

Complaint

53 F.T.C.

IN THE MATTER OF
BYMART-TINTAIR, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)
OF THE CLAYTON ACT

Docket 6521. Complaint, Mar. 5, 1956—Decision, Sept. 25, 1956

Consent order requiring a manufacturer of hair coloring preparations in Newark, N.J., to cease violating Sec. 2(d) of the Clayton Act by paying certain of its customers for advertising its products on television programs, while not making such payments available on proportionally equal terms to all their competitors.

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

Mr. Donald R. Moore for the Commission.

Hughes, Hubbard, Blair & Reed, by *Mr. Richard W. Hogue, Jr.*, *Mr. Kalman A. Oravetz* and *Mr. Allen S. Hubbard, Jr.*, of New York City, for respondent.

COMPLAINT

This complaint is issued by the Federal Trade Commission against the respondent, Bymart-Tintair, Inc., a corporation, because the Commission has reason to believe the corporation has violated the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C., Section 13). The charges are as follows:

PARAGRAPH 1. Bymart-Tintair, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Its factory and general offices are at 250 Hillside Avenue, Newark, New Jersey. It also maintains executive offices at 677 Fifth Avenue, New York, New York.

PAR. 2. Bymart-Tintair, Inc., is engaged in the manufacture and sale of hair coloring preparations, including Tintair, Touch-Up and Lightening Change. It sells these products to customers with places of business located throughout the several states of the United States and in the District of Columbia for resale within the United States to consumers. Among these customers are retail drug chains, independent retail drug stores, department stores, variety stores and beauty salons.

PAR. 3. Bymart-Tintair is now, and for many years has been, engaged in commerce, as that term is defined in the Clayton Act. It transports, or causes to be transported, its products from the state of manufacture to customers located in other States of the United States and the District of Columbia, as well as in the state of manufacture. There is, and has been, a constant stream of trade and

commerce in these products among the various states and the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce during the past five years, Bymart-Tintair has contracted to pay, and has paid, money, goods or other things of value to or for the benefit of certain of its customers. It has made these payments as compensation or in consideration for services or facilities furnished by or through these customers in connection with the sale or offering for sale of products manufactured, sold or offered for sale by Bymart-Tintair. But such payments or consideration have not been available on proportionally equal terms to all other customers competing in the sale and distribution of such products.

PAR. 5. Transactions between Bymart-Tintair and United Cigar-Whelan Stores Corporation provide an example of the discriminations alleged in Paragraph Four. United-Whelan operates a chain of retail drug stores in New York, New York, as well as in other cities. Bymart-Tintair has paid to United-Whelan, directly or indirectly, substantial sums of money for services and facilities furnished it by United-Whelan in the form of advertising of Bymart-Tintair products on television programs sponsored by United-Whelan in New York, New York. These payments have been made, and the services and facilities furnished, in connection with the handling, sale and offering for sale of Bymart-Tintair products.

These payments were not available, however, on proportionally equal terms to all other customers competing in the distribution and sale of Bymart-Tintair products.

PAR. 6. The acts and practices of Bymart-Tintair, as alleged in this complaint, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C., Section 13).

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

This proceeding was initiated March 5, 1956. The complaint charges that respondent Bymart-Tintair, Inc., a corporation, has violated the provisions of subsection (d) of Section 2 of the Clayton Act as amended (U.S.C., Title 15, Sec. 13) by contracting to pay and paying money, goods or other things of value to certain of its customers as compensation or in consideration for services or facilities furnished by or through them in connection with the sale of respondent's products, without making such payment or consideration available on proportionally equal terms to all other customers competing in the sale and distribution of such products.

Specifically, the complaint alleges that, in connection with the handling, sale and offering for sale of respondent's products, re-

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spondent has paid to United Cigar-Whelan Stores Corporation substantial sums of money for services and facilities furnished it by said corporation in the form of advertising of respondent's products on television programs sponsored by United-Whelan, and that such or similar payments were not available on proportionally equal terms to all other of respondent's customers competing in the sale and distribution of its products.

On May 14, 1956, respondent filed a motion that the complaint herein be dismissed. This motion was certified to the Commission, and by the Commission denied in an order which remanded the proceeding to the Hearing Examiner for further proceedings in the usual course.

On July 20, 1956, respondent, its counsel, and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director of the Commission's Bureau of Litigation and transmitted to the Hearing Examiner for his consideration.

The agreement identifies respondent Bymart-Tintair, Inc. as a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 15 West 44th Street, New York, New York.

The agreement provides, among other things, that said respondent admits all the jurisdictional facts alleged in the complaint and that the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; 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 the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by said respondent that it has violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent, in said agreement, waives any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of its rights to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully covers all the issues raised in the complaint, and adequately prohibits the acts and practices therein alleged to be in violation of Section 2(d) of the Clayton Act as amended. Accordingly, the Hearing Examiner finds this proceeding to be in the public interest, and accepts the Agreement Containing Consent Order To Cease And Desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent Bymart-Tintair, 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 in commerce (as "commerce" is defined in the Clayton Act) of hair coloring preparations or other cosmetic products, do forthwith cease and desist from:

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

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 25th day of September, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Bymart-Tintair, Inc., a corporation, 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.

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IN THE MATTER OF
JOHNSON & JOHNSON

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)
OF THE CLAYTON ACT

Docket 6523. Complaint, Mar. 5, 1956—Decision, Sept. 27, 1956

Consent order requiring a manufacturer of surgical dressings, first aid kits, etc. in New Brunswick, N.J., to cease violating Sec. 2(d) of the Clayton Act by paying certain customers for advertising its products on television programs while not making such payments available on proportionally equal terms to their competitors.

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

Mr. Donald R. Moore for the Commission.

Mr. Herbert E. Bailey of New Brunswick, N.J., and *Rogers, Hoge & Hills*, by *Mr. Andrew J. Graham*, of New York City, for respondent.

COMPLAINT

This complaint is issued by the Federal Trade Commission against the respondent, Johnson & Johnson, a corporation, because the Commission has reason to believe the corporation has violated the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C., Section 13). The charges are as follows:

PARAGRAPH 1. Johnson & Johnson is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Its principal office is at 500 George Street, New Brunswick, New Jersey. It operates manufacturing plants in New Brunswick, Metuchen and Cranford, New Jersey, and in Chicago, Illinois.

PAR. 2. Johnson & Johnson is engaged in the manufacture and sale of products in these categories: surgical dressings, first aid kits, baby products, dental soft products and foot products. It sells these products to customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Among these customers are retail drug chains, independent retail drug stores and department stores.

PAR. 3. Johnson & Johnson is now, and for many years has been, engaged in commerce, as that term is defined in the Clayton Act. It transports, or causes to be transported, its products from the state of manufacture to customers located in other States of the United States and in the District of Columbia, as well as in the state of