

Complaint

IN THE MATTER OF
KNOMARK MANUFACTURING COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND OF SECS. 2 (d) AND 2 (e) OF THE
CLAYTON ACT AS AMENDED

Docket 6264. Complaint, Nov. 19, 1954—Decision, Apr. 7, 1955

Consent order requiring one of the three largest manufacturers of shoe polishes, dyes, etc., including its "Esquire" brand, to cease discriminating in price between competing customers through (a) paying to some of them promotional allowances for furnishing services and facilities, and (b) furnishing certain others with facilities such as wire racks or dispensers for displaying its products and free demonstrator service, while not making proportional allowances or facilities available to competitors of those favored, in violation of subsections (d) and (e) of sec. 2 of the Clayton Act as amended; and to cease buying dealers' stocks of competing products and selling them to jobbers at reduced prices, and making cash payments to buyers of certain large customers without apprising their employers thereof, in violation of the Federal Trade Commission Act.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Paul R. Dixon and *Mr. William A. Mulvey* for the Commission.

Mr. Abraham Zemlock, of New York City, for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the corporation named as the respondent in the caption hereof, and herein-after more particularly designated and described, has violated and is now violating the provisions of sub-sections (d) and (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C. A., Sec. 13), and provisions of the Federal Trade Commission Act (15 U. S. C. A., Sec. 45), hereby issues its complaint stating its charges with respect thereto as follows:

Count I

PARAGRAPH 1. Respondent, Knomark Manufacturing Company, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 330 Wythe Avenue, Brooklyn, New York.

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PAR. 2. Respondent is now and for many years has been engaged in the business of manufacturing and selling shoe polishes, including pastes, creams, dyes and other related products. Certain of these products are being, and have been sold under the brand name, "Esquire." It is one of the two or three largest firms engaged in the business of manufacture, sale and distribution of shoe polishes in the United States. It has grown with acceleration in recent years.

Respondent manufactures its products, or most of them, at its plant located in Brooklyn, New York, and sells such products to over 3400 retailer customers or purchasers in the United States and in other places subject to the jurisdiction of the United States for resale within such places to consumers.

Substantially all of such customers or purchasers are, either chain shoe stores, jobbers and retailers solely engaged either in the sale or repair of shoes, food and drug chain stores, variety chain syndicates and major department stores. Two or more of such customers or purchasers are located in each of a large number of different towns, cities and other trading areas, and such customers or purchasers, when so located, are in competition with each other in offering for resale and reselling respondent's products.

PAR. 3. In the course and conduct of its business, respondent engaged in commerce, as commerce is defined in the Clayton Act as amended by the Robinson-Patman Act, having shipped said products or caused them to be transported from their plant to their customers, having places of business located in the same and other States of the United States and the District of Columbia. Said products were sold by respondent to such customers for resale within the United States.

PAR. 4. In the course and conduct of its business in commerce, particularly during the past two or three years, respondent paid or contracted for payment money, credits, allowances or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers, in connection with the sale or offering for sale of respondent's products, which it manufactures, sells or offers for sale; and respondent did not make or contract to make, such payments or considerations available on proportionally equal terms to all other of its customers competing in the sale and distribution of respondent's products.

PAR. 5. Included among and illustrative of the payments alleged in Paragraph 4 were credits and sums of money, by way of allowances, rebates and quantities of free merchandise, as compensation or in consideration for general promotional services or facilities in connection

with the offering for sale or sale of respondent's products, including displays and advertising in various forms. Such payments are hereinafter referred to as promotional allowances.

Promotional allowances were not available on proportionally equal terms to all of respondent's customers competing in the distribution of its shoe polishes, as alleged in Paragraph 4, in that:

(1) Respondent paid or contracted to pay promotional allowances to some competing customers, and respondent did not offer to pay or otherwise make available promotional allowances to all other competing customers.

(2) Respondent paid or contracted to pay promotional allowances to competing customers in amounts not determined by any percentage, and not equal to the same percentage of dollar volume of purchases or of any other measurable base; and respondent did not offer to pay or otherwise make available promotional allowances to all of such competing customers in amounts equal to and determined by the same percentage of dollar volume of purchase or of any other measurable base.

(3) Respondent paid or contracted to pay to some competing customers by granting and giving free quantities of its products to said customers, particularly to chain stores, in amounts not determined by any percentage, and not equal to the same percentage of dollar volume of purchases or of any other measurable base; and respondent did not offer to pay or otherwise make available this form of promotional allowance to all of such competing customers in amounts on an equally proportional basis or on any basis.

PAR. 6. The acts and practices of respondent as alleged above in Count I violates sub-section (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. (15 U. S. C. A. Sec. 13)

Count 1

PARAGRAPH 1. The allegations of this paragraph are the same as the allegations made in Paragraphs 1, 2 and 3 of Count 1.

PAR. 2. In the course and conduct of its business in commerce, particularly during the past two or three years, respondent discriminated in favor of some purchasers against other purchasers of its product, bought for resale by contracting to furnish, furnishing, or contributing to the furnishing of services or facilities connected with the handling, sale, or offer for sale of such products so purchased upon terms not accorded to all competing purchasers on proportionally equal terms.

PAR. 3. Included among and illustrative of the services or facilities alleged in Paragraph 2 were wire racks or dispensers, fixtures espe-

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cially designed for use in retail stores to display and offer for sale shoe polishes purchased from respondent. Said display racks or dispensers are priced and sometimes sold by respondent.

Display racks were not accorded on proportionally equal terms to all of respondent's purchasers competing in the distribution of its shoe polishes, as alleged in Paragraph 2, in that respondent contracted to furnish or furnished display racks or dispensers to some competing purchasers without charge, and respondent did not offer to furnish or otherwise accord display racks or dispensers without charge to all other of such competing purchasers but only offered to sell or sold display racks to such other competing purchasers.

PAR. 4. Also included among and illustrative of the services and facilities alleged in Paragraph 2 was the practice of respondent of furnishing prizes, money or merchandise to some competing customers for promotional enterprises without charge. This service was not accorded on proportionally equal terms to all of respondent's purchasers competing in the distribution of respondent's products in that respondent furnished this service to some of such competing customers and did not offer to furnish or otherwise accord it to all other of such competing customers.

PAR. 5. Also included among and illustrative of the services or facilities alleged in Paragraph 2 was the practice of respondent of furnishing some competing purchasers with free demonstrator service. This service was not accorded on proportionally equal terms to all of respondent's purchasers competing in the distribution of respondent's products in that respondent furnished this service to some of such competing customers and did not offer to furnish or otherwise accord it to all other competing customers.

PAR. 6. The acts and practices of respondent as alleged above in Count II violates sub-section (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. (15 U. S. C. A., Sec. 13)

Count III

PARAGRAPH 1. The allegations of Paragraphs 1 and 2 of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count III the same as if they were repeated here verbatim.

PAR. 2. In the course and conduct of its business, respondent engaged in commerce, as commerce is defined in the Federal Trade Commission Act, as amended, having shipped its products or caused them to be transported from New York to such customers or purchasers located

in the same and in the other States of the United States, and in other areas subject to the jurisdiction of the United States.

PAR. 3. Except to the extent that competition has been hindered, frustrated and lessened as set forth in this complaint, respondent has been and is in substantial competition with other corporations and individuals, firms and partnerships, engaged in the sale and distribution of shoe polishes and related products in commerce as the term is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, particularly during the past two years, respondent, in attempting to sell and in the sale and distribution of said products in interstate commerce, has used, engaged in, done and performed, among others, the following acts, practices, and methods with the effect of interfering with the sale of merchandise bearing the trade names and trademarks of competitors:

(1) Offered to buy and bought from retail dealers existing stocks of shoe polishes and related products sold and distributed by competitors to such retail dealers.

(2) Offered to sell and sold the shoe polishes and related products mentioned in sub-paragraph (1) above to jobbers at reduced prices who in turn offered for sale and sold said products to retail customers at prices substantially below those prices customarily obtained for such products.

(3) Offered to give and gave cash payments to buyers of certain large customers without apprising said customers or employers of said buyers of such payments.

PAR. 5. The above alleged acts, practices and methods of the respondent, all and singularly, have a dangerous tendency unduly to restrain, hinder, suppress and eliminate competition between and among respondent and its competitors in the sale and distribution of shoe polishes and related products in commerce within the meaning of the Federal Trade Commission Act, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning 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 April 7, 1955, the initial decision in the instant matter of hearing examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. A. 12), and the Federal Trade Commission Act (15 U. S. C. A. 41), the Federal Trade Commission on November 19, 1954, issued its complaint in this proceeding against respondent, upon whom such complaint was duly served and thereafter answered.

Respondent is a New York corporation, located at 330 Wythe Avenue, Brooklyn, New York, and is engaged in the manufacture and sale of shoe polishes and related products under the brand name, "Esquire."

On January 20, 1955, counsel for the parties hereto entered into a stipulation providing for entry of a consent order, which stipulation appears of record. By the terms thereof, respondent admits all of the jurisdictional allegations set forth in the complaint; stipulates that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations; expressly waives a hearing before a hearing examiner or 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 other and further procedures before the hearing examiner and the Commission to which respondent may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. By the terms of said stipulation, respondent withdraws its answer heretofore filed by it; agrees that the order hereinafter set forth shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon; specifically waives any and all right, power or privilege to challenge or contest the validity of said order; agrees that the stipulation, together with the complaint, shall constitute the entire record herein; agrees that the complaint herein may be used in construing the terms of said order, which order may be altered, modified, or set aside in the manner provided by the statute for the orders of the Commission; and agrees that the stipulation is subject to approval in accordance with Rules V and XXII of the Commission's Rules of Practice and that said order shall have no force and effect unless and until it becomes the order of the Commission. Said stipulation further provides that it is made for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

On the basis of the foregoing, the undersigned hearing examiner concludes that this proceeding is in the public interest and in conformity with the action therein contemplated and agreed upon makes the following order:

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Order

ORDER

It is ordered, That respondent Knomark Manufacturing Company, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of shoe polishes and related products or of any other related products, in commerce, as "commerce" is defined in the afore-said Clayton Act as amended, do forthwith cease and desist from:

I

A. Making or contracting to make any payment to or for the benefit of any customer unless a payment is offered to be made or otherwise made available to each of all other competing customers.

B. Making or contracting to make, to or for the benefit of competing customers, any payments in amounts which are not determined by a percentage of dollar volume of purchases or by some other measurable basis.

C. Making, or contracting to make, to or for the benefit of any customer, any payments in an amount equal to and determined by any percentage of dollar volume of purchases or of any other measurable base unless such a payment, in an amount equal to and determined by the same percentage of dollar volume, or of such other measurable base, as the case may be, is offered to be made or otherwise made available to each of all other competing customers.

D. Making, or contracting to make, to or for the benefit of any customer, any payment, unless such a payment is made available on proportionally equal terms to each of all other competing customers.

As used in Part I of this Order, "payment" means the payment of anything of value as compensation, or in consideration for any services or facilities furnished by or through any customer of respondent in connection with his handling, offering for sale or sale of products sold to him by respondent.

II

A. Discriminating between or among competing purchasers by furnishing any service or facility to any of them unless a service or facility is offered to be furnished or otherwise accorded to each of all of the others.

B. Discriminating between or among competing purchasers by furnishing any service or facility without charge to any of them unless a service or facility is offered to be furnished or otherwise accorded without charge to each of all of the others.

C. Discriminating between or among competing purchasers by furnishing them any service or facility in amounts which are not deter-

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mined by a percentage of dollar volume of purchases or of some other measurable base.

D. Discriminating between or among competing purchasers by furnishing any service or facility to any of them in amounts equal to and determined by any percentage of dollar volume of purchases or of any other measurable base unless such service or facility in an amount equal to and determined by the same percentage of dollar volume of purchases or of such other measurable base, as the case may be is offered to be furnished or otherwise made available to each of all of the others.

E. Discriminating between or among competing purchasers by furnishing any service or facility to them upon terms not accorded to all of them on proportionally equal terms.

As used in Part II of this order :

1. "Service or facility" means any services or facilities connected with the handling, offering for sale, or sale of respondent's products by purchasers who bought them from respondent.

2. "Furnishing" means furnishing, contracting to furnish, or contributing to furnish.

It is further ordered, That respondent Knomark Manufacturing Company, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of shoe polishes and related products, or of any other related products in commerce as commerce is defined in the aforesaid Federal Trade Commission Act as amended, do further cease and desist from :

A. Offering to buy or buying and taking over stocks of shoe polishes and related products sold and distributed by competitors to retail sellers.

B. Offering to sell or selling shoe polishes and related products mentioned immediately in "A" above to jobbers at prices lower than the prices at which competitors ordinarily offer for sale and sell such products to jobbers.

C. Offering to give and making gifts of cash payments to buyers of its customers without the knowledge of such customers or employers of said buyers.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall, within sixty (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 the order to cease and desist [as required by said declaratory decision and order of April 7, 1955].

Findings

IN THE MATTER OF

CLEAN-RITE VACUUM STORES, INC., SAMUEL
BERENSON, AND ETTA BERENSONORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6181. Complaint, Feb. 18, 1954—Decision, Apr. 8, 1955

Order requiring a retail dealer in Washington, D. C., to cease representing falsely in "bait" advertising that it was making a bona fide offer to sell reconditioned vacuum cleaners at exceptionally low prices and that the machines would do a satisfactory job of cleaning, when such offers were made for the purpose of obtaining leads as to prospective buyers and in follow-up calls on persons responding to them, respondent's salesmen disparaged the advertised cleaners and attempted to, and often did, sell them much more expensive cleaners.

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

Mr. William J. Tompkins and *Mr. Michael J. Vitale* for the Commission.

Koonin & Chalfonte, of Washington, D. C., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration on the complaint, answer thereto, testimony and other evidence and proposed findings as to the facts and conclusions presented by counsel, and the Hearing Examiner, 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 his findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

1. Respondent Clean-Rite Vacuum Stores, Inc., is a corporation organized under the laws of the State of Maryland with its principal office and place of business located at 925 F Street, N. W., Washington, D. C. Respondents Samuel Berenson and Etta Berenson are individuals and are President and Secretary-Treasurer, respectively, of the corporate respondent. These individual respondents formulate, control and direct the policies, acts and practices of the corporate respondent.

2. The respondents are now, and for several years last past have been, engaged in the sale and distribution of vacuum cleaners in inter-