

Complaint

IN THE MATTER OF

SUNSHINE BISCUITS, INC., STATLER MANUFACTURERS
CORP., STATLER DISTRIBUTORS, INC., AND LAW-
RENCE S. REISS

PARTIAL CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2 (A) OF THE CLAYTON ACT AS AMENDED, AND OF THE FEDERAL
TRADE COMMISSION ACT¹

Docket 6191. Complaint, Mar. 11, 1954—Decision, July 20, 1954

Partial consent settlement order requiring Sunshine Biscuits, Inc., the second largest producer of bakery packaged food products in the United States, with gross sales for 1952 of about \$120,000,000, to cease selling or contracting to sell its products on the condition that purchasers not use or deal in the merchandise of any of its competitors, and entering into or carrying out agreements with any seller of automatic vending machines that the latter's vendees, operators, etc., would dispense through said machines exclusively Sunshine bakery products; and requiring Statler Manufacturers Corp., a seller of some 7,000 automatic vending machines located throughout the country, with gross annual sales of about \$500,000, to cease selling, or making or enforcing any contract for the sale of, vending machines on the condition that purchasers dispense through the machines exclusively Sunshine bakery products, among other things.

Before *Mr. John Lewis*, hearing examiner.

Mr. William H. Smith and *Mr. Brockman Horne* for the Commission.

Mr. A. W. DeBirny, of Long Island City, N. Y., and *Mr. Robert E. Freer*, of Washington, D. C., for Sunshine Biscuits, Inc.

Mr. Avel B. Silverman, of New York City, for Statler Manufacturers Corp., Statler Distributors, Inc. and Lawrence S. Reiss.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunshine Biscuits, Inc., hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (a) 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, and pursuant also to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Commission, having reason to believe that said Sunshine Biscuits,

¹ Count I of the complaint, charging price discrimination in violation of Sec. 2 (a) of the Clayton Act as amended by Sunshine in the sale of its products, was settled a year later by a consent order to cease and desist, effective July 30, 1955, 52 F. T. C. —.

Complaint

51 F. T. C.

Inc., Statler Manufacturers Corp., a corporation, Statler Distributors, Inc., a corporation, and hereinafter more particularly designated and described, and Lawrence S. Reiss, individually and as an officer of Statler Manufacturers Corp. and Statler Distributors, Inc., have violated the provisions of Section 5 of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent Sunshine Biscuits, Inc. (formerly Loose-Wiles Biscuit Company), hereinafter referred to as Sunshine, is a New York corporation with its office and principal place of business located at 29-10 Thomson Avenue, Long Island City, New York.

PAR. 2. Respondent Sunshine is now and for many years last past has been engaged in the manufacture, sale and distribution of bakery packaged food products, commonly referred to as cookies, crackers, biscuits and cakes. In certain avenues of distribution these products are sold under the trade name "Nicks." Said respondent is the second largest producer and distributor of bakery packaged food products in the United States. Its gross sales of said products for the year 1952 was in excess of \$130,000,000.

Respondent Sunshine operates bakeries and maintains 115 warehouses for the temporary storage and to facilitate the delivery of said products; and also maintains numerous branch sales offices in various localities throughout the United States. Salesmen are employed to solicit orders and sell said products and subsequently said products are delivered by trucks owned by said respondent Sunshine to some 240,000 customers located in every city, town and village of the United States. The customers of respondent include chain retail stores (whether corporate or independently owned), voluntary and cooperative chain retail stores, independent store owners and customers who sell said products through automatic vending machines.

Respondent Sunshine causes said products, when sold, to be transported from its various bakeries and warehouses to purchasers located in the District of Columbia and in States other than the States where respondent's products are manufactured or sold. There is, and has been at all times mentioned herein, a continuous current of trade in commerce in said products across state lines from respondent Sunshine's bakeries and warehouses to the purchasers thereof. Said products are sold and distributed for use, consumption and resale in 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 Sunshine is now, and during the times herein mentioned has been, in substantial competition with others engaged in the manufacture, sale and distribution of bakery packaged food products in commerce between and among the various States of the United States and in the District of Columbia.

Many of respondent Sunshine's customers are competitively engaged with each other and with customers of respondent Sunshine's competitors in the resale of bakery packaged food products within the trading areas in which said customers are engaged in business.

PAR. 4. Respondent Sunshine, in the course and conduct of its business, as aforesaid, has been and is now discriminating in price between different purchasers of their products of like grade and quality by selling said products to some of its customers at higher prices than to others of its customers.

PAR. 5. The discriminations in price referred to in Paragraph Four hereof have been and now are effected pursuant to the method by which respondent bases the price on which it sells such products to its purchasers. The basic method involves a volume discount plan whereby respondent sells its products at prices based upon the monthly purchases of said products of a particular customer. This volume discount plan is as follows:

<i>Monthly Purchases</i>	<i>Discount (Percent)</i>
\$0 to \$20.00.....	None
\$20.00 to \$149.00.....	2
\$150.00 to \$999.00.....	2½
\$1,000.00 to \$2,499.99.....	3
\$2,500.00 to \$4,999.99.....	3½
\$5,000.00 to \$7,499.99.....	4
\$7,500.00 and up.....	4½

PAR. 6. The effects of such discriminations in price as set forth in Paragraph 4 and Paragraph 5 hereof may tend to create a monopoly in the lines of commerce in which respondent Sunshine and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent Sunshine, or with customers thereof who receive the benefits of such discrimination.

PAR. 7. The foregoing alleged acts and practices of said respondent Sunshine, as set forth herein, constitute violation of subsection (a) 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.

Complaint

51 F. T. C.

COUNT II

PARAGRAPH 1. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph 1 of Count I of this complaint to the same extent as though the allegations of said Paragraph 1 of said Count I were set out in full herein, and said Paragraph One of said Count I is incorporated herein by reference and made a part of the allegations of this count.

PAR. 2. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph 2 of Count I of this complaint to the same extent and as though the allegations of said Paragraph 2 of said Count I were set out in full herein, and said Paragraph 2 of said Count I is incorporated herein by reference and made a part of the allegations of this count.

PAR. 3. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph 3 of Count I of this complaint to the same extent and as though the allegations of said Paragraph 3 of said Count I were set out in full herein, and said Paragraph 3 of said Count I is incorporated herein by reference and made a part of the allegations of this count.

PAR. 4. Respondents Statler Manufacturers Corp., and Statler Distributors, Inc., are New York corporations with their office and principal place of business located at 2112 Broadway, New York, New York.

Respondent Lawrence S. Reiss is vice-president of both respondents Statler Manufacturers Corp. and Statler Distributors, Inc. Respondent Lawrence S. Reiss formulates, directs and controls the business, acts, practices and policies of said respective corporate respondents.

All three respondents named in this paragraph will hereinafter be referred to, unless specifically mentioned, as respondents "Statler."

PAR. 5. Respondents Statler are now and for many years last past have been engaged in the sale and distribution of automatic vending machines under franchise agreements. These machines are used in dispensing biscuits, crackers, and cookies to the consumer. The respondents Statlers' vending machines are located in industrial plants, hospitals, subways and other strategic locations. There are presently approximately 7,000 of these vending machines located throughout the country. Gross sales of respondent Sunshine's products sold through these machines approximate \$500,000 annually.

In the course and conduct of their business, as aforesaid, respondents Statler are now, and during the time herein mentioned have been, in substantial competition with others engaged in the manufacture, sale

and distribution of automatic vending machines used in dispensing biscuits, crackers and cookies.

PAR. 6. In the course and conduct of their businesses, respondents Statler cause the said vending machines, when sold, to be transported from their place of business in New York to the purchasers located in other States than the State of New York and in the District of Columbia. Respondents Statler maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 7. In the course and conduct of their businesses, as aforesaid, on or about July 27, 1940, respondent Sunshine and respondents Statler entered into an agreement wherein respondents Statler, for themselves, their vendees, operators, brokers and licensees, agreed to dispense through the vending machines, either operated by or sold by them, solely and exclusively, products manufactured and distributed by the said respondent Sunshine.

The aforementioned agreement by the said respondent Sunshine and respondents Statler, since the date of its original execution, which was for a period of five years, has been renewed from time to time, more particularly on November 17, 1944, and again on April 20, 1950. Respondent Sunshine agreed with respondents Statler not to enter into any similar agreement with any other person, firm or corporation for the advertisement, promotion or sale of its products through the means of vending machines.

For the purpose of carrying out the agreement between respondent Sunshine and respondents Statler, respondents Statler operate as follows:

Respondent Statler Manufacturers Corp. enters into a sales agreement with the buyer for the sale of a vending machine to be used by the buyer solely and exclusively in the sale of the products manufactured by respondent Sunshine "as provided in an agreement between Statler Distributors, Inc., with said buyer"; and as part of the same transaction, Statler Distributors, Inc. enters into a licensing agreement with the buyer of the vending machine which was purchased under the aforementioned sales agreement, under which agreement the buyer agrees to dispense through said vending machine, solely and exclusively, products manufactured and distributed by the respondent Sunshine. The buyer is also granted and limited to the sale of said products in a definite territory. The agreement extends not only to the vending machines purchased at the time the agreement is executed, but to all future machines purchased by the vendee. The terms of the agreement are allegedly for a period of five years; how-

ever, respondents Statler seek compliance therewith beyond said period.

PAR. 8. In the course and conduct of the business of the respective respondents hereinbefore described, and in pursuance of the practices and acts alleged in Paragraph 7 hereof, all of the respondents have cooperated in carrying out the agreement restricting the use of the vending machines sold by respondents Statler, solely and exclusively, to the sale of respondent Sunshine's products.

Respondent Sunshine pays a commission to respondents Statler on products sold by it to respondents Statlers' vendees. Respondent Sunshine keeps respondents Statler advised when sales of its products to respondents Statlers' vendees decline, thus indicating that said respondents Statlers' vendees are dispensing, through the vending machine, products other than those manufactured and distributed by respondent Sunshine.

Respondents Statler, upon learning, either from its own policing, or from information furnished by respondent Sunshine, that its vendees are dispensing through their vending machines products other than those manufactured by respondent Sunshine, they, among other things, coerce or intimidate said vendees to carry out the terms of their agreement by threatening to cancel said agreement unless the vendee confines his sale through the said vending machine solely and exclusively to products manufactured and distributed by respondent Sunshine.

As a result of threats and intimidations made by respondents Statler, many of respondents Statlers' vendees have been induced to stop selling, through said vending machines, products of respondent Sunshine's competitors.

PAR. 9. The acts and practices of the respondents, as herein alleged, are all to the injury and prejudice of competitors of respondents, of customers and purchasers of respondents and of the public; have a tendency and effect of obstructing, hindering and preventing competition in the sale of vending machines and bakery packaged food products in commerce within the intent and meaning of the Federal Trade Commission Act; have a tendency to, and have, obstructed and restrained such commerce in such merchandise, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and

Order to File Report of Compliance", dated July 20, 1954, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BASED ON STIPULATION FOR CONSENT ORDER AS TO
COUNT II OF COMPLAINT BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on March 11, 1954, issued and subsequently served its complaint in this proceeding upon the corporations and the individual named in the caption hereof, hereinafter called respondents, charging the respondent Sunshine Biscuits, Inc., in Count I of said complaint, with having violated the provisions of subsection (a) 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, and charging all of said respondents, in Count II of the complaint, with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. Following the issuance of said complaint, the respondents appeared by counsel and entered into a stipulation consenting to the entry of a cease-and-desist order in disposition of Count II of said complaint. Said stipulation provides that respondents admit all the jurisdictional allegations of the complaint and, with respect to Count II of the complaint, provides that respondents waive the filing of answer, a hearing before a hearing examiner of the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission, and further, that the aforesaid consent cease-and-desist order shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, and that respondents specifically waive any and all right, power, or privilege to challenge or contest the validity of the order entered in accordance with said stipulation.

The said stipulation having been filed with the above-named hearing examiner, theretofore duly designated by the Commission, for consideration by said examiner in accordance with Rule V of the Commission's Rules of Practice, is hereby accepted and made a part of the record herein by the hearing examiner who, after considering the complaint and said stipulation, finds that this proceeding is in the

interest of the public and, in disposition of Count II of the complaint, makes the following:

JURISDICTIONAL FINDINGS

PARAGRAPH 1. Respondent Sunshine Biscuits, Inc. (formerly Loose-Wiles Biscuit Company), hereinafter referred to as Sunshine, is a New York corporation with its office and principal place of business located at 29-10 Thomson Avenue, Long Island City, New York.

PAR. 2. Respondent Sunshine is now and for many years last past has been engaged in the manufacture, sale and distribution of bakery packaged food products, commonly referred to as cookies, crackers, biscuits and cakes. In certain avenues of distribution these products are sold under the trade name "Nick." Said respondent is the second largest producer and distributor of bakery packaged food products in the United States. Its gross sales of said products for the year 1952 was approximately \$120,000,000.

Respondent Sunshine operates bakeries and maintains approximately 110 warehouses for the temporary storage and to facilitate the delivery of said products; and also maintains numerous branch sales offices in various localities throughout the United States. Salesmen are employed to solicit orders and sell said products and subsequently said products are delivered by trucks owned by said respondent Sunshine to some 240,000 customers located in numerous cities, towns and villages of the United States. The customers of respondent include chain retail stores (whether corporate or independently owned), voluntary and cooperative chain retail stores, independent store owners and customers who sell said products through automatic vending machines.

Respondent Sunshine causes said products, when sold, to be transported from its various bakeries and warehouses to purchasers located in the District of Columbia and in states other than the states where respondent's products are manufactured or sold. There is, and has been at all times mentioned herein, a continuous current of trade in commerce in said products across state lines from respondent Sunshine's bakeries and warehouses to the purchasers thereof. Said products are sold and distributed for use, consumption and resale in 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 Sunshine is now, and during the times herein mentioned has been, in substantial competition with others engaged in the manufacture, sale and distribution of bakery packaged food products in commerce between and among the various states of the United States and in the District of Columbia.

Many of respondent Sunshine's customers are competitively engaged with each other and with customers of respondent Sunshine's competitors in the resale of bakery packaged food products within the trading areas in which said customers are engaged in business.

PAR. 4. Respondents Statler Manufacturers Corp., and Statler Distributors, Inc., are New York corporations with their office and principal place of business located at 2112 Broadway, New York, New York.

Respondent Lawrence S. Reiss is vice-president of both respondents Statler Manufacturers Corp. and Statler Distributors, Inc. Respondent Lawrence S. Reiss formulates, directs and controls the business, acts, practices and policies of said respective corporate respondents.

All three respondents named in this paragraph will hereinafter be referred to, unless specifically mentioned, as respondents "Statler."

PAR. 5. Respondents Statler are now and for many years last past have been engaged in the sale and distribution of automatic vending machines under franchise agreements. These machines are used in dispensing biscuits, crackers, and cookies to the consumer. The respondents Statler's vending machines are located in industrial plants, hospitals, subways and other strategic locations. There are presently approximately 7,000 of these vending machines located throughout the country. Gross sales of respondent Sunshine's products sold through these machines approximate \$500,000 annually.

In the course and conduct of their business, as aforesaid, respondents Statler are now, and during the time herein mentioned have been, in substantial competition with others engaged in the manufacture, sale and distribution of automatic vending machines used in dispensing biscuits, crackers and cookies.

PAR. 6. In the course and conduct of their businesses, respondents Statler cause the said vending machines, when sold, to be transported from their place of business in New York to the purchasers located in other states than the State of New York and in the District of Columbia. Respondents Statler maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various states of the United States and in the District of Columbia.

ORDER

It is ordered that respondent Sunshine Biscuit, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering

for sale, sale and distribution of bakery packaged food products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or making any contract for sale of any such products on the condition, agreement or understanding that the purchasers thereof shall not use, or deal in, or sell the goods, wares or merchandise of a competitor or competitors of respondent Sunshine Biscuits, Inc.

2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with any existing sales contract, which condition, agreement or understanding is to the effect that the purchaser of said products will not use or deal in the goods, wares or merchandise of a competitor or competitors of the respondent Sunshine Biscuits, Inc.

3. Entering into any agreement or understanding with a seller of automatic vending machines, that its vendees, operators, brokers or licensees would dispense through said vending machines, solely and exclusively, products manufactured and sold by said respondent Sunshine Biscuits, Inc.

4. Cooperating with respondents Statler Manufacturers Corp., Statler Distributors, Inc., and Lawrence S. Reiss, or any of them, to carry out any conditions, agreements or understandings made by them, jointly or severally, with their vendees, operators, brokers and licensees to dispense through the vending machines, sold by them, solely and exclusively, products manufactured and sold by respondent Sunshine Biscuits, Inc.

It is further ordered that respondents Statler Manufacturers Corp., a corporation, Statler Distributors, Inc., a corporation, their respective officers, agents, representatives and employees, and respondent Lawrence S. Reiss, individually and as an officer of said corporations, directly or through any corporate or other device, jointly or severally, in connection with the offering for sale, sale and distribution of automatic vending machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or making any contract for sale of such vending machines on the condition, agreement or understanding that the purchasers, operators, brokers or licensees thereof, dispense, through said vending machines, solely and exclusively products manufactured and sold by respondent Sunshine Biscuits, Inc.

2. Enforcing or continuing in operation or effect any condition, agreement or understanding, in or in connection with any existing

25

Order

sales contract or franchise agreement, which condition, agreement or understanding is to the effect that the purchasers, operators, brokers, or licensees of said vending machines will dispense through said vending machines, solely and exclusively, products manufactured and sold by respondent Sunshine Biscuits, Inc.

3. Cancelling, or directly or by implication threatening the cancellation of any contract or franchise or selling agreement with the vendees, operators, brokers or licensees of said products because of the failure or refusal of said vendees, operators, brokers or licensees to dispense, through said vending machines, solely and exclusively products manufactured and sold by respondent Sunshine Biscuits, Inc.

4. The performance of any act of intimidation or coercion, either through statements, oral or written, or during the course of calls made upon the vendees, operators, brokers or licensees of said vending machines, at their place of business or at any other place, or the use of any other plan, practice, system or method of doing business for the purpose or having the effect of intimidating or coercing respondents' vendees, operators, brokers or licensees, or other purchasers to dispense, through vending machines sold by them, solely and exclusively, products manufactured and sold by respondent Sunshine Biscuits, Inc.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that respondents Sunshine Biscuits, Inc., a corporation, Statler Manufacturers Corp., a corporation, Statler Distributors, Inc., a corporation, and Lawrence S. Reiss, individually and as an officer of Statler Manufacturers Corp. and Statler Distributors, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of July 20, 1954].

IN THE MATTER OF
HILLMAN PERIODICALS, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6033. Complaint, Aug. 22, 1952—Decision, July 22, 1954

Where a corporate publisher of magazines and books, including its "Confessions" magazine, the contents of which consisted almost exclusively of stories and features which had been previously published in other of its magazines—
Failed adequately to disclose that the contents of its said magazine consisted of reprinted stories and articles, through a statement in small type (later enlarged, following conferences with Commission representatives) below the table of contents on the masthead "All stories reprinted by request from Real Story and Real Romances Magazines", and the added statement, at or near the beginning of each story and frequently in connection with the use of a picture illustration, as "Copyrighted 1943 by Real Story, Inc.":
Held, That such acts and practices were to the prejudice and injury of the public and constituted unfair and deceptive acts and practices.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. J. W. Brookfield, Jr. for the Commission.

Mr. Henry E. Schultz, of New York City, for respondent.

ORDERS AND DECISION OF THE COMMISSION

Order denying respondent's appeal from initial decision of hearing examiner and decision of the Commission and order to file report of compliance, Docket 6033, July 22, 1954, follows:

This matter having come on to be heard by the Commission upon respondent's appeal from the initial decision of the hearing examiner and briefs of counsel in support of and in opposition thereto, oral argument not having been requested; and

The Commission having duly considered said appeal and the record herein and being of the opinion, for the reasons appearing in the accompanying opinion of the Commission, that the appeal should be denied and that the said initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered that respondent's appeal from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered that the attached initial decision of the hearing examiner shall, on the 22d day of July 1954, become the decision of the Commission.