No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY, *Petitioner,*

vs.

SPRAY-RITE SERVICE CORPORATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT SPRAY-RITE SERVICE CORPORATION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court should apply a rule of reason test to a trial in which the petitioner agreed to the *per se* test and submitted no other instructions?

2. Whether the Court, leaving aside Monsanto's position in the District Court, should overrule decisions of the Court which have applied a *per se* test to vertical price-fixing?

3. Whether there was sufficient evidence to sustain the jury's findings regarding defendant's *per se* violations of Section 1 of the Sherman Act?

4. Whether the Court in light of the extensive factual support for the jury's findings should use this case to resolve supposed conflicts between the circuits on the amount of proof necessary to establish a vertical price-fixing agreement?

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BRIEF OF RESPONDENT SPRAY-RITE SERVICE CORPORATION[1]

COUNTERSTATEMENT OF THE CASE[2]

I. Summary of Proceedings Below[3]

A. District Court

Respondent, Spray-Rite Service Corporation, charged petitioner, Monsanto Company, with violating Section 1 of the Sherman Act, 15 U.S.C. § 1, by fixing and stabilizing resale prices, restricting customers and territories, and wrongfully terminating and subsequently boycotting Spray-Rite. (Amended Complaint, Pars. 11a-d, 11g)

[1] Pursuant to Rule 28.1, Spray-Rite Service Corporation states that it is a closely-held corporation which does not have any parent companies, subsidiaries or affiliates.

[2] Contrary to the Court's Rule 34(g), Monsanto's Statement of the Case bears no relationship whatsoever to the evidence of conspiracy presented to the jury.

[3] The following abbreviations are used in this Brief: "Pet. App." (Appendix to Petition for Certiorari); "J.A." (Joint Appendix of Petitioner and Respondent); "Tr." (Trial Transcript); "PX"

After five weeks of trial, the jury returned a verdict for plaintiff in the untrebled amount of $3,500,000. (Tr. Feb. 21, 1980, at 2) The jury also answered affirmatively each of three special interrogatories requested by Monsanto:

> Question No. 1:
>
> "Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices on Monsanto herbicides?"
>
> The answer is: "Yes."
>
> Question No. 2:
>
> "Were the compensation programs and/or areas of primary responsibility and/or shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?"
>
> The answer is: "Yes."
>
> Question No. 3:
>
> "Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto's herbicides after 1968?"
>
> The answer is: "Yes."

J. A. 27-28.

B. Court of Appeals

The Court of Appeals rejected Monsanto's belated contention that a rule of reason instruction was mandatory and held that the trial court properly instructed the jury that "Monsanto's otherwise lawful compensation programs and shipping policies were per se unlawful if undertaken as part of an illegal scheme to fix prices." (Pet. App. at 5-13) Citing specific evidence of illegal agreement, the Seventh Circuit then held that "[t]here was sufficient evidence to support the jury's verdict that Monsanto terminated Spray-

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(*footnote continued*)

(Plaintiff's Exhibit); "DX" (Defendant's Exhibit); "Cert. Pet." (Monsanto's Petition for Certiorari); "Pet. Br." (Brief of Petitioner Monsanto).

Rite pursuant to a conspiracy with other distributors to fix the resale price of Monsanto herbicides." (*Id.* at 16-17)

II. Summary of the Facts

A. The Results of Monsanto's Illegal Conspiracy Were Threefold.

Monsanto accomplished the three objectives of its illegal conspiracy. (*See, e.g.*, Tr. 2960) First, the two most aggressive and effective price-cutters were "squared away." (Tr. 1945-46, 1979) Spray-Rite was terminated in 1968, crippled through 1972 and eventually destroyed. (Tr. 225, 1322, 2854, 3029-30) Mid-State Chemical, the Spray-Rite of Minnesota, was also terminated. (Tr. 406-08, 451, 452[o]-53, 1948)

Second, Monsanto and its distributors stabilized the prices of its herbicides throughout the distribution system. (PX 139, J.A. 50-58) A Monsanto task force was therefore able to conclude after the 1970 season that there was "a relatively stable market with respect to price." (PX 139, J.A. 51) Michael Flynn, a Monsanto sales representative in Illinois during 1965-66 and 1969-70, testified that "prices were much more stable" during the latter seasons. (Tr. 217)

Third, the sales and profits of both Monsanto and its distributors skyrocketed. (Tr. 2960, 3250) By as early as 1970, the suggested distributor margin on Monsanto's Lasso was twice that of Geigy's Atrazine. (Tr. 1687-88) Stewart Daniels, second in command of Monsanto's Agricultural Division, testified that Monsanto wanted its distributors "to make as much money as they possibly can," and the distributors who wanted to remain distributors agreed. (Tr. 3328) Phil James therefore testified that distributor Midwest's pricing philosophy was to charge everything the market would bear and to "get the absolute top dollar that we can get." (Tr. 3685)

With Spray-Rite eliminated and prices stabilized, the sales and profits of its former competitors flourished. (Tr. 2960) Hopkins Chemical, which could not compete with

Spray-Rite until after the latter's termination, picked up the customers Spray-Rite could no longer supply and saw its sales soar from $500,000 in 1965 to $15 million in 1975 and $20 million in 1978. (Tr. 1372-75, 1448-49) Van Diest, who started in the herbicide business the same year as Spray-Rite and did not become a Monsanto distributor until 1973, had sales of $102 million in 1979. (Tr. 3720-21, 3762) In 1968, Van Diest purchased Monsanto herbicides from Spray-Rite, and Van Diest's sales that season were $2.1 million compared to Spray-Rite's $3.4 million. (Tr. 721, 3726) In 1975, Van Diest had pre-tax profits of $6,841,160 on sales of $56 million. (Tr. 3775)

The farmer-consumer was the victim of this conspiracy. (*See* PX 309, J.A. 73; Tr. 1646, 1651) Spray-Rite's prices and competition were favorable to the farmer. (Hopkins, Tr. 1377) With Spray-Rite eliminated, those same farmers paid the price for the soaring profits of Monsanto and its cooperating distributors. (Tr. 3775)

B. The Product Market: Herbicides Are Patented, Proprietary and Generally Non-Competitive.

The few herbicides manufactured during this period were the exclusive property of the manufacturer, and each possessed unique qualities or characteristics which were patented. (PX 137, J.A. 52, Tr. 1567; PX 139, J.A. 51, 57, Tr. 2635) Monsanto's task force concluded in its September 1970 Business Plan that "all major herbicides are proprietary with a single producer-seller...," and that "[t]hese compounds are the patented property of a handful of large companies marketing agricultural chemicals." (PX 139, J.A. 51, 57)

Monsanto's task force also found that all herbicides have "varying levels of activity and selectivity," and that its herbicides have very specific "geographic and/or crop limitations which affect their sale and distribution." (PX

137, J.A. 48; PX 139, J.A. 51) Monsanto's objectives were to concentrate on markets it could "dominate and capitalize on" and "[t]o develop and preserve to the greatest degree possible a proprietary position, or franchise, in the market place." (PX 139, J.A. 50, 56) In 1968, for example, Monsanto touted its "dominance" in granular application on corn, and by 1970 it claimed "a market franchise" of 89 to 93 percent of granular herbicide sales. (PX 139, J.A. 57; PX 140, Tr. 1607) Monsanto distributor Hopkins therefore testified that the herbicides of the various manufacturers were complementary, not competitive. (Tr. 1359-60, 1388) Donald Yapp, Spray-Rite's president, testified that the herbicides of different manufacturers were extremely different from each other, "do not compete" and were "entirely different kinds of products, for different jobs." (Tr. 511, 516-17, 532, 571-72, 579-82)

The herbicide industry was highly concentrated during this period. (PX 139, J.A. 52) Monsanto acknowledged in 1970 that "[c]ompetition for the herbicide treated acreage on corn and soybeans comes from a relatively few products manufactured and sold by large chemical companies." (PX 139, J.A. 52)[4]

High entry barriers also existed. (PX 139, J.A. 56, 58) Monsanto's task force therefore noted in 1970 that "[t]he cost of introducing a new product into this consumer market will discourage lesser companies . . . from entering," and that its strategy was to reach the point "where product manufacturing and promotion costs will deter all but the most aggressive competitors from entering the market with similar products." (*Id.*)

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[4] Monsanto's Business Plan 1970-1975 concluded:

> A "price war", as such, will not occur between manufacturers prior to 1975 because producers will become dependent upon one another and product mixtures.

PX 139, J.A. 58.

C. Monsanto Introduced Three Generations of Herbicides; The Most Successful, Lasso, Was Introduced Immediately After Spray-Rite's Termination.

In 1956, Monsanto introduced its first pre-emergent herbicide for corn and soybeans, Randox. (Tr. 3217) Randox was effective only against certain grasses in heavy soils (the "Randox Belt"), and its performance was "erratic" against other grasses and weeds in light soils. (PX 134, J.A. 38, Tr. 3034-35) Randox was also extremely irritational to the user. (Tr. 1289, 3218, 3308)

In 1966, Monsanto introduced its "second generation" corn herbicide, Ramrod. (Tr. 3308) Ramrod was viewed by Monsanto as "a substantial improvement over the first generation" Randox. Ramrod quickly supplanted Randox,[5] and the immediate demand for Ramrod caused Monsanto's "share" of the corn herbicide market to jump from 8.6 percent in 1965 to almost 14 percent in 1966. (PX 134, J.A. 38; Tr. 3034-35, 3338-39)

In 1969, Monsanto introduced its "third generation" corn and soybean herbicide, Lasso. (Tr. 1558, 3309) Monsanto praised Lasso as an improvement over Ramrod, and described Lasso as "the best grass control chemical on both corn and soybeans." (PX 139, J.A. 52; Tr. 1558) Monsanto therefore concluded in its 1970 Business Plan that it should "[p]hase out Ramrod; push Lasso" in an effort to "dominate and capitalize on" grass control. (PX 139, J.A. 56) As with the introduction of Ramrod in 1966, the entry of Lasso in 1969 caused Monsanto's "share" of the corn herbicide market to rise from almost 15 percent in 1968 to 22 percent in 1969. (DX 503, J.A. 115) Monsanto's assistant general manager testified that in both instances the reason for Monsanto's increased sales was its "new products," and he acknowledged that Monsanto's increased "share" of the soybean herbicide market "could certainly" have been due

[5] This resulted in a huge inventory carry-over of Randox at the distributor level. (Tr. 1071-75, 1464-65)

to the introduction of Lasso. (Tr. 3307, 3309-10; *accord,* PX 139, J.A. 51; Tr. 1375, 2994-95)

D. Spray-Rite, Monsanto's Tenth Largest Distributor, Actively and Effectively Promoted Monsanto's Herbicides and Provided Unequalled Service.

Spray-Rite began distributing agricultural chemicals in 1955. (Tr. 509) In 1957, Spray-Rite became an authorized distributor of Monsanto's Randox and Geigy's Atrazine. (Tr. 531-34, 537, 539) Although Spray-Rite received one-year contracts from Monsanto for 1957, 1965 and 1968, Monsanto sold its herbicides directly to Spray-Rite continuously from 1957 through 1968. (PX 167, 174, 201; Tr. 1069, 1222-24)

Approximately 90 percent of Spray-Rite's sales volume consisted of herbicide sales, and two-thirds of those sales were made each season by the end of January. (Tr. 758, 762) Spray-Rite concentrated its sales efforts in northern Illinois, southern Wisconsin and eastern Iowa, but it also sold in Minnesota, Nebraska, Missouri, Indiana and Ohio. (Tr. 549, 2124, 2128)

Spray-Rite was an efficient and effective low overhead distributor. (Tr. 221-23) It ordered in large quantities early in the season when prices were lowest, picked up orders to save freight, made its own deliveries, and employed the wife and children of its president and owner, Donald Yapp. (Tr. 221, 575-76) Flynn, Monsanto sales representative in Spray-Rite's trade area, testified that Spray-Rite "worked with a minimal amount of overhead," could sell herbicides at lower prices than other distributors, and offered service "anytime, day or night."[6] (Tr. 221-23)

Spray-Rite was not a free rider and provided unequalled pre-sale, point-of-sale and post-sale promotion and service. Dr. Earl Hughes testified that Hughes Hybrids bought its herbicides from Spray-Rite because it was a pioneer and

[6] Flynn added that "the farmer appreciated what Don Yapp was doing." (Tr. 222)

innovator, "knew the business" and provided "very good service." (Tr. 1233-35) Spray-Rite recommended Monsanto products to Hughes and "gave more time to Monsanto than he did to Geigy." (Tr. 1237-38) When Spray-Rite was no longer able to supply Hughes with Monsanto herbicides, Hughes was forced to buy from other distributors who provided little or no service. (Tr. 1240-41, 1248, 1277)

Robert Tracy, Chairman of Tracy & Sons, testified that his company depended entirely on Spray-Rite for herbicide recommendations, that he never had a supplier who provided better service than Spray-Rite, and that Spray-Rite recommended that he use Monsanto's Ramrod instead of Geigy's Atrazine. (Tr. 898, 904-07, 910) Tracy wrote Monsanto a letter protesting Spray-Rite's termination and declaring that "Don Yapp . . . has done more than any other five persons in this general area to increase the use of herbicides and to help people get them properly applied." (PX 237; Tr. 908-09, 927) Tracy bought from other distributors when Spray-Rite could not supply them, but "we never got the help in the field that we had from Mr. Yapp." (Tr. 912, 920-21)

Robert Muirhead of Muirhead Farms testified that Spray-Rite sold 15 percent cheaper than other distributors, provided better service and "knew more about the chemicals." (Tr. 3200) Muirhead bought all of its herbicides from Spray-Rite because of its "[p]rice and service." (*Id.*)

James Forster, production manager of the DeKalb Agricultural Association[7] through 1967, testified that DeKalb bought its herbicides from Don Yapp "[b]ecause of the service and because of his knowledge of the chemicals and his willingness to work with us. . . ." (Tr. 2126-27) Regarding Monsanto's products, Spray-Rite "recommended them and we purchased large quantities of them." Yapp "worked 24 hours a day, 7 days a week." (Tr. 2127)

[7] During this period, DeKalb was the largest seed company in the world and the largest purchaser of herbicides in the United States. (Tr. 1175, 2117)

John Case, owner of PAG of Naperville, testified that his company bought all of its herbicides from Spray-Rite because it "was able to provide . . . product at a reasonable price, give us excellent service in season [and] provide us with the technical information to make sure our growers got the best results from the product. . . ." (Tr. 1710) Spray-Rite promoted and recommended Monsanto products, and as far as Case was concerned, Spray-Rite "was Monsanto in northern Illinois." (Tr. 1710, 1714) In 1969, PAG was forced to stop buying from Spray-Rite, since it "did not have a full line of chemicals to offer at that time." (Tr. 1716) It therefore bought from Monsanto distributors W. R. Grace and Hopkins, but "never had service from any chemical company like we had from Spray-Rite." (Tr. 1717)

As a result of its efficient, low overhead operation, Spray-Rite could sell at lower prices than other distributors and still make a substantial profit. (Tr. 221-22) In 1967 and 1968, Spray-Rite had net profits of $88,564 and $84,657, and by 1968 Spray-Rite had grown to be Monsanto's tenth largest distributor out of more than 100, and the eighth most proficient in meeting Monsanto's performance goals. (PX 126-27, 426; Tr. 1549-50) Spray-Rite's sales from 1963 to 1968 grew faster than the industry, and from 1957 to 1968 its sales multiplied more than 40 times. (PX 436; Tr. 2646-48) Monsanto's accountant testified that the sale of its products accounted for 47 percent of Spray-Rite's profit from 1966 to 1968. (DX 454; Tr. 3086-87, 3132-35)

E. The Conspiracy to Terminate Price-Cutter Spray-Rite Included Complaints, Demands for Action, Investigations, Warnings and Threats of Termination.

Spray-Rite was known by its customers, competitors and Monsanto as a distributor who never adhered to Monsanto's suggested resale prices.[8] (Tr. 126-27, 133-34, 614, 1375-76, 1379, 1392, 1937, 3319-20, 3572-73, 3630-31, 3662, 3779-80)

[8] In 1968, the year of its termination, all of Spray-Rite's sales of Monsanto herbicides were below Monsanto's suggested prices. (Tr. 3178)

Hopkins, who described Spray-Rite as a major competitor, testified that Spray-Rite set the level of competition on pricing in northern Illinois and southern Wisconsin. (Tr. 1375, 1379)

Monsanto personnel were also more than familiar with Spray-Rite's reputation and low prices. (Tr. 126-27, 133-34, 1937, 3319-20, 3630-31, 3662) Several described Spray-Rite as an "aggressive price cutter," and Flynn named seven distributors who called Spray-Rite a price-cutter and complained to him about Spray-Rite selling at an "exceptionally . . . low market price." (Tr. 126-27, 1937, 3319-20, 3662)

The complaints to Monsanto about Spray-Rite's prices were legion. (Tr. 107-29, 191-94, 1389, 1944-48, 3630-31, 3657-59) David Stein, a Monsanto financial services manager, testified that Spray-Rite's price-cutting was discussed at two Chicago district meetings during the 1968 season. (Tr. 2384-88) Stein stated that complaints about Spray-Rite's pricing came from virtually everyone in the distribution system, and that his superiors (Fischer, Bone[9] and Sinclair) and "other distributors" complained about Spray-Rite "not holding adequate price margins." (Tr. 2394-97)

Emmett McCormick, manager of a competing Monsanto-owned retail outlet (MAC Center) from 1964-67, testified that he had approximately twenty-five discussions with his area supervisor, James Sovacool, regarding Spray-Rite's price-cutting. (Tr. 1945-48) Spray-Rite was selling "every place" at low prices, and Sovacool repeatedly complained about "the same problem with Don Yapp" and "about this pricing situation." (Tr. 1947-48) Sovacool finally exclaimed: "[I]f we could keep these two guys [Yapp and John Mulvehill] squared away, we could stabilize things around here." (Tr. 1945-46)

Flynn testified that he received complaints about Spray-Rite's pricing "at least 20 times" from distributors

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[9] Fischer testified that he made the final decision to terminate Spray-Rite based upon field information from Bone. (Tr. 3825-26)

American Oil, Farm Services, Funk Bros., C. D. Ford & Sons, Hub Oil, Cole Chemical, Bureau Service Company, Hopkins and FMC. (Tr. 107-29) Flynn stated that Monsanto was concerned about the prices their distributors were charging for Monsanto herbicides, and that St. Louis "wanted to know what the pricing was in the area." (Tr. 115-16)

Flynn testified that Spray-Rite published its prices in flyers distributed to dealers[10] and farmers, and that he "sent one of them to St. Louis as, you know, what Spray-Rite was doing." (Tr. 117, 119) Spray-Rite was also the subject of at least 25 written call reports sent by Flynn to St. Louis, and in "at least half" Flynn discussed specific complaints by named distributors regarding Spray-Rite's prices. (Tr. 120-21)

Flynn testified that on "three or four" occasions he approached Don Yapp regarding Spray-Rite's prices and "encourage[d] him to maintain or to derive the profitability out of the product that was suggested to him. . . ." (Tr. 114) Flynn recalled one instance where distributor Farm Services (F.S.), a "highly valued customer of Monsanto in the herbicide field,"[11] complained to him "face-to-face" about Spray-Rite "selling at what F.S. felt to be a low market price in its retail area." (Tr. 109-10) Flynn then approached Spray-Rite: "I would tell Don, you know, that we received this complaint . . . and tried to encourage Don

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[10] Flynn added: "[A] dealer would get ahold of one of these [Spray-Rite] flyers . . . and when I would show up on the scene on a sales call, the dealer would pull the flyer out and say, 'Well, what do you think of this?'" (Tr. 117)

[11] Flynn added that "if F.S. complained, generally if it was a very vocal specific complaint, it was relayed to St. Louis by means of a call report." (Tr. 108) F.S. was an influential "major" or "national" Monsanto distributor due to "the depth that they had . . . in the corn belt area, and their strength as far as marketing products." (Tr. 126, 135)

to realize the profitability aspect in the sale of the product." (*Id.*)

In yet another instance, distributor Hopkins complained about Spray-Rite's low prices to Bob Wilson, a Monsanto sales representative in Wisconsin. (Tr. 127-28, 193-94) Hopkins was attempting to sell a dealer in southern Wisconsin, and he complained to Wilson that "he could not compete with Don Yapp's marketing practices." (*Id.*) Wilson relayed the complaint to Flynn and told Flynn to keep Spray-Rite out of Wisconsin. (*Id.*) Flynn in turn confronted Spray-Rite with the complaint, but Yapp refused to tell Flynn whether Spray-Rite would heed Monsanto's warning. (Tr. 194)

On May 16, 1967, Hopkins wrote a letter to Peter Arvan, Monsanto's general manager for agricultural chemicals, complaining about an attached price flyer offering Monsanto herbicides to a customer at prices which he viewed as "unloading excess inventories." (PX 185; Tr. 1395) Hopkins stated that such "actions as represented by the attached flyer are definitely not conducive to an *orderly marketing structure,*" and that he wanted Arvan's response regarding this "situation . . . of interest to you." (*Id.*) (Emphasis added) Hopkins admitted that he was not able to compete with this distributor's prices,[12] and that his goal in sending the letter was to cooperate with Monsanto in prohibiting sales at depressed prices. (Tr. 1399-400) Hopkins also ad-

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[12] Hopkins testified that he was concerned until after the 1968 season about his company's ability to meet Spray-Rite's prices. (Tr. 1379) Hopkins "expected a 25 percent return on investment capital," and he flatly admitted that he could not compete with Spray-Rite's low overhead operation:

> [T]hey [Spray-Rite] were able to stay in business for years, from '65 to whenever they pulled out of the market at the low profit margins. We were barely making any money through those years and it was necessary for us to sell at higher prices in order to stay in business.

Tr. 1383-86.

mitted that he received Spray-Rite price flyers from both his salesmen and dealers through 1968, and that he complained to Monsanto about Spray-Rite's prices. (Tr. 1378, 1383-84, 1388-89, 1397-98)

Flynn also testified regarding complaints he received about Spray-Rite's pricing from Garland Grace, field wholesale salesman for Monsanto distributor FMC. (Tr. 128-29, 191-93) Grace showed Flynn Spray-Rite flyers and complained "25, 30 times" that he was "coming against some very stiff price competition from Spray-Rite." (Tr. 129, 192) Flynn transmitted Grace's complaint to either Bill Butler, Chicago district manager, or to his product supervisors in St. Louis. (Tr. 192-93)

Flynn recalled a specific instance where Grace showed him Spray-Rite price flyers and stated that "he could not meet [Spray-Rite's] competition in terms of prices." (Tr. 129) Grace complained that "Spray-Rite's practices were having an effect upon his ability to sell Monsanto products," and wanted to know if Flynn "*could do anything about it.*" (*Id.*) (Emphasis added)

In response to these distributor complaints and requests for action, Monsanto moved from Flynn's "suggestions" to clear threats of termination. (Tr. 616-711) In June or July of 1966, Bill Butler, Monsanto's district manager for Spray-Rite's trade area, telephoned Yapp and asked him to attend a meeting at the district office. (Tr. 615) Yapp met with Butler and Arvan, who questioned him regarding the prices Spray-Rite had quoted for Monsanto's Ramrod to Myer's Inc. at Lexington, Illinois, and other customers.[13] Yapp testified:

> Mr. Arvan told me that we had better increase our prices, if we do not increase our prices we may lose our distributorship.

Tr. 619.

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[13] This meeting occurred during the period that Flynn was reporting distributor complaints and demands for action to both Butler and Arvan.

In January of 1967, Spray-Rite received a telephone call from Donald Fischer,[14] Monsanto's product sales director in St. Louis. (Tr. 620-27, 1122-24) Fischer told Yapp that Arvan[15] had requested him to telephone regarding the prices Spray-Rite had charged for Randox to Myer's Inc. and to Stewart Hybrids at Princeville, Illinois. (Tr. 625, 1124) Fischer asked whether Spray-Rite "had charged $41.05 for Randox," and Yapp responded that the price was $41.87.

In February of 1968,[16] William Bone, Butler's successor as manager of the Chicago district, telephoned Spray-Rite and asked Yapp whether he was "aware of the Monsanto suggested price on Ramrod." (Tr. 702, 1125) Bone then asked Yapp what price Spray-Rite had charged Myer's Inc. for Ramrod 20-G. (Tr. 702) Bone told Yapp that Spray-Rite was to sell at Monsanto's suggested prices, and that if Yapp did not know these suggested prices, he would

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[14] The first thing that Fischer told Yapp at the 1968 meeting regarding Spray-Rite's termination was that Monsanto had received many complaints about Spray-Rite's prices. (Tr. 768, 774, 1295)

[15] Hopkins testified that during 1967 he met with Arvan in the Chicago district office to discuss Monsanto's pricing policies and "possibly" Spray-Rite. (Tr. 1401-03)

[16] Monsanto repeatedly claims, without supporting citation, that the last distributor complaint occurred 15 months prior to Spray-Rite's non-renewal. (Pet.Br. at 10, 11, 12, 39) Given the plethora of complaints both before and *after* termination, the jury could easily have inferred that this 1968 telephone call from Bone about Myer's Inc. was the result of one or more distributor complaints—as were the prior calls in 1966 and 1967 regarding Myers. Moreover, Hopkins testified that he complained to Monsanto about Spray-Rite's prices, and that he continued to receive Spray-Rite flyers and to be concerned about Spray-Rite's prices through 1968. (Tr. 1379, 1383-84, 1388-89) In addition, Monsanto's Stein testified that Spray-Rite's price-cutting was discussed at two meetings of the Chicago district during the 1968 season, and that he heard complaints about Spray-Rite's pricing from virtually everyone in the distribution system, including "other distributors." (Tr. 2384-88; 2394-97)

send Spray-Rite a price list. (Tr. 703) Bone did send Spray-Rite a price list with the words "Dealer Price" underscored by hand and a note that the list was from him. (PX 202, J.A. 62-63; Tr. 704, 708, 713) Bone also told Yapp that if Spray-Rite did not follow Monsanto's suggested prices, *"retaliation was going to take place."* (Tr. 711) (Emphasis added) Spray-Rite refused to follow those suggested prices. (Tr. 712)

F. Spray-Rite Was Terminated for Price-Cutting; Monsanto's Business Explanation Was Specious.

On October 28, 1968, Fischer telephoned Spray-Rite and informed Yapp that Monsanto did not renew Spray-Rite's distributorship contract for the 1969 season. (Tr. 767) When Yapp went to St. Louis on November 8 to plead for reconsideration, the first thing Fischer told him was that Monsanto had received many complaints about Spray-Rite's prices. (Tr. 774, 1295)

Fischer testified that he personally made the decision not to renew Spray-Rite. (Tr. 3824, 3826) Fischer did not recall whether he ever told Yapp the reason for Spray-Rite's termination, but the *sole* reason for his decision was that Spray-Rite "didn't have a sales organization." (Tr. 3850, 3914) Fischer admitted that he had no personal knowledge about Spray-Rite when he made this decision, and that he relied on district manager Bone for whatever information he had. (Tr. 3868, 3912)

Bone, however, testified that he did not discuss any Monsanto criteria with Spray-Rite, and that he never suggested that Spray-Rite hire more salesmen.[17] (Tr. 2522) Bone had no information that Spray-Rite was not properly servicing its customers, and he did not recall stating to anyone at Monsanto that Spray-Rite did not have a sales organization or failed to meet any of Monsanto's criteria.

[17] Not one Monsanto witness testified that he discussed Monsanto's criteria with Spray-Rite prior to its termination, or that Spray-Rite refused to hire more salesmen or meet any criteria.

(Tr. 2521, 2525, 2530) In fact, Bone did not recall either making or even being asked to make a recommendation during 1968 regarding Spray-Rite's non-renewal. (Tr. 2528-29)

Yapp testified that Spray-Rite met all of Monsanto's criteria, and that he had no reason to believe that Spray-Rite would not be renewed for the 1969 season. (Tr. 697, 1281, 1335) During the 1968 season, no one from Monsanto told Spray-Rite that it did not have a sales organization or failed to meet any of its criteria, and the only complaint Spray-Rite ever received from Monsanto concerned its pricing. (Tr. 614-15, 619-20, 1294)

Spray-Rite's termination was also against Monsanto's immediate economic interest. By 1968, Spray-Rite had grown to be Monsanto's tenth largest distributor out of more than 100, and the eighth most proficient in meeting Monsanto's performance goals. (Tr. 1549-50; PX 426) Tom Dille, Monsanto district manager, wrote after the 1969 season that "my greatest need is in northern Illinois where we missed some sales this year . . . ." (PX 279, J.A. 71) At the end of the 1967 season, while Spray-Rite was still a distributor, Illinois was the only state in which Monsanto's distribution was characterized as "Excellent." (PX 209)

G. Monsanto's Business Explanation for Spray-Rite's Termination Is Inconsistent with the Post-Termination Boycott.

Termination did not stop the complaints from Monsanto distributors about Spray-Rite's pricing. A 1970 letter to Monsanto regional sales director Robert Schweikher from USS Agri-Chemicals contrasted its prices with the prices on an attached Spray-Rite flyer. (PX 307, Tr. 1806-07, 3504) A 1971 letter from distributor Smith-Douglas to Schweikher enclosed a Spray-Rite price flyer and commented that "[e]vidently the Spray-Rite Service Corporation—judging from the attached—doesn't have too much sympathy for companies such as yours and ours. . . ." (PX 376 at 3; Tr.

3526-28, 3576-77) Schweikher replied, stating that "[n]eedless to say, the [Spray-Rite] flyer had been brought to our attention by many of our customers in the Midwest," and that "Spray-Rite . . . has not been an appointed distributor for Monsanto . . . in the years 1969, 1970, 1971. . . ." (PX 376 at 1; Tr. 3526-34) A 1972 letter from Midland Cooperatives to Monsanto district manager Albertson also enclosed a Spray-Rite price flyer and concluded:

> [A]ny effort on the part of your company to see that this type of marketing activity is discontinued will certainly be most appreciated and will be a benefit to the entire industry.

PX 384; Tr. 2252-54, 2272.

Tom Dille, Monsanto district manager for Spray-Rite's trade area from 1968 until the end of 1971, testified that both he and his six sales representatives continuously received complaints about Spray-Rite's prices from Monsanto distributors in the district. (Tr. 1736) Whenever a salesman received a complaint, he reported it to Dille, who in turn relayed it to his supervisors in St. Louis. (Tr. 1736-37) Dille also testified that "many" Monsanto distributors asked him and his salesmen "what will you do about them [Spray-Rite]," and that he transmitted these inquiries to St. Louis. (Tr. 1741-42) He declared that "more than one" Monsanto distributor, particularly in northern Illinois, asked whether Monsanto could cut off Spray-Rite's source of Monsanto products. (Tr. 1742-43) Such specific requests "would have gone to Bob Schweikher" in St. Louis. (Tr. 1742-44)

In the light of such continuing complaints and calls for action, Monsanto and its distributors were not satisfied with just terminating Spray-Rite's ability to purchase directly from Monsanto—they joined together to ensure that Spray-Rite was unable to buy Monsanto herbicides from anyone in the distribution chain. (Tr. 155, 168-71, 224, 1733-34, 1948-51, 1954-56, 2406)

Flynn, re-employed by Monsanto as a sales representative in western Illinois during 1968-70, testified that he was aware that during this period Spray-Rite had difficulty purchasing Monsanto herbicides. (Tr. 92, 136, 168-69) Spray-Rite was "still selling products at low prices," and "[t]here was a fear that if Don [Yapp] could get hold of any product, that he could . . . create an irritation to Monsanto's distributor program." (Tr. 155, 224) Flynn stated that "[i]n either the 1969 or the 1970 season, Monsanto became aware that Don Yapp did have some Monsanto product . . .," and that district manager Tom Dille asked Flynn to discover the source of Spray-Rite's supply. (Tr. 169) Flynn then called on some dealers and distributors "in an indirect method . . . to determine where Don got this product." (*Id.*) He added that since "there was a grapevine among the distributors" and "the distributors as a general rule did communicate among themselves," he could "put together an answer to a question that may have been presented . . . by Tom Dille or other Monsanto personnel." (Tr. 169-70) Flynn testified that during this period Dille told Monsanto sales representatives at district sales meetings that both he and Monsanto "did not want Don Yapp to get any product." (Tr. 170-71)

Emmett McCormick, Monsanto's district manager in Minnesota during 1968-69, testified that Spray-Rite was frequently described "[a]s a price cutter and hard to control" by various Monsanto officials during district manager meetings held in St. Louis during this period. (Tr. 1948, 1954-55) When McCormick proposed that Mid-State Chemical (John Mulvehill) be added as a new Monsanto distributor for the 1970 season, an objector declared: "Let's not have another Don Yapp." (Tr. 1948)

McCormick testified that during this period "we were trying to find out what he [Yapp] got his products for, what price and who sold it to him." (Tr. 1949, 1956) More specifically, "Bob Schweikher . . . asked Associated Producers [Fred Bailey] several times if they sold Don Yapp."

