IN THE MATTER OF

CONSUMER DIRECT, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9236. Complaint, Jan. 5, 1990—Decision, Oct. 29, 1990*

This consent order prohibits, among other things, two Ohio based companies and their officers from making false and unsubstantiated claims about "Gut Buster", an exercise device. Respondents are required to include a notice stating—that overstretching the spring in the device may break the spring and cause injury—in all advertisements and to warn past purchasers of the potential for breakage and personal injury from the device.

Appearances

For the Commission: *Maureen Enright* and *Joel Winston.*

For the respondents: *Alan K. Palmer, Morrison & Foerster,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Fitness Quest, Inc. and Consumer Direct, Inc., corporations, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Fitness Quest, Inc. is an Ohio corporation, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Consumer Direct, Inc. is an Ohio corporation, with its office and principal place of business located at 1375 Raff Road, S.W., Canton, Ohio.

Respondents Richard A. Suarez and LuAnn Suarez are officers and directors of each of the corporate respondents named herein. They

*Order Amending Complaint, in regards to the caption and preamble, issued April 30, 1990. *See* 113 FTC 327.

formulate, direct and control the acts and practices of said corporate respondents. LuAnn Suarez' address is the same as that of respondent Fitness Quest, Inc. Richard Suarez' address is the same as that of respondent Consumer Direct, Inc.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed exercise products and devices, including the Gut Buster, to the public. The Gut Buster is a device marketed as a stomach exerciser which consists of a coil spring attached to a plastic hand grip-bar at one end and to a stirrup-like foot section at the other end.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Gut Buster. Typical of respondents' advertisements and promotional materials, but not necessarily all-inclusive thereof, are the attached Exhibits A through C. The aforesaid advertisements and promotional materials contain the following statements and depictions:

1. "Gut Buster is the ultimate fitness machine, designed to do one thing supremely well, it firms and flattens the stomach as nothing else can. And all it takes is minutes a day with belly-burning basics like these spring-ups for the upper abdominal region. Reverse, and tension-assisted high risers exercise the lower abdomen. The secret is this resistance coil that springs into action at a touch and turns ordinary situps into power crunches! Gut Buster is the only stomach slimmer you'll ever need." (Video superscript: "THE 5 MIN. REGIMEN.") [Exhibit A]

2. "Just watch this easy exerciser turn ordinary sit-ups into fat-burning, tummy tightening, power stretches. Each time you activate the resistance coil is like trading ugly flab for sexy, sinous [sic] muscle ... [R]ow, row, row your way to a trimmer you ... [T]hat flat stomach you had in high school can be yours again. Minutes a day is all it takes." (Video superscript: "THE 5 MINUTE REGIMEN.") [Exhibit B]

3. "Flatten your stomach in just minutes a day! ... Yes, this gutsy little machine speeds you from fat to flat! ... Durable, no-nonsense construction makes Gut Buster the only stomach exerciser you'll ever need ... Forget about gyms, expensive rowing machines and wasted energy on exercises you don't need ... Go ahead Gut Busters, order today to get your stomach flat and keep it like that!" [Exhibit C]

PAR. 5. Through the use of the statements and depictions referred to in paragraph four and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that:

1. Use of the Gut Buster as stated and depicted will significantly flatten and trim the user's stomach.

2. Use of the Gut Buster as stated and depicted will strengthen or tone the user's stomach (abdominal) muscles sufficiently to significantly improve the user's waistline.

3. When used as stated and depicted, the Gut Buster is effective in burning or reducing stomach fat.

4. Use of the Gut Buster for five minutes per day will achieve the effects described in sub-paragraphs 1 through 3, above.

5. The Gut Buster is superior to ordinary sit-ups as a means of exercising and strengthening stomach (abdominal) muscles.

PAR. 6. In truth and in fact:

1. Use of the Gut Buster as stated and depicted will not significantly flatten and trim the user's stomach.

2. Use of the Gut Buster as stated and depicted will not strengthen or tone the user's stomach (abdominal) muscles sufficiently to significantly improve the user's waistline.

3. When used as stated and depicted, the Gut Buster is not effective in burning or reducing stomach fat.

4. Use of the Gut Buster for five minutes per day will not achieve the effects described in sub-paragraphs 1 through 3 of paragraph five.

5. The Gut Buster is not superior to ordinary sit-ups as a means of exercising and strengthening stomach (abdominal) muscles.

Therefore, the representations set forth in paragraph five were and are, false and misleading.

PAR. 7. Through the use of the statements and depictions set forth in paragraph four, and others not specifically set forth herein, respondents have represented, directly or by implication, that, at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis for such representations.

PAR. 8. In truth and in fact, at the time respondents made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representation as set forth in paragraph seven was, and is, false and misleading.

PAR. 9. In the advertising and sale of the Gut Buster, respondents have failed to disclose adequately that, when performed as directed, the Gut Buster exercises pose a risk of injury to users from snapping

or breakage of the product's spring or other parts. These facts would have been material to purchasers and owners of the Gut Buster in their decisions regarding the purchase and use of the Gut Buster. Respondents' failure to disclose these facts to purchasers and owners of the Gut Buster has caused substantial and ongoing injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Respondents' failure to disclose these facts was, and is, an unfair act or practice.

PAR. 10. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

ORDER

1. For purposes of this order, all references to "exercise product or device" shall include any product or device designed or used to develop or maintain fitness or to strengthen, tone, firm, trim, flatten, condition, or stretch one or more body parts.

2. For purposes of this order, all references to "weight control product or device" shall include any product or device designed or used to prevent weight gain or to produce weight loss, reduction or elimination of fat, slimming, or a caloric deficit in a user of the product or device.

I.

It is ordered, That respondents Fitness Quest, Inc. and Consumer Direct, Inc., corporations, their successors and assigns, and their officers, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of the Gut Buster exerciser or any substantially similar device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product or device will:

A. Significantly flatten or trim the user's stomach;

B. Strengthen or tone the user's stomach or abdominal muscles sufficiently to significantly improve the user's waistline;

C. Burn or reduce stomach fat;

D. Achieve any of the effects described in subparagraphs A through C above with a daily regimen of five minutes of use; or

E. Achieve stomach exercising or strengthening effects superior to those of ordinary sit-ups.

II.

It is further ordered, That respondents Fitness Quest, Inc. and Consumer Direct, Inc., corporations, their successors and assigns, and their officers, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale, or distribution of any exercise product or device or any weight control product or device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product or device:

A. Is effective for exercising, strengthening or toning the body or any specific muscle or body part;

B. Can achieve any result superior or comparable to that achieved with any other product, device or exercise;

C. Can achieve any specific result upon use for any stated amount of time;

D. Is effective in burning off, reducing or eliminating fat;

E. Is effective in flattening, trimming, or slimming the stomach or any other body part; or

F. Can perform in any manner,

unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon a reasonable basis consisting of competent and reliable evidence substantiating the representation.

For purposes of this provision, to the extent evidence consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests,

analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

III.

It is further ordered, That respondents send by first-class mail to all past purchasers of the Gut Buster a notification letter stating in a clear and prominent manner that the device imposes a risk of harm to users from snapping or breakage of the product's spring or other parts.

IV.

It is further ordered, That respondents, their successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

a. All materials that were relied upon by respondent(s) in disseminating any representation covered by this order; and

b. All reports, tests, studies, surveys, demonstrations or other evidence in any respondent's possession or control that contradict, qualify, or call into question such representation, or the basis upon which the respondent relied for such representation, including complaints from consumers.

V.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VI.

It is further ordered, That for a period of ten (10) years from the

date of service of this order, each of the individual respondents named herein shall promptly notify the Commission in the event of the discontinuance of his/her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which said respondent is newly engaged as well as a description of said respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VII.

It is further ordered, That respondents Fitness Quest, Inc. and Consumer Direct, Inc. shall distribute a copy of this order to each of its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation and placement of advertising or other sales materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

VIII.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the requirements of this order.

Commissioner Calvani dissenting; and Commissioner Azcuenaga not participating by reason of recusal.

EXHIBIT A

GUT BUSTER II 60 SPOT OF FINAL SHOOT SCRIPT 4/8/87

VIDEO	AUDIO
1. Lift A-1 Medium neck-to-waist shot of 2 men talking at a bar.	1. Lift A-1 ANNCR. (VO): If that trim little tum
2. Lift A-2 Both stomachs start to balloon out...	2. Lift A-2 you had in high school is getting a bit out of hand....
3. Lift A-3 Cut to MCU. Gaps appear on his shirt front. Two buttons pop off.	3. Lift A-3 SFX: POP! POP!
4. Lift A-4 Cut to shot framed as in #1 & #2, stomachs continue swelling until they touch.	4. Lift A-4 you better draw the waistline somewhere. Well now you can.
5. Lift A-5 Freeze. SUPER: RED STOP SYMBOL SLASH.	5. Lift A-5 SFX: WOOSH! With the original Gut Bust
6. Lift A-6 SUPER: RED CIRCLE TO COMPLETE STOP SYMBOL	6. Lift A-6 SFX: CLANK!
7. Lift A-7 Dissolve to established couple exercising in livingroom. (dolly) SUPER: CONSULT YOUR PHYSICIAN BEFORE BEGINNING THIS OR ANY OTHER PROGRAM OF EXERCISE.	7. Lift A-7 MUSIC: (THEME, UNDER) Gut Buster is the ultimate fitness machi designed to do one thing supremely well,
8. Lift A-8 Cut to as above, new angle. (overhead, perhaps).	8. Lift A-8 it firms and flattens the stomach as nothing else can.
9. Lift A-18 Cut to Slide: THE 5 MIN. REGIMEN.	9. Lift A-18 And all it takes is minutes a day
10. Lift A-19 Cut to woman doing spring-ups in livingroom.	10. Lift A-19 with belly-burning basics like these spring-ups for the upper abdominal region
11. Lift A-20 Diss. to new angle. She reverses to new exercise.	11. Lift A-20 Reverse, and tension-assisted high risers exercise the lower abdomen.
12. Lift A-27 (may need to go to original footage to cover) Pan of coil from original spot.	12. NEW AUDIO The secret is this resistance coil
13. Lift A-28 Cut to CU, man's hands bending spring.	13. NEW AUDIO that springs into action at a touch
14. Lift A-21 (may need to go to original footage to cover) Cut to man doing crunches. (Pick up good video for at least 8 continuous seconds)	14. NEW AUDIO and turns ordinary situps into power crunches! Gut Buster is the only stomach slimmer you'll ever need,

000191 Exhibit A

GUT BUSTER II 60 SPOT 9F FINAL SHOOT SCRIPT 4/8/87 Pg. 2

VIDEO	AUDIO
15. Lift D-35 Vertical crawl white type on black YOU MUST BE SATISFIED. PURCHASE PRICE REFUNDED IF NOT DELIGHTED	15. Lift C-14 NEW AUDIO and it's yours with a money-back guarant
16. Lift C-16 NEW VIDEO (shot for 60) CUT TO THEM EXERCISING IN LIVING ROOM HE AND SHE WEARING T-SHIRTS SPRING INTO VIEW, ONE AFTER ANOTHER. (FASTER THAN IN A-36,37)	16. Lift C-16 NEW AUDIO So go ahead Gut Busters, if your serious about a flat stomach
17. Lift A-42 Cut to man's hand picks up phone receiver and does a curl with it as if it were a dumb bell. SUPER: CALL TOLL FREE	17. Lift A-42 Exercise your right to call toll free now MUSIC: OUT
18. Ordering Slide.	18. Tag.

EXHIBIT B

ORIGINAL GUT BUSTER 120 *[handwritten: illegible] - 90 sec.*

VIDEO	AUDIO
1. Waist-high shot of two fat businessmen at a bar. One of them, who wears a vest with a broad chain across it, is holding a beer mug. The second is tapping his finger on his friend's stomach to make a point.	1. ANNCR. (VO): Behold the beer belly!
2. Waist-high shot of a fat mechanic in a T-shirt, changing a tire.	2. The old spare tire!
3. Waist-high shot of a fat woman serving a huge platter of pasta.	3. The labonza!!!
4. Freeze above and super the red international circle/slash symbol.	4. 50 million Americans need a shortcut to from fat...
5. Dissolve to male and female models, exercising at home as in the Trim-Track commercial. SUPER: CONSULT YOUR PHYSICIAN BEFORE BEGINNING THIS OR ANY PROGRAM OF EXERCISE.	5. And here it is. It's called the Gut Buster! MUSIC: IN It's the ultimate fitness machine specifically designed to firm and flatter the stomach.
6. Cut to new angle.	6. Just watch this easy exerciser turn ordinary sit-ups into
7. Cut to CU of his washboard stomach.	7. fat-burning, tummy tightening, power stretches.
8. Cut to CU of product in limbo. Start at hand grips and pan down spring.	8. Each time you activate the resistance coi
9. Dissolve to limbo shot of man's 2 hands bending spring.	9. is like trading ugly flab for sexy, sinou muscle.
10. CU of man's foot slipping into stirrup, shot from above.	10. Just slip into the stirrups...
11. CU man's hand tightening on grip.	11. curl your fingers around the molded handgrips
12. Cut to medium shot of man pulling back on machine.	12. and row,
13. Repeat shot 12.	13. row,
14. Repeat and complete shot 12.	14. row your way to a trimmer you.
15. Pull back to reveal woman in leotard seated near man.	15. And ladies, if you're as serious as he is
16. She starts exercising while he looks on.	16. that flat stomach you had in high school can be yours again.

000176 Exhibit B

ORIGINAL GUT BUSTER 120 Pg. 2

VIDEO	AUDIO
17. Dissolve to white type on blue:	17. SLIDE: THE 5 MINUTE REGIMEN.
18. Cut to woman doing "Spring-Ups" (sit-ups)	18. Minutes a day is all it takes Basic spring-ups like these work the upper abdominal region.
19. Cut to woman on back, legs in air.	19. Reverse, for tension-assisted high riser that exercise lower stomach muscles.
20. Dissolve to woman in hotel room. She's wearing a business suit. She opens her suitcase...	20. This light but sturdy unit weighs in at just 27 ounces,
21. ...and takes out the product.	21. and travels easily so you can exercise anywhere.
22. Dissolve to woman exercising in hotel room. Camera circles her while horizontal crawl at the bottom of the frame reads: THE OFFICE...ON BUSINESS TRIPS...VACATIONS...	22. Forget about gyms, expensive rowing machines, and exercises you don't need. If your stomach's the problem, Gut Buster is the answer.
23. Dissolve to vertical crawl white type on blue: AVOID IMITATIONS. YOU MUST SEE RESULTS FAST. YOU MUST BE SATISFIED. PURCHASE PRICE REFUNDED IN 30 DAYS IF NOT DELIGHTED.	23. Copy cat devices may look similar, but nothing fights the battle of the bulge li the original Gut Buster. And it's yours with a 30-day money back guarantee of satisfaction. So go ahead Gut Busters!
24. Man wearing T-shirt with circle/slash symbol on his stomach, enters frame left.	24. If you're serious...
25. Woman, wearing same T-shirt, enters frame right.	25. and you're serious about a flat stomach,
26. Cut to hand reaching for and grasping phone receiver.	26. just pick up the phone
27. Hand picks up phone receiver and does a curl with it, as if it were a dumb-bell.	27. and exercise your right
28. Freeze frame. SUPER: CALL TOLL FREE © 1986 Fitness Quest, Inc. Gut Buster™ is a trademark of Fitness Quest, Inc. Patent Pending	28. to call toll free now.

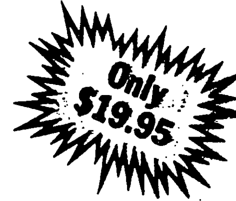
EXHIBIT C

The Original

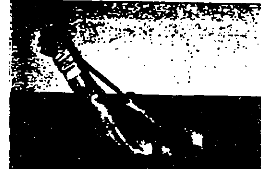
Exhibit C

GutBuster™

Flatten your stomach in just minutes a day!



Gut Buster power-assisted sit-ups work the upper abdominal region . . .



. . . Reverse, for tension-assisted high rises that work magic on lower stomach muscle

Amazing Gut Buster™ turns ordinary sit-ups into tummy tightening power stretches.

000173

Yes, this gutsy little machine speeds you from fat to flat!

Gut Buster is specifically designed to firm and flatten the stomach as nothing else can. Get back that flat stomach you had in high school—even though you thought those days were gone forever.

This extraordinary exerciser turns ordinary sit-ups into tummy tightening power stretches. Gals, Gut Buster is so tough on tummies you quickly get in perfect shape for snug jeans, knits and swim suits. Guys can trade those bulging bellies for sexy, sensuous muscle—fast!

SO COMPACT IT TRAVELS ANYWHERE

Durable, no-nonsense construction makes Gut Buster the only stomach exerciser you'll ever need. Yet, it's so compact you can take it wherever you go. Pop it in your suitcase for trimming when you travel. Use it while you watch TV, at the office—anywhere—anytime you have a few minutes to spare.

Forget about gyms, expensive rowing machines and wasted energy on exercises you don't need. If your stomach is the problem, Gut Buster is your answer!

NO RISK GUARANTEE

Don't settle for anything but the original Gut Buster. You risk nothing when you order. You must see a flat-as-a-pancake stomach or return it within 30 days for a full refund of your purchase price.

Go ahead Gut Busters, order today to get your stomach flat and keep it like that!

ORDER TOLL FREE

Credit card customers don't wait any longer to get a flat stomach. Call toll free today: **1-800-255-4321.** Ask for operator 4042

MAIL NO RISK COUPON TODAY

YES, I want to flatten my stomach in just minutes a day. Please send me ______ Gut Busters ordered below. I understand that I must be delighted or return it within 30 days for a refund (less shipping & handling). ☐ EXTRA RUSH SERVICE: I'm in a hurry. I'm enclosing an extra $1 for special handling and printing the word "RUSH" on the front of my envelope.

CHECK OFFER DESIRED:

☐ 1 Gut Buster .... only $19.95 + $2.00 shipping & handling

YOU SAVE $5.00 WHEN YOU ORDER TWO

☐ 2 Gut Busters .... only $34.90 + $4.00 shipping & handling

YOU MAY PAY IN ONE OF TWO WAYS:

☐ Cash, check or Money Order (Make checks payable to Gut Buster)

☐ MasterCard ☐ VISA ☐ Discover Card

Exp. Date ______

Acct. # ______

-OR- CHARGE IT! By toll free phone: 1-800-255-4321 Ask for operator 4042

Name ______ (please print clearly)

Address ______

City ______

State ______ Zip ______

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served a copy of that complaint, together with a notice of contemplated relief; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Consumer Direct, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1375 Raff Road, S.W., Canton, Ohio.

Respondent The Gut Buster Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Fitness Quest, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Richard A. Suarez is an officer and director of the corporate respondents named herein. LuAnn Suarez is an officer of The Gut Buster Corporation and an officer and director of Fitness Quest, Inc. They formulate, direct and control the policies, acts and

practices of said corporations. Richard Suarez' address is the same as that of respondent Consumer Direct, Inc. LuAnn Suarez' address is the same as that of respondent Fitness Quest, Inc.

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

ORDER

1. For purposes of this order, all references to "exercise product or device" shall include any product or device designed or used to develop or maintain fitness or to strengthen, tone, firm, trim, flatten, condition, or stretch one or more body parts.

2. For purposes of this order, all references to "any substantially similar device" means any exercise device consisting of a spring connected to handles and foot pedals that is marketed to be used to perform any spring-assisted stomach exercise.

3. For purposes of this order, all references to "weight control product or device" shall include any product or device designed or used to prevent weight gain or to produce weight loss, reduction or elimination of fat, slimming, or a caloric deficit in a user of the product or device.

I.

It is ordered, That respondents Consumer Direct, Inc., The Gut Buster Corporation, and Fitness Quest, Inc., corporations, their successors and assigns, and their officers, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of The Gut Buster exerciser or any substantially similar device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product or device will:

A. Significantly flatten or trim the user's stomach;

B. Strengthen or tone the user's stomach or abdominal muscles sufficiently to significantly improve the user's waistline;

C. Burn or reduce stomach fat;

D. Achieve any of the effects described in subparagraphs A through C above with a daily regimen of five minutes of use; or

E. Achieve stomach exercising or strengthening effects superior to those of ordinary sit-ups.

II.

It is further ordered, That respondents Consumer Direct, Inc., The Gut Buster Corporation, and Fitness Quest, Inc., corporations, their successors and assigns, and their officers, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale, or distribution of any exercise product or device or any weight control product or device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product or device:

A. Is effective for exercising, strengthening or toning the body or any specific muscle or body part;

B. Can achieve any result superior or comparable to that achieved with any other product, device or exercise;

C. Can achieve any specific result upon use for any stated amount of time;

D. Is effective in burning off, reducing or eliminating fat;

E. Is effective in flattening, trimming, or slimming the stomach or any other body part; or

F. Can perform in any manner,

unless, at the time of making such representation, respondents possess and rely upon a reasonable basis consisting of competent and reliable evidence substantiating the representation.

For purposes of this provision, to the extent evidence consists of scientific or professional tests, analyses, research or studies, such evidence shall be "competent and reliable" only if those tests, analyses, research, or studies are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

III.

It is further ordered, That respondents shall include a clear and prominent notice in all advertisements, promotional materials, and product instructions, and on the product itself, for the Gut Buster exerciser or any substantially similar device, stating that overstretching the spring may break the spring and cause injury, and describing what steps should be taken to avoid overstretching the spring.

Nothing contrary to, inconsistent with, or in mitigation of the above required notice shall be used in any such advertising, instruction or promotional materials.

IV.

It is further ordered, That respondents, their successors and assigns, and their officers, employees, agents and representatives, shall, in accordance with the provisions of this Part, provide notification to purchasers of the Gut Buster. *Provided, however,* that the requirements of this Part shall not apply to any owner or purchaser of a Gut Buster who returned the device to respondents or reported that it had been discarded, and received a full refund.

A. *Notification of Consumers*

1. Within twenty (20) days from the date of service of this order, respondents shall compile a current mailing list containing the name and last known address of each customer who purchased a Gut Buster from respondents in the United States. This list shall be separate from the list of names and last known addresses of Gut Buster purchasers and owners compiled pursuant to Parts IV.B.1 and IV.B.2 of this order.

2. In compiling this list, respondents shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.

3. Within thirty (30) days from the date of service of this order, respondents shall send a postcard, $3\frac{2}{3}$ inches by 6 inches, in the form set forth in Appendix A to this order, by third class mail, to the last known address of each customer named on the mailing list compiled in accordance with Parts IV.A.1 and IV.A.2. The text of the postcard shall be printed in black ink. The phrase "WARNING! SAFETY NOTICE Read Carefully" shall appear on both the front and the back

of the postcard in red ink. The typeface of both the text and the phrase "WARNING! SAFETY NOTICE" shall be equal or larger in size to that set forth in Appendix A. No information other than that contained in Appendix A shall be included in or added to the postcard, nor shall any other material be transmitted therewith.

4. Respondents shall also mail the postcard described in Part IV.A.3 to any person about whom a respondent receives information through any inquiry indicating that (s)he purchased or owns a Gut Buster or any substantially similar device. The mailing required by this subparagraph shall be made within thirty (30) days of a respondent's receipt of a corrected address for, or information identifying, each such person.

B. *Notification of Persons Who Purchased Gut Busters Through Credit Card Solicitations*

1. Respondents shall use their best efforts to obtain the names and last known addresses of all persons who either purchased Gut Busters through solicitations in credit card bills or statements, or who own Gut Busters as a result of such a purchase. Such efforts shall include, but are not limited to, sending within five (5) days from the date of service of this order the letter attached hereto as Appendix B to all credit card syndicators used by respondents, and directly notifying, upon the approval of the appropriate syndicator, any credit card company that fails in response to a request from the syndicator to provide all available names and last known addresses of persons who purchased Gut Busters through solicitations in its bills or statements.

2. Within sixty (60) days from the date of service of this order, respondents shall compile a list of all purchasers identified pursuant to Part IV.B.1, shall retain a National Change of Address licensee to update this list in the manner specified in Part IV.A.2, and shall notify all such persons in the manner specified in Part IV.A.3 within seventy (70) days from the date of service of this order, or pay all reasonable expenses of having notices sent directly by the credit card syndicators or credit card companies.

3. Within seventy (70) days from the date of service of this order, respondents shall submit to the staff of the Federal Trade Commission a written report on all efforts taken to acquire the names and last known addresses of all persons who purchased the Gut Buster through solicitations in credit card bills or statements, including the total number of persons who purchased Gut Busters through this

method. Such report, which may be submitted as a part of the report filed pursuant to Part IX of this order, shall include a list of all Gut Buster purchasers whose names and last known addresses have been acquired from credit card syndicators or credit card companies. For each credit card company that provides any names and last known addresses of Gut Buster purchaser and/or represents that any names or last known addresses are not in its possession or control and are otherwise not reasonably available, respondents shall procure and submit as part of its report a written statement signed by an authorized corporate officer or responsible departmental manager of the credit card company stating that all names and last known addresses reasonably available have been provided, and with respect to any names or last known addresses that are not available, describing with specificity the reason(s) for the unavailability. *Provided,* that in any instance in which a credit card syndicator is in possession of the names and last known addresses of all persons who purchased the Gut Buster through solicitations in a particular credit card company's bills or statements, respondents shall instead procure and submit as part of its report a written statement signed by the credit card syndicator stating that all names and last known addresses reasonably available have been provided.

4. If any credit card syndicator or credit card company either (a) fails to respond to requests by any credit card syndicator and by respondents made pursuant to Part IV.B.1; or (b)(i) fails to provide either the names and last known addresses of all persons who purchased a Gut Buster through that company's solicitations or a written statement as described in Part IV.B.3 that said information is not available, and (ii) fails to provide a written statement that it mailed out all notifications itself, the report required by Part IV.B.3 shall include the names, addresses, and telephone numbers of each such credit card syndicator or credit card company. The staff of the Federal Trade Commission shall retain the right to contact each such credit card syndicator or credit card company directly.

5. Respondents shall notify in the manner specified in Part IV.A herein all Gut Buster owners or purchasers whose names and last known addresses the staff of the Federal Trade Commission has obtained from any credit card syndicator or credit card company within ten (10) days of their receipt of the names and addresses, or shall pay all reasonable expenses of having notices sent by the staff of the Federal Trade Commission or its agents or by credit card syndicators or credit card companies.

6. The submission to the staff of the Federal Trade Commission of the report required in Parts IV.B.3 and IV.B.4 containing all required information and the mailing of all required notifications to all Gut Buster purchasers identified pursuant to Part IV.B herein shall be deemed to be satisfactory compliance with the terms of Part IV.B of this order.

C. *Respondents' Obligation to Provide Retrofit Instructions*

1. Respondents shall maintain and provide adequate staffing for the toll-free telephone number specified in Appendix A which purchasers may call to request retrofit instructions or with inquiries relating to the retrofit program. This obligation shall expire two (2) years from the date of service of this order. From the date of the first mailing of a postcard pursuant to Part IV.A.3 to a date 120 days after the last mailing of a postcard pursuant to Part IV.A.3, the toll-free telephone number shall be staffed seven days a week between the hours of 8:00 a.m. to 10:00 p.m., Eastern Standard Time/Eastern Daylight Time, national holidays excluded. For the remainder of the two-year period in which respondents are to maintain this toll-free telephone number, respondents shall staff the number from 8:00 a.m. to 5:00 p.m., Eastern Standard Time/Eastern Daylight Time, Monday through Friday, national holidays excluded. At all times during the two-year period when respondents are not under an obligation to staff the toll-free number, respondents shall answer the number with a tape recorder announcing the hours during which the number is staffed. Respondents shall not promote or solicit the sale of any product or service in response to requests or inquiries to this toll-free telephone number.

2. Within ten (10) days from the receipt in any manner of a customer request for retrofit instructions, respondents shall mail instructions in the form set forth in Appendix C to this order by third class mail to the mailing address of each customer requesting such instructions.

3. If a customer informs a respondent that (s)he is unable to retrofit his or her Gut Buster after telephone assistance, respondents shall pay for shipment of the customer's Gut Buster to respondents for respondents to make the retrofit without charge to the customer.

D. *Respondents' Record-Keeping Requirements*

Respondents, their successors and assigns, shall, for three (3) years

after the date of service of this order, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

1. Sufficient records to identify:

a. The name and last known address of each purchaser of the Gut Buster compiled pursuant to Part IV of this order;

b. The name and last known address of each person sent a notification postcard pursuant to Part IV.A.3 of this order and the date the postcard was mailed;

c. The name and last known address of each person sent a notification postcard pursuant to Part IV.A.4 of this order and the date the postcard was mailed;

d. The name and last known address of each person sent retrofit instructions pursuant to Part IV.C.2 of this order and the date the instructions were mailed;

e. The name and last known address of each person who requested retrofit instructions and was refused, the reason for each refusal and the dates of the request and refusal; and

f. The name and last known address of each person who purchased or owned a Gut Buster, returned the device to respondents or reported that it had been discarded, and received a full refund.

2. Sample copies of all postcards, letters and instructions sent to consumers pursuant to this order.

3. All correspondence and records of communications between respondents and any person relating to the notification program.

V.

It is further ordered, That respondents, their successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon by respondent(s) in disseminating any representation covered by this order; and

B. All reports, tests, studies, surveys, demonstrations or other evidence in any respondent's possession or control that contradict, qualify, or call into question such representation, or the basis upon

which the respondent relied for such representation, including complaints from consumers.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That for a period of ten (10) years from the date of service of this order, each of the individual respondents named herein shall promptly notify the Commission in the event of the discontinuance of his/her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which said respondent is newly engaged as well as a description of said respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VIII.

It is further ordered, That respondents Consumer Direct, Inc., The Gut Buster Corporation, and Fitness Quest, Inc. shall distribute a copy of this order to each of their operating divisions, to each of their managerial employees, and to each of their officers, agents, representatives or employees engaged in the preparation and placement of advertising or other sales materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

IX.

It is further ordered, That respondents shall, within seventy (70)

days after the date of service of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the requirements of this order.

Commissioner Azcuenaga recused.

IN THE MATTER OF

E-Z-EM, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3311. Complaint, Oct. 29, 1990—Decision, Oct. 29, 1990

This consent order requires, among other things, a Westbury, N.Y., based corporation and certain officers to divest, within twelve months of the issuance of this order, the Lafayette Pharmacal barium business and assets to a Commission-approved acquirer. Respondents are prohibited, for a period of ten years, from acquiring any interest in any other firm in the relevant market without prior Commission approval, and from selling or otherwise disposing of any interest in or assets of respondents to such a firm without providing thirty days prior notice to the Commission.

Appearances

For the Commission: *Susan P. Pettee* and *Steven A. Newborn.*

For the respondents: *Terry M. Gordon, Lasky, Haas, Cohler & Munter, P.C.,* San Francisco, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, E-Z-EM, Inc. ("EZM"), a corporation subject to the jurisdiction of the Federal Trade Commission, has acquired the barium diagnostic products business and assets of Lafayette Pharmacal, Inc., ("Lafayette"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. E-Z-EM, INC.

1. Respondent EZM is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 7 Portland Avenue, Westbury, New York.

2. EZM is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. Lafayette Pharmacal, Inc.

3. Lafayette is a corporation organized and existing under the laws of the State of Delaware, with its headquarters at 4200 S. Hulen, Fort Worth, Texas.

4. Lafayette is, and at all times relevant herein has been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. The Acquisition

5. On or about December 22, 1988, EZM entered into a purchase agreement with Lafayette pursuant to which EZM agreed to purchase the barium business of Lafayette for approximately $16.9 million and issued stock warrants worth at least $2.5 million to the remaining entity of Lafayette.

IV. The Relevant Market

6. The relevant line of commerce in which to analyze EZM's acquisition of Lafayette is the business of formulating, manufacturing, marketing and selling barium diagnostic products and related accessories.

7. The relevant area of the country is the United States.

V. Market Structure

8. The market for barium diagnostic products and related accessories is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

VI. Barriers to Entry

9. Entry into the relevant market set forth in paragraphs 6 and 7 is very difficult.

VII. Actual Competition

10. EZM and Lafayette were actual competitors in the relevant market.

VIII. Effects of the Acquisition

11. The effect of the acquisition may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

a. Actual competition between EZM and Lafayette has been eliminated;

b. EZM has acquired a monopoly in the relevant market in the barium business in the United States; and

c. The resulting monopoly in the relevant market would increase the likelihood of collusion if another firm should enter the market.

IX. Violations Charged

12. The acquisition agreement described in paragraph 5 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The acquisition agreement described in paragraph 5 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent EZM is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 7 Portland Avenue, Westbury, New York.

2. Respondent Howard S. Stern is a Director, Chairman of the Board, and Chief Executive Officer of EZM, and the beneficial owner of approximately 34 percent of the outstanding shares of common stock of EZM, with his business address at 7 Portland Avenue, Westbury, New York.

3. Respondent Phillip H. Meyers is a Director, Senior Vice President, and Medical Director of EZM, and the beneficial owner, jointly with Betty S. Meyers, of approximately 34 percent of the outstanding common stock of EZM, with his business address at 7 Portland Avenue, Westbury, New York.

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

ORDER

I.

As used in this order, the following definitions shall apply:

A. *"EZM"* means E-Z-EM, Inc., its predecessors, successors and assigns, parents, subsidiaries, divisions, groups controlled by EZM, and affiliates, and their respective directors, officers, employees,

agents and representatives, and their respective successors and assigns.

B. *"Lafayette"* means Lafayette Pharmacal, Inc. as it was constituted prior to the acquisition, its predecessors, parents, subsidiaries, divisions, groups controlled by Lafayette, and affiliates, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. *"Acquisition"* means acquisition by EZM of the barium diagnostic products business and related assets of Lafayette.

D. *"Barium diagnostic products business"* means the business of either manufacturing or importing barium diagnostic products and marketing and selling those products to distributors and or end-users, except that it does not extend to the distribution and selling, by one primarily engaged in distributing and selling x-ray supplies, of barium diagnostic products produced or imported by another firm, to end-users.

E. *"Barium diagnostic products manufacturing plant"* means the premises described in numbered paragraph 1 of Schedule A of this order.

F. *"Schedule A Properties"* means the assets and manufacturing plant listed in Schedule A of this order.

II.

It is ordered, That:

A. EZM shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Schedule A Properties, as well as any additional assets relating to the barium diagnostic products business that EZM may at its discretion include as a part of the assets to be divested and that are acceptable to the acquiring entity.

B. Divestiture of the Schedule A Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Properties is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the barium diagnostic products business and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. On or before the date six weeks prior to the closing by which the

Schedule A Properties will be divested, EZM shall make available to the acquirer or acquirers of the Schedule A Properties the names, addresses, titles, job descriptions, and salary histories of two-thirds of its employees concerned with the barium diagnostic products business and EZM shall not interfere in any way with the hiring of any of those employees by the acquirer or acquirers of the Schedule A Properties.

D. On or before the date six weeks prior to the closing by which the Schedule A Properties will be divested, EZM shall make available all records it has of the names and most recent addresses and telephone numbers of all former Lafayette employees to the acquirer of the Schedule A Properties.

E. Respondents shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Schedule A Properties. In this regard:

1. Respondents shall maintain the Schedule A Properties, including both premises and assets to the extent and in the manner maintained by Lafayette prior to the acquisition.

2. Respondents shall maintain and perform in good faith all contracts for products sold under the trade names transferred to EZM by the acquisition, and will refrain from taking any action toward terminating such contracts other than that which would be commercially reasonable under the terms of those agreements.

3. Respondents shall, at the option of the acquirer of the Schedule A Properties, continue to maintain in good faith, on identical terms, conditions and stipulations, all contracts for barium products sold under the trade names transferred to EZM by the acquisition that expire by their terms prior to divestiture for a period lasting until such divestiture is completed.

III.

It is further ordered, That:

A. If EZM has not divested, absolutely and in good faith and with the Commission's approval, the Schedule A Properties within twelve (12) months of the date this order becomes final, EZM shall consent to the appointment by the Commission of a trustee to divest the Schedule

A Properties. In the event the Commission or the Attorney General brings an action pursuant to Section 5 (*l*) of the Federal Trade Commission Act, 15 U.S.C. 45 (*l*), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee to divest the Schedule A Properties. Neither the appointment of a trustee nor a decision not to appoint a trustee shall constitute a waiver by the Commission or the Attorney General of its right to seek civil penalties and other relief available to it, including a court-appointed trustee, for any violation of this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of EZM, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest the Schedule A Properties. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee, *provided, however*, that the Commission or the court for a court-appointed trustee may only extend the divestiture period two (2) times.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of EZM relating to the schedule A Properties, and EZM shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Respondents shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to EZM's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraphs II.A. and II.B. of this order.

5. The trustee shall serve, without bond or other security at the cost

and expense of EZM, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of EZM, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as may be reasonably necessary. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to EZM and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (percentage of price) that is contingent on the trustee's divesting the Schedule A Properties. Nothing herein shall be construed to limit the trustee's compensation to an amount not in excess of the monies derived from the divestiture.

6. Within fifteen (15) days after appointment of the trustee and subject to the Commission's prior approval and, if the trustee was appointed by a court, subject also to the prior approval of the court, EZM shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture of the Schedule A Properties and sign agreements.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraphs III.A. and III.B., for the balance of the time periods specified in paragraph III.B.2 or any extensions thereof. EZM shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order. The trustee shall have no obligation or authority to operate or maintain the Schedule A Properties.

8. The trustee shall report in writing to EZM and the Commission every sixty (60) days from the date the trust agreement is executed concerning the trustee's efforts to accomplish divestiture.

9. If EZM and the trustee are unable to resolve a dispute regarding the reasonable value of his/her services or the reasonableness of an expenditure or obligation incurred by the trustee in connection with his/her efforts to divest the assets, then EZM and the trustee shall submit the dispute to the Commission for resolution, but the time periods shall continue to run. The trust agreement shall recite that the

Commission's determination of the reasonable value of the trustee's services or the reasonableness of expenditures and other obligations incurred by the trustee shall be binding upon EZM and the trustee.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until EZM has fully complied with the provisions of paragraphs II and III of this order, EZM shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with those provisions. EZM shall include in its compliance reports, among other things that are required from time to time, a full description of the contacts or negotiations for the divestiture of the Schedule A Properties, including the identity of all parties contacted. EZM also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

It is further ordered, That:

A. Until divestiture of the Schedule A properties is final, respondents are prohibited from acquiring, directly or indirectly, any interest in any person or business that is engaged in the barium diagnostic products business in the United States.

B. For a ten (10) year period commencing on the date this order becomes final, EZM shall cease and desist from selling or disposing of in any other way, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any assets, related to, or used or previously used in (and still suitable for use in) the barium diagnostic products business or the whole or any part of EZM stock or share capital to any person or business engaged in the barium diagnostic products business in the United States, except that EZM may continue to sell barium diagnostic products and dispose of used equipment in the ordinary course of business.

C. For a ten (10) year period commencing on the date this order becomes final EZM shall cease and desist from acquiring, without the

prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, any stock or share capital of, or interest in, any person that is engaged in the barium diagnostic products business in the United States, or any assets related to, or currently or previously used in (and still suitable for use in) the barium diagnostic products business in the United States except raw material and new equipment purchased in the ordinary course of business. *Provided, however,* that paragraph V.C. shall not apply to the construction of new facilities.

D. For a ten (10) year period commencing on the date this order becomes final, respondents Stern and Meyers (but only so long as they remain shareholders, officers, or directors of EZM) shall give thirty (30) days' prior notice to the Federal Trade Commission before selling or disposing of in any other way, individually or jointly, directly or indirectly, through subsidiaries or otherwise, the whole or any part of their holdings of EZM stock or share capital to any person or business that is engaged in the barium diagnostic products business in the United States.

VI.

It is further ordered, That one year from the date this order becomes final, annually thereafter for nine (9) years, and at such other times as the Commission or its staff may request, respondents shall each file with the Commission a verified written report of their compliance with paragraph V.

VII.

It is further ordered, That EZM shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change that may affect compliance obligations arising out of the order.

SCHEDULE A

The properties to be divested by EZM, as provided in the Agreement and Consent Order, are the following assets:

1. The manufacturing plant located at 526 North Earl Avenue, Lafayette, Indiana, including all the land, all buildings and improvements on the land, and all machinery and other equipment used in the testing, formulation, production, packing, shipping, or for any other purpose relating to the barium diagnostic products business that were transferred by the December 22, 1988 acquisition agreement between EZM and Lafayette ("the premises").

2. All other assets of Lafayette transferred by the December 22, 1988, acquisition agreement, including all of Lafayette's right, title and interest in and to all corporate names, trade names, service marks, know-how, trade secrets, product formulas, and other intellectual property (including all applications relating thereto) of the Lafayette barium diagnostic products business and all customer lists, sales and credit reports, sales literature, manuals, regulatory permits and other filings with and approvals by regulatory authorities and product formulas. The assets include all assets and rights relating to the business acquired by Lafayette from Mallinckrodt, Inc., Alcon Laboratories, Inc., C.B. Fleet Company, Incorporated and their respective subsidiaries and affiliates ("the assets").

IN THE MATTER OF

BOISE CASCADE CORP.

Docket 9133. Interlocutory Order, November 1, 1990

ORDER REISSUING FINAL ORDER

This matter has been remanded to the Commission for further proceedings by the United States Court of Appeals for the District of Columbia Circuit. *Boise Cascade Corp. v. FTC,* 837 F.2d 1127 (D.C. Cir. 1988). The remand directs the Commission to determine whether Boise Cascade Corporation's rebuttal evidence overcomes the inference of competitive injury previously drawn by the Commission. Having reviewed the record and considered the briefs and oral arguments of the parties, the Commission has determined that Boise Cascade Corporation has failed to overcome the inference of competitive injury established by the evidence. Accordingly,

It is ordered, That paragraphs I to V of the Commission's order dated February 11, 1986, are reissued. See *Boise Cascade Corp.,* 107 FTC 76, 224-25 (1986).

Chairman Steiger abstaining and Commissioner Owen not participating.*

OPINION OF THE COMMISSION

BY CALVANI, *Commissioner:*[1]

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* Prior to leaving the Commission, former Commissioner Calvani registered his vote in the affirmative for the Final Order and Opinion of the Commission in this matter.

[1] The following abbreviations are used throughout this opinion.

RPFF	— Respondent Boise Cascade Corporation's Proposed Findings of Fact and Conclusions of Law.
CRRPFF	— Complaint Counsel's Reply to Respondent's Proposed Findings of Fact and Conclusions of Law.
IDF	— Initial Decision, February 14, 1984 (cited by finding number).
BOP	— Brief of Petitioner Boise Cascade Corporation to the United States Court of Appeals for the District of Columbia Circuit dated August 15, 1986.
BRC	— Brief for Respondent Federal Trade Commission to the United States Court of Appeals for the District of Columbia Circuit dated October 15, 1986.
BOR	— Brief of Respondent dated May 18, 1988.
BOC	— Brief of Complaint Counsel dated June 15, 1988.
RBR	— Reply Brief of Respondent dated June 27, 1988.
TR	— Transcript of July 28, 1988 hearing before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit.

I. Introduction

This case, arising under the Robinson-Patman Act ("Act" or "R-P"), 15 U.S.C. 13 (1988), is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit. *Boise Cascade Corp. v. FTC,* 837 F.2d 1127 (D.C. Cir. 1988). At issue is whether evidence in the record overcomes the inference of injury that the Commission drew, relying upon *FTC v. Morton Salt Co.,* 334 U.S. 37 (1948), from proof that manufacturers of office products engaged in substantial price discrimination between competing purchasers over time. Respondent Boise Cascade Corporation ("Boise") offered specific evidence at trial about competing dealers to show the absence of any actual or reasonable possibility of competitive injury. 837 F.2d at 1144, 1148. The Commission found this evidence irrelevant to the legal issue, but the Court of Appeals, in a split decision, disagreed. **[2]**

The court directed us to determine whether the rebuttal evidence overcomes the *Morton Salt* inference of injury. Courts and the Commission have in the past identified two types of competitive injury in R-P cases, each gauged by different standards. *See, e.g., Texaco, Inc. v. Hasbrouck,* 110 S.Ct. 2535, 2543 n.15 (1990). Primary line or "seller level" injury is that which occurs at the level of competitors of the discriminating seller. Evaluation of such injury tends to focus on the use of market power as in cases brought under Section 2 of the Sherman Act. *Boise Cascade Corp.,* 107 FTC 76, 203 (1986). Secondary line or "buyer level" injury is that which occurs at the level of competing purchasers from the discriminating seller. Courts and the Commission have used a variety of devices to identify the existence of secondary line injury without explicitly defining it. *See infra* at pp. 8-11, 15-18. Since the disfavored dealers competed with Boise for sales to end-users, the injury at issue on remand is alleged to have occurred in the secondary line. IDF 96-100; 107 FTC at 105-07.

In order to assess the probative value of Boise's rebuttal evidence we must understand the inference that it is directed at rebutting, *i.e.,* the nature of secondary line injury itself. The three opinions from the Court of Appeals panel, together, send mixed signals about the court's readiness to jettison the traditional distinction between primary and secondary line competitive injury.[2] The majority opinion "steadfastly

[2] The opinion of the court was written by Judge Starr. Judge Williams joined in the opinion to form a majority, but wrote separately to express his doubt that the practices complained of could be found to be unlawful on remand. 837 F.2d at 1148. Judge Mikva, writing in dissent, would have upheld the Commission's order. 837 F.2d at 1163.

adhered to traditional principles of Robinson-Patman law" in supporting the Commission's use of *Morton Salt* to establish a prima facie case of competitive injury. 837 F.2d at 1146 n.16. The court's remand, however, invites the Commission to blur the distinction between primary and secondary line analysis by directing us to weigh evidence that the Commission previously found irrelevant to the issue of secondary line injury. Nevertheless, we have examined this evidence on the assumption that it is relevant, but find that it is of insufficient probative force to rebut the *Morton Salt* inference.[3] **[3]**

A. *General Background*

Boise entered the office products industry in 1964 through the acquisition of Associated Stationers Company and the Honolulu Paper Company.[4] IDF 3, 48. Boise is a dual distributor of office products; it operates as both a wholesaler (selling to retailers) and as a retailer (selling to end-users). IDF 5. Boise received a "wholesaler" discount on purchases of office products from six selected manufacturers such that the prices it paid were from 5-33% less than the prices at which these manufacturers sold goods of like grade and quality to competing retail dealers. 107 FTC at 180, 182; IDF 96-100, 384. Boise received these discounts on all goods purchased from these manufacturers regardless of whether the specific goods were resold by Boise to other retailers or to end-users. 837 F.2d at 1132-33. Thus, Boise obtained a "wholesaler" discount on goods that it sold at retail in competition with retailers who purchased from the same manufacturers, but received no such favored treatment.

On April 23, 1980, the Commission issued an administrative complaint alleging that respondent violated Section 2(f) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1988). Administrative Law Judge Parker rendered the initial decision finding Boise in violation of both statutes on February 14, 1984. 107 FTC 76. Judge Parker made detailed factual findings in route to drawing the *Morton Salt* inference of competitive injury. These included the intensely competitive nature of the office products industry (IDF 408), the low net profits of the selected dealers (3-4%) (IDF 423-30), the fact that those profits were much lower than the price advantage Boise enjoyed (5-33%) (IDF 313, 237) on its

[3] We need not decide whether the examination of competitive injury in primary line cases is identical to that under Section 7 of the Clayton Act, or Section 2 of the Sherman Act. Complaint counsel has conceded that it has "not established competitive injury in a primary line sense." Tr. at 37.

[4] The facts are set forth at length in the Initial Decision.

substantial and sustained purchases from the six manufacturers (in excess of $10 million in 1979) (IDF 145, 192, 239, 274, 324, 362), and the fact that Boise took advantage of its discounts to offer its customers better prices or services than those offered by its competitors. IDF 384-406. Judge Parker also concluded that successful efforts by the dealers to underprice Boise were accompanied by a significant impairment of the dealers' profits. 107 FTC at 182. Considering these facts, Judge Parker found that the effect of the substantial and sustained price discriminations favoring Boise "may be to destroy or prevent competition with the unfavored dealers." *Id.*

Boise endeavored to overcome the inference of competitive injury by introducing evidence that the industry as a whole and the business of the disfavored dealers in particular had **[4]** flourished, that the lower prices Boise received were available to other dealers, that Boise lost accounts to the selected dealers, and that the resale functions Boise performed justified the discounts it received under the doctrine of *Doubleday & Co.*, 52 FTC 169 (1955) ("*Doubleday*"). Rejecting these arguments, Judge Parker concluded that the evidence of dealer and industry health showed only "apparent lack of effect on market structure [that] is not appropriate in a [secondary line] Robinson-Patman case." 107 FTC at 183. Judge Parker further found, *inter alia*, that the discounts were not "available" to the disfavored dealers and could not be justified under the competing functional discount standards of either *Doubleday* or *Mueller Co.*, 60 FTC 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) ("*Mueller*"). Indeed, the disfavored dealers generally performed the same functions as those that Boise alleged justified its greater discount. IDF 70; 502-514; 522.

The Commission adopted the findings and conclusions of the Administrative Law Judge. 107 FTC at 201. It rejected respondent's contentions that complaint counsel had failed to lay a foundation for invoking the *Morton Salt* inference, that actual injury must be demonstrated under sections 2(a) and 2(f) of Robinson-Patman, that competitive injury in a secondary-line case is identical to injury to competition under Section 7 of the Clayton Act, that respondent had a valid availability defense, and that the discounts were protected by the meeting competition and cost justification affirmative defenses. 107 FTC at 202-09, 215-22. The Commission found that the inference permitted by *Morton Salt* established the causal connection between the price differences and the competitive injury. *Id.* at 208. Relying

upon *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983) ("*Falls City*"), the Commission observed that "in the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Id.* at 435; 107 FTC at 206. We concluded, however, that "Boise does not adduce any such evidence; indeed, Boise does not address the causal connection at all. Instead, it cites evidence that competition in the industry has not disappeared." 107 FTC at 208. Finally, the Commission viewed Boise's attempt to prove the absence of actual competitive injury as inconsistent with *Falls City*, 460 U.S. at 434-35, which requires only that "a reasonable possibility that a price difference may harm competition be shown." 107 FTC at 208.

B. *The Court of Appeals Decision*

The Court of Appeals held that the Commission erred by failing to determine whether Boise's evidence demonstrated that "no injury or 'reasonable possibility' of competitive injury existed." 837 F.2d at 1144. While endorsing the Commission's **[5]** invocation of the *Morton Salt* rule,[5] the court rejected our view that under *Falls City* the inference of injury may be overcome only by evidence that breaks the causal connection between a price differential and lost sales or profits. The court said that such a rule "defies both logic and the import of *Morton Salt* that the inference of injury is rebuttable; for if . . . there is no competitive injury (or reasonable possibility of competitive injury) to begin with, then evidence breaking the causal connection is obviously impossible to adduce." *Id.*[6] Therefore, the court concluded:

[5] The court characterized the *Morton Salt* inference as "alive and well in the law," (837 F.2d at 1139) and concluded that the "inference was properly relied upon here to establish a *prima facie* case of competitive injury." *Id.* at 1146 n.16. The court stated, however, that "[t]his case is simply not of the lineage of *Morton Salt*" (*id.* at n.14.) and rejected the dissent's notion that this is a "paradigmatic Robinson-Patman Act case." *Id.* at 1139 n.14.

It is true that application of Robinson-Patman to dual distributors that receive functional discounts raises an array of complex legal and policy issues. It is also true, however, that courts and scholars have grappled with these issues for years in cases involving application of the Act to functional discounts. *See, e.g.*, *Texaco Inc. v. Hasbrouck*, 110 S.Ct. 2535 (1990); Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Com. L. Rev. 543, 555-56 (1976); III E. Kintner & J. Bauer, *Federal Antitrust Law* §22.14 at 306-15 (1983) and cases cited therein. In short, there is nothing trail-blazing about the Commission's case against Boise.

[6] The parties dispute whether the remand requires the Commission to reconsider its decision that Boise failed to introduce evidence breaking the causal connection between the price discrimination and competitive injury. Without deciding this issue, we select the prudent approach of reexamining the probativeness of the

(footnote cont'd)

"In reason, the inference can also be overcome by evidence showing an absence of injury within the meaning of Robinson-Patman." *Id.*

Specifically, the court held that "the Commission's conclusion that Boise's dealer-specific evidence was irrelevant to the inference of competitive injury [was] wrong as a matter of law." *Id.* at 1144. The Commission's error was that it "simply failed to determine whether Boise's evidence demonstrated that no **[6]** injury or reasonable possibility of competitive injury existed." *Id.* at 1144. "Specific, substantial evidence of absence of competitive injury . . . is, in our view, sufficient to rebut what is, after all, only an inference." *Id.*

The court dismissed four categories of evidence which, in its view, the Commission erroneously ignored.[7] First, the court referred to dealer-specific evidence supporting what it characterized as the Administrative Law Judge's "finding" that "the selected dealers were not wallowing in a hopeless or deteriorating environment." *Id.* Second, the court opined that the longstanding nature of the challenged discounts and their apparent lack of measurable competitive effects to date are relevant to determining whether a "reasonable possibility" of injury exists. *Id.* at 1145-56. Third, the court asserted that the Commission erred by "assuming" the existence of competitive injury without analysis, *id.* at 1146, noting the absence of evidence that Boise coerced more favorable discounts than those available to many other firms that met the objective definition of "wholesaler." *Id.* at 1147. Finally, the court noted that since buyer liability under Section 2(f) is entirely derivative of seller liability under Section 2(a), the six manufacturers stand in violation of the R-P Act although they followed neutral, objective criteria in defining which purchasers were "wholesalers" for the purpose of qualifying for the discount. Significantly, the court declined to specify how the Commission should weigh or evaluate Boise's rebuttal evidence, choosing instead to defer to this agency's expertise. 837 F.2d at 1145 n.15.

On March 29, 1988 the Commission voted to restore this matter to adjudicative status within the Commission upon issuance of the

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rebuttal evidence to determine whether it overcomes the inference of injury by either demonstrating an absence of actual injury (or reasonable possibility of competitive injury) or breaking the causal connection.

[7] In addition to the four categories of evidence discussed in the text, the court implied that the Commission erred when it "waved aside [as irrelevant] substantial evidence (1) that competition among dealers generally was healthy, (2) that the selected dealers singled out for FTC examination were thriving, and (3) that this happy picture of prosperity was apparently unclouded by instances of diverted sales attributable to the challenged discounts." 837 F.2d at 1143-44. Although we do not construe this language to mean that the Commission should have considered evidence of industry health unrelated to the specific dealers, we have fully evaluated all of the evidence cited by the court.

court's mandate. The Commission's order afforded the parties an opportunity to submit briefs "discussing whether there is evidence in the record sufficient to overcome the inference of competitive injury found by the Commission in its decision on February 11, 1986." The Commission's order further directed that **[7]** any briefs submitted by the parties address the following issues: (1) the correct theory of "competitive injury" by which the Commission should evaluate respondent's rebuttal case, and (2) the evidentiary effects of invoking and overcoming the inference of competitive injury. The order provided that if any party wishes that the Commission proceed in a different manner on remand, it should submit a motion within seven days from the date of service of the order. Neither party requested within the seven day period that the record be reopened for the submission of new evidence. Accordingly, we decide the case on the existing record in light of the opinion of the Court of Appeals.

II. Analytic Framework

A. *The Development of the Morton Salt Inference*

Section 2(a) of the Robinson-Patman Act prohibits price discrimination that satisfies the jurisdictional prerequisites of the statute only if the effect of such discrimination:

> may be substantially to lessen competition or to 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.

15 U.S.C. §13(a).

Complaint counsel bears the burden of persuasion on the element of competitive injury. *See, e.g., Sun Oil Co.*, 55 FTC 955, 976 (1959), *rev'd on other grounds*, 294 F.2d 465 (5th Cir. 1961), *rev'd on other grounds*, 371 U.S. 505 (1963); *General Foods Corp.*, 50 FTC 885, 890 (1954); *cf. Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 434-35 (burden on plaintiff in private action). *See generally* E. Kintner & J. Bauer, *supra* note 5, §22.3 at 251-54. Since liability under Section 2(f) is wholly derivative of liability under section 2(a), *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 76 (1976), the Commission must establish competitive injury when it proceeds under either provision of the Act.

The statutory language contains at least two standards for

establishing the injury to competition element of an R-P cause of action. First, injury may be established by a substantial lessening of competition or tendency to create a monopoly in any **[8]** line of commerce.[8] This is the test generally applied in primary line cases, where competitive injury to the vigor of competition generally and not merely to the plaintiff-seller, must be shown. *See, e.g., Borden Co. v. FTC*, 381 F.2d 175, 178 (5th Cir. 1967). Second, the Act condemns price differences, the effects of which are to injure, destroy or prevent competition with a customer of the seller.[9] This narrower standard, applicable in secondary line cases, safeguards from competitive injury the seller's customers, as distinguished from competition generally. *Id.; see FTC v. Morton Salt Co.*, 334 U.S. at 49; *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 678 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965).

Conventional wisdom is that secondary line injury may be established in either of two ways. First, in the absence of evidence of substantial, continuous price discrimination, complaint counsel may establish the requisite injury by presenting a detailed "market analysis." Under such an analysis, the longer the duration of the discrimination, the more competitive the buyers' market, the lower the profit margins of firms in that market, the more homogeneous the product and the greater the similarity between the form in which the product is resold and the form in which it was purchased from the discriminating seller, the more likely the finding of competitive **[9]** injury. *See generally* E. Kintner & J. Bauer, *supra* note 5, §22.13 at 304-06 and cases cited in accompanying footnotes; F. Rowe, *Price Discrimination Under the Robinson-Patman Act* at 180-81 (1962).[10]

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[8] Some commentators further distinguish injury that may lessen competition generally from that which tends to create a monopoly. *See, e.g.*, E. Kintner, *A Robinson-Patman Primer* 21 (2d ed. 1979); H. Shniderman, *Price Discrimination in Perspective* 24 (1977).

[9] This standard, added by the 1936 Robinson-Patman Amendments to Section 2 of the Clayton Act, *FTC v. Morton Salt Co.*, 334 U.S. at 49-50 & n.18, focussed on the "effects of a practice on competitive relationships among firms at the reseller level." 107 FTC at 204. For this reason, we have characterized the concern of Robinson-Patman in secondary line cases as "competition as fairness," and have concluded that Congress must have intended that this second formulation mean something other than injury to competition as understood in primary line cases and those brought under Section 7 of the Clayton Act. *Id.* The Court of Appeals agreed that "it is fairness, as Congress perceives it, that Robinson-Patman is all about." 837 F.2d at 1146-47. Judge Williams, concurring, noted that the courts "have read the Act to protect certain fairness goals, at the expense of competition." 837 F.2d at 1149. *See also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132-133 (1978) (Act "reflect[s] a policy choice favoring the interest in equal treatment of all customers over the interest in allowing seller's freedom to make selective competitive decisions.")

[10] This "market analysis" approach to establishing secondary line injury must not be confused with a "market structure" evaluation of injury to competition under other antitrust statutes such as Section 7 of the Clayton Act.

The second method of establishing competitive injury is with evidence that a seller has charged competing customers substantially different prices over a prolonged period of time. *See* H. Shniderman, *supra* note 8, at 34. In such instances, a long line of cases beginning with the Supreme Court's decision in *Morton Salt* allow courts and the Commission to infer the requisite competitive injury under Robinson-Patman.

> It would greatly handicap enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. <u>This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury were adequately supported by evidence.</u>

334 U.S. at 50-51 (emphasis added).

This inferential method of establishing secondary line injury is arguably a particular application of the "market analysis" approach. Under the *Morton Salt* doctrine, an inference of injury may be drawn only where the price differential is substantial and continuous—two of the factors relevant to secondary injury market analysis. In that case, for example, price differentials of up to 18.5% were in effect for decades. The courts of appeals have also permitted the inference to be drawn where the price differential, although small as an absolute percentage, was substantial relative to low profit margins in industries characterized by keen competition. *Compare Purolator v. FTC,* 352 F.2d 874, 879-80 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (4% price differential over number of years unlawful) and *Foremost Dairies, Inc. v. FTC,* 348 F.2d 674, 680 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965) (5% price differential over 2 years unlawful), *with American Oil Co. v. FTC,* 325 F.2d 101 (7th Cir. 1963), *cert. denied,* 377 U.S. 954 (1964) (price differences of 25% to 75% sustained for only 17 days not unlawful). **[10]**

In *Morton Salt* the Supreme Court reasoned that evidence that a seller's price differentials were "sufficient in amount to influence [competing customers'] resale prices" was adequate in itself to support a finding of competitive injury. *Id.* at 47. Lower courts subsequently held that the inference may be drawn even where there is no difference in the resale prices of competing purchasers since the disfavored buyer may be injured by the impairment of his profits or a

reduced ability to provide services that attract customers. *See, e.g., Kroger Co. v. FTC,* 438 F.2d 1372, 1378-79 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971); *Foremost Dairies, Inc. v. FTC,* 348 F.2d at 680. Reduced profits leave the disfavored firm with "fewer funds available with which to advertise, make capital expenditures, and the like." *Black Gold, Ltd. v. Rockwool Indus., Inc.,* 729 F.2d 676, 681-82 (10th Cir.), *cert. denied,* 469 U.S. 854 (1984), *quoting J. Truett Payne Co. v. Chrysler Motors Corp.,* 451 U.S. 557, 565 n.4 (1981).[11]

Although *Morton Salt* was later interpreted as having created only a "prima facie" inference of competitive injury, *Falls City,* 460 U.S. at 435, the cases often inferred such injury from little more than the "bare existence of price differentials." *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana),* 466 F.2d 1163, 1174 (7th Cir. 1972) (Mr. Justice Clark, retired, sitting by designation). Several circuits upheld findings of competitive injury in the face of direct testimony by the alleged victims that they were not, in fact, injured. *See, e.g., United Biscuit Co. of America v. FTC,* 350 F.2d 615, 621-22 (7th Cir. 1965), *cert. denied,* 383 U.S. 926 (1966); *Standard Motor Prods., Inc. v. FTC,* 265 F.2d 674 (2d Cir.), *cert. denied,* 361 U.S. 826 (1959); *Whitaker Cable Corp. v. FTC,* 239 F.2d 252 (7th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957); *E. Edelman & Co. v. FTC,* 239 F.2d 152 (7th Cir. 1956); *see also National Dairy Prods. Corp. v. FTC,* 395 F.2d 517, 522 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968); *Foremost Dairies, Inc. v. FTC,* 348 F.2d at 680; U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 12 (1977). In *Moog Industries, Inc. v. FTC,* 238 F.2d 43, 51 (9th Cir. 1956), *aff'd per curiam,* 355 U.S. 411 (1958), for example, the court refused to permit a witness "by conclusion to deny a mathematical fact" **[11]** —that he was competitively injured by paying more for like goods than his rivals paid.[12]

Cases such as these prompted influential commentators to opine

[11] In *J. Truett Payne,* the Supreme Court actually reserved the question of whether competitive injury may be established in the absence of a showing that the favored purchasers lowered their resale prices. The outcome of this case, however, would not be altered by the adoption of such a rule since "Boise has used its advantage to underprice competitors on occasion or to offer better services than its competitors (F's 384-406)." 107 FTC at 182.

[12] The strength of the *Morton Salt* inference was illustrated by the opinion of the hearing examiner in *Sun Oil Co.,* 55 FTC at 962, who explained:

> 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 margins of profit 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.

The Commission expressly adopted the findings and conclusions of the hearing examiner. 55 FTC at 981.

that *Morton Salt* created a virtually irrebuttable inference that price discrimination, particularly in highly competitive markets with low profit margins, was "per se" anticompetitive when the prerequisites for invoking the inference were present. *See, e.g.,* E. Kintner & J. Bauer, *supra* note 5, §22.13, at 300; ABA Antitrust Section, Monograph 4, *The Robinson-Patman Act: Policy and Law* 101 (1980). Indeed, the Department of Justice reviewed the case law in 1977 and concluded, "[t]he total effect of the majority of secondary line cases is to create a virtually irrebuttable presumption that any price discrimination is injurious to competition." U.S. Dep't of Justice, *supra* p. 10, at 14.

The Supreme Court reaffirmed the viability of *Morton Salt* and described the showing respondent must make to overcome the inference of injury some thirty-five years later in *Falls City*:

> In *Morton Salt* this Court held that, for the purposes of [Section] 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time [citations omitted]. In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.

Falls City, 460 U.S. at 435; *see also Texaco Inv. v. Hasbrouck,* 110 S.Ct. at 2544. In the instant case, the Court of Appeals agreed that the Commission properly relied upon *Morton Salt* to find a prima facie case of competitive injury. 837 F.2d at 1146 n.16. The issue on remand concerns the showing necessary to overcome this inference of injury. **[12]**

It is difficult to distinguish between those cases in which the *Morton Salt* inference was deemed overcome and those in which the factual predicate for invoking the inference was not established in the first instance.[13] Many cases in which injury is not inferred from sustained

[13] In *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir. 1982), for example, the court found *Morton Salt* was "not relevant to the facts" of the case because plaintiff failed to establish "substantial price differences granted to market leaders in a highly competitive market in which minor price differences significantly affected competitors' low profit margins." 670 F.2d at 581. In finding for defendant, the court identified several reasons for plaintiff's injury unrelated to the price discrimination, including: (1) plaintiff was unable to obtain financing for his used car business and therefore had to sell his used cars at wholesale; (2) plaintiff chose to forego the new car market to some extent in pursuit of fleet sales; and (3) the amount of the discrimination was relatively small ($11.00 per car). Since *J. Truett Payne* is the only case cited by the Supreme Court in *Falls City* to illustrate how the *Morton Salt* inference may be overcome by evidence breaking the causal connection, it is reasonable to assume the Supreme Court intended that such evidence would be sufficient to overcome the inference even though *Morton Salt* was not invoked in the Fifth Circuit decision. *See also Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 421 (8th Cir. 1986) (after finding plaintiff failed to establish a prima facie case under *Morton Salt*, court held in alternative that plaintiff's mismanagement and questionable business practices caused alleged injury).

and substantial discriminations make no mention or only passing reference to *Morton Salt.* No inference of injury has been drawn in cases where the evidence showed plaintiff's own poor business judgment was the cause of his injury;[14] where the discrimination in issue related to the price of a component part which bore no correlation to the price of the finished product;[15] where a price differential reflected **[13]** nothing more than a consumer preference for a premium brand over a nonpremium brand;[16] or where the lower-priced product was available from the same or an alternate source.[17] *See generally,* ABA Antitrust Section, *supra* p. 11, at 99-100. Together, these cases loosely illustrate the *Falls City* principle that the inference will not be drawn where the evidence breaks the causal connection between the price discrimination and any reasonable possibility of competitive injury. *See generally,* J.F. Lewis and R.L. Horstman, Competitive Injury—Secondary/Tertiary Line, 53 *Antitrust L.J.* 891, 898-903 (1985).[18]

The competitive injury element of a Section 2(a) offense has two principal components: (1) the reasonable possibility of injury itself (hereinafter "injury" or "fact of injury); and (2) causation. *See* BOR at 21, 32. The *Morton Salt* rule permits the trier of fact to infer the existence of both components. The Court of Appeals did not distinguish between these two aspects of the prima facie case in stating that the *Morton Salt* inference—as if it were only one inference—may be overcome either by demonstrating an absence of injury or by breaking the causal connection. The effect of the court's decision would be to permit respondent to overcome the "fact of injury" element of the competitive injury requirement of Section 2(a)

[14] *See, e.g., Richard Short Oil Co. v. Texaco, Inc.,* 799 F.2d at 421; *cf. American Can Co. v. Russellville Canning Co.,* 191 F.2d 38, 60 (8th Cir. 1951) (illness of plaintiff's manager, his preoccupation with preparing for litigation, difficult climatic conditions and change from a noncompetitive to a competitive market all affected plaintiff's business).

[15] *Minneapolis-Honeywell Regulation Co. v. FTC,* 191 F.2d 786, 791 (7th Cir. 1951), *cert. dismissed,* 344 U.S. 206 (1952); *accord Marty's Floor Covering Co. v. GAF Corp.,* 604 F.2d 266 (4th Cir. 1979), *cert. denied,* 444 U.S. 1017 (1980); *Quaker Oats Co.,* 66 FTC 1131 (1964).

[16] In such cases, "the price difference creates no competitive advantage to the recipient of the cheaper private brand product on which injury could be predicated." *Borden Co. v. FTC,* 381 F.2d 175, 181 (5th Cir. 1967).

[17] *See, e.g., Tri-Valley Packing Ass'n v. FTC,* 329 F.2d 694, 703-04 (9th Cir. 1961); *Hanson v. Pittsburgh Plate Glass Indus., Inc.,* 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974); *contra, Fowler Mfg. Co. v. H. H. Gorlick,* 415 F.2d 1248, 1253 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); *Purolator Prods., Inc. v. FTC,* 352 F.2d 874, 882 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968).

