

Complaint

IN THE MATTER OF
THE BORDEN COMPANY ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2 (a) OF THE CLAYTON ACT

Docket 6737. Complaint, Mar. 8, 1957—Decision, Nov. 13, 1957

Consent order requiring a manufacturer and processor of fluid milk and other dairy products and two of its subsidiaries—one the successor of the other in handling such products in the areas concerned and with an annual business therein of approximately \$14,000,000—to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act through charging customers in Wilmington, Del., for fluid milk prices substantially lower than those charged customers in Pennsylvania and New Jersey, and also through giving favored customers cash purchase discounts of 2%.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Lewis F. Depro for the Commission.

Mr. Cecil I. Crouse and *Dewey, Ballantine, Bushby, Palmer & Wood*, by *Mr. John E. F. Wood*, of New York City, for The Borden Co.

Fox, Rothschild, O'Brien & Frankel, by *Mr. Daniel Lowenthal*, of Philadelphia, Pa., for Sylvan Seal Milk, Inc. and 612 Corporation.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and more particularly designated and described hereinafter, have violated and are now violating the provisions of Section 2(a) of the Clayton Act (U.S.C. Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent The Borden Company, sometimes hereinafter referred to as respondent Borden, is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, New York, New York.

Respondent Sylvan Seal Milk, Inc., sometimes hereinafter referred to as respondent Pennsylvania corporation, is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at 612 South 24th Street, Philadelphia, Pennsylvania. Said respondent was incorporated on April 13, 1956.

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Respondent 612 Corporation, sometimes hereinafter referred to as respondent Delaware corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 612 South 24th Street, Philadelphia, Pennsylvania. Said respondent was incorporated in January 1932, as Sylvan Seal Milk, Inc., and on or about May 1, 1956, its name was changed to 612 Corporation.

PAR. 2. Respondent Borden has been and is now engaged, throughout the United States, in the purchase, manufacture, processing, sale and distribution of fluid milk and other dairy products including, but not limited to, cheese, cream, buttermilk, chocolate milk and ice cream.

Respondent 612 Corporation, under the name of Sylvan Seal Milk, Inc., a Delaware corporation, from 1932 to 1956, has been engaged in the purchase, manufacture, processing, sale and distribution of fluid milk and other dairy products. Its plant has been and is now located at 612 South 24th Street, Philadelphia, Pennsylvania.

Respondent Pennsylvania corporation has been since on or about May 1, 1956, and is now operating the business of the purchase, manufacture, processing, sale and distribution of fluid milk and other dairy products, which business prior to that time was operated by respondent Delaware corporation.

Said respondents have sold and distributed and respondents Borden and Pennsylvania corporation now sell and distribute fluid milk and other dairy products, at wholesale, to supermarkets and other retail outlets including grocery stores. The annual sales of respondents Delaware and Pennsylvania corporations have approximated \$14,000,000.

PAR. 3. As a result of negotiations beginning in 1955, respondent Borden on or about April 13, 1956, acquired ownership and control of Sylvan Seal Milk, Inc., of Delaware, through the acquisition of all property, assets and rights of the latter, and on or about May 1, 1956, caused the name of the said Sylvan Seal Milk, Inc., of Delaware to be changed to respondent 612 Corporation.

Also on or about May 1, 1956, respondent Borden caused to be organized under the laws of the State of Pennsylvania the respondent Sylvan Seal Milk, Inc., of Pennsylvania, which is a wholly owned and controlled subsidiary of respondent Borden.

The business formerly conducted by Sylvan Seal Milk, Inc., of Delaware has been since about May 1, 1956, conducted by respondent Sylvan Seal Milk, Inc., of Pennsylvania. Respondent Borden has through ownership of the business exercised authority and con-

trol over said business by formulating and directing the policies and operations thereof, and has entered into contracts with the principal officers of the said Sylvan Seal Milk, Inc., of Delaware, providing for their employment by respondent Borden and their continuation in the business.

PAR. 4. Respondents in the course and conduct of their said business are engaged in commerce as "commerce" is defined in the Clayton Act in that they sell and distribute fluid milk and other dairy products to purchasers thereof located in states other than the state of origin of shipment and cause such products, when sold, to be shipped and transported from their place of business in the state of origin to purchasers located in other states. There is now and has been a constant course and flow of trade and commerce in such products between respondents in the state of origin and purchasers located in states other than the state of origin and respondents are, therefore, subject to the jurisdiction of the Federal Trade Commission.

PAR. 5. In the course and conduct of their said business respondents have been, and respondents Borden and Pennsylvania corporation are now, in competition with others in the sale and distribution in commerce of fluid milk and other dairy products, except as such competition has been substantially lessened by the pricing practices of respondents hereinafter alleged.

Some of the respondents' customers are in competition with each other and with customers of competitors of respondents in the purchase and resale of fluid milk and other dairy products.

PAR. 6. Respondents, either directly or indirectly, have been and respondents Borden and Pennsylvania corporation are now discriminating in price between different purchasers of fluid milk by selling such products to some purchasers at substantially higher prices than they sell such products of like grade and quality to other purchasers, some of whom are engaged in competition with the less favored purchasers in the resale of such products.

For example, since about June 1955, respondents have charged, and respondents Borden and Pennsylvania corporation do now charge, prices for the sale of fluid milk in half gallon and quart containers in the Wilmington, Delaware, area which prices have been and are lower than those charged by said respondents for the sale of fluid milk of like grade and quality to purchasers in Pennsylvania and New Jersey. Such differences in price have ranged as high as 5 to $7\frac{1}{2}$ cents per half gallon or, on a quart basis, from $2\frac{1}{2}$ to $3\frac{3}{4}$ cents per quart.

As of October 1956, respondents Borden's and Pennsylvania corporation's prices for fluid milk in the Wilmington area were 7 cents less per half gallon than for the same quantity of fluid milk of like grade and quality sold to purchasers in Pennsylvania.

PAR. 7. Respondents have further discriminated, and respondents Borden and Pennsylvania corporation do now discriminate, in price between purchasers by granting discounts for cash of 2% for the sale of fluid milk of like grade and quality to some purchasers and not to others, some of whom, though not receiving the benefit of the cash discount, are nevertheless in competition in the resale of such milk with some of those purchasers who do receive the benefit of a lower price in the form of cash discounts.

PAR. 8. The discrimination in price on the part of respondents being substantial, it is alleged that the effect thereof may be substantially to lessen competition and to tend to create a monopoly in the respective lines of commerce in which respondents and the purchasers receiving the preferential prices are engaged and to tend to prevent, injure and destroy competition between respondents and their competitors and between and among purchasers of such fluid milk from respondents.

PAR. 9. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Clayton Act, subsection (a) of section 2 (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, the Federal Trade Commission on March 8, 1957, issued and subsequently served its complaint in this proceeding against respondents The Borden Company, a corporation existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 350 Madison Avenue, New York, New York; Sylvan Seal Milk, Inc., a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania; and 612 Corporation, a corporation existing and doing business under and by virtue of the laws of the State of Delaware. The office and principal place of business of the last two named respondents is at 612 South 24th Street, Philadelphia, Pennsylvania.

On September 25, 1957, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the

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record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they 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 respondents that they have 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 respondents, 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 The Borden Company is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 350 Madison Avenue, New York, New York.

Respondent Sylvan Seal Milk, 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 612 South 24th Street, Philadelphia, Pennsylvania.

Respondent 612 Corporation is 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 612 South 24th Street, Philadelphia, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered. That respondents Sylvan Seal Milk, Inc., a corporation, and 612 Corporation, a corporation and their successors or

assigns, and their respective officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of fluid milk in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in price by selling fluid milk of like grade and quality to any purchaser at a price which is lower than the price charged any other purchaser in the same line of commerce:

(1) Where such lower price undercuts the price at which the purchaser charged the lower price may purchase fluid milk of like grade and quality from another seller; or

(2) Where any purchaser who does not receive the benefit of the lower price does in fact compete in the resale of such product with the purchaser who does receive the benefit of the lower price.

It is further ordered. That respondent The Borden Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from directing or suggesting or participating in any conduct, on the part of respondent Sylvan Seal Milk, Inc. or respondent 612 Corporation or their successors or assigns, and their respective officers, representatives, agents and employees, constituting a violation of this order.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 13th day of November, 1957, become the decision of the Commission; and, accordingly:

It is ordered. That the respondents herein 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 to cease and desist.

Decision

IN THE MATTER OF
HIRAM B. HUNDLEY DOING BUSINESS AS
BEN HUNDLEY

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

Docket 6815. Complaint, June 7, 1957—Decision, Nov. 13, 1957*

Consent order requiring a seller in Washington, D.C., to cease advertising falsely in newspapers that automobile and truck tires into which he had cut additional grooves to give the appearance of snow tires, were brand new, factory built, 100 level, first line snow and slush tires, and that the District of Columbia law required chains or snow tires on vehicles driving on certain streets when the weather warranted them.

Mr. Michael J. Vitale for the Commission.

Mr. Frederick Stohlman, of Washington, D.C., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued June 7, 1957, charges the respondent Hiram B. Hundley, an individual, trading and doing business as Ben Hundley, with violation of the Federal Trade Commission Act in connection with the selling and distributing of new and used automobile and truck tires. Thereafter, on August 28, 1957, this Hearing Examiner issued an order amending the complaint by removing as respondent said individual, and substituting in lieu thereof Ben Hundley Tires, Inc., a corporation, existing and doing business under and by virtue of the laws of the District of Columbia, and Hiram B. Hundley, individually and as principal officer of said corporate respondent. The office and principal place of business of both respondents is located at 3446 14th Street, N. W., Washington, D.C.

Subsequently, on September 6, 1957, respondents entered into an agreement for consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all the jurisdictional allegations of the complaint, as amended, and agreed that the record herein may be taken as though the Commission had

* Amended Aug. 28, 1957.