

Syllabus

IN THE MATTER OF
DENTISTS' SUPPLY COMPANY OF NEW YORK

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED, AND SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 4915. Complaint, Feb. 18, 1943—Decision, Aug. 17, 1943

Where the largest manufacturer in the United States of artificial teeth, engaged in competitive interstate sale and distribution thereof, and selling more than 50 percent of the total production to over 200 authorized wholesalers or dental supply houses for resale to dental laboratories and to dentists who, however, customarily purchase such dental requirements from the former;

Selling its said product under a uniform discount schedule under which it granted its said dealers a 40 percent discount, plus 9 percent for payment within thirty days, from list, and an additional 7½ percent in event of sales to laboratories or dentists in \$300 quantities; and under a system of bonus contract agreements superimposed thereon, solicited from dental laboratories as a special inducement to make purchases of its dealers in amounts in excess of \$1,000 annually—

- (a) Discriminated in price through such agreements under which said laboratories received 10 percent of free bonus teeth on annual purchases between \$1,000 and \$2,500; 15 percent on purchases ranging from \$2,500 to \$5,000; 20 percent on those from \$5,000 to \$10,000; and 25 percent on those exceeding said sum;

With the result that purchasers able to take advantage thereof, paid a lower price for teeth, and were enabled either to undersell competitors or furnish better facilities and service to dentist-customers, or both;

- (b) Granted and allowed chain dental laboratory buyers, under its said system, the bonus applicable to the volume of teeth represented by pooling orders of their unit laboratories, as made up of purchases from many of its dealers;

With result that many such units received discounts, to which, on the basis of their separate purchases, they were not entitled, and which were larger than those received by competitors:

- (c) Employed its said bonus system in connection with sales made from its New York City depot to dental laboratories in area concerned in competition with its dealers therein;

With result that purchaser-customers able to take advantage of such bonus system secured a lower unit price than competitors, and, thus favored, were enabled either to undersell latter or to furnish better facilities and service to customers, or both; and

- (d) Paid to dealers upon amounts purchased of them by laboratories which had qualified for free products in accordance with terms of such bonus agreements, secondary discounts over and beyond those contained in its aforesaid regular discount schedule, of 8½ percent and, later, 12½ percent;

With result that amount paid by such favored dealers for their regular purchases was decreased accordingly and they paid lower unit prices for its teeth than others not thus favored, and said bonus system, under which the

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dealer did not directly profit in the free products supplied through him to laboratories, was implemented and made effective;

Effect of which discriminations in price—which did not make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which its products were sold or delivered to various purchasers, and were not made in good faith to meet an equally low price of a competitor—had been and might be substantially to lessen competition with it in the line of commerce concerned; and to injure, destroy or prevent such competition and competition with customers who received benefits thereof;

Held, That such pricing methods constituted discriminations in price in commerce in violation of subsection (a) of sec. 2 of the Clayton Act, as amended.

Mr. W. C. Kern for the Commission.

Mr. Henry Ward Beer, of New York City, and *Mr. James Fawcett*, of Brooklyn, N. Y., 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" (the Clayton Act), as amended by an Act of Congress approved June 19, 1936, (U. S. C. title XV, sec. 13) (The Robinson-Patman Act), and 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 Federal Trade Commission Act), the Federal Trade Commission having reason to believe that the respondent named in the caption hereof has violated and is now violating the provisions of subsection (a) of section 2 of the said Clayton Act as amended; and the Federal Trade Commission having reason to believe that said respondent has been and is using unfair methods of competition in commerce, as "commerce" is defined in said Federal Trade Commission Act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint against the said respondent, stating its charges as follows.

COUNT I

PARAGRAPH 1. Respondent, Dentists' Supply Co. of New York, is a corporation organized and existing by virtue of the laws of the State of New York with an office and principal place of business located at 220 West Forty-second Street, New York City, and with factories located at York, Pa., and Philadelphia, Pa.

PAR. 2. Respondent corporation is now, and has been since prior to June 19, 1936, engaged in the business of manufacturing artificial

teeth which it sells to wholesale dealers known as dental supply houses, to dental laboratories and to dentists, located in States other than the State of Pennsylvania, causing said artificial teeth, when sold, to be transported from the place of manufacture within said State of Pennsylvania to the purchasers thereof located in States other than the State of Pennsylvania, and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said product across State lines between respondent's factories and the purchasers of such product. Said product is sold and distributed for use, consumption, and resale within the various States of the United States and 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 engaged in the business of manufacturing and selling artificial teeth in commerce between and among the various States of the United States and the District of Columbia. Said corporate respondent is the largest manufacturer and distributor of artificial teeth in the United States, its sales constituting approximately 70 percent of the total United States production, and as such occupies a dominant position in the artificial-teeth industry. The annual net sales of respondent in the United States of artificial teeth total approximately \$3,000,000. Respondent's product is sold to over 200 authorized dealers known as dental supply houses, which are wholesalers and which resell to the ultimate purchasers, dental laboratories, and dentists located in the various States of the United States and in the District of Columbia. Dentists by trade custom seldom make their own false denture requirements but customarily order such work performed by dental laboratories which laboratories constitute the dominant factor in the use and consumption of artificial teeth. While respondent's dealers sell other dental supplies than teeth, approximately 20 percent of their sales are artificial teeth purchased from respondent.

Respondent is now, and has been since prior to June 19, 1936, selling its said dealers on the following uniform discount plan: Respondent grants its dealers a 40 percent discount, plus 9 percent for payment within 30 days, from the unit retail price of the artificial teeth as shown on respondent's price list; and in addition, where a dealer sells to a dental laboratory or dentist in \$300 quantities, respondent grants the dealer making such purchase an additional 7½ percent discount. Dealers' resale prices, as suggested by respondent, are now and have been during said period on the basis of 10 percent discount from list prices on \$100 purchases and 20 percent discount from list prices on purchases amounting to \$300 or more.

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PAR. 4. In the course and conduct of its business as aforesaid since June 19, 1936, respondent has been, and is now, discriminating in price between different purchasers buying such products of like grade and quality sold by the respondent for use, consumption and resale, by giving and allowing some of its purchasers of such products lower prices 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 or allowed to other of respondent's purchaser customers. That the respondent has effectuated the discriminations in price referred to herein by superimposing upon the regular schedule of discounts allowed by respondent to its dealers and by its dealers to the ultimate purchasers a variety of additional rebates and discounts given in the form of free or bonus artificial teeth and more particularly hereinafter described in paragraphs 5, 6, 7, and 8 of this complaint.

PAR. 5. Respondent employs some twenty district sales representatives who visit dental laboratories and dentists for the purpose of promoting the sale of teeth by said prospective purchasers from respondent's dealers. Such sales representatives take orders for teeth, and solicit the execution of bonus contract agreements hereinafter described. Any orders for teeth obtained by respondent's sales representatives aforesaid are transmitted to respondent's New York office where they are either filled directly by respondent or referred to a dealer to fill out of such dealer's current stock or are filled by shipping the order to such dealer for subsequent delivery to the purchaser. Respondent's book entries, however, invariably show the sale as having been made to the dealer, and respondent looks to such dealer for payment of the order and credits the dealer's account accordingly.

As a special inducement to dental laboratories to purchase from respondent's dealer selling agencies in amounts in excess of \$1,000 per annum, since prior to June 19, 1936, respondent through its sales representatives aforesaid has been and is now soliciting and obtaining the execution of bonus contract agreements from numerous dental laboratories located in the various States of the United States and in the District of Columbia. If a laboratory agrees to purchase \$1,000, \$2,500, \$5,000, or \$10,000 worth of teeth annually from respondent's dealers or any of them, then respondent in turn agrees to give such purchaser 10 percent or \$100 worth of free bonus teeth computed at unit retail prices on a \$1,000 to \$2,499 annual volume purchase, 15 percent or \$375 worth of free bonus teeth similarly computed on a \$2,500 to \$4,999 annual volume purchase, 20 percent or \$1,000 worth of free bonus teeth similarly computed on a \$5,000 to \$9,999 annual volume purchase, and

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25 percent or \$2,500 worth of free bonus teeth similarly computed on a \$10,000 or greater annual volume purchase. That said bonus contracts contain among other provisions the following clauses, to-wit:

(1) The CONSUMER covenants and agrees to purchase from the Company's regular selling agencies named herein teeth of the Company's manufacture, namely "Trubyte," "Solila," "Twentieth Century," "Dentsply," "Famous" and "Trubridge" teeth (Steele's facings excepted) and/or "Trubase" and "Truwax" and/or White's teeth to the total purchase price and amount of _____ Dollars during the term of this agreement.

(5) Upon the faithful carrying out by the CONSUMER of the aforesaid covenants, the COMPANY hereby covenants and agrees to give direct to the CONSUMER a bonus on all such teeth and on "Trubase" or "Truwax" of its manufacture and on White's teeth purchased and paid for by the consumer during the term of this agreement by supplying free of charge to the CONSUMER porcelain teeth of the Company's manufacture (Steele's facings excepted), as specified by the CONSUMER of the value of \$ _____ Dollars. The value of the teeth so delivered as said bonus to be computed at the Unit Prices of such teeth published in the price list of the Company, current December 31, 194____, or at the date of the termination of this agreement in case of its earlier termination.

(6) It is mutually covenanted and agreed that as evidence of the purchase of such teeth or wax by the CONSUMER, the CONSUMER shall present to the Company on or before January 20, 194____, receipted bills or other evidence, satisfactory to the Company, showing the quantities purchased, from whom purchased and amounts paid for same by the CONSUMER during the term of this agreement; and the amount of such purchases upon which the bonus shall be computed shall be the amount actually paid by the CONSUMER for said teeth and wax; and within thirty days after the presentation of such evidence by the CONSUMER, the Company agrees to give to the CONSUMER the quantity of teeth so due as said bonus.

