

IN THE MATTER OF

J. C. MARTIN CORP., ET AL.

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

Docket 6145. Complaint, Dec. 2, 1953—Decision, June 29, 1956

Order requiring sellers in New York City of a variety of merchandise, including jewelry, silverware, kitchen utensils, and toilet articles, to cease using lottery devices in the sale of said merchandise through members of the public by means of pull cards they mailed to them, giving the purchaser the option of either pulling a tab or buying outright as many articles as he wished from the list in accompanying circulars giving description and price of each.

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

Mr. Edward L. Smith, of Washington, D. C., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with the use of lottery methods or games of chance in the sale and distribution of their merchandise. After the filing of respondents' answer denying all the material allegations of the complaint, hearings were held at which evidence was received, both in support of and in opposition to the complaint. Proposed findings and conclusions were then submitted by counsel and the case argued orally. The matter is now before the hearing examiner for final consideration and decision.

2. Respondent J. C. Martin Corp., is a corporation organized 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 133 West 20th Street, New York, New York. Respondents Jack Kaslow and Seymour Orenstein are officers of the corporation and control its policies and sales activities. Respondent Jack Kaslow also trades as K. W. Sales Company, with his office and principal place of business located at 20 West 17th Street, New York, New York. Respondent Seymour Orenstein also trades as L. & S. Sales Company, with his office and principal place of business located at 598 Broadway, New York, New York. All of the respondents have cooperated with one another and acted in concert in carrying on the activities hereinafter described.

3. Respondents are engaged in the sale and distribution in commerce, as that term is defined in the Federal Trade Commission Act, of numerous and varied articles of merchandise, including, among others, jewelry, silverware, kitchen utensils and toilet articles. Prac-

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tically all of respondents' sales are made through members of the public, whose names and addresses are obtained by respondents from mailing lists. To such persons respondents mail circulars or catalogs describing and depicting certain articles of merchandise and containing a device commonly known as a pull card. This card contains a number of partially perforated tabs under each of which is a feminine or masculine name, together with the name of one of the articles described in the circular and a statement of the price of the article. The information under the tabs is concealed from view, and persons pulling the tabs have no information as to the article they are to receive or the price to be paid therefor until the tab has been pulled or separated from the card.

4. Persons who pull the tabs pay to the individual circulating the pull card the respective amounts specified by the tabs, and their names are noted on the circular in a place provided for that purpose. After all of the tabs on the card have been pulled and the respective amounts paid, the individual circulating the card remits the total amount to respondents and receives the merchandise from them. The respective articles are then distributed by such individual to the persons entitled thereto. For his compensation the person circulating the pull card receives an article of merchandise selected by him from a designated group or, if he prefers, he may elect to receive a designated amount of cash.

5. The three essential elements in a lottery are consideration, chance, and prize. The first two, consideration and chance, obviously are present here; the only question is as to the element of prize. On this point the complaint alleged: "Some of said articles of merchandise have purported and represented retail values greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The prices of others of the articles are higher in proportion than the articles first mentioned. The apparent greater values of some of said articles, induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of greater value than the designated prices to be paid for same."

6. There is no evidence supporting these allegations in the complaint. It is the view of the hearing examiner, however, that such evidence is unnecessary, that the allegations in question may properly be regarded as surplusage, and that the element of prize is present in respondents' method of merchandising. This is so because the some forty articles which may be obtained through the pull card vary widely in nature and might well prove to be either valuable or worthless, depending upon the situation of the particular individual receiv-

ing them. An article regarded as a "prize" by one recipient might be wholly without use or value to another. For example, the cigarette lighter offered on one of respondents' circulars would be of value to a smoker, while valueless to a nonsmoker. Again, a man receiving the ten packages of razor blades included in the list probably would get his money's worth if he used a safety razor rather than an electric shaver and if the blades would fit his razor; otherwise the blades would be wholly without value to him.

7. It should be added that one sales circular formerly used by respondents (Com. Ex. 6) provided for the awarding of an additional article as a "grand prize" to the person who happened to pull the tab bearing the same name as that concealed beneath the "grand prize" tab.

8. There is no contention on the part of respondents that the sales methods described above are legal. Respondents do urge, however, that such methods were voluntarily and completely abandoned approximately a year prior to the issuance of the Commission's complaint, and that the sales method then adopted and now in use is unobjectionable. The sales circulars formerly used appear in the record as Commission's Exhibits 1 to 8, while the new circular appears in the record as Commission's Exhibit 9. Both the discontinuance of the former circulars and the adoption of the present circular were upon advice of respondents' legal counsel.

9. The principal distinction drawn by respondents between the former circulars and the present one is that, whereas the former circulars contemplated that purchases of articles described in the circular would be made only through use of the pull card, the current circular gives the purchaser the option of either pulling a tab or buying an article outright from the list appearing in the circular, which describes the articles and states the price of each. And purchasers may buy as many of any particular article as they wish. If the individual conducting the sale does not succeed in selling the complete assortment, he receives a cash commission on the articles sold. Should his sales exceed the amount represented by the assortment, he receives the regular premium (or a commission in lieu thereof) plus a commission on the excess. Approximately 70 percent of the sales made by means of the current circular (including both sales made through use of the pull card and sales made outright without use of the pull card) have been for the amount represented by the complete assortment (\$29.99), 20 percent for amounts exceeding that figure, and 10 percent for amounts below that figure.

10. The fatal difficulty with respondents' position is that the present sales circular, like those preceding it, includes the lottery device, that

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is, the pull card. So long as a device of this nature forms a part of respondents' sales method it would appear to be immaterial that purchasers can, if they so desire, disregard the pull card and purchase particular articles outright. It seems clear that while respondents have discontinued the use of particular sales circulars and altered their sales method in certain details, there has in fact been no abandonment of the practice challenged by the complaint, that is, the use by respondents of lottery devices in the sale of their merchandise.

CONCLUSION

The proceeding is in the public interest. Respondents' sales methods involve and contemplate the use of lottery devices in the sale and distribution of their merchandise to the public. Such methods are in contravention of the public policy of the United States, are to the prejudice of the public, and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent J. C. Martin Corp., a corporation, and its officers, and respondents Jack Kaslow and Seymour Orenstein, individually and trading as K. W. Sales Company and L. & S. Sales Company, respectively, or trading under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others pull cards or any other devices which are designed or intended to be used in the sale and distribution of respondents' merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.
2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

ON APPEAL FROM INITIAL DECISION

Per Curiam:

This matter is before the Commission on an appeal from the initial decision of the hearing examiner holding that the respondents have violated Section 5 of the Federal Trade Commission Act by supplying to others lottery devices for use in the sale of their merchandise.

The issues raised on the appeal are no different, in essence, from those considered by the hearing examiner and on which he made definite and specific findings. In the opinion of the Commission those

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findings, and the conclusions drawn therefrom, are fully justified by the record, and the order to cease and desist included in the initial decision is entirely appropriate.

Accordingly, the respondents' appeal is denied and the hearing examiner's initial decision is adopted as the decision of the Commission.

FINAL ORDER

The respondents having filed an appeal from the initial decision of the hearing examiner; and the matter having been heard on briefs and oral arguments of counsel; and the Commission having rendered its decision denying the appeal and adopting the initial decision as its own decision:

It is ordered, That the respondents, J. C. Martin Corp., a corporation, and Jack Kaslow and Seymour Orenstein, individuals, 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 contained in said initial decision.

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IN THE MATTER OF
MARYLAND BAKING COMPANY, ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2 (a) OF THE CLAYTON ACT*Docket 6327. Complaint, Apr. 6, 1955—Decision, June 29, 1956*

Order requiring one of the largest ice cream cone manufacturers in the United States, with plant in Baltimore, Md., owning or controlling for such purpose companies in New York City, Chicago, and Charlotte, N. C., and capital stock in other ice cream cone plants in Pittsburgh, Pa., and Oakland and Los Angeles, Calif., to cease discriminating in price by selling ice cream cones to any purchaser at higher prices than those charged the latter's competitor, as it did in May or June 1951, at the time of entry into the cake cone business of its single competitor in the area concerned and apparently in retaliation therefor, through reducing its price for rolled sugar cones—which constituted only 1½% of its total sales—in the Washington-Baltimore metropolitan area from \$6.66 to \$5.00 per thousand, while maintaining its price of \$7.16 per thousand for such cones in the Philadelphia metropolitan area and in the States of Delaware and New Jersey; with result that said sole competitor in the Washington-Baltimore metropolitan area lost all of its sales of rolled sugar cones to some of its former jobber customers and respondent virtually restricted to itself the jobber market for rolled sugar cones in that area.

Mr. Rice E. Schrimsher for the Commission.

Burke, Gerber & Wilen, of Baltimore, Md., and *Mr. William Simon*, of Washington, D. C., for respondents.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in this case, which was issued in April 1955, charges the respondent, a Maryland corporation located in Baltimore, Maryland, one of the largest ice cream cone manufacturers in the United States, with violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, in the sale of rolled sugar cones in the metropolitan areas surrounding the cities of Baltimore, Hagerstown and Frederick, Maryland, and Washington, D. C., beginning in May 1951. The complaint also names Joseph Shapiro, individually, as a respondent and as a treasurer of the Maryland Baking Company, alleging that he "is primarily responsible for the acts and practices hereinafter alleged to be unlawful." Testimony in support of the allegations of the complaint was taken in the city of Baltimore at which time one of the officials of the respondent and of one, Harry

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Sandler, the only competitor of the respondent in the metropolitan areas described, testified.

Although the respondent corporation in its answer denied some of the allegations of the complaint, no testimony was offered in opposition to those allegations. However, at the conclusion of the taking of testimony counsel for the respondents filed a motion to dismiss the complaint before the hearing examiner, which motion, after oral argument, was denied. It is contended by counsel for the respondents that the complaint with respect to the individual respondent Joseph Shapiro should be dismissed because it has not been shown that he personally has been engaged in the sale of ice cream cones and, therefore, he has not been engaged in any conduct within the scope of jurisdiction of the Federal Trade Commission in enforcement of the Clayton Act. As to the corporate respondent, it is contended by its counsel that the complaint should be dismissed because of lack of proof as to the effect of the price discrimination required under the statute and the evidence shows purely a private controversy between two competitors and there is no public interest.

Due consideration having been given to the evidence adduced, the contentions of both counsel, and the proposed findings filed by them in accordance with the Commission's rules, the hearing examiner makes the following:

FINDINGS OF FACTS AND CONCLUSIONS

1. Respondent The Maryland Baking Company (erroneously named in the complaint as "Maryland Baking Company") hereinafter referred to as respondent corporation, is a corporation organized, existing, and doing business under the laws of the State of Maryland, with its principal office and place of business located at 1200 South Eutaw Street, Baltimore, Maryland.

2. Respondent Joseph Shapiro is an individual who is Chairman of the Board, a large stockholder in and treasurer of respondent corporation. He is primarily responsible for the acts and practices herein alleged to be unlawful.

3. Respondent corporation is now, and since 1926 has been, engaged in the business of manufacturing and selling ice cream cones for use, consumption, and resale throughout the United States and in the District of Columbia. Its sales of such products for the years 1950, 1951 and 1952 were approximately \$1,000,000 annually, one-quarter of which is sold in the metropolitan areas hereinbefore mentioned. It occupies a major position in the ice cream cone industry engaging therein on a nationwide scale and owning or controlling for that purpose the following companies: Eagle Cone Corporation, New

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York, New York; Northwest Cone Company, Inc., Chicago, Illinois; and the Maryland Baking Company of the Carolinas, Inc., Charlotte, North Carolina. In addition it owns capital stock in the following companies which manufacture and sell ice cream cones: Keystone Cone Company, Inc., Pittsburgh, Pennsylvania (preferred stock investment); 50 percent of the common stock of Maryland-Pacific Cone Company, Inc., Oakland, California, which corporation owns all of the common stock of the Pacific Coast Baking Company, Los Angeles, California.

4. Respondent corporation is now, and for approximately 30 years has been, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, in that it ships ice cream cones or causes same to be transported from the State of manufacture to purchasers located in other States of the United States and in the District of Columbia. In the course and conduct of its said business respondent corporations has been, and now is, competitively engaged with other corporations, individuals, partnerships, and firms in the sale of ice cream cones. However, in the metropolitan areas hereinbefore mentioned it has but one competitor, Harry Sandler, doing business as Sandler R-Good Cake Cone Company, hereinafter referred to as Sandler, with his principal office and place of business located at 4211 Menlo Drive, Baltimore, Maryland.

5. Respondent corporation manufactures and sells four different types of ice cream cones: (1) rolled sugar cones, (2) chocolate-coated rolled sugar cones, (3) cake cones, and (4) cake cup ice cream holders with a flat, rather conical, bottom. It sells its products principally to jobbers or distributors who resell to the retail trade. Rolled sugar cones manufactured by said respondent are sold and delivered primarily to such customers located in the States of Pennsylvania, Maryland, Virginia, New Jersey, Delaware, and the District of Columbia. Such sales constitute a relatively small percentage of respondent's total sales of ice cream cones (1½ percent).

6. The said Sandler is a relatively small manufacturer of ice cream cones whose sales are restricted to the said metropolitan areas, and prior to 1951 consisted exclusively in the sale of rolled sugar cones.

7. Beginning in May or June 1951, respondent corporation reduced its price for rolled sugar cones in the said metropolitan area from \$6.66 per thousand to \$5.00 per thousand while maintaining a price of \$7.16 per thousand for rolled sugar cones in the metropolitan Philadelphia area, including the States of Delaware and New Jersey. This action on the part of the respondent corporation was apparently in retaliation for the entry by Sandler in the cake cone business at or

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about that time and has continued from that date to the time of the taking of testimony in his area.

8. As a result of the price discrimination herein set forth in Paragraph 7, the said Sandler lost all of its sales of sugar cones to some of its jobber customers, some during the year 1951 and others during the succeeding years. The following table is illustrative of the effect upon the sales of Sandler to some of its distributors as a result of the foregoing discriminatory price of rolled sugar cones in the said metropolitan areas beginning in May or June 1951.

Sales of sugar cones by R-Good Cake Cone Company to certain jobber customers for the years 1950 through 1954

Name of jobber and location	1950	1951	1952	1953	1954
WASHINGTON, D. C.					
Berritt Distributing Company.....	\$7,642.16	\$4,953.35	\$317.82	None	None
BALTIMORE, MD.					
Becker Pretzel Bakery.....	2,293.37	1,147.50	None	None	None
Chef's Taste.....	400.20	473.07	27.00	None	None
Mann Company.....	574.12	198.00	None	None	None
Quality Distributing Company.....	2,426.46	1,539.10	None	None	None
HAGERSTOWN, MD.					
Weiss Bros.....	1,349.95	1,291.28	482.70	\$149.00	None

9. Beginning in November 1951, the said Sandler began to sell rolled sugar cones to the retail druggists trade. He also continued to sell rolled sugar cones to the retail outlets such as ice cream stores and frozen custard stands. The volume of business in rolled sugar cones in the said metropolitan areas of Washington and Baltimore by respondent corporation and Sandler during the period 1950 to 1954 and the percentage of such sales enjoyed by each competitor are set forth in the following tabulation:

Year	Total sales in area	Respondent Corporation		R-Good Cake Cone Company	
		Total sales	Percentage of total market	Total sales	Percentage of total market
1950.....	\$37,594.41	\$3,274.20	8.7	\$34,320.21	91.3
1951.....	35,245.26	4,314.50	12.3	30,930.76	87.7
1952.....	26,325.20	9,549.28	36.3	16,775.92	63.7
1953.....	27,222.87	11,302.63	41.5	15,920.24	58.5
1954.....	23,674.09	9,886.38	41.8	13,787.71	58.2

Said Sandler's total business during the period 1950-1954 showed a substantial increase due principally to increased sales of chocolate-coated rolled sugar cones which were sold by him to ice cream manu-

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facturers who prefilled them and sold them to retail outlets such as drug stores and confectionery stores.

10. Sandler's price for rolled sugar cones in May 1951 was \$6.80 per thousand to distributors. This price has been reduced to \$6.00 per thousand as a result of respondent corporation's discriminatory price of \$5.00 per thousand to distributors as hereinbefore described. Sandler has been able to maintain his price of \$7.00 per thousand to frozen custard stands and retail ice cream stores and \$8.00 per thousand to drug stores and confectionery stores.

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The effect of the discrimination in price by respondent corporation as herein found in Paragraph 7 may be substantially to lessen competition and definitely has injured competition with said Sandler and has tended to create a monopoly in the manufacture and sale of sugar cones in the respondent corporation in violation of Section 2 (a) of the Clayton Act, as amended. The evidence set forth in the foregoing findings of facts shows conclusively that the sales of respondent corporation's only competitor of rolled sugar cones in the area where they competed, substantially declined as a direct result of discriminatory price put into effect by the respondent corporation in May or June 1951 and continued since that time. This competitor although it lost its sales to distributors or wholesalers was only able to survive the adverse competitive condition resulting from the discriminatory price, by selling direct to drug stores and other customers of such distributors and increasing its business to other types of trade such as frozen custard stands and the sale of chocolate-coated cones to ice cream manufacturers. Furthermore respondent's percentage of total sales of rolled sugar cones in the metropolitan areas surrounding the cities of Baltimore and Washington has substantially increased even though its sales in this particular area is a small percentage of its total sales of ice cream cones throughout the United States. It is believed that Section 2 (a) of the Clayton Act was intended to reach just such a practice as respondent corporation has initiated and followed in this case. Although it was not completely successful in driving its smaller competitor Sandler out of business, as its president respondent Shapiro threatened at the time discriminatory price was launched, it was successful in inflicting serious injury to this lone competitor, and in the light of the well-known Federal Court decisions such a practice is a violation of Section 2 (a) of the Clayton Act.

Section 2 (a) of the Clayton Act provides that it shall be unlawful for any person engaged in commerce, in the course of such commerce "to discriminate in price between different purchasers of commodities

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of like grade and quality * * * where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injury, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination * * *." In a Federal Court decision, *E. B. Muller & Co., et al. vs. F.T.C.*, 142 F. 2d 511, 518, the court upheld an order of the Commission under the Clayton Act, as amended, where there was an injury to competition and a single competitor was involved, and there was in that case, as in the present case, an attempt to drive this lone competitor out of business. In another Federal Court case, *National Nut Company of California vs. Kelling Nut Co., et al.*, 61 F. Supp. 76, page 81, the facts were somewhat similar to the facts in the present case and the court held "a practice of underselling plaintiff in certain territory where plaintiff has an established business and maintaining a higher level of prices in other localities where competition with plaintiff or other companies is not so keen is a practice condemned by the anti-trust laws."

It is not believed, however, that it is necessary for the order in this case to include the individual respondent Shapiro although he is the principal stockholder and is responsible for the acts and practices set forth in the foregoing findings of fact. It is believed that the order in this case against the respondent corporation is adequate to prevent continuation of the illegal practice.

The outstanding case and the one relied upon by the attorney in support of the complaint for the inclusion of officers of respondent's individually in Commission's orders to cease and desist is that of *F.T.C. v. Standard Education Society, et al.*, 302 U.S., 112. In that case, however, the court held that there were circumstances, as disclosed by Commission's finding, when further efforts of these individual respondents to evade orders of the Commission might be anticipated, and under those circumstances it was proper for the Commission to include them in its cease and desist order. The court commented on the fact that the three individually named respondents acted with the same freedom as though no corporation existed and that the Commission was justified in reaching the conclusion that it was necessary to include the individuals in each part of its order, if the order was to be effective in preventing the unfair competitive practices which the Commission had found to exist. In the present case there are no such facts in the record. The respondent is a large responsible corporation and there is nothing in the record to indicate

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that there would be any attempt on the part of the respondent Shapiro to evade or not comply with the Commission's order to cease and desist.

It is believed that the order of the Commission should not be restricted to items covered by the specific allegations of the complaint and the evidence in the record. It is true that the only product as to which evidence has been received tending to indicate a violation of Section 2 (a) of the Clayton Act is rolled sugar cones, but in the light of Federal Court decisions the Commission is justified in issuing an order broad enough to include other types of ice cream cones.

Reference is made to *Hershey Chocolate Corporation v. F.T.C.*, 121 F. 2d 968, 971-2; *Lane v. F.T.C.*, 130 F. 2d 48. Also, in the General Motors case involving spark plugs, Docket No. 5620, where it was contended by respondents that the Commission's order should not cover all AC products since they were not specifically named in the complaint and the findings, the Commission rejected this contention and issued an order including "other related automotive parts and accessories." In another case, Moog Industries, Docket No. 5723, the Commission rejected a similar contention by including "piston rings" and "other related items" even though there was no evidence of price discrimination in the record on those items.

ORDER

It is ordered, That respondent The Maryland Baking Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of ice cream cones in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling ice cream cones to any purchaser at higher prices than the prices charged any other purchaser engaged in the same line of commerce where, in the sale of said cones to such purchaser charged the lower price, respondent The Maryland Baking Company is in competition with another seller.

It is further ordered, That the complaint against Joseph Shapiro, individually only, be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By SECRET, Commissioner:

This matter has come on for hearing on the appeals of counsel supporting the complaint and counsel for respondents from the initial decision of the hearing examiner filed January 30, 1956.

The complaint charges respondent, The Maryland Baking Company,¹ a Maryland corporation, located in Baltimore, Maryland, with violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, in the sale of rolled sugar cones in the metropolitan areas surrounding Baltimore, Hagerstown and Frederick, Maryland, and Washington, D. C., beginning in 1951. The complaint also names as a respondent, Joseph Shapiro, individually, and as treasurer of The Maryland Baking Company, alleging that he "is primarily responsible for the acts and practices hereinafter alleged to be unlawful."² Testimony was received in support of the complaint, but no testimony was offered in opposition thereto.

The Maryland Baking Company (hereinafter referred to as respondent corporation) is engaged in the business of manufacturing and selling ice cream cones for use, consumption, and resale throughout the United States and in the District of Columbia. Its sales of such products for the years 1950, 1951, and 1952 were approximately \$1,000,000 annually. About one-quarter of such sales were in the metropolitan areas mentioned above. Respondent corporation occupies a major position in the ice cream industry. It is engaged in this business on a nationwide scale, owning or controlling for such purpose the following companies: Eagle Cone Corporation, New York, New York; Northwest Cone Company, Inc., Chicago, Illinois; and the Maryland Baking Company of the Carolinas, Inc., Charlotte, North Carolina. In addition, it also owns capital stock in companies manufacturing and selling ice cream cones, including: Keystone Cone Company, Inc., Pittsburgh, Pennsylvania (preferred stock investment); 50 percent of the common stock of Maryland-Pacific Cone Company, Inc., Oakland, California, which corporation owns all of the common stock of the Pacific Coast Baking Company, Los Angeles, California.

Respondent corporation manufactures and sells four different types of ice cream cones: (1) rolled sugar cones, (2) chocolate-coated rolled sugar cones, (3) cake cones, and (4) cake cups. Its sales of these products are made principally to jobbers or distributors who resell to the retail trade. Rolled sugar cones manufactured by the respondent are sold and delivered to customers located in Pennsylvania, Maryland, Virginia, New Jersey, Delaware, and the District of Columbia. Its sales of rolled sugar cones are a relative small proportion of its total sales of ice cream cones, in the order of one and one-half percent.

¹ Erroneously named in the complaint as "Maryland Baking Company."

² Respondent, Joseph Shapiro, is also Chairman of the Board and a large stockholder in respondent corporation.

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Respondent corporation has only one competitor in the sale of ice cream cones in the metropolitan areas surrounding Washington and Baltimore, R-Good Cake Cone Company, a partnership composed of Harry Sandler, his brother and his son, located in Baltimore, Maryland. This company is a relatively small manufacturer of ice cream cones whose sales are restricted in general to the said metropolitan areas.

Beginning in May or June of 1951, respondent corporation reduced its price for rolled sugar cones in the metropolitan areas surrounding Washington and Baltimore from \$6.66 per thousand to \$5.00 per thousand. Meanwhile, its price for such cones in the Philadelphia metropolitan area and in the States of Delaware and New Jersey was maintained at \$7.16 per thousand. This action was apparently in retaliation for the entry of R-Good Cake Cone Company into the cake cone business at or about this same time. This pricing policy continued to the time testimony was taken in the case.

As a result of this discrimination in price, R-Good Cake Cone Company lost all of its sales of sugar cones to some of its jobber customers, as illustrated by the following table:

Sales of sugar cones by R-Good Cake Cone Company to certain jobber customers for the years 1950 through 1954

Name of jobber and location	1950	1951	1952	1953	1954
WASHINGTON, D. C.					
Berritt Distributing Company.....	\$7,642.16	\$4,953.35	\$317.82	None	None
BALTIMORE, MD.					
Becker Pretzel Bakery.....	2,293.37	1,147.50	None	None	None
Chef's Taste.....	400.20	473.07	27.00	None	None
Mann Company.....	574.12	198.00	None	None	None
Quality Distributing Company.....	2,426.46	1,539.10	None	None	None
HAGERSTOWN, MD.					
Weiss Bros.....	1,349.95	1,291.28	482.70	\$149.00	None

R-Good Cake Cone Company, after 1951, began to sell rolled sugar cones to retail drug stores and continued to sell to retail outlets such as ice cream stores and frozen custard stands, but, nevertheless, its sales of rolled sugar cones declined while those of respondent corporation increased in the said metropolitan areas surrounding Washington and Baltimore. The following tabulation sets forth the volume of business in rolled sugar cones in the said metropolitan areas during the period 1950 to 1954 and the percentage of such sales enjoyed by the two companies:

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Year	Total sales in area	Respondent corporation		R-Good Cake Cone Company	
		Total sales	Percent- age of total market	Total sales	Percent- age of total market
1950.....	\$37,594.41	\$3,274.20	8.5	\$34,320.21	91.3
1951.....	35,245.26	4,314.50	12.3	30,930.76	87.7
1952.....	26,325.20	9,549.28	36.3	16,775.92	63.7
1953.....	27,222.87	11,302.63	41.5	15,920.24	58.5
1954.....	23,674.09	9,886.38	41.8	13,787.71	58.2

As a result of the price discrimination of respondent corporation, R-Good Cake Cone Company's sales of rolled sugar cones declined from in excess of \$34,000 in 1950 to something more than \$13,000 in 1954. At the same time, respondent corporation tripled its sales of rolled sugar cones in the Metropolitan areas affected. Additionally, though R-Good Cake Cone Company was able to minimize the adverse effect resulting from the price discrimination by selling directly to drug stores and other retail customers, it nevertheless was forced to reduce its price on rolled sugar cones to distributors from \$6.80 per thousand to \$6.00 per thousand, and even then was practically foreclosed from the jobber market. Though the total business of R-Good Cake Cone Company increased from 1950 to 1954, this increase was due principally to sales of chocolate coated rolled sugar cones to ice cream manufacturers who prefilled them and sold them to retail outlets as distinguished from the rolled sugar cones which are sold to retailers and then filled for sale to consumers.

The hearing examiner in his initial decision concluded that respondent corporation had violated Section 2 (a) of the Clayton Act, as amended, but that the complaint against Joseph Shapiro, individually, should be dismissed. Accordingly he ordered that:

respondent The Maryland Baking Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution of ice cream cones in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling ice cream cones to any purchaser at higher prices than the prices charged any other purchaser engaged in the same lines of commerce where, in the sale of said cones to such purchaser charged the lower price, respondent The Maryland Baking Company is in competition with another seller.

It is further ordered, That the complaint against Joseph Shapiro, individually only, be, and the same is dismissed.

In its appeal from the hearing examiner's initial decision, respondent corporation first contends that the evidence shows there was no probability of a substantial lessening of competition. We disagree.

The evidence clearly shows that, in the metropolitan areas in which respondent corporation charged lower prices on rolled sugar cones, it substantially increased its sales of such cones at the expense of existing competition. The sole competitor of respondent corporation in the said areas lost all of its sales of rolled sugar cones to some of its former jobber accounts as a direct result of the price discrimination. It is clear from the record that the competitor, at the time of the taking of the testimony, was selling rolled sugar cones to only one of its former jobber customers, whereas, respondent corporation, after effecting the price discrimination, began selling said products to many such accounts. It is apparent that respondent corporation by its action, virtually restricted to itself the jobber market for rolled sugar cones in the metropolitan areas surrounding Washington and Baltimore. The showing that the competitor did not lose all of its sales of rolled sugar cones because of its direct distribution to retail accounts does not detract from the fact that it was practically precluded from making sales of such cones in the jobber channel of distribution. The effect of the action by respondent corporation was to substantially lessen and injure competition in the line of commerce affected.

Respondent argues that the effect of the discrimination, at most, was to reduce the competitor's share of the rolled sugar cone market from 91.3% to 58.2%, which was to terminate a monopoly and create a competitive market. While the competitor, R-Good Cake Cone Company, had a major share of such sales prior to the effective date of the discrimination, it was, and continued to be, a small business by comparison with respondent corporation. The fact that the competitor could not maintain its relative position in the face of price cuts by the larger company shatters any contention that it had a monopolistic hold on the market. The Clayton Act proscription as to discrimination in price is not nullified merely because of a showing that the existing competition in a particular market had a major share of the sales of the product involved.

The appeal of respondent corporation also questions the scope of the hearing examiner's order. In the first place, it is contended, since the evidence and the findings are confined to rolled sugar cones, that it is beyond the Commission's statutory power to prohibit price discrimination in other types of ice cream cones. In carrying out its function of preventing illegal practices in the future, the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470. The courts have consistently upheld Commission cease and desist orders relating not only to the products complained of, but other similar products as well. *American*

Tack Co., Inc., et al. v. F.T.C., 211 F. 2d 239; *Consumer Sales Corp. v. F.T.C.*, 198 F. 2d 404, 408, certiorari denied, 344 U.S. 912; *Hershey Chocolate Corporation v. F.T.C.*, 121 F. 2d 968, 971; *P. Lorillard Co. v. F.T.C.*, 186 F. 2d 52, 58-59; *Eugene Dietzgen Co. v. F.T.C.*, 142 F. 2d 321, 329-330, certiorari denied, 323 U.S. 730. The Commission is entitled to make its order broad enough to prevent evasion. *P. Lorillard Co. v. Federal Trade Commission*, *supra*, and an order, in this case, covering only rolled sugar cones, a small part of respondent corporation's total business in cone products, would not effectively prevent the practice found to be unlawful. The hearing examiner properly applied the order to price discrimination in the sale or distribution by respondent corporation of ice cream cone products.

It is also contended by respondent corporation that the order is too broad in its geographic scope since the evidence relates to an effect on competition solely in the areas in which it charged the lower price and there is no evidence as to what might be the effect on competition as to a price reduction elsewhere. The practice, however, of a national organization systematically charging lower prices, in first one area and then another, and thereby injuring local competitors, was one which Section 2 (a) of the Clayton Act, as amended, was designed to prevent. An order would serve little purpose in prohibiting an area price discrimination in only the territory where a respondent was found to have charged a lower price, leaving such respondent free to engage in a similar practice in other areas. Such orders are necessarily general and must be broad enough to prevent evasion. *E. B. Muller Co. v. F.T.C.*, 142 F. 2d 511, 520. There is no validity to the argument that this order requires respondent corporation to have one price throughout the United States. The provisos of Section 2 of the Clayton Act, as amended, such as that permitting, in effect, price differences which merely make allowance for differences in the cost of manufacture, sale or delivery, are implicit in the order. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 475-476.

The argument of respondent corporation that the order should be limited to the predatory type of price-cut charged in the complaint is also without merit. The complaint charges a violation of Section 2 (a) of the Clayton Act, as amended, in the sale of rolled sugar cones. Though relevant, the testimony that the declared purpose of the discrimination was to put a competitor out of business, if that indicates a predatory act, is not essential to the conclusion of illegality. It is sufficient that the required effect on competition was shown. The order, therefore, may properly prohibit such discrimination whether with predatory purpose or not. *E. B. Muller Co., et al. v. Federal Trade Commission*, *supra*.

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Order

Counsel supporting the complaint appeals from the hearing examiner's initial decision dismissing the complaint as to individual respondent Joseph Shapiro. The record does not reveal that Joseph Shapiro dominated respondent corporation or that he, in an individual capacity, was responsible for the acts and practices alleged to be unlawful. That he was Chairman of the Board and Treasurer of respondent corporation is not enough to show an individual responsibility. There is no showing, moreover, of any special circumstances which would indicate a likelihood that Joseph Shapiro would cause an evasion of the order against the corporation. He is, in any event, bound by the order as a corporate officer. In the absence of some special reason for naming Joseph Shapiro personally, the order against the corporation, and its officers, representatives, agents, and employees, would seem to be adequate.

The appeals of both the corporate respondent and counsel supporting the complaint are accordingly denied.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent, The Maryland Baking Company, and counsel supporting the complaint from the hearing examiner's initial decision, and briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying the appeals:

It is ordered, That the findings, conclusions, and order contained in the initial decision be, and they hereby are, adopted as those of the Commission.

It is further ordered, That respondent, The Maryland Baking Company, 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 contained in the initial decision.

Complaint

52 F. T. C.

IN THE MATTER OF

JOS. MARTINSON & CO., INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d)
OF THE CLAYTON ACT*Docket 6469. Complaint, Nov. 21, 1955—Decision, June 30, 1956*

Consent order requiring distributors in New York City of coffee and tea products, with total sales in 1955 of \$14,000,000, to cease making to any customer such payments as the \$3,300 it made to Food Fair Stores, Inc., of Philadelphia, Pa., for advertising its products, unless they were made on proportionally equal terms to all competitors of the recipient.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Andrew C. Goodhope and *Mr. Fredric T. Suss* for the Commission.

Phillips, Nizer, Benjamin & Krim, 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 described, has violated the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Jos. Martinson & Co., 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 190 Franklin Street, New York, New York.

PAR. 2. Respondent is now and has been engaged in the business of producing, selling and distributing a line of coffee and tea products, the principal brands of which are sold under the trade names "Martinson's," "Jomar" and "Aborn's." In excess of 90% of respondent's products are distributed directly to retail grocery stores, including large retail chain store organizations, and the balance of respondent's products are sold through brokers and grocery wholesale distributors. Total sales made by respondent are substantial, amounting to approximately \$14,000,000 in the year 1955.

PAR. 3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended. Respondent ships its products, or causes them to be transported, from its principal place of business in the State of New