

Syllabus

IN THE MATTER OF
AMERICAN OPTICAL COMPANY ET AL.

COMPLAINT, FINDINGS, OPINION, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED

Docket 3232. Complaint, Sept. 30, 1937—Decision, Jan. 21, 1939

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (a)—CUMULATIVE QUANTITY DISCOUNTS—LARGE CUSTOMER DIFFERENTIALS—WHERE NOT SUCH AS MAKE ONLY DUE ALLOWANCE FOR DIFFERENCES IN COST OF SALE OR DELIVERY OF STOCK RESULTING FROM DIFFERING QUANTITIES IN WHICH SALE AND DELIVERY MADE TO DIFFERENT CUSTOMERS.

A cumulative discount is sound only where savings have been achieved by the seller with respect to individual sales made to a particular buyer over a period of time, which savings were not reflected in the price at which the buyer purchased, and which are reserved for the purpose of refunding at the end of a period of time, and it does not follow that purchasers of large annual amounts also buy in larger individual shipments than do buyers whose purchases do not amount to so large a sum. Large buyers also place numerous small orders, the average size of which is frequently less than the average size of orders placed by buyers whose periodical annual purchases are less in volume. Thus it may cost seller more per dollar of sales to serve a customer who places a large number of small orders sufficient in the aggregate to earn the discount, than to serve a customer who places a few large orders whose total is not sufficient for such purpose. *H. C. Brill Co., Inc.*, Docket 3239, 26 F. T. C. 666.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (a)—QUANTITY DISCOUNTS—QUANTITY ORDER BASIS—DEALER PURCHASE RANGE—WHERE IN REACH OF AVERAGE—SAVING SALE AND DELIVERY CRITERIA.

Discount schedule under which Nation-wide producer-wholesaler seller of ophthalmic products provided for such quantity bases for discounts from list as one-order purchases of 2, 5, 10, 25, or 50 units without further concessions was not found to have effect of substantially lessening or injuring competition, either with said seller or with its customers, in the absence of evidence that quantity differentials in question were beyond the range of the purchases of the average retailer and thereby resulted in discrimination in favor of certain large dealers, and in view of possible justification, in whole or in part, by differences in cost of sale and delivery resulting from difference in size of individual orders, large orders ordinarily being obtained, assembled, packed, billed, and delivered at a lower cost per dollar of sales than small orders.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (A)—CUMULATIVE QUANTITY DISCOUNTS—LARGE CUSTOMER DIFFERENTIALS—"BIG DEALER" (RETAILER) DISCOUNT PLAN—WHERE NATION-WIDE PRODUCER-WHOLESALE SELLER AND COMPETITIVE EFFECTS ADVERSE, ABSENT DUE ALLOWANCE DIFFERENTIALS ONLY.

Where a voluntary association organized, existing, and doing business as a Massachusetts common-law trust; various officers thereof; and a corporation organized by them to do business in certain States in which said association did not do so, and stock of which was owned or controlled by such association; and which, as largest manufacturers and sellers of ophthalmic products in the United States, were engaged in selling as chain wholesaler through their 220 branches throughout the United States their said products to, chiefly, opticians, optometrists, and oculists, and in selling also to wholesalers, and to consumers such as laboratories, hospitals, and educational institutions direct, in competition with other manufacturers, jobbers, and distributors engaged in sale and distribution of optical and ophthalmic products, and including independent wholesalers in sales territories served by such branches;

In selling, as aforesaid, their said products (a) under certain catalogue "column" schedules or discounts from list under which purchasers, irrespective of total amounts otherwise bought, received, without further concession, discount on basis of purchases in one order, and discounts on lenses, frames, and mountings based on such order purchases of 2, 5, 10, 25, or 50 units as case might be, and (b) under so-called "big dealer" discount schedule by which, on basis of all monthly purchases aggregating (or averaging over year) \$1,500 or \$750, as case might be, retailer received off list, among other discounts, on types of merchandise for which demand is greatest and making up bulk of purchases of its customers, i. e., on lenses, frames, and mountings purchased by it and counted at 5- and 10-unit price of "column" schedules 33½ percent or 25 percent respectively, and under which they included in such aggregate for determining discount eligibility as aforesaid prescription items, surfacing, polishing, and edging machinery, and all purchases regardless of particular item's own discount status, and regardless also of size or number of separate orders making up total, and aggregated for determining retailer's "big dealer" discount status, as aforesaid, all purchases of multiunit outlets of retailer having such outlets, and (c) under which approved wholesalers were sold on usual manufacturer-to-wholesaler discount of 33½ percent on lenses, frames, mountings, cases, and machinery, as were, as above set forth, \$1,500 dealer purchasers under "big dealer" discount schedule—

Discriminated in price between different retail dealer purchasers of their products by offering to sell and selling same to a substantial number of their larger customers in various cities and towns throughout the United States at the cumulative discounts and substantial price differences and differentials of their said "big dealer" discount schedules, which did not make only due allowance for, or have any consistent relation to, differences, if any, in cost of sale or delivery of stock merchandise resulting from differing quantities in which sale and delivery was made to different customers under said plan, and which, in case of maximum discounts allowed thereunder and secured by such large purchasers as department stores and jewelry chains, approximated their factory-to-jobber discounts and those of other manufacturers, and of which differentials and discounts substantial number

of their customers were able to secure the benefit, and of which many other customers engaged in competition with such "big dealers" did not secure the benefit;

With the result that—

There was a distinct competitive advantage to such "big dealer" customers by reason of the very considerable saving per dollar on purchases to such customers as against smaller retailer who could not, in general, purchase their products or other products of like grade and quality from wholesalers or jobbers on such favorable terms;

Many independent wholesalers who necessarily must purchase, as wholesalers, optical goods of first grade and quality from manufacturers at prices generally approximating those available to large retailers under such "big dealer" plan, were prevented from selling stock merchandise to a large and profitable class of customers, except at a loss, and smaller manufacturers of optical goods who market their products largely through independent wholesalers were likewise affected;

There was a tendency to induce retailers whose purchases were little more than enough to qualify for "big dealer" discount to group all purchases with their wholesale branch offering cumulative discounts, so that independent wholesaler or small and limited line manufacturer, not in a position to offer similar "big dealer" plan covering all classes of optical goods, even by direct sales, was required, to obtain part of such business, to offer sufficiently lower prices to compensate retailer for loss of discount on purchase of his requirements which he might desire or be compelled to purchase from them; and

Many retailers were induced, necessarily, through inclusion in totals under said plan of prescription business, not discountable, for determination of discount status on other items subject thereto, to give such retailers' prescription business to their said various branches, equipped therefor, to obtain lower price on purchases of stock merchandise subject to discount, and freedom of competition on basis of price, quality, and efficiency of service was, to such extent, prevented for prescription business, of importance to retailer and public in view of necessary reliance by most of smaller optometrists and opticians on wholesaler for prompt prescription service in view of own lack of machinery, facilities, or stock necessary to meet greatly varying needs of individual customers; and

With result that effect of such discrimination in price (a) had been and might be to injure, destroy, or prevent competition of their retailer customers who, as aforesaid set forth, did not secure benefit of such "big dealer" discount plan, with those of their retailer customers who did secure such benefit, and (b) had been and might be substantially to lessen competition or tend to create a monopoly in the line of commerce in which they were engaged, and to injure, destroy or prevent competition with them in both wholesale and manufacturing fields:

Held, That through use of their "big dealer" cumulative discount plan and pricing policies embraced therein, they violated and were violating Section 2 (a) of Clayton Act.

Before *Mr. Robert S. Hall*, trial examiner.

Mr. Cyrus B. Austin for the Commission.

Root, Clark, Buckner & Ballantine, of New York City, for respondents.

Complaint

28 F. T. C.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936 (U. S. C. Title XV, Section 13), commonly known as the Robinson-Patman Act, the Federal Trade Commission having reason to believe that the respondents named in the caption hereof have violated and are now violating the provisions of Subsection (a) of Section 2 of said Act as amended, hereby issues its complaint against the said respondents, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, American Optical Co., an association, is a voluntary association, organized in 1912 under the laws of Massachusetts as a common law trust, owning, holding, or controlling all of the capital stock of respondent (American Optical Co., a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business at Southbridge, Mass.

The American Optical Co., a corporation, was organized by respondents to engage in and carry on manufacturing and sales activities of the respondents in States where the Massachusetts trust type of association is not recognized as a corporate entity, and the said respondent corporation is licensed to do and does carry on such business and sales activities for and on behalf of respondents in the States of Pennsylvania, Virginia, Ohio, Tennessee, Alabama, Michigan, Wisconsin, Texas, California, and Idaho.

Respondents, George B. Wells, Ira Mosher, Charles O. Cozzens, John M. Wells, Edward E. Williams, A. Turner Wells, and Albert B. Wells, all of Southbridge, Mass., are severally here made parties respondent in their respective capacities as indicated in the caption hereof, individually and as representative members of American Optical Co., the association.

PAR. 2. Respondents and each of them are now and have been since June 19, 1936, engaged in the business of manufacturing and selling optical goods and ophthalmic products, including lenses, frames, mountings, diagnostic instruments, optical machinery, tools, and grinding and polishing materials to various retailers, independent wholesalers, and chain business enterprises engaged in business as lessee-operators of the optical departments of various large department stores. Respondents effect the sale and distribution of these products through some 320 branch offices, each of which functions

as a wholesaler. These branch offices are grouped into 9 districts or sales territories, each with a central sales branch where the respondents maintain a stock of supplies on hand from which they supply the other branch sales offices in each district. Respondents employ over 300 salesmen who call regularly upon the retail trade, and during 1936 did a volume of approximately \$18,500,000 in total sales. The individual respondents herein named in their respective capacities as officers and chairman of the board and as representative of the association American Optical Co., control and direct the sales policies, pricing, and selling activities engaged in by all of the said other respondents as hereinafter set forth.

PAR. 3. In the course and conduct of their respective businesses as aforesaid, respondents, and each of them, transports or causes to be transported the said products, when sold, from the places of their respective locations to the purchasers thereof located in the several States of the United States other than the States in which such shipments originated, and there is and has been at all times herein mentioned a current of trade and commerce in said products, between the States wherein these several respondents are located and the various other States of the United States.

Said respondents and each of them sell and distribute the aforesaid products for use, consumption or resale within the United States and the District of Columbia, in the same territories and places and in competition with various other manufacturers, distributors, and wholesalers engaged in the sale of optical goods and ophthalmic products, including lenses, frames, mountings, diagnostic instruments, optical machinery and tools, and grinding and polishing materials.

Respondents' aforesaid purchaser customers are competitively engaged with each other and with the purchaser customers of respondents' competitors, in the resale of said products, both at wholesale and retail, within the several sales areas in which the said wholesale and retail customers respectively offer for sale and sell the said products of American Optical Co.

PAR. 4. Said respondents and each of them, in the course and conduct of interstate commerce as hereinbefore set forth have, since June 19, 1936, discriminated in price and are now discriminating in the prices at which they and each of them have sold and do sell American Optical Co. products and commodities of like grade and quality, between the different purchasers of such products and commodities, by giving and allowing certain of said purchasers a lower price than given or allowed other purchasers competitively engaged in said line of commerce, and by giving and allowing certain of said purchasers

adjustments, rebates, or discounts in the form of cash or commodities not given and allowed to others of respondents' said purchaser customers. Respondents' purchaser customers in whose favor such price discrimination is made are generally the larger dealers who are thus enabled either to undersell their competitors or furnish superior facilities and services to the prospective consumer purchaser, or both, and thereby trade is diverted from the smaller retailer to the more favored and larger dealer in said products.

PAR. 5. The effect of such discrimination in price made by said respondents, as set forth in paragraph 4 hereof, may be substantially to lessen competition between the respondents and their aforesaid competitors; between the customers of respondents in whose favor such discrimination is made and respondents' other customers; and between the customers of respondents' competitors who do not grant such customers the benefit of such discriminatory prices and the customers of respondents in favor of whom respondents discriminate, or tend to create a monopoly in the aforesaid line of commerce in respondents and respondents' favored customers, and to injure, destroy and prevent competition with the said respondents and with those of respondents' customers who knowingly receive the benefit of such discrimination, and with the customers of each of them.

Such discrimination in price by said respondents, and each of them, between different purchasers of commodities of like grade and quality in interstate commerce in the manner and form aforesaid are in violation of the provisions of Subsection (a) of Section 2 of the Act described in the preamble hereof.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), as amended, the Federal Trade Commission, on September 30, 1937, issued its complaint against the above-named respondents and caused such complaint to be served as required by law, charging that said respondents were and had been discriminating in price between different purchasers from them of commodities of like grade and quality in commerce, in violation of the provisions of Section 2 (a) of said Act.

Respondents duly filed their joint answer to said complaint. Thereafter a stipulation was entered into between counsel for the Commission and counsel for the respondents containing a statement

of the facts in this proceeding upon which it was agreed that said proceeding might be submitted to the Commission for final determination, the respondents consenting that upon said stipulation an order be issued requiring them to cease and desist from the price discrimination alleged in the complaint. Said stipulation was duly approved and filed herein by order of the Commission.

This proceeding regularly coming on to be heard upon said complaint, answer and stipulation, filing of briefs, and presentation of oral argument having been waived, the Commission, having duly considered the same and being fully advised in the premises, and being of the opinion that the respondents have been and are violating the provisions of Section 2 (a) of said Clayton Act, now makes these its findings as to the facts and states its conclusions drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent American Optical Co., an association, is a voluntary association organized in 1912, and existing and doing business under and by virtue of the laws of the State of Massachusetts as a common-law trust. Respondents George B. Wells, Ira Mosher, Charles O. Cozzens, John M. Wells, Edward E. Williams, A. Turner Wells, and Albert B. Wells are, respectively, president, vice president, and general manager, vice president in charge of sales, vice president in charge of research laboratory, treasurer, secretary, and chairman of the board of trustees of American Optical Co., an association. Respondent American Optical Co., a corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, having been organized by the other respondents to engage in business in certain States where the respondent association does not do business. All of the capital stock of said respondent corporation is owned or controlled by the respondent association. "American Optical Company" and "respondents," when used hereinafter, shall be deemed to refer to both American Optical Co., the association, and American Optical Co., the corporation, and to the individual respondents only in their capacities as directors, officers, and/or trustees of the respondent association and corporation.

PAR. 2. Respondents are now and for many years have been engaged in the business of manufacturing, distributing, and selling ophthalmic merchandise and optical goods generally, including lenses, frames, and mountings for eyeglasses, cases, ophthalmological equipment, machinery, and specialties. They are the largest manufacturers and sellers of ophthalmic products in the United States. Their only man-

ufacturing competitor of comparable size is Bausch & Lomb Optical Co., of Rochester, N. Y. The annual volume of business of each of these two concerns is considerably larger than that of any other manufacturer of optical goods in the United States.

Distribution and sales of American Optical Co. are effected through about 220 branch stores located throughout the United States, each of which performs the functions of a wholesaler for the adjacent sales territory. Each branch store is operated by a salaried branch manager. More than 80 percent of the company's sales volume of ophthalmic merchandise is in sales to opticians, optometrists, and oculists through the branch stores. The branches are divided territorially into nine zones, each with a main zone office to which the branch managers account and which maintains a complete stock of the company's products from which the branch stores are chiefly supplied.

Respondents also sell ophthalmic merchandise to wholesalers, such sales accounting for between 10 and 15 percent of total volume. Other sales are made direct to consumers such as laboratories, hospitals, and educational institutions.

PAR. 3. Respondents' products are manufactured at Southbridge, Mass., and are constantly shipped from that point to the company's zone and branch agencies in the other States of the United States and the District of Columbia for sale through said agencies and to meet the constant demand which exists for such products on the part of respondents' wholesaler and retailer customers. Shipments are also made, when necessary or convenient, directly from the factory to purchasers in other States. Said products are sold for use and resale in the United States and the District of Columbia.

PAR. 4. Respondents sell and distribute their said products in the same territories and places as and in active competition with various other manufacturers, jobbers, and wholesalers likewise engaged in the sale and distribution of optical and ophthalmic products. Some of respondents' customers are engaged in competition with each other and with customers of respondents' competitors, in the use and resale of such products, at wholesale or retail, within the several localities and sales areas in which such customers are located and do business.

PAR. 5. An important function of the so-called optical wholesaler is the maintenance and operation of a prescription shop with the necessary machinery and tools for grinding, polishing, edging, and inserting or mounting lenses. There are many retailers who cannot or do not wish to make the investment in machinery and provide the space

necessary to maintain their own prescription shops, and they rely upon the nearby wholesalers to do this work and to maintain an extensive supply of unfinished lenses, frames, and mountings of various types and styles from which individual prescriptions can be filled promptly as ordered. The greater part of the business of the average small independent optical wholesaler is in the filling and delivery of prescription orders for the retailers in his locality. All of respondents' branch offices have well-equipped prescription shops and actively compete for the prescription business in their respective sales territories. Many of the larges retailers maintain their own prescription shops and do most of their own grinding, edging, etc., in order to enable them to give better service.

PAR. 6. The lenses, frames, and mountings manufactured by respondents are listed in respondents' catalog and sold to retailers at varying prices, depending on the number of pairs (lenses) or units (frames and mountings) of one description, type, or brand purchased in a single order. For example, as applied to certain gold filled mountings and lenses, the catalog "column" schedules quote prices under the following headings:

- 2 (pairs) of a kind or 5 assorted
- 5 (pairs) of a kind or 10 assorted
- 25 (pairs) assorted
- 50 (pairs) assorted

For certain other items, such as blank and semifinished lenses, zylonite frames, solid gold mountings, etc., fewer columns are listed, in some cases the price reduction for quantity extending only to purchases of five or more assorted units, or one package of lenses. Generally no price concession is made on the basis of single purchases in excess of 50 units or pairs. These "column prices" are available to all purchasers on the basis above stated, irrespective of the total amount of merchandise of various kinds ordered at one time or the total volume purchased over any given period.

Prices listed for a single pair of lenses or a single frame or mounting (RX prices) are the prices charged for filling prescription orders. The column price lists above described do not apply to sales on prescription, but only to sales of stock merchandise.

PAR. 7. Respondents also sell their lenses, frames, mountings, machinery, ophthalmological equipment and other stock merchandise to retailer customers at different prices, under respondents' "big dealer discount" plan. The "Big Dealer Discount Schedule", as printed in respondents' price list, follows:

Findings

28 F. T. C.

DISCOUNT SCHEDULE

Applying to All Listed Merchandise

The discounts on stock as shown in the following schedule apply to the large retail accounts and are classified under the *Big Dealer Discount Schedule*

Big Dealer Discount Schedule

	\$1,500 and up at list prices per month	\$750 up to \$1,500 at list prices per month
Lenses	33 1/3% & 2%	25% & 2%
Tilley Single Vision and Bifocals	33 1/3% & 2%	25% & 2%
All Bifocals (except Panoptik and Full-Vue)	33 1/3% & 2%	25% & 2%
Panoptik Bifocal Blanks (to Licensees and Agents only)	Net.	Net.
Full-Vue Bifocal Blanks (to Licensees Only)	Net.	Net.
Gold	20% & 2%	20% & 2%
Zylonite	33 1/3% & 2%	25% & 2%
All other frames (except Oxfords)	33 1/3% & 2%	25% & 2%
Oxfords—Folding	Net.	Net.
Non-Folding, G. F. and Zyl.	25% & 2%	20% & 2%
Non-Folding, Gold	20% & 2%	20% & 2%
Z-Fold	20% & 2%	10% & 2%
Cases	25% & 2%	20% & 2%
Ophthalmological Equipment	10% & 1%	10% & 1%
Machinery	20% & 2%	10% & 2%
All Chains and Ribbons	20% & 2%	10% & 2%
Sun Goggles except Sportglas (including Autoglas and Solarglas)	33 1/3% & 2%	25% & 2%
Sportglas	Net.	Net.
Specialties	20% & 2%	10% & 2%

All Items Are Included in Determining Above Dealer Classifications

Rx and Net items are included in determining above dealer classifications but are not subject to any trade discount.

Machinery and Ophthalmological Equipment items are to be included in determining above dealer classifications; and are subject to the discounts listed above.

Dealers whose purchases total \$18,000 per year will receive the same discounts as apply to the \$1,500 per month classification, the discount being extended each month when the dealer qualifies, and credit given at the end of the year for the difference in the discount received during the month or months when dealer did not purchase \$1,500.

Dealers who purchase \$750 per month will be granted similar proportionate credit for total purchases of \$9,000 per year.

The lenses, frames, and mountings on which the big-dealer discounts 33 1/3 percent and 25 percent are offered in the above schedule include the types of such merchandise for which the demand is greatest and which make up the bulk of the purchases of respondents' customers. In computing the big-dealer discounts on lenses, frames, and mountings, purchases falling under the second, third, or fourth catalog column headings shown in paragraph 6 hereof are billed at the second column price (5 of a kind or 10 assorted). Under this schedule the discounts allowed are determined solely by the customer's total purchases during the discount period, regardless of the size or number of

separate orders filled in making up the total. No discount (except cash discount) is allowed on prescription (Rx) sales and "net" items, but such sales are included in determining total volume for qualification for big-dealer discounts on stock merchandise. Purchases of surfacing, polishing, and edging machinery are likewise so included. Such purchases frequently run into hundreds of dollars, and in some cases are in larger amounts, and a single such purchase may, under the above schedule, affect the discount received by the buyer on lenses and frames purchased during the month or year. A substantial number of respondent's customers have been able to secure the discounts provided for in the big dealer discount schedule, while many other customers engaged in competition with such "big dealers" in the use and sale of respondents' said products have not received the benefit of such discounts.

PAR. 8. Respondents maintain a list of approved wholesalers and sell to the wholesalers so listed at discounts which on lenses, frames, mountings, cases, and machinery are in general the same as those extended to \$1,500 per month dealers under the big-dealer schedule. The smaller manufacturers of ophthalmic merchandise market their products largely through these and other wholesalers, and also by direct factory-to-retailer selling. The majority of such manufacturers produce only limited lines, some making only lenses, others frames, etc. In general, list prices of the various manufacturers are substantially the same for merchandise of comparable quality, price competition generally being carried on through the granting of discounts rather than by lowering base prices. The usual manufacturer-to-wholesaler discount on lenses, frames, and mounting is 33 $\frac{1}{3}$ percent, but greater discounts are given by some manufacturers.

PAR. 9. Respondents sell some of their products to large retailer purchasers who are proprietors or operators of multiple shops or outlets. In some cases these outlets are in a single city, in some cases in more than one city, and in some cases in more than one State. These outlets are in some cases separate stores and in some cases optical departments in department stores or jewelry stores. In many cases each of the shops or departments operated by these concerns orders merchandise which it requires and has the same delivered from respondents' nearest branch. The business of each of said shops or departments may be in competition with the businesses of other optometrists and opticians in the same locality who purchase from the same branch of respondents, and in some cases in as large or larger quantity. Total purchases by the various outlets or shops of these large retailer purchasers are billed to the central office of

the proprietor, subject to big-dealer discounts on the total purchases for all the outlets rather than on the basis of the total purchases of the several units.

OPINION

The products manufactured by the respondent are constantly shipped by them in interstate commerce from their factories at Southbridge, Mass. to their zone and branch agencies, and from zone agencies to local branches, for sale through said agencies to meet the constant demand for said products existing on the part of optical wholesalers and retailers throughout the country. The prices fixed and charged by respondents for their products so shipped and sold are fixed and charged by them in the course of commerce, and such sales are sales in commerce, within the meaning of Section 2 (a) of the Clayton Act.

Pursuant to the "Big-Dealer Discount Schedule" set forth in paragraph 7 of the above findings, respondents have, at all times since June 19, 1936, discriminated in price between different retailer purchasers of their products by offering to sell and selling said products to a substantial number of their larger customers, located in various cities and towns throughout the United States, at the cumulative discounts shown in said schedule while many other customers, engaged in competition with said larger customers, do not receive and cannot purchase in sufficient volume to obtain these discounts. On lenses, frames, and mountings making up the bulk of sales of ophthalmic stock merchandise, large purchasers, including department store and jewelry store chains, are allowed a discount of $33\frac{1}{3}$ percent plus 2 percent for cash, other purchasers receive 25 percent plus 2 percent for cash, while smaller purchasers are allowed only 2 percent cash discount (plus such additional savings as result when purchases are made in lots of 25 or 50 units or pairs). The resulting price differences are substantial, and amount to a very considerable saving per dollar of purchases to the "big dealer" as against the smaller retailer. The maximum discounts allowed under the "big dealer" plan approximate the factory-to-jobber discounts of respondents and other manufacturers, and the smaller retailer cannot, in general, purchase respondent's products or other products of like grade and quality from wholesalers or jobbers on these favorable terms. The lower price paid for respondents' products by their "big dealer" customers has been and is a distinct competitive advantage to such customers.

The effect of such discrimination in price has been to injure, and may be to injure, destroy, or prevent competition with respondents' retailer customers receiving the benefit of such discrimination.

Respondents operate as a chain wholesaler, maintaining some 220 branch stores throughout the United States, each of which performs the functions of a wholesaler and engages in active competition with independent wholesalers in the same sales territory. Independent wholesalers must purchase optical goods of first grade and quality from manufacturers at prices generally approximating those available to large retailers under the respondents' "big-dealer" plan. As a result of the discriminatory prices charged by respondents, many independent wholesalers are prevented from selling stock merchandise to a large and profitable class of customers, except at a loss. The smaller manufacturers of optical merchandise market their products largely through the independent wholesalers, and to that extent are likewise affected. Furthermore, the smaller limited line manufacturer is not in a position to offer a similar "big-dealer" plan covering all classes of optical goods, even by direct sales. The tendency of the cumulative "big-dealer" discounts is to induce the retailer whose purchases are little more than enough to qualify therefor to group all his purchases with the respondents' wholesale branch offering the cumulative discount. The independent wholesaler or small manufacturer cannot obtain a *part* of this business even by offering an equal price, but must offer a sufficiently *lower* price to compensate the retailer for the loss of discount on the portion of his requirements which he may desire or be compelled to purchase from the respondents.

What has just been stated applies particularly to competition between respondents' branches and independent wholesalers for prescription business. An important function of the optical wholesaler is the maintenance and operation of a prescription shop with machinery and tools for grinding, polishing, edging, and inserting or mounting lenses, and the filling of prescriptions for nearby optometrists and opticians. Most of the smaller optometrists and opticians do not have the machinery or facilities for doing this work nor maintaining the large stock of merchandise necessary to meet the greatly varying needs of individual customers, and they must rely upon the wholesaler for prompt prescription service. Free and open competition in this branch of the wholesale optical business is important to the retailer and to the public. Under respondents' "big-dealer" plan, prescription sales are included in volume of purchases in determining the retailer's qualification for the cumulative discounts, resulting in a discrimination in price between retailers who do, and who do not, give their prescription business to respondents' branches. No discount is allowed on prescription sales, and it does not appear that such sales affect the cost of sale or delivery of stock merchandise to the same customer. Such a plan necessarily

induces many retailers to give their prescription business to respondents in order to obtain a lower price on purchases of stock merchandise, and to that extent prevents freedom of competition for such prescription business on the basis of price, quality and efficiency of service.

The effect of the price discrimination practiced by respondents under their "big-dealer discount" plan is and may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondents are engaged and to injure, destroy or prevent competition with respondents in both the wholesale and manufacturing fields.

It does not appear from the facts before us that the differentials of the "big-dealer" plan make only due allowance for, or bear any consistent relation to differences, if any, in cost of sale or delivery of stock merchandise resulting from the differing quantities in which sale and delivery is made to different customers under said plan. There is no indication of differing methods of sale or delivery. Since the "big dealer" has no price incentive for ordering lenses, frames and mountings in lots of more than five of a kind or ten assorted, it cannot be inferred that the average individual order for stock merchandise placed by a retailer making purchases of \$1,000 or \$1,500 in a month is larger than the average order of a \$500 per month or smaller purchaser. The \$500 purchaser may receive no discount other than for cash, while a competitor purchasing \$400 worth of stock merchandise during the same month in similar quantities may be allowed a discount of 25 percent, or even 33⅓ percent, as a result of throwing in his prescription business or giving an order for machinery or equipment.

As we stated in our opinion in Matter of H. C. Brill Co., Inc. (F. T. C. Docket 3299, opinion dated February 10, 1938, 26 F. T. C. 666) :

Purchasers of large annual amounts sometimes buy in larger individual shipments than do buyers whose purchases do not amount to as large a sum. Large buyers, however, also place numerous small orders and the average size of such orders is frequently less than the average size of orders placed by buyers whose aggregate annual purchases are less in volume. Indeed under a discount plan based on aggregate volume purchases for a given period, such as that contained in the aforesaid contract, it may cost the seller more per dollar of sales to serve a customer who places a large number of small orders which are sufficient in the aggregate to earn the discounts than to serve the customer who places a few large orders whose total is not sufficient to obtain the discounts.

* * * * *

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Order

A cumulative discount is sound only where savings have been achieved by the seller with respect to individual sales made to a particular buyer over a period of time, which savings were not reflected in the price at which the buyer purchased and which are reserved for the purpose of refunding at the end of a period of time.

Stock merchandise manufactured by respondents is listed in respondents' catalogs and price lists at prices which, for most merchandise, vary according to the number of articles of a particular type and description (or pairs of a single type of lens) which are purchased in one order. For the majority of lenses and the more popular types of frames and mountings, the price range extends to purchases in the following "column" quantities (lenses in pairs): 2 of a kind or 5 assorted; 5 of a kind or 10 assorted; 25 assorted; 50 assorted. While the price for 50 pairs or units is substantially lower than the price for 2 or 5, these prices are available to all customers who purchase in the stated amounts. In general no price concession is made for single orders of more than 50 units or pairs.

We do not find, upon these facts, that the "column" differentials have the effect of substantially lessening or injuring competition, either with respondents or with their customers. A different conclusion might be reached if it should appear that these differentials were extended to large quantities beyond the range of the purchases of the average retailer, thereby resulting in discrimination in favor of certain large dealers—but such is not shown to be the case here. Furthermore, said column differentials may be justified, in part at least, by differences in cost of sale and delivery resulting from the difference in the size of individual orders. Ordinarily large orders are obtained, assembled, packed, billed, and delivered at a lower cost per dollar of sales than small orders.

We conclude that through the use of their "big-dealer" cumulative discount plan and the pricing policies embraced therein respondents have violated and are violating Section 2 (a) of the Clayton Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the joint answer of the respondents, and a stipulation as to the facts signed by counsel for the Commission and counsel for the respondents in which it is provided that the statement of facts contained therein may be accepted as the facts in this proceeding in lieu of testimony in support of the charges stated in the complaint and in opposition thereto, and the taking of testimony and all intervening procedure having

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been waived, and the Commission being of the opinion that said respondents have violated the provisions of Section 2 (a) of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), as amended, and having made its report stating its findings as to the facts, which report is made a part hereof,

It is ordered, That the respondents, American Optical Co., an association, and American Optical Co., a corporation, and their respective officers, members, representatives, agents, and employees, in connection with the distribution and sale of optical and ophthalmic products in commerce between the States and in the District of Columbia, do forthwith cease and desist

1. From discriminating in price between different purchasers of such products of like grade and quality, either directly or indirectly, by granting or allowing the cumulative or volume discounts described in paragraph 7 of said findings as to the facts, or by continuing in effect the "big-dealer" discount plan in said paragraph described.

2. From discriminating in price between purchasers of ophthalmic stock merchandise and equipment who also purchase merchandise from respondents on prescriptions for single pairs of glasses, or employ respondents to fill such prescriptions, and other purchasers of such merchandise and equipment who do not purchase from respondents on prescriptions or employ respondents to fill prescriptions, unless such price differences make only due allowance for differences in cost of selling or delivering such stock merchandise and equipment to such purchasers resulting from the differing methods or quantities in which such stock merchandise and equipment is sold and delivered.

3. From discriminating in price between different purchasers of such products of like grade and quality by granting or allowing any other cumulative or volume discounts, rebates, or price reductions, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in a line of commerce in which respondents or their customers are engaged, or to injure, destroy, or prevent competition with respondents or with any of their customers, except where such discounts, rebates, or price reductions make only due allowance for differences in cost resulting from the differing methods or quantities in which such products are to such purchasers sold and delivered during the period of time for which such discounts, rebates, or price reductions are granted or allowed.

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Nothing contained in paragraphs 2 or 3 hereof shall be construed to prevent said respondents from showing that any such discount, rebate or other price reduction made or offered to be made by them was given in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor, or from granting any discounts, rebates or price reductions permitted by law.

It is further ordered, That said respondents, within 60 days after service upon them of this order, shall file with the Commission a report in writing setting forth in detail the manner and form in which they have complied and are complying with this order.

IN THE MATTER OF
BAUSCH & LOMB OPTICAL COMPANY ET AL.

COMPLAINT, FINDINGS, OPINION, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 2 (a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914,
AS AMENDED

Docket 3233. Complaint, Sept. 30, 1937—Decision, Jan. 21, 1939

Where (1) a corporation engaged in manufacture, distribution, and sale of a complete line of ophthalmic merchandise and optical goods, including lenses, frames, and mountings for eye glasses, scientific instruments for eye testing, cases, equipment, machinery, and specialties, and which (a) effected distribution and sale of its products through six corporate wholesalers, outstanding voting stock of which is controlled, with power to coordinate and control their sales and pricing policies, and which engaged in their respective territories in selling, through a system of wholesale outlets or branches extending throughout the United States, its said products under pricing policies coordinated and controlled by it and at uniform prices fixed or approved by it, and to which and other wholesalers it sold its products at same prices as those listed as below set forth for \$1,500 retailer accounts, and (b) constituted, considered together with its aforesaid selling affiliates, the second largest organization manufacturing and distributing ophthalmic products in the United States; and (2) said six corporate wholesalers, in their respective territories, dealing, principally, in its products, directing their sales efforts primarily to sale of its merchandise, and charging prices and using discount plans which were substantially the same, and quoting and using, in the case of its merchandise, prices published in its catalogs, and making use thereof as basis for computation of various discount allowances; and, by and large, with well-equipped prescription shops and doing substantial amount of prescription business in their respective sales territories, and competing for such business for which many retailers, not themselves equipped, rely upon nearby wholesalers;

In selling, as thus engaged, such manufacturer's said products in competition with numerous other manufacturers of such goods, and in substantial competition with other wholesalers and with wholesale branches of largest manufacturer of such products in the United States, (a) under certain "column" schedules or discounts from list prices which were, in general, common to and made use of by manufacturing trade in question, and under which purchasers, irrespective of total amounts otherwise bought, received, without further concession, discount on basis of purchases in one order and discounts on lenses, frames, and mountings based on such order purchases of 2, 5, 10, 25, or 50 units, as case might be, (b) under so-called "big dealer" discount plan or "volume purchase schedule" by which, on basis of all monthly purchases aggregating \$1,500 or \$750, as case might be, retailer received off list, among other discounts on types of merchandise for which demand is greatest and which make up bulk of purchases of its customers, i. e., on lenses, frames and mountings purchased by it, 33½ percent or 25 percent, respectively, and under which they included, in such aggregate for determining discount eligibility as aforesaid, prescription