

IN THE MATTER OF

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

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2
(a) OF THE CLAYTON ACT AND OF THE FEDERAL TRADE COMMISSION ACT

Docket 6191. Complaint, Mar. 11, 1954—Decision, July 30, 1955

Consent order requiring the second largest producer of packaged bakery products to cease discriminating in price in violation of sec. 2 (a) of the Robinson-Patman Act, through selling its products to some customers at higher prices than to their competitors by means of a volume discount plan based on the monthly purchases of the particular customer, as charged in Count I of the Commission's complaint.¹

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, 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

¹ Count II of the complaint was settled on July 20, 1954, 51 F. T. C. 25, by a consent order forbidding exclusive-dealing arrangements under which said baking corporation and sellers of automatic vending machines agreed that the latter would dispense the former's baked goods exclusively through their machines.

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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

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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 4 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:

Monthly purchases:	Discount
\$0 to \$20.00 -----	None
\$20.00 to \$149.00 -----	2%
\$150.00 to \$999.99 -----	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.

COMPILER'S NOTE

Count II of the complaint, charging distributors of vending machines with entering into agreements with Sunshine to dispense Sunshine products exclusively through their vending machines, was settled on July 20, 1954, 51 F. T. C. 25, by a consent order terminating the challenged practices.

INITIAL DECISION IN DISPOSITION OF COUNT I OF COMPLAINT
BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on March 11, 1954, charging 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, and charging all of said respondents, in Count II of the complaint, with the use of unfair methods of competition and unfair and deceptive practices in commerce in violation of Section 5 of the Federal Trade Commission Act. After being duly served with said complaint, respondents appeared by counsel and entered into a stipulation for consent order disposing of Count II of the complaint. Said stipulation was thereafter accepted by the undersigned hearing examiner and an initial decision based thereon was filed June 8, 1954, which became the decision of the Commission by its order issued June 30, 1954.

Following submission of the stipulation disposing of Count II of the complaint, respondent Sunshine Biscuits, Inc., filed its answer to Count I of the complaint. Thereafter various interlocutory motions were filed with the undersigned by counsel for said respondent and by counsel supporting the complaint, and appeals were taken to the Commission from the order of the undersigned disposing of said motions. Following the final disposition of said appeals, counsel for respondent Sunshine Biscuits, Inc., and counsel supporting the complaint entered into a stipulation, dated June 9, 1955, providing for the withdrawal of said respondent's answer to Count I of the complaint and for the entry of a consent order disposing of said count. Said stipulation was thereafter submitted to the hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice For Adjudicative Proceedings.

Respondent Sunshine Biscuits, Inc., pursuant to the aforesaid stipulation, had admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Said stipulation further provides that all parties expressly waive a hearing before the hearing examiner or the Commission, and all further and other procedure to which said respondent may be entitled under the Clayton Act or the Rules of Practice of the Commission. Respondent has also agreed that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, and specifically waives any and all right, power, or privilege to chal-

lenge or contest the validity of said order. It has been further stipulated and agreed that the complaint herein may be used in construing the terms of the order provided for in said stipulation, and that the signing of said stipulation is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The order agreed upon in the aforesaid stipulation accords substantially with the order proposed in the "Notice" portion of the complaint, except for the elimination of a provision covering price discriminations which affect competition in the line of commerce in which respondent Sunshine Biscuits, Inc., is engaged, the so-called primary line. By memorandum dated June 9, 1955, transmitting the stipulation for consent order, the hearing examiner has been advised by counsel supporting the complaint that the reason for the elimination of said provision is that it was not his intention to introduce evidence of possible injury in the primary line and that the principal basis of the complaint is injury to competition in the so-called secondary line of commerce, as to which he believes the order agreed upon makes adequate provision.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid stipulation for consent order, the answer previously filed being hereby deemed withdrawn, and the hearing examiner being satisfied, on the basis of the representations made by counsel supporting the complaint concerning the proof which he proposed to offer had this proceeding gone to hearing, that the aforesaid stipulation provides for an appropriate disposition of this proceeding, the said stipulation is hereby accepted and ordered filed by the hearing examiner, who makes the following findings, for jurisdictional purposes, and order:

1. Respondent Sunshine Biscuits, Inc., is now and has been at all times mentioned in the complaint a corporation organized under and existing by virtue of the laws of the State of New York, with its principal office located at 29-10 Thomson Avenue, Long Island City, New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent above named. The complaint states a cause of action against said respondent under the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

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

sale, sale or distribution of bakery packaged food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating in price, directly or indirectly, between said purchasers of said products by selling such products of like grade and quality to any purchaser at a price different from that granted any other purchaser who in fact competes with the former in the resale or distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner in disposition of Count I of the complaint shall, on the 30th day of July, 1955, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Sunshine Biscuits, Inc., 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.

OPINION OF THE COMMISSION

Per Curiam:

This matter is before us upon the interlocutory appeal of respondent Sunshine Biscuits, Inc., from two rulings of the hearing examiner. The appeal raises questions, among others, as to the sufficiency of the complaint and the propriety of the hearing examiner's action with respect to a request of counsel supporting the complaint that this proceeding be certified to the Commission, questions which we believe require a prompt decision in order to prevent unusual expense and delay in the proceedings within the meaning of Rule XX of the Commission's Rules of Practice. Written briefs have been filed by both parties and oral argument was had before the Motions Commissioner.

Count I of the complaint¹ charges respondent Sunshine Biscuits, Inc., with price discriminations in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, in connection with the sale of bakery packaged food products. Following the filing of respondent's answer to Count I of the complaint in which respondent stated, among other things, that the complaint contains no allega-

¹ Count II of the complaint which charged Sunshine Biscuits, Inc. and others with violation of Section 5 of the Federal Trade Commission Act has already been disposed of by the issuance of a consent order.

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tion that the customers involved in the alleged discriminations compete with each other, counsel supporting the complaint moved the hearing examiner to certify the proceeding to the Commission and moved the Commission to amend the complaint so as to correct the alleged deficiency. Respondent thereafter moved the hearing examiner to dismiss the complaint for the principal reasons that it is insufficient, vague, indefinite and uncertain; the matter is moot; and it is contrary to the public interest. The lack of an allegation in the complaint as to the existence of competition between the customers involved in the alleged price discriminations constitutes a part of the basis for respondent's contention that the complaint is insufficient.

The hearing examiner did not certify this proceeding to the Commission, as he was requested to do so by counsel supporting the complaint. Instead, after expressing the opinion that the requested amendment merely involved "a clarification of the complaint in a respect which does not change in any material respect the original cause of action" and that, therefore, he could grant the relief requested without certifying the matter to the Commission, he entered an order granting the motion "to the extent that the complaint shall be deemed amended" in the respects requested by counsel supporting the complaint. The Commission interprets this action solely as a clarification of the complaint. No new or additional issue is created by the action and it does not in any way change the cause of action stated in the complaint. It may, however, serve to remove any possibility of doubt or misunderstanding on respondent's part as to the charge it must meet. We believe, therefore, that the hearing examiner's action with respect to the motion of counsel supporting the complaint was proper.

Respondent in its motion to the hearing examiner to dismiss also claimed that the complaint is insufficient because it is not specific as to the results of the alleged price discriminations. In its appeal from the hearing examiner's denial of the motion to dismiss respondent makes the further contention that the complaint is insufficient because it contains no allegation that any of the sales involved in the discriminations were in interstate commerce.

In Paragraph Six of Count I of the complaint it is alleged that the effects of the discriminations "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." In Paragraph Three it is alleged, among other things, that respondent Sunshine sells and distributes

bakery food products in interstate commerce. Respondent in its answer admits the allegations of Paragraph Three of the complaint. In Paragraph Four it is alleged that respondent Sunshine "in the course and conduct of its business, as aforesaid, has been and is now discriminating in price * * *." We believe the allegations in the complaint are sufficient to fully apprise the respondent of the charge it must meet and that the absence of further particulars cannot operate to deprive respondent of a full and fair hearing.

Respondent's contentions that this matter is moot and that it is contrary to the public interest to proceed appear to be based largely on the grounds that the discount schedule referred to in the complaint was discontinued on January 1, 1954, prior to the issuance of the complaint, and that for a period of more than thirty years respondent has followed the pricing practices of the dominant member of the industry, namely, National Biscuit Company. It appears from an affidavit of an official of the respondent, submitted with the motion to dismiss, that, prior to April 1944, respondent was using a discount plan under which the maximum discount of $4\frac{1}{2}\%$ was associated with purchases of \$150,000 per month. A similar plan which had been used by the National Biscuit Company was found by the Commission to have resulted in unlawful price discriminations and an order to cease and desist was issued against National Biscuit Company on February 23, 1944 (Docket 5013). Shortly thereafter National Biscuit Company adopted a discount plan whereby the maximum discount of $4\frac{1}{2}\%$ was associated with monthly purchases of \$10,000. Respondent, in April 1944, adopted a discount schedule whereby the maximum discount of $4\frac{1}{2}\%$ was associated with purchases of \$7,500 per month. This discount plan is the subject of the complaint in this proceeding. Respondent's present discount schedule whereby the maximum discount is associated with monthly purchases of \$500 was put into effect on January 1, 1954, after respondent learned that a similar discount schedule had been announced by National Biscuit Company.

We agree with the hearing examiner that the facts asserted by the respondent do not establish that this proceeding is moot. Respondent does not assert that its discount schedule was revised as of January 1, 1954, in order to avoid the alleged unlawful price discriminations. It appears instead that the revised discount schedule was adopted in order to follow a similar discount plan which had been announced by National Biscuit Company. Conceding that the respondent has discontinued using the discount schedule which resulted in the price discriminations which the complaint alleges to be unlawful, there is no sufficient basis for either a determination that the discount schedule

which respondent is presently using does not also result in unlawful price discriminations, or a conclusion that there is no likelihood that the alleged unlawful discriminations will be resumed.

As further grounds for dismissal of the complaint, respondent contends that its volume discount plan was established in good faith to meet a similar discount plan previously adopted by the dominant member of the industry and that the effect of the price differences in the secondary line, if any, is *de minimis*. The merits of these contentions cannot be determined on the basis of the present record.

We are of the opinion that the hearing examiner's denial of respondent's motion to dismiss was proper and respondent's appeal therefrom will be denied.

ORDER DENYING APPEAL FROM HEARING EXAMINER'S RULINGS

This matter having come on to be heard by the Commission upon the appeal of respondent Sunshine Biscuits, Inc., from an order of the hearing examiner disposing of a motion by counsel supporting the complaint requesting that this proceeding be certified to the Commission for its consideration of a proposed amendment to the complaint, and denying respondent's motion to dismiss the complaint, and briefs of counsel in support thereof and in opposition thereto; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that the action of the hearing examiner with respect to the said motion of counsel supporting the complaint was proper in all respects, and also that the hearing examiner properly denied respondent's motion to dismiss and that respondent's appeal should be denied.

It is ordered, That the appeal of respondent Sunshine Biscuits, Inc., from rulings of the hearing examiner, be, and it hereby is, denied.

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IN THE MATTER OF
RECOTON CORPORATION ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6322. Complaint, Apr. 1, 1955—Decision, Aug. 2, 1955*

Consent order requiring manufacturers in New York City of phonograph needles with points made of synthetic materials to cease representing falsely in catalogues, on packages and containers, and in sales promotional material furnished to dealers, that the needles had points of sapphire or ruby or jewel; and to cease representing that they were the world's largest manufacturer of phonograph needles.

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

Mr. Terral A. Jordan for the Commission.

Cahn, Schwartzreich & Mathias, of New York City, for respondents.

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 Recoton Corporation and Herbert H. Borchardt, Jack Karns and Alfred Wish, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of 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 in that respect as follows:

PARAGRAPH 1. Respondent Recoton Corporation, 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 147 West 22nd Street, New York, N. Y. Respondents Herbert H. Borchardt, Jack Karns and Alfred Wish are respectively President, Vice-President and Secretary of said corporate respondent. These individuals acting in cooperation with each other formulate, direct and control all of the policies, acts and practices of said corporation. Their address is the same as that of corporate respondent.

PAR. 2. Respondents are now, and have been for more than two years last past, engaged in the sale and distribution of phonograph needles to wholesalers and dealers in commerce, among and between the various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have main-