mechanically applies the dogma that retailers and interior decorators must buy at the same price because "there is an area of competitive contact between them" (p. 410). It wholly ignores the fact that retailers perform valuable and necessary distribution functions for the manufacturer which interior decorators do not. Retailers, unlike interior decorators, maintain an inventory of furniture, provide showrooms and floor space for its display in their stores, advertise the furniture for sale, and perform a large variety of other functions which may be essential to the manufacturer. Interior decorators perform none of these functions.

I find nothing in the Robinson-Patman Act which indicates that it was intended to prevent a manufacturer from obtaining distribution through as many functionally distinct channels as his business needs require. A legitimate functional price discount is the incentive which a manufacturer offers his distributors to induce them to render distribution services which he may regard as necessary to increase efficiency, lower costs, or expand consumer demand for his products. If, as the Commission holds, a manufacturer may not grant a functional discount to distributors who render such services unless he also grants the same discount to other "competing" distributors who do not render such services, the result may be that neither will perform these functions for the manufacturer.

If a manufacturer offers functional price discounts on a non-discriminatory basis to all of his distributors who are able and willing to earn them by performing the distribution functions he requires, how is competition injured? To be sure, a functional discount should be *bona fide*, and not a sham or disguised price discrimination. But the Robinson-Patman Act should not be construed to prohibit a manufacturer from granting functional discounts that genuinely compensate for the performance of distribution functions that may be essential to the efficient and economical conduct of his business and do not injure competition.

Complaint

70 F.T.C.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the initial decision; and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal, and having modified the initial decision in part:

It is ordered, That the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent 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.

Commissioner Elman dissented and has filed a dissenting opinion.

IN THE MATTER OF

PHILLIPS PETROLEUM CO. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-1088. Complaint, Aug. 2, 1966—Decision, Aug. 2, 1966

Consent order requiring the dissolution of major joint ventures in the polyolefin plastics field between Phillips Petroleum Co. of Oklahoma and National Distillers and Chemical Corp. of New York City, and requiring divestiture of a resin plant and three acquisitions made by one of these joint ventures, and requiring the construction of two new resin plants by Phillips and banning future acquisitions and joint ventures by Phillips or National.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 7 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §§ 18 and 45(a)(1), and that a proceeding in respect thereof would be to the interest of the public, issues this complaint, stating its charges as follows: