

Complaint

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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

York to customers located in the same and other States of the United States and the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has paid, or contracted for the payment of, something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the distribution of respondent's products.

PAR. 5. For example, during the year 1955 respondent contracted to pay and did pay \$3,300.00 to Food Fair Stores, Inc., of Philadelphia, Pennsylvania, as compensation or as an allowance for advertising or other service or facility furnished by or through such customer in connection with its offering for sale or sale of products sold it by the respondent. Such compensation or allowance was not offered or otherwise made available by respondent on proportionally equal terms to all other customers competing with Food Fair Stores, Inc., in the sale and distribution of respondent's products.

PAR. 6. The acts and practices of the respondent, as alleged above, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of subsection (d) of section 2 of the Clayton Act (15 U.S.C. 13), as amended by the Robinson-Patman Act, the Federal Trade Commission on November 21, 1955, issued and subsequently served its complaint in this proceeding against respondent Jos. Martinson & Co., Inc., a corporation 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.

After three hearings at which considerable evidence in support of the complaint was introduced in the record, there was on May 8, 1956, submitted to the undersigned Hearing Examiner an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; agrees that the answer to respondent herein to the complaint shall be considered as having been withdrawn; waives any further procedural steps before the Hearing Examiner and the Commission; waives the

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making of findings of fact and conclusions of law; and waives 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. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The Hearing Examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent, Jos. Martinson & Co., Inc., is a corporation existing and doing business under 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.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Jos. Martinson & Co., 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 coffee and tea products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other service or facilities furnished by or through such customer, in connection with the handling, offering for resale or resale of products sold to him by respondent, unless such payment is affirmatively offered or otherwise made available to all competing customers on proportionally equal terms.

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Decision

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 30th day of June 1956, become the decision of the Commission; and, accordingly:

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.

STIPULATIONS

DIGEST OF STIPULATIONS EFFECTED AND HANDLED THROUGH THE COMMISSION'S DIVISION OF STIPU- LATIONS

02794.¹ Cigars—Composition, Price Reduction.—Stipulation No. 02794 has been amended so that it now reads: H. Fendrich, Inc., a corporation, 101 Oakley Street, Evansville, Ind., vendor-advertiser, was engaged in selling certain cigars designated "La Fendrich."

In a stipulation filed and approved by the Federal Trade Commission the vendor-advertiser agreed, in connection with the dissemination of future advertising, to cease and desist from representing directly or by implication:

(a) That La Fendrich cigars contain an "imported Havana-rich long filler" or from making any other representation referring to or designating the origin of the filler tobaccos of said cigars, except that as to cigars containing a substantial amount of Havana tobacco (1) the word "Havana" may be used as a part of a descriptive statement setting forth the origin of all of the filler tobaccos contained in said cigars in the order of their predominance by weight and in letters of equal size and conspicuousness or (2) such cigars may be described, designated or referred to as "Blended with Havana," provided that the words "blended with" are set out in immediate connection or conjunction with the word "Havana" and in letters of equal size and conspicuousness.

(b) That the price of this cigar was formerly ten cents and is now only five cents, or any other representation indicating a reduction in price unless in fact the price of the particular cigar referred to has recently been the price stated and the reduction in price has only recently become effective, or unless the date such reduction in price was made be set forth or stated immediately in conjunction with the former price and in letters of equal size and conspicuousness or with equal emphasis.

The said H. Fendrich Inc. agrees not to publish or cause to be published any testimonial containing any representation contrary to the foregoing agreement.

¹ Amendment. See 32 F. T. C. 1806.

It is further stipulated and agreed, That as thus amended all of the terms and provisions of Stipulation No. 02794 shall remain in full force and effect. (1-15982, Apr. 12, 1956.)

8527.² Chemical Fertilizer—Unique Nature, Approval, Comparative Merits and Prices, etc.—Stern's Nurseries, Inc., a New York corporation, with its principal place of business in Geneva, N. Y., and Otto Stern an officer thereof, engaged in the offering for sale, sale and distribution in commerce, of a chemical fertilizer designated "Miracle-Gro," entered into an agreement that in connection with the offering for sale, sale and distribution of that product or any other product containing substantially the same ingredients or possessing substantially similar properties, they and each of them will cease and desist from representing directly or by implication:

1. That such product is a new discovery or a new development in plant nutrition, or that it is exclusive or the only product of its kind on the market;
2. That said product has been the subject of extensive tests in leading experimental greenhouses, botanical gardens or Agricultural Experiment Stations;
3. That said product is or has been approved by Agricultural authorities;
4. That said product is 100% plant food;
5. That the application of Miracle-Gro will not burn plants unless expressly limited to its use as directed;
6. That one pound of Miracle-Gro makes 300 pounds of liquid fertilizer or any other amount that is in excess of the actual amount of fertilizer present;
7. That one pound of Miracle-Gro is equivalent to 100 pounds of other fertilizer or to any number of pounds that is contrary to the fact;
8. That Miracle-Gro costs less than other commercial fertilizers;
9. That said product contains all the elements necessary for the growth or feeding of plants;
10. That vitamins are necessary for the growth, production or feeding of plants;
11. That the application of Miracle-Gro will cause plants to grow under any circumstances other than a lack of fertilizer;
12. That other fertilizers or plant foods will not produce as satisfactory results as Miracle-Gro.

It is further agreed, That this substitute stipulation cancels and supersedes Stipulation No. 8527 approved by the Federal Trade Commission on February 2, 1954.

In this substitute stipulation provisions 1, 2, 3 and 4, together with the pertinent claims and recitations, have been incorporated without

² Substitute stipulation. See 50 F. T. C. 1159.

change from Stipulation No. 8527; and provisions 5, 6, 7 and 8 are revisions of provisions 4 and 6 of said Stipulation No. 8527.

The stipulation provides that the agreement is for settlement purposes only and does not constitute an admission by Stern's Nurseries, Inc. and Otto Stern that they have engaged in any method, act or practice violative of law. (5220003, June 26, 1956.)

8545.³ **Margarine—Nature as Dairy Product.**—Stipulation No. 8545 has been amended so that it now reads:

Safeway Stores, Inc. and Salem Commodities, Inc., a subsidiary of Safeway Stores, Inc. and operating under the name of Coldstream Products Co., are Maryland corporations, with their principal offices and places of business located in Oakland, Calif. Safeway Stores, Inc. and Salem Commodities, engaged in the business of advertising, offering for sale and selling in commerce, an oleomargarine designated "Sunnybank Margarine," entered into an agreement that each of them, will cease and desist from disseminating or causing to be disseminated any advertisement for oleomargarine in which:

(a) Any statement, word, grade, designation, design, device, symbol, sound, or any combination thereof is used which represents or suggests that said product is a dairy product provided, however, that nothing contained in this agreement shall prevent Safeway Stores, Inc. and Salem Commodities, Inc., or either of them, from the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product or of a truthful statement that said product contains milk or any other dairy product provided the percentage thereof contained is clearly and conspicuously set forth.

It is further stipulated and agreed, That as thus amended all of the terms and provisions of Stipulation No. 8545 shall remain in full force and effect. (5420341, Nov. 8, 1955.)

8545.⁴ **Margarine—Nature as Dairy Product.**—Stipulation No. 8545 has been further amended so that it now reads:

Safeway Stores, Inc. and Salem Commodities, Inc., a subsidiary of Safeway Stores, Inc. and operating under the name of Coldstream Products Co., are Maryland corporations, with their principal offices and places of business located in Oakland, Calif. Safeway Stores, Inc. and Salem Commodities, Inc., engaged in the business of advertising, offering for sale and selling in commerce, an oleomargarine designated "Sunnybank Margarine," entered into an agreement that each of them, will cease and desist from disseminating or causing to be disseminated any advertisement for oleomargarine in which:

(a) Any statement, word, grade designation, design, device, symbol, sound, or any combination thereof is used which represents or

³ Amendment. See 51 F. T. C. 1426.

⁴ Further amendment. See 51 F. T. C. 1426 and amendment in this volume above, immediately preceding.

suggests that said product is a dairy product; provided however, that nothing contained in this agreement shall prevent Safeway Stores, Inc. and Salem Commodities, Inc., or either of them, from the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product. *It is further stipulated and agreed*, That as thus amended all of the terms and provisions of Stipulation No. 8545 shall remain in full force and effect. (5420341, Apr. 24, 1956.)

8645. Liquid Fertilizer—Results, Unique Nature, Relevant Facts, etc.—“Na-Churs” Plant Food Co., an Ohio corporation, with its place of business in Marion, Ohio, engaged in the business of offering for sale, selling and distributing in commerce, a fertilizer in liquid form designated “‘Na-Churs’ Liquid Fertilizer,” entered into an agreement that in connection with the offering for sale, sale and distribution of that product or any other product of substantially the same composition, it will cease and desist from representing directly or by implication:

1. Through use of the term “results guaranteed” or otherwise, that the product will assure an increase in the growth or yield of plants regardless of other factors or conditions;

2. That the product is more effective than any other fertilizer;

3. That the nutrients of the product are absorbed faster and more efficiently through the leaves than through the roots, or that leaf feeding is superior to root feeding;

4. That all the ingredients are absorbed when the product is applied on foliage, or that the foliage of all plants effectively absorbs the product.

5. That the product is a new plant food or is substantially different from other liquid fertilizers on the market;

6. That the product will not burn plants unless expressly limited to its use as directed. (5420652, July 8, 1955.)

8646. Sulphur Soap—Therapeutic Properties.—Kay Preparations Co., Inc., a New York corporation, with its principal place of business located in New York, N. Y., engaged in the business of offering for sale and selling in commerce, preparations designated “Kay Genuine Colloidal Sulphur Soap” also known as “Kay 301 Soap with Genuine Colloidal Sulphur” and “Kay Formula 301 Clear-Skin Lotion” the combination of the two preparations being designated “Kay 301,” entered into an agreement that it will cease and desist from disseminating or causing to be disseminated, any advertisement for those medicinal preparations or any other preparations of substantially the same compositions or possessing substantially the same properties, whether sold under those names or any other names, which represents directly or by implication: