UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 31st day of January, 1940.

COMMISSIONERS:
Ewin L. Davis, Chairman,
Garland S. Ferguson,
Charles H. March,
William A. Ayres,
Robert E. Freer.

In the Matter of THE SHERWIN-WILLIAMS COMPANY, a corporation, THE LOWE BROTHERS COMPANY, a corporation, and JOHN LUCAS & COMPANY, INC., a corporation.	DOCKET NO. 3965 ORDER EXTENDING TIME FOR FILING ANSWER

This matter coming on to be heard by the Commission upon the request of Davies, Richberg, Beebe, Busick & Richardson, attorneys for the respondents herein, for an extension of time from January 31, 1940, until and inclusive of February 10, 1940, within which to file answers to the complaint herein, and the Commission having duly considered said request and the record herein, and being now fully advised in the premises;

IT IS ORDERED that the time within which the respondents may file their answers to the complaint be, and the same hereby is, extended from January 31, 1940 until and inclusive of Saturday, February 10, 1940.

By the Commission.

N17928

Otis B. Johnson,
Secretary.

FTC-SW-000040

FTC - SW - 000041

FTC - SW - 000042

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 28th day of December, A. D. 1939.

COMMISSIONERS:
Robert E. Freer, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
William A. Ayres.

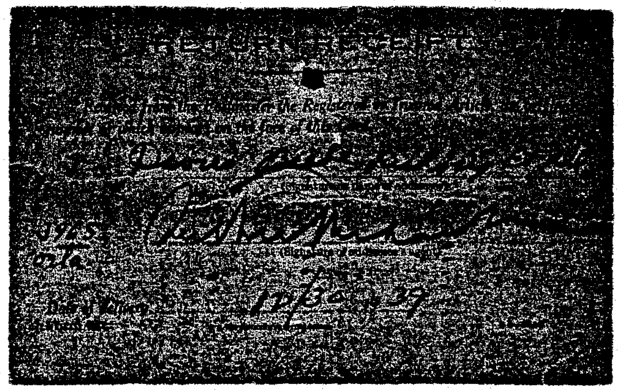
In the Matter of THE SHERWIN-WILLIAMS COMPANY, a corporation, THE LOWE BROTHERS COMPANY, a corporation, and JOHN LUCAS AND COMPANY, INC., a corporation.	DOCKET NO. 3965 ORDER EXTENDING TIME FOR FILING ANSWER

This matter coming on to be heard by the Commission upon the request of the Sherwin-Williams Company, one of the respondents, for an extension of time from December 31, 1939, until and inclusive of January 31, 1940, within which to file answer to the complaint herein, and the Commission having duly considered said request and the record herein, and being now fully advised in the premises;

IT IS ORDERED that the time within which the respondents may file their answers to the complaint herein be, and the same hereby is, extended from December 31, 1939, until and inclusive of Wednesday, January 31, 1940.

BY the Commission.

Otis B. Johnson,
Secretary.