[18] Rowe states that a seller may escape liability by demonstrating the absence of a causal connection with evidence of any of the following: "(1) intervening economic factors influencing a buyer's resale activities, (2) added functions or offsetting costs by the low-price buyer, (3) the competitive inertia of his rivals, and (4) the availability of the goods at the lower price from another source." Rowe, *supra* p. 9, at 186.

with evidence directed at breaking the causal connection between that injury and the challenged price difference. **[14]**

We have found no authority, in the four decades since *Morton Salt,* for the proposition that one does not incur this fact of secondary line injury despite paying substantially more than a competitor for goods of like grade and quality over a prolonged period in an industry with low profit margins and keen competition. Indeed, injury in this sense appears to be conclusively established in cases where *Morton Salt* was properly invoked in the first instance. As two commentators put it, "arguments attempting to show an absence of actual injury to competition, have . . . proved unsuccessful in the face of evidence that the price discriminations were substantial." E. Kintner & J. Bauer, *supra* note 5, §22.13 at 302.

The presence of this "fact of injury," however, does not mandate a finding of "competitive injury" within the meaning of Robinson-Patman. *Falls City* makes clear that in the absence of "direct evidence of displaced sales," respondent may escape liability by introducing evidence breaking the causal connection between the price discrimination and the injury. The corollary of the *Falls City* rule is that the *Morton Salt* inference of competitive injury is conclusive—regardless of evidence of dealer health—where direct evidence of displaced sales is adduced. The only difference between the rule conclusively inferring competitive injury under *Morton Salt* and the rule of inferring it subject to rebuttal is that in the former case the direct evidence of displaced sales supplies proof of causation independent of the inference. Since secondary line injury may be conclusively inferred where there is direct evidence of displaced sales, *Falls City* suggests that this "fact of injury"—as distinguished from causation—is established by the same facts necessary to invoke *Morton Salt* in the first instance. Thus, a reading of the Court of Appeals decision to allow respondent to overcome the *Morton Salt* inference with evidence of the absence of this "fact of injury" would be inconsistent with the Supreme Court's teaching in *Falls City.*

B. *The Standard for Overcoming the Morton Sale Inference*

The Court of Appeals held that the *Morton Salt* inference "can" be overcome by evidence showing an absence of competitive injury "within the meaning of Robinson-Patman." 837 F.2d at 1144. Future interpretations of this phrase will ultimately determine whether the court's decision will lessen the evidentiary showing necessary to

overcome the *Morton Salt* inference. The court eschewed articulating a standard for assessing secondary-line competitive injury despite Boise's urging that the court adopt a market-structure approach **[15]** comparable to that used in primary line cases or under other antitrust statutes. 837 F.2d at 1145 n.15. BOP at 27-29.[19]

There are at least four approaches to assessing secondary line injury that are discussed in the record or by the Court of Appeals. First is the view that secondary line injury should be evaluated by the same standards employed in merger analysis under section 7 of the Clayton Act or monopolization cases brought under section 2 of the Sherman Act. This approach—characterized by Judge Richard Posner as a "polar extreme" view—was taken by Boise below and, to some extent, again on remand. *See* BOR at 54-56.[20] R. Posner, *The Robinson-Patman Act* 39 (1976). Whatever mixed signals may exist in the Court of Appeals's opinion, its decision cannot be read as expressly or impliedly reversing the Commission's previous rejection of this theory. 107 FTC at 202-04.

The second, and polar opposite view, would permit competitive injury to be conclusively inferred from a price difference. The premises of this theory is that any firm that **[16]** pays more than its rivals for goods that it is trying to resell in competition with them is competitively disadvantaged. R. Posner, *supra* p. 15, at 39. Although some previous decisions by courts and the Commission have arguably approached adoption of this standard in secondary line cases, we do not today.[21] Such a rigid approach has been criticized because it

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[19] The court expressly adhered to the incipiency standard for measuring competitive injury, but did not otherwise define the nature of secondary-line injury within the meaning of the Act. 837 F.2d at 1139 n.12, 1144. It acknowledged that the Commission rejected Boise's effort to "muddy the Robinson-Patman waters by implanting market-structure analysis in alien legal soil." 107 FTC at 202 n.3; 837 F.2d at 1145 n.15. The court stated that Judge Parker did not co-mingle "market-structure analysis appropriate under other provisions of the Clayton Act, such as Section 7 . . . but, as the Commission claims, off-target as to Robinson Patman's less global perspective." 837 F.2d at 1145 n. 15. Similarly, the court observed that "[t]his was no open-ended Sherman or Clayton Act case going broadly to the structure of the market or 'market dynamics'." *Id.* at 1146 n.16. In any event, the court's "quarrel with the Commission" was that "the FTC proceeded deliberately to ignore . . . fact-specific evidence going directly to the Commission-annointed [sic] 'victims,' "namely the selected dealers." *Id.* at 1146 n.16. The fact that the "target[s]" of Boise's evidence were the "selected dealers themselves and their specific circumstances in the competitive arena with Boise," *id.*, however, provides little additional guidance as to the type of dealer-specific evidence that would demonstrate an absence of competitive injury.

[20] At oral argument, respondent's counsel initially argued that the Court of Appeals obliterated the distinction between primary and secondary line injury, then retreated from this position. Tr. at 16. Boise stated "the Court of Appeals is telling us that the focus of the statute must be injury to the competitive process." Tr. at 18-19.

[21] *Foremost Dairies, Inc. v. FTC,* 348 F.2d at 678, for example, has been interpreted as holding that threatened injury to an individual plaintiff that lacks the capacity to diminish competition generally is unlawful. *See O'Connell v. Citrus Bowl, Inc.,* 97 F.R.D. at 122 n.3 (without expressing an opinion as to the

(footnote cont'd)

"reads the competitive injury requirement right out of the statute" (*id.*) and would condemn sporadic price discriminations that occur in the process of a market adjusting to a new equilibrium. *Id.* at 40. *See also id.* at 12-14.

The third approach, that Robinson-Patman condemns only those practices that constitute "economic price discrimination," is advanced by Judge Williams in the concurring opinion. Under this view, liability is appropriate only in those cases where the price difference "causes disfavored purchasers to bear a disproportionate share of the seller's total costs of production." 837 F.2d at 1149. Judge Williams argues that economic price discrimination could not occur in this case due to the absence of barriers which prevent arbitrage—"resales by favored customers to disfavored ones." *Id.* at 1149-50.[22]

The cases hold, however, that the Robinson-Patman Act diverges from a law against economic price discrimination in two **[17]** fundamental ways.[23] First, discrimination under the Act is "merely a price difference" and is distinct from the economist's notion of economic price discrimination. *Texaco Inc. v. Hasbrouck,* 110 S.Ct. at 2544; *Falls City,* 460 U.S. at 443 n.10; *FTC v. Anheuser-Busch, Inc.,* 363 U.S. 536, 549 (1960). The Act does not proscribe economic price discrimination that exists where a seller charges two purchasers the same price although the seller's cost of supplying one of the customers is substantially lower than his cost of supplying the other. *Sano Petroleum Corp. v. American Oil Co.,* 187 F. Supp. at 353-54; E. Kintner & J. Bauer, *supra* note 5, §21.7 at 167; R. Bork, *The Antitrust Paradox* 391 (1978).

Second, the limited range of evidence that courts and the Commission have considered to support a cost justification defense has arguably led to the condemnation of practices which were cost justified in an economic sense. *See* R. Posner, *supra* p. 15, at 42. *See also,* 837 F.2d at 1149 (J. Williams, concurring) (Act condemns efficiency enhancing practices). Indeed, in *Morton Salt* itself, the

correctness of *Foremost*). Arguably, such an approach is also inconsistent with *Falls City* to the extent that it conclusively infers that the price discrimination caused the disfavored purchaser's injury.

[22] Economists teach that in order for a seller to profitably price discriminate by charging different prices, the following three conditions must exist: (1) the seller must have monopoly power; (2) the seller must be able to segregate its customers into classes that have either different price elasticities of demand or varying reservation prices; and (3) opportunities for arbitrage must be constrained. F. Scherer, *Industrial Market Structure and Economic Performance* at 315 (2d ed. 1980).

[23] The socio-political concerns that led Congress to enact Robinson-Patman are well documented elsewhere and need not be repeated here. *See, e.g., General Motors Corp.,* 103 FTC 641, 693-96 (1983); E. Kintner & J. Bauer, *supra* note 5, §19.1 et seq.; R. Posner, *supra* p. 15, at 25-29; F. Rowe, *supra* p. 9, at 3-11.

Seventh Circuit embraced a variant of this economic price discrimination theory only to be rebuffed by the Supreme Court.[24]

The fourth approach to secondary line injury is less a definition than a description of the conditions under which evidence of injury to competitors will support a finding of liability absent an affirmative defense.[25] It is consistent with **[18]** the Supreme Court's view that the 1936 Amendment "was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'" *Morton Salt,* 334 U.S. at 49; *accord Hasbrouck v. Texaco, Inc.,* 842 F.2d at 1041 (since *Morton Salt* "it has been permissible to infer harm to competition from evidence of harm to competitors.") (emphasis in original).

Respondent proposes a narrow variation of this theory of competitive injury on remand. It argues that secondary line injury occurs only where a price differential, if continued, threatens the disfavored dealer's "existence" (Tr. at 18) or "competitive viability, thereby raising the concern of incipient injury to competition." BOR at 56.[26] But this test is more restrictive than that applied in *Morton Salt,* in which the Court rejected a defense premised on the small amount of sales for which table salt accounted relative to the total stock of the grocery store-purchasers. 334 U.S. at 49. The Court recognized that "since a grocery store consists of many comparatively small items, there is no possible way effectively to protect a grocery store from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store." *Id.*

Our review of the case law and the arguments of the parties suggests the following definition—also a variation of the fourth approach. Secondary line competitive injury is that injury which flows from the practice of a seller charging two or more customers different

[24] The Court of Appeals in *Morton Salt* defined unlawful price discrimination as follows: "It is the Act of unfairly, injuriously and prejudicially distinguishing between persons or objects, where economically speaking a sound and fair distinction does not exist." 162 F.2d 949, 954-55 (7th Cir. 1947).

[25] *Cf. J.F. Feeser, Inc. v. Serv-A-Portion, Inc.,* 7 Trade Reg. Rep. (CCH) (1990-2 Trade Cas.) ¶69,124 at 64,173 n.10 (3d Cir. Aug. 2, 1990) ("[e]vidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act" in a secondary line case); *Hasbrouck v. Texaco, Inc.,* 842 F.2d 1034, 1040 (9th Cir. 1988), *aff'd,* 110 S.Ct. 2535 (1990) ("[c]learly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct.").

[26] In *Richard Short Oil Co. v. Texaco, Inc.,* 799 F.2d 415, 420 (8th Cir. 1986), the principal case upon which Boise relies for this proposition, the court found plaintiff failed to prove the elements necessary to invoke *Morton Salt* in the first instance. *Id.* at 420-21. Thus, the passage in *Short* that "injury to competition focusses on whether there has been a substantial impairment to the vigor or health of the contest for business" is mere dictum. Moreover, it is dictum which the Eighth Circuit derived from *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977), a case brought under Section 7 of the Clayton Act which, as we previously have held, is not the controlling standard in this case.

prices for goods of like grade and quality, where the price differential is (1) substantial in amount,[27] and (2) sustained in duration,[28] (3) such that it **[19]** creates a reasonable possibility,[29] (4) that the favored purchaser would benefit from the lower price by either (a) lowering its resale prices in competition with the disfavored purchaser to attract customers,[30] (b) using its increased gross margins to enhance its services which may attract customers,[31] or (c) enlarging its profit margins over what they would have been without the discount.[32] *See supra* at pp. 9-11.

The Court of Appeals stated that the *Morton Salt* inference can be overcome by evidence showing an absence of injury within the meaning of Robinson-Patman. In our view, this would require the respondent to produce evidence that would preclude a finding that complaint counsel met its burden of proof on one or more of the four elements above as follows.[33] Evidence that negates a finding of either of the first two elements—that the price differences were (1) substantial, or (2) sustained—would overcome the *Morton Salt* inference.[34] Under those circumstances, the complaint should be dismissed unless complaint counsel makes its case under the more stringent market analysis approach. *See supra* at pp. 8-9 & note 10. The third element, causation, is **[20]** established through the *Morton Salt* inference from proof of the first two elements, and may be overcome, in the absence of direct evidence of displaced sales, with evidence breaking the causal connection between the price discrimination and injury. Finally, respondent may not overcome the *Morton Salt* inference with evidence negating one or two of the benefits that may inure to the favored purchaser as described in the preceding paragraph. Rather, the evidence would have to preclude the Commis-

[27] *Falls City,* 460 U.S. at 435; *Morton Salt,* 334 U.S. at 50-51.

[28] *Falls City,* 460 U.S. at 435.

[29] *Id.*

[30] *Morton Salt,* 334 U.S. at 47.

[31] *See, e.g., Kroger v. FTC,* 438 F.2d at 1378-79; *Foremost Dairies, Inc. v. FTC,* 348 F.2d at 680; *Black Gold, Ltd. v. Rockwool Indus., Inc.,* 729 F.2d at 681-82.

[32] *See supra* note 31. Increased profits confer a competitive advantage on the favored purchaser in several ways, such as by enabling to make greater capital expenditures than its competitors or to better weather a decline in the business cycle.

[33] Since the burden of persuasion on the issue of competitive injury ultimately rests with complaint counsel, respondent cannot be required to show the absence of any element that goes to the question of *Morton Salt* injury. Respondent should be deemed to have overcome the inference of injury if it has presented sufficient evidence from which the trier of fact finds that the essential elements of injury have not been established by a preponderance of the evidence.

[34] Although Robinson-Patman is not a law against economic price discrimination, these two elements operate to exclude from the grasp of the Act many price differences that would not constitute such discrimination. *See* R. Posner, *supra* at p. 15, at 39-40; *Boise Cascade Corp.,* 107 FTC at 184.

sion from finding a reasonable possibility that the price difference would enable the favored purchaser to enjoy any of the benefits previously identified: the ability to offer lower resale prices, to offer new or enhanced services, or to increase its profits. We recognize that such a standard will likely prove difficult for respondents to meet. This is no doubt why neither the court nor Boise cites a single case in which the *Morton Salt* inference, once properly invoked, was overcome on the ground that no "injury in fact" was demonstrated.

C. *Morton Salt Permits An Inference of Competitive Injury To Be Drawn from Predicate Facts*

Respondent argues that the *Morton Salt* "inference" is in fact two presumptions[35]—one of injury and the other of causation—which may be overcome by introducing evidence sufficient to raise a genuine issue as to the existence of either presumed fact. BOR at 21, 32 and n.9. Upon the production of such evidence, Boise suggests that the burden shifts back to complaint counsel to produce additional evidence sufficient to prove the previously presumed facts without the benefit of the presumptions. BOR at 30-31. *See* IX Wigmore, *Evidence* §2491 at 305 (Chadborn rev. 1981) (hereinafter "Wigmore, *supra*").[36] Complaint counsel counters that *Morton Salt* does not create any rebuttable presumption, but merely permits the fact finder to **[21]** draw a permissive inference[37] of injury from proof of the facts that gave rise to the inference.[38] Our view is that *Morton Salt* and its progeny stand for the proposition that proof of substantial price discrimination between competing purchasers over a competitively

[35] A presumption, often called a "rebuttable prescription," is "an inference which the law directs the [trier of fact] to draw if it finds a given set of facts." *Legille v. Dann,* 544 F.2d 1, 5 n.24 (D.C. Cir. 1976). It is a procedural rule which compels a factual conclusion in the absence of contrary evidence. *Id.*

[36] This approach—commonly known as the "bursting bubble" theory—was pioneered by the late Professor Thayer and is the choice of leading scholars and most federal courts today. *Legille v. Dann,* 544 F.2d at 6-7; *see generally* M.H. Graham, *Handbook of Federal Evidence* §301.1 (2d ed. 1986); Fed. R. Evd. 301.

[37] "An inference is a conclusion as to the existence of a particular fact reached by considering other facts in the course of human reasoning." M.H. Graham, *supra* note 36, §301.7 at 108. An inference permits, but does not require, the trier of fact to deduce the existence of one fact from proof of another by using ordinary reasoning and logic. *Id.* ; *See also* E. Cleary, *McCormick on Evidence* §342 at 965 (3d ed. 1984); *Legille v. Dann,* 544 F.2d 1, 5 n.24; *Bray v. United States,* 306 F.2d 743, 747 (D.C. Cir. 1962). In some instances "an inference may be so strong that no other conclusion may reasonably be reached." M.H. Graham, *supra* note 36, §301.7 at 108. This is because of the "compelling nature of the particular factual circumstances rather than that, as is the case with a presumption, a rule of law requires the conclusion to be drawn." *Id.*

[38] Assuming, however, that *Morton Salt* creates a rebuttable presumption, complaint counsel argues that the requisite competitive injury may be inferred from the evidence which gave rise to the presumption in the first instance. BOC at 22. The Commission "must [then] weigh the disputed rebuttal evidence to determine the strength of any inference flowing therefrom, and then it must compare the strength of that inference against the strength of the *Morton Salt* inference." BOC at 19.

significant period of time is sufficient evidence from which a logical inference of competitive injury may be draw.

The opinion of the Court of Appeals is consistent with our analysis. The court stated, "sustained and substantial price discrimination raises an inference, but it manifestly does not create an irrebuttable presumption of competitive injury." 837 F.2d at 1144 (emphasis added). The court's characterization of the *Morton Salt* rule as an inference, rather than a presumption, is supported by two score years of case law.[39] Indeed, a leading **[22]** Robinson-Patman Act scholar noted a quarter of a century ago that "Mr. Justice Black's opinion [in *Morton Salt*] sanctions but does not compel conclusions of competitive injury from minimal evidence in other factual contexts." F. Rowe, *supra* p. 9, at 135.

Against this plethora of authority,[40] Boise fails to identify a single case holding that the "inference" of injury established by *Morton Salt* and its progeny is a bursting-bubble type "presumption." Instead, it relies upon language in *Falls City,* 460 U.S. at 435, suggesting that the *Morton Salt* inference establishes only a "prima facie" case of competitive injury. Boise also points to language in the opinion of the Court of Appeals explaining that once complaint counsel successfully invoked the *Morton Salt* rule, "the burden therefore shifted to Boise to rebut the FTC's prima facie case by breaking, if it could, the causal connection." 837 F.2d at 1146 n.16. Boise's review of the case law leads it to conclude that courts have "uniformly" applied the *Morton Salt* inference in practice as a legal presumption. BOR at 28-29; RBR at 9.

Language in the cases referring to complaint counsel's obligation to present a "prima facie" case of injury does not establish that *Morton Salt* creates a rebuttable presumption of injury. The term "prima facie" is "often used in two senses and is therefore an ambiguous and

[39] *See, e.g., Hasbrouck v. Texaco, Inc.*, 842 F.2d at 1041, *aff'd*, 110 S.Ct. at 2544; *National Dairy Prods. Corp. v. FTC*, 395 F.2d at 521 (facts supporting invocation of *Morton Salt* are "adequate to support the Commission's finding that the effect of National's price discriminations might be substantially to injure competition among retail stores"); *Foremost Dairies, Inc. v. FTC*, 348 F.2d at 679-81 (court must defer to the Commission "the task of drawing the inference of probable injury to competitors so long as that inference is supported by a reasonable quantum of evidence in the record"). In *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987), the Eighth Circuit recognized that *Morton Salt* permits the trier of fact to draw an inference of competitive injury, but does not require that such injury be found. The court upheld an instruction to the jury that it "may infer that such price differential lessened competition." The court held that "the instruction as given adequately informed the jury that it need not draw, the *Morton Salt* inference. . . . Thus, the instruction permitted the jury to find that there was no injury to competition despite Rose Confection's *Morton Salt* evidence." *Id.* at 388-89. The Eighth Circuit expressly affirmed the district court's refusal to instruct the jury that the *Morton Salt* inference is rebuttable. *Id.* at 388.

[40] *See supra* note 39.

often misleading term." E. Cleary, *supra* note 37, §342 at 965 n.4; *see also Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254 n. 7. ("*Burdine*") ("The phrase 'prima facie' case not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue."). Boise evidently ascribes only one meaning to it—to describe the evidentiary showing necessary to shift **[23]** the burden of production. RBR at 9.[41] The term also may mean evidence simply sufficient to withstand a motion for a directed verdict. E. Cleary, *supra* note 37, §342 at 965 n.4. Thus, the statement in *Falls City* that the *Morton Salt* inference establishes a "prima facie" case is inconclusive. In addition, language in the Court of Appeals' opinion stating that invocation of *Morton Salt* shifted to respondent the burden "to rebut the FTC's prima facie case" only points to the strength of the inference which, through logic and reasoning rather than by operation of law, may result in a finding against respondent in the absence of rebuttal evidence. *See* M.H. Graham, *supra* note 36, §301.7 at 108.

Even assuming, however, that *Morton Salt* creates "presumptions" of injury and of causation and that respondent has rebutted those presumptions, the underlying inferences which may be drawn from the facts that gave rise to the presumptions remain. M.H. Graham, *supra* note 36, §301.12 at 113; *cf.* E. Cleary, *supra* note 37, §344 at 975 (natural inference underlying presumption may be sufficient to take a case to the jury, despite the existence of contrary evidence and the resultant destruction of the presumption). There is no merit in Boise's suggestion that upon introduction of rebuttal evidence complaint counsel must produce additional evidence of competitive injury. BOR 30-31. Indeed, the Title VII cases from which Boise argues by analogy hold that once a presumption of discriminatory intent has been rebutted, courts may continue to rely upon the evidence introduced by plaintiff to establish its prima facie case and upon inferences properly drawn therefrom in determining whether respondent's explanation for the challenged conduct was "pretextual." *Burdine,* 450 U.S. at 255 n.10 (plaintiff's initial evidence,

[41] Boise's reliance on a series of age and sex discrimination cases that discuss the burden of proof once plaintiff makes a prima facie case of discriminatory treatment is wholly misplaced. BOR at 26-27, 29-30 & n.8. *See, e.g., Elliott v. Group Medical & Surgical Serv.,* 714 F.2d 556 (5th Cir. 1983) and *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 239-40 (4th Cir. 1982) (cases under Age Discrimination in Employment Act, 29 U.S.C. 621 et seq.) Nothing in these cases augers in favor of our construing *Morton Salt* to create a rebuttable presumption rather than to permit an inference of injury to be drawn.

combined with effective cross-examination of the defendant, may suffice to discredit defendant's explanation).[42] **[24]**

In our view, the evidence of sustained and substantial price discrimination in the record is sufficient to permit us to infer the existence of competitive injury within the meaning of Robinson-Patman. This inference is bolstered by testimony that the selected dealers lost accounts to Boise because of its better prices or services, and the evidence that Boise enjoyed greater net profits than dealers generally and the selected dealers in **[25]** particular. Respondent's rebuttal evidence is of insufficient probative value, for the reasons explained *infra*, to overcome our drawing an inference of actual injury; *a fortiori*, said evidence does not establish any fact from which we may infer the absence of a reasonable possibility of competitive injury in this case.

III. Analysis of Rebuttal Evidence

The Court of Appeals directed the Commission "to determine whether Boise's evidence demonstrated that no injury or 'reasonable possibility' of competitive injury existed." 837 F.2d at 1144. The court identified four categories of evidence for us to consider on remand, but did not draw inferences from the facts previously found by the

[42] The other cases Boise cites do not support its assertion that complaint counsel's evidence is insufficient to warrant an inference of competitive injury in the face of contrary evidence Boise produced. BOR at 28, 30-31; RBR at 11. *See, e.g., Lovelace v. Sherwin-Williams Co.*, 681 F.2d at 230, 239-40, 244-45 (4th Cir. 1982) (detailing the evidentiary effects of rebuttable presumptions operable in cases brought under Title VI and the Age Discrimination in Employment Act); *Scott Medical Supply Co. v. Bedsole Surgical Supplies, Inc.*, 488 F.2d 934, 937-38 (5th Cir. 1974) (inference of conspiracy cannot stand in the face of "substantial and uncontradicted evidence to the contrary"); *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1384 (5th Cir. 1979) ("overwhelming" evidence of business justification precludes finding of liability in the absence of "substantial" evidence). As explained in Part III, *infra*, respondent's evidence is underwhelming in the face of complaint counsel's substantial evidence of competitive injury.

Equally misplaced is Boise's reliance on a line of cases counseling against drawing inferences of conspiracy or anticompetitive intent from ambiguous evidence in the face of contrary business justification/independent action evidence in antitrust actions under the Sherman Act, 15 U.S.C. 1 et seq. (1982). BOR at 48-50. *See, e.g., Business Elecs. Corp. v. Sharp Elecs. Corp.*, 106 S. Ct. 1515 (1988); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 632 (9th Cir. 1987); *Smith v. Northern Mich. Hosps., Inc.*, 703 F.2d 942, 956 (6th Cir. 1983); *Panotex Pipeline Co. V. Phillips Petroleum Co.*, 457 F.2d 1279, 1289 (5th Cir. 1972); *H.L. Hayden Co. v. Siemens Medical Sys. Inc.*, 672 F. Supp. 724, 733-39 (S.D.N.Y. 1987). The *Morton Salt* inference is a breed apart; its purpose is to simplify the burden on the Commission while roughly distinguishing between harmless and heinous price differences. We reject Boise's assertion that the reasoning of these cases applies here because the Supreme Court admonished against overbroad interpretations of R-P in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953). Nothing in *Automatic Canteen* permits us to read Robinson-Patman more narrowly than required by the four corners of the Act. 837 F.2d at 1158-59 (J. Mikva, dissenting). Boise's argument is similar to Morton Salt's assertion that the facts in that case were "equally reconcilable with an inference in favor of innocence of wrongdoing and the commission of the offense"; thus, the inference of innocence should prevail. 162 F.2d 949, 956 (7th Cir. 1947). The argument is no more persuasive to us on the facts of the case than it was to the Supreme Court on the facts of *Morton Salt*.

Commission. *See Corn Prods. Co. v. FTC,* 324 U.S. 726, 739 (1945); *FTC v. Algoma Lumber Co.,* 291 U.S. 67, 73 (1934).[43]

We have reviewed the record in light of the court's holding, and have carefully weighed the probative value of the evidence noted by the court against the *Morton Salt* inference. Pursuant to the framework set forth in the previous sections, Boise may overcome the inference of injury and prevail on remand by demonstrating that there is no reasonable possibility that the discounts enabled Boise to lower its resale prices, provide enhanced services to attract customers, or increase its profits. As explained below, Boise's evidence is of insufficient probative value to overcome the inference of competitive injury based on the size and duration of the price differentials.

A. *Evidence of Dealer Health*

The court criticized the Commission for ignoring evidence that the "selected dealers were not wallowing in a hopeless or deteriorating environment." 837 F.2d at 1144. Specifically, the court directed the Commission to consider the following evidence: (1) the selected dealers' sales and gross profits increased by 22% during the period in question despite a recessionary economy, *id.* at 1135; and (2) evidence that "switches [of customers] to Boise apparently cannot be explained as sales diverted through **[26]** operation of the wholesaler discount." 837 F.2d at 1145.[44] The court stated that the Commission "mischaracterizes Boise's evidence as going to market structure, rather than to

[43] Throughout its briefs, respondent argues that the Court of Appeals made factual findings which are now binding on the Commission. *See, e.g.,* BOR at 21-22; RBR at 6. Boise even asserts that the Court of Appeals found "an absence of competitive injury", an issue inextricably entwined with the remand itself. At oral argument, however, respondent virtually conceded that the Court of Appeals did not set aside any of the Commission's factual findings for want of substantial evidence. Tr. at 8. Thus, we review the evidence in the context of the opinion of the court.

[44] The court also pointed to evidence that credit ratings of the selected dealers were favorable "on the whole" and that those companies that did experience a change in their credit rating from 1977 to 1980 found that it "generally improved." 837 F.2d at 1135. The court did not, however, direct the Commission to review this evidence of changing credit ratings on remand.

The evidence supporting the contention that the dealers generally experienced improving credit ratings is very weak. Finding 432 quotes from the testimony of Boise's expert, Dr. Elzinga on this issue:

> But overall, the assessment of a number of the companies had not changed. Two or three, I think, had gotten worse, eight or nine [out of 23 total], I believe is the number you will find . . . that the credit ranking . . . was assessed by D & B to be up.

IDF 432. Significantly, Dr. Elzinga saw credit reports for just over half of the selected dealers. He asked to see credit reports "for each" of the selected dealers, IDF 432, but reviewed such reports for only thirteen dealers in August, 1981 and fourteen of the 23 selected dealers in January, 1983. Elzinga tr. 6267-68. Moreover, Dr. Elzinga testified that he did not think that the credit reports were broken down in a manner that would assist in evaluating the performance of various segments (printing, retail, etc.) of the dealers' businesses. *Id.* Thus, his testimony cannot support a finding connecting the status of the dealers' credit to the health of their competition with Boise.

the twenty-three selected dealers themselves, when Boise, in fairness, adduced evidence as to both." *Id.* at 1145, n.15. On the other hand, the court noted that evidence that the median net profit of the dealers may have been lower than that of dealer-members of the National Office Products Association ("NOPA") as well as Boise's combined wholesaler/dealer profit also deserve attention. *Id.* at 1144. Each of these categories of evidence are discussed below.

1. Growth Evidence

Following the court's lead, Boise argues that evidence of the selected dealers' increasing sales and gross profits—that which we will collectively refer to as "growth" evidence—demonstrates the general health of the selected dealers and overcomes the inference of injury. Although the court stated **[27]** this evidence "tends, if anything, to point to an absence of 'lost profits' of the sort described in *Falls City* as one possible manifestation of injury to competition," the court expressly did "not decide the matter." 837 F.2d at 1144 (emphasis added). Indeed, the court noted only that the growth evidence "merited consideration by the Commission rather than the out-of-hand dismissal that it received." *Id.*

Falls City is distinguishable. There the Court was concerned with evidence of lost profits from sales of one specific product—Falls City beer. 460 U.S. at 433 n.4, 436 n.7. Boise offered no evidence of the sales and profitability of the selected dealers on the products bought from the six selected manufacturers at discriminatory prices, but instead only evidence of the dealers' overall sales and profitability on all products, regardless of their source. Since the selected dealers resell between 3,500 (IDF 504) and 18,000 (IDF 510) products made by hundreds of manufacturers, their overall sales and gross profits are of limited value in assessing whether the dealers suffered competitive injury in connection with their purchase and resale of the specific products of the six manufacturers in question. Moreover, these aggregate sales and gross profit figures include data on sales of merchandise other than "office products" as the market has been defined in these proceedings.[45]

Morton Salt and its progeny make clear that the Robinson-Patman

[45] In maintaining that only gross (rather than net) profit figures are relevant to the issue of competitive injury, Boise argues that the net profit figures for the dealers are unreliable because they are based on data that includes sales and profits on products that are not defined as "office products" in this proceeding. BOR at 36 n.10. Boise cannot have it both ways; if net profit figures are unreliable because they include products not at issue, then the "increased" gross profit figures Boise cites should be disregarded too.

Act must be applied to "each individual article" sold to competing purchasers at discriminatory prices. 334 U.S. at 49. It is of no import whether such goods constitute a major or minor portion of the dealer's stock. *Id.*; *accord Gold Strike Stamp Co. v. Christenson*, 436 F.2d 791, 797 (10th Cir. 1970). This reasoning applies here to dealers that sell thousands of office products to end-users just as it did in *Morton Salt* to grocery stores that sold thousands of products to consumers. The present case is much more like *Morton Salt* than *Falls City.* Boise attempts to distinguish *Morton Salt* on the ground that respondent in that case introduced no evidence of the absence of competitive injury. RBR at 23 n.5. In fact, however, evidence was introduced in *Morton Salt* that showed "substantial increases in sales to all non-discount customers in all trade areas for the entire period **[28]** covered by the Commission's evidence," which the Court of Appeals credited as rebutting the inference of injury. 162 F.2d at 957. Contrary to respondent's suggestion, *Morton Salt* imposes no obligation upon complaint counsel to present evidence of the selected dealers' sales or profits solely on that portion of their business corresponding to the product market in this case. RBR at 22-23. Since Boise failed to demonstrate any connection between the selected dealers' overall growth and their performance in the relevant product market, the evidence of overall sales and gross profit growth is not persuasive.[46]

Respondent states that it is "the dealers' overall competitive health and financial viability that is important to a determination of whether competition has been injured." RBR at 23. The crux of this argument is that evidence of increasing sales by disfavored purchasers precludes a finding of competitive injury. BOR at 64-65; RBR at 21-22. Boise fails to appreciate, however, that the probative value of such evidence will vary depending on whether a given case involves alleged primary or secondary line injury. Evidence that competitors of a discriminating seller experienced increased sales has been deemed significant in some primary line cases, *see Borden Co. v. FTC, 381 F.2d 175, 179 (5th Cir. 1967); Minneapolis-Honeywell Regulator Co. v. FTC,* 191 F.2d 786, 790 (7th Cir. 1951), *cert. dismissed,* 344 U.S. 206 (1952), but evidence of new entry and sales volume growth by competitors of a favored buyer have been ignored by courts in assessing secondary line

[46] For example, although total sales by one of the dealers, A. Pomerantz & Co., more than doubled from \$14.6 million in 1977 to \$36.3 million in 1980, the bulk of that increase was accounted for by a three-fold rise in sales by its furniture department from \$8.3 to \$26.4 million. Bertholdt tr. at 5891-92. Thus, during this period furniture sales as a proportion of total sales for Pomerantz increased from nearly 57% to 73%.

injury. *Cf. FTC v. Morton Salt Co.*, 334 U.S. 37, *rev'g* 162 F.2d at 957 (injury found despite evidence of increased sales to non-discount customers); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 7 Trade Reg. Rep. (CCH) (1990-2 Trade Cas.) ¶69,124 at 64,168 (noting district court's rejection of defendant's argument that overall competitive health of plaintiff and its market precluded finding of secondary line competitive injury).[47] **[29]**

Further eroding respondent's claim that evidence of increasing sales and profits precludes a finding of secondary line injury are the cases in which such injury was found despite testimony from disfavored dealers that they were not injured by the price discrimination. *See supra* at pp. 10-11. These cases are consistent with Judge Parker's earlier finding that the dealers would have earned even greater profits and experienced more growth had they enjoyed the same pricing that the six manufacturers afforded to Boise. 107 FTC at 184. Boise asserts that a finding of competitive injury on this basis would be mere "speculation." RBR at 24. Relying upon the court's statement that the growth evidence may point to "an absence of 'lost profits' of the sort described in *Falls City* as one possible manifestation of injury to competition," 837 F.2d 1144, RBR at 21, Boise asserts that the "sole purpose" of the Act is to prevent competitive injury. RBR at 24. Respondent argues that the dealers are "competitively healthy"; therefore, "the prospect that they might achieve even greater success" if accorded the favorable discounts "proves nothing." RBR at 24.

We reject Boise's suggestion that dealers suffer no competitive injury within the meaning of *Falls City* unless their total profits are decreasing. In essence, respondent suggests the existence of some absolute standard of dealer health, above which there can be no finding of secondary line injury. Such an approach betrays the goals of the Act itself. Boise would have us ignore a fundamental principle of

[47] The cases Boise cites for the proposition that evidence of an increase in plaintiff's sales volume is inconsistent with a finding of competitive injury are inapposite. In *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 597-98 (8th Cir. 1987), the court stressed that only primary line injury was in issue. *Id.* at 596. Equally misguided is respondent's reliance upon *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986). In *Richard Short*, the Eighth Circuit held plaintiff failed to establish a prima facie case of injury—that is, plaintiff failed to present evidence of the amount, percentage and duration of the discrimination or the amount of competition the disfavored purchaser faced in the market. *Id.* at 420-21. In the alternative, the court found that even if plaintiff "had been able to establish competitive injury," such injury was caused by defendant's own mismanagement, thereby breaking the causal connection. *Id.* at 421. For the same reasons, Boise can take no solace from *Chrysler Credit Corp. v. J. Truett Payne, Co.*, 670 F.2d 575 (5th Cir 1982). The Fifth Circuit stated "*Morton Salt* . . . and its progeny is not relevant to the facts of this case," and went on to determine that plaintiff failed to demonstrate any of the elements necessary to invoke the *Morton Salt* rule. *Id.* at 581.

business—that money not gained is money lost. A finding that the dealers would have been more successful had they received the greater discounts is not "speculation," but is consistent with the evidence in *Morton Salt* itself. There complaint counsel demonstrated competitive injury in part by asking customer witnesses hypothetical questions about whether each customer's business would be "affected" if it either paid or charged a higher price for goods than its competitor. 162 F.2d at 956. Thus, we find Boise's growth evidence is of **[30]** insufficient probative value to overcome the *Morton Salt* inference of injury.[48] **[31]**

[48] Complaint counsel further maintains that the growth evidence should be given little weight because it is "misleading and unreliable." Specifically, complaint counsel argues the following: (1) the growth figures overstate real growth because they fail to adjust for inflation; (2) the figures were not offered in conjunction with any industry average growth figures so that it cannot be determined whether or not the selected dealers kept up with the average dealer growth nationwide; (3) there is at least one "obvious inconsistency" in underlying data for one of the selected dealers from which the average growth figures are calculated, allegedly casting doubt upon the reliability of the figures as a whole; (4) the statistics, which include data for only 1977-1980, focus on an improperly narrow time frame since significant competitive injury allegedly occurred shortly after Boise's entry into given markets well before the chosen time period; and (5) gross profits are an inferior measure of dealer success. BOC at 27-30.

We need not reach these issues on remand since we find that the rebuttal evidence, if reliable, would be insufficient to overcome the inference of injury for the reasons stated in the text. In the interest of judicial economy, however, we note there is more merit in some of complaint counsel's arguments than in others.

First, while there is testimony in the record that the gross profit figures did not adjust for inflation, there is insufficient evidence to support a finding as to what the relevant measure of inflation should be in this case. Therefore, we do not reject the growth evidence on this basis.

Second, we agree that the record is devoid of evidence of probative industry-wide growth standards with which the selected dealers may be compared. Boise argues on remand, apparently for the first time, that the NOPA dealer survey demonstrates that the average reporting-members growth rate was 15%, less than the 22% average of the selected dealers. Boise explained on remand that the 15% figure is derived by multiplying average sales per employee of the reporting NOPA dealers by the average number of employees of those dealers, and then calculating average growth from 1978 through 1980. Tr. at 62. Initially, we note that Boise's estimated NOPA growth rate is the average of the growth rates so calculated for only two years, 1978-1979 and 1979-1980, whereas the selected dealers' actual average growth rates also included data for the 1977-78 period. Moreover, we find no evidence in the record supporting the reliability of conducting such a calculation for the purpose of deriving meaningful average NOPA-member dealer growth rates. In addition, the NOPA growth rates, like those for the selected dealers, fail to distinguish between sales of office products as defined in this proceeding and sales from other aspects of the dealers' businesses.

Third, complaint counsel made the same argument to Judge Parker about inconsistencies in the calculations of the selected dealers' gross sales and profits (CRRPFF at 67), who nevertheless found their average growth to be 22% per year. Complaint counsel has offered no reason why we should modify our previous adoption of that finding.

Fourth, we need not decide whether the "baseline" year for examining the effects of the price discriminations is, as complaint counsel argues, the year in which Boise first entered each market (BOC at 28), or the first year in which the discounts were introduced in each market. *Cf.* RBR at 26-27. In this case, the six manufacturers had granted the wholesaler discounts to Boise or its predecessors in most markets before the first year for which growth evidence was introduced. *See infra* note 63. Thus, even if growth evidence did have some probative value in secondary line cases, this value would be diminished where the evidence presented failed to include economically significant periods of time both before and after injury was likely to have begun as a result of the discriminatory discounts.

Fifth, our previous finding that net profits are "the true measure of dealer success," 107 FTC at 182 n.15, does not cast doubt on the accuracy of the gross profit data which we are specifically directed by the Court of

(footnote cont'd)

2. Displaced Sales

a. *Relation to the Morton Salt Inference*

The court focussed on other evidence "relevant to resolution of this controversy and unusual in the context of a R-P proceeding—a virtually complete absence of sales lost to Boise by the selected dealers traceable to the price differential caused by the wholesale discounts to Boise." 837 F.2d at 1135. The court stated "the evidence, as found by the ALJ, failed to demonstrate 'displaced sales,' another form the *Falls City* Court indicated injury could take." 837 F.2d at 1145. In support of this statement, the court pointed to four factors: (1) evidence that it was "not uncommon" for accounts to switch; (2) while dealers lost accounts to Boise, Boise also lost accounts to the dealers and was unable to meet competitors' prices in some instances; (3) the fact that the number of accounts that switched to Boise was "quite small" and the proportion to dealers' total **[32]** accounts was "strikingly low;" and (4) what the court termed "the key point:"

> None of the selected dealers who lost accounts in whole or in part to Boise were able to conclude that losses were due to the different prices charged them and Boise by the six manufacturers (citations omitted).

Id. at 1146. It concluded *"the switches to Boise apparently cannot be explained by operation of the wholesale discount." Id.* at 1145 (italics in original; emphasis added).

Preliminarily, we reconcile the court's statement that the evidence failed to demonstrate "displaced sales," with its more cautious observation that accounts "apparently" did not switch to Boise because of the wholesale discount. In light of the evidence that dealers lost accounts to Boise because of the latter's lower prices, better services, or both (IDF 384), and the fact that the court declined to specify how the Commission should weigh or evaluate the evidence on remand (837 F.2d at 1145 n.15), we read the opinion to mean that the evidence, as found by the ALJ, did not establish "direct evidence of displaced sales," the *Falls City* formula for conclusively invoking *Morton Salt.* (Emphasis added.)

Assuming, however, that the evidence does not establish "displaced sales,"—by direct evidence or otherwise—this showing, alone or in conjunction with other record evidence, would fail to overcome the

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Appeals to examine. Nevertheless, the evidence of increasing gross profits fails to demonstrate an absence of actual injury for the reasons set forth in the text.

inference of injury. The Administrative Law Judge correctly held that "diversion of trade to the favored customer need not be proved." 107 FTC at 181; *see Bargain Car Wash, Inc. v. Standard Oil Co.,* 466 F.2d at 1174 (proof of loss of specific sales not required). In describing displaced sales as "another" form in which competitive injury may be manifested, the Court of Appeals implicitly recognized that injury may be found in the absence of such evidence. Injury may also take the form of the favored purchaser's use of its price advantage to increase its profits or enhance its services. *See supra* at pp. 10, 19-20.[49] **[33]**

More importantly, the Court of Appeals confirmed that proof of actual harm to competition in *any* form is not required. *Boise Cascade Corp. v. FTC,* 837 F.2d at 1139 n.14. Under the court's decision, evidence of the absence of displaced sales is relevant to whether the inference of competitive injury has been overcome to the extent such evidence either (a) demonstrates an absence of actual injury from which an inference of the absence of competitive injury within the meaning of R-P can be drawn, or (b) breaks the causal connection between any injury and the price differential. The inference would be overcome by probative evidence that would preclude the fact-finder from concluding that Boise's price advantage enabled it to lower its resale prices, offer improved services, or reap greater profits. As we explain below, no such rebuttal has been made.

b. *The Evidence Pertaining To Displaced Sales Fails To Overcome The Morton Salt Inference.*

The Court of Appeals directs us to consider four types of evidence pertaining to displaced sales. First, the court observes that account shifting was "not uncommon" but rather was the "order of the day." 837 F.2d at 1145. Frequent account shifting between competitors may suggest that competition for the business of those accounts "is healthy," but, like the growth evidence, does not preclude a finding of secondary line injury.

Boise makes the related argument that while account shifting may be common industry-wide, the relatively small amount of account switching in this case suggests an absence of injury. Boise points to the court's observation that "[t]his stability of dealer accounts is of

[49] The introduction of new services by the favored purchaser would be expected to cause service-sensitive customers to switch their business to the favored purchaser. At some point, however, the market would substantially adjust to these new conditions, and most customers sensitive to the better services offered by the favored dealers would have already switched to them. Moreover, extensive switching may not be manifested where the favored purchaser uses some or all of its price advantage to widen its net profit margins, a result that may later redound to that competitor's advantage. *See supra* note 32.

especial note in an industry where switching of accounts is common." 837 F.2d at 1135; RBR at 33. Such a phenomenon may be explained, however, by dealers electing not to compete aggressively with Boise for some customers because of the substantial cost advantage enjoyed by Boise as a result of its favorable discounts (IDF 76), or by the market previously adjusting to the effects of the price discrimination. *See supra* note 49.

Second, the court directs us to consider that this "phenomenon of lost accounts" was "a two way street," noting Boise lost accounts to the selected dealers and at times Boise was unable to meet the selected dealers' prices. *Id.* at 1136. The court characterized the "considerable evidence" that Boise lost sales to the selected dealers as "[f]urther diluting the Commission's attempted showing of diverted sales." *Id.* at 1136.[50] **[34]**

While the loss of some accounts from Boise to the selected dealers may "dilute" complaint counsel's showing of "diverted" sales, it does not defeat a finding of liability. Such a showing may limit respondent's exposure to damages in a private action under Section 4 of the Clayton Act, but would not absolve Boise from liability under §2(a). *See Falls City Indus., Inc. v. Vanco Beverage, Inc.,* 460 U.S. at 437 (respondent liable to the extent plaintiff's injury was attributable to price difference, even if other factors accounted for most of the plaintiff's lost sales); *Rose Confections, Inc. v. Ambrosia Chocolate Co.,* 816 F.2d 381, 387 (3d Cir. 1987). Similarly, a finding that disfavored dealers were injured within the meaning of Robinson-Patman is not overcome by evidence that they obtained some accounts from the favored purchaser.

A myriad of factors may explain Boise's loss of accounts to the selected dealers or the ability of dealers to underprice Boise in certain instances. The evidence shows that Boise established above average return on investment standards for itself (CX 44E; RPFF 389) and targeted customers interested in Boise's high service-oriented marketing approach. *See, e.g.,* tr. at 5186, 5221-22; CX 85J; RPFF 339.[51] In addition, Boise may have incurred greater costs (other than cost of goods sold) and thereby operated less efficiently than the selected

[50] The court did not distinguish between "diverted" and "displaced" sales in its opinion.

[51] The point is illustrated by Boise's use of price lists ("net pricers") which include four different price levels—known as column 5 through column 8 pricing—which Boise quoted to accounts for given products. Willingham Dep. CX 974, pp. 144-45; Barnett tr. 5789-90. The price level Boise quoted to accounts varied based on a number of factors, including the prices offered by competing dealers (Kupp. tr. 5197), the mutual interest of Boise and the account in doing business together (RX 239B), or the amount of services Boise offered to the account. Kupp. tr. 5186, 5221-22; Bode tr. 5247.

dealers. *See* RPFF 383-84 (dealers' lower inventory costs); RPFF 388 (dealers' greater purchasing flexibility); RPFF 389 and Wolnhofer Dep. CX 672, pp. 38-39 (dealers' lower overhead, wage and fringe-benefit expenses than Boise). Indeed, the Administrative Law Judge found, "[t]he extent of [the dealers'] success in the face of these price discriminations is a testimony to their business acumen and establishes that they are as efficient, and perhaps more efficient, than Boise." 107 FTC at 184.

While respondent minimizes the 162 specific accounts the dealers lost to Boise (*id.* at 1135), the figure takes on greater significance when compared to the no more than 60 accounts that the Administrative Law Judge specifically identified as either having been lost by Boise to other dealers or having received lower price quotes from dealers in competition with Boise. **[35]** IDF 409-421.[52] Ironically, just as complaint counsel argues that the 162 specific accounts were merely examples of those that the selected dealers lost to Boise,[53] respondent emphasizes the existence of other accounts Boise lost which were not identified in Judge Parker's opinion. IDF 422. Were we to treat the accounts specifically identified as only examples of the total number of accounts Boise and the selected dealers actually lost to one another, there would be no reason to conclude that Boise's share of the actual lost accounts would be larger. Indeed, it was probably easier for Boise to readily identify accounts it had lost than for complaint counsel to track down accounts lost by more than 20 different dealers.[54] Thus, the specific accounts **[36]** identified in the

[52] Interestingly, each party challenges the reliability of those portions of Judge Parker's findings about lost accounts which are not favorable to its respective position. For example, complaint counsel argues that the Administrative Law Judge mistakenly found Boise "lost" certain accounts which it did not in fact service in the first instance or which it later regained. BOC at 47-51; *but see* RBR at 43-44. Similarly, Boise argues that "many of the 162 so-called 'lost accounts' were never the dealers' accounts, were never lost by the dealers, were not lost to Boise Cascade or were regained by the dealers." BOR at 18; *but see* BOC at 54 n.27. The Administrative Law Judge made specific findings concerning the lost accounts evidence which we have previously adopted.

[53] Although the court cited the Commission's brief to the Court of Appeals as the source of the 162 lost accounts figure, 837 F.2d at 1135, the Commission's brief actually referred to that number as "Boise's own highly conservative tabulation." *See* BRC at 32; RPFF 310. Both the dealers (*see, e.g.,* Kelly tr. 4000; Wilhelmi tr. 3557; Cashman tr. 2607; Lake tr. 3035; B. Jones tr. 3426) and Boise's own salespeople (*see, e.g.,* Bode tr. 5263-65, 5267; Kupp tr. 5223, 5230-310) testified that other accounts switched from the selected dealers to Boise. The evidence is insufficient, however, for us to determine just how many accounts switched from dealers to Boise, either in absolute terms or as a percentage of the total number of accounts that switched in both directions.

[54] Complaint counsel's comparative difficulty in marshalling lost accounts evidence is illustrated by its effort to introduce testimony at trial about accounts the dealers lost that were not identified in response to Boise's interrogatories. Jones tr. 3426; *see also* Mack tr. 3667. In one instance, Boise objected to a dealer-witness's testimony about an account that was not brought to complaint counsel's attention until the night before the witness testified. Jones tr. 3428. No ruling on the objection was made, but complaint counsel elected not to pursue the line of questioning.

record may well overstate the number of accounts that Boise lost to the dealers relative to those that it gained.

The third factor the court cited was the "quite small" number and "strikingly low" proportion of accounts that switched to Boise. Specifically, Boise estimates that the 162 accounts identified as having been lost by the selected dealers to Boise account for less than .4% of the dealers' 42,000 accounts. BOR at 18; RBR at 33. Respondent claims this "dearth of evidence regarding lost accounts led the ALJ to conclude that complaint counsel's attempt to establish displaced sales was a very fruitless endeavor." Tr. 4554; RBR at 33.[55]

As previously noted, evidence in the record supports complaint counsel's assertion that the 162 specific accounts are merely examples of the accounts lost by the selected dealers to Boise. In any event, Boise does not explain how the fact that only a small number of accounts switched shows the absence of actual injury or breaks the causal connection between the price discrimination and the alleged injury.[56] Since complaint counsel **[37]** has no obligation to establish displaced sales it is Boise that must produce probative evidence to overcome the *Morton Salt* inference. In essence, the court's reference to the small number of accounts that switched is a restatement of its initial observation that account switching was relatively infrequent, and fails to overcome the inference of injury for the reasons previously set forth. *See supra* at p. 33.[57] **[38]**

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[55] The context of the statement suggests a very different meaning than that which Boise ascribes to it. Judge Parker was urging counsel for both parties to enter into a stipulation that Boise took some customers from the selected dealers and vice versa. Boise, asserting that the government had not yet proved competitive injury, took the suggestion under advisement. Tr. 4554-55. The import of this exchange was that it was fruitless for both parties to fill the record with examples of account switching—nothing more.

[56] Complaint counsel argues that the 162 accounts specifically identified as lost by the dealers to Boise included some of those dealers' largest accounts. BOC at 54, 57; IDF 391, 392, 394, 398, 400. Respondent notes that complaint counsel identified only five such "large" accounts, and questions whether the loss of two of those accounts was causally related to the challenged discounts. RBR at 34-35 & n.12.

We are satisfied that the evidence supports Judge Parker's previous findings that at least some of the accounts specifically identified as lost by the dealers were among their largest. The message of *Morton Salt* is that Robinson Patman guards disfavored purchasers against price discrimination affecting even a minor portion of their stock. This is of particular importance in this industry where it is not uncommon for a dealer to derive a disproportionately large share of its revenue from a small number of accounts. *See, e.g.*, Cushman tr. 2601; Applebaum tr. 1334-1335; Crompton tr. 723; Elzinga tr. 6258.

[57] Respondent points to two additional aspects of the displaced sales evidence which it asserts demonstrates the absence of competitive injury. First, it relies upon the testimony of its expert, Professor Elzinga, that "you simply cannot look at that evidence and conclude that injury to competition has occurred or is occurring here." BOR at 41; RBR 38; 837 F.2d at 1136; IDF 433. Professor Elzinga, however, did not address whether the evidence demonstrated the existence of secondary line injury rather than "injury to competition" as that term is used in other antitrust contexts.

Second, Boise argues that there is no evidence that injury has occurred in any other form in which it may be manifested; therefore, the dearth of displaced sales overcomes the inference of injury. It asserts that the government offers speculation, not evidence, that profits of disfavored dealers were impaired by the discounts and that such speculation is unfounded given that the selected dealer's gross sales and profits grew at the

(footnote cont'd)

The final point emphasized by the court was that none of the selected dealers testified that they lost accounts to Boise because they paid higher prices than Boise paid on the products of the six manufacturers. The court concluded, "[i]n short, *the switches to Boise apparently cannot be explained as sales diverted through operation of the wholesale discount.*" *Id.* at 1146.

The selected dealers' inability to provide such testimony is not significant. As a practical matter, dealers would be unable to testify credibly on the subject without extensive access to Boise's cost and markup data broken down by manufacturers and customers. To place this type of evidence in the record, the dealers would have to respond to questions concerning the price Boise itself pays for products purchased from specific manufacturers. The dealers would also have to understand Boise's operations so thoroughly as to testify that no explanation other than the difference in cost of goods sold accounts for the differences in prices charged by Boise and the selected dealers on those products. Dealers are unlikely to have such intimate knowledge of their competitors' costs. Indeed, the dealers' **[39]** acquisition of such knowledge may raise serious questions about their compliance with the antitrust laws.

Respondent argues that accounts switch among dealers for a variety of reasons unrelated to the price differences. Boise initially

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same rate. RBR at 36. It further states there is no evidence to support complaint counsel's assertion that dealers may have been injured because Boise was able to enlarge its profits or enhance its services. Boise argues that the latter point is only relevant if Boise's enhanced services "led to sales diversion, a fact which the Court explicitly found not to exist." RBR at 37. Finally, respondent asserts enhancement of its profits or services "are not elements of competitive injury under the Act." RBR at 37.

Boise misstates the law and stretches the facts. Secondary line injury may be established where a price difference creates a reasonable possibility that the favored purchaser will enhance its profits or services relative to its disfavored competitor. Evidence of sales and gross profits increasing at the same rate does not preclude a finding of impaired profits as a form of competitive injury, *see infra* at pp. 42-43, particularly where the evidence relates to a period long after the discount structure was put into place.

Contrary to Boise's assertions, there is substantial evidence that Boise earned greater net profits than not only the selected dealers, but than the average for dealers as reported in the NOPA and Robert Morris Associates dealer studies. *See infra* note 59. Respondent's statement that there is "no evidence suggesting that dealers did not or could not offer the same consumer services" that Boise offered is equally specious. In support of this proposition, Boise cites testimony of the purchasing director of the Delaware Trust Company, which actually supports complaint counsel's position. Hitchens tr. at 5829-32. Mr. Hitchens explained that Boise Cascade attempted to interest him in Boise's "stock control program." Thereafter, Hitchens solicited expressions of interest in supplying the stock control program from the three suppliers Delaware Trust had used for years, H&H Stationery, George D. Hanby Company ("GDH") and Hugh A. George Company ("HAG"). GDH and HAG were two of the selected dealers in this proceeding. Hitchens tr. at 5830. H&H and Hugh A. George indicated that "they would not be interested in getting involved in that type of program or being able to offer that kind of a service to their customers." *Id.* A GDH representative stated his company could provide such a service but that it would "take a little time" to put it together. *Id.* at 5831. After a while, Mr. Hitchens decided that he did not want to be a guinea pig for Hanby and decided to go with Boise Cascade. *Id.* at 5832. The example in no way undermines the Administrative Law Judge's finding that Boise used its price advantage to offer better services than its competitors offered. 107 FTC at 182.

emphasized that "[t]he most prominent reason" for accounts switching among vendors was the change in employment of sales representatives that serviced said accounts (BOR at 41), but later conceded that it "has never claimed that the change in employment of sales representatives explains all or most of the 162 so-called lost accounts." RBR at 43. In its reply brief, Boise summarized its view as follows:

> The evidence demonstrates that the change in employment of sales representatives is just one of many reasons, unrelated to the functional discount, that explain the shifting of accounts. If account shifting was the result of an anticompetitive pricing practice, it would move only in one direction, from the dealers to Boise. The Court and the ALJ explicitly found that this was not the case. Indeed, the Court held that "the phenomenon of lost accounts was very much a two-way street." 837 F.2d at 1145 (citation to Appendix omitted).

RBR at 43.[58]

Boise erroneously assumes that if accounts shifted as the result of an anticompetitive pricing practice, they would move in only one direction, from the dealers to Boise. In fact, dealers may have lost some accounts to Boise because of the cost advantage resulting from the favorable discounts while others may have been lost for other reasons. On the other hand, there was no evidence that accounts that shifted from Boise to the dealers were aided by any "anticompetitive pricing practice" favorable to the dealers. In short, while account shifts resulting from the discriminatory pricing would have moved in only one direction, other accounts may have shifted in both directions for reasons wholly unrelated to the challenged pricing practices. Boise's argument is not persuasive. **[40]**

3. Comparative Net Profit Data

The court pointed to evidence that the selected dealers' median net profit before taxes as a percent of sales (2.3%-3.5% for 1976 to 1981) may have been lower than that of dealer-members of NOPA (3.0%-3.9% for 1967 to 1980), and lower still than Boise's combined wholesaler/dealer net profit (3.1%-5.6% from 1976 to 1979). 837 F.2d at 1144. Acknowledging "comparative problems," the court counseled

[58] Dr. Elzinga admitted that accounts do not always switch because of salesmen changing positions, and that "price and service has (sic) something to do with it." IDF 434. Even if changes in the employment of salesmen were the principal reason for account shifting among dealers, there is evidence that Boise may have attracted salesmen from competing dealers by offering them higher wages and better benefits. Welnhofer Dep. CX 672 p. 38.

that "this apparent discrepancy in profitability obviously deserved consideration." 837 F.2d at 1144 (emphasis in original). The Administrative Law Judge expressly referred to this net profit data in concluding, "[c]onsidering these [and other] facts, the only possible inference is that the effect of the substantial and sustained price discriminations favoring Boise may be to destroy or prevent competition with the favored dealers." 107 FTC at 182, 201; *see also* IDF 423-30.[59] Although the Commission previously **[41]** adopted this

[59] Rather than focus on whether the net profit evidence overcomes the inference of injury, the parties vigorously dispute whether the evidence cited by the Court of Appeals is reliable or the best indication of dealer success. Boise maintains that the dealers' gross profits, rather than net profits, are the relevant inquiry, and faults complaint counsel for making assertions that Boise claims were previously rejected by each body that has reviewed the evidence. RBR at 27. In fact, it is Boise that makes the same arguments previously rejected by the Administrative Law Judge and the Commission. Boise again asserts that net profit data for closely held dealers is unreliable because the dealers have tax incentives for artificially lowering their bottom line. BOR at 36 n.10; RBR at 29-30. This is the very argument that was dismissed by Judge Parker who found, "net profits are the true measure of dealer success . . . and I reject Boise's claim that only gross profits of privately-held companies should be considered." 107 FTC at 182. Most importantly, the Court of Appeals directs us to consider net, not gross, profit figures for comparative purposes.

Boise further asserts that no reliable inferences regarding the effect of the challenged discounts can be drawn from a comparison of the net profit data for the NOPA dealers and the selected dealers. RBR at 30. Boise asserts the NOPA figures are unreliable because (1) they were derived from summaries prepared by NOPA staff from data submitted in a voluntary survey; (2) many surveys submitted were incomplete but nonetheless included in the study; (3) Boise's expert concluded the survey was not valid or reliable; and (4) a study entitled Dealer Operating Results published in an industry publication, *Office Products Dealer*, reported dealer net profits at 14.3%. BOR at 36 n.10. Respondent further questions the probative value of the profitability figures cited by the court concerning Boise itself because they reflect Boise's sales to both end-users and to dealers, as well as sales of merchandise that were excluded from this proceeding. *Id.* Interestingly, while Boise challenges the NOPA survey results on the one hand, it relies upon them on the other to argue that the leading NOPA dealers had median net profits that were comparable to or greater than Boise's from 1978 to 1980 (RBR at 31), and that the average NOPA growth rate was below that of the selected dealers. *See infra* note 62 and accompanying text.

We are unpersuaded that we have erred in adopting Judge Parker's findings. First, the reliability of the NOPA net profit figures is supported by evidence that such data is used by dealers in approaching banks for loans (Tr. 1813) and that the Dealer Operating Results reflect "a pretty good overall sample of the industry" and not just the dealers who report. IDF 424. Significantly, whatever deficiencies may exist in the NOPA survey do not appear to have undermined the reliability of its net profit results, which are substantially corroborated by the results of a Robert Morris Associates Annual Study. Compare IDF 428, 429 with IDF 425. The consistency between the Robert Morris and NOPA surveys for the years they have in common are illustrated by the following chart (which also shows that Boise's profits were generally higher, and the selected dealers' generally lower, than the Morris and NOPA results):

NET PROFITS BEFORE TAXES

	1976	1977	1978	1979	1980	1981
Boise's Net Profit (IDF87 CX 51Z12)	3.1%	4.5%	4.8%	5.6%	6.1%	—
NOPA's Dealer Operating Results (CX 355 p.3)	3.9%	3.7%	3.7%	3.8%	3.5%	—

(footnote cont'd)

conclusion from Judge Parker's initial decision, we take this opportunity to address Boise's specific concerns on remand.

The net profit evidence does not demonstrate the absence of any actual or reasonable possibility of competitive injury. It does not preclude a finding that Boise enjoyed any of the benefits of favorable pricing from which courts have inferred competitive injury. *See supra* at pp. 10-11, 19-20. If anything, this evidence tends to demonstrate that Boise benefited from the discriminatory discounts at the expense of the dealers.

Unable to contend that the net profit data alone weighs against a finding of injury,[60] respondent argues that the data, examined in the context of the selected dealers' increasing sales and gross profits, breaks the causal connection between any substandard performance in the selected dealers' net profits and **[43]** the challenged discounts. First, Boise states that evidence that 18 of 23 selected dealers experienced increasing sales and profits at the same rate from 1977 through 1980 (IDF 431) demonstrates "the dealers clearly did not achieve their sales growth at the expense of profits." RBR at 28. The argument is without merit. That gross sales and profits increased in parallel implies nothing about the effects of the discriminatory prices

Robert Morris Associates Annual Statement Studies (CX 2300; Rowe tr. 7113)	—	3.9%	3.7%	3.7%	3.2%	3.4%
Selected Dealer's Financial Statements or Tax Returns (CX 2301) *See* BOC 32, 39.	3.5%	2.8%	3.2%	2.4%	2.5%	2.3%

Second, by citing the testimony of complaint counsel's expert who found NOPA's Dealer Operating Results to be reliable (IDF 426, 427), Judge Parker apparently rejected the opinion of Boise's expert. Third, the testimony of Ronald Rowe, complaint counsel's accounting expert, raised serious questions about the methodology of the *Office Products Dealer* study, including the fact that it reported *average*, not median, dealer net profits. Obviously, Judge Parker found the *OPD* survey results less reliable than NOPA's when he found net profits "in the industry are low (from 3-4%)." 107 FTC at 182 citing IDF 423-430. To the extent the court's net profit figures include sales by Boise to dealers, they may understate Boise's profits on sales to end-users, the sales for which Boise competes with the selected dealers. *See, e.g.,* Bertholdt tr. 6029-30; CX-1380, 1381 [In Camera: 1979 pre-tax net profit on sales to dealers was 0.8%; pre-tax net profit on sales to commercial accounts that same year was 6.1%].

We recognize that the net profit data suffers from the same defect as Boise's gross profits and sales figures—overinclusion. Thus, while this evidence alone might not support a finding of competitive injury in the relevant product market, it also cannot overcome the *Morton Salt* inference of injury.

[60] Boise does not contend that a comparison of the net profit data supports its case. It maintains simply that "no reliable inference regarding the competitive effect of the functional discount can be drawn from a comparison of the NOPA net profit data and the net profits of the selected dealers" (RBR at 30), and that a "comparison of Boise Cascade's net profits to [the selected] dealer[s'] net profits . . . is equally unavailing." RBR at 31.

unless the period studied includes years both before and after the discounts were initially granted. Otherwise, these parallel increases in sales and profits would be of no more probative value than evidence of growth in either measure independent of the other. Since many of the challenged discounts at issue in this case were put into effect prior to 1977, the first year of parallel rises in gross sales and profits cited by respondent, the evidence fails to overcome the *Morton Salt* inference. *See infra* note 63.

Even assuming that the evidence showed the selected dealers' overall gross sales and profits increased at the same rate both before and after Boise began to receive the favorable discounts, such evidence, alone, would not overcome the inference of injury. As explained earlier, rebuttal evidence that is not product-specific is of relatively little probative value since some dealers earned significant revenues from the sale of products outside of the defined market. *Cf. Morton Salt,* 334 U.S. at 49; *see supra* at pp. 27-28. Thus, higher sales and profits in one segment of a dealer's business may have offset poorer performance in other segments. In addition, evidence of increasing parallel gross sales and profits by dealers both before and after the introduction of the favorable discounts does not rule out the possibility that these increases would have been even greater but for Boise's receipt of the discriminatory discounts.

Boise's attempt to use growth evidence under the guise of net profit data to break the causal connection fails in the face of direct evidence that the dealers did, in fact, lower their prices and margins in order to retain accounts for which they competed with Boise. IDF 405. The ALJ concluded:

> The dealers have also underpriced Boise at times (F.'s 409-22), but they have had to do so in the face of its substantial price advantage, so that when a dealer lured a customer away from Boise, its success was accompanied by a significant impairment of profits.

107 FTC at 182. Other dealers refrained from competing against Boise for certain accounts because they could not compete on price. IDF 406.

Second, Boise argues that evidence that the selected dealers increased their sales and gross profits at a greater rate than their net profits breaks the causal connection between the price **[44]** discrimination and competitive injury. Judge Parker found the selected dealers experienced, on average, a 22% increase in sales and gross profits

from 1977 through 1980. IDF 431. Net profits over the same period, however, ranged from 2.4% to 3.2% and, while drifting downward, did not do so without interruption. *See supra* note 59. Boise argues that net profit does not provide a true picture of dealer success because its calculation requires that many expenses other than cost of goods sold be deducted from sales. As Boise puts it, a "dealer's management of these expenses may suggest the extent of his business acumen, but it says nothing about the potential competitive impact of the functional discount." RBR at 28 (emphasis added).[61]

Although Boise's approach might simplify the task of courts and the Commission in evaluating rebuttal evidence, a firm may experience declining net profits while sales are rising for many reasons. Thus, that experience alone would not preclude a finding that the challenged discounts substantially contributed to the disfavored dealer's injury. A firm faced with greater costs of goods sold than its rival, with resale prices and all other costs equal, would realize lower (gross and net) profit margins than its rival. In the long run, however, the disfavored firm might decide to make operational or strategic changes in order to remain competitive. It might, for example, explore ways to reduce its operational costs and increase its efficiency by making capital investments or other expenditures. Alternatively, it may attempt to maintain market share by providing additional consumer services (at greater costs) in pursuit of an upscale clientele. This approach would reduce the firm's net profits unless it could pass the increased costs through in the form of **[45]** higher prices without an offsetting loss in unit sales. Under either scenario (and surely there are others) the disfavored firm is gambling that additional costs incurred today will win it loyal customers for tomorrow. These added costs would have the effect of reducing net profits without necessarily triggering a corresponding decline in sales.

The analysis is not altered by the fact that the selected dealers also experienced growth in gross profits while their net profits declined.

[61] The parties' respective positions are illustrated by the example of Kelly Co., whose gross profit increased from 27.97% in 1979 to 29.06% in 1980 while its net profit decreased from 2.54% to 0.47% during the same period. Complaint counsel maintains that the example demonstrates that net profits are a better measure of dealer performance. BOC at 29. Boise counters that an examination of Kelly Company's financial statements shows that the decline in net profits was occasioned by increased "office" and "occupancy" expenses unrelated to the challenged discounts. The financial statements upon which Boise relies, however, are merely exhibits which were marked for identification but were never offered into evidence. They are not part of the record of these proceedings, and are entitled to no weight on remand. *Cf.* Commission Order dated September 6, 1988 (granting in part and denying in part Respondent's Motion for Leave to File Attached Supplemental Letter). Moreover, even if the financial statements were part of the record they could not alone establish that the decrease in net profits was unrelated to the challenged discounts for the reasons set forth in the text.

Gross profits will rise as long as prices increase relative to costs of goods sold. This rise may be the result of many factors such as increased demand resulting from growth in the white collar sector of the economy or inflation. Here, it may also reflect increased sales of products that were not the subject of these proceedings. In short, the evidence is too ambiguous to overcome the inference of injury.