That the amount of dollar purchases of teeth which the dental laboratory entering into such a contract agrees to purchase is either \$1,000, \$2,500, \$5,000, or \$10,000 annually as heretofore alleged, one of which amounts being inserted in the space provided in clause (1) of such contract above set forth. That the dollar amount of bonus or free teeth agreed to be supplied by respondent to such dental laboratory purchaser in consideration for the agreed annual dollar volume purchase is a sum certain computed in the manner alleged, said dollar amount of bonus or free teeth being inserted in the space provided in clause (5) of such contract above set forth. If the amount which a dental laboratory agrees to purchase is not reached, but one of the lower brackets is obtained within the period covered by the contract, then such dental laboratory is paid in accordance with the bracket it does reach, whereas if a higher bracket is reached than agreed upon under the bonus contract, then such dental laboratory is paid at the rate provided for such higher bracket. The bonus provided by such bonus contract agreement is cumulative. For example, a dental laboratory purchasing \$9,500 in teeth is given 20 percent of \$9,500 or \$1,900 in free teeth.

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If, however, it purchases an additional \$500 it will reach the \$10,000 bracket and be paid a bonus at the rate of 25 percent of its entire purchases or \$2,500. That approximately 1,400 of such bonus contracts have been executed by respondent and respondent's purchaser customers annually since June 19, 1936, and that minimum annual volume purchases provided for under such contracts were completed and bonus or free teeth given in the amount provided as to approximate 65 percent of the total number of bonus contracts executed. That respondent through its sales representatives not only personally solicits such dental laboratories for both regular teeth orders and for bonus contract agreements but also makes effective its special price policies and schedules as applied to them, which price policies and schedules are reduced to writing and formally executed by both respondent and by such dental laboratories in the form of such bonus contracts aforesaid. That such dental laboratories are purchasers from and customers of respondent within the intent and meaning of the provisions of subsection (a) of section 2 of the act described in the preamble hereof. That such bonus system results in a lower unit price being paid for teeth by respondent's purchaser customers who are able to take advantage of such bonus system by purchasing in the required volume and enables such purchaser customers in whose favor such discrimination is made either to undersell their competitors or furnish better facilities and services to their dentist customers, or both.

PAR. 6. That, for the purpose of granting and allowing the bonus or free teeth discounts under its bonus system described in paragraph 5 hereof, respondent has permitted the main office of some chain dental laboratory buyers to pool the orders of the unit laboratories thereof and has granted and allowed to such chain dental laboratory buyers the bonus applicable to the volume of teeth purchases during the bonus contract period represented by the pooled orders. For example, if the pooled order has totaled over \$10,000 in teeth ordered from respondent during the bonus contract period, each unit laboratory through its main office has received a 25 percent free teeth bonus on all its purchases even though the individual unit laboratory may not have ordered a sufficient quantity to qualify for any or for more than a 10 percent bonus under respondent's bonus system. That the respondent granting and allowing such pooling privilege in connection with the granting and allowing of bonus teeth under its bonus system aforesaid did not make shipment of the teeth purchased from all the unit laboratories during the bonus contract period to the main office or warehouse of such dental laboratory chains. That in fact the teeth purchased by such dental laboratory chains were and are now purchased in small amounts from time to time by each unit laboratory from many of respondent's dealers.

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That the chain dental laboratories receiving such pooling privilege in the calculation of bonuses under respondent's bonus system aforesaid were and are now in competition with other dental laboratories competing with such dental laboratory chains in the sale of respondent's teeth but which by virtue of not being a unit laboratory of a chain do not receive any bonus or as large a bonus from respondent.

PAR. 7. Respondent since prior to June 19, 1936, has and now does operate a dental depot in New York City, where it keeps a complete stock of artificial teeth manufactured in its factories in the State of Pennsylvania and shipped to said dental depot located in New York City, State of New York. That in connection with the operation of such dental depot it sells directly to dental laboratories in competition with its dealers located in New York City. That in connection with such direct sales made to its purchaser customers it solicits and procures the execution of bonus contract agreements identical in form to said bonus contract agreements described in paragraph 5 of this complaint. That such bonus system employed in connection with sales made from respondent's New York City depot to purchaser customers located in the New York City area results in a lower unit price being paid for teeth by respondent's purchaser customers who are able to take advantage of such bonus system by purchasing in the required volume and enables such purchaser customers in whose favor such discrimination is made either to undersell their competitors or furnish better facilities and services to their dentist customers, or both.

PAR. 8. The prices at which respondent sells its teeth products to its dealers are uniform and are as set forth in paragraph 3 of this complaint with the following exceptions: In fulfilling its agreement to furnish a specified amount of bonus or free teeth to its bonus contract holders, respondent since June 19, 1936, has and now does issue to such purchaser customers holding and completing bonus contracts certificates entitling the holder thereof to bonus or free teeth in the dollar amount specified therein upon presentation of such certificates to respondent or to any of respondent's dealers. Prior to January 1, 1939, respondent allowed its dealers a secondary bonus or discount of 8 percent of the dollar value of bonus certificates and in proportion to the dollar amounts of respondent's teeth purchased by the bonus certificate holders from such dealers. To illustrate: Abel Dental Laboratory, of Houston, Tex., having a \$1,000 bonus contract, purchased during the period specified therein \$56.48 worth of teeth from A. P. Cary Co. and \$979.17 worth of teeth from Pendleton & Arto, two of respondent's dealers located in Houston, Tex.; respondent issued to said dental laboratory purchaser two bonus certificates, one in the

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amount of \$97.91 and another in the amount of \$5.65. Both of such certificates were redeemed by said Pendleton & Arto and its account was credited for the amount of the teeth given in such redemption at dealers' list prices; however, Pendleton & Arto, which handled the redemption of both certificates, was allowed by respondent 8 percent of \$97.91 as \$979.17 of the merchandise had been purchased from such dealer, and A. P. Cary Co. was allowed by respondent 8 percent of \$5.65 as \$56.48 of the merchandise had been purchased from such dealer. Since the dealer redeeming the bonus certificates is credited with the full amount of teeth given in redemption of such certificates at dealers' prices, no profit is made by the dealer on the transaction as is the case in ordinary dealers' sales. It is only in the event that the dealer has originally sold some of the merchandise to the bonus certificate holder upon which the bonus certificate is issued that the dealer redeeming the certificate obtains any part of the above described secondary bonus or discount. From January 1, 1939, and thereafter respondent increased such secondary bonus or discount paid to its dealers upon bonus certificates in the manner aforesaid from 8 percent to 12½ percent. The dealer's account is credited by respondent in the amount of such secondary bonus or discount allowed, thereby reducing the cost to the dealer of the teeth purchased by such dealer at regular dealers' prices. That the practice aforesaid of respondent's secondary bonus system to dealers results in a lower unit price being paid for teeth by some of respondent's dealers than is paid by other of respondent's dealers. Moreover, said secondary bonus or discount paid by respondent to its dealers and predicated upon the bonus certificates issued to dental laboratories under respondent's bonus system described in paragraph 5 hereof, implements and makes effective such bonus system to dental laboratories, thereby contributing to the discriminations and competitive injuries resulting from said bonus system or respondent described in said paragraph 5 hereof.

PAR. 9. The effect of the discriminations in price set forth in paragraphs 5 to 8, inclusive, hereof, may be substantially to lessen competition between respondent and its competitors; between the customers of respondent in whose favor such discriminations are made and the customers of the competitors of the respondent; tend to create a monopoly in respondent in the line of commerce in which it is engaged; to injure, destroy, or prevent competition with the customers of respondent who receive the benefit of such discriminations; to injure, destroy, or prevent competition with customers of persons, partnerships and corporations that have knowingly received and are now knowingly receiving the benefit of such discriminations.

Such discriminations in price by the respondent between different 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 Clayton Act described in the preamble hereof.

COUNT II

PARAGRAPHS 1 to 8, inclusive: As paragraphs 1 to 8, inclusive, of Count II of this complaint, the Commission hereby incorporates paragraphs 1 to 8, inclusive, of count I hereof to precisely the same extent as if each and all of them were set forth in full and repeated verbatim in this count.

PAR. 9. The capacity, tendency, and effect of the respondent's system of bonus contract agreements extended to dental laboratories in the manner fully described in paragraph 5, 6, and 7 hereof, and of the respondent's system of secondary bonuses or discounts extended to its dealers in the manner fully described in paragraph 8 hereof, are and have been:

1. To bring about an unlawful discrimination in the prices at which respondent's artificial teeth are sold to respondent's purchaser customers.

2. To discriminate unlawfully against small dental laboratories who are or have been engaged or desire to engage in the use, consumption, and resale of respondent's artificial teeth.

3. To unreasonably lessen, eliminate, restrain, stifle, hamper, suppress, and injure competition in the sale of artificial teeth by encouraging concentrated buying of respondent's teeth in order to obtain the bonuses under respondent's bonus system and thereby depriving dealers of competing manufacturers of the business which they would enjoy under conditions of normal and unobstructed or free and fair competition in the sale of artificial teeth.

4. To encourage the purchase of excess requirements of respondent's artificial teeth beyond the needs of purchaser customers, thereby restricting, restraining, and impeding the normal flow of commerce in such products.

5. To monopolize or to tend to monopolize in respondent interstate trade and commerce in artificial teeth.

6. To hamper and interfere with the natural flow of trade in commerce of artificial teeth to and through the various States of the United States; and to injure the manufacturer competitors of respondent by unfairly diverting business and trade from them and by depriving them of the business which they would enjoy were it not for the unfair tendency and effect of respondent's bonus system.

7. To prejudice and injure manufacturers who do not conform to respondent's bonus system or sales methods or who do not desire to conform to them but are compelled to adopt similar bonus systems or sales methods by the action of respondent in that particular.

PAR. 10. The acts and practices in this count set forth are all to the prejudice of the public; they have a dangerous tendency to hinder, lessen, restrict, and suppress competition in the interstate sale of artificial teeth throughout the several States, and to create a monopoly thereof in the hands of the respondent and constitute unfair methods of competition in commerce within the meaning of section 5 of the Federal Trade Commission Act described in the preamble hereof.

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 purpose," approved October 15, 1914 (the Clayton Act), as amended by an act of Congress approved June 19, 1936 (the Robinson-Patman Act, U. S. C. A., title 15, sec. 13), and 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 Federal Trade Commission Act), the Federal Trade Commission on February 18, 1943, issued its complaint against the above-named respondent and caused such complaint to be served as required by law. Said complaint charged in count I thereof that said respondent was and had been discriminating in price between different purchasers from it of commodities of like grade and quality in the course of interstate commerce in violation of the provisions of subsection (a) of section 2 of the said Clayton Act, as amended, and in count II thereof that said respondent was and had been engaging in unfair methods of competition in commerce within the meaning of section 5 of the said Federal Trade Commission Act.

Subsequently, a stipulation as to the facts was entered into between W. T. Kelley, chief counsel for the Commission, and Leroy Frantz, vice president and treasurer of respondent corporation, providing that, subject to the approval of the Commission, such stipulation of facts should be taken as constituting the entire record with respect to the practices alleged in count I of the complaint and that the Commission might, with respect to said practices, make its report setting forth its findings as to the facts (including inferences which it might draw from the said stipulated facts) and its conclusion based thereon, and might enter its order based upon such findings of fact and conclusion.

As a part of such stipulation of facts, respondent waived any further hearing as to the facts with respect to such practices, as well as all other intervening procedure with respect thereto, including the filing of briefs and the presentation of oral argument. Thereafter, the proceeding regularly came on for final hearing before the Commission on said complaint and said stipulation of facts, such stipulation having been approved by the Commission; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Dentists' Supply Co. of New York, is a corporation, organized and existing by virtue of the laws of the State of New York, with an office and principal place of business located at 220 West 42d Street, New York City, and with factories located at York, Pa., and Philadelphia, Pa.

PAR. 2. Respondent corporation is now and has been since prior to June 19, 1936, engaged in the business of manufacturing artificial teeth, which it sells to wholesale dealers known as dental supply houses, to dental laboratories, and to dentists located in States other than the State of Pennsylvania, causing said artificial teeth, when sold, to be transported from the place of manufacture within said State of Pennsylvania to the purchasers thereof located in States other than the State of Pennsylvania. There is and has been at all times herein mentioned a continuous current of trade in commerce in said product across State lines between respondent's factories and the purchasers of such product. Said product is sold and distributed for use, consumption, and resale within the various States of the United States and 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 engaged in the business of manufacturing and selling artificial teeth in commerce between and among the various States of the United States and the District of Columbia. Said corporate respondent is the largest manufacturer and distributor of artificial teeth in the United States, its sales constituting over 50 percent of the total United States production, and as such occupies a dominant position in the artificial-teeth industry. The annual net sales of respondent in the United States of artificial teeth total approximately \$3,000,000. Respondent's product is sold to over 200 authorized dealers known as dental supply houses which

are wholesalers and which resell to the ultimate purchasers, dental laboratories, and dentists located in the various States of the United States and in the District of Columbia. Dentists by trade custom seldom make their own false-denture requirements but customarily order such work performed by dental laboratories, which laboratories constitute the dominant factor in the use and consumption of artificial teeth. While respondent's dealers sell other dental supplies than teeth, approximately 15 percent of their sales are artificial teeth purchased from respondent.

Respondent is now and has been since prior to June 19, 1936, selling its said dealers on the following uniform discount plan: Respondent grants its dealers a 40 percent discount, plus 9 percent for payment within 30 days, from the unit retail price of the artificial teeth as shown on respondent's price list; and, in addition, where a dealer sells to a dental laboratory or dentist in \$300 quantities, respondent grants the dealer making such purchase an additional $7\frac{1}{2}$ percent discount. Dealers' resale prices, as suggested by respondent, are now and have been during said period on the basis of 10 percent discount from list prices on \$100 purchases, and 20 percent discount from list prices on purchases amounting to \$300 or more.

PAR. 4. In the course and conduct of its business as aforesaid, since June 19, 1936, respondent has been and now is discriminating in price between different purchasers buying such products of like grade and quality sold by the respondent for use, consumption, and resale, by giving and allowing some of its purchasers of such products lower prices 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 or allowed to other of respondent's purchaser customers. The respondent has effectuated the discriminations in price referred to herein by superimposing upon the regular schedule of discounts allowed by respondent to its dealers and by its dealers to the ultimate purchasers a variety of additional rebates and discounts given in the form of free or bonus artificial teeth and more particularly hereinafter described.

PAR. 5. Respondent employs some twenty district sales representatives who visit dental laboratories and dentists for the purpose of promoting the sale of teeth by said prospective purchasers from respondent's dealers. Such sales representatives take orders for teeth, and solicit the execution of bonus contract agreements hereinafter described. Any orders for teeth obtained by respondent's sales representatives aforesaid are transmitted to respondent's New York office, where they are either filled directly by respondent or referred to

a dealer to fill out of such dealer's current stock, or are filled by shipping the order to such dealer for subsequent delivery to the purchaser. Respondent's book entries, however, invariably show the sale as having been made to the dealer, and respondent looks to such dealer for payment of the order and credits the dealer's account accordingly.

As a special inducement to dental laboratories to purchase from respondent's dealer selling agencies in amounts in excess of \$1,000 per annum, since prior to June 19, 1936, respondent, through its sales representatives aforesaid has been and is now soliciting and obtaining the execution of bonus contract agreements from numerous dental laboratories located in the various States of the United States and in the District of Columbia. If a laboratory agrees to purchase \$1,000, \$2,500, \$5,000, or \$10,000 worth of teeth annually from respondent's dealers or any of them, then respondent in turn agrees to give such purchaser 10 percent or \$100 worth of free bonus teeth computed at unit retail prices on a \$1,000 to \$2,499 annual volume purchase, 15 percent or \$375 worth of free bonus teeth similarly computed on a \$2,500 to \$4,999 annual volume purchase, 20 percent or \$1,000 worth of free bonus teeth similarly computed on a \$5,000 to \$9,999 annual volume purchase, and 25 percent or \$2,500 worth of free bonus teeth similarly computed on a \$10,000 or greater annual volume purchase. Said bonus contracts contain among other provisions the following clauses, to-wit:

(1) The CONSUMER covenants and agrees to purchase from the Company's regular selling agencies named herein teeth of the Company's manufacture, namely: "Trubyte," "Solila," "Twentieth Century," "Dentsply," "Famous" and "Trubridge" teeth (Steele's facings excepted) and/or "Trubase" and "Truwax" and/or White's teeth to the total purchase price and amount of ----- dollars during the term of this agreement.

(5) Upon the faithful carrying out by the CONSUMER of the aforesaid covenants, the COMPANY hereby covenants and agrees to give direct to the CONSUMER a Bonus on all such teeth and on "Trubase" or "Truwax" of its manufacture and on White's teeth purchased and paid for by the consumer during the term of this agreement by supplying free of charge to the CONSUMER porcelain teeth of the Company's manufacture (Steele's facings excepted), as specified by the CONSUMER of the value of ----- Dollars. The value of the teeth so delivered as said Bonus to be computed at the Unit Prices of such teeth published in the price list of the Company, current December 31, 194--, or at the date of the termination of this agreement in case of its earlier termination.

(6) It is mutually covenanted and agreed that as evidence of the purchase of such teeth or wax by the CONSUMER, the CONSUMER shall present to the Company on or before January 20, 194--, receipted bills or other evidence, satisfactory to the Company, showing the quantities purchased, from whom purchased and amounts paid for same by the CONSUMER during the term of this agreement; and the amount of such purchases upon which the Bonus shall be computed shall be the amount actually paid by the CONSUMER for said teeth and wax; and within thirty days after the presentation of such evidence by the

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CONSUMER, the Company agrees to give to the CONSUMER the quantity of teeth so due as said Bonus.

The amount of dollar purchases of teeth which the dental laboratory entering into such a contract agrees to purchase is either \$1,000, \$2,500, \$5,000, or \$10,000 annually, as heretofore described, one of these amounts being inserted in the space provided in clause (1) of such contract above set forth. The dollar amount of bonus or free teeth agreed to be supplied by respondent to such dental laboratory purchaser in consideration of the agreed annual dollar volume purchase is a sum certain computed in the manner described above, said dollar amount of bonus or free teeth being inserted in the space provided in clause (5) of such contract above set forth. If the amount which a dental laboratory agrees to purchase is not reached, but one of the lower brackets is attained, within the period covered by the contract, then such dental laboratory is paid in accordance with the bracket it does reach; whereas if a higher bracket is reached than agreed upon under the bonus contract, then such dental laboratory is paid at the rate provided for such higher bracket. The bonus provided by such bonus contract agreement is cumulative. For example, a dental laboratory purchasing \$9,500 in teeth is given 20 percent of \$9,500, or \$1,900 in free teeth. If, however, it purchases an additional \$500, it will reach the \$10,000 bracket and be paid a bonus at the rate of 25 percent of its entire purchases, or \$2,500. Approximately 1,400 of such bonus contracts have been executed by respondent and respondent's purchaser customers annually since June 19, 1936, and minimum annual volume purchases provided for under such contracts were completed and bonus or free teeth given in the amount provided as to approximately 65 percent of the total number of bonus contracts executed. Respondent through its sales representatives not only personally solicits such dental laboratories for both regular teeth orders and for bonus contract agreements, but also makes effective its special price policies and schedules as applied to them, which price policies and schedules are reduced to writing and formally executed by both respondent and by such dental laboratories in the form of such bonus contracts aforesaid. Such bonus system results in a lower unit price being paid for teeth by respondent's purchaser customers who are able to take advantage of such bonus system by purchasing in the required volume, and enables such purchaser customers in whose favor such discrimination is made either to undersell their competitors or furnish better facilities and services to their dentist customers, or both.