(Tr. 1949) McCormick added that he was also "asked to control it," and that "[t]he only one I knew I had problems with was Associated Producers . . . ." (Tr. 1951, 1955) McCormick therefore "told Fred Bailey that he wasn't supposed to sell Don Yapp," and his command was obeyed. (Tr. 1951) When asked the purpose of all this effort, McCormick declared: "Well, to keep Don Yapp from tearing up the marketing." (Tr. 1950)

Monsanto also told John Mulvehill, president of distributor Mid-State, not to sell Spray-Rite. (Tr. 274-75) In March of 1970, Mulvehill met with Stewart Daniels, Assistant General Manager of the Agricultural Division:[18]

> Mr. Stew Daniels . . . told me that I shall not sell Spray-Rite in Illinois . . . . I said, "What's going to happen if I do?" He said, "You know what's going to happen." "You mean I may not be selling next year?" He said, "You get the idea."

Id.

In the fall of 1970, less than one year after his conversation with Daniels, Spray-Rite called Mulvehill to buy Monsanto herbicides. (Tr. 289-90, 858-62) Mulvehill testified that the Spray-Rite call "tied back to the statement that Daniels had made to me," and that he "immediately got sort of a little sick feeling in my stomach because I knew I couldn't sell him or didn't think I was going to be able to do it and get away with it." (Tr. 290-92) Although Spray-Rite's order was "a big sale, cash in hand," Mulvehill stalled until he could meet with Max Albertson, Monsanto's district manager for Minnesota:

> And either the Friday or the Thursday before the closing date of that order, Max was in fact in my office and I did ask him if I could make that sale to Don Yapp. I said, "I have it in hand here. He's called. He's done everything possible to buy this stuff from me," and he said, "No, don't make that sale. He's somebody that

[18] Daniels was second in command of the entire Agricultural Division. (Tr. 3289)

> we don't want you to sell to. And besides, he's out of your territory."

Tr. 292. Mulvehill therefore declined the sale, even though Yapp "was pretty desperate and . . . even raised the price." (Tr. 293-94) Mulvehill added that he was trying to "play their game," and that "[i]f I had not had the fear of getting in trouble with Monsanto, I would have done it." (Tr. 295, 297)

The effects of the termination and concerted refusal to deal were obvious and devastating. (*See, e.g.*, Tr. 2682-87) During 1969, Spray-Rite could not purchase even one gallon of Monsanto's new and improved Lasso (Tr. 793, 809, 2988), which Monsanto agreed was the real reason for Monsanto's increased sales during that year. (*See* pp. 6-7 *supra*) What little Monsanto product Spray-Rite was able to obtain, was too little, too late[19] and at non-competitive prices. (Tr. 811-71, 2682-87) Without a full line,[20] Spray-Rite's sales dropped 70% between 1968 and 1972. (Tr. 2955) Spray-Rite plunged from profits of $88,564 and $84,657 in 1967 and 1968 to losses of $37,067, $111,513, $61,763 and $65,469 in 1969, 1970, 1971 and 1972, respectively. (*Compare* PX 126-27 *with* PX 128-31; Tr. 716-17) To quote Monsanto's Sovacool, Spray-Rite had been "squared away." (*See* pp. 3, 10 *supra*)

H. Monsanto's Customer and Territorial Policies and Programs Had the Purpose and Effect of Stabilizing Prices and Prohibiting Sales to Spray-Rite.

Between Spray-Rite's termination (1968) and its eventual destruction (1972), Monsanto enacted and/or enforced cer-

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[19] Spray-Rite's early season sales, traditionally two-thirds of its annual total, plummeted from more than $2 million in 1968 to $1,500 in 1969. (Tr. 567-69, 808-09)

[20] Not only Yapp, but Spray-Rite's competitors and even Monsanto officials testified to the critical importance and competitive necessity of having a "full line." (Tr. 97, 168, 630-31, 682, 1435-36, 2537-38, 2682, 3207, 3597; PX 146, Tr. 1504, 1631; PX 279, J.A. 71, Tr. 1768-69, 1774)

tain customer and territorial policies and programs that had the purpose and effect of stabilizing prices and discouraging or even prohibiting sales to price-cutter Spray-Rite.[21] (*See, e.g.*, Tr. 2667-80, 2688-93, 2716-25) Monsanto's distributors cooperated with or acquiesced in this conspiracy in order to reap substantial financial benefits and continue as distributors. (*See, e.g.*, Tr. 289-95, 846, 1432, 2673-76)

Allan Davis, Monsanto's manager for marketing administration, testified regarding all of the programs and policies for each of the four years. (Tr. 1566-67, 1574-640, 3034; PX 136-38, 139, 141, 143, 145-46) Dr. Ozanne, Spray-Rite's marketing and damage expert, then testified regarding both the anti-competitive effects and the specific impact upon Spray-Rite of the four programs and policies at issue—areas of pricing responsibility, shipping and pick-up, compensation for sales to resellers, and early order payments. (Tr. 2667-80, 2688-93, 2716-25)

During this period, Monsanto conducted annual distributor presentations for each of its distributors and explained the primary purpose of its programs and policies as being "to maintain, and increase, profit margins in distribution channels. . . ." (PX 144 at 15; Tr. 1654-58) David Stein, St. Louis district manager for Monsanto during 1968-70, admitted that the relationship between resale price maintenance and Monsanto's programs and policies was discussed at 40 to 50 percent of its distributor presentations:

> There were times after the program presentation or during the program presentation that there were points made about control of territories, distribution systems, price levels, purchases of other products. These types of comments were made to selected distributors in an effort for Monsanto . . . to keep the price levels and profit levels as attractive as possible during the entire marketing system so that . . . there were at times direct

[21] The evidence in this section provides the causal connection or "linkage" of these policies and programs to the price-fixing conspiracy and supports the jury's answer to Monsanto's Special Interrogatory No. 2.

> statements, there were at times innuendoes to a particular distributor as related to particular potential problem areas within that distributor.

Tr. 2371-72. Monsanto, for example, told Mid-State Chemical during a distributor presentation that if it did not hold its prices, or if it sold outside its area or to certain customers, it would be terminated. (Tr. 299-300) Monsanto's Schweikher delivered these threats in "[v]ery few words, very curt, sharp, clear and distinct." (Tr. 302)

Beginning with the 1969 season, Monsanto prohibited its distributors from shipping or picking up Monsanto herbicides from warehouses outside previously established areas of primary responsibility.[22] (PX 137, J.A. 48, Tr. 1558-59, 1567, 2247, 2269) As enforced and "policed"[23] by Monsanto, areas of primary responsibility were clear cut. (Tr. 327, 1939, 2353) Distributor Mulvehill testified:

> Yes, there were occasions where I asked if I could make a separate sale outside of this territory and was told, flatly, "No. Don't even bring it up. You know where you belong."

Tr. 327. District manager Stein testified that Monsanto told distributors in "eye-to-eye discussions" not to sell outside their areas of primary responsibility. (Tr. 2354, 2357)

The relationship between resale price maintenance and areas of primary responsibility was even more explicit, as evidenced by McCormick's description of Monsanto's 1969 district manager meetings:

> We [Monsanto] were trying to stabilize this . . . . We felt . . . that if we could limit distributors in a certain area that we could limit the competition, and, in turn, limit the price gouging and cutting . . . . That was the reason behind . . . giving a distributor only two or three states to limit this competition amongst the distrib-

[22] Dr. Ozanne testified that Monsanto's areas of primary responsibility and shipping policy were "two very closely related elements" of the conspiracy. (Tr. 2688)

[23] Mulvehill added: "Price policing events convinced me that they meant business." (Tr. 326)

> utors and, in turn, limit the price cutting, because if you had twenty-five independent distributors in Minnesota after a given amount of product, someone would have to cut a price to get it, and if we could keep our distributors out of a state, this would *stabilize the market.*[24]

Tr. 1936-38 (Emphasis added). Stein testified that in considering a distributor for renewal, whether he stayed within his area of primary responsibility was "a consideration that Monsanto was concerned about in an effort to provide price stability . . . ." (Tr. 2353-54, 2356)

A typical example of an "eye-to-eye" discussion is Mulvehill's description of Schweikher's "advice" to Mid-State during its 1969 distributor presentation:

> And, really, John, it's all quite good for you. If you maintain the prices, and we don't get into a big price war out there with each other . . . , you are going to be happy and we're going to be happy. Now the way that is done [is] by giving people certain pieces of geography to work in and stay in. Now you play our ball game and we're going to get along just fine.

Tr. 320. McCormick, who attended this presentation for Monsanto, testified that he and Schweikher told Mulvehill:

> We are trying to get a stable market, and *the reason why we are limiting you to certain states is so we could stabilize the market.*[25]

Tr. 1983-84 (Emphasis added). Schweikher also instructed Mulvehill regarding Monsanto's policy on shipping to price cutters:

> And he [Schweikher] made a point about pricing, wherein he stated that, no, they weren't going to be

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[24] McCormick noted that "at every district managers' meeting we talked about prices, how we could stabilize it," and that the participants would "spend 45 to 50 percent of our time talking about these areas of responsibility . . . and on pricing." (Tr. 1938)

[25] McCormick stated that he and Schweikher specifically used the words "stabilize the market," that the "only way we can do that is to . . . give them certain areas to sell in," and that Monsanto would give a distributor "a fairly small area so he doesn't want too much . . . [and] wouldn't tear the market up." (Tr. 1984)

> looking in on every sale, but they had enough people in the field to get the general terms of the pricing and that if the situation arose where they felt I was too low, might just be that I wouldn't get a shipment . . . .

Tr. 320-21.

Monsanto was constantly attempting to "control" Mid-State's pricing and limit its sales area. (Tr. 292, 344-45, 352-53) Sinclair, Dille and Blackwelder first expressed concern at the 1969 district managers' meeting appointing Mid-State as a Monsanto distributor and setting its area of primary responsibility:

> Everyone felt that we [Monsanto] gave John Mulvehill too many states, that we couldn't control him and his pricing, and he would be moving products all over. And further, that he would compete with other distributors that were strong in that area and that he would bring down the price.

Tr. 1916. In the fall of 1971, Monsanto told Mid-State to keep its low prices out of South Dakota:

> You [Mulvehill] just be careful what you do, how you play our ball game . . . . You keep your prices up; you stay in your territory and we'll get along just fine.

Tr. 344-45. During the 1972 season, Monsanto again told Mid-State to get its prices up and "play the ballgame" or it "might not be a distributor next year." (Tr. 352-53)

Monsanto was also concerned that Mid-State would sell terminated price-cutter Spray-Rite at a price which would permit Spray-Rite to "tear up the market." (Tr. 1950, 1984) Daniels therefore warned Mulvehill in March of 1970 that Mid-State "shall not sell Spray-Rite in Illinois" or risk termination. (Tr. 274-75) That fall Mid-State acquiesced by following the order of Monsanto's Albertson:

> No, don't make that sale. He's somebody that we don't want you to sell to. And besides, he's out of your territory.

Tr. 292.

Two weeks later, Spray-Rite attempted to purchase Monsanto herbicides from distributor Midwest Agricultural Warehouse Company. (Tr. 845-46) Spray-Rite was located

outside Midwest's area of primary responsibility, and Phil James, Midwest's general manager, told Yapp that district manager "Lane had contacted him [James] and told him that he could not sell any Monsanto products outside of his assigned area *or else.*" (Tr. 846) (Emphasis added)

Beginning in 1969, Monsanto also instituted compensation programs which paid its distributors for sales to "resellers" or "dealers." (PX 136-39; 141, 143, 145-46; Tr. 1557-658, 3034) A reseller or dealer was defined as one selling primarily to the consuming farmer, and "credit would only be given to distributor sales that went to resellers that fit this definition." (Tr. 142) The amount of compensation for such reseller or dealer sales increased substantially between 1969 and 1972, and as the programs developed Monsanto required more detail from cooperating distributors regarding when, where and to whom its products were sold. (PX 146 at 6, Tr. 1631; DX 288; Tr. 1431, 3796, 3799, 3802-03)

During this period Spray-Rite was classified by Monsanto as a "sub-distributor" or "a wholesaler who does not have a contract," and a distributor who sold Spray-Rite was not compensated under its programs. (Tr. 2201-02, 2455) Dr. Ozanne testified that Monsanto's payment of compensation only for sales to resellers was "a very significant factor" in discouraging sales to non-reseller Spray-Rite. (Tr. 2674, 2725) Monsanto's compensation programs also "produced a situation where Spray-Rite, when it could obtain product, would pay a higher price than it would have if it had been a contract distributor." (Tr. 2692; *accord* Tr. 3615) When Spray-Rite attempted to purchase Monsanto herbicides from distributor Midwest in December of 1970, James quoted a price he knew Spray-Rite would not and could not accept. (Tr. 3688-89) James also knew that Spray-Rite was a very aggressive price-cutter, that the price he quoted Spray-Rite was higher than the price he had sold other sub-distributors, and that less than one month before he had met with Monsanto and been told that Midwest

had "a choice to make" regarding its sales to "others." (PX 320, Tr. 3688-91, 3710)

The final blow to sub-distributor Spray-Rite came in the 1972 season when Monsanto changed the time for payment of its early order discount. (Tr. 2716-24) Before 1972, a Monsanto distributor who ordered early received a substantial discount off the face of the invoice. (Tr. 1625-27, 2718) In 1972, Monsanto changed this policy so that the early order discount was not paid until the end of the selling season. (DX 38, J.A. 90; Tr. 1627-28, 2718) According to Monsanto, the old practice was undesirable, since the preseason discount was not retained by some distributors, created "depressed pricing practices" by distributors, left product movement "strictly in [the] hands of distributors," and "[e]nabled sub-distributors to operate at distributor or *slightly below distributor price well into season.*" (PX 146 at 3, Tr. 1631) (Emphasis added) The delay in payment resolved these problems with distributor margins and price-cutting sub-distributors, because the "[d]istributor will not receive compensation until October which should encourage retention of monies for more dollars of margin . . . [and] service of bona-fide resellers rather than sub-distributors and others." (PX 146 at 4)

I. Monsanto and Its Distributors Engaged in a Pervasive Pattern of Resale Price Stabilization, Including Monitoring, Policing, and Threats of Termination, Resulting in Distributor Agreement and Acquiescence.[26]

Between Spray-Rite's termination and its total destruction, Monsanto wasted no time in "getting our distribution system in line." (Fischer, Tr. 3847) During the summer of 1969, for example, Monsanto held several district manager meetings in St. Louis during which Schweikher dictated

[26] This section is directed at Monsanto's blatantly false assertions that there is no evidence in the record (1) "that distributor resale prices were controlled"; (2) "that distributors adhered to suggested resale prices"; or (3) "that distributors acquiesced in any price coercion by Monsanto." (Pet. Br. at 12, 44)

Monsanto's "pricing policy on Lasso"—"how we could stabilize it." (Tr. 1910-12, 1938, 1944) McCormick best described that policy:

> We had several meetings in St. Louis in 1969. In these meetings we were appointing new distributors, we were dismissing other ones, and at these meetings we spent a considerable amount of time talking about how we could stabilize the price in the market place .... [A]t that time it was Lasso liquid which we were trying to control; it was a new product which was short; there was a big demand for it, and we felt that we should be able to hold the price on that product because, in the future, we felt that it was going to be a big mover for Monsanto down the road, and if we could stabilize the price at the market place, then we would have more dealers handle our products. . . . If the distributor cut the price, then, some dealer would have an edge on the the next dealer; so, then . . . our pricing structure would go to pieces.[27]

Tr. 1929, 1935.

Other examples of Monsanto and its distributors stabilizing resale prices during 1969-72 include:

1. Monitoring the market. As a part of Monsanto's 1969 goal of "preventing any undue price wars," St. Louis district manager Stein was directed by "management . . . to monitor and observe the market" (Tr. 2301, 2380):

> We were asked to monitor the level of pricing in the market place in a given season. And in the case of reports of someone selling at low prices, we were asked to investigate and try to determine whether or not the allegations were in fact true. And then we reported back to our superiors as to whether or not . . . there was, oh, *any undue competition* in any areas. . . .

Tr. 2301 (Emphasis added). The persons so requesting included management in St. Louis, other district managers, and "a distributor or dealer of our product line." (Tr. 2312, 2314, 2380-81) Upon receiving such a request, Stein would

[27] McCormick testified that during this period he talked to every distributor in Minnesota about Monsanto's plan to stabilize the price of Lasso. (Tr. 1935)

"inquire at that time as to a particular situation," including the price and seller. (Tr. 2312, 2380) He then confronted the seller:

> When we came across a situation like that . . ., I inquired of the distributor as to his reasons for pricing lower than perhaps I thought they should. . . .

Tr. 2313.

2. The decision of the umpire is final. Monsanto's approach to marketing and distributor selection for the 1969 season was described as follows by distributor Associated Producers in a newsletter issued the month of Spray-Rite's termination:

> Monsanto, now recognizing the absolute necessity of getting the "market place in order" with regard to their entire line of agricultural chemicals, is determined to do what it takes to rectify the situation from now on.
>
> * * *
>
> [E]very effort will be made to maintain a minimum market price level.
>
> In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as *the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons.* So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. . . . It is elementary that harmony can only come from following the rules of the game and that in case of dispute, the decision of the umpire is final.

PX 233, J.A. 65-69, Tr. 2566-70 (Emphasis added). Bailey, president of Associated and author of the newsletter, testified that Monsanto "really wanted us to adhere to their suggested pricing schedule," and that he prepared the newsletter soon after meeting in person with Monsanto's Sovacool, McCormick and Albertson. (Tr. 2564-65, 2571-73)

3. Monsanto's additional oral criteria. Stein testified that in evaluating its distributors during the 1969 season, Mon-

santo utilized not only the written criteria in the distributor agreements, but also certain additional, oral criteria: (1) "how well they kept their margins, price margins;" (2) "whether or not a man was a price cutter;" (3) "whether or not he maintained a stable price schedule throughout the season;" and (4) whether or not he "played the game." (Tr. 2346-47, 2356, 2478-79)

4. Distributor American Oil acquiesces. District manager McCormick testified that early in 1969, MAC manager Ray Meyers gave him a copy of an invoice indicating a sale of Lasso to a farmer by distributor American Oil "at a reduced rate." (Tr. 1931-34) McCormick then confronted the American agent:

> All I told him was that Lasso was in short supply. We don't want people cutting price; we expect to get the highest price for this because there was such a demand, and if you can't get it, well, maybe we can shove it to somebody else.

Tr. 1933. McCormick also "turned this over to St. Louis" to regional sales director Schweikher, who told McCormick: "I'll take care of it." (Tr. 1933-34) Schweikher then called American Oil's main office in Kansas City, which in turn contacted its agent. (*Id.*) McCormick testified:

> An American Oil representative from Kansas City called the . . . [agent] and talked to him about this problem, and the . . . [agent] came back and told me, later, that it was all taken care of. He was going to settle for the suggested price, at whatever they were supposed to sell.

Tr. 1934.

5. Monsanto disciplines Associated Producers. McCormick testified that Schweikher telephoned him from St. Louis in March or April of 1969 regarding a sale "for too low a price" by distributor Associated Producers to Funk Seed:

> Bob Schweikher wanted me to call Associated Producers and tell them we were out of the product and that we couldn't ship any more right now.

Tr. 1929-30, 1934. McCormick and Schweikher confronted Fred Bailey, president of Associated:

> Well, we went in and tried to explain our programs to Fred, how we felt there was such a demand for our product, and that he ought to be able to make more money without selling it at a reduced price. And, we also told him at that time that he wasn't going to get all the Lasso he was supposed to get because we were out at that time.

Tr. 1930. McCormick testified that what they told Bailey about Lasso was not true. (Tr. 1931)

6. Terra acquiesces. District manager Dille testified that in 1971 "everybody kept addressing our people and myself about this distributor [Terra] in Wisconsin" who was selling fertilizer and Monsanto herbicides as a package at a low price. (Tr. 1883, 1888) The complaints resulted in a request that Dille "visit Bill Skree," and the outcome of that visit was described in a July 21 memorandum from Dille to Monsanto's Sinclair:

> I had an opportunity while in Madison this past week to visit with Bill Skree of Terra about my area of concern with this distributor. He told me that they had two types of farmer dealer arrangements. In Iowa they work as a commissioned agent, selling at a certain price and then receiving a certain commission. However, in Wisconsin they make the sale to a farmer at dealer prices along with fertilizers. He is then responsible for sales and collections from his customers. They have no discipline on the selling price of the fertilizer or herbicide.
>
> He agreed this was not a healthy situation and had caused him considerable grief in certain areas. They will continue with the farmer dealer marketing philosophy next year, but will place the Wisconsin dealers on a commission rather than direct sale basis.

PX 355; Tr. 1881-85. Dille testified that the complaints about Terra were from "other distributors," and that Terra's agreement to stop this package discounting made his "life . . . much more pleasant." (Tr. 1887-89)

SUMMARY OF ARGUMENT

Monsanto should not have agreed to submit *per se* instructions and then after an adverse jury verdict, argue to the higher courts that the jury was not properly advised of the law. The fundamental unfairness in that position was further highlighted when Monsanto, after trial, did not ask the trial court to enter judgment notwithstanding the verdict on the ground that the jury was improperly instructed.

This case begins and ends with a dramatic change in what Monsanto preceives the law to be; that dramatic change did not surface until the jury decided against Monsanto on the *per se* instruction accepted by Monsanto. It is unfortunate indeed, that the Court is asked by Monsanto and the antitrust division to address a "fundamental" change in the law, using a case in which the District Court never received from Monsanto the "rule of reason" instructions, now said to be so important to antitrust enforcement. The Court should not accept Monsanto's new, post-trial assertion that the case was improperly submitted using *per se* instructions.

Spray-Rite was driven from the industry after a successful business history in which Monsanto recognized Spray-Rite as its tenth largest distributor out of a total system of 100 distributors. The record shows persistent reaction by Monsanto to distributor complaints and requests for action against Spray-Rite's price competition. Monsanto threatened retaliation, warned of termination, followed through on its warnings to terminate, and instigated a boycott of Spray-Rite as a direct result of Spray-Rite's failure to follow prices established by Monsanto. The evidence was overwhelming; the jury could reach no other conclusion. Monsanto's explanation for the event of termination was specious: Spray-Rite was told that it did not hire enough salesmen. No trier of fact would accept such a story. Spray-Rite had increased its sales in the years prior to termination

by 600%. It was against Monsanto's economic interest to terminate Spray-Rite, unless—as the jury believed—Monsanto was about to introduce its new and third generation product, Lasso, and needed to maximize profits by stabilizing the market and eliminating price-cutters.

The petition inaccurately states that this case involves a "fundamental issue" of whether a jury verdict can be based upon mere distributor complaints followed by an unrelated termination. Such a statement is a wholesale disregard of the record and the rule that inferences are to be used on appeal to support a jury verdict, not the arguments and rejected theories of the losing party.

This case should not be used by the Court to resolve an alleged conflict between the circuits on the amount of proof necessary to establish vertical price-fixing because the facts reviewed by the Seventh Circuit in this case support a violation of the Sherman Act under any expression of that theory in the various circuit courts. In short, this is not a case to measure such differences, if any, among the circuits because the jury would find a violation under any form of *per se* instruction.

ARGUMENT

I. Monsanto's Statement of this Case Omits the "Agreement" in the District Court to Apply a "Per Se" Test, Ignores Monsanto's Illegal "Boycott" of Spray-Rite, and Construes the Evidence in Favor of the Losing Party.

Monsanto's Statement of the Case is a partial, argumentative review of the record highlighting Monsanto's testimony which the jury rejected. It is not a concise statement of the facts within the rule that the evidence and reasonable inferences on review are to be construed in favor of the jury's decision. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35 (1944).

First. The "rule of reason" test now advanced as so important to antitrust law was never presented

to the District Court; Monsanto agreed to per se jury instructions.

Monsanto's Statement of the Case states that fundamental issues "important to the antitrust laws" are presented in this matter, the first of which is the need for the Court to apply a rule of reason test: "when should non-price distribution restrictions, *normally tested under the rule of reason,* be condemned as part of *per se* unlawful price fixing?" Pet. Br. at 4 (Emphasis added). Monsanto, in short, asks that the case be resubmitted to a jury with an instruction that the conduct of Monsanto in this case without reference to the boycott issue is subject to the rule of reason and is not a *per se* offense.

Monsanto's Statement of the Case ignores the position of Monsanto before the trial judge. Monsanto at trial adopted the *per se* rule, agreed to its application, and did not submit rule of reason instructions to the District Court. Monsanto's position at that time was clear:

> These things are all the law. I just object to sitting there and having them [the jury] told five or six times that *it is per se illegal when you only need to be told once.*
>
> * * *
>
> Well, right at the beginning, I say that it is *per se illegal to use restrictions pursuant to a price fixing conspiracy.* . . . I would say it is also per se illegal for a manufacturer to utilize customer or territorial restrictions pursuant to a price fixing conspiracy or agreement.

Tr. 4049, 4054 (Emphasis added).

The jury was thus instructed without objection that a *per se* test should be used.

> Under Section 1 of the Sherman Act, there are agreements, conspiracies and combinations whose nature and effect on competition are conclusively presumed to be unreasonable and therefore illegal, without any inquiry as to the harm they have caused or the business excuse for their own use—they are "illegal per se."

Tr. 4355. Simple fairness would dictate that the Court be

advised that the trial court was never asked to give "rule of reason" instructions on the issues now raised.

Respondent respectfully suggests that neither petitioner nor the antitrust division should ask the Court to review a case to change the law when petitioner omits in the petition critical, adverse "record" references. The antitrust division essentially asks the Court to use this case for that purpose:

> Finally, it would now be appropriate for this Court fully to reexamine the legal status of resale price maintenance.
>
> • • •
>
> The Court should grant review in this case to address the question of the competitive analysis to be applied to all forms of vertical restraints, "price" and "non-price" alike.

Br. U.S. in Supp. of Pet. at 15, 16, 17-18. Indeed, the attention this case has received and the many requests by interested parties to file supporting amicus briefs, was caused in part by the suggestion that the Court change the rule and apply a rule of reason test to vertical price-fixing cases. The Court should not address that question through this case. Monsanto plainly agreed to try this case using jury instructions built on a *per se* violation.

At the close of all the evidence, Monsanto moved for a directed verdict. After the jury verdict, Monsanto moved for judgment notwithstanding the verdict. In each case, Monsanto did not ask the trial court to direct a verdict or enter judgment for Monsanto on the theory that the *per se* instruction was erroneous. No right to appeal exists on that point. This case was a hotly contested adversary proceeding in which Monsanto, represented by experienced counsel, tried the case on a *per se* theory, and expected to win the case. After the jury ruled for Spray-Rite, Monsanto now suggests that the rule of reason should apply to vertical price-fixing. The Court should not tolerate any such approach to serious litigation.

Indeed, the Court in the recent case of *Bowen* v. *United States Postal Service*, ____ U.S. ____, 103 S. Ct. 588 (1983), observed that:

> We need not decide whether the District Court's instructions on apportionment of damages were proper. The Union objected to the instructions only on the ground that no back wages at all could be assessed against it. *It did not object to the manner of apportionment if such damages were to be assessed.*

Id. at 599, n.19 (Emphasis added). It is hardly surprising that the Court would not review objections to jury instructions and legal positions which flow from such events if an opportunity was not first given to the District Court to rule on the matter, and yet that is precisely the position that Monsanto has assumed in this case.

> *Second. Monsanto agreed with distributors to boycott Spray-Rite. This jury conclusion, which is now final, supports the jury verdict rejecting Monsanto's explanation of the termination.*

Monsanto's Statement of the Case would have the Court marshal the facts in airtight compartments to suit their needs, and thus ignores inferences that flow from Monsanto's successful boycott of Spray-Rite after 1968. A manufacturer's agreement with its distributors to boycott a competing distributor is simply illegal. *See, e.g., St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 543-46 (1978); *United States* v. *General Motors Corp.*, 384 U.S. 127, 146 (1966), *quoting Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). The jury's conclusion that a boycott existed was based upon direct evidence. Indeed, Monsanto instructed its distributors not to sell to Spray-Rite. The jury expressly found in answer to Monsanto's third special interrogatory[28] that Monsanto conspired with its

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[28] The jury answered affirmatively the following special interrogatory requested by Monsanto:

> 3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968?

distributors to limit access to Monsanto's herbicides after 1968. The significance of this "boycott" is obvious: Monsanto was coming out with a revolutionary new product—the third generation herbicide called Lasso. *See supra* at 6-7.

As is fully considered in the detailed Counterstatement of the Case, *supra* at 16-20, Spray-Rite, after 1968, was simply prevented from obtaining Monsanto herbicides from other distributors who reluctantly agreed to Monsanto's position.

Associated Producers (another distributor) was told not "to sell to Don Yapp" (Spray-Rite). (Tr. 1951)

Mid-State Chemical was also told not to sell to Spray-Rite and if it did, would risk termination. (Tr. 274-75) The following year, the general manager of Mid-State stated, "I knew I could not sell to them or didn't think I was going to be able to get away with it". (Tr. 290-91) Finally, the distributor was told "do not make that sale [to Spray-Rite]". (Tr. 292)

Midwest Agriculture, another distributor, was told not to sell Monsanto products "outside of his area or else." (Tr. 846, 3621, 3624)

In short, the jury had every right to conclude in answer to Monsanto's special interrogatory that Monsanto obtained agreements from other distributors to curtail any sales to Spray-Rite: a classic boycott. The post-termination boycott evidence explains why the jury did not believe Monsanto's antiseptic explanation of the cause of termination.

Spray-Rite contended that Monsanto was attempting to eliminate price-cutters. Monsanto argued that the decision had no such motive but was caused by the failure of Spray-Rite to "hire salesmen." Monsanto's so-called Statement of

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(footnote continued)

Answer: *Yes.*

Tr. Feb. 21, 1980, at 3 (Emphasis added).

the Case, moreover, reviews the evidence favorable to Monsanto on this issue as follows: "Monsanto witnesses testified that Spray-Rite was not renewed because it failed to hire additional salesmen and to adequately promote sales to dealers." Pet. Br. at 11. The jury plainly rejected this argument. How could the jury give credit to that explanation when immediately thereafter Monsanto engineered a boycott of Spray-Rite to keep Monsanto's products away from a "price-cutter?"

Monsanto's Statement of the Case virtually ignores the boycott issue and unfairly summarizes the record, adopting the proposition that the Court has no reason to consider such facts, which should be isolated from the "fact of termination." Needless to say, that argument is not a statement of facts and conflicts with the accepted judicial principle that all inferences from the evidence should be construed in favor of the winning party.

Third. Implicit in Monsanto's Statement of the Case is the erroneous suggestion that the only evidence of record is "mere complaints" from distributors preceding an unconnected "termination."

The Statement of the Case states a self-serving proposition based upon a limited and unfair review of the record: "can a *per se* unlawful price fixing conspiracy be inferred *solely* from the termination of a distributor following *price complaints* from other distributors?" Pet. Br. at 4 (Emphasis added). Spray-Rite objects to this Statement of the Case. As is fully considered, *infra,* the record is replete with substantial evidence regarding Monsanto's objectives and actions responding to Spray-Rite's price-cutting. Spray-Rite was terminated because it was a price-cutter and jeopardized Monsanto's market scheme to fix prices and stabilize the market. *See supra* at 9-16.

To summarize: Spray-Rite was told directly to stop price-cutting or face the loss of its distributorship. (Tr. 619) Some months later a Monsanto representative demanded

Spray-Rite's use of a suggested list price or face "retaliation." (Tr. 711) Monsanto representatives stated simply that if Spray-Rite and one other distributor could be "squared away", the market could be stabilized (Tr. 1945-46) In the month of Spray-Rite's termination, an authorized Monsanto distributor's newsletter noted the "absolute necessity of *getting the market place in order* with regard to the entire line of agricultural chemicals," and that Monsanto "is determined to do what it takes to rectify the situation from now on." (PX 233) (Emphasis added).

The termination explanation was specious. There was no independent Monsanto business reason for its termination of Spray-Rite. *See supra* at 15-16. Indeed, Spray-Rite was Monsanto's tenth largest distributor, performing extraordinary service to customers. *See supra* at 7-9. It could hardly be terminated for failure to hire salesmen, and yet, that is precisely Monsanto's explanation.

Monsanto's Statement of the Case simply ignores such evidence, and substitutes the proposition that the Seventh Circuit erred because it relied only on distributor complaints preceding a termination. Pet. Br. at 31. Any fair review of the Seventh Circuit's opinion demonstrates the inaccuracy of that assertion. This case, in short, involved considerably more than the mere "distributor complaints" which Monsanto describes as the "fundamental issue." Pet. Br. at 4. What has occurred in this case, as fully considered, *infra,* is that the Seventh Circuit's opinion has been read out of context without bothering to review the evidence cited by the Seventh Circuit.

The Court should not treat Monsanto's Statement of the Case as the facts relevant to this proceeding; rather, Spray-Rite respectfully suggests that Respondent's detailed Counterstatement of the Case, *supra,* fairly reviews the evidence which the jury had every right to accept and adopt in deciding this case for Respondent.

II. Assuming that Monsanto Can Argue in the Court a "Rule Of Reason" Test, Contrary to its Position in the District Court, the Court Should Not Change the Law and Alter or Reverse Decisions of the Court Which Have Applied the "Per Se" Test to Vertical Price-Fixing.

The Court recently stressed that "resale price maintenance [is] an activity that has long been regarded as a *per se* violation of the Sherman Act." *Rice* v. *Norman Williams Co.*, ___ U.S. ___, 102 S. Ct. 3294, 3299 (1982). In many decisions throughout the history of the antitrust laws, "[t]his Court has ruled consistently that resale price maintenance illegally restrains trade." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980). *See, e.g., United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Any departure from the settled rule of *per se* illegality would ignore congressional intent. In 1975, Congress enacted the Consumer Goods Pricing Act, which repealed the Miller-Tydings and McGuire Acts, which had, for a certain time, eliminated the antitrust exemption for state laws which permitted so-called "fair trade" agreements. Pub. L. No. 94-145, 89 Stat. 801 (1975). Both legislative reports concerning the 1975 Act explicitly state the congressional intent that vertical price-fixing conspiracies be deemed *per se* unlawful. H.R. REP. No. 341, 94th Cong., 1st Sess. 2 (1975); S. REP. No. 466, 94th Cong., 1st Sess. 1 (1975). Several members of Congress stressed, without contradiction, that the effect of the Act was to invalidate all resale price maintenance agreements. 121 CONG. REC. H7103 (1975) (remarks of Reps. Rodino and Jordan); *id.* at H7104 (Rep. Hutchinson); *id.* at H7105 (Rep. Van Deerlin); *id.* at H7106 (Rep. Seiberling); *id.* at S20872 (Sen. Brooke).

The Court has recognized this compelling evidence of legislative intent regarding the appropriate standard by

which to judge resale price maintenance contracts in a case involving vertical nonprice restraints:

> The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. . . . Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States .... No similar expression of congressional intent exists for nonprice restrictions.

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36, 51, n. 18 (1977). *See also California Retail Liquors Dealers' Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980).

The Court properly defers to legislative intent, rather than formulate national economic policy, when confronted with questions concerning the scope of the antitrust laws. *See Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, ____ U.S. ____, ____, 103 S. Ct. 897, 904-05 (1983); *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

> [I]t certainly is 'not for [the Court] to indulge in the business of policy-making in the field of antitrust litigation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress'.

Jefferson County Pharmaceutical Ass'n v. *Abbott Laboratories*, ____ U.S. ____, ____, 103 S. Ct. 1011, 1023, (1983), *quoting United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). *See also* 103 S. Ct. at 1028, n.10 (O'Connor, J. dissenting). Congress has balanced the economic benefits and disadvantages of vertical price-fixing contracts, and concluded that such agreements should be *per se* unlawful.

The United States and other amici for the petitioner suggest that the Court summarily reject over seventy years of precedent and the economic principles of competition upon which that precedent is based, in favor of the legality of resale price maintenance schemes. As the Court concluded

last term, "arguments against application of the *per se* rules in this case therefore are better directed to the legislature." *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, ____, 102 S. Ct. 2466, 2478-79 (1982). The Solicitor General and petitioner are bold indeed to suggest that the Court abandon its precedents and, in effect, legislate in the face of conclusive congressional legislation to the contrary.

III. The Use of the Word "Allegation" in the Seventh Circuit's Opinion Should Not Be Used As a Pretext to Restate the Law: The Seventh Circuit's Use of That Expression Must Necessarily Be Taken in the Context of the Whole Opinion.

Monsanto and the antitrust division have repeatedly emphasized with italics the Seventh Circuit's use of the word "allegation." In its brief in support of the writ, the antitrust division objected to the Seventh Circuit's opinion because "non-price vertical restrictions can be deemed per se violations merely because they are alleged to be part of a resale price maintenance scheme." Br. U.S. in Supp. of Pet. at (I). In Monsanto's Statement of the Case, the Seventh Circuit is criticized again for interpreting *Sylvania* to apply only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices. Pet. Br. at 3. In short, sprinkled throughout Monsanto's petition and the briefs in support thereof is the suggestion that the Seventh Circuit should be reversed because of that court's use of the word "allegation." Pet. App. at 12.

This bootstrap argument should be rejected. The Seventh Circuit's analysis was a comparison of the Court's opinion in the *Sylvania* case, and the Court's decision in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). The Court of Appeals noted that the Court in *Sylvania* was reviewing a case "involving non-price vertical location restrictions." Pet. App. at 12. The Seventh Circuit observed that the Court in *Sylvania* did not reverse *Sealy*, which held "that otherwise lawful vertical restrictions imposed as part of

an unlawful scheme to fix prices are *per se* unlawful." *Id.* The Court discussed the language in some detail and then concluded that "*Sealy* rather than *Continental TV* governs this case. *Continental TV* applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices." *Id.*

The use of the word "allegation" in the context of the Seventh Circuit's analysis does not establish the proposition that only allegations, and not proof, are needed in antitrust cases. Monsanto's argument and repeated emphasis of the word "allegation" is plainly unfair. The Seventh Circuit was simply comparing the structure of the issues presented in *Sylvania* with the issues presented in *Sealy*.

Indeed, the antitrust division after stating that the Court of Appeals erred in the use of the word "allegation," states that the Court of Appeals should have said "proof adduced at trial" instead of "allegation." Br. U.S. in Supp. of Pet. at 9. The Court should not reverse the Seventh Circuit in an opinion which strikes the word "allegation" and substitutes the expression "proof adduced at trial." Any fair reading of the Seventh Circuit's opinion would recognize that the Court of Appeals did not endorse the proposition that no proof be adduced at trial and only allegations are needed to support a jury verdict.

After construing the Seventh Circuit opinion to suit this appeal, Monsanto then boldly states that "[t]here is no evidence that Monsanto's programs and policies were designed or used for the purpose of fixing resale prices." Pet. Br. at 27. This contention simply ignores substantial record evidence to the contrary. The Counterstatement of the Case, *supra* at 20-26, outlines in detail the programs and policies used by Monsanto to reduce price competition among its distributors and limit product shipments to the price-cutter, Spray-Rite. Monsanto's McCormick admitted that areas of primary responsibility were enforced by Monsanto

to "limit the price gouging and cutting, . . . to limit this competition amongst the distributors and, in turn, limit the price cutting . . . [and] stabilize the market." (Tr. 1636-38) The areas of primary responsibility were something "Monsanto was concerned about in an effort to provide price stability." (Tr. 2365-66)

The desire to control resale prices similarly prompted Monsanto to change the time for payment of the early order discount to the end of the selling season. According to Monsanto, the old practice was undesirable for the reason that since the preseason discount was not retained by some distributors, it created "depressed pricing practices" by distributors and "[e]nabled sub-distributors [such as Spray-Rite] to operate at distributor or slightly below distributor price well into the season." (PX 146, Tr. 1631)

Monsanto specifically invoked these restrictions to discourage its distributors from selling to Spray-Rite and thereby to prevent the re-introduction of Spray-Rite's disruptive price competition. The jury so found in answer to Monsanto's second special interrogatory.[29] Daniels told Mid-State that it "shall not sell Spray-Rite in Illinois" or risk termination. (Tr. 274-75) Monsanto's Albertson ordered Mid-State: "No, don't make that sale. He's somebody that we don't want you to sell to. And besides, he's out of your territory." (Tr. 292) In short this small sample of the evidence fully supports the jury's conclusion that all or part of Monsanto's programs and policies were part of a price-fixing conspiracy.

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[29] 2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto *pursuant to* a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides? Answer: *Yes.*

Tr., Feb. 21, 1980 at 2, 3 (Emphasis added).

IV. The Court Should Not Use this Case to Resolve Supposed Conflicts Between the Circuits on the Issue of the Amount of Proof Necessary to Establish a Vertical Price-Fixing Agreement Between a Manufacturer and Distributors.[30]

Any fair analysis of the record in this case would establish a jury question on vertical price-fixing under any sufficiency of the evidence standard. Monsanto argues that cases such as *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S. Ct. 362 (1982), establish that mere complaints by distributors and a subsequent termination are not sufficient evidence to establish vertical price-fixing between the manufacturer and a distributor. Summarizing the facts of this case in such a manner may suit Monsanto's motive in convincing the Court to grant the writ, but it does not represent fairly the Seventh Circuit's opinion and ignores mountains of additional evidence other than "mere complaints."

As discussed *supra* at 17-21, Monsanto entered into an unlawful boycott agreement. The jury finding of a boycott has not been appealed by petitioner and, as such, is the law of this case. None of the other cases which allegedly create a conflict between the circuits referred to in petitioner's brief address a fact pattern in which a boycott was the final link in a price-fixing conspiracy.

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[30] Because of its affirmance of the vertical price-fixing verdict, the Seventh Circuit did not need to address Spray-Rite's alternate theory and evidence of combination:

> Because we hold that Spray-Rite presented sufficient evidence to support the jury's verdict on its theory that Monsanto terminated the Spray-Rite distributorship pursuant to a resale price maintenance agreement between Monsanto and some of its distributors, we need not decide whether Spray-Rite presented evidence to support a verdict based on the theory that Monsanto effectuated its resale price maintenance scheme by coercing distributors into adhering to Monsanto's suggested resale price.

Pet. App. at 17, n. 9.

It is true that the Seventh Circuit's opinion states: "We believe however that proof of termination following competitor complaints is sufficient to support an inference of concerted action." Pet. App. at 15. The Court of Appeals did not conclude its discussion with that sentence, but expressly "agreed" with the Eighth Circuit's decision in *Battle* v. *Lubrizol*: "Proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints should be sufficient to raise an inference of concerted action." Pet. App. at 15, *quoting Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir.), *rehearing granted* (8th Cir. 1982) (en banc) (Emphasis in original).

The Seventh Circuit exhibited no difficulty in concluding on the facts of this case that proof of termination "in response to" competitor complaints was more than enough to satisfy any legal test. The Court of Appeals specifically identified evidence to support its conclusion that Spray-Rite presented sufficient evidence to establish an inference of concerted activity between Monsanto and certain distributors.

The terminated dealer in *Battle* established that one competitor complained about prices to Lubrizol, that Lubrizol received these complaints, and that the company officials who made the decision to reduce supply were aware of the substance of the complaints. On that record, the Eighth Circuit concluded that there was "sufficient circumstantial evidence, when viewed most favorably to appellants, to suggest that Lubrizol terminated appellants' " supply of product "in order to protect Jenkins-Guerin [complaining competitor] from price competition." 673 F.2d at 993.

Spray-Rite established not only all the indices of concerted action that were present in the *Battle* fact pattern, but also that Spray-Rite received a multitude of warnings and threats of termination from Monsanto as well as being informed by Monsanto at the time of termination that Spray-Rite's pricing policy was the cause of its termination.

See supra at 14-15. Further, the boycott evidence in this case was not present in *Battle*. In addition, Lubrizol, unlike Monsanto, did not engage in a pervasive effort to stabilize the market price for its products. Finally, only one other dealer was complaining of Battle's pricing policy, whereas Spray-Rite incurred the wrath of a number of distributors who communicated their price complaints to and requested action from Monsanto.

Petitioner contends that the Court should reverse the Seventh Circuit because of an alleged different standard for determining the sufficiency of the evidence necessary to establish a price-fixing conspiracy in *Edward J. Sweeney & Sons, Inc.* v. *Texaco,* 637 F.2d 105 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981), and *Schwimmer* v. *Sony Corp. of America,* 677 F.2d 946 (2d Cir.), *cert. denied,* —— U.S. ——, 103 S.Ct. 362 (1982). While *Sweeney* and *Schwimmer* may differ in language from the Seventh Circuit's opinion in *Spray-Rite,* neither the plaintiff in *Sweeney* nor the plaintiff in *Schwimmer* was able to demonstrate the type of evidence that Spray-Rite presented to the trier of fact.

In *Sweeney* the terminated gasoline dealer had a poor service record, engaged in questionable credit card practices, and misrepresented non-Texaco gasoline as a Texaco product. Texaco's termination of a hauling allowance agreement with Sweeney saved Texaco approximately $60,000 per year. Such independent business reasons for termination do not exist in this record, and the jury so found.

Fischer specifically informed Yapp that he was terminated because of price complaints from other distributors. (Tr. 774, 1295) In addition, the volume and intensity of price complaints requesting termination was more extensive in *Spray-Rite.* Further, Texaco did not engineer a boycott of *Sweeney* after termination. Finally, contrary to *Spray-Rite*'s facts, the terminated dealer in *Sweeney* was not persistently threatened with termination.

In *Schwimmer* the Second Circuit refused to find sufficient evidence of a conspiracy between Sony and some of

its dealers to discourage transshipping of Sony products. The Second Circuit, citing *H. L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, ___ U.S. ___, 103 S.Ct. 176 (1982), held that Sony's dealers' complaints about transshipping did not support an inference of a tacit agreement. Plaintiff was unable to introduce any evidence other than dealer complaints to infer a conspiracy. Thus, the Second Circuit held that "other evidence of a tacit understanding or agreement" in addition to complaints is necessary to establish concerted action. 677 F.2d at 953.

The Seventh Circuit also relied on "evidence refuting Monsanto's alleged independent business reason for terminating Spray-Rite" to find other evidence of a conspiracy on which to impose section 1 liability on Monsanto. (Pet. App. at 17, n.8, *distinguishing H. L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S.Ct. 176 (1982). Since the Second Circuit requirement of "other evidence of a tacit understanding" as set forth in *Schwimmer* has its genesis in *H. L. Moore*, the Seventh Circuit by factually distinguishing *H. L. Moore* held that Spray-Rite presented sufficient evidence to satisfy any standard of proof. Even the jury instructions included a requirement that Spray-Rite present sufficient proof to establish a "tacit understanding." (Tr. 4352)

Monsanto agrees that "[t]o be probative of conspiracy, the circumstances of a distributor termination must establish a causal nexus between the complaints of other distributors and the manufacturer's decision to terminate." Pet. Br. at 37. Petitioner necessarily then must accept the Ninth Circuit's decision in *Filco* v. *Amana Refrigeration, Inc.*, ____ F.2d ____, [1983-1] Trade Cas. (CCH), ¶ 65,450 (9th Cir. 1983), which adopts a causal relationship standard, citing *Spray-Rite* and *Battle* with approval.[31]

[31] In *Filco* the Ninth Circuit held that both *Battle* and *Spray-Rite* required "evidence of a causal relationship between the competitor

While the language of the Seventh Circuit's opinion in *Spray-Rite* may be different from the *Schwimmer* and *Sweeney* cases, the evidence presented in *Spray-Rite* demonstrates a completely different case. The antitrust division and the petitioner would have the Court believe that by adopting different language from the Seventh Circuit's causal relationship test, the Court could reverse the Seventh Circuit's decision. Such is not the case. The true issue presented to the Court is whether *Spray-Rite* presented sufficient evidence to establish a vertical price-fixing agreement between Monsanto and some of its distributors. This paper or theoretical disagreement between *Sweeney* or *Schwimmer* and *Spray-Rite, Battle* or *Filco* disappears if the facts are examined. In short, Spray-Rite did indeed present sufficient evidence of a tacit understanding between Monsanto and some of its distributors to terminate Spray-Rite because of its price-cutting practices.

Moreover, the case really boils down to the instructions given to the jury. Monsanto's instructions are part of the jury charge. The jury was told: "The fact that distributors complain about prices or anything does not in itself mean that a conspiracy existed." (Tr. 4354) Further, that a manufacturer has the right to announce suggested retail prices and "refuse to sell to a distributor who refuses to abide by those suggested prices." (Tr. 4363) In short, the jury was told that a manufacturer can select any distributor it wants as long as it is not pursuant to a price-fixing conspiracy. (Tr. 4350-64) As fully discussed *supra*, Monsanto did not object to the *per se* instructions. Monsanto should not be permitted to try the case on one theory and then, years later, armed with instructions that were never submitted, return to the District Court for a new trial on a new theory.

Because Monsanto waived all of these points in the Dis-

(footnote continued)

dealer's price-related complaints and the manufacturer's action." [1983-1] Trade Cas. (CCH), ¶ 65,450 at 70,570 (9th Cir. 1983) (citations omitted).

trict Court, a secondary argument is made based on the notion that there is no evidence on which the jury would find for Spray-Rite. Any careful reading of the record, or fair summary of the facts, demonstrates that such a contention is simply specious, and the attempt to restructure the case as one involving "mere complaints" followed by an antiseptic, unconnected termination is a wholesale misstatement of the record.

Petitioner ignores two legal propositions in its warped record review. First, Monsanto's "evidence" is simply inconsistent with the jury verdict, and thus must be assumed to have been rejected by the jury. *See, e.g., Branti* v. *Finkel,* 445 U.S. 507, 512, n.6 (1980); *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 703 (1969) (per curiam).

Second, petitioner seeks to impose a requirement that a terminated distributor must present *direct evidence* of a "causal nexus between the complaints of other distributors and the manufacturer's decision to terminate." Pet. Br. at 37. Because of the clandestine nature of concerted activity, "conspiracies are seldom capable of proof by direct testimony . . . ." *Eastern States Retail Lumber Dealers' Ass'n* v. *United States,* 234 U.S. 600, 612 (1914). Thus, the Court has consistently held that a price-fixing victim need not prove the existence of an agreement by direct evidence to prove an unlawful conspiracy. *See Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 704 (1969) (per curiam); *United States* v. *General Motors Corp.,* 384 U.S. 127, 142-43 (1966); *United States* v. *McKesson & Robbins, Inc.,* 351 U.S. 305, 310 (1956); *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U.S. 537, 540 (1954); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809-10 (1946). Rather, "the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances." *Frey & Son, Inc.* v. *Cudahy Packing Co.,* 256 U.S. 208, 210 (1921). *See also Albrecht* v. *The Herald Co.,* 390 U.S. 145, 149 (1968);

American Tobacco Co. v. *United States*, 328 U.S. 781, 809-10 (1946); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226, 227 (1939); Piraino, *Distributor Terminations Pursuant to Conspiracies Among A Supplier And Complaining Distributors: A Suggested Antitrust Analysis*, 67 CORNELL L. REV. 297, 315, 322 (1982).

Thus, the trial court properly determined in denying defendant's motions for directed verdict that Spray-Rite presented sufficient circumstantial evidence on which to infer the existence of a price-fixing conspiracy.

V. Conclusion

For the foregoing reasons, the Seventh Circuit's decision should be affirmed.

Respectfully submitted,

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