Third, Boise argues that the challenged discounts should have affected all dealers equally; therefore, evidence that the selected dealers earned lower net profits than the dealers as a whole "leads only to the conclusion that complaint counsel attempted to select the least profitable dealers in the hope that such dealers would help support complaint counsel's theory of competitive injury." RBR at 30. In essence, the argument is that complaint counsel chose the selected dealers because of their inefficiency, and that such inefficiency breaks the causal connection between the price discrimination and the alleged resulting injury. The argument assumes, without proof, that all dealers are otherwise identical, devoting the same proportion of their respective businesses to the sale of office products in relation to the sale of other products excluded from consideration in this case. It also assumes that the net profit data showing that the selected dealers earned lower profits than the NOPA dealers on all sales is a reliable surrogate for the selected dealers' respective net profits on sales of only those products that are the subject of these proceedings. In any event, the more pertinent comparison is between Boise and the selected dealers, not between the selected dealers and the NOPA dealers. Boise fared significantly better.

Even if complaint counsel's case did focus on dealers who were less profitable than most with respect to sales of the products in issue, their low profitability is still consistent with an inference of injury. These relatively low profits may suggest the disfavored dealers' injuries were caused in part by other factors, but does not preclude the reasonable inference that the price discrimination caused a material part of the dealers' injury. "It would be enough with respect to causation if the defendant 'materially contributed' to plaintiff's injury . . . or 'substantially contributed notwithstanding other factors contributed also.'" *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d at 1174, **[46]** *quoting Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 143 (1968) (J. White, concurring); *see also Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. at 100, 114 n.9 (1969); *Hasbrouck v. Texaco, Inc.*, 842 F.2d at 1042

("[i]t is enough that the illegality is shown to be a material cause" of plaintiff's injury to recover under Section 4 of the Clayton Act).

Fourth, Boise argues that its net profits were comparable to those of the leading industrial stationers (IDF 87, 837 F.2d at 1135), and that the top 25% of the dealers in the NOPA survey had greater median net profits than Boise for the years 1978 to 1980. RBR at 31. Assuming that these assertions are fully supportable by the record,[62] they are of little probative value. The following colloquy at oral argument on remand was instructive:

> Commission: Counsel, what is your explanation for taking the upper 25 percent, as opposed to the entire average, the range?
> Respondent's Counsel: I think the point is this. If, in fact, the discount had any impact, it impacted all of the NOPA dealers in the same way. **[47]**
> This shows that Boise was doing less well than the more successful dealers. If, in fact, the discount had any competitive impact at all, one would expect to see these figures reversed, that Boise would do better than even the best, even the most successful dealers.

Tr. at 65.

This evidence shows only that Boise fared no better than leading dealers. As Boise acknowledges, there are many reasons which may reduce a firm's net profit other than paying more for inventory. RBR at 28-29. Since Boise had lower costs of goods sold than the selected dealers one would expect Boise to have greater gross and net profits than the other dealers if all other costs were equal. But Boise may have had greater costs (*i.e.*, been less efficient) than the leading dealers, which would account for Boise's lower net profits. Thus, this evidence does not overcome the inference that competitive injury resulted from the discounts and, like the other comparative net profit evidence, is insufficient to overcome the *Morton Salt* inference.

[62] While the NOPA surveys do report that the highest 25% of dealers in profits earned higher median net profits than Boise for 1978-1980, there is reason to question the evidence that the leading industrial stationers earned profits comparable to those earned by Boise. Boise relies upon language in the opinion of the Court of Appeals that "[t]his return on sales, as Boise's 1979-83 Business Plan explained, was comparable to the leading industrial stationers." The court cited IDF 87, which in turn cites only the Business Plan itself, CX 48H, which provides in pertinent part:

Large industrial stationers. . . .

> At the present time, accurate information regarding competitive performance statistics is unavailable. We do feel, however, that our projected inventory turns and return on sales for the period of the plan are comparable to the leaders in our industry.

Whatever significance may attach to this evidence is further eroded by the fact that the term "contract stationer," apparently used interchangeably with the term "industrial stationer," has "no generally accepted meaning in the office products industry." IDF 44.

B. *Evidence of the Longevity of the Discounts*

The Court of Appeals recognized that the *Falls City* Court looked to the longstanding nature of a price difference as giving rise to *Morton Salt's* inference of injury, but read that case to mean only that long-term price discrimination is more likely to lead to injury than short-term or sporadic discrimination. *Id.* at 1146, n.17. The court reasoned that "a price difference with the potential for causing injury will eventually result in measurable effects, such as diverted sales or lost profits." 837 F.2d at 1146 n.17. Relying upon *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the court observed that the "more time that passes without such effects showing up, the more likely it becomes that the price difference does not in fact pose a threat of competitive injury." *Id.* While acknowledging that the "longstanding nature of the discounts does not preclude the possibility" that they pose a "threat of injury to competition in the future," 837 F.2d at 1146, the court stated one would reasonably expect to have seen competitive injury manifest itself by this time "in the form of some dragging down." *Id.* As yet, the court observed, "there appears to be no such damper." *Id.*

Certainly, it may be argued as a general proposition that the longer a price difference prevails without visible manifestation of competitive injury, the less likely such injury is to occur in the future. But such is not this case. The record contains evidence that the selected dealers have **[48]** experienced "dragging down." We have previously discussed the evidence that both the selected dealers and dealers in general earned lower average net profits than did Boise for the years 1977 through 1980. *See supra* at pp. 40-42. Accounts of substantial size were lost by the dealers to Boise during that period. *See supra* note 56. Judge Parker found the selected dealers often had to lower their prices to compete with Boise or refrained from competing with Boise for a number of accounts. IDF 405, 406. These indicia of injury are particularly significant in light of evidence suggesting that the selected dealers may have operated more efficiently than Boise in some ways. *See supra* at p. 34.

There are, however, limits to applying the principles of *Matsushita*, a Sherman Act predatory pricing case, to the problems of price discrimination under Robinson-Patman. Secondary line Robinson-Patman injury is distinct from injury to competition under the Sherman Act. Measurable competitive effects may be manifested within a relatively short time following the initiation of the price discrimination

in some industries, while it may take longer in others. Moreover, the profit and sales data produced in this case for the selected dealers is overbroad, *see supra* at pp. 27-28 & note 59, and therefore is of little value in assessing the effects of even recently introduced price discrimination. In short, there is reason to doubt whether Boise's rebuttal evidence, which focuses on a period some 40 years after respondent asserts the discounts began, can be causally related to either the presence or absence of secondary line injury under the Robinson-Patman Act.

Thus, it is unnecessary for us to determine whether the relevant period during which the discounts have been in effect is 40 years, as respondent asserts,[63] or the time since Boise first **[49]** received the discounts in given geographic markets as complaint counsel intimates.[64] Indeed, in *Morton Salt* itself, the challenged carload discount had been offered by the Morton Salt Company since 1922. *Morton Salt Co. v. FTC,* 162 F.2d 949, 953 (7th Cir. 1947). It was a full 22 years later when the Commission issued its order imposing liability, and an additional four years until the Supreme Court made that order stick.

The evidence of competitive injury in this case is as strong as that which supported the Supreme Court's finding of liability in *Morton Salt* more than two decades after that challenged discount program began. Thus, even assuming that the complaint in this matter was issued some forty years after the hybrid discounts first went into effect, this fact does not overcome our finding of competitive injury.

[63] BOR at 58. The six manufacturers whose sales are the subject of this litigation actually initiated the challenged discount programs at various times over the past forty years. *See, e.g.,* IDF 116, 117 (Boise or predecessors received favorable wholesaler discount on all Rediform business forms since the late 1950's or early 1960's, and on Recordplate since 1977); IDF 171 (Boise received favorable wholesaler discount from Sheaffer Eaton as long as twenty-five year employee of Sheaffer Eaton had known Boise); IDF 226, 230 (Boise received favorable wholesaler discount on visible equipment and on insulated files from Victor Systems and Equipment division of Kardex Systems, Inc., since 1979); IDF 263 (Boise received favorable wholesaler discount from Boorum & Pease for almost 20 years); IDF 302 (Bates offered wholesaler discount since the 1940s and Boise received it as long as it had been a customer); IDF 346 (Masterproducts gave Boise the favorable discount for at least 10 years prior to issuance of the Initial Decision).

[64] BOC at 61. For example, Boise entered the Massachusetts area by acquiring Dennis Office Supply, a commercial office products dealer that did not engage in any wholesaling, on March 21, 1978. Rodman tr. at 4435-36. Similarly, Boise entered Phoenix in 1978 by acquiring PBSW (Starr tr. at 5154), which previously made relatively few sales to other dealers. *Id.* at 5161-62; RPFF 87. Boise entered Salt Lake City by acquiring Pembrokes Company, a local office supplies dealer (Vielstich tr. at 4934), in 1974. Pembroke did not previously sell to other dealers. *Id.* at 4940; RPFF 88. It entered San Francisco through the acquisition of Southern California Stationers in approximately 1966. CX 977 at 26-27. Prior to being acquired by Boise, Southern California Stationers did not engage in wholesaling. Edquist tr. at 5075-76.

C. *A Finding of Liability is Consistent with the Purpose of R-P and is Not Averted by an Availability Defense.*

The court criticized the Commission for failing "to inform" its application of *Morton Salt* with the purposes of Robinson-Patman by "assuming, without analysis, the existence of competitive injury." 837 F.2d at 1146. Specifically, the court stated the Act is directed toward halting the practice of singling out large purchasers for "disparately favorable treatment," a practice which the court found no evidence of in this case. *Id.* The majority emphasized four points: (1) an absence of evidence that the six manufacturers sold to Boise on more favorable terms than they sold to smaller wholesalers; (2) lack of evidence that manufacturers framed the definitions of "wholesaler" to favor Boise's method of doing business; (3) a dearth of evidence that Boise was a "power buyer" or coerced the manufacturers into granting it favorable treatment in any way; and (4) no evidence of cabal between Boise and the six manufacturers to give Boise an additional price break. *Id.* at 1147. We address each of the court's concerns below. **[50]**

There is little value in focusing on the availability of the wholesale discount to distributors who meet each manufacturer's objective definition of a "wholesaler." As the Ninth Circuit recently stated in *Hasbrouck v. Texaco, Inc.*:

> That all wholesalers were offered the same discount would be an appropriate defense in a case where the [selected dealers] and the other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. Here, however, only the other customers are wholesalers; the [selected dealers] are retailers who are further down the chain of distribution.

842 F.2d at 1039. The favoritism that pervades this case is not the preference of one wholesaler over another, but of Boise, in its capacity as a dealer, over other dealers who could not purchase at the substantial wholesale discount. Boise purchased products from the six manufacturers at the "wholesale discount" that it resold to end-users in competition with the selected dealers.

Respondent's "availability defense" was previously rejected by the Commission. 107 FTC at 215-17. The premise of the defense is that there is no competitive injury "where the discounts are generally and practically available to competitors of the favored customer. . . ." 837 F.2d at 1130. Boise argues that the fact that some distributors have

chosen to accept certain risks in order to qualify for the wholesale discount, while the selected dealers have not, does not render the functional discounts "practically unavailable." BOR at 60. Boise suggests the discounts are not unavailable because the selected dealers need only to become dual distributors so as to qualify as "wholesalers" under the manufacturers' definitions, which generally required that a distributor resell at least 20% of its office products to dealers. BOR at 9-10, 44.[65] We have previously held, however, that discounts are not practically available where a buyer must alter his purchasing status (*e.g.*, from a retailer as to a dual distributor) before receiving them. 107 FTC at 215; *Dayton Rubber Co.*, 66 FTC 423, 470-71 (1964), *rev'd on other grounds sub nom., Dayco Corp. v. FTC*, 362 **[51]** F.2d 180 (6th Cir. 1966).[66] The Court of Appeals did not question our reliance on *Dayton Rubber* as the law on availability. Indeed, it noted that "[d]ue to the understandable reluctance of dealers to buy from their competitors, dealers rarely move into the class of dual distributors." 837 F.2d at 1131.

The discount cannot be deemed "practically available"—and hence lawful—solely because any distributor who makes 20% of its sales to dealers would qualify as a "wholesaler." Under Boise's theory, a manufacturer (either independently or in reliance upon a different standard adopted by WSA) could decide that a distributor must make 50% or more of its sales to dealers in order to qualify for a wholesaler discount. *See* Golder Tr. 1280. Obviously, at some point an objective standard that would require the selected dealers, in order to qualify for the wholesaler discount, to make a very large portion of their total sales to other dealers, would render such a discount practically unavailable to them.[67]

The Commission and the Administrative Law Judge also rejected the availability defense on the ground that "dealers do, in fact, perform wholesale functions, but do not receive the functional discounts that Boise enjoys" even when the dealers specifically request the discounts from the manufacturers. 107 FTC at 215-16;

[65] The Court of Appeals stated that manufacturers "typically" consider membership in the Wholesale Stationers Association ("WSA") as the first hurdle in qualifying for the discount, but that manufacturers differ in whatever additional services they require distributors to perform in order to qualify. Only about 50 of 100 wholesalers in the United States, however, actually were members of WSA. Seltzer Tr. 6587-88.

[66] The wholesale discounts in this case were far less available than the "carload" discount in *Morton Salt*, which small buyers were able to obtain by aggregating their purchases. In fact, less than one tenth of one percent of Morton Salt's total salt business did not benefit from the carload-lot discount. 334 U.S. at 60 (J. Jackson, dissenting).

[67] The fact that discounts are not practically available to all customers, however, does not itself establish liability. Complaint counsel must establish all essential elements of a Robinson-Patman Act violation.

accord 107 FTC at 184-86. The Court of Appeals observed, however, that while marketing functions Boise performs (in its capacity as a dealer) for manufacturers through its virtually "autonomous" distribution centers are similar to those performed by other dealers in the industry, the Administrative Law Judge "did not expressly find that any of the individual dealers provide the quality and quantity of services that Boise does." 837 F.2d at 1134 n.7. Nevertheless, we do not see a material distinction in the quality or quantity of functions performed by Boise and the selected dealers for the manufacturers. Complaint counsel's expert witness, Dr. Nevin, agreed that "to the extent that Boise performs functions for manufacturers which are not performed by dealers, it is entitled to a lower price (Tr. 6989-90); however, according to Dr. Nevin **[52]** this situation does not exist in the present case (F. 522)." IDF 502 (Emphasis added). Dr. Nevin further testified that the "dealers could not obtain the discounts even if they performed the same functions as wholesalers (Tr. 6938-39)." IDF 454. Again, Finding 522 supports the view that Boise and the selected dealers performed the same relevant functions for R-P purposes:

> Based on his review of portions of the record, Dr. Nevin "Basically . . . found the dealers performing the <u>same</u> marketing functions that Boise performs in their sales to commercial users," a conclusion with which I agree (F.'s 70, 503-14).

(Emphasis added) IDF 522.

We do not understand Dr. Nevin's use of the word "same" to mean "same-type but materially different" in comparing the marketing functions performed by Boise and other dealers. Our interpretation is bolstered by Boise's own expert, Dr. Elzinga, who agreed with the following statement:

> On the other hand, to say that two buyers who perform the <u>same services</u> and buy in the same quantities should, on grounds of efficiency, receive different discounts solely because they resell to different customers also is nonsense (Tr. 6400).

IDF 519. The record does not support the hypothesis that the quality and quantity of the services provided by the selected dealers as a whole for the manufacturers materially differed from those provided by Boise. In short, the challenged discounts were mere subterfuges to

avoid the restrictions of Robinson-Patman. *See Texaco Inc. v. Hasbrouck*, 110 S.Ct. at 2546-47.[68]

Whether or not the manufacturers specifically "framed" their definition of "wholesaler" to benefit Boise or other dual distributors, the fact is that Boise receives the favorable discounts while other dealers do not largely because of its status as a large volume purchaser. In 1980, for example, Boise received the "wholesaler" discount on all its purchases of the products from the manufacturers in issue, even though seven of the eight distribution centers involved in this case made fewer than 20 percent of their sales to other dealers—the minimum criterion the court identified for receiving the wholesale **[53]** discount. 837 F.2d at 1134 n.7; IDF 61. On this basis, only six of the eight centers would have independently qualified for the discounts in 1980. IDF 61. Thus, while the proscriptions of Robinson-Patman are of general applicability and are not limited to large purchasers with market power, *Falls City*, 460 U.S. at 436, the evidence in this case shows that Boise qualified for the favorable discounts by virtue of its aggregate wholesale sales throughout the country, rather than at each virtually autonomous distribution center.

Finally, there is no requirement that a buyer have monopsony power or that discriminatory discounts be granted in secret in order to violate Robinson-Patman. We have previously acknowledged the limits of economic theory in Robinson-Patman jurisprudence. *See supra* at pp. 16-17. In *Morton Salt*, the Court of Appeals emphasized—

> . . . it is not contended that any of said discounts or the price system which embraces them all was formulated to give any particular customer or customers . . . a cost advantage over others who qualify therefor for quantity purchases. It is not claimed that there has been anything secret, local, special or personal about any such quantity discount as offered by petitioner to any of its customers."

162 F.2d at 953. Nevertheless, the Supreme Court found liability. This holding is consistent with the language of Section 2(f) itself, which makes it unlawful for any person to "knowingly induce or receive" unlawful discounts, and contemplates no exception for open and notorious price discriminations that are otherwise unlawful.

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[68] Of course, even if Boise actually performed "certain functions, assuming all risks, investment, and costs involved" to qualify for a legitimate functional discount on the goods it purchased as a wholesaler, it could not claim a functional discount on the goods it purchased for sale as a retailer. *See Texaco Inc. v. Hasbrouck*, 110 S.Ct. at 2546-47.

D. *The Manufacturers' Discount Based on "Objective" Criteria May Be the Basis of Section 2(f) Liability*

The Court of Appeals deemed ironic that the six manufacturers now "stand condemned as price discriminators" although they followed "neutral, objective criteria in determining what buyers are to be considered wholesalers." 837 F.2d at 1147. The court warned that the Commission was marching toward a regime of "price uniformity and rigidity" in "an all-out attack on uniform wholesale prices to dual distributors." *Id.*

Given the multitude of manufacturers involved and Boise's position as a leading buyer, it was both appropriate and a more efficient use of limited public resources for the Commission to proceed against Boise. Moreover, since most of Boise's distribution centers in issue would not have qualified for the wholesale discount based upon their own operations, the manufacturers' discounts appear to have been more "neutral" on paper than they were in practice. Thus, we condemn the practice **[54]** of manufacturers selling to Boise's distribution centers, which are essentially autonomous dealers (837 F.2d at 1134 n.7), at a substantial price advantage relative to the prices available to similarly situated dealers, over a sustained period of time, solely because Boise itself would qualify for the wholesale discount based on its aggregate sales.

IV. ORDER

Paragraphs I through V of the Commission's order dated February 11, 1986 will be reissued in the following form:

This matter has been remanded to the Commission for further proceedings by the United States Court of Appeals for the District of Columbia Circuit. *Boise Cascade Corp. v. FTC,* 837 F.2d 1127 (D.C. Cir. 1988). The remand directs the Commission to determine whether Boise Cascade Corporation's rebuttal evidence overcomes the inference of competition injury previously drawn by the Commission. Having reviewed the record and considered the briefs and oral arguments of the parties, the Commission has determined that Boise Cascade Corporation has failed to overcome the inference of competitive injury established by the evidence. Accordingly,

It is ordered, That Paragraphs I to V of the Commission's order dated February 11, 1986, are reissued. See *Boise Cascade Corp.,* 107 FTC 76, 224-25 (1986).

V. Conclusion

Having reviewed the record, and particularly the evidence cited by the Court of Appeals, we hold that Boise has failed to overcome the inference of competitive injury established by the evidence that Boise purchased office products at sustained and substantial discriminatory prices from the manufacturers over a competitively significant period of time.

CONCURRING OPINION OF COMMISSIONER MARY L. AZCUENAGA

This case is before the Commission on remand from the Court of Appeals directing the Commission to consider evidence that we previously deemed irrelevant to the issue of competitive injury. I agree with the majority that the respondent Boise Cascade Corporation ("Boise") has failed to rebut the previously drawn inference of competitive injury and concur in the resulting conclusion that Boise knowingly received discriminatory prices in violation of Section 2(f) of the Robinson-Patman Act.

I do not join the opinion of the majority. To the extent that the majority may believe that the three opinions from the Court of Appeals fail to establish an adequate context within which to carry out this remand, we perhaps should have sought further clarification or review. To the extent that the analytical framework set forth by the majority may be inconsistent with the opinion of the court, that argument is beyond the scope of the remand. To the extent that I can discern new standards in the opinion of the majority, I disagree.

For example, the majority advances the proposition that "a reading of the Court of Appeals decision to allow respondent to overcome the *Morton Salt* inference with evidence of the absence of th[e] 'fact of injury' [as distinguished from causation] would be inconsistent with the Supreme Court's teaching in *Falls City.*" Slip op. at 14. This proposition seems at odds with the plain statement of the Court of Appeals that the *Morton Salt* inference of injury can be overcome by evidence '"breaking the causal connection between a price differential and lost sales or profits"' as well as "by evidence showing an absence of competitive injury." 832 F.2d at 1144 (emphasis omitted). If "there is no competitive injury (or reasonable possibility of competitive injury) to begin with," the Court of Appeals said, "then evidence breaking the causal connection is obviously impossible to adduce." *Id.*

Nor do I endorse the evidentiary standard, as I understand it, that

the majority would impose on Boise. According to the majority, Boise may prevail on remand if the evidence would "preclude the Commission from finding a reasonable possibility" that Boise benefited from the preferential discounts. Slip op. at 20. Preclusion is a demanding standard of proof. In addition, instead of focusing on evidence concerning absence of competitive injury, a critical element of a statutory violation and the matter at issue on remand, the majority's proposed standard would require Boise to prove the absence of benefits from a discriminatory price. The majority is closer to the mark when it suggests that Boise need show only that "the essential elements of [competitive] injury have not been established by a preponderance of the evidence." Slip op. at 19 n.33. **[2]**

The Court of Appeals said that the *Morton Salt* inference of competitive injury drawn from proof of substantial, sustained price differences can be overcome by "[s]pecific, substantial evidence of the absence of competitive injury" and directed us on remand to "sift and weigh Boise's evidence of absence of injury" to determine whether it "demonstrates that there is no competitive injury (or reasonable possibility of competitive injury.)" *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988), *reversing and remanding Boise Cascade Corp.*, 107 FTC 76 (1986). Having accepted the remand and forgone further attempts to obtain review of the issue of which evidence is relevant to rebut the inference of injury, our task on remand is narrow.

For the most part, the majority relies on *Morton Salt* and its progeny to conclude that the evidence identified by the Court of Appeals is "not probative" of the lack of injury. The Court of Appeals required us on remand to examine the evidence, not to explain again why we believe that under the case law the evidence proffered by Boise does not matter. Nowhere in the opinion does the majority say that the evidence does not show what Boise says it shows. Instead, the conclusions of the majority regarding the evidence come perilously close to repeating the Commission's original position that the evidence is irrelevant but substituting the phrase "not probative" for "irrelevant." Because relevance usually is defined by reference to probative value—relevant evidence is evidence that tends to make the existence of any fact more or less probable than it would otherwise be, Fed. R. Evid. 401; *McCormick on Evidence* §185 (3d ed. 1984)—the approach of the majority may beg the question.

I.

The Court of Appeals directed us to consider evidence proffered by Boise of "high profitability and financial health on the part of the selected dealers" and of the absence of diverted sales attributable to the wholesale discount granted to Boise. 837 F.2d at 1144-45. Boise asserts that the "evidence established that the selected dealers enjoyed increasing sales and profits and 'a virtually complete absence of sales lost to Boise' . . . thereby precluding a finding of competitive injury." **[3]** R.R.B. at 20-21.[1] The majority concludes that Boise's evidence is of insufficient probative value to overcome the inference of competitive injury. Slip op. at 25. As I read the record, the evidence does not show what Boise says it shows.

