

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

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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 under which, moreover, large part of stock merchandise as thus sold to \$1,500 per month "big dealers," and including most lenses, frames, and mountings, was sold at cost without markup for selling, handling and overhead—

Discriminated in price, through use of their "big dealer" cumulative discount plan and cumulative discounts and differentials allowed thereunder, which bore no consistent relation to size of single orders or differences in cost of sale and delivery per dollar of merchandise as between different purchasers, and did not make only due allowances for differences, if any, in cost of sale or delivery resulting from differing methods or quantities in which sale or delivery is made to different purchasers under said plan, in favor of a substantial number of their larger customers who were able to receive volume discounts thus provided, and as against many other customers engaged in competition with such "big dealers" and including small optometrists and opticians who did not receive such discounts and could not purchase in sufficient volume to qualify therefor;

With the result that the effect of such discrimination in price had been and might be to injure, destroy, or prevent competition with customers of industry receiving benefit of discrimination aforesaid, and had been and might be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which they were respectively engaged, and to injure, destroy or prevent competition with them by other wholesalers and with it by limited line manufacturers of optical goods:

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 the Clayton Act.

Mr. Cyrus B. Austin for the Commission.

Hubbell, Taylor, Goodwin, Nixon & Hargrave, of Rochester, N. Y., for respondents, and *Mr. James M. O'Reilly*, of Rochester, N. Y., also for Bausch & Lomb Optical Co.

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 15, sec. 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 Bausch & Lomb Optical Co. is a corporation, organized and existing under and by virtue of the laws of the State of New York, and its principal office and place of business is

located in the city of Rochester in said State. It is now, and has 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. Such sales are by said respondent made both directly and through the other respondents hereinabove named in the caption and hereinafter more particularly designated and described. Respondent Bausch & Lomb Optical Co. owns a controlling share of the stock in each of the said other respondent companies and exercises such control in directing the sales policies, pricing and selling activities engaged in by said other respondents in their respective businesses.

PAR. 2. (a) Respondent Colonial Optical Co., Inc., is a corporation, organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business at 62 West Forty-seventh Street, in the city of New York in said State. Bausch & Lomb Optical Co. owns and holds approximately 91 percent of the outstanding shares of voting stock issued by Colonial Optical Co., Inc.

(b) Respondent McIntire, Magee & Brown is a corporation, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at 1700 Walnut Street in the city of Philadelphia, in said State. Approximately 58 percent of the outstanding shares of the voting stock by it issued are owned and held by the respondent Bausch & Lomb Optical Co.

(c) Respondent Riggs Optical Co. Consolidated is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 222 West NoBank Drive, in the city of Chicago, in the State of Illinois. Approximately 82 percent of the outstanding shares of voting stock by it issued are owned and held by the respondent Bausch & Lomb Optical Co.

(d) Respondent Riggs Optical Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Flood Building, in the city of San Francisco, in the State of California. Approximately 74 percent of the outstanding shares of voting stock by it issued are owned and held by the respondent Bausch & Lomb Optical Co.

(e) Respondent Southeastern Optical Co. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business at 212 East

Franklin Street, in the city of Richmond in said State. Approximately 60 percent of the outstanding shares of voting stock by it issued are owned and held by the respondent Bausch & Lomb Optical Co.

(f) Respondent The White, Haines Optical Co. is a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal office and place of business at 82 North High Street, in the city of Columbus, in said State. Approximately 72 percent of the outstanding shares of voting stock by it issued are owned and held by the respondent Bausch & Lomb Optical Co.

(g) Each of the respondents in said subsections (a) to (f) inclusive in this paragraph named is now, and since June 19, 1936, has been engaged in the business of selling at wholesale the aforesaid optical goods and ophthalmic products of the respondent Bausch & Lomb Optical Co.

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 in the resale of said products, both at wholesale and retail, to the consumers or users thereof, within the several sales areas in which said purchaser customers respectively offer for sale and sell the said products of Bausch & Lomb 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 price at which they and each of them have sold and do sell Bausch & Lomb 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 other of respondents' said purchaser customers. Respondents' purchaser customers in whose favor such discrimination is made, are generally the larger dealers who are thus enabled either to undersell their competitors or furnish better facilities and services to the prospective consumer purchaser, or both.

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; and said discrimination tends 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, issues its complaint against the above-named respondents and causes such complaint to be served as required by law, charging that said respondents were and had been discriminating in price between different purchasers 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 separate answers 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, answers and stipulations, filing of briefs and presentation of oral argument having been waived by counsel for all parties, 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 its conclusions drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Bausch & Lomb Optical Co. (hereinafter referred to as "Bausch & Lomb") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with main offices and factories located at Rochester, N. Y. Said respondent is now and for many years has been engaged in the business of manufacturing, distributing, and selling, among other things, 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.

PAR. 2. Respondent Colonial Optical Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office located in New York, N. Y. Said respondent is engaged in the business of distributing and selling optical and ophthalmic products at wholesale, sale, through some 21 branches located in the principal cities of and serving the following territory: New York, the northern half of New Jersey, and all of New England. Of 6,777 shares of capital stock of said respondent outstanding, 6,350 shares are owned by Bausch & Lomb.

PAR. 3. Respondent McIntire, Magee & Brown Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office located in Philadelphia, Pa. Said respondent is engaged in the business of distributing and selling optical and ophthalmic products at wholesale, through some 9 branches located in the principal cities of and serving the following territory: the southern half of New Jersey, the eastern half of Pennsylvania, Maryland (except two western counties), Delaware, the District of Columbia, and the northern quarter of Virginia.

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Of 3,695 shares outstanding capital stock of said respondent, 2,139 shares are owned by Bausch & Lomb.

PAR. 4. Respondent Southeastern Optical Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its principal office located in Richmond, Va. Said respondent is engaged in the business of distributing and selling optical and ophthalmic products at wholesale, through some 21 branches located in the principal cities of and serving the following territory: Virginia (except the northern quarter), North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, and northeastern Arkansas. Said respondent has voting stock outstanding consisting of 2,014 shares of class A stock, all of which is owned by Bausch & Lomb, and 2,663 shares of common stock, of which 1,559 shares are owned by Bausch & Lomb.

PAR. 5. Respondent The White-Haines Optical Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office located in Columbus, Ohio. Said respondent is engaged in the business of distributing and selling optical and ophthalmic products at wholesale, through some 24 branches located in the principal cities of and serving the following territory: The Western half of Pennsylvania, West Virginia, Maryland (two western counties), Ohio, Kentucky (except southwestern corner), Indiana (except three northwestern counties), central Illinois, and the southern peninsula of Michigan. Said respondent has voting stock outstanding as follows: 5,725 shares, second preferred, of which 4,280 shares are owned by Bausch & Lomb, and 14,376 shares of common stock of which 7,650 are owned by Bausch & Lomb.

PAR. 6. Respondent Riggs Optical Co., Consolidated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office located in Chicago, Ill. Said respondent is engaged in the business of distributing and selling optical and ophthalmic products at wholesale, through some 56 branches located in the principal cities of and serving the following territory: Illinois (except the central portion), Indiana (three northwestern counties), the southwest corner of Kentucky, the northern peninsula of Michigan, Wisconsin, Minnesota, North Dakota, South Dakota, the eastern quarter of Montana, the eastern two-thirds of Wyoming, Nebraska, Iowa, Missouri, Kansas, Colorado, New Mexico, the southeastern corner of Arizona, Texas, Oklahoma, Arkansas (except the northeastern portion), and Louisiana. The outstanding voting stock of said respondent consists of 8,070 common shares, of which 6,555½ shares are owned by Bausch & Lomb.

PAR. 7. Respondent Riggs Optical Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office located in San Francisco, Calif. Said respondent is engaged in the business of distributing and selling optical and ophthalmic products at wholesale, through some 33 branches located in the principal cities of and serving the following territory: Montana (except eastern quarter), the western third of Wyoming, Idaho, Washington, Oregon, California, Nevada, Utah, and Arizona (except southeastern corner). Of 9,798½ shares outstanding capital stock of said respondent, 7,996½ shares are owned by Bausch & Lomb.

PAR. 8. Distribution and sale of the Bausch & Lomb products herein referred to is effected chiefly through the said six wholesaler respondents. Bausch & Lomb sells most of its ophthalmic merchandise, equipment, and machinery to said wholesaler respondents, and also sells such products to other wholesalers. No sales are made direct to retailers. The lenses, frames, mountings, and other ophthalmic products manufactured by Bausch & Lomb, are listed, described, and priced in its catalogs, which are distributed to and used by the wholesaler respondents as a basis for selling to the trade. Bausch & Lomb sells to the six wholesaler respondents and to other wholesalers at the same prices for goods of the same grade and description, regardless of quantity purchased, the wholesaler or jobbers' prices being in general the same as those listed for "\$1,500 Accounts" in the schedule set forth in paragraph 14 hereof. Bausch & Lomb, through its ownership of a majority of the outstanding voting stock of each of said wholesaler respondents, has power to coordinate and control the sales and pricing policies of said wholesaler respondents.

