

Syllabus

IN THE MATTER OF
SIMMONS COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (A) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3840. Complaint, June 30, 1939—Decision, Aug. 25, 1939

Where a corporation which (1) was engaged on Nation-wide scale in manufacture, sale, and distribution of standardized and nationally advertised products, such as metal beds, bed springs, studio couches, gliders and mattresses, (2) had, in addition to its principal manufacturing plant in the State of Wisconsin, 8 other manufacturing plants in various States across the country, and maintained and operated approximately 55 warehouses situated in as many cities in over 30 States, and maintained and operated service stations and sales headquarters in each of the cities in which its warehouses were located, for convenience in sale and delivery of its merchandise, and (3) employed some three hundred salesmen who called regularly on the retail trade, and derived approximately 90 percent of its income from sales in the United States, ranging, during the years concerned, from some \$24,000,000 to \$31,000,000, and which, as aforesaid engaged, sold and distributed its said products to customers selling at retail in competition with each other locally and, to a lesser extent, nationally, and in competition in such resale with retailer customers of its competitors, who distributed, in case of few, their products nationally, as did it, but, in case of most, to customers located within 250 or 300 miles of their manufacturing plants;

In selling its said standardized product under its "Plan" and schedule, under which customer purchasing in year amount aggregating from \$50,000 to \$75,000 became entitled to discount of 3 percent on *entire amount* purchased, customer thus purchasing amount aggregating from \$75,000 to \$100,000 became thus entitled to discount of 4 percent under schedule first employed and 3½ percent under later schedule, and under which, through five additional steps in former schedule, customer became entitled to successively increased discounts similarly retroactively applicable and ranging from 5 percent on amount aggregating from \$100,000 to \$200,000, up to 7 percent on amount equalling or exceeding \$500,000, and under which, in later schedule, customer became entitled to similar retroactive discounts of 4 percent on amount ranging from \$100,000 to \$150,000, 4½ percent on amount ranging from \$150,000 to \$200,000, and 5 percent on amount equalling or exceeding latter figure—

(a) Discriminated in price against competing individual customers purchasing less than \$50,000 a year through granting, allowing and paying to the few individual customers who qualified therefor under said schedules by purchasing required amount of \$50,000 or over, discounts due thereunder on such customers' year's purchasing; and

Where said corporation which, for purpose of granting and paying aforementioned discounts, treated as single customer various types of organizations, including the "individual customer" who was individual, partner-

ship or corporation owning one and only one retail store, and "central organizations" comprised of (1) individual, partnership or corporation owning two or more unincorporated retail store units, (2) corporation owning substantially or completely issued and outstanding stock of number of separately incorporated retail stores, (3) corporation, stock of which, as aforesaid, was owned by other corporation which, in turn, owned such stock of number of such separately incorporated stores, and (4) various other similarly constituted organizations—

- (b) Discriminated in price against individual customers in competition with one or more of the unit stores of one or more of such "central organizations," through granting, allowing and paying discounts as aforesaid to such organizations, purchase of which organizations' individual retail stores or units, as made by or for them from said corporation, were often no larger, and frequently smaller, than quantities of merchandise purchased during same period by many "individual customers" who did not qualify for and did not in fact receive such discounts, and were serviced in substantially same manner as were said "central organization's" retail stores or units, and were, often, in direct competition;

With result that manufacturers in competition with said corporation could not obtain a part of the business of a "central organization" receiving discounts even by offering equal price, but were compelled to offer sufficiently lower price to compensate such organization for loss of discount on that portion of its requirements which it had already purchased, or which it might be compelled to purchase, from said corporation; and

With result that effect of discriminations in price in favor of "central organizations" and other large buyers might be substantially to lessen competition with, and tend to create a monopoly in, said corporation in line of commerce in which it was engaged; and

Where said corporation which, for purpose of granting and paying aforementioned discounts, treated as single customer "syndicate heads" made up of various types of organizations, and including (1) independent individual, partnership, or corporation which acted or was authorized to act as buying agent for number of otherwise independent and unrelated individual customers or for number of such customers and one or more central organizations, (2) corporation, stock of which was owned substantially or entirely by number of otherwise independent and unrelated individual customers, and which acted or was customarily authorized to act as buying agent therefor, (3) cooperative corporation of which number of otherwise independent and unrelated individual customers were members, and which acted or was customarily authorized to act as buying agent therefor, and (4) loosely knit association of otherwise independent and unrelated individual customers, or number of such customers and one or more central organizations, and which might or might not act or be authorized to act as buying agent of members, and (5) various other similarly constituted organizations—

- (c) Discriminated in price against nonmember or nonaffiliated individual customers who were in competition with one or more of the individual customers, or one or more unit stores, or one or more of the central organizations, which were members of or affiliated with one or more of said "syndicate heads," through granting, allowing and paying discounts, either directly or indirectly, to individual customers and central organizations which were such members or thus affiliated, by payment, in first

instance, to appropriate "syndicate heads," of such discounts as aggregate purchases of members or affiliates might secure under such schedules, for proportionate payment over to such members or affiliates, purchases of which from said corporation, as respected individual customers or unit stores of central organizations receiving such discounts by reason of their said membership or affiliation, were often no larger than, and often smaller than, quantities of merchandise purchased during same period by many individual customers who did not qualify for and receive such discounts, and who were serviced in substantially same manner as were others and were, in many instances, in direct competition with one or more of member or affiliated individual customers or unit stores of said central organization; and

- (d) Discriminated in price, insofar as it granted, allowed and paid higher or greater discount, either directly or indirectly, to individual customer or central organization which was syndicate member or affiliate than it paid to competing individual customer or central organization which was member or affiliate of other syndicate, to the advantage and favor of former and disadvantage of latter;

With result that adoption of said "Plan" encouraged some of otherwise independent and unrelated individual customers of said corporation and central organizations purchasing from it to become affiliated with syndicate heads already in existence, and caused creation by others of said customers and organizations of other buying syndicates and similar groups, and with result that many competitors of it unsuccessfully sought to sell their former and other potential customers who had "gone syndicate," and effect of discriminatory treatment in favor of individual customers and central organizations which constituted or were allied with syndicate heads might be substantially to lessen competition with and tend to create a monopoly in it in the line of commerce in which it was engaged; and

With effect that its said "Plan," either alone or in combination with its practice aforesaid of treating central organizations and syndicate heads as one customer for purpose of computing and paying discounts thereunder, operated to produce, among others and as typical of many thereof, situations in which—

(1) Individual customer purchasing over \$50,000 worth of its merchandise a year and receiving 3 percent discount thereon might be in competition in same city with customer purchasing less than said amount and receiving no discount, but with considerably larger average purchases and deliveries than those of discount receiving customer;

(2) Fifteen thousand dollar individual customer purchaser with no discount might be local competitor of \$5,000 unit store purchaser receiving 3 to 5 percent discount on its purchases by virtue of aggregate purchases of or for all the units of its central organization, notwithstanding deliveries by corporation to unit store in same way as to individual customer, and with average size deliveries to latter frequently larger than to former, and with same service by its salesmen in both cases, and not infrequently same procedure in taking orders, invoicing, etc.;

(3) Ten thousand dollar individual customer purchaser with no discount might be local competitor of other individual, thousand dollar customer purchaser receiving from 3 to 5 percent discount as member of or allied with syndicate head, with facts with respect to service, solicitation of orders, delivery, etc., involving no distinction in the one case over the other, and

Complaint

29 F. T. C.

with average size deliveries to unaffiliated customer frequently larger than those to others;

(4) Ten thousand dollar individual customer purchaser receiving 3 percent discount as member of or affiliate with syndicate head, aggregate purchases of which fall in the \$50,000 to \$75,000 group, might be in local competition with thousand dollar individual customer purchaser receiving 5 percent discount as member of or affiliated with syndicate head, aggregate purchases of which exceed \$200,000, with salesmen's service, solicitation of orders, and delivery of merchandise, invoicing of bills, etc., without distinction in case of either, except that average size of deliveries to larger purchaser getting smaller discount is apt to be larger than that of smaller purchaser with larger discount; and

(5) Two individual customers of it, in competition with one another and purchasing exactly same quantity of its products of like grade and quality during any year, might pay aggregate prices therefor varying almost as much as \$2,500; and

With result that advantage to its customers who purchased at the lower prices under said practices and price differentials, as above set forth, with respect to central organizations and syndicate heads, and which made other than due allowance in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which said corporation's products were sold or delivered by it to its customers as aforesaid, might be reflected not only in price cutting, but also in increase in service, sales effort, sales appeal and in other ways that injure or tend to lessen competition with them, to the disadvantage of the customers against whom such discriminations were employed; and

With result that effect of discriminations in price made by it as above set forth might be—

(1) Substantially to lessen competition between it and its competitors aforesaid, and between its retailer customers in whose favor such discriminations were made and its other retailer customers, and between retailer customers of its competitors who did not grant them the benefit of such discriminatory prices and the retailer customers who purchased of said corporation, and in favor of whom it discriminated; and

(2) Tend to create a monopoly in it in the line of commerce involved, and to injure, destroy or prevent competition with it and competition with retail customers of it who received benefit of such discrimination:

Held, That said corporation discriminated in price between different purchasers of its products of like grade and quality as above set forth, and violated subsection (a) of section 2 of Clayton Act, as amended.

Mr. S. G. Churchill and Mr. J. W. Carter, Jr. for the Commission.
Cummings & Lockwood, of Stamford, Conn., for respondent.

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, (U. S. C. title 15, sec. 13), as amended by an act of Congress, approved June 19, 1936, commonly

known as the Robinson-Patman Act, the Federal Trade Commission, having reason to believe that the respondent Simmons Co. (hereinafter referred to as "Simmons") since June 19, 1936, has been and now is violating the provisions of subsection (a) of section 2 of said act as amended, issues its complaint against respondent and states its charges with respect thereto as follows, to wit:

PARAGRAPH 1. Simmons is a corporation organized and existing under the laws of the State of Delaware and has its principal executive office and place of business at 230 Park Avenue, New York City, N. Y.

PAR. 2. For many years prior to and since June 19, 1936, Simmons has been and now is engaged in the business of manufacturing, selling and distributing metal beds, bedsprings, studio couches, gliders, mattresses, and miscellaneous allied products. That, except for certain lines manufactured on special order, constituting approximately 6 percent of its total United States business, its products are all standardized. In the course and conduct of its business Simmons has been and now is manufacturing said products at its principal manufacturing plant, which is located at 551 Fifth Avenue, Kenosha, Wis., and at its eight other manufacturing plants, which are located at Watertown, Mass.; Elizabeth, N. J.; Atlanta, Ga.; Kansas City, Kans.; Dallas, Tex.; Seattle, Wash.; San Francisco, Calif., and Los Angeles, Calif. That Simmons maintains and operates approximately 55 warehouses situated in as many cities in over 30 States of the United States. That Simmons, for convenience in selling and delivering its merchandise, maintains and operates service stations and sales headquarters in each of the cities in which its warehouses are located. Simmons employs approximately 300 salesmen who call regularly on the retail trade. Simmons' total net sales in the United States amounted, in the year 1936, to approximately \$28,000,000; in the year 1937, to approximately \$31,000,000; in the year 1938, to approximately \$24,500,000; and approximately 97 percent of its income from sales made in the United States is derived from sales to dealers who sell at retail.

PAR. 3. In the course and conduct of its business as aforesaid, Simmons transports or causes to be transported some of said products, when manufactured, from its plants aforesaid to its warehouses which are located, as hereinbefore set forth, in various States of the United States, and oftentimes in States other than the States in which its plants are located and in which such shipments originated, and transports or causes to be transported its said products from its plants aforesaid or from its warehouses aforesaid to the purchasers thereof located in the several States of the United States

and in the District of Columbia, other than the States in which its said plants are located, and there is and has been, at all times herein mentioned, a continuous current of trade and commerce in said products between Simmons' plants, warehouses, and distributing points and purchasers located in all of the States of the United States and the District of Columbia.

Simmons advertises many of its products nationally, particularly its highest quality merchandise, such as its "Beautyrest" mattresses and springs, and has created a public demand for such products throughout the States of the United States, the District of Columbia, and elsewhere.

Simmons' plan for the marketing of its products is designed to and does in fact enable it to sell and distribute its products to dealers located in every State of the United States and the District of Columbia. The business of Simmons is an integrated whole and is national in scope.

Simmons sells and distributes the aforesaid products for use, consumption or resale within the United States and in the District of Columbia, in the same States and places as and in competition with various other manufacturers of beds, bedding and miscellaneous allied products. A few of said competing manufacturers distribute their products nationally, as does Simmons, but most of said competing manufacturers distribute their products to customers located within 250 or 300 miles of their manufacturing plants.

Simmons' customers who sell at retail are competitively engaged with each other locally, and to a lesser extent, nationally, and with the retailer customers of Simmons' competitors, in the resale of said products, said resales taking place in every State of the United States and in the District of Columbia.

PAR. 4. Simmons, in the course and conduct of its business in commerce as hereinbefore set forth has, since June 19, 1936, discriminated in the prices at which it has sold and is now discriminating in the prices at which it is selling its products of like grade and quality between different retailer purchasers of such products by giving and allowing to some of said retailer purchasers, either directly or indirectly, rebates or discounts from its published prices not given and allowed to others of Simmons' said retailer purchasers.

PAR. 5. That the discriminations in price referred to in paragraph 4 hereof have been effectuated through the use by Simmons in its pricing plan of a sliding scale of discounts based upon the quantities purchased in any one year by any one customer (hereinafter sometimes referred to as the "Simmons Plan"). The plan, briefly stated, as operative for the years prior to January 1, 1938, was as follows:

To any customer who purchased less than \$50,000 worth of merchandise in any one calendar year, no discount was granted (except a 2 percent discount for cash). To any customer who purchased merchandise in any one year to an aggregate of \$50,000 or more, the following scale of discounts applied:

\$50,000 to \$75,000.....	3 percent
\$75,000 to \$100,000.....	4 percent
\$100,000 to \$200,000.....	5 percent
\$200,000 to \$300,000.....	5½ percent
\$300,000 to \$400,000.....	6 percent
\$400,000 to \$500,000.....	6½ percent
\$500,000 and over.....	7 percent

Aggregate purchases of a customer during a calendar year not only determined the rate of discount, but the discount rate thus determined was retroactively applied to all purchases made during the year, even to those in the no-discount zone, so that if a customer bought \$500,000 worth of merchandise in any one calendar year, he got the 7 percent discount on the first \$50,000 worth of his purchases as well as on the remaining \$450,000 thereof.

The discounts were computed and paid in cash by Simmons shortly after the end of each calendar year.

The Simmons Plan operates and is the same today as aforesaid, except that the schedule of discounts now in effect (effective as of January 1, 1938) is as follows:

\$50,000 to \$75,000.....	3 percent
\$75,000 to \$100,000.....	3½ percent
\$100,000 to \$150,000.....	4 percent
\$150,000 to \$200,000.....	4½ percent
\$200,000 and more.....	5 percent

PAR. 6. That, for the purpose of granting and paying the aforementioned discounts, Simmons has at all times hereinbefore mentioned treated and now treats each of the following types of organizations as a single customer:

1. An individual, partnership, or corporation owning one and only one retail store (hereinafter referred to as an "individual customer").
2. An individual, partnership, or corporation owning more than one retail store, the individual retail stores or individual units not being incorporated (hereinafter sometimes referred to as a "central organization").
3. A corporation owning all or substantially all of the issued and outstanding equity stock of a number of separately incorporated retail stores (hereinafter sometimes referred to as a "central organization").

4. A corporation, all or substantially all of the issued and outstanding equity stock of which is owned by another corporation, which, in turn, owns all or substantially all of the issued and outstanding equity stock of a number of separately incorporated retail stores (hereinafter sometimes referred to as a "central organization").

5. Divers other organizations constituted similarly to the organizations set forth and described briefly in subdivisions (2), (3), and (4) of this paragraph 6 (hereinafter sometimes referred to as "central organizations").

That the discounts hereinbefore mentioned are paid in cash by Simmons to each individual customer, as hereinbefore defined, who qualifies therefor by purchasing the requisite amount of merchandise. That there are few such individual customers of Simmons in the entire United States who qualify for and receive such discounts. That in granting, allowing and paying such discounts to individual customers who purchase \$50,000 worth or more of Simmons' merchandise in any one year, Simmons has discriminated in price against competing individual customers who purchase less than \$50,000 worth of Simmons' merchandise in such period.

That the discounts hereinbefore mentioned are paid in cash by Simmons to each of such central organizations, as hereinbefore defined, which qualify therefor by purchasing the requisite amount of merchandise, pursuant to oral understandings between Simmons and each of such central organizations to the effect that the aggregate purchases of the individual stores or units constituting each such central organization shall be used in determining the rate and the amount of the discounts payable to each such central organization.

That the quantities of merchandise purchased each year from Simmons by or for each of the individual retail stores or units constituting the central organizations which receive the aforementioned discounts are oftentimes no larger than, and oftentimes smaller than, the quantities of merchandise purchased during the same period by many individual customers who do not qualify for, and do not, in fact, receive said discounts, and the individual retail stores or units constituting the herein mentioned central organizations are serviced in substantially the same manner by Simmons as are the individual customers herein mentioned. That, in many instances, the individual customers mentioned herein are in direct competition with one or more of the unit stores of one or more of the central organizations mentioned herein. That in granting, allowing and paying discounts to the central organizations herein mentioned, Simmons has discriminated in price against individual customers herein mentioned who are

in competition with one or more of the unit stores of one or more of such central organizations.

That manufacturers in competition with Simmons cannot obtain a part of the business of a central organization receiving the discounts even by offering an equal price, but must offer a sufficiently lower price to compensate said central organization for the loss of the discount on that portion of its requirements which it has already purchased or which it may be compelled to purchase from Simmons. That the effect of the discriminations in price in favor of central organizations and other large buyers may be substantially to lessen competition with and tend to create a monopoly in Simmons in the line of commerce in which it is engaged.

PAR. 7. That, for the purpose of granting and paying the aforementioned discounts, Simmons has at all times hereinbefore mentioned treated and now treats each of the following types of organizations as a single customer:

1. An independent individual, partnership or corporation that acts or which is authorized to act, whether it in fact does so or not, as the buying agent for a number of otherwise independent and unrelated individual customers or for a number of such customers and one or more central organizations (hereinafter sometimes referred to as a "syndicate head").

2. A corporation all or substantially all of the issued and outstanding equity stock of which is owned by a number of otherwise independent and unrelated individual customers and which acts or which is customarily authorized to act, whether it in fact does so or not as the buying agent of said customers (hereinafter sometimes referred to as a "syndicate head").

3. A cooperative corporation of which a number of otherwise independent and unrelated individual customers are members, and which acts or which is customarily authorized to act, whether it in fact does so or not, as the buying agent of said customers (hereinafter sometimes referred to as a "syndicate head").

4. A loosely-knit association of otherwise independent and unrelated individual customers or of a number of such customers and one or more central organizations, which may or may not act, or which may or may not be authorized to act, as the buying agent of the members thereof (hereinafter sometimes referred to as a "syndicate head").

5. Divers other organizations constituted similarly to the organizations set forth and described briefly in this paragraph 7.

That the discounts hereinbefore mentioned are paid in the first instance in cash by Simmons to each of such syndicate heads, as here-

inbefore defined, as qualified therefor by reason of member purchases, pursuant to oral understandings between Simmons and each of such syndicate heads to the effect that the aggregate purchases of the individual customers and central organizations, if any, constituting or allied with each such syndicate head shall be used in determining the rate and the amount of the discounts payable in the first instance to each such syndicate head.

That each such syndicate head receiving the discounts pays over, either directly or indirectly, the total discounts initially received by it, or substantially all thereof, to the individual customers and central organizations, if any, of which it is comprised or which are allied with it, said payment bearing the same ratio to the total discounts received by the syndicate head as the total purchases of the individual customer or central organization receiving it bear to the total purchases of all the individual customers and central organizations comprising or allied with said syndicate head. That the syndicate head is in every case the agent of the individual customers and central organizations, constituting or allied with it, for the purpose of receiving and passing on to such customers and organizations the discounts aforementioned.

That the quantities of merchandise purchased each year from Simmons by each of the individual customers or by each of the unit stores of the central organizations which receive the aforementioned discounts by reason of membership in or affiliation with a syndicate head, are oftentimes no larger than and oftentimes smaller than, the quantities of merchandise purchased during the same period by many individual customers who do not qualify for and do not, in fact, receive said discounts, and the individual customers and the unit stores of the central organizations comprising or allied with the hereinmentioned syndicate heads are serviced in substantially the same manner by Simmons as are the individual customers who do not qualify for and do not in fact, receive said discount. That, in many instances, the individual customers who do not receive the discounts are in direct competition with one or more of the individual customers or one or more of the unit stores of one or more of the central organizations which are members of or allied with one or more of the syndicate heads mentioned herein.

That in granting, allowing and paying discounts, either directly or indirectly, to individual customers and to central organizations which are members of or affiliated with a syndicate head, Simmons has discriminated in price against nonmember or nonaffiliated individual customers who are in competition with one or more of the individual customers or one or more of the unit stores of one or more of the

central organizations which are members of or allied with one or more of the syndicate heads mentioned herein. That in granting, allowing and paying a higher or greater discount, either directly or indirectly, to an individual customer or to a central organization which is a member of or affiliated with one syndicate head than to a competing individual customer or central organization which is a member of or affiliated with another syndicate head, Simmons has discriminated in price in favor of the former.

That the adoption of the Simmons Plan has encouraged some of the otherwise independent and unrelated individual customers of Simmons and central organizations purchasing from Simmons to become affiliated with syndicate heads already in existence and has caused the creation by others of said customers and organizations of other buying syndicates and similar groups. Many competitors of Simmons have unsuccessfully sought to sell their former and other potential customers who have "gone syndicate." The effect of the discriminatory treatment in favor of individual customers and central organizations which constitute or are allied with syndicate heads, as alleged in this Paragraph Seven, may be substantially to lessen competition with and tend to create a monopoly in Simmons in the line of commerce in which it is engaged.

PAR. 8. The amount of the rebates or discounts paid by Simmons, during the year 1936, amounted to more than \$500,000; to approximately \$750,000 during the year 1937 and to over \$485,000 during the year 1938.

PAR. 9. The effect of such discriminations in price made by Simmons, as set forth in paragraphs 4 to 7, inclusive, hereof, may be substantially to lessen competition between Simmons and its aforesaid competitors; between the retailer customers of Simmons in whose favor such discriminations are made and Simmons' other retailer customers; between the retailer customers of Simmons' competitors who do not grant such customers the benefit of such discriminatory prices and the retailer customers who purchase of Simmons in favor of whom Simmons discriminates; tend to create a monopoly in Simmons in the aforesaid line of commerce; to injure, destroy, or prevent competition with Simmons; to injure, destroy, or prevent competition with retailer customers of Simmons who receive the benefit of such discrimination.

Such discriminations in price by Simmons between different retailer purchasers of goods 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 June 30, 1939, issued its complaint against the respondent Simmons Co. (hereinafter referred to as "Simmons") and caused such complaint to be served as required by law, charging that Simmons discriminated in the prices at which it has sold and is now discriminating in the prices at which it has sold and is now selling its products of like grade and quality in interstate commerce, in violation of the provisions of subsection (a) of section 2 of said act, as amended.

Simmons duly filed its answer to said complaint which answer admits all the material allegations of fact set forth in said complaint. Said answer further waives the taking of evidence and all other intervening procedure herein and further hearing as to the said facts. The allegations contained in the concluding paragraph of the complaint (par. 9) were denied, in so far as they state conclusions of law to the effect that the price discriminations by Simmons constitute violations of the provisions of subsection (a) of section 2 of the act, as amended.

This proceeding regularly coming on to be heard upon said complaint and answer, 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 Simmons has been and is violating the provisions of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, now makes these its findings as to the facts:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Simmons is a corporation organized and existing under the laws of the State of Delaware and has its principal executive office and place of business at 230 Park Avenue, New York City, N. Y.

PAR. 2. For many years prior to and since June 19, 1936, Simmons has been and now is engaged in the business of manufacturing, selling and distributing metal beds, bedsprings, studio couches, gliders, mattresses and miscellaneous allied products. That, except for certain lines manufactured on special order, constituting approximately 6 percent of its total United States business, its products are all

standardized. In the course and conduct of its business Simmons has been and now is manufacturing said products at its principal manufacturing plant, which is located at 551 Fifth Avenue, Kenosha, Wis., and at its eight other manufacturing plants, which are located at Watertown, Mass.; Elizabeth, N. J.; Atlanta, Ga.; Kansas City, Kans.; Dallas, Tex.; Seattle, Wash.; San Francisco, Calif., and Los Angeles, Calif. That Simmons maintains and operates approximately 55 warehouses situated in as many cities in over 30 States of the United States. That Simmons, for convenience in selling and delivering its merchandise, maintains and operates service stations and sales headquarters in each of the cities in which its warehouses are located. Simmons employs approximately 300 salesmen who call regularly on the retail trade. Simmons' total net sales in the United States amounted, in the year 1936, to approximately \$28,000,000; in the year 1937, to approximately \$31,000,000; in the year 1938, to approximately \$24,500,000; and approximately 97 percent of its income from sales made in the United States is derived from sales to dealers who sell at retail.

PAR. 3. In the course and conduct of its business as aforesaid, Simmons transports or causes to be transported some of said products, when manufactured, from its plants aforesaid to its warehouses which are located, as hereinbefore set forth, in various States of the United States and oftentimes in States other than the States in which its plants are located and in which such shipments originated, and transports or causes to be transported its said products from its plants aforesaid or from its warehouses aforesaid to the purchasers thereof located in the several States of the United States and in the District of Columbia, other than the States in which its said plants are located, and there is and has been, at all times herein mentioned, a continuous current of trade and commerce in said products between Simmons' plants, warehouses and distributing points and purchasers located in all of the States of the United States and the District of Columbia.

Simmons advertises many of its products nationally, particularly its highest quality merchandise, such as its "Beautyrest" mattresses and springs and has created a public demand for such products throughout the States of the United States, the District of Columbia, and elsewhere.

Simmons' plan for the marketing of its products is designed to and does in fact enable it to sell and distribute its products to dealers located in every State of the United States and the District of

Columbia. The business of Simmons is an integrated whole and is national in scope.

Simmons sells and distributes the aforesaid products for use, consumption or resale within the United States and in the District of Columbia, in the same States and places as and in competition with various other manufacturers of beds, bedding, and miscellaneous allied products. A few of said competing manufacturers distribute their products nationally, as does Simmons, but most of said competing manufacturers distribute their products to customers located within 250 or 300 miles of their manufacturing plants.

Simmons' customers who sell at retail are competitively engaged with each other locally, and to a lesser extent, nationally, and with the retailer customers of Simmons' competitors, in the resale of said products, said resales taking place in every State of the United States and in the District of Columbia.

PAR. 4. That Simmons, prior to and since June 19, 1936, has used in its pricing plan a sliding scale of discounts based upon the quantities of merchandise purchased in any one year by any one customer (hereinafter sometimes referred to as the "Simmons Plan"). The plan, briefly stated, as operative for the years prior to January 1, 1938, was as follows:

To any customer who purchased less than \$50,000 worth of merchandise in any one calendar year, no discount was granted (except a 2 percent discount for cash). To any customer who purchased merchandise in any one year to an aggregate of \$50,000 or more, the following scale of discounts applied:

\$50,000 to \$75,000-----	3 percent
\$75,000 to \$100,000-----	4 percent
\$100,000 to \$200,000-----	5 percent
\$200,000 to \$300,000-----	5½ percent
\$300,000 to \$400,000-----	6 percent
\$400,000 to \$500,000-----	6½ percent
\$500,000 and over-----	7 percent

Aggregate purchases of a customer during a calendar year not only determined the rate of discount but the discount rate thus determined was retroactively applied to all purchases made during the year, even to those in the no-discount zone, so that if a customer bought \$500,000 worth of merchandise in any one calendar year, he got the 7 percent discount on the first \$50,000 worth of his purchases as well as on the remaining \$450,000 thereof.