Injury within the meaning of the Robinson-Patman Act may be found although the businesses of the disfavored purchasers remain financially viable and the favored purchaser does not win all accounts from its disfavored competitors. The Act in secondary line cases does not require the destruction of competition, nor are diverted sales a necessary element of injury in a government injunction action, and complaint counsel expressly disclaimed any intent to make their case under these standards. Oral argument tr. at 62-65 (June 20, 1984). The opinions of the Court of Appeals do not appear to require application of these standards but rather consideration in the existing context of "whether Boise's evidence demonstrated that no injury or 'reasonable possibility' of competitive injury existed." 837 F.2d at 1144. An examination of Boise's evidence shows that it is consistent with the Commission's inference of competitive injury.

The theory of competitive injury in this case is "that the competitive opportunities of certain merchants were injured when they had to pay . . . substantially more for their goods than their competitors had to pay." *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47 (1948). Boise, a substantial reseller of office products,[2] obtains wholesale discounts from office product manufacturers on goods that Boise resells directly

[1] The following abbreviations are used in this concurring opinion:

I.D.F.	Initial Decision Finding
R.I.B.	Respondent's Initial Brief (May 18, 1988)
R.R.B.	Respondent's Reply Brief
C.A.B.	Complaint Counsel's Answering Brief
RX	Respondent's Exhibit
CX	Complaint Counsel's Exhibit.

[2] Boise's combined sales ($346.6 million in 1980, I.D.F. 58 *in camera*) make it the largest distributor of office products in the United States, I.D.F. 52, and it is one of the two largest wholesale distributors ($196.5 million in 1980, I.D.F. 58 *in camera*) in the United States. I.D.F. 53.

to large commercial and industrial end users in competition with dealers that also buy directly from manufacturers and sell to the same [4] accounts. The direct-buying dealers[3] pay the manufacturers 5% to 33% more for office products than Boise pays for the same products. 107 FTC at 182. The complaint challenges as unlawfully discriminatory the wholesale discounts that Boise obtains on goods resold to end users in competition with the direct-buying dealers; it does not challenge the wholesale discounts to the extent that Boise resells as a wholesaler.

Boise does not dispute that it competed with the direct-buying dealers. I.D.F. 96-100. In its 1976 and 1977 business plans, Boise specifically targeted its sales effort at the large customers served by the direct-buying dealers.[4] CX34B *in camera;* CX44H *in camera.* Although Boise received wholesale discounts on all its purchases from the six selected manufacturers, seven of the eight Boise distribution centers examined in this matter made more than 80% of their sales directly to end users.[5] The direct-buying dealers, because of the higher price they had to pay, were placed at the outset at a competitive disadvantage with respect to Boise.

A. *Sales and Profits*

Boise asserts that the direct-buying dealers were "competitively healthy and financially prosperous," R.R.B. at 4, citing testimony that the sales of the direct-buying dealers increased more than 22% annually between 1977 and 1980 and claiming that this growth was "unusual, particularly in light of [5] the recessionary economy." R.R.B. at 21.[6] To support its claim that the growth of the selected dealers was "unusual," Boise asserted on remand that "Boise Cascade's growth rate was 19 percent," oral argument tr. at 63, and that dealer-members of the National Office Products Association ("NOPA") "experienced an average annual growth rate of 15%."

[3] To prove a violation, complaint counsel presented evidence concerning twenty-three dealers that also buy directly from manufacturers and compete with Boise for sales to large commercial end users. I.D.F. 88 & 96. The selected dealers are referred to throughout this opinion as "direct-buying dealers."

[4] Boise planned "selective expansion of its direct sales efforts to compete for business against dealers who buy a significant percent of their requirements from manufacturers" ("4% of the dealers do more than $2,000,000 of volume . . . but buy only 15% of their requirements from wholesalers"). Boise limited its direct or "commercial" sales to large end users "to minimize conflicts" with dealer-customers that buy from Boise and other wholesalers. CX34B *in camera; see also* CX37D *in camera.*

[5] Of the eight, only Boise's center in Philadelphia, with 47.1% of sales to end users, made less than 80% of its 1980 sales directly to end users. I.D.F. 61 *in camera.*

[6] Contrary to Boise's argument, *see* R.R.B. at 21, the Administrative Law Judge did not find that these assertions were true but only that two of Boise's witnesses, Mr. Bertholdt and Dr. Elzinga, had so testified. *See* I.D.F. 431-34.

R.R.B. at 26.[7] These growth figures do not stand up on examination. According to Boise's 1981-1985 Business Plan, its commercial business (in competition with the direct-buying dealers) grew at an average annual rate of 26.4% in 1977-1979. CX510 *in camera* (data reprinted at page 6 below).[8] In addition, the 15% NOPA growth rate asserted by Boise in its brief on remand is lower than the NOPA growth rate that appears in the record in Boise's business planning documents.[9] **[6]**

Boise's Business Plan for 1981-1985 provides an additional context for comparing the 22% rate of growth that Boise claims the direct-buying dealers enjoyed between 1977-1980. The following statistics showing year-to-year growth are taken from that plan:[10]

	NOPA Dealers	Boise Direct Sales
1977	17.9%	23.5%
1978	18.0	37.8
1979	21.3	18.0

These data indicate, assuming, as Boise asserts, a 22% rate of growth for the direct-buying dealers, that Boise's growth was in the same range and even somewhat higher (three-year average of 26.4%). In Boise's estimation, office product dealers in general (three-year average of 19.1%, based on the above column for NOPA dealers) fell short of Boise's performance. *See also* CX40J-L *in camera* (showing

[7] National Office Products Association, a major industry trade association, the members of which are office product manufacturers, wholesalers and dealers, compiles and publishes annually data concerning dealer operations. I.D.F. 423.

[8] The document cited by Boise's counsel to show a 19% growth rate for Boise does not show data for Boise's commercial sales but rather shows that Boise's overall sales grew 21.4% in 1977, 26.2% in 1978 and 17.3% in 1979 (an average of 21.6%). CX51Z1 *in camera*. Boise estimated in August 1980 that its overall average annual rate of growth for 1976-1980 would be 19.26%, but this does not appear to be a simple average and the method of calculation is not explained. In addition, this estimate was based in part on sales for 1976, for which we lack figures, for purposes of comparison, for the direct-buying dealers (in 1976, Boise's sales increased 17.3%) and 1980, for which Boise lacked actual data.

[9] Boise's business plans cited NOPA growth rates of 18% in 1978, 21.3% in 1979 and 12.2% for 11 months in 1980. CX510 *in camera;* CX43H *in camera*. The NOPA growth rate of 15% that Boise asserted in its brief was not calculated by NOPA but was "determined [presumably by Boise or its counsel] by multiplying the average sales per employee, which is in the NOPA data, by the total number of employees of an average dealer," allegedly also in the NOPA data. Oral argument tr. at 62. The NOPA surveys in the record, however, do not show "the total number of employees of an average dealer," as counsel claimed, but instead a "typical personnel structure." This is not necessarily the same as the total number of employees, and Boise makes no showing that the two are equivalent.

[10] CX510 *in camera*. Although the majority states that "the record is devoid of evidence of probative industry-wide growth standards," slip op. at 30 n.48, these data in Boise's 5-year plan provide evidence on growth that undermines Boise's claim that the selected dealers' growth was "unusual" during a "recessionary period."

Boise's growth in sales exceeding NOPA growth).[11] This evidence tends to show that office product dealers and the direct-buying dealers did not fare as well as Boise, which is consistent with the inference of competitive injury from substantial, sustained price discrimination.

Boise's own documents also belie its claim that the growth of the selected dealers was unusual "in light of the recessionary economy." *See* I.D.F. 431. In addition to the growth figures cited above, Boise's business documents indicate that the office products industry was not adversely affected by a recession in the years for which growth figures were presented. Boise's 1980-1984 Business Plan (dated August 1979) stated that "[t]he growth of white collar employment continues to be the stimulus for office supply consumption growth." According to Boise, in the preceding six years, "the dealer to consumer growth of the industry has been at a compounded rate of 14.6 percent; wholesale growth has been growing at a 21.6 percent rate over the same period." "Over the longer term," Boise "anticipated that these growth rates will be similar. CX50E *in camera.* One year later, **[7]** in August 1980, Boise stated that "[i]ndustry growth continues to look attractive." CX510 *in camera.*

In addition to the growth data, the record contains net profit data for the direct-buying dealers, for Boise, for NOPA dealer-members and for retail office product dealers (calculated by Robert Morris Associates). These data also indicate that the direct-buying dealers and office product dealers in general were not as profitable as Boise:

	1976	1977	1978	1979	1980	1981
Boise[12]	3.1%	4.5%	4.8%	5.6%	6.1%	5.6%
Dealers[13]	3.5	2.8	3.2	2.4	2.5	2.3
NOPA[14]	3.9	3.7	3.7	3.8	3.5	N.A.
Morris[15]	N.A.	3.9	3.7	3.7	3.2	3.4

As the Court of Appeals pointed out, "these statistics pose obvious comparative problems," 837 F.2d at 1144, because they were prepared by different persons for different periods. Despite these differences, the data for the direct-buying dealers, the NOPA dealers and the Morris study are similar. The NOPA data and the Morris

[11] Boise described the NOPA report of "year-to-year sales growth of dealers to final consumers" as "the most significant" measure. CX40I *in camera.*

[12] CX51Z1 *in camera* (estimated figures for 1980 and 1981).

[13] CX2301 (data for the direct-buying dealers, as calculated by complaint counsel's expert accountant).

[14] CX356 at 4; CX355 at 5.

[15] CX2300.

study have been used for more than 50 years by the industry and by lending institutions for comparative purposes, and Boise regularly cited NOPA data in its business planning documents. These are significant indicia of their reliability. *See* I.D.F. 427 & 429; 107 FTC at 182 & n.15. In general, the data show that the net profits of the direct-buying dealers and of office product dealers declined between 1976 and 1980. During the same period, Boise's net profit increased steadily, and, except for 1976, Boise's net profit always exceeded those of both the direct-buying dealers and NOPA dealer-members. This is consistent with Boise's belief that its "growth has exceeded NOPA growth" and that its "sales growth on commercial sales has exceeded industry rates." CX40I *in camera*. The net profit data also are consistent with the inference of competitive injury from discriminatory prices.[16] **[8]**

The Court of Appeals suggested that the Commission should consider the "apparent discrepancy in profitability" between the NOPA dealer-members who were surveyed and the direct-buying dealers and "analyze the relationship of Boise's higher net profit (which, of course, reflected both its sales as a wholesaler and a dealer) to that of the selected dealers." 837 F.2d at 1144-45. The slight difference between the profits of office product dealers as shown in the NOPA survey and the net profits of the direct-buying dealers (calculated by complaint counsel's expert accountant) may be explained by the fact that the NOPA survey includes dealers that sell through retail, walk-in stores: retail sales usually are made at full list price while sales to commercial end users usually are made at some discount from list price. Boise's higher net profits are entirely consistent with its favorable prices from office product manufacturers: Boise's cost-of-goods-sold was lower than that of the selected dealers.[17]

B. *Diversion of Sales*

Evidence that sales have been diverted from the disfavored to the favored customer as a result of discriminatory prices usually is

[16] Additional data in the record also are consistent with this conclusion: For example, the return on investment for NOPA dealers was 20.35% in 1977, 20.55% in 1978, 22.77% in 1979 and 19.10% in 1980. CX355 at 5; CX356 at 4; CX357 at 4. Boise's return on investment was consistently higher: 22.8% in 1977, 24.4% in 1978, 28.8% in 1979 and 31.9% in 1980. CX51Z1 *in camera;* CX43H *in camera.*

[17] Although Boise enjoyed substantial price advantages, it worked to improve its margins "by better buying *and* pricing" and "more effective purchasing . . . to reduce material costs and keep the majority of the savings as profit." CX44H & 44Z37 *in camera*. Boise's central purchasing organization "implement[ed] gross margin improvement goals [and] . . . more effective vendor negotiations." CX37J *in camera*.

required in private cases under Section 4 of the Clayton Act to support a claim for damages.[18] As the Court of Appeals pointed out, diversion of sales is "another form" that competitive injury could take. 837 F.2d at 1145. A showing of diverted sales is not necessary to support injunctive relief under the Robinson-Patman Act, because the Act does not require that the discriminatory prices in fact have harmed competition. It is sufficient for a finding of liability and the imposition of injunctive relief "that there is a reasonable possibility" that the price discrimination may harm competition. 837 F.2d at 1139 n.12; *see* 107 FTC at 181-82. The distinction between actual injury and the reasonable possibility of injury is **[9]** important, because this case was not tried on an "actual injury" theory. Complaint counsel made no claim to have shown direct evidence of competitive injury, oral argument tr. at 65 (June 20, 1984), and the Commission in 1986 expressly rejected Boise's claim that actual injury must be proved. 107 FTC at 208.

The record does support the specific findings of the Administrative Law Judge (subsequently adopted by the Commission, 107 FTC at 201) that accounts switched from the direct-buying dealers to Boise "because of Boise's lower prices, better service, or a combination of these factors" and that some of the direct-buying dealers believed, based on their experience, that they could not economically compete against Boise and, therefore, did not bid for some business. I.D.F. 384 & 406. The Administrative Law Judge concluded that the direct-buying dealers were able to underbid Boise only "in the face of [a] substantial price disadvantage," and their success "was accompanied by a significant impairment of profits." 107 FTC at 182.[19]

Boise in its business planning documents suggested that the direct-buying dealers were able to compete for sales to large commercial accounts—despite Boise's price advantage—because they were more efficient than Boise: their "overheads are generally lower than Boise Cascade, hence the tendency to accept lower average gross margins than [Boise] can tolerate." Boise also believed that the direct-buying dealers might have lower standards for return on investment than Boise did.[20] CX44E *in camera; see* note 16 *supra*. Boise's former

[18] *See, e.g.*, J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981).

[19] As the majority points out, the finding of the Administrative Law Judge that the direct-buying dealers could not conclude that the losses were due to the discriminatory prices obtained by Boise, I.D.F. 407, *quoted at* 837 F.2d at 1145, is not surprising, because the dealers were not in a position to know Boise's costs, Boise's bids or why an account shifted to Boise.

[20] Boise focused on larger commercial accounts, choosing not to compete for smaller accounts, "to minimize conflicts with many small dealers who support wholesalers and to improve the profitability of such accounts,"

(footnote cont'd)

general manager testified that Boise likely had higher wage and pension costs than the direct-buying dealers and that Boise "may elect to have better facilities" than the dealers. CX672Z12-13 *in camera;* CX44H *in camera.* In addition, Boise did not regularly exploit its price advantage by offering lower prices. Instead, Boise believed that "[s]ales are more responsive to service and in-stock condition than to price." CX44Z19 *in camera.* This evidence is entirely consistent with the Administrative Law **[10]** Judge's conclusion that the direct-buying dealers faced a substantial price disadvantage in competition with Boise and were able to compete with Boise only with "a significant impairment of profits."

The alleged longevity of the wholesale discount in the office products industry is a related point. The Court of Appeals suggested that "a price difference with the potential for causing injury will eventually result in measurable effects, such as diverted sales or lost profits." 837 F.2d at 1146 n.17. Boise asserts that the issue in this case is "the competitive effect of the manufacturers' decades-old practice of voluntarily providing the functional discount to dual distributors" and that any competitive injury must be judged on the basis of a "forty year track record" of functional discounts. R.R.B. at 39-40. But the discriminatory prices challenged here are of more recent vintage: Boise did not begin obtaining a wholesale discount for direct sales to commercial accounts in competition with the direct-buying dealers until after its "acquisition program in 1964-1966." CX44A *in camera.*

In addition, Boise's recognition that its competitors for direct sales were direct-buying dealers, not other wholesalers, *see* CX44E *in camera,*[21] seems to suggest that the "practice of voluntarily providing the functional discount to dual distributors" may not be "decades old" but may have originated with Boise.[22] By the middle to late 1970's, the period examined in the record, Boise was still in the process of defining and implementing its dual distribution policy.[23] *See, e.g.,*

CX34B *in camera,* and to eliminate "unprofitable accounts." CX37D *in camera; see also* CX54A-D *in camera;* CX78V *in camera;* CX88Z24 *in camera;* CX101J *in camera.*

[21] Boise estimated that it was in 1978 the largest seller to the commercial market. Boise identified direct-buying dealers, not other wholesalers, as its competitors for direct sales to commercial end users. *See* CX400 *in camera.*

[22] Boise apparently was the only one of the "Big 5" wholesalers to pursue a national dual distribution policy. Boise described Champion and S.P. Richards as "pure wholesalers," CX45E-F *in camera,* and Zellerbach maintained a "tradition of wholesale." CX40F *in camera.* Although Boise asserted that United is a dual distributor, CX45E *in camera,* Boise did not identify any non-wholesale sales for United, CX51Z34 *in camera,* and there is no showing that United obtained a wholesale discount on products sold directly to end users.

[23] The complaint in this case issued in April 1980.

CX37D *in camera;* CX54A-D *in camera.* The Court of Appeals raised the concern that Boise may not have been singled out for "disparately favorable treatment." 837 F.2d at 1147. The record evidence suggests that Boise was indeed so favored as compared to the direct-buying dealers with which it competes. **[11]**

II.

The Court of Appeals expressed two additional concerns: that Boise is not a "power buyer exerting its muscle to win additional pricing concessions" and that the manufacturers, by implication if Boise violated Section 2(f) of the Act, have "run afoul of Robinson-Patman, even though they have followed neutral, objective criteria" in granting wholesale discounts. 837 F.2d at 1147. The record evidence leaves the first concern largely unanswered. Although Boise is one of the largest purchasers and resellers in the office products industry, complaint counsel made no attempt to prove that Boise has power in any market, believing that such a showing was legally unnecessary. Oral argument tr. at 48 (June 20, 1984).[24] If this were held to be a necessary element in a Section 2(f) case, the record would not sustain a finding of liability. With respect to the concern about the liability of the manufacturers, because the record shows that Boise obtained discriminatory prices on goods sold in competition with the direct-buying dealers, I agree with the majority that "the manufacturers' discounts appear to have been more 'neutral' on paper than they were in practice." Slip op. at 53.

III.

The evidence proffered by Boise is consistent with the Commission's previous conclusion that the discriminatory prices obtained by Boise "caused, or reasonably might cause, competitive injury." 837 F.2d at 1129. Therefore, I agree with the conclusion and the order of the majority.

CONCURRING OPINION OF COMMISSIONER ANDREW J. STRENIO, JR.

I wish to emphasize that in voting to approve this Opinion and

[24] The Supreme Court has said that "[a]lthough concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act, . . . the Act is 'of general applicability and prohibits discriminations generally' . . . ." *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983).

Order, my deliberations were confined solely to the single issue remanded by the Court of Appeals, namely whether Boise Cascade Corporation ("Boise") has overcome the inference of competitive injury. On this specific question, my answer is in the negative for the reasons explained at length in the Commission's Opinion. In brief, after taking into account all the evidence presented by Boise and applying the standard set forth in footnote 33 of the Opinion, I find that the essential elements of injury have been established by a preponderance of the evidence.

I also agree with the additional reasons articulated by Commissioner Azcuenaga for supporting the Order. Some of these grounds include her analysis of Boise's sales and profits data, her comparison of that data with the sales and profits data of National Office Products Association dealers generally and the 23 direct-buying dealers in particular, and her explication of why there is a reasonable possibility that the disfavored dealers suffer competitive harm as a result of the price differentials.

IN THE MATTER OF

NEW ENGLAND MOTOR RATE BUREAU, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9170. Final Order, Aug. 18, 1989—Modifying Order, Nov. 6, 1990

This order reopens the proceeding and modifies the final order [112 FTC 200], that prohibits the respondent from agreeing to fix rates charged for interstate transportation in certain states, by deleting references to the state of Massachusetts, pursuant to the mandate of the First Circuit in the United States Court of Appeals.

MODIFIED ORDER TO CEASE AND DESIST

Respondent New England Motor Rate Bureau ("NEMRB") having filed in the United States Court of Appeals for the First Circuit on October 11, 1989, a petition to review an order to cease and desist entered herein on August 18, 1989; the court of appeals having rendered its decision and judgment on July 20, 1990, affirming and enforcing the Commission's order with modifications; and the time in which to file a petition for certiorari having expired without either party having filed such a petition;

Now, therefore, *it is hereby ordered,* That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the court of appeals to read as follows:

ORDER

I.

It is ordered, That NEMRB, its successors and assigns, and its officers, agents, representatives, directors and employees directly or through any corporation, subsidiary, division or other device shall forthwith cease and desist from:

1. Entering into, adhering to, or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize, raise, maintain, or otherwise interfere or tamper with the rates charged by carriers that compete for the

intrastate transportation of property or related services, goods or equipment within any of the states in which NEMRB operates.

2. Knowingly preparing, developing, disseminating, or filing a proposed or existing tariff provision that contains collective rates for the intrastate transportation of property or other related services, goods, or equipment.

3. Providing information to any carrier about rate changes ordered by any other carrier employing the publishing services of the respondent prior to the time at which such rate change becomes a matter of public record.

4. Inviting, coordinating, or providing a forum for (including by publication of an informational bulletin) any discussion or agreement between or among competing carriers concerning intrastate rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods, or equipment.

5. Suggesting, urging, encouraging, persuading, or influencing in any way members to charge, file, or adhere to any existing or proposed tariff provision that affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided.

6. Agreeing with any carrier to institute automatic changes to rates on file for that carrier.

Provided, however, that except as to the state of New Hampshire, nothing in this order shall prohibit NEMRB from jointly setting or adhering to rates charged for intrastate transportation of property in any state where such joint activity is engaged in pursuant to a policy, clearly articulated and affirmatively expressed by the state legislature, to displace competition with respect to those prices and where such joint activity is actively supervised by a state regulatory body.

II.

It is further ordered, That NEMRB shall, within six (6) months after service upon it of this order:

1. Take such action as may be necessary to effectuate cancellation and withdrawal of all tariffs and any supplements thereto on file with any state or commonwealth that it was involved in preparing, developing, or filing that establish rates for transportation of property or related services, goods or equipment by common carriers within such state or commonwealth.

2. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within any state or commonwealth.

Provided, however, that except as to the state of New Hampshire, nothing in this order shall require NEMRB to cancel and withdraw tariff filings, powers of attorney, or rate and tariff service agreements in any state where joint setting of rates charged for intrastate transportation of property is engaged in pursuant to a policy, clearly articulated and affirmatively expressed by the state legislature, to displace competition with respect to those prices and where such joint activity is actively supervised by a state regulatory body.

III.

It is further ordered, That NEMRB shall within thirty (30) days after service upon it of this order, mail or deliver a copy of this order to each current member, and for a period of three (3) years from the date of service of this order, to each new member within ten (10) days after the member's acceptance by NEMRB.

IV.

It is further ordered, That NEMRB notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of the order.

V.

It is further ordered, That NEMRB shall file a written report within six (6) months after the date of service of this order, and annually on the anniversary date of the original report for each of the five years thereafter, and at such other times as the Commission may require by written notice to respondent, setting forth in detail the manner and form in which it has complied with this order.