PAR. 9. Each of said six wholesaler respondents restricts its selling activities to its own territory, as above described, and said respondents do not engage in competition with each other. Said respondents deal principally in the products of Bausch & Lomb, although they also deal in the products of other manufacturers; but their sales efforts are directed primarily to the sale of Bausch & Lomb merchandise. The prices charged by them, respectively, and their respective discount plans are substantially the same, and as to Bausch & Lomb merchandise all of them quote the prices published in the Bausch & Lomb catalogs and use such prices as a basis for computing the various discount allowances hereinafter described.

PAR. 10. Respondent Bausch & Lomb's said products are manufactured at Rochester, N. Y., and are constantly shipped from that

point to its wholesaler customers in other States of the United States and the District of Columbia for use and resale by and through said customers to meet the constant demand which exists for said products on the part of opticians, optometrists, and oculists using and selling such products at retail. Each of said wholesaler respondents is constantly engaged in shipping and distributing such products from its main office or warehouse to its branches in the same and other States in which it does business for resale through said branches to supply the demand of its retail customers. Shipments are also made, when necessary or convenient, directly from the main office to purchasers in the same and other States. Frequently orders for machinery, equipment, or special merchandise are filled by direct shipment from Bausch & Lomb to the retailer purchaser, at the request of the wholesaler. There is a constant stream of commerce in such products running from Bausch & Lomb to said wholesaler respondents and their branches and through them to the retailer purchasers of such products.

PAR. 11. Respondent Bausch & Lomb sells and distributes its said products throughout the United States in competition with numerous other manufacturers of optical and ophthalmic products. Said wholesaler respondents, respectively, are engaged in substantial competition with other wholesalers and with American Optical Co. branches in the sale and distribution of such products in most of the localities and sales areas in which said respondents do business. Many of the customers of said wholesaler respondents are engaged in competition with each other and with customers of competitors of said respondents, in the use and resale of such products in the several localities where such customers are located.

PAR. 12. An important function of the 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 optical wholesaler is in the filling and delivery of prescription orders for the retailers in his locality. Substantially all of the branches of the six wholesaler respondents have well equipped prescription shops and, in addition to selling stock merchandise, compete for and do a substantial amount of the prescription business

in their respective sales territories. Many of the larger 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. 13. The lenses, frames, and mountings manufactured by Bausch & Lomb are listed and sold by said wholesaler respondents 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 on 5 or more assorted units, or 1 package of lenses. 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 during any given period. Prices listed for a single pair of lenses or a single frame or mounting are also the prices charged in filling prescription orders. The column price lists above described do not apply to sales on prescription, but only to sales of stock merchandise.

PAR. 14. The wholesaler respondents also sell their lenses, frames mountings, machinery, equipment, and other stock merchandise to retailer customers at different prices, under a "big dealer" discount plan. This plan is illustrated by the following "Volume Purchase Schedule" set forth in a price bulletin issued October 1, 1936, by respondent the White-Haines Optical Co., which is still in effect. The same or substantially the same "big dealer" discount plan is used by the other wholesaler respondents.

VOLUME PURCHASE SCHEDULE

When a customer's total monthly purchases reach \$750, or more, or \$1,500, or more, in any given month, the following discounts are extended, when the account is paid on the 10th of the month following purchases.

Prescription work----- 2% only
 (Includes all kind of Rx work, lenses, frames, etc., in single or pairs)

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ANY ITEMS OF LENSES, FRAMES OR MOUNTINGS SOLD IN THE FIVE COLUMN SET-UP AT THE 25 OR 50 QUANTITY PRICES ARE SUBJECT ONLY TO THE 2 PERCENT CASH DISCOUNT

	\$750 accounts	\$1,500 accounts
LICENSED PRODUCTS:		
PANOPTIKS—Sold to Licensees only at terms specified in License.		
SOFT-LITES—Sold to Licensees only at Licensee Stock and Rx Net Prices.		
ORTHOGONS—Sold to Franchise Dealers only:	<i>Percent</i>	<i>Percent</i>
Finished Uncuts, Single Vision in "10 pr. asst." and "5 pr. asst." columns	25	33½
Singles or single pairs	2	2
Semifinished, Single Vision or Bifocal blanks (any quantity)	25	33½
LOXITS—Sold to Licensees only:		
Gold Filled in quantities of two (2) or more	25	33½
Solid Gold in quantities of two (2) or more	20	20
Singles	2	2
LENSES (not including "6-50", Orthogon or Soft-Lite lenses):		
Finished Uncuts, Single Vision in "10 pr. asst." and "5 pr. asst." Columns	25	33½
Singles or single pairs	2	2
Semi-finished or Rough, Single Vision or Bifocal Blanks (any quantity)	25	33½
LENSES—B & L "1st" 6-50 Ophthalmic lenses (in any quantity)	2	2
GOLD FILLED FRAMES, MTGS., AND PARTS (Also Innerlim and Zylonite).		
In quantities of two (2) or more	25	33½
Singles	2	2
SOLID GOLD FRAMES, MTGS., AND PARTS:		
In quantities of two (2) or more	20	20
Singles	2	2
OXFORD AND CHAINS (except Z-Fold)	2	2
OXFORDS, Z-FOLD	10	20
Ear Loop and H. P. Chains, Ribbons, Coris, etc	10	20
Sun Glasses & Goggles (except Soft-Lite) Sport-Lite and Soft-Lite Overglass	10	20
Soft-Lite Sport-Lite and Overglass	2	2
Cases	20	25
Miscellaneous—Reels, Field & Opera Glasses, Binoculars, Readers & Magnifiers,		
Charts, Case Labels, E. G. Cleaners, Clens, etc	2	2
Machinery (except Midget Cleaner)	10	20
Midget Cleaner	2	2
Dual Edger	10	20
Shop Tools, pliers, etc., Grinding & Polishing Material & Supplies	10	20
Equipment:		
Bausch & Lomb, Shuron, American	10	10
Green Test Cabinets, Hamilton and Archer furniture	10	10
Rotoscopes	2	2
Snyder Electric Table	2	2
Henry Retinoscope	2	2
Sight-Light Equipment	2	2
Troy Furniture	10	10
Zeiss	2	2

The 2-percent discount shown above is a cash discount. This same 2-percent cash discount is also allowed in addition to the trade discounts shown. Cash discounts are not allowed according to custom on the west coast.

The lenses, mountings, and frames subject to the big dealer discounts of 25 and 33½ percent under 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 the optical retailer. 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 (other than 2 percent for cash) 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 machin-

ery 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 respondents' customers have been able to secure the volume discounts provided for in the above 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. 15. Respondent Bausch & Lomb considered together with its selling affiliates (the wholesaler respondents herein) is the second largest organization manufacturing and distributing ophthalmic products in the United States, the largest being American Optical Co. of Southbridge, Mass. Many other manufacturers of such products (some of whom also do substantial volumes of business) market their products largely through wholesalers, other than the wholesaler respondents herein. Some engaged to a large extent in direct factory-to-retailer selling. Some of these manufacturers produce only limited lines, some making only lenses, others frames, etc. List prices of the various manufacturers are substantially the same for competitive merchandise, price competition generally being carried on through the granting of discounts rather than by lowering of base prices. The usual manufacturer-to-wholesaler discount on lenses, frames, and mountings is $33\frac{1}{3}$ percent, but greater discounts are given by some manufacturers.

OPINION

*Respondent Bausch & Lomb is engaged in the sale and shipment of ophthalmic products and other optical merchandise in interstate commerce from its factories in Rochester, N. Y., to its customers in other States. The six wholesaler respondents are likewise engaged in interstate commerce as to a substantial portion of their business. Said wholesalers deal principally in Bausch & Lomb merchandise, their pricing policies are coordinated and controlled by Bausch & Lomb, and such merchandise is sold by each of them at uniform prices fixed or approved by Bausch & Lomb. The prices so fixed and charged for Bausch & Lomb products are fixed and charged by respondents in the course of commerce, and such sales are sales in commerce within the meaning of Section 2 (a) of the Clayton Act.

The wholesaler respondents provide a system of wholesale outlets for Bausch & Lomb products extending throughout the United States. All of said wholesalers sell Bausch & Lomb merchandise to different purchasers at varying prices pursuant to the "big dealer" discount plan described in paragraph 14 of the above findings. The discounts

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allowed under said plan are determined on the basis of a customer's volume of purchases over a month or year and bear no consistent relation to the size of single orders or differences in cost of sale and delivery per dollar of merchandise as between different purchasers. By allowing such cumulative discounts respondents have discriminated in price in favor of a substantial number of their larger customers. Small optometrists and opticians do not receive these discounts and cannot purchase in sufficient volume to qualify for them.

The "big dealer" discount plan employed by these respondents is substantially the same as the "big dealer" plan considered by us in *Matter of American Optical Company, et al.* (F. T. C. Docket No. 3232), decided this day. The two plans appear to be coextensive in operation and effect. For the reasons stated in our opinion in that case (insofar as applicable to the facts here), we find that the effect of the discrimination in price above described has been to injure, and may be to injure, destroy or prevent competition with respondents' customers receiving the benefit of such discrimination.

We find, further, that the effect of such price discrimination by respondents is and may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents, respectively, are engaged, and to injure, destroy, or prevent competition with respondents by other wholesalers and, with respondent Bausch & Lomb, by limited line manufacturers of optical goods. As to this branch of the case, the same considerations apply which we outlined in our opinion in *Matter of American Optical Company, supra*. It is also to be noted here that a large part of the stock merchandise sold by the respondent wholesalers to \$1,500-per-month "big dealers," including most lenses, frames, and mountings, is sold at cost without any mark-up for selling, handling, and overhead.

It does not appear from the facts before us that the differentials of the "big dealer" plan make only due allowances for differences, if any, in cost of sale or delivery resulting from differing methods or quantities in which sale and delivery is made to different purchasers under said plan.

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 separate answers of the respondents, and a stipulation as to the facts signed by counsel

for the Commission and counsel for all of 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 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, Bausch & Lomb Optical Co., Colonial Optical Co., Inc., McIntire, Magee & Brown Co., Riggs Optical Co., Consolidated, Riggs Optical Co., Inc., Southeastern Optical Co., and The White-Haines Optical Co., and their respective officers, 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 14 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 difference make only due allowance for differences in cost of manufacturing, 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 allow-

Order

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ance for differences in cost of manufacture, sale or delivery 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.

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 each of 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 it has complied and is complying with this order.

Complaint

IN THE MATTER OF

S. C. ROSS DOING BUSINESS AS IDEAL GIFT COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3205. Complaint, Aug. 16, 1937—Decision, Jan. 25, 1939

Where an individual engaged in offer, sale, and distribution of various articles of merchandise, including rotary clocks, fountain pen sets, and fountain pen and pencil combinations, to purchasers in the various States, in soliciting sale of and selling and distributing said products—

Furnished various types of merchandising plans which involved operation of games of chance, gift enterprises, or lottery schemes for distribution thereof to consumers wholly by lot or chance, and consisted of certain literature and circular letters together with paper push cards, order blanks, and advertisements depicting his aforesaid merchandise, for use in offer and sale thereof by operators of said cards under scheme in accordance with which persons paid for chance secured varying amount in accordance with number revealed by particular disk selected and punched, and person purchasing chance received article of merchandise being thus disposed of in accordance with his selection of, or failure to select, feminine name corresponding with that concealed under card's master seal, and other article in accordance with success or failure in securing from cards certain number, and others secured nothing other than privilege of making selection for money paid, and thereby conducted lotteries in sale and distribution of his said products, and placed in hands of others means of conducting lotteries in sale thereof, contrary to the common law and criminal statutes and to an established public policy of the United States Government, and in competition with many engaged in sale and distribution in similar commerce of like and similar articles of merchandise who do not sell the same through use of lotteries or games of chance;

With result that many purchasers of his said products were attracted by games of chance involved in his said sales method and thereby induced to purchase his merchandise in preference to same or similar goods of competitors who did not and do not use same or equivalent method, and thereby substantial volume thereof was bought by public and trade was unfairly diverted to him from competitors aforesaid:

Held, That such acts and practices were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition.

Before *Mr. William C. Reeves*, trial examiner.

Mr. Henry C. Lank and *Mr. D. C. Daniel* for the Commission.

Nash & Donnelly, of Chicago, Ill., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the