

Complaint

IN THE MATTER OF
AMERICAN ART CLAY COMPANY

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

Docket 5049. Complaint, Sept. 17, 1948—Decision, May 12, 1944

Where a corporation engaged in the manufacture and competitive interstate sale and distribution of crayons, chalk, paint sets, art materials, educational supplies and allied products to customers—

- (a) Discriminated in price between different purchasers by selling to some customers at higher prices than those at which it sold products of like grade and quality to others competitively engaged therewith, through granting, in addition to the general 50 per cent trade discount from list price, a 10 per cent discount to customers designated by it as "wholesalers" and "jobbers":

Effect of which discrimination in price had been and might be substantially to lessen competition in the line of commerce concerned; and to injure, destroy and prevent competition with it in the sale and distribution of said products, and to injure, destroy and prevent competition in the resale thereof between said favored customers and those to whom such discount was denied:

Held, That under said facts and circumstances, it 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; and

Where said corporation, engaged as aforesaid—

- (b) Granted and allowed to certain customers designated by it as "promotional distributors" an additional 10 per cent discount in consideration of merchandising and selling services furnished by them in connection with the sale of its products, without making said secret discount or allowance available on proportionally equal terms to other customers who competed therewith and were able and willing to furnish same services and facilities:

Held, That such granting to favored customers of promotional allowances without making same available to competing customers on proportionally equal terms was in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John T. Haslett for the Commission.

Wise, Corlett & Canfield, 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, has, since June 19, 1936, violated and is now violating the provisions of subsections (a) and (d) of section 2 of the Clayton Act (U.S.C., title 15, section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

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

PARAGRAPH 1. Respondent, American Art Clay Company, is a corporation, organized and existing under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 4717 West 16th Street, Indianapolis, Ind.

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, art materials, 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 place of business to purchasers thereof who are located in the various States of the United States other than the State in which respondent's place of business is 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 times 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, art materials, educational supplies, and allied products in commerce.

Many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the several trade areas in which respondent's said customers respectively offer for sale and sell the said products purchased from the respondent.

PAR. 4. In the course and conduct of its said business since June 19, 1936, respondent has been and is now discriminating in price between different purchasers buying said products by selling them to some of its customers at higher prices than it sells products of like grade and quality to other customers who are competitively engaged in the resale of said products within the United States with customers receiving the lower prices.

PAR. 5. The respondent has discriminated in price by the use of so-called trade discounts whereby it has sold to some customers at higher prices than it has sold goods of like grade and quality to other customers who are in competition with them in the resale of said products within the United States. Respondent offers and sells its said products from one list price from which all customers who purchase for use or for resale are allowed by the respondent a 50% trade discount. To some purchasers among this class of customers, whom respondent designates as "wholesalers" and "jobbers," the respondent grants and allows an additional discount of 10% over and above the regular trade discount of 50% given to all of respondent's customers who purchase for use or for resale.

The "wholesaler" and "jobber" customers of the respondent who are granted and allowed the 10% discount over and above the regular trade

discount of 50% off the list price as aforesaid, are in active competition with other customers of respondent who purchase respondent's products and who do not receive any discounts over and above such regular trade discount.

PAR. 6. The effect of the discriminations in price generally alleged in paragraph 4 hereof and of those specifically set forth in paragraph 5 hereof has been and may be substantially to lessen competition in the line of commerce in which respondent and its said customers are engaged and to injure, destroy and prevent competition with the respondent in the sale and distribution of crayons, chalk, paint sets, art materials, educational supplies and allied products, and has been and may be substantially to injure, destroy and prevent competition in the resale of such products between the favored customers of respondent who are granted and allowed the 10% discount as aforesaid over and above the regular trade discount of 50% off the list price and the customers from whom such extra discount is withheld.

PAR. 7. The foregoing acts and practices of respondent are violations of subsection 2(a) of section 1 of said act of Congress, approved June 19, 1936, 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, section 13) and for other purposes."

COUNT 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 of this complaint 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 now granting compensation in the form of a percentage discount or allowance to some of its customers who are selected by the respondent and who are designated as "promotional distributors." Such percentage discount or allowance has been and is granted to favored customers in consideration of merchandising and selling services furnished by them in connection with the sale of respondent's products. The percentage discount is deducted from the invoice price and is over and above the regular trade discount of 50% off the list price. The respondent grants and allows such percentage discount to its favored customers without making such discount or allowance available on proportionally equal terms to other of its customers that compete with such favored customers in the resale 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 favored customers designated by the respondent as "promotional distributors." The respondent has not made known to any but its favored customers that it grants and allows any discounts or allowances for promotional services.

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, section 13), and for other purposes" approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission on September 17, 1943, issued and subsequently served its complaint in this proceeding upon the party respondent named in the caption hereof, charging it with violating the provisions of subsection (a) and subsection (d) of section 2 of said act, as amended.

After the issuance of said complaint, a stipulation was entered into between W. T. Kelley, Chief Counsel for the Commission, and the respondent, subject to the approval of the Commission, providing that the statement of facts contained therein might be taken as the facts in this proceeding and authorizing the Commission to proceed upon such statement and to make its report stating its findings as to the facts and its conclusion 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, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusions drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, American Art Clay Company, is a corporation, organized and existing under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 4717 West 16th Street, Indianapolis, Ind.

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, art materials, 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 place of business to purchasers thereof who are located in the various States of the United States other than the State in which respondent's place of business is 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, art materials, educational supplies and allied

products in commerce. Many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the several trade areas in which respondent's said customers respectively offer for sale and sell the said products purchased from the respondent.

PAR. 4. In the course and conduct of its said business since June 19, 1936, respondent has been and is now discriminating in price between different purchasers buying said products by selling them to some of its customers at higher prices than it sells products of like grade and quality to other customers who are competitively engaged in the resale of said products within the United States with customers receiving the lower prices.

PAR. 5. The respondent has discriminated in price by the use of so-called trade discounts, whereby it has sold to some customers at higher prices than it has sold goods of like grade and quality to other customers who are in competition with them in the resale of said products within the United States. Respondent offers and sells its said products from one list price, from which all customers who purchase for use or for resale are allowed by the respondent a 50% trade discount. To some purchasers among this class of customers, whom respondent designates as "wholesalers" and "jobbers," the respondent grants and allows an additional discount of 10% over and above the regular trade discount of 50% given to all of respondent's customers who purchase for use or for resale.

The "wholesaler" and "jobber" customers of the respondent who are granted and allowed the 10% discount over and above the regular trade discount of 50% off the list price, as aforesaid, are in active competition with other customers of respondent who purchase respondent's products and who do not receive any discounts over and above such regular trade discount.

PAR. 6. The effect of the discriminations in price generally stated in paragraph 4 hereof and of those specifically set forth in paragraph 5 hereof has been and may be substantially to lessen competition in the line of commerce in which respondent and its said customers are engaged and to injure, destroy and prevent competition with the respondent in the sale and distribution of crayons, chalk, paint sets, art materials, educational supplies and allied products, and has been and may be substantially to injure, destroy and prevent competition in the resale of such products between the favored customers of respondent who are granted and allowed the 10% discount as aforesaid over and above the regular trade discount of 50% off the list price and the customers from whom such extra discount is withheld.

PAR. 7. In the course and conduct of its business, as aforesaid, respondent since June 19, 1936, has been and is now granting compensation in the form of a 10% discount or allowance to some of its customers who are selected by the respondent and who are designated as "promotional distributors." Such 10% discount or allowance has been and is granted to favored customers in consideration of merchandising and selling services furnished by them in connection with the sale of respondent's products. The percentage discount is deducted from the invoice price and is over and above the regular trade discount of 50% off the list price. The respondent grants and allows such percentage discount to its favored customers without making such discount or allowance available on proportionally equal terms to other of its customers

Order

38 F. T. C.

that compete with such favored customers in the resale 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 favored customers designated by the respondent as "promotional distributors." The respondent has not made known to any but its favored customers that it grants and allows any discounts or allowances for promotional services.

CONCLUSIONS

Under the facts and circumstances set forth in the foregoing findings as to the facts, the Commission concludes that the respondent, American Art Clay Company, has discriminated in price in the sale of crayons, chalk, paint sets, art materials, educational supplies and allied 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, American Art Clay Company, has granted to favored customers promotional allowances without making such allowances available to 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 and the stipulation as to the facts entered into between the 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 its conclusions that the 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 the respondent, American Art Clay Company, 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 crayons, chalk, paint sets, art materials, educational supplies and allied products in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist:

1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and granting discounts therefrom in the manner and under the circumstances found in paragraph 5 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 5 of the Commission's findings as to the facts herein.

3. From otherwise discriminating in price between purchasers of crayons, chalk, paint sets, art materials, educational supplies and allied

products of like grade and quality in a manner and degree substantially similar to the manner and degree of the discrimination referred to in paragraph 5 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% of the respondent's net billing price of the products sold by such customer, or any other compensation, 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 customers.

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.

Complaint

38 F. T. C.

IN THE MATTER OF

ZONITE PRODUCTS CORPORATION AND H. W. KASTOR & SONS ADVERTISING COMPANY, INC.

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

Docket 4755. Complaint, May 1, 1942—Decision, May 17, 1944

Where a corporation, engaged in the manufacture and interstate sale and distribution of its "Zonite Liquid" and "Zonitors," and its advertising representative; in advertisements of said products—

- (a) Represented, directly and by implication, that they were effective in destroying germs and bacteria in the genital tract and constituted an adequate treatment for infections in the genito-urinary tract; and that when used as a means of feminine hygiene they constituted effective contraceptives, and were reliable and dependable for such use;

The facts being that while they had the power to kill germs and bacteria which they contacted, when used as recommended they would not effectively destroy all germs and bacteria or serve as an adequate treatment for infections for the reason that in use they could not be depended upon to, and did not, always contact all germs, bacteria, and infections as they exist in the genital or genito-urinary tract, and they were not dependable contraceptives in that they could not and did not always contact all spermatozoa therein; and

- (b) Failed to disclose that because of physical conformation, malformation, and for other reasons, it is impossible in many cases for said products, in use, to contact all germs, bacteria, and spermatozoa in the genito-urinary tract, and that in such cases effective results are not possible; and

Where said corporation, in advertisements of its said liquid,—

- (c) Represented that when used as a mouth wash, it would destroy tobacco breath, kill onion breath and eliminate all offending mouth odors; the facts being that it would not destroy tobacco breath or other odors where it could not reach their source and would not kill onion breath when it resulted from chemical substances in the blood stream;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such misrepresentations were true, and to induce it, because of such erroneous belief, to purchase said products:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Mr. R. P. Bellinger for the Commission.

Littlefield & Marshall and *Mr. Horace C. Hitchcock*, of New York City, for Zonite Products Corp.

Mr. Harris F. Williams and *Mr. B. B. Harris*, of Chicago, Ill., for H. W. Kastor & Sons Advertising Co., Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Zonite Products Corporation, a corporation, and H. W. Kastor & Sons Advertising Company, Inc., a