PAR. 6. For the purpose of granting and allowing the bonus or free-teeth discounts under its bonus system described in paragraph 5 hereof, respondent has permitted the main office of some chain

dental laboratory buyers to pool the orders of the unit laboratories thereof, and has granted and allowed to such chain dental laboratory buyers the bonus applicable to the volume of teeth purchases during the bonus contract period represented by the pooled orders. For example, if the pooled order has totaled over \$10,000 in teeth ordered from respondent during the bonus contract period, each unit laboratory through its main office has received a 25 percent free-teeth bonus on all its purchases even though the individual unit laboratory may not have ordered a sufficient quantity to qualify for any or for more than a 10 percent bonus under respondent's bonus system. The respondent, in granting and allowing such pooling privilege in connection with the granting and allowing of bonus teeth under its bonus system aforesaid, did not make shipment of the teeth purchased from all the unit laboratories during the bonus contract period to the main office or warehouse of such dental laboratory chains. In fact, the teeth purchased by such dental laboratory chains were and are now purchased in small amounts from time to time by each unit laboratory from many of respondent's dealers. The chain dental laboratories receiving such pooling privilege, in the calculation of bonuses under respondent's bonus system aforesaid, were and are now in competition with other dental laboratories competing with such dental laboratory chains in the sale of dentures which contain teeth of respondent's manufacture, but such other laboratories, by virtue of not being a unit laboratory of a chain, do not receive any bonus or as large a bonus from respondent.

PAR. 7. Respondent since prior to June 19, 1936, has and now does operate a dental depot in New York City, where it keeps a complete stock of artificial teeth manufactured in its factories in the State of Pennsylvania and shipped to said dental depot located in New York City, State of New York. In connection with the operation of such dental depot, it sells directly to dental laboratories in competition with its dealers located in New York City. In connection with such direct sales made to its purchaser customers, it solicits and procures the execution of bonus contract agreements identical in form to said bonus contract agreements described in paragraph 5 hereof. Such bonus system employed in connection with sales made from respondent's New York City depot to purchaser customers located in the New York City area results in a lower unit price being paid for teeth by respondent's purchaser customers who are able to take advantage of such bonus system by purchasing in the required volume, and enables such purchaser customers in whose favor such discrimination is made either to undersell their competitors or to furnish better facilities and services to their dentist customers, or both.

Findings

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PAR. 8. The prices at which respondent sells its teeth products to its dealers are uniform and are as set forth in paragraph 3 hereof, with the following exception: In fulfilling its agreement to furnish a specified amount of bonus or free teeth to its bonus contract holders, respondent since June 19, 1936, has issued and now does issue to such purchaser customers holding and completing bonus contracts, certificates entitling the holder thereof to bonus or free teeth in the dollar amount specified therein upon presentation of such certificates to respondent or to any of respondent's dealers. Prior to January 1, 1939, respondent allowed its dealers a secondary bonus or discount of 8 percent of the dollar value of bonus certificates and in proportion to the dollar amounts of respondent's teeth purchased by the bonus certificate holders from such dealers. To illustrate: Abel Dental Laboratory of Houston, Tex., having a \$1,000 bonus contract, purchased during the period specified therein \$56.48 worth of teeth from A. P. Cary Co. and \$979.17 worth of teeth from Pendleton & Arto, two of respondent's dealers located in Houston, Tex.; respondent issued to said dental laboratory purchaser two bonus certificates, one in the amount of \$97.91 and the other in the amount of \$5.65. Both of such certificates were redeemed by said Pendleton & Arto and its account was credited for the amount of the teeth given in such redemption at dealer's list prices. However, Pendleton & Arto, which handled the redemption of both certificates, was allowed by respondent 8 percent of \$97.91, as \$979.17 of the merchandise had been purchased from such dealer; and A. P. Cary Co. was allowed by respondent 8 percent of \$5.65, as \$56.48 of the merchandise had been purchased from such dealer. Since the dealer redeeming the bonus certificates is credited with the full amount of teeth given in redemption of such certificates at dealers' prices, no profit is made by the dealer on the transaction, as is the case in ordinary dealers' sales. It is only in the event that the dealer has originally sold some of the merchandise to the bonus certificate holder upon which the bonus certificate is issued that the dealer redeeming the certificate obtains any part of the above described secondary bonus or discount. From January 1, 1939, and thereafter, respondent increased such secondary bonus or discount paid to its dealers upon bonus certificates in the manner aforesaid from 8 percent to 12½ percent. The dealer's account is credited by respondent in the amount of such secondary bonus or discount allowed, thereby reducing the cost to the dealer of the teeth purchased by such dealer at regular dealers' prices. The practice aforesaid of respondent's secondary bonus system to dealers results in a lower unit price being paid for teeth by some of respondent's dealers than is paid by other of respondent's dealers. Moreover, said secondary bonus or discount paid by respondent to its dealers and

predicated upon the bonus certificates issued to dental laboratories under respondent's bonus system described in paragraph 5 hereof, implements and makes effective such bonus system to dental laboratories.

PAR. 9. The effect of the discrimination in price set forth in paragraphs 5 to 8, inclusive, hereof, has been and may be substantially to lessen competition with the respondent in the line of commerce in which it is engaged; to injure, destroy, or prevent competition with the respondent; and to injure, destroy, or prevent competition with the customers of respondent who receive the benefits of such discrimination.

CONCLUSION

Respondent having offered no evidence and having made no contention that the discriminations in price stipulated by it, and herein set forth, made only 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 to various purchasers, or that such discriminations were in good faith to meet an equally low price of a competitor, the Commission concludes that the discriminations were not within any of the corresponding provisos and exceptions of subsections (a) and (b) of section 2 of the Clayton Act, as amended. The Commission also concludes that the methods of pricing which respondent uses and causes its dealers to use, as set forth above, constitute and result in discriminations in price in the course of interstate commerce and are in violation of 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 a stipulation of facts entered into between W. T. Kelley, chief counsel for the Commission, and Leroy Frantz, vice president and treasurer of the respondent, in which stipulation respondent waived hearings, the filing of briefs, oral argument, and all intervening procedure; and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936.

It is ordered, That the respondent, Dentists' Supply Co. of New York, a corporation, and its officers, directors, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of its products in commerce, as "commerce" is defined in the Clayton Act, as

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amended, do forthwith cease and desist from the discriminations in price under the circumstances stipulated by it and found by the Commission, and from any discriminations similar thereto, and more particularly from such discriminations by use of the following methods:

1. Discriminating in price by giving and allowing to certain purchasers adjustments, rebates, or discounts in the form of cash or commodities while withholding same from other purchasers competitively engaged with said favored purchasers.

2. Discriminating in price by giving and allowing adjustments, rebates, or discounts in the form of cash or commodities depending upon the cumulative total of purchases made during a year or other given period of time as distinguished from the amount purchased in one transaction.

3. Discriminating in price by giving and allowing adjustments, rebates, or discounts in the form of cash or commodities to chain dental laboratories depending upon the total of separate purchases by the various units of such chains although separate deliveries are made to the respective units.

4. Requiring, providing, or arranging that respondent's dealers shall give and allow such discriminatory adjustments, rebates, or discounts as are forbidden under the preceding parts of this order.

It is further ordered, That the 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.

It is further ordered, That count II of the complaint herein be, and it hereby is, dismissed.

Order

IN THE MATTER OF

DE FOREST'S TRAINING, INC.

MODIFIED CEASE AND DESIST ORDER

Docket 4441. Order, August 30, 1943

Modified order, pursuant to provisions of Section 5 (i) of the Federal Trade Commission Act and in accordance with decree below referred to, in proceeding in question, in which original order issued on March 23, 1942, 34 F. T. C. 902, and in which Circuit Court of Appeals for the Seventh Circuit, on April 22, 1943, in *De Forest's Training, Inc. v. Federal Trade Commission*, 134 F. (2d) 819, rendered its opinion, and on May 14, 1943, entered its decree, modifying aforesaid order in certain particulars and affirming the same in other particulars—

Requiring respondent, its officers, etc., in connection with offer, etc., in commerce, of any course of study in television, to cease and desist from representing that there are possibilities or opportunities for employment of students of its course in said field until substantial numbers thereof have been and can be employed directly therein; and that there are now or in the near future will be possibilities or opportunities for such employment in said field until the commercial development of television is sufficiently advanced to assure immediate availability of such possibilities or opportunities; or misrepresenting in any manner the possibilities or opportunities for employment of students or graduates of its course in the television field.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding coming on for further hearing before the Federal Trade Commission, and it appearing that on March 23, 1942, the Commission made its findings as to the facts herein and concluded therefrom that the respondent had violated the provisions of section 5 of the Federal Trade Commission Act, and on March 23, 1942, issued and subsequently served upon respondent its order to cease and desist, and it further appearing that on April 22, 1943, the United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion and on May 14, 1943, entered its decree modifying the aforesaid order of the Commission in certain particulars and affirming said order in other particulars.

Now, therefore, Pursuant to the provisions of subsection (i) of section 5 of the Federal Trade Commission Act, the Commission issues this, its modified order to cease and desist, in conformity with said decree.

It is ordered, That respondent, De Forest's Training, Inc., a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering