

Complaint

IN THE MATTER OF

ELMO, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SECS. 2 (d) AND 2 (e) OF THE CLAYTON ACT*Docket 6443. Complaint, Nov. 8, 1955—Decision, Mar. 7, 1956*

Consent order requiring a manufacturer of cosmetics, beauty aids, and toilet preparations to cease discriminating in price in violation of subsections 2 (d) and 2 (e) of the Clayton Act, as amended, through furnishing demonstrator services and promotional and advertising allowances in varying amounts to certain customers, but not to their competitors in the Chicago trade area, and not requiring from the favored customers reciprocal services of proportionally equal degree.

Before *Mr. Everett F. Haycraft*, hearing examiner.
Mr. Donald K. King for the Commission.
LaBrum & Doak, of Philadelphia, Pa., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that Elmo, Inc., hereinafter designated as respondent, 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 (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Elmo, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at Tulip and Rhawn Streets, Philadelphia, Pennsylvania.

PAR. 2. The respondent is now and for a number of years has been engaged in the business of manufacturing and selling cosmetics, beauty aids, and toilet preparations. Said products are sold to customers with places of business located throughout the several states of the United States and in the District of Columbia for resale to consumers within the United States.

PAR. 3. In the course and conduct of said business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act, having shipped its products or caused them to be transported from its said place of business to said customers with places of business located in the several states of the United States and in the District of Columbia.

PAR. 4. In the course of said business in commerce, respondent

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has paid or contracted to pay, money, goods, or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers in connection with the processing, handling, sale or offering for sale of said cosmetics, beauty aids, and toilet preparations which respondent manufactures, sells, or offers for sale; and respondent has not made or contracted to make such payments or considerations (or in the alternative, equivalent services or facilities) available on proportionally equal terms to all other of its customers competing in the sale and distribution of said products.

PAR. 5. In the course of said business in commerce, respondent has furnished, contracted to furnish, or has contributed to the furnishing of certain services and facilities to some of its customers in connection with the processing, handling, sale or offering for sale of respondent's products by them; and respondent has not made such services and facilities (or in the alternative, equivalent payments or allowances) available on proportionally equal terms to all other of its customers competing in the sale and distribution of said products.

PAR. 6. Specifically respondent:

1. Furnished or contracted to furnish demonstrator services or allowances and/or paid or contracted to pay promotional allowances and/or advertising allowances to some competing customers and respondent did not offer to pay or otherwise make available any such services and/or allowances or any alternative services to all other competing customers.

2. Furnished or contracted to furnish demonstrator services or allowances, and/or paid or contracted to pay promotional allowances and/or advertising allowances to certain competing customers in amounts (based on respondent's costs) not equal to the same percentage of net purchases of respondent's products by such customers and not proportionally equal by any other test; and respondent did not offer to pay or otherwise make available such services and allowances in amounts equal to the largest of such percentages to all such competing customers, and not proportionally equal by any other test.

Illustrative of and included among the practices referred to above were respondent's following described dealings with its 42 accounts in the Chicago, Illinois, trade area during 1954:

1. Five competing customers received from respondent demonstrator services or allowances in amounts, based on respondent's cost, varying from 7.6% up to 55.9% of their individual net purchases from respondent.

2. Eight competing customers received from respondent promotional allowances at substantially different rates ranging up to 25% of their individual net purchases from respondent.

3. Six competing customers received from respondent contributions for cooperative advertising at substantially different rates ranging up to 100% of their individual net purchases from respondent.

4. Other competing customers were accorded and received no such services or allowances from respondent.

5. Reciprocal services of a proportionally equal degree were not demanded or required by respondent from said competing customers in exchange for respondent's contributions to them. For example, in some instances some customers were required to file retail sales reports to receive promotional allowances while others were paid solely on the basis of net purchases. In other instances some customers receiving the smaller payment or allowance were required to furnish a greater amount of counter and display space than were other customers receiving the greater payment or allowance.

In determining the services and allowances granted to these competing customers, respondent did not use any proportionally equal basis. On the contrary, they were determined on the basis of individual negotiations between respondent and different customers which resulted in different and arbitrary terms.

PAR. 7. The acts and practices of the respondent as above alleged violated sub-sections (d) and (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13).

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on November 8, 1955, charging it with a violation of subsections (d) and (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. After being duly served with said complaint, the respondent in lieu of submitting answer to said complaint, entered into an agreement on December 27, 1955, for a consent order with counsel supporting the complaint, disposing of all the issues in this proceeding in accordance with Section 3.25 of the Rules of Practice and Procedure of the Commission, which agreement has been duly approved by the Acting Director of the Bureau of Litigation.

Respondent, pursuant to the aforesaid agreement, has admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Respondent in the

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agreement waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that said agreement is for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint. The agreement also provided that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint and the Amended Trade Practice Rules for the Cosmetic and Toilet Preparations Industry, promulgated September 10, 1954, may be used in construing the terms of the order.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement the hearing examiner makes the following jurisdictional findings and order:

1. Respondent Elmo, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at Tulip and Rhawn Streets, Philadelphia, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, which is in the public interest, and of the respondent hereinabove named; the complaint herein states a cause of action against said respondent under the provisions of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Section 13).

ORDER

It is ordered, That respondent Elmo, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the sale or offering for sale, of cosmetics, beauty aids, and toilet preparations in commerce,

as "commerce" is defined in the said Clayton Act as amended, do forthwith cease and desist from:

1. Paying, or contracting to pay, to, or for the benefit of, any customer, anything of value as compensation or in consideration for advertising, display, demonstrator services, promotional, or other services or facilities furnished by or through such customer in connection with the handling, processing, sale or offering for sale of respondent's products unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the resale of such products.

2. Furnishing or contributing to the furnishing of demonstrator services to any purchaser of its products when such services are not accorded on proportionally equal terms to all other purchasers located in the same competitive trade area, or all other purchasers who in fact resell such products in competition with purchasers who receive such demonstrator services.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The Commission having considered the initial decision of the hearing examiner herein; and

It appearing that the word "By" was superfluously used to commence Paragraph 2 of the order to cease and desist contained therein:

It is ordered, That this case be, and it hereby is, placed on the Commission's own docket for review.

It is further ordered, That the word "By," appearing as the first word of Paragraph 2 of the order to cease and desist contained in the initial decision, be deleted.

It is further ordered, That the initial decision as so modified shall, on the 7th day of March 1956, become the decision of the Commission.

It is further ordered, That Elmo, Inc., 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.

IN THE MATTER OF
HERBERT B. SYKES TRADING AS SYKES HERNIA
CONTROL SERVICE ET AL.

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

Docket 6118. Complaint, Aug. 13, 1953—Decision, Mar. 8, 1956

Order requiring an individual in St. Petersburg, Fla., to cease representing falsely in advertisements in newspapers and magazines that his "Sykes Hernia Control" device was radically different from a truss; that it would completely cure many hernias and would hold all securely in place at all times and under all conditions; and that he and his representatives conducted clinics where sufferers from hernia might be examined and treated by a physician.

Mr. Jesse D. Kash and Mr. William M. King for the Commission.
Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C.,
for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that respondent Herbert B. Sykes, an individual trading as Sykes Hernia Control Service, and Respondent Griffith and McCarthy, Inc., a corporation, have engaged in acts and practices which are in violation of the Federal Trade Commission Act—particularly that they have misrepresented a device for use by individuals suffering from hernia.

After the issuance of said complaint and the filing of respondents' answers thereto, hearings were held, at which testimony and other evidence in support of and in opposition to the allegations of the complaint were received before the above-named hearing examiner, duly recorded and filed in the office of the Commission, and proposed findings of fact and conclusions of law were submitted by counsel. Upon the entire record, the hearing examiner, having determined that this proceeding is in the public interest, makes the following findings of facts and conclusions.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Herbert B. Sykes, since 1931, has been engaged in the sale of a device, as that term is defined in Section 15