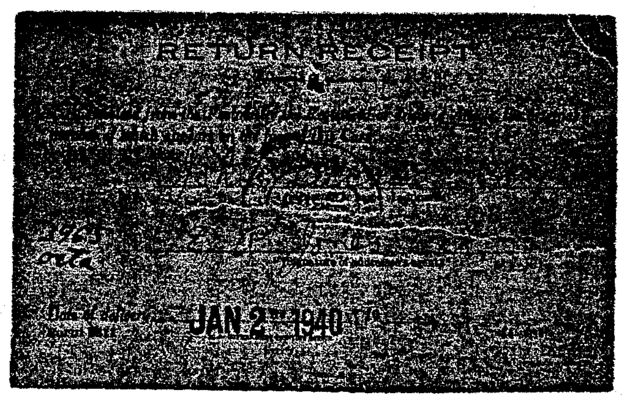


RETURN RECEIPT

10/30/39

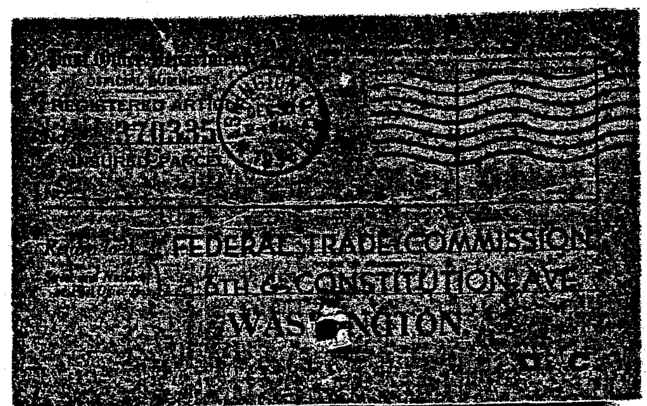
RETURN RECEIPT

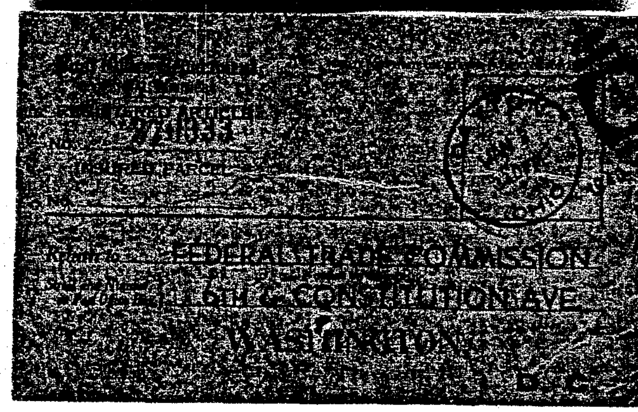
JAN 2 1940

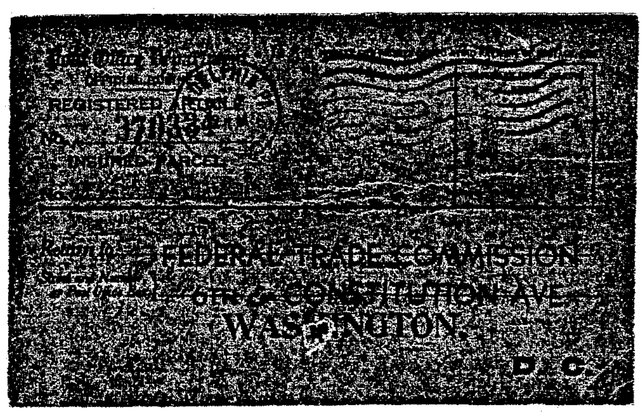


RETURN RECEIPT

JAN 2 1940


REGISTERED ARTICLE
FEDERAL TRADE COMMISSION
6th & CONSTITUTION AVE
WASHINGTON
D C


REGISTERED ARTICLE
FEDERAL TRADE COMMISSION
6th & CONSTITUTION AVE
WASHINGTON
D C


REGISTERED ARTICLE
INSURED PARCEL
FEDERAL TRADE COMMISSION
6th & CONSTITUTION AVE
WASHINGTON.
D C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of THE SHERWIN-WILLIAMS CO., a corporation, THE LOWE BROTHERS COMPANY, a corporation, and JOHN LUCAS & COMPANY, INC., a corporation.	Docket No. 3965

FEDERAL TRADE COMMISSION
RECEIVED
FEB 10 1940
SECRETARY

A N S W E R

DONALD R. RICHBERG
RAYMOND N. BEEBE
ADRIEN F. BUSICK
815 15th Street,
Washington, D.C.

T. J. McDOWELL,
101 Prospect Ave.N.W.
Cleveland, Ohio.

Attorneys for Respondents.

DAVIES, RICHBERG, BEEBE, BUSICK & RICHARDSON
815 FIFTEENTH STREET
WASHINGTON, D. C.

31

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of THE SHERWIN-WILLIAMS CO., a corporation, THE LOWE BROTHERS COMPANY, a corporation, and JOHN LUCAS & COMPANY, INC., a corporation.	Docket No. 3965

FEDERAL TRADE COMMISSION
RECEIVED
FEB 10 1940
SECRETARY

A N S W E R

Come now the Respondents in the above-entitled proceeding, by their counsel, Davies, Richberg, Beebe, Busick & Richardson, and T. J. McDowell, and for answer to the complaint in the above-entitled proceeding state:

PARAGRAPH ONE: The Respondents admit the allegations of Paragraph One of the complaint.

PARAGRAPH TWO: The Respondents admit the allegations of Paragraph Two of the complaint.

PARAGRAPH THREE: The Respondents admit the allegations of Paragraph Three of the complaint.

PARAGRAPH FOUR: The allegations of Paragraph Four of the complaint which constitute merely definitions in aid of the complaint are accepted by the Respondents for purposes of the complaint and answer. While these constitute definitions, abbreviations and terms "for purposes of this complaint", the Respondents state that the said definitions, abbreviations and terms are not in all instances in accord with the definitions, abbreviations and terms as understood and accepted in the industry and trade, and therefore may not be accepted in the consideration of evidence presented in this case, unless and except the said terms and abbreviations when used in questions propounded to witnesses are expressly so defined when so used.

PARAGRAPH FIVE: The Respondents admit that the Sherwin-Williams Company owns 100 per cent of the issued and outstanding equity stock of Lowe Brothers Company, John Lucas & Company, Inc., Acme White Lead and Color Works, of Hamtramck, Michigan, Martin Senour Company, of Chicago, Illinois, and Detroit White Lead Works, of Hamtramck, Michigan. The Respondents deny that the Sherwin-Williams Company controls all of the policies and activities of the said corporations and state the facts to be that the Sherwin-Williams Company has the power to control the policies and activities of the said corporations, but does not exercise the power, except in certain instances of major policies. The said subsidiary corporations operate and manufacture as separate and distinct operating companies with separate and distinct management and personnel. They operate in competition with each other and with the parent company.

Sherwin-Williams was organized as a partnership in 1868, and incorporated in 1884, and during all times since, first the partnership and later the corporation has been engaged in the business of manufacturing and selling paint and allied products. For many years it has manufactured and sold certain raw materials from which paints are made; and for some years this has constituted a substantial portion of its business. The principal purpose for which the businesses of other corporations engaged in the manufacture and sale of paint products have been acquired is to provide additional outlets and markets for certain raw materials and ingredients of paint products made by Sherwin-Williams. In all instances in which the businesses of other paint manufacturers have been acquired by Sherwin-Williams the plants, goodwill, trade-marks and trade names, manufacturing processes and sales organizations have been continued as conducted prior to acquisition. Lowe Brothers, Lucas, Acme White Lead and Color Works and Martin Senour Company all conduct businesses which have been operated under trade-marks and trade names, methods of manufacture and formulae, and under a substantial goodwill in the trade for many years prior to the acquisition of these businesses by Sherwin-Williams. Competition between the parent company and each of its subsidiaries and between the subsidiaries has continued in most respects as keenly as it existed prior to the acquisition and in most respects as keenly as it exists with other and unrelated companies.

The Respondents admit that John Lucas & Company, Inc. owns 100 percent of the issued and outstanding equity stock of W. W. Lawrence & Company of Pittsburgh, Penna., which is engaged in the manufacture, sale and distribution of trade sale and allied line paint products. Respondents deny that John Lucas & Company, Inc., controls all of the policies and activities of the W. W. Lawrence & Company and state the facts to be, that John Lucas & Company, Inc. has the power to control the policies and activities of said corporation but does not exercise the power. The said W. W. Lawrence & Company operates as a separate and distinct operating company with separate and distinct management and personnel. It operates in competition with Sherwin-Williams and with all of the subsidiaries of Sherwin-Williams. The Respondents deny that the Sherwin-Williams Company, by and through John Lucas & Company, Inc., controls the policies and activities of W. W. Lawrence & Company, except to the extent heretofore admitted in this paragraph.

The Respondents admit that the Acme White Lead and Color Works own 100 percent of the issued and outstanding equity stock and controls the policies and activities of the Peninsular Paint and Varnish Company, of Hamtramck, Michigan, and Lincoln Paint and Color Company, of Lincoln, Nebraska. Respondents deny that the Sherwin-Williams Company through the

Acme White Lead and Color Works controls the policies and activities of the said corporations, except as heretofore admitted in this paragraph.

PARAGRAPH SIX: The Respondents admit the allegations of Paragraph Six of the complaint, with the exception of the second sentence thereof, as follows:

> "The paint products of Sherwin-Williams are all standardized".

Without knowing what is meant by the word "standardized", Respondents can neither admit nor deny that allegation. The Respondents state the facts to be as follows:

The paint products of Sherwin-Williams are standardized to the extent that Sherwin-Williams continually produces as nearly as possible the same grade, quality and formula paint products for sale under the same trade name, except as changes may be made from time to time for the improvement of the product. Sherwin-Williams manufactures numerous paint products of different formulae for different consumption, such as, for example, exterior house paint, interior house paint, enamels, varnishes, etc., each of which is a different product and a different composition. The paint products of Sherwin-Williams are standardized only to conform to Sherwin-Williams own standard of formulae, processes of manufacture, and finished product. They are not standardized to products for similar purposes produced by the other respondents herein or to the products of other subsidiary corporations or to the products produced for similar purposes by others in the paint industry. High grade paints of all national manufacturers naturally contain some of the same essential ingredients, such as white lead, linseed oil, zinc oxide and titanium pigment, but in varying proportions according to the manufacturer's opinion of what constitutes the best combination for making a high grade paint. Also the processes of combining essential ingredients and manufacturing of all of the national manufacturers are different in varying degrees to produce a different finished product, even from the same formula. The formulae, the methods and processes of manufacture, the costs of manufacture and the resultant products designed for the same or similar purposes of Sherwin-Williams and all of its subsidiaries differ in varying degrees.

PARAGRAPH SEVEN: The Respondents admit the allegations of Paragraph Seven of the complaint, with the exception of the second sentence thereof, which reads as follows:

> "The paint products of Lowe Brothers are all standardized."

Without knowing what is meant by the word "standardized", Respondents can neither admit nor deny that allegation. The Respondents state the facts to be as follows:

The paint products of Lowe Brothers are standardized to the extent that Lowe Brothers continually produces as nearly as possible the same grade, quality and formula paint products for sale under the same trade name, except as changes may be made from time to time for the improvement of the product. The Lowe Brothers manufacture numerous paint products of different formulae for different consumption, such as, for example, exterior house paint, interior house paint, enamels, varnishes, etc., each of which is a different product and a different composition. The paint products of Lowe Brothers are standardized only to conform to Lowe Brothers' own standard of formulae, processes of manufacture, and finished product. They are not standardized to products for similar purposes produced by the other respondents herein or to the products of other subsidiary corporations of Sherwin-Williams Company, or to the products produced for similar purposes by others in the paint industry. High grade paints of all national manufacturers naturally contain some of the same essential ingredients, such as white lead, linseed oil, zinc oxide and titanium pigment, but in varying proportions according to manufacturer's opinion of what constitutes the best combination for making a high grade paint. Also the processes of combining essential ingredients and manufacturing of all of the national manufacturers are different in varying degrees to produce a different finished product even from the same formu-

1a. The formulae, the methods and processes of manufacture, the costs of manufacture and the resultant products designed for the same or similar purposes of Lowe Brothers, Sherwin-Williams and all of its subsidiaries differ in varying degrees.

PARAGRAPH EIGHT: The Respondents admit the allegations of Paragraph Eight of the complaint, with the exception of the second sentence thereof, which reads as follows:

"The paint products of Lucas are all standardized."

Without knowing what is meant by the word "standardized", Respondents can neither admit nor deny that allegation. The Respondents state the facts to be as follows:

The paint products of John Lucas & Company, Inc., are standardized to the extent that John Lucas & Company, Inc., continually produces as nearly as possible the same grade, quality and formula paint products for sale under the same trade name, except as changes may be made from time to time for the improvement of the product. John Lucas & Company manufactures numerous paint products of different formulae for different consumption, such as, for example, exterior house paint, interior house paint, enamels, varnishes, etc., each of which is a different product and a different composition. The paint products of John Lucas & Company are standardized only to conform to John Lucas & Company's own standard of formulae, processes of manufacture and finished product. They are not standardized to products for similar purposes produced by the other respondents herein or to the products of other subsidiary corporations of Sherwin-Williams Company, or to the products produced for similar purposes by others in the paint industry. High grade paints of all national manufacturers naturally contain some of the same essential ingredients, such as white lead, linseed oil, zinc oxide, and titanium pigment, but in varying proportions according to the manufacturer's opinion of what constitutes the best combination for making a high grade paint. Also the processes of combining essential ingredients and manufacture of all of the national manufacturers are different in varying degrees to produce a different finished product even from the same formula. The formulae, the methods and processes of manufacture, the costs of manufacture and the resultant products designed for the same or similar purposes of Lucas, Sherwin-Williams and all of its subsidiaries differ in varying degrees.

PARAGRAPH NINE: The Respondents admit the allegations of the first three paragraphs of Paragraph Nine of the complaint.

Respondents deny that comparable trade sale line products sold by the manufacturers are of like grade and quality; and state the facts to be as follows:

Each of the manufacturers manufacture and sell trade sale line products designed for like or similar purposes. Each of such manufacturers manufactures each of its trade sale line products by different formulae and varying processes. Each of the trade sale line products of each of the manufacturers possesses its own unique qualities with some distinction between that product and the products of the other manufacturers designed for the same purpose. The products of the different manufacturers can be said to be of "like grade and quality" only to the extent that they are designed for the same functional use. The customer and consumer acceptances of each of the various products of each of the respondents is different. The products of each individual company listed in the complaint are sold in packages bearing the distinctive labels and trade-marks of the respective companies; said respective labels and trade-marks having been used for many years, have developed their own particular following, who regard the products of each said company as separate, distinct, and different products with separate, distinct and different characteristics and qualities. Respondents further state that the facts in this respect are set forth more in detail in Paragraphs 6, 7 and 8 hereof.

The Respondents deny that the Sherwin-Williams customers who sell at retail are competitively engaged locally except as they may sell to customers outside of their immediate trading centers.

The Respondents admit that Sherwin-Williams customers are sometimes competitively engaged locally in competition with the dealers who sell the products of Lowe Brothers and/or Lucas, and retailers who sell the products of the Respondents are almost uniformly competitively engaged locally with the retail customers of the competitors of the Respondents, said resales taking place in every state in the United States and the District of Columbia.

PARAGRAPH TEN: The Respondents admit all of Paragraph Ten of the complaint with the exception of the last two paragraphs thereof, except the allegation that discounts have depended either upon the total volume purchased by one customer during a specified period or upon the quantity purchased by one customer at and for shipment at one time. The Respondents state that discounts have been dependent either upon the total volume of purchases within a specified period or upon the quantity purchased by one customer by a single order, the simultaneous shipment under one order not being an essential factor in determining the discount, except as to carload and truck load shipments.

Respondents deny that on or about September 1, 1939, the Sherwin-Williams Company altered the 1938 plan described in Paragraph Ten of the complaint and states the facts to be, that on or within a short time after September 1, 1939, each of the respondents abandoned the 1938 plan described in Paragraph Ten of the complaint and that Sherwin-Williams adopted the 1939 plan as set forth in the next to the last paragraph of Paragraph Ten of the complaint. Lowe Brothers adopted the said 1939 plan, except that in place of the discounts as set forth, the discounts allowed by Lowe Brothers were 5% on purchases of less than $500.00 during one year and 10% to customers purchasing more than $500.00 worth of products during one year and 10% and 5% on purchases of carload or truck load quantities shipped direct from factory to purchaser.

Lucas adopted the said 1939 plan except that the discounts allowed by Lucas were based upon three different groupings of products, as follows: On group 1, discounts were 10% and 10% to customers purchasing less than $500.00 worth of its products during one year, and 10%, 10% and 5% to customers purchasing more than $500.00 worth of its products during one year, and 10%, 10%, 5% and 5% on carload and truck load shipments direct from factory to purchaser. On group 2 products the discounts were 5% to customers purchasing less than $500.00 worth of its products during one year, and 5% - 5% to customers purchasing more than $500.00 worth of its products during one year, with an additional 5% on direct carload and truck load shipments. On group 3 products there are no discounts whatsoever.

Respondents deny the allegation that "whether a particular customer is entitled to receive the 5% or the 5% - 5% discount is determined by averaging his purchases of such items over the three year period immediately preceding the inauguration of the 1939 plan" and state the fact to be as follows: Sherwin-Williams, except in case of such purchases that are so large that it is known that their requirements will be far in excess of $500.00 a year, require an executed contract by the customer that he will purchase products of the manufacturer in the amount of $500.00 or more during the course of the year. In the case of Lucas, discounts are granted upon the basis of the total of the preceding year purchases. In the case of Lowe Brothers, discounts are based upon average purchases over the past three years; but as soon as that average falls below $500.00, the classification is immediately changed to eliminate the discounts to which a customer purchasing over $500.00 is entitled.

Without knowing what is meant by the last paragraph of Paragraph Ten of the complaint, respondents neither admit nor deny the allegations thereof; and state the facts to be, that under the 1938 plan and during the times when it was in effect, it was the general policy and practice of Sherwin-Williams to sell its trade sale line products to its dealers and Sherwin-Williams has sold such products to such dealers generally at its dealers' list prices less whatever discounts may have been applicable under the 1938 plan. That it is the general policy and practice of Sherwin-Williams Company under the 1939 plan and has been such policy since September 1, 1939 to sell its trade sale line paint products to its dealers and Sherwin-Williams has since September 1, 1939 sold and is now selling such products to such dealers generally at its dealers' list prices less whatever discounts are applicable under the 1939 plan.

PARAGRAPH ELEVEN: Respondents admit the allegations of Paragraph Eleven of the complaint, except in so far as those allegations may import that the 1938 plan is still in effect as to Lowe Brothers and state the fact to be that shortly after September 1, 1939 Lowe Brothers abandoned the 1938 plan and adopted the 1939 plan as set forth in Paragraph Ten hereof.

PARAGRAPH TWELVE: Respondents admit the allegations of Paragraph Twelve of the complaint except in so far as they may import that the 1938 plan is still in effect with Lucas and state the facts to be that shortly after September 1, 1939, Lucas abandoned the 1938 plan and adopted the 1939 plan as set forth in Paragraph Ten hereof.

PARAGRAPH THIRTEEN: Respondents deny the allegations of Paragraph Thirteen of the complaint, except in so far as those allegations are admitted elsewhere in this answer.

PARAGRAPH FOURTEEN: The Respondents deny the allegations of Paragraph Fourteen, except as hereinafter admitted in this paragraph of the answer, and state the facts to be, that for the purpose of granting and allowing the quantity discounts under the respective 1938 plans, the respondents have all maintained the policy of granting discounts to all purchasers on the basis of the quantity of the single order, regardless of whether or not the purchaser was a chain lumber yard and regardless of whether or not the products so purchased were intended for resale by more than one yard or store of the chain lumber yard and upon request granted the customer the privilege of splitting shipments under the order to varied locations. As a matter of consistent policy, the same privilege was available to every customer of the respondents who could classify as a single purchaser, that is, who constituted an individual partnership or corporation. With respect to certain chain lumber yards Sherwin-Williams granted and allowed a flat 10% discount off dealers' list prices on all purchases regardless of size. In all such instances such discounts were allowed to meet the competition of manufacturers of paint and paint products other than the respondents herein who had offered as low or lower prices on dealer trade sales line products as were represented by 10% off Sherwin-Williams dealers' lists. The said discounts do not have the effect of substantially lessening competition or tending to create a monopoly or to injure, destroy or prevent competition with the respondents or with their said customers or with the customers of either of them. In all such instances, the said discount is no more than that which makes due allowance for difference in costs of sale and delivery resulting from the more substantial quantities of products purchased and delivered to such purchasers.

PARAGRAPH FIFTEEN: Respondents admit the allegations of Paragraph Fifteen, except as hereinafter qualified. The practice referred to was employed by Sherwin-Williams only in the metropolitan area of New York City and not elsewhere in the United States. It was available to all distributor and dealer customers in that area on the same basis. Except in cases where the discount resulting from the said privilege of accumulating orders amounted to a flat 10% discount, no flat 10% discount was granted to distributors and dealers in that area.

PARAGRAPH SIXTEEN: Respondents deny the allegation contained in the first sentence of Paragraph Sixteen of the complaint. Respondents admit the allegations of the remainder of Paragraph Sixteen of the complaint with the following qualifications:

The discount granted to Cleveland Builders Supply Company was not a "carload discount". The said discount was allowed to Cleveland Builders Supply Company because of the exceptional situation of the purchaser in having the warehouse of Lowe Brothers located on the premises of the purchaser. The discount was arrived at on the basis that a purchaser of the quantities customarily purchased by Cleveland Builders Supply Company would ordinarily purchase 50% in carload and the remaining 50% in 84 gallon or greater L.C.L. quantities. The Respondents deny that Cleveland Builders is in competition in Cleveland and environs with other customers of Lowe Brothers. There are many paint manufacturers who sell in the Cleveland area direct to painters, painting contractors and maintenance account and/or to dealers who resell to painters, painting contractors and maintenance accounts at prices which could only be met by Cleveland Builders in the sale of Lowe Brothers' products when and if the prices of Lowe Brothers to Cleveland Builders made due allowance for quantities customarily purchased by Cleveland Builders at a discount based upon the assumption that parts of such purchases were in carload quantities. Respondents state that the said discount is justified as making only due allowance for difference in cost of sale and delivery; and that the said price was made in good faith to meet equally low prices of competitors available to the purchaser.

PARAGRAPH SEVENTEEN: Respondents deny the allegations of the first paragraph of Paragraph Seventeen of the complaint except to the extent admitted in the following. All of the respondents under both the 1938 plans and the 1939 plans have regularly and customarily allowed jobbers or wholesalers discounts to customers who could qualify as jobbers, wholesalers or distributors. It is the policy and practice of all of the respondents to allow such discounts to jobbers and distributors only to the extent that such dealers perform the functions of jobbers or distributors. It is not the policy or general practice of Sherwin-Williams to grant or allow functional discounts on paint products which are resold by distributors or dealers (1) directly to regular or occasional consumers, or (2) indirectly through retail branches owned or controlled by the distributors or dealers to regular or occasional consumers. This is also true of Lucas and Lowe Brothers, except that in the case of Lucas and Lowe Brothers they have been compelled in some instances by force of competition to grant a wholesale discount to distributors who resell to painters, painting contractors and maintenance accounts, to the extent of their purchases for such resale. It is the common practice among many paint manufacturers to sell direct to painters, painting contractors and maintenance accounts at prices which are as low or lower than respondents' dealer prices; and it is the common practice among many paint manufacturers to sell to dealers who resell to painters, painting contractors and maintenance accounts at prices based upon the premise that such sales by dealers to painters, painting contractors and maintenance accounts are sales at wholesale. The said prices of Lucas and Lowe Brothers to dealers who resell to painters, painting contractors and maintenance accounts do not have the effect of substantially lessening competition or tending to create a monopoly or to injure, destroy or prevent competition with respondents, their said customers or with the customers of the respondents or customers of said customers of respondents. The said prices made by Lowe Brothers and Lucas were made in good faith to meet equally low prices of competitors.

The Respondents admit the allegation of the second paragraph of Paragraph Seventeen of the complaint and state in addition thereto that in instances where the alleged functional discounts were granted that such are justified as representing savings in costs of sale and delivery, due to the fact that Sherwin-Williams in such instances does not perform its usual sales promotional work, or provide its usual warehouse and distribution facilities, but leaves that function to be performed by the account receiving the functional discount referred to in the complaint, and it is for the services herein above mentioned and resulting savings in cost of selling that the additional discount is granted.

The Respondents admit the allegations of the third paragraph of Paragraph Seventeen of the complaint, except that it is denied that the functional discount of Lowe Brothers is or has been based upon the gross dollar value under the 1939 plan since its adoption and state the fact to be, that since the adoption of the 1939 plan the functional discount granted by Lowe Brothers has been on the net dollar value, and based upon a maximum functional allowance of 17%.

The Respondents admit the allegations of Paragraph Seventeen A of the complaint and state that the said differential based upon quantity between the price paid by some retailers and the price paid by others who conduct both a wholesale and a retail business, constitutes a differential which makes only due allowance for differences in cost of sale and delivery of the products so sold. Respondents further state that any discrimination which may result from this practice is so infinitesimal and inconsiderable as not to substantially lessen competition or to injure, destroy or prevent competition, with the respondents, their customers or with customers of either of them.

The Respondents deny the allegations of Paragraph Seventeen B of the complaint except as hereinafter admitted, and state the facts to be:

The large purchasers of paint products for resale to painters, painting contractors, building contractors, and maintenance accounts customarily buy trade sales line paint products at wholesale, that is, at prices ranging from 10% to 20% below the occasional consumer's price. There are many paint manufacturers who specialize in sales direct to this trade. The force of that competition has made it impossible to sell substantial quantities of trade sales line paint products to such purchasers unless discounts are granted which will reduce the price level to the competitive price customarily available to that line of trade in the area in which the price is made.

1. Lowe Brothers has granted and allowed under the 1938 plan to Cleveland Builders in addition to the 12% discount described in Paragraph Sixteen hereof an additional discount of 7½% based upon a certified statement from Cleveland Builders Supply Company that 50% of the purchases were sold at wholesale.

Under the 1939 plan Lowe Brothers has granted and allowed and now grants and allows to Cleveland Builders a discount equivalent to that granted under the 1938 plan, but arrived at by a different method. There are many paint manufacturers who sell in the Cleveland area direct to painters, painting contractors and maintenance accounts and to dealers for resale to such accounts, at prices which could only be met by Cleveland Builders in the sale of Lowe Brothers' products when and if the prices of Lowe Brothers to Cleveland Builders made due allowance for the assumption that sales to painters, painting contractors and maintenance accounts are sales at wholesale as well as that parts of such purchases were in carload quantities as set forth in Paragraph Sixteen hereof. Cleveland Builders do not substantially compete with any other customer of Lowe Brothers who sells at retail; and the effect of the said discounts to Cleveland Builders does not substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition with Lowe Brothers or Cleveland Builders or the customers of either of them. The said discount granted and allowed by Lowe Brothers has resulted in sales to Cleveland Builders at prices made in good faith to meet equally low prices of competitors.

2. Respondents state that the allegations of Paragraph Seventeen B (2) are true and further state that the Spanos Paint Store is of the class of trade who customarily buys at wholesale, and that said discounts and the prices resulting therefrom were made in good faith to meet equally low prices of competitors, and also to enable the said Spanos Paint Store to meet the prices of his competitors who customarily purchase direct from manu-

facturers and distributors at prices as low or lower than dealer's prices.

3. The respondents admit the allegations of Paragraph Seventeen B (3) of the complaint and further state that up to August, 1937, B. Frank Shinn Paint Company purchased from Lucas at the regular dealer's discount. The Shinn Company had been a very substantial account of Lucas. In 1937 the Shinn Company discontinued buying from Lucas, except occasional insignificant purchases and purchased a full line of paint products from a competitor of Lucas, which competitor granted Shinn Company net prices equal to or below Lucas jobber prices; and since that time Lucas has offered the price resulting from the discounts as set forth in Paragraph Seventeen B (3) to meet the price and services of the said competitor, but has been unsuccessful up to this time in re-establishing the account as a full line dealer. The purchases of Lucas products by Shinn Company since 1937 have been too small to substantially lessen competition, tend to create a monopoly, or to injure, destroy or prevent competition with Lucas or Shinn Company, or with the customers of either of them.

