

Syllabus

IN THE MATTER OF
BINNEY AND SMITH COMPANY

COMPLAINT, FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSECTIONS (a) AND (d) OF SECTION 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY SECTION 1 OF AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 4143. Complaint, May 24, 1940—Decision, Dec. 31, 1940

Where a corporation engaged in manufacturing crayons, chalk, paint sets, educational supplies, and allied products, and in offering for sale, selling, and distributing said products to purchasers in various States, in substantial competition with other concerns similarly engaged—

In selling its products of like grade and quality to all customers at one list price from which those who purchased solely in case lots were allowed a 50 percent trade discount—

- (a) Granted and allowed to a certain group of "competitive distributors" who were in active competition with its other customers receiving only aforesaid regular trade discount of 50 percent additional discounts including, (1) prior to complaint, discounts of 5 percent over and above the regular trade discount; and (2) discounts of 10 percent above the regular trade discount, thereafter, accorded to all such "competitive distributors" following the regular trade discount allowed to all customers purchasing in case lots;

With result that the effect of said discriminations in price might be substantially to lessen competition and to injure, destroy and prevent competition between it and its competitors in the products in question; and also substantially to lessen competition and to injure, destroy and prevent it in the use and resale of such products between some of its customers receiving the lower prices and some of the customers competitively engaged therewith who did not receive such lowered prices; and to tend to create a monopoly in it in said line of commerce;

Held, That under the facts and circumstances above set forth said corporation discriminated in price in the sale of its products between different purchasers in violation of subsection (a) of section 2 of the Clayton Act as amended; and

Where said corporation, engaged as aforesaid—

- (b) Granted to certain "special or promotional representatives," over and above aforesaid regular trade discount of 50 percent, as compensation for carrying warehouse stocks and furnishing selling services and facilities (1) in some cases, additional percentage discounts of 10 percent; and (2) in another group of cases, additional discounts of 5 percent, without making such compensation available on proportionally equal terms to their competitors, whose request to be allowed such compensation for furnishing the same services and facilities as those supplied by aforesaid favored customers it refused;

Held, That said corporation granted and allowed compensation to certain of its customers for services and facilities without making such payments available to all other competing customers on proportionally equal terms in violation of subsection (d) of section 2 of the Clayton Act as amended.

Complaint

32 F. T. C.

Mr. John T. Haslett for the Commission.

Clark, Carr & Ellis, of New York City, for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of subsections (a) and (d) of section 2 of the Clayton Act (U. S. C. title 15, sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

I

Charging violation of subsection (a) of section 2 of the Clayton Act as amended, the Commission alleges:

PARAGRAPH 1. Respondent, Binney & Smith Co., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 41 East Forty-Second Street, New York, N. Y. The respondent operates and maintains a manufacturing plant at Keplers, Pa.

PAR. 2. Respondent corporation is now and has been, since June 19, 1936, engaged in the business of manufacturing, offering for sale, selling and distributing crayons, chalk, paint sets, educational supplies, and allied products. Respondent sells and distributes said products in commerce between and among the various States of the United States and in the District of Columbia and, as a result of such sales, causes said products to be shipped and transported from its places of business to the purchasers thereof who are located in the various States of the United States other than the States in which respondent's places of business are located. There is and has been at all times mentioned a continuous course of trade and commerce in said products across State lines between respondent's factory and the purchasers of said products. Said products are sold and distributed for use and resale within the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent is now and during the time herein mentioned has been in substantial competition with other corporations and with individuals, partnerships and firms engaged in the business of selling and distributing crayons, chalk, paint sets, educational supplies, and allied products in commerce.

PAR. 4. In the course and conduct of its business as aforesaid, respondent, since June 19, 1936, has been and is now discriminating in price between different purchasers by selling its products to some of its customers at lower prices than it sells its products of like grade and quality to other of its customers competitively engaged one with the other in the resale of said products within the United States. Respondent offers and sells its said products at one price list from which customers who purchase in case lots either for use or for resale are allowed by the respondent a 50 percent trade discount. To purchasers among this class of customers, whom respondent designates as "Competitive Distributors," the respondent grants and allows additional discounts. To some of such "Competitive Distributors" respondent grants and allows a discount of 5 percent over and above the regular trade discount of 50 percent off the list price. To others of such "Competitive Distributors" the respondent grants and allows a discount of 10 percent over and above the regular trade discount of 50 percent off the list price.

The "Competitive Distributors" of the respondent who are granted and allowed the discounts over and above the regular trade discount of 50 percent off the list price, as aforesaid, are in active competition with other customers of respondent who purchase respondent's products in case lots and who do not receive any discounts over and above the regular trade discount of 50 percent off the list price.

PAR. 5. The effect of the discriminations in price set forth in paragraph 4 hereof has been and may be substantially to lessen competition in the lines of commerce in which respondent and its said customers are engaged and to injure, destroy and prevent competition with respondent in the sale and distribution of crayons, chalk, paint sets, educational supplies, and allied products, and has been and may be substantially to injure, destroy and prevent competition in the resale of such products with the favored customers of respondent who are granted and allowed the discounts as aforesaid, over and above the regular trade discount of 50 percent off the list price.

PAR. 6. The foregoing acts and practices of said respondent are in violation of subsection (a) of section 2 of the Clayton Act as amended.

II

Charging violation of subsection (d) of section 2 of the Clayton Act as amended, the Commission charges:

PARAGRAPH 1. Paragraphs 1 to 3, inclusive, of count I hereof, are hereby repeated and made a part of this charge as fully and with the same effect as though herein again set forth at length.

PAR. 2. In the course and conduct of its business as aforesaid, respondent, since June 19, 1936, has been and is granting compensation in the form of percentage discounts or allowances to some of its customers who are selected by the respondent and who are designated as "Special or Promotional Representatives." Such percentage discounts or allowances have been and are granted to favored customers in consideration for merchandising and selling services furnished in connection with the sale of respondent's products. The percentage discounts are deducted from the invoice price and are over and above the regular trade discount of 50 percent off the list price. The respondent grants and allows such percentage discounts to its favored customers without making such discounts or allowances available on proportionally equal terms to other customers competing with such favored customers in the sale and distribution of respondent's said products.

Such other customers are able and willing to furnish the same services and facilities to the respondent as those furnished by its customers designated by the respondent as "Special or Promotional Representatives." To these customers who are able and willing to furnish the same services or facilities for the respondent as those furnished by customers designated as "Special or Promotional Representatives," the respondent has not made available the percentage discounts or allowances which are granted by the respondent to its "Special or Promotional Representatives." Respondent's customers who are able and willing to furnish the same services and facilities as furnished by respondent's "Special or Promotional Representatives" have requested the respondent to allow such compensation to them and, although often requested so to do by such customers, the respondent has refused and continues to refuse to grant or allow such compensation to them.

PAR. 3. The foregoing acts and practices of said respondent are violations of subsection (d) of section 2 of the Clayton Act as amended.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 (the Clayton Act), as amended by section 1 of an act entitled "An Act to amend section 2 of an act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13) and for other

purposes" approved June 19, 1936 (the Robinson-Patman Act); the Federal Trade Commission on May 24, 1940, issued and served its complaint in this proceeding upon the respondent named in the caption hereof, charging respondent with violating the provisions of subsections (a) and (d) of section 2 of said act as amended.

After the issuance of said complaint and the filing of respondent's answer, a stipulation was entered into between W. T. Kelley, chief counsel for the Commission, and the respondent containing a statement of certain facts taken as the facts for the purpose of this proceeding and authorizing the Commission to proceed upon such statements and to make its report stating its findings as to the facts and its conclusions based thereon and enter its order disposing of the proceeding without the presentation of argument and the filing of briefs.

Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the stipulation of facts, and the Commission having duly considered the matter and being now fully advised in the premises, and being of the opinion that subsections (a) and (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act have been violated by the respondent, now makes this its findings as to the facts and its conclusions drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Binney and Smith Co., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 41 East Forty-second Street, New York, N. Y. Respondent operates and maintains a manufacturing plant at Keplers, Pa.

PAR. 2. Respondent corporation is now, and has been since June 19, 1936, engaged in the business of manufacturing, offering for sale, selling, and distributing crayons, chalk, paint sets, educational supplies, and allied products. Respondent sells and distributes said products in commerce between and among the various States of the United States and in the District of Columbia, and as a result of such sales causes said products to be shipped and transported from its places of business to the purchasers thereof who are located in the various States of the United States other than the States in which respondent's places of business are located. There is, and has been at all times mentioned herein, a continuous course of trade and commerce in said products across State lines between respondent's factory and the purchasers of said products. Said products are sold and distributed for use and resale within the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business as aforesaid, respondent is now, and during all times herein mentioned has been, in substantial competition with other corporations and with individuals, partnerships and firms engaged in the business of manufacturing, selling, and distributing crayons, chalk, paint sets, educational supplies, and allied products in commerce.

PAR. 4. Respondent has sold and is selling its products of like grade and quality to all customers at one list price from which customers who purchase solely in case lots are allowed by the respondent a 50 percent trade discount. Among the customers of the respondent who purchase solely in case lots and who are allowed the 50 percent trade discount is a group designated as "competitive distributors." To purchasers among this class of customers designated as "competitive distributors" the respondent has granted and allowed, and does grant and allow, additional discounts. To some of such "competitive distributors" the respondent did grant and allow a discount of 5 percent over and above the regular trade discount of 50 percent off the list price, but since the issuance of the complaint herein the respondent has discontinued the allowance of such 5 percent discount to any customers.

To others of such "competitive distributors" and since the issuance of the complaint herein to all such "competitive distributors," the respondent has granted and allowed and does grant and allow a discount of 10 percent over and above the regular trade discount of 50 percent off the list price.

All customers of the respondent designated as "competitive distributors" receive such 10 percent discount, which is deducted from the invoice price, and follow the regular trade discount generally allowed to all customers by the respondent who purchase in case lots.

The "competitive distributors" of respondent who are granted and allowed the additional discount above referred to are in active competition with other customers of the respondent who purchase products of like grade and quality solely in case lots and who do not receive any discounts other than the regular trade discount of 50 percent off the list price generally allowed customers of the respondent purchasing in case lots.

PAR. 5. The effect of said discriminations in price so made by the respondent as above set forth may be substantially to lessen competition and to injure, destroy, and prevent competition between the respondent and its competitors in the sale and distribution of crayons, chalk, paint sets, educational supplies, and allied products; and also may be substantially to lessen competition and to injure, destroy, and prevent

competition in the use and resale of such products between some of the customers receiving the lower prices and some of the customers competitively engaged with the customers receiving lower prices and who deal in said products and who do not receive such lowered prices. The effect of said discriminations in price also may tend to create a monopoly in respondent in said line of commerce.

PAR. 6. In the course and conduct of its business as aforesaid, respondent since June 19, 1936, has been and is granting compensation in the form of percentage discounts or allowances to some of its customers who are selected by the respondent, and who are designated by the respondent as "special or promotional representatives." Such percentage discounts, or allowances, have been and are granted to these customers as compensation in consideration of merchandising and selling services furnished in connection with the sale of respondent's products. The percentage discounts are deducted from the invoice price and are over and above the regular trade discount of 50 percent off the list price generally allowed by the respondent to all customers who purchase solely in case lots. The respondent grants and allows such compensation to "special or promotional representatives" without making such compensation available on proportionally equal terms to other customers who are in competition with such "special or promotional representatives" in the sale and distribution of respondent's products of like grade and quality.

To some customers classified as "special or promotional representatives" the respondent has granted and allowed, and does grant and allow, a 10 percent discount as compensation for carrying warehouse stocks and furnishing selling services and facilities.

To another group of customers in the classification of "special or promotional representatives" the respondent did grant and allow a 5 percent discount as compensation for carrying warehouse stocks and furnishing selling services and facilities less extensive than the group receiving the 10 percent compensation, but since the issuance of the complaint herein the respondent has discontinued the allowance of a 5 percent discount to any customers, and since the issuance of the complaint herein to all "special or promotional representatives" the respondent has granted and allowed and does grant and allow a 10 percent discount as compensation for carrying warehouse stocks and furnishing selling services and facilities.

Among the customers of the respondent are some who are able and willing to furnish, and in some instances do furnish, the same services and facilities to the respondent as those furnished by its customers designated as "special or promotional representatives." To

Order

32 F. T. C.

these customers the respondent has not made available the discount and allowance which is granted by the respondent as compensation to its "special or promotional representatives." Among these customers who are able and willing to furnish, and in some instances do furnish, the same services and facilities as are furnished by the respondent's "special or promotional representatives" are some who have requested the respondent to allow such compensation to them and, although so requested by such customers, the respondent has refused and continues to refuse to grant or allow compensation to such non-compensated customers on proportionally equal terms.

CONCLUSIONS

Under the facts and circumstances set forth in the foregoing findings as to the facts, the Commission concludes that the respondent, Binney and Smith Co., has discriminated in price in the sale of its products between different purchasers in violation of subsection (a) of section 2 of the Clayton Act as amended by the Robinson-Patman Act.

The Commission further concludes that the respondent, Binney and Smith Co., has granted and allowed compensation to certain of its customers for services and facilities without making such payments available to all other competing customers on proportionally equal terms in violation of subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and the stipulation as to the facts entered into between respondent herein and W. T. Kelley, Chief Counsel for the Commission, which provides, among other things, that without the presentation of argument or other intervening procedure the Commission may issue and serve upon the respondent herein findings as to the facts and conclusions based thereon, and an order disposing of the proceedings, and the Commission having made its findings as to the facts and conclusions that said respondent has violated the provisions of subsection (a) and subsection (d) 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 by the Robinson-Patman Act.

It is ordered, That respondent, Binney and Smith Co., a corporation, its officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of crayons, chalk, paint sets, educational supplies, and allied products in interstate commerce for use or resale, do forthwith cease and desist:

1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and granting varying discounts therefrom in the manner and under the circumstances found in paragraph 4 of the aforesaid findings as to the facts and conclusions.

2. From continuing or resuming the discriminations in price referred to and described in paragraph 4 of the Commission's findings as to the facts herein.

3. From otherwise discriminating in price between purchasers of crayons, chalk, paint sets, educational supplies, and allied products of like grade and quality, in a manner and degree substantially similar to the manner and degree of the discriminations referred to in paragraph 4 of the Commission's findings as to the facts herein, and in any other manner resulting in price discriminations substantially equal in amount to such discriminations, except as permitted by section 2 of the Clayton Act as amended.

4. From granting or allowing compensation to any customer of the respondent of an amount equal to 10 percent of the respondent's net billing prices of the products sold by such customer, for services or facilities furnished by or through such customer in connection with the handling, sale or offering for sale of respondent's products, unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

5. From granting or allowing compensation of an amount equal to 5 percent of the respondent's net billing prices of products sold by such customer, for services or facilities furnished by or through such customer in connection with the handling, sale or offering for sale of respondent's products, unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

It is further ordered, That the respondent, Binney and Smith Co., a corporation, its officers, directors, representatives, agents, and employees, in connection with the sale and distribution of crayons, chalk, paint sets, educational supplies, and allied products, do forthwith cease and desist from granting or allowing to any customer of the respondent any compensation for services or facilities furnished by or through such customer in connection with the handling, sale or offer-

Order

32 F. T. C.

ing for sale of respondent's products, unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

It is further ordered, That respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF

MENDOZA FUR DYEING WORKS, INC.

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

Docket 3824. Complaint, June 16, 1939—Decision, Jan. 4, 1941

Where a corporation engaged in dyeing furs for fur coats, fur-trimmed coats and fur clothing, and in furnishing to some customers, in course and conduct of its business and to induce customers to forward pelts to it for dyeing and processing, various sketches or designs for use in manufacture of fur garments, and in furnishing also labels to be attached to such garments and designating same under trade name "Mendoza Furs," in harmony with corporate name thereof, and in causing, as thus engaged, its said sketches or designs and labels, together with such processed furs in some instances, to be transported from its place of business in New York to customers in various other States, and in substantial competition, in the course and conduct of its said business, with others likewise engaged in fur dyeing—

- (a) Represented, in advertisements in various circulars, newspapers and periodicals distributed to customers and prospective customers in the various States, that the sketches supplied by it were adaptations of designs by famous Parisian couturiers, and, in a few instances, that such sketches were designed by such couturiers;
- (b) Represented, in general advertising to acquaint public and trade with trade name aforesaid, that various garments, thus labeled, were adaptations from designs of various famous Parisian couturiers, and that furs processed by it had won a prize or award in active competition in Paris, France; and
- (c) Depicted or set forth in its various advertisements, reproductions of the various labels which it furnished and which purported to be those of Parisian couturiers, such as Schiaparelli, Vionnet, Heim, Max and Jeanne Lavin and others, and furnished to customers labels in the French language and which it reproduced as above set forth in its advertisements, and which purported to carry signatures and trade marks of certain Parisian couturiers, and which included, as typical, such labels as "d'apres un modele MADELIENE VIONNET (in longhand) pour Mendoza Furs";

Facts being sketches and designs furnished by it were not prepared by any Parisian couturier and labels supplied by it were not those of the particular Parisian couturiers named, it was not authorized by them to use such labels and garments to which they were attached were not made in Paris, France, nor designed by either Schiaparelli, Vionnet, Heim, Max or Jeanne Lavin, or any other person or persons in Paris, and no such persons had any connection with designing or manufacture of products in question, and, while it was, in 1923, awarded Grand Prix, gold medal and diploma by the "Exposition d'Economie Domestique" held at Paris, France, "for its excellent process of the imitation of skins of beaver, fox" and other furs, none of its garments had ever won a prize or award in competition with garments of others in Paris, except as above stated;