UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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| In the Matter of<br><br>THE SHERWIN-WILLIAMS CO.,<br>a corporation,<br>THE LOWE BROTHERS COMPANY,<br>a corporation, and<br>JOHN LUCAS & COMPANY, INC.,<br>a corporation. | DOCKET NO. 3965. |

STIPULATION AS TO CERTAIN OF THE FACTS

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914, The Clayton Act, as amended by an Act of Congress approved June 19, 1936, The Robinson-Patman Act, (U.S.C., Title 15, Sec. 13), the Federal Trade Commission, on the 8th day of December, 1939, issued its complaint against the above-named respondents and caused such complaint to be served as required by law, charging that said respondents were and had been discriminating in price between different purchasers from them of commodities of like grade and quality in the course of interstate commerce, in violation of the provisions of subsection (a) of Section 2 of the said Act, as amended. The parties to this proceeding being desirous of saving a substantial portion of the time and expense incident to the taking of testimony and there being no disagreements between them as to some of the facts;

IT IS HEREBY STIPULATED AND AGREED, by and between W. T. Kelley, Chief Counsel for the Federal Trade Commission and Davies, Richberg, Beebe, Busick and Richardson, attorneys for the respondents, that, subject to the approval of the Commission, the following stipulated facts, together with the exhibits made a part hereof, shall constitute a part of the record herein.

DEFINITIONS

Except where the context hereof requires another or different meaning, the abbreviations and terms used herein, for the purposes hereof, shall be understood to have the same meanings as such abbreviations and terms were defined to have in Paragraph Four of the complaint herein. In the definition of "Sherwin-Williams", however, the words "parent company only" shall be deemed to have been inserted in parenthesis for the purposes hereof between "Co.," and "solely".

TENSE

Except where the context hereof indicates the contrary, the use of the present tense herein shall be deemed to include also the past tense.

EXHIBITS

All exhibits referred to herein shall be deemed to be attached hereto and made a part hereof.

PARTIAL STATEMENT OF FACTS

PARAGRAPH ONE: The Sherwin-Williams Co. is a corporation organized and existing under the laws of the State of Ohio and has its principal executive office and place of business at 1200 Midland Building, Cleveland, Ohio.

Commission Exhibit A-1 is a certified copy of the certificate of incorporation of the Sherwin-Williams Co. and all amendments thereof to the date hereof. Commission Exhibit A-2 is a true and correct copy of the by-laws of The Sherwin-Williams Co. and contains all amendments thereof to the date hereof.

The Sherwin-Williams Co. has had the same officers and directors from on or about January 1, 1938 to the date hereof, except that George T. Bishop is now deceased and his successor has not as yet been elected. The names of these officers and directors are as follows:

| DIRECTORS | OFFICERS | |
|---|---|---|
| A. D. Baldwin | Geo. A. Martin | President |
| George T. Bishop | H. D. Whittlesey | First Vice President |
| Harris Creech | H. J. Hain | Vice President |
| C. S. Eaton | A. W. Steudel | Vice President |
| H. J. Hain | N. E. Van Stone | Vice President |
| C. P. Jarden | T. G. Murphey | Secretary |
| D. A. Kohr | L. H. Schroeder | Treasurer |
| Geo. A. Martin | | |
| Z. E. Martin | | |
| A. W. Steudel | | |
| H. D. Whittlesey | | |
| L. W. Wolcott | | |

PARAGRAPH TWO: The Lowe Brothers Company is a corporation organized and existing under the laws of the State of Ohio and has its principal executive office and place of business at 424 East 3d Street, Dayton, Ohio.

Commission Exhibit B-1 is a certified copy of the certificate of incorporation of The Lowe Brothers Company and all amendments thereof to the date hereof. Commission Exhibit B-2 is a true and correct copy of the by-laws of The Lowe Brothers Company and contains all amendments thereof to the date hereof.

The Lowe Brothers Company has had the same officers and directors from on or about January 1, 1938 to the date hereof. The names of these officers and directors are as follows:

| DIRECTORS | OFFICERS | |
|---|---|---|
| E. W. Fasig | D. A. Kohr | President |
| D. P. Haber | A. W. Steudel | Vice President |
| H. J. Hain | C. W. Parrott | Vice President |
| D. A. Kohr | D. P. Haber | Treasurer |
| Geo. A. Martin | L. H. Schroeder | Assistant Treasurer |
| C. W. Parrott | C. W. Parrott | Secretary |
| L. H. Schroeder | T. G. Murphey | Assistant Secretary |
| A. W. Steudel | P. H. Harn | Cashier |
| H. D. Whittlesey | | |

PARAGRAPH THREE: John Lucas & Company, Inc., is a corporation organized and existing under the laws of the State of Maryland and has its principal executive office and place of business at 322 Race Street, Philadelphia, Pennsylvania.

Commission Exhibit C-1 is a certified copy of the certificate of incorporation of John Lucas & Company, Inc. and all amendments thereof to the date hereof. Commission Exhibit C-2 is a true and correct copy of the by-laws of John Lucas & Company, Inc. and contains all amendments thereof to the date hereof.

John Lucas & Company, Inc. has had the same officers and directors from on or about January 1, 1938 to the date hereof. The names of these officers and directors are as follows:

| DIRECTORS | OFFICERS | |
|---|---|---|
| Geo. A. Martin | Geo. A. Martin | President |
| A. W. Steudel | W. A. Gorrell | Vice President |
| L. H. Schroeder | H. J. Goodyear | Secretary-Treasurer |
| L. Reese | H. H. Ottey | Assistant Treasurer |
| H. J. Hain | | |
| W. A. Gorrell | | |
| John Stokes Adams | | |

PARAGRAPH FOUR: The Sherwin-Williams Co. (herein sometimes referred to as the "parent company") owns 100% of the issued and outstanding equity stock of the following corporations (herein sometimes referred to as "first degree subsidiaries"):

The Lowe Brothers Company;
John Lucas & Company, Inc.;
Acme White Lead and Color Works--of Hamtramck, Michigan;
Detroit White Lead Works--of Hamtramck, Michigan; and,
Martin Senour Company--of Chicago, Illinois,
The Sherwin-Williams Co. of California,

each of which is engaged in the manufacture, sale and distribution in commerce of trade sale and allied line paint products.

John Lucas & Company, Inc., owns 100% of the issued and outstanding equity stock of the following corporation (herein sometimes referred to as a "second degree subsidiary"):

W. W. Lawrence & Company--of Pittsburgh, Pennsylvania,

which is engaged in the manufacture, sale and distribution in commerce of trade sale and allied line paint products.

Acme White Lead and Color Works owns 100% of the issued and outstanding equity stock and controls the policies and activities of the following corporations (herein sometimes referred to as "second degree subsidiaries"):

The Peninsular Paint and Varnish Company--of Hamtramck, Michigan; and
The Lincoln Paint and Color Company--of Lincoln, Nebraska,

each of which is engaged in the manufacture, sale and distribution in commerce of trade sale and allied line paint products.

Each of the aforesaid first and second degree subsidiary corporations, with the exceptions of Peninsular Paint and Varnish Company and Lincoln Paint and Color Company, which are operated as departments or divisions of Acme White Lead and Color Works, manufactures and operates generally as a separate and distinct operating company with a management and personnel, which is not the same as the management and personnel, either of the parent company or of any of the other subsidiaries. Each of said subsidiaries, however, has certain officers and directors who are also either officers or directors, or both, either of the parent company or of one or more of the other subsidiaries or of both the parent company and of one or more of the other subsidiaries. (Paragraphs One, Two and Three hereof disclose the common officer and director situation as to the parent company, Lowe Brothers and Lucas.)

PARAGRAPH FIVE: For many years prior to and since June 19, 1936, Sherwin-Williams has been and now is engaged in the business of manufacturing, selling and distributing (1) basic raw materials used in the production of paint, varnishes and lacquers, (2) specification paint, and (3) paint products. In the course and conduct of its business Sherwin-Williams has been and now is manufacturing said paint products principally at its factories which are located in Cleveland, Ohio; Chicago, Illinois; Newark, New Jersey; and Oakland, California. Sherwin-Williams maintains and operates approximately forty warehouses situated in as many cities in over twenty-five states of the United States. Sherwin-Williams, for convenience in selling and delivering its merchandise, maintains and operates district offices or sales division offices in over one-half of the cities in which its warehouses are located, and, in addition, maintains and operates a sales office in Washington, D.C., where it has no warehouse. Sherwin-Williams employs several hundred salesmen who call regularly on all classes of customers. The annual net sales of Sherwin-Williams in the United States of trade sale line paint products alone total in excess of $16,000,000. Such products are sold and distributed through (1) over 6300 authorized dealers, a number of whom act as distributors with respect to a portion of such paint products purchased by them, (2) over 80 chain lumber yards, (3) approximately 120 wholly owned retail stores, and (4) other miscellaneous mediums.

Commission Exhibit A-3 discloses the locations of the district offices, sales division offices and warehouses of Sherwin-Williams as of August, 1938. Sherwin-Williams maintains and operates warehouses at each one of the district offices and sales division offices set forth in Exhibit A-3.

Commission Exhibit A-4 discloses the locations, as of August, 1938, of the Sherwin-Williams wholly owned retail stores.

PARAGRAPH SIX: For many years prior to and since June 19, 1936, Lowe Brothers has been and now is engaged in the business of manufacturing, selling and distributing specification paint and paint products. In the course and conduct of its business, Lowe Brothers has been and now is manufacturing paint products at its factory which is located at Dayton, Ohio; Lowe Brothers maintains and operates seventeen warehouses located in the following cities: Dayton, Ohio; Chicago, Illinois; Kansas City, Missouri; Atlanta, Georgia; Boston, Massachusetts; Jersey City, New Jersey; Cleveland and Cincinnati, Ohio; Omaha, Nebraska; Minneapolis, Minnesota; Indianapolis, Indiana; Memphis, Tennessee; Jacksonville, Florida; Fort Worth, San Antonio and Houston, Texas, and New Orleans, Louisiana. Lowe Brothers, for convenience in selling and delivering its merchandise, maintains and operates district offices in the first six of the herein named cities in which its warehouses are located. Lowe Brothers employs a substantial number of salesmen, who call regularly on all classes of customers. The annual net sales of Lowe Brothers in the United States of trade sale line paint products alone total over $4,000,000. Such products are sold and distributed through (1) over 1500 authorized dealers, (2) approximately 70 distributors, and (3) approximately 100 chain lumber yards, (4) 11 wholly owned retail stores, and (5) other miscellaneous mediums.

Commission Exhibit B-3 is a map showing, as of August, 1938, the location of the home office and factory of Lowe Brothers, and the location of its district offices, warehouses and retail stores.

PARAGRAPH SEVEN: For many years prior to and since June 19, 1936, Lucas has been and now is engaged in the business of manufacturing, selling and distributing specification paint and paint products. In the course and conduct of its business, Lucas has been and now is manufacturing said paint products at its principal manufacturing plant which is located in Gibbsboro, New Jersey. Lucas maintains and operates seven warehouses located in Philadelphia, Pa.; Boston, Mass.; New York City; Chicago, Ill.; Albany, N. Y.; Pittsburgh, Pa.; and Richmond, Va. Lucas, for convenience in selling and delivering its merchandise, maintains and operates sales offices in the first four of the herein named cities in which its warehouses are located. Lucas employs a substantial number of salesmen who call regularly on all classes of customers. The annual net sales of Lucas in the United States of trade sale line paint products alone total approximately $2,000,000. Such products are sold and distributed through (1) approximately 1500 authorized dealers, (2) approximately 100 distributors, (3) 3 chain lumber yards, (4) 10 wholly owned retail stores, and (5) other miscellaneous mediums.

Commission Exhibit C-3 discloses, as of August, 1938, the locations of the sales offices, warehouses and retail stores of Lucas.

PARAGRAPH EIGHT: Each trade sale line paint product manufactured by Sherwin-Williams conforms as nearly as possible to the standard which has been determined upon by Sherwin-Williams for that particular product. As to any particular trade sale line paint product of Sherwin-Williams, the entire output of such product is manufactured according to the same formulae, the processes of manufacture and the finished products are substantially identical and the entire output thereof is of like grade and quality. 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.

Each trade sale line paint product manufactured by Lowe Brothers conforms as nearly as possible to the standard which has been determined upon for that particular product. As to any particular trade sale line paint product of Lowe Brothers, the entire output of such product is manufactured according to the same formulae, the processes of manufacture and the finished products are substantially identical and the entire output thereof is of like grade and quality. Lowe Brothers 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.

Each trade sale line paint product manufactured by Lucas conforms as nearly as possible to the standard which has been determined upon for that particular product. As to any particular trade sale line paint product of Lucas, the entire output of such product is manufactured according to the same formulae, the processes of manufacture and the finished products are substantially identical and the entire output thereof is of like grade and quality. Lucas 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.

Each of the manufacturers manufactures and sells trade sale line paint products designed for like or similar purposes. The trade sale line products of each of the manufacturers are competitive with the comparable trade sale line products of each of the other manufacturers and a dealer selling the trade sale line products of one of the manufacturers in a given trading area often is in competition with a dealer selling the trade sale line products of another of said manufacturers.

PARAGRAPH NINE: In the course and conduct of their respective businesses as aforesaid, the manufacturers transport or cause to be transported some of their paint products, when manufactured, from their respective factories aforesaid to their respective warehouses which are located as hereinbefore set forth, in various states of the United States, and oftentimes in states other than the states in which their respective factories are located and in which such shipments originated, and transport or cause to be transported their paint products from their respective factories aforesaid or from their respective warehouses aforesaid to the purchasers thereof located in the several states of the United States and in the District of Columbia, other than the states in which their respective factories are located, and there is and has been, at all times herein mentioned, a continuous current of trade and commerce in said paint products between the respective factories, warehouses and distributing points of said manufacturers and purchasers from each of them located in many and, as to Sherwin-Williams, in all of the states of the United States and the District of Columbia.

Sherwin-Williams advertises its paint products nationally; Lowe Brothers and Lucas advertise their products in a more limited manner. As a result of said advertising, Sherwin-Williams has created a public demand for its products throughout all of the states of the United States and in the District of Columbia, and each of the other manufacturers has created a public demand for its products in several of the states of the United States and, in some instances, in the

District of Columbia.

The manufacturers sell and distribute their respective paint products for use, consumption or resale within the United States and in the District of Columbia, in the same states and places as and in competition with various other sellers of paint products. Many of said competing sellers distribute their products nationally or in a number of the states of the United States, as do the manufacturers, while many of said competing sellers distribute their paint products to customers located almost exclusively within the trading area or areas embraced within or adjacent to the trading areas in which their factories are located.

The Sherwin-Williams customers who sell at retail are occasionally competitively engaged with each other locally, are oftentimes competitively engaged locally with the customers of Lowe Brothers and/or of Lucas and/or of one or more of the other subsidiaries of The Sherwin-Williams Co. who sell at retail and are almost uniformly competitively engaged locally with the retailer customers of the competitors of The Sherwin-Williams Co., in the resale of said products, said resales taking place in every state of the United States and in the District of Columbia. A similar situation exists as to the retailer customers of Lowe Brothers and as to the retailer customers of Lucas.

PARAGRAPH TEN: Sherwin-Williams, for the purpose of selling and distributing its paint products, has divided the territorial United States into six zones. Commission Exhibit A-5 is a map, in colors, which discloses, as of August, 1938, the territory embraced within each of the six zones. For each zone, Sherwin-Williams has published the prices that have been applicable from time to time, on sales of its paint products to dealers in that zone (hereinafter referred to as "dealers list prices" and whenever this term is used with respect to Sherwin-Williams, it shall be understood to refer to that one of the six different dealers list prices issued by Sherwin-Williams that shall be in effect at the time and that shall be applicable to the particular situation or situations under consideration), the differentials in prices between the zones being sufficient, as a rule, to compensate Sherwin-Williams for the differences in the average cost of freight between its factories and its warehouses in the various zones. Sherwin-Williams, as a rule, ships its paint products to its customers f.o.b. the warehouse nearest the customer. In all cases where the customer buys a carload or truckload of 20,000 pounds or more and receives shipment direct from the factory, freight is allowed.

The dealers list prices herein mentioned, so far as applicable to trade sale items, since June 19, 1936, have been subject to various discounts, depending either upon the total volume of Sherwin-Williams paint products, or certain of them, purchased by one customer during a specified period or upon the single order quantities purchased by, and shipped to, one customer. Under the "per order" discount plans, a customer was not deprived of whatever discount he was entitled to receive upon his single order purchase, although Sherwin-Williams, because of circumstances beyond the control of the customer, had to fill his single order by two or more shipments.

On or about January 3, 1938, Sherwin-Williams, and shortly thereafter, Lowe Brothers and Lucas commenced to operate under a discount plan (hereinafter referred to as the "1938 Plan") which was operative from that date until on or about September 1, 1939. The 1938 Plan, briefly described, was as follows:

> To any customer who purchased in one order for shipment at one time less than 24 gallons 1/ of trade sale line paint products, no discount was granted from the dealers list prices (except a 2% discount for cash within 10 days from date of invoice); to any customer who purchased such paint products in one order for shipment at one time to an aggregate of 24 gallons or more, the following scale of discounts applied:

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| 24 to 48 gallons | 6% off dealers list on entire order of such items. |
| 48 to 84 gallons | 8% off dealers list on entire order of such items. |

1/ Products packaged and priced by the pound were calculated at the rate of 1 gallon to every 12 pounds.

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| 84 gallons and over | 10% off dealers list on entire order of such items. |
| Carloads and Truckloads (from factory) | 14% off dealers list on entire order of such items. |

The aforementioned discount was shown on the face of the customer's invoice and the customer was billed for the net price, after the deduction of the per order discount.

On or about September 1, 1939, Sherwin-Williams, and shortly thereafter, Lowe Brothers and Lucas, ceased to operate under the 1938 Plan herein described and commenced to operate under a discount plan (hereinafter referred to as the "1939 Plan"), pursuant to which discounts from dealers list prices are dependent upon the annual volume of trade sale items purchased by a customer, with one exception hereinafter noted. Under the 1939 plan, as applied by Sherwin-Williams, a customer purchasing less than $500 worth of such products during a year receives a 5% discount from dealers list prices. A customer purchasing more than $500 worth of such products during one year receives an additional 5% discount. Such a customer pays 95% of dealers list prices, less 5% of such prices as so reduced. Such discounts are given on the face of the customer's invoice. Whether a particular customer is entitled to receive the 5% or the 5% - 5% discount is determined by ascertaining his purchases of trade sale items in prior years. Unless it appears that the customer's purchases of such products will be far in excess of $500 a year, Sherwin-Williams requires an executed contract by the customer that he will purchase from Sherwin-Williams trade sale line products in the amount of $500 or more during the course of the year. A customer purchasing in carloads or truckloads and receiving shipment direct from the factory receives a further 5% discount. As to such a customer, the present base price of 95% of dealers list prices is reduced by 5% thereof and by a further 5% of the net figure thus obtained, to arrive at the net price which the carload or truckload customer pays.

Under the 1938 Plan and during all the time it was in effect, it was the general policy and practice of

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Sherwin-Williams to sell its trade sale line paint products to its dealers and Sherwin-Williams sold such products to such dealers, generally at its dealers list prices, less whatever discounts may have been applicable under the 1938 Plan. It is, and, since September 1, 1939, has been, the general policy and practice of Sherwin-Williams to sell its trade sale line paint products to its dealers and Sherwin-Williams has, since September 1, 1939, been selling and is now selling such products to such dealers, generally at its dealers list prices, less whatever discounts are applicable under the 1939 Plan.

Commission Exhibits A-6 to A-9, inclusive, are Sherwin-Williams Price Lists, #76, effective January 3, 1938, and contain dealers list prices for the first four zones for the period the 1938 Plan was in effect. Commission Exhibit A-10 sets forth the Discount Schedule under the 1938 Plan which was applicable to said Price Lists #76.

Commission Exhibits A-11 to A-14, inclusive, are Sherwin-Williams Price Lists, #77, effective September 1, 1939, and contain dealers list prices for the first four zones for the period during which the 1939 Plan has been in effect. Commission Exhibits A-15 to A-16, inclusive, set forth the discounts under the 1939 Plan which are applicable to said Price Lists #77.

PARAGRAPH ELEVEN: The Lowe Brothers methods of selling and distributing its paint products, so far as concerns the establishment of zones, the publishing of its own dealers list prices for each zone, the collection of freight charges and the applicability of the 1938 and 1939 Plans to such dealers list prices, have been and are substantially the same as those of Sherwin-Williams, with the following exceptions:

1. Lowe Brothers, in shipping its paint products to its customers f.o.b. its warehouse nearest the customer, makes it a practice to equalize the freight charges with the freight charges applicable from that warehouse of a seller (or of another of said manufacturers or of one of the other subsidiaries of The Sherwin-Williams Co.) which is nearest to the customer.

2. Under variations of the 1939 Plan applicable to Lowe Brothers,

(a) A customer purchasing more than $500 worth of trade sale line paint products during a year receives a 10% discount from dealers list prices instead of a 5% - 5% discount;

(b) A customer purchasing in carloads or truckloads and receiving shipment direct from the factory receives a 15% discount instead of a 5%-5%-5% discount; and

(c) Whether a particular customer is entitled to receive the 10% discount is determined by averaging his purchases of trade sale items over a three-year period, but as soon as that average falls below $500, the classification of such customer is changed to eliminate the discount to which a customer purchasing over $500 is entitled.

Under the 1938 Plan and during all the time it was in effect, it was the general policy and practice of Lowe Brothers to sell its trade sale line paint products to its dealers and Lowe Brothers sold such products to such dealers, generally at its dealers list prices, less whatever discounts may have been applicable under the 1938 Plan. It is, and, since on or about September 15, 1939, has been, the general policy and practice of Lowe Brothers to sell its trade sale line paint products to its dealers and Lowe Brothers, since on or about September 15, 1939, has been selling and is now selling such products to such dealers, generally at its dealers list prices, less whatever discounts are applicable under the 1939 Plan.

Commission Exhibits B-4 to B-7, inclusive, are Lowe Brothers Price Lists, #31, effective January 15, 1938, and contain its dealers list prices for the first four zones for the period the 1938 Plan was in effect and the discounts applicable thereto. Commission Exhibits B-8 and B-9, inclusive, are Lowe Brothers Price Lists, #31M, effective July 1, 1938, and contain its dealers list prices for the last two zones for the period the 1938 Plan was in effect and the discounts applicable thereto. Commission Exhibits B-10 to B-13, inclusive, are Lowe Brothers Price Lists #32, effective September 15, 1939, and contain dealers list prices for the first four zones for the period during which the 1939 Plan has been in effect. Commission Exhibits B-14 and B-15, inclusive, are covering letters which Lowe Brothers sent to all of its dealers in the under and over $500 a year class, respectively, at the same time that Price Lists #32 were sent to them, on or about September 15, 1939.

PARAGRAPH TWELVE: The Lucas methods of selling and distributing its paint products, so far as concerns the establishment of zones, the publishing of its own dealers list prices for each zone, the collection of freight charges and the applicability of the 1938 and 1939 Plans to such dealers list prices, have been and are substantially the same as those of Sherwin-Williams, with the following exceptions:

1. The territorial United States has been divided into 4 instead of 6 zones;

2. Lucas allows freight to destination. The paint products are shipped f.o.b. the warehouse, but the customer is permitted to deduct freight from the net amount of the invoice; and

3. Under a variation of the 1938 Plan applicable to Lucas, customers purchasing in carloads and truckloads of 20,000 pounds or more direct from the factory were allowed a 12% rather than a 14% discount from dealers list prices.

4. Under variations of the 1939 Plan applicable to Lucas,

   (a) The discounts allowed by Lucas are based upon three different groupings of products, as follows: On group 1, discounts are 10% - 10% to customers purchasing less than $500 worth of such products during one year, and 10% - 10% - 5% to customers purchasing more than $500 worth of such products during one year, and 10% - 10% - 5% - 5% on carload and truckload shipments of such products direct from the factory to the purchaser. On group 2 products, the discounts are 5% to customers purchasing less than $500 worth of such products during one year and 5% - 5% to customers purchasing more than $500 worth of such products during one year with an additional 5% on direct carload and truckload shipments of such products. On group 3 products, there are no discounts whatsoever;

(b) Discounts are granted upon the basis of the total purchases of trade sale items by a customer during the preceding year.

Under the 1938 Plan and during all the time it was in effect, it was the general policy and practice of Lucas to sell its trade sale line paint products to its dealers and Lucas sold such products to such dealers, generally at its dealers list prices, less whatever discounts may have been applicable under the 1938 Plan. It is, and, since on or about September 5, 1939, has been, the general policy and practice of Lucas to sell its trade sale line paint products to its dealers, and Lucas, since on or about September 5, 1939, has been selling, and is now selling, such products to such dealers, generally at its dealers list prices, less whatever discounts are applicable under the 1939 Plan.

Commission Exhibits C-4 to C-7, inclusive, are Lucas Price Lists #22-a to 22-d, inclusive, effective January 10, 1938, and contain its dealers list prices for the four zones for the period the 1938 Plan was in effect. Commission Exhibit C-8 sets forth the discount schedule under the 1938 Plan which was applicable to said Price Lists #22-a to 22-d, inclusive. Commission Exhibits C-9 to C-12, inclusive, are Lucas Price Lists #23-a to 23-d, inclusive, effective September 5, 1939, and contain dealers list prices for the four zones for the period during which the 1939 Plan has been in effect. Commission Exhibit C-13 sets forth the discounts under the 1939 Plan which are applicable to said Price Lists #23-a to 23-d, inclusive.

PARAGRAPH THIRTEEN: The manufacturers sell their trade sale line paint products to a number of chain or line yard lumber companies. A chain lumber yard customer may operate from two to over seventy unit stores.

For the purpose of granting and allowing the quantity discounts under their respective 1938 Plans, each of the manufacturers customarily treated an order from a unit store of one of its chain lumber yard customers in the same way that it treated an order from an independent dealer. If the order was for less than 24 gallons of trade sale items, dealers list prices were charged; if for more, the discount applicable to the number of gallons ordered was granted and allowed. However, for the purpose of granting and allowing such discounts, each of the manufacturers treated all orders received at one time from the main office of a chain lumber yard as a single order, although such combined order may have called for shipments to a number of the unit stores of the chain. This privilege granted chain lumber yard customers was known as "pooling". The mechanics of ordering, invoicing, shipping and billing in a typical case of this sort may be described as follows:

Each of the unit stores of the chain that needed a supply of paint products would designate on the regular order forms of the particular manufacturer from which that chain was purchasing the amount, number, sizes, colors, etc., of the paint products desired by it, together with the name and address of the unit store. These filled in order forms were sent by the unit stores to the main office of the chain which in turn would forward a number of them at one time to the manufacturer. The manufacturer would give, to all these orders which were received at one time from one chain lumber yard customer, a single order number. This order number would then be placed by the manufacturer upon each of the order forms that had been executed by the various unit stores. The manufacturer would place after this order number the letters A, B, C, D, E, etc., to designate the different unit stores to which shipments were to be made.

Separate invoices were made out by the manufacturer to cover the paint products listed on each one of the order forms which had been executed by the various unit stores. Any particular invoice might cover only a very few gallons of trade sale line paint products, but the quantity discount granted, allowed and shown on the face of each of such invoices was that applicable to the combined gallonage of such products covered by all of the orders received from the chain lumber yard customer at one time. For example, if the pooled order totaled over 84 gallons of trade sale items, the invoice covering the ten gallon order of but one unit store would grant, allow and show on the face of such invoice a 10% discount off the manufacturer's dealers list prices.

The paint products ordered by the various unit stores through their main office were then shipped by the manufacturer to such unit stores at the various addresses which appeared on the order forms filled out by such stores. All the invoice sheets which covered all the orders of all the unit stores which had been forwarded to the manufacturer at one time by the main office of the chain lumber yard were then sent to the main office of the chain for payment. Thus, the main office of each chain received detailed information and detailed billing, regarding the separate orders of its unit stores which together made up the pooled order and regarding the individual shipments made pursuant thereto.

Commission Exhibit B-16, consisting of 54 pages, numbered 1 to 54, inclusive, contains true and correct copies of filled out order forms executed by the unit stores of four of the chain lumber yard customers of Lowe Brothers calling for shipments to one and to more than one of the unit stores thereof, invoices covering the paint products so ordered, together with certain explanatory matter. It is agreed that the evidence contained in Exhibit B-16 with respect to ordering by, invoicing, shipping to and billing chain lumber yards, in cases where the main office of the chain pooled the orders of its unit stores, is typical and representative of all the evidence that might be introduced herein with respect to the mechanics of handling the orders of all such customers by all of the manufacturers.

The pooling privilege herein described was extended by each of the manufacturers, not only to all of its chain lumber yard customers, but also to every one of its customers which owned, controlled or operated two or more stores.

Sherwin-Williams, under the 1938 Plan, granted and allowed to some of its chain lumber yard customers a flat 10% discount off dealers list prices on all their purchases of trade sale items, irrespective of the size of the order. In such cases, a separate order for a few gallons of such products from a unit store of one of such chains sent directly to Sherwin-Williams was accorded the 10% discount.

The salesmen of the manufacturers in general devoted approximately the same amount of time in calling on, servicing and rendering sales assistance to a unit store of a chain lumber yard customer as was spent on an independent dealer in the same territory whose per order and annual purchases were approximately the same as those of the unit store.

PARAGRAPH FOURTEEN: For the purpose of granting and allowing the quantity discounts under its 1938 Plan, Sherwin-Williams adopted the practice of accumulating the orders of some of its distributors and dealers, either for a specified period, usually a week, or for a time sufficiently long to enable the particular distributor or dealer to earn the maximum quantity discounts for orders of less than carload quantities, and has granted and allowed to such distributors and dealers, the quantity discounts applicable to the gallonage represented by the orders so accumulated.

For example, Sherwin-Williams accumulated the orders of its dealer in Crystal Falls, Michigan, until the orders received by it from him covered 84 gallons of trade sale items; the 10% discount from dealers list prices was then granted and allowed in invoicing and billing such dealer on his purchases of all such items. Sherwin-Williams nevertheless customarily shipped to said dealer as often as it received orders from him, and irrespective of the size of the order. This practice necessarily resulted in this dealer receiving a flat 10% off dealers list prices irrespective of the size of his individual orders.

Further illustrating the practice herein considered, Sherwin-Williams totaled the gallonage of all orders received in a period of one week from anyone of some, but not all, of its distributors and dealers in the trading area known as "Metropolitan New York", and granted and allowed to each such favored distributor and dealer on each order the quantity discount that would have been applicable, had such gallonage been covered by one order for shipment at one time. Sherwin-Williams nevertheless customarily shipped or delivered to its thus favored distributors and dealers in Metropolitan New York as often as it received orders from them, and irrespective of the size of the individual orders. In the cases of several of such favored distributors and dealers, Sherwin-Williams frequently delivered to them as often as once a day. This practice usually resulted in the favored distributors and dealers receiving 10% off dealers list prices, irrespective of the size of the individual orders.

During the period that the 1938 Plan was operative, neither Lowe Brothers nor Lucas accumulated the orders of their distributors and dealers located in Metropolitan New York or in other trading areas with respect to which Sherwin-Williams adopted this practice.

PARAGRAPH FIFTEEN: Lowe Brothers, from on or before January 15, 1938, until on or about May 6, 1940, maintained a warehouse in the building at 2063 E. 55th Street, Cleveland, Ohio, owned by The Cleveland Builders Supply Company (hereinafter referred to as "Cleveland Builders"), a corporation organized and existing under the laws of the State of Ohio. Cleveland Builders, during the period aforementioned, has been and is now engaged in Cleveland and environs in the sale and distribution of paint products, and has been and is itself a dealer in Lowe Brothers products.

Approximately three-fourths of the paint products which have been stored by Lowe Brothers in said warehouse have been ultimately shipped by Cleveland Builders, pursuant to the instructions of Lowe Brothers, to customers of Lowe Brothers, other than Cleveland Builders. The remaining paint products stored by Lowe Brothers in said warehouse have been withdrawn from time to time by Cleveland Builders and delivered by Cleveland Builders to its own customers to whom it has sold such products.

On or before the tenth day of each month during the period that its 1938 Plan was in effect, Lowe Brothers paid to Cleveland Builders, in lieu of a fixed monthly rental for the aforesaid warehouse and for services performed by Cleveland Builders, or its employees, in connection therewith, a commission equal to 10% of the total net amount of Lowe Brothers paint products shipped out of said warehouse to Lowe Brothers' customers by Cleveland Builders during the immediately preceding month. Payment was made by credit memorandum. Cleveland Builders used this credit memorandum as an offset against the sums due Lowe Brothers for paint products purchased by Cleveland Builders and withdrawn by it from the warehouse for its own account during the immediately preceding month.

Lowe Brothers guaranteed that Cleveland Builders' annual commissions would total not less than eighteen hundred dollars ($1800.00) a year. No commissions were paid by Lowe Brothers on Cleveland Builders' own purchases of stock from the warehouse. The cost to Lowe Brothers of procuring warehousing services and facilities comparable to those furnished by Cleveland Builders does not normally exceed 7% of the net amount billed by it on all the paint products so warehoused. It is agreed that the 10% commission paid by Lowe Brothers to Cleveland Builders was at least an adequate payment to Cleveland Builders for the warehousing of all the paint products which were, from time to time during the aforementioned period, stored in said warehouse, including those purchased by Cleveland Builders for its own account, and for services rendered by Cleveland Builders, or its employees, in connection therewith.

Whenever Cleveland Builders received an order from any of its own customers for any of the Lowe Brothers paint products, it withdrew from the Lowe Brothers warehouse sufficient paint products to fill said orders. Tickets were made out to cover each such withdrawal. These tickets showed the value at dealers list prices of the paint products so withdrawn. Only rarely did an individual ticket cover 84 or more gallons of Lowe Brothers trade sale items; oftentimes, a single ticket did not cover 24 gallons of such products. Cleveland Builders made almost daily withdrawals from the warehouse; occasionally, more than one withdrawal was made during one day.

Early in each month, Lowe Brothers billed Cleveland Builders for all the paint products withdrawn from the warehouse by Cleveland Builders during the preceding month.

During the period that its 1938 Plan was in effect, Lowe Brothers granted and allowed to Cleveland Builders a flat discount of 12% from dealers list prices on all its purchases of trade sale items. This discount was arrived at by estimating that, if Lowe Brothers had not had a warehouse in one of Cleveland Builders' buildings, a purchaser of the quantities customarily purchased by Cleveland Builders would ordinarily purchase 50% in carload quantities and the remaining 50% in 84 gallons or greater L.C.L. quantities. During said period, Cleveland Builders purchased annually from Lowe Brothers at dealers list prices between $10,000 and $11,000 worth of paint products. (An additional 7½ percent discount on such purchases was also granted and allowed on the theory that, with respect to one-half of its purchases of such products, Cleveland Builders acted as a distributor. Such discount is not here material and this stipulation does not purport to cover the facts with respect to it.)

A dealer's paint inventory will normally average between 25% and 50% of his annual purchases. In other words, a dealer does not normally turn over his paint stock more frequently than four times a year.

Cleveland Builders, during the period the 1938 Plan was in effect, was in competition in Cleveland and environs with the customers of Sherwin-Williams, with the customers of Lucas and other subsidiaries of The Sherwin-Williams Co., and with the customers of the competitors of The Sherwin-Williams Co. in the sale and distribution of paint products.

Commission Exhibit B-17, consisting of seven pages, numbered 1 to 7, inclusive, contains a record of the paint withdrawals by Cleveland Builders from the Lowe Brothers warehouse for the months of July to December, 1938, inclusive, the ticket number covering each such withdrawal, the date thereof, and the dealers list prices of the paint products so withdrawn, together with the total amounts billed for the paint withdrawn during each of such months. Commission Exhibit B-18, consisting of 6 pages, numbered 1 to 6, inclusive, are invoices covering paint products ordered by Cleveland Builders from Lowe Brothers and shipped by Lowe Brothers from its factory in Dayton, Ohio.

PARAGRAPH SIXTEEN: In addition to the per order quantity discounts applicable under their respective 1938 Plans and generally available to all purchasers from them and the volume discounts and carload or truckload quantity discount applicable under their respective 1939 Plans and generally available to all purchasers from them, the manufacturers have regularly and customarily granted and allowed and are now granting and allowing functional discounts to customers who have qualified as jobbers, wholesalers or distributors. It was, at the time of the issuance of the complaint herein, the established policy and practice of the manufacturers to grant and allow functional discounts only to jobbers or distributors and to such dealers that perform the functions of the jobber or distributor, and only in the latter cases, to the extent that such dealers perform such functions. It was not, at the time of the issuance of the complaint herein, the policy or general practice of the manufacturers to grant or allow functional discounts on paint products which were 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.

Sherwin-Williams does not have any customers who operate exclusively as distributors, but does grant functional discounts to some of its dealers who perform the functions of a distributor; that such discounts, depending upon the services performed by the distributor, vary from 5% to 12½%, although they customarily amount to 7½% or 10%. Sherwin-Williams, as a rule, requires its dealers acting as distributors to submit statements after the end of each month showing the total sales at dealers list prices made to other dealers during the preceding month. From such total sales, Sherwin-Williams deducts the discounts that have been received by the reporting dealer with respect to the purchases which have been so resold. The applicable percentage functional discount is then applied to the net amount thus obtained to ascertain the sum due the reporting dealer as a functional discount for that month. Sherwin-Williams then issues a credit memorandum to the reporting dealer covering the functional discount so allowed for such month.

Lowe Brothers, during the period its 1938 Plan was in effect, allowed a maximum functional discount of 15% to its distributors. In the case of dealers performing all of the functions of a distributor, the functional discount, as a rule, bore the same ratio to 15 as the percentage of the dealer's distributor business bore to his entire business. The functional discount, as a rule, was granted and allowed on the face of the invoice and was based upon the gross dollar value of the dealer's purchases at dealers list prices and prior to the deduction of the per order quantity discounts. Since its 1939 Plan has been in effect, Lowe Brothers has allowed a maximum functional discount of 17% to its distributors. The functional discount is now based upon the net amount of the dealer's purchases at dealers list prices, after the deduction of the volume or quantity discount.

Lucas, under the 1938 Plan, allowed and now allows, under the 1939 Plan, a maximum functional discount of 15% to its distributors. In the case of dealers performing all of the functions of a distributor, the functional discount, as a rule, formerly bore and now bears the same ratio to 15 as the percentage of the dealer's distributor business bore or bears to his entire business. The functional discount, as a rule, was and is granted or allowed on the face of the invoice and was and is based upon the net amount of the dealer's purchases at dealers list prices, after the deduction of the quantity or volume discounts.

PARAGRAPH SEVENTEEN: During the time that both the 1938 and 1939 Plans have been in effect, Lowe Brothers, as a rule, has accepted and now accepts the statements of its dealers as to the percentage that their distributor business bears to their entire business. As a result of this method of computing and paying functional discounts, however, a substantial number of Lowe Brothers dealer-distributors have been receiving functional discounts with respect to a substantial portion of the trade sale items resold by them to regular and occasional consumers, either (1) directly or (2) indirectly, through retail branches owned by them.

All of the Lowe Brothers dealer-distributors who receive functional discounts on trade sale item purchases which are resold to regular and occasional consumers, either (1) directly, or (2) indirectly, through retail branches owned by them, are occasionally in competition with other Lowe Brothers dealers, are frequently in competition with the dealers of another of said manufacturers or of other subsidiaries of The Sherwin-Williams Co., are almost invariably in competition with the dealers of other sellers, and are not infrequently in competition with the dealer-distributors, either of Lowe Brothers, or of another of said manufacturers, or of other subsidiaries of The Sherwin-Williams Co., or of other sellers.

PARAGRAPH EIGHTEEN: When Lucas adopted its 1938 Plan, all dealer-distributors were requested to submit invoices or certified statements each month showing the sales of trade sale items to other dealers during the preceding month. Some of the dealers complied; others said they would not do so. As a result, the company adopted two forms of distributor agreements, the first (yellow) being signed by all distributors who were willing to submit invoices or certified statements each month, the second (white) being signed by those who would do no more than certify the percentage of their business transacted with retail dealers. Commission Exhibit C-14 and C-15 are true and correct copies of these two forms of distributor agreements. It is agreed that practically all Lucas distributors have signed only the white contract, Exhibit C-15, and, during the time that the 1938 and

1939 Plans have been in effect, have received functional discounts from Lucas on the basis of the representations contained therein. As a result of this method of computing and paying functional discounts, a substantial number of Lucas dealer-distributors, have been receiving functional discounts with respect to a substantial portion of the trade sale items resold by them to regular and occasional consumers, either (1) directly, or (2) indirectly, through retail branches owned by them.

All of the Lucas dealer-distributors who receive functional discounts on trade sale item purchases which are resold to regular and occasional consumers, either (1) directly, or (2) indirectly, through retail branches owned by them are occasionally in competition with the other Lucas dealers, are frequently in competition with the dealers of another of said manufacturers, or of other subsidiaries of The Sherwin-Williams Co. are almost invariably in competition with the dealers of other sellers and are not infrequently in competition with the dealer-distributors, either of Lucas, or of another of said manufacturers or of other subsidiaries of The Sherwin-Williams Co., or of other sellers.

PARAGRAPH NINETEEN: All of the prices and discounts on said prices of the manufacturers have been made in the course of commerce.

PARAGRAPH TWENTY: The effect of the discriminations in price, set forth in Paragraph Thirteen to Fifteen, inclusive, hereof, has been and may be substantially to lessen competition with the respondent or respondents, as the case may be, in the line of commerce in which they are engaged; to injure, destroy, or prevent competition with the respondent or respondents, as the case may be, and to injure, destroy or prevent competition with the customers of said respondents who received the benefit of such discriminations.

It is agreed that any and all admissions of and agreements as to facts made in this Paragraph Twenty by the respondents are solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals and for any review in the Supreme Court of the United States.

Dated this 6th day of Dec A.D., 1940.

FEDERAL TRADE COMMISSION

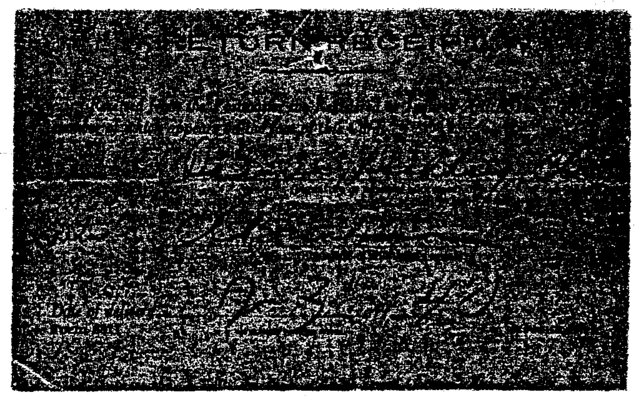
By W. T. Kelley,
W. T. Kelley, Chief Counsel.

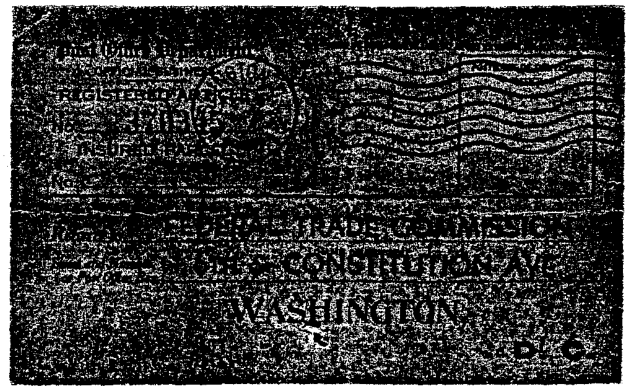
Davies, Richberg, Beebe, Busick Richardson
Davies, Richberg, Beebe, Busick and Richardson,
Attorneys for Respondents.
By Raymond Beebe

APPROVED: December 6, 1940

FEDERAL TRADE COMMISSION

By ______
Otis B. Johnson,
Secretary.



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