The discounts were computed and paid in cash by Simmons shortly after the end of each calendar year.

The Simmons Plan operates and is the same today as aforesaid, except that the schedule of discounts now in effect (effective as of January 1, 1938) is as follows:

\$50,000 to \$75,000-----	3 percent
\$75,000 to \$100,000-----	3½ percent
\$100,000 to \$150,000-----	4 percent
\$150,000 to \$200,000-----	4½ percent
\$200,000 and more-----	5 percent

PAR. 5. That, for the purpose of granting and paying the aforementioned discounts, Simmons has at all times hereinbefore mentioned treated and now treats each of the following types of organizations as a single customer:

1. An individual, partnership, or corporation owning one and only one retail store (hereinafter referred to as an "individual customer").

2. An individual, partnership, or corporation owning more than one retail store, the individual retail stores or individual units not being incorporated (hereinafter sometimes referred to as a "central organization").

3. A corporation owning all or substantially all of the issued and outstanding equity stock of a number of separately incorporated retail stores, (hereinafter sometimes referred to as a "central organization").

4. A corporation, all or substantially all of the issued and outstanding equity stock of which is owned by another corporation, which, in turn, owns all or substantially all of the issued and outstanding equity stock of a number of separately incorporated retail stores, (hereinafter sometimes referred to as a "central organization").

5. Divers other organizations constituted similarly to the organizations set forth and described briefly in subdivisions (2), (3) and (4) of this paragraph 5 (hereinafter sometimes referred to as "central organizations").

That the discounts hereinbefore mentioned are paid in cash by Simmons to each individual customer, as hereinbefore defined, who qualifies therefor by purchasing the requisite amount of merchandise. That there are few such individual customers of Simmons in the entire United States who qualify for and receive such discounts. That, in granting, allowing and paying such discounts to individual customers who purchase \$50,000 worth or more of Simmons' merchandise in any one year, Simmons has discriminated in price against competing individual customers who purchase less than \$50,000 worth of Simmons' merchandise in such period.

Findings

29 F. T. C.

That the discounts hereinbefore mentioned are paid in cash by Simmons to each of such central organizations, as hereinbefore defined, which qualify therefor by purchasing the requisite amount of merchandise, pursuant to oral understandings between Simmons and each of such central organizations to the effect that the aggregate purchases of the individual stores or units constituting each such central organization shall be used in determining the rate and the amount of the discounts payable to each such central organization.

That the quantities of merchandise purchased each year from Simmons by or for each of the individual retail stores or units constituting the central organizations which receive the aforementioned discounts are oftentimes no larger than, and oftentimes smaller than, the quantities of merchandise purchased during the same period by many individual customers who do not qualify for, and do not in fact, receive said discounts, and the individual retail stores or units constituting the herein mentioned central organizations are serviced in substantially the same manner by Simmons as are the individual customers herein mentioned. That, in many instances, the individual customers mentioned herein are in direct competition with one or more of the unit stores of one or more of the central organizations mentioned herein.

That in granting, allowing and paying discounts to the central organizations herein mentioned, Simmons has discriminated in price against individual customers herein mentioned who are in competition with one or more of the unit stores of one or more of such central organizations.

That manufacturers in competition with Simmons cannot obtain a part of the business of a central organization receiving the discounts even by offering an equal price, but must offer a sufficiently lower price to compensate said central organization for the loss of the discount on that portion of its requirements which it has already purchased or which it may be compelled to purchase from Simmons. That the effect of the discriminations in price in favor of central organizations and other large buyers may be substantially to lessen competition with and tend to create a monopoly in Simmons in the line of commerce in which it is engaged.

PAR. 6. That, for the purpose of granting and paying the aforementioned discounts, Simmons has at all times hereinbefore mentioned treated and now treats each of the following types of organizations as a single customer:

1. An independent individual, partnership, or corporation that acts or which is authorized to act, whether it in fact does so or not, as the buying agent for a number of otherwise independent and unrelated

individual customers or for a number of such customers and one or more central organizations (hereinafter sometimes referred to as a "syndicate head").

2. A corporation all or substantially all of the issued and outstanding equity stock of which is owned by a number of otherwise independent and unrelated individual customers and which acts or which is customarily authorized to act, whether it in fact does so or not, as the buying agent of said customers (hereinafter sometimes referred to as a "syndicate head").

3. A cooperative corporation of which a number of otherwise independent and unrelated individual customers are members, and which acts or which is customarily authorized to act, whether it in fact does so or not, as the buying agent of said customers (hereinafter sometimes referred to as a "syndicate head").

4. A loosely knit association of otherwise independent and unrelated individual customers or of a number of such customers and one or more central organizations, which may or may not act, or which may or may not be authorized to act, as the buying agent of the members thereof (hereinafter sometimes referred to as a "syndicate head").

5. Divers other organizations constituted similarly to the organizations set forth and described briefly in this paragraph 6.

That the discounts hereinbefore mentioned are paid in the first instance in cash by Simmons to each of such syndicate heads, as hereinbefore defined, as qualify therefor by reason of member purchases, pursuant to oral understandings between Simmons and each of such syndicate heads to the effect that the aggregate purchases of the individual customers and central organizations, if any, constituting or allied with each such syndicate head shall be used in determining the rate and the amount of the discounts payable in the first instance to each such syndicate head.

That each such syndicate head receiving the discounts pays over, either directly or indirectly, the total discounts initially received by it, or substantially all thereof, to the individual customers and central organizations, if any, of which it is comprised or which are allied with it, said payment bearing the sale ratio to the total discounts received by the syndicate head as the total purchases of the individual customer or central organization receiving it bear to the total purchases of all the individual customers and central organizations comprising or allied with said syndicate head. That the syndicate head is in every case the agent of the individual customers and central organizations, constituting or allied with it, for the purpose of receiving and passing on to such customers and organizations the discounts aforementioned.

That the quantities of merchandise purchased each year from Simmons by each of the individual customers or by each of the unit stores of the central organizations which receive the aforementioned discounts by reason of membership in or affiliation with a syndicate head, are oftentimes no larger than, and oftentimes smaller than, the quantities of merchandise purchased during the same period by many individual customers who do not qualify for and do not, in fact, receive said discounts, and the individual customers and the unit stores of the central organizations comprising or allied with the hereinmentioned syndicate heads are serviced in substantially the same manner by Simmons as are the individual customers who do not qualify for and do not in fact, receive said discount. That, in many instances, the individual customers who do not receive the discounts are in direct competition with one or more of the individual customers or one or more of the unit stores of one or more of the central organizations which are members of or allied with one or more of the syndicate heads mentioned herein.

That in granting, allowing and paying discounts, either directly or indirectly, to individual customers and to central organizations which are members of or affiliated with a syndicate head, Simmons has discriminated in price against nonmember or nonaffiliated individual customers who are in competition with one or more of the individual customers or one or more of the unit stores of one or more of the central organizations which are members of or allied with one or more of the syndicate heads mentioned herein. That in granting, allowing and paying a higher or greater discount, either directly or indirectly, to an individual customer or to a central organization which is a member of or affiliated with one syndicate head than to a competing individual customer or central organization which is a member of or affiliated with another syndicate head, Simmons has discriminated in price in favor of the former.

That the adoption of the "Simmons Plan" has encouraged some of the otherwise independent and unrelated individual customers of Simmons and central organizations purchasing from Simmons to become affiliated with syndicate heads already in existence and has caused the creation by others of said customers and organizations of other buying syndicates and similar groups. Many competitors of Simmons have unsuccessfully sought to sell their former and other potential customers who have "gone syndicate." The effect of the discriminatory treatment in favor of individual customers and central organizations which constitute or are allied with syndicate heads, as alleged in this paragraph 6, may be substantially to lessen com-

petition with and tend to create a monopoly in Simmons in the line of commerce in which it is engaged.

PAR. 7. The Simmons Plan, either alone or in combination with the practice of Simmons, hereinbefore described, of treating central organizations and syndicate heads as one customer for the purpose of computing and paying the discounts under the Plan, has operated to produce, amongst others, the following results, which are typical of many of the situations created thereby:

1. An individual customer purchasing over \$50,000 worth of Simmons' merchandise in a year and receiving a 3 percent discount thereon may be in competition in the same city with an individual customer purchasing less than \$50,000 worth of merchandise in such year and receiving no discount, yet the average size of the purchases of and deliveries to the latter customer may be considerably larger than the average size of the purchases of and deliveries to the former customer.

2. An individual customer purchasing \$15,000 worth of Simmons' merchandise in a year and receiving no discount thereon may be in competition in the same locality of the same city with a unit store (of a central organization) which purchases but \$5,000 worth of merchandise in the same period and receives a discount of from 3 percent to 5 percent on its purchases because of the aggregate purchases of all the unit stores of the central organization. Yet, Simmons may and usually does make deliveries to the unit store in exactly the same way as it makes deliveries to the individual customer, the average size of the deliveries to the individual customer are oftentimes larger than the average size of the deliveries to the unit store, its salesmen may call upon the unit store as often as on the individual customer, and not infrequently its salesmen actually take orders from the unit store, and in such cases Simmons invoices, bills, extends credit to and collects from the unit store, all in the same manner as it handles the accounts of its individual customers.

3. An individual customer purchasing \$10,000 worth of Simmons' merchandise in a year and receiving no discount thereon may be in competition in the sale locality of the same city with another individual customer which purchases but \$1,000 worth of Simmons' merchandise in such period, and receives a discount of from 3 percent to 5 percent on its purchases because it is a member of or is allied with a syndicate head. Yet, the Simmons' salesmen may and usually do call upon the affiliated individual customer as often as upon the non-affiliated individual customer. The orders of the former are solicited and taken in the same manner as in the case of the latter. Simmons makes delivery to the one in exactly the same way as it makes delivery

to the other and the average size of the deliveries to the unaffiliated individual customer is oftentimes larger than the average size of the deliveries to the individual affiliated customer. Simmons invoices, bills, extends credit to and collects from the affiliated individual customer and the nonaffiliated individual customer in the same manner.

4. An individual customer purchasing \$10,000 worth of merchandise in a year and receiving a discount of 3 percent on its purchases because it is a member of or is allied with a syndicate head, the purchases of all of the members of which aggregate more than \$50,000 but less than \$75,000, may be in competition in the same locality of the same city with another individual customer purchasing but \$1,000 worth of Simmons' merchandise in such period but receiving a discount of 5 percent on its purchases because it is a member of or is allied with a syndicate head, the purchases of all the members of which aggregate more than \$200,000. Yet, the salesmen of Simmons contact, solicit and take orders from, and Simmons delivers its merchandise to, invoices, bills, extends credit to and collects from each of the individual customers mentioned herein in exactly the same manner. The only difference is that the average size of the deliveries to the individual customer purchasing \$10,000 worth of merchandise a year and getting the smaller discount is apt to be larger than the average size of the deliveries to the individual customer purchasing \$1,000 worth of merchandise a year but receiving the larger discount.

It is possible, under the operation of the Simmons Plan, for two individual customers of Simmons who are in competition with each other and who purchase exactly the same quantity of Simmons' products of like grade and quality during any year to pay aggregate prices therefor varying almost as much as \$2,500. The advantage to the customers of Simmons who purchase at the lower prices may be reflected not only in price cutting but also in an increase in service, sales effort, sales appeal and in other ways that injure or tend to lessen competition with them, all of which operate to the disadvantage of the customers against whom these discriminations are employed.

PAR. 8. The price differentials (described in pars. 4, 5, 6, and 7 hereof) which have resulted from the Simmons Plan, described in paragraph 4 hereof, and the practical application thereof to central organization and syndicate heads, make other than due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which its products are sold or delivered by Simmons to the customers described, respectively, in said paragraphs.

727

Order

PAR. 9. That the rebates or discounts granted, allowed and paid by Simmons have been made from its published prices for its standardized products. The amount of the rebates or discounts paid by Simmons, during the year 1936, amounted to more than \$500,000; to approximately \$750,000 during the year 1937 and to over \$485,000 during the year 1938.

PAR. 10. The effect of such discriminations in price made by Simmons, as set forth in paragraphs 5 to 7, inclusive, hereof, may be substantially to lessen competition between Simmons and its aforesaid competitors; between the retailer customers of Simmons in whose favor such discriminations are made and Simmons' other retailer customers; between the retailer customers of Simmons' competitors who do not grant such customers the benefit of such discriminatory prices and the retailer customers who purchase of Simmons in favor of whom Simmons discriminate; tend to create a monopoly in Simmons in the aforesaid line of commerce; to injure, destroy or prevent competition with Simmons; to injure, destroy, or prevent competition with retailer customers of Simmons who receive the benefit of such discrimination.

CONCLUSION

The Commission concludes that respondent Simmons Co. has discriminated in price between different purchasers of its products of like grade and quality, as set forth in paragraphs 4 to 7, inclusive, hereof, and has been and is violating subsection (a) of section 2 of the Clayton Act, as amended.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, and the answer of the respondent Simmons Co. (hereinafter referred to as "Simmons") by which Simmons admits all the material allegations of fact set forth in said complaint and waives the taking of testimony and all other intervening procedure herein and further hearing as to said facts, and the Commission being of the opinion upon the facts so admitted that Simmons has violated and is violating the provisions of subsection (a) of section 2 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.

It is ordered, That Simmons, its officers, representatives, agents, and employees, in connection with the distribution and sale of its

products in commerce between the several States of the United States and in the District of Columbia, do forthwith cease and desist from:

(a) Discriminating in price, directly or indirectly, between different retailer purchasers of its products of like grade and quality by granting, allowing, or paying the cumulative discounts of the Simmons Plan, as set forth in paragraph 4 of said findings as to the facts, heretofore granted, allowed and paid by Simmons.

(b) Continuing to practice the discriminations in prices adjudged to be unlawful in the aforesaid findings and conclusions; and

(c) Discriminating in price, directly or indirectly, by granting, allowing, or paying, directly or indirectly, to any of its customers, whether individual customers, central organizations or syndicate heads, as said customers are defined in the aforesaid findings, any cumulative or retroactive quantity discounts either under the aforesaid Simmons Plan or any plan or method like or similar thereto making provision for the granting, allowing, or paying of cumulative or retroactive quantity discounts.

It is further ordered, That Simmons, within 60 days after the service upon it 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.

Syllabus

IN THE MATTER OF
THE JOSEPH DIXON CRUCIBLE COMPANY ET AL.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3643. Complaint, Nov. 1, 1938—Decision, Aug. 28, 1939*

Where some 13 corporations, which were and had been for some time past engaged in manufacture and sale of wood-cased lead pencils, and made and sold approximately 75 percent of such pencils produced in the United States, and were actively and substantially engaged in competition with one another in making and seeking to make sales of such pencils in commerce among the several States and in the District of Columbia, except insofar as said competition had been hindered, lessened, restricted, or restrained and potential competition among them forestalled by understandings and agreements among them and acts and things done in pursuance thereto, as below set forth; acting directly through and by means of their association and its secretary, or among themselves—

(a) Entered into and carried out understandings and agreements with intent and effect of unlawfully restricting, restraining, suppressing, and eliminating competition in sale of comparable wood-cased lead pencils in trade and commerce as aforesaid; and in pursuance of said agreements and understandings, and in furtherance thereof—

1. Agreed to and did fix and maintain uniform prices, terms, and conditions for sale of said products.

2. Agreed to and did change, simultaneously, prices at which they were to sell such products;

3. Agreed to and did adopt, fix, and determine uniform schedules of quantity or annual cumulative discounts thereof;

4. Agreed to and did fix and determine prices of "blanks," or wood-cased lead pencils upon which neither name nor any brand of manufacturer appears; and

5. Agreed to and did offer uniform bids on comparable wood-cased lead pencils to prospective purchasers thereof; and

Where said various member corporations, acting through their said association and in a manner calculated to effect said agreements and understandings to fix and maintain prices on such products as aforesaid, and with capacity and tendency to accomplish the same—

(b) Agreed to and did investigate and consult with each other with reference to standardization program having as its objective limitation of styles, grades, and qualities of wood-cased lead pencils made and offered by such members;

(c) Agreed to and did report, through and by means of such association in the above manner and with the above capacity and tendency, monthly statistics of each member, showing new orders, production for shipment, unfilled orders, and inventory of finished stock, and caused said association to report to each member industry totals and each member's own individual percentage thereof;