The Respondents are without knowledge of the allegations of Paragraph Seventeen C of the complaint, and therefore deny the said allegations. Respondents further state that they do not make any attempt to dictate or maintain the prices at which their jobbers resell the products sold to them.

The Waite Hardware Company is a jobber and as such is granted a jobber's discount based upon the proportion of business which constitutes resales to dealers. Comparable discounts are granted to all other jobbers on the same ratio basis.

The Respondents, being without knowledge in respect to most of the allegations of Paragraph Seventeen D, deny the allegations thereof, except as hereinafter admitted. Lucas has sold and does sell to all of the accounts mentioned in Paragraph Seventeen D. The said accounts are all classified as jobbers and receive jobber's discounts. They perform all of the functions customarily performed by jobbers; and thus save the expense of the performance of those functions which would have to be borne by Lucas in the case of sales direct to retail dealer accounts. The said accounts are generally classified as jobbers in the trades in which they are engaged, and jobber's discounts are generally available to all of them in all of the lines handled by them. Lucas does not control or attempt to control the prices at which jobbers resell the products of Lucas. The prices made to the said accounts have been made in good faith to meet equally low prices of competitors.

The Respondents deny the allegations of Paragraph Seventeen E of the complaint.

PARAGRAPH EIGHTEEN: The Respondents deny the allegations of Paragraph Eighteen of the complaint.

FIRST SPECIAL DEFENSE

Further answering, and for first special defense, Respondents allege that each of the products of each of the Respondents designed, manufactured and sold for similar consumption uses are different and distinct products. The buyers of paints have been accustomed to purchasing the products of each of the respondents as different and distinct lines of merchandise, distinguished in each case by its own trade-marks, trade names and labels. The trade and consumer following of each of the respondents regard the respective products as separate, distinct and different products with different characteristics and qualities. The reduction of the prices on the products of one of the respondents has no different effect on competition of jobbers or dealers handling the products of the other respondents than a price reduction by any competing manufacturer of high quality paints. A reduction in price by one respondent to a jobber, dealer or other buyer in a community where there is but one such buyer of its products cannot result in injuring competition with buyers of the products of one or more of the other respondents in the same community within the meaning of Section 2 (a) of the Robinson-Patman Act.

SECOND SPECIAL DEFENSE

Further answering, and for second special defense, Respondents allege that whereas Section 2 (a) of the Robinson-Patman Act purports to make unlawful a discrimination in price in the course of interstate commerce where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, prevent or destroy competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them, yet Section 2 (b) of said Act authorizes the Federal Trade Commission to issue an order to cease and desist from a discrimination in price upon the proof of one element only of the purported offense, to wit, discrimination in price; that Sections 2 (a) and 2 (b) of said Act, therefore, in effect prohibit a price discrimination irrespective of its purpose or effect and irrespective of whether it directly affects interstate commerce; hence said sections are unconstitutional and void because they deprive Respondents of their liberty and property without due process of law contrary to the Fifth Amendment to the Constitution of the United States and because they exceed the power of Congress to regulate commerce between and among the states.

THIRD SPECIAL DEFENSE

Further answering, and for third special defense, Respondents allege that the Federal Trade Commission has no power to issue a cease and desist order against the Respondents upon the basis of the complaint issued herein, for Section 2 (b) of the Robinson-Patman Act is unconstitutional and void by purporting to authorize the Commission to issue such an order upon proof only of a discrimination in price irrespective of the purpose or effect of such discrimination and irrespective of whether it directly affects interstate commerce; that there is no reasonable relation between a mere discrimination in price within the terms of Section 2 (a) of the Act and any constitutional object sought to be attained by the enactment of said Act; that Section 2 (b) of said Act accordingly deprives the Respondent of its liberty and property without due process of law contrary to the Fifth Amendment to the Constitution of the United States, and exceeds the power of Congress to regulate commerce between and among the states.

WHEREFORE, Respondents pray that an order be entered dismissing the above-entitled complaint.

DAVIES, RICHBERG, BEEBE, BUSICK & RICHARDSON

Donald R. Richberg
DONALD R. RICHBERG

Raymond N. Beebe
RAYMOND N. BEEBE

Adrien F. Busick
ADRIEN F. BUSICK

T. J. McDowell
T. J. McDOWELL

Attorneys for Respondents