

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.

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IN THE MATTER OF  
PANGBURN COMPANY, INC.

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

*Docket 7447. Complaint, Mar. 17, 1959—Decision, July 15, 1959*

Consent order requiring a manufacturer of chocolates in Fort Worth, Tex., selling almost exclusively to drugstores, to cease price discrimination in violation of Sec. 2(a) of the Clayton Act by allowing drug chain customers to combine purchases of their various outlets and thus receive preferential prices ranging from one percent on yearly purchases of from \$1,000 to \$1,999, to ten percent on \$10,000 and up, while competing non-chain customers—frequently buying in much greater volume than an individual chain outlet—received no discount at all or, at best, a much smaller one.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Pangburn Company, Inc., hereinafter sometimes referred to as respondent or as respondent Pangburn, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1301 West Seventh Street, Fort Worth, Texas.

PAR. 2. Respondent Pangburn is engaged in the manufacture, sale and distribution of premium quality assorted chocolates and confections. Its chocolates are packed and sold in various assortments and sizes under its own brands. These chocolates are sold almost exclusively to drug stores located in various cities of approximately 42 states of the United States. Respondent does not employ jobbers or distributors but sells and distributes its products through its own sales force. Respondent employs approximately 36 salesmen in

connection with the sale of its products, and has a sales volume in excess of \$5,000,000 annually.

PAR. 3. In the course and conduct of its business in commerce, as "commerce" is defined in the aforesaid Clayton Act, respondent Pangburn is now and has been for several years selling and distributing its products to buyers located in the several States of the United States, and has transported, or caused such products, when sold, to be transported from its place of business in Fort Worth, Texas, or from its warehouses located elsewhere, to buyers located in various other States. There is and has been at all times mentioned herein, a continuous course of trade in commerce in said products across State lines between respondent and the respective buyers of said products. Said products were and are sold for use, consumption or resale within the various States of the United States, and at least one of the sales involved in each discrimination in price hereinafter alleged was in interstate commerce.

PAR. 4. Respondent now has and for the past several years has had in effect an annual cumulative quantity discount system ranging from one to 10 percent, based on the amount of the customer's annual purchases for the calendar year ending December 31 of each year as follows:

| <i>Annual Purchases</i> | <i>Discount</i> |
|-------------------------|-----------------|
| Up to \$999 -----       | 0%              |
| \$1,000 to 1,999 -----  | 1%              |
| 2,000 to 2,999 -----    | 2%              |
| 3,000 to 3,999 -----    | 3%              |
| 4,000 to 4,999 -----    | 4%              |
| 5,000 to 5,999 -----    | 5%              |
| 6,000 to 6,999 -----    | 6%              |
| 7,000 to 7,999 -----    | 7%              |
| 8,000 to 8,999 -----    | 8%              |
| 9,000 to 9,999 -----    | 9%              |
| 10,000 and up -----     | 10%             |

These discounts or rebates are usually distributed at the end of the calendar year, or shortly thereafter to customers who qualify therefor. There are a few customers, such as Walgreen Drug Stores, Katz Drug Company, Al's Drug Stores and others, whose combined annual purchases for all their respective stores greatly exceed \$10,000 and to these customers respondent allows the 10% discount on a monthly basis, without waiting until the end of the year.

In determining the amount of discount or rebate the customer is to get, respondent allows chain stores to combine the purchases of their various outlets so as to qualify for the maximum discount, up to 10 percent. In a number of instances the chain is allowed

to combine the purchases of its outlets in more than one city, or even more than one state, in order to qualify for the maximum discount to their individual stores. In many instances the purchases of the individual stores of the chain are not sufficient to warrant any discount at all, but because of the policy of the respondent in fixing the rate of discount on the combined purchases of the chain's outlets, these individual stores thereof receive the maximum discount up to 10 percent.

In many instances respondent's independent or non-chain customers, whose individual purchases from respondent are considerably greater than the purchases of the individual outlet of the chain with whom they compete, get no discount at all, or at best not more than one, two, three or four percent, depending on their volume of purchases, while the individual outlet of the chain gets the maximum discount up to 10 percent. These independent or non-chain customers purchase the same grade and quality products from respondent as do the chain customers. In many instances the individual chain store and the independently owned store are located within a few blocks of each other, and are in active competition with each other for the consumer trade. Respondent's method of sale and delivery to the individual chain store customer is substantially the same as its method of sale and delivery to the independent or non-chain customer.

PAR. 5. Respondent in the allowance and payment of these discounts or rebates by means of its cumulative quantity discount system, as hereinabove outlined and described, has been for the past several years, and is now, discriminating in price between favored and non-favored purchasers of its products of like grade and quality, in commerce. The effects of such discriminations as set forth herein, may be substantially to lessen competition in the lines of commerce in which the purchasers are engaged, and to injure, destroy or prevent competition between purchasers receiving the benefit of such discriminatory discounts and the purchasers from whom such discounts are withheld.

PAR. 6. The aforesaid discriminations in price by respondent by means of its cumulative quantity discounts or rebates as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended.

*Mr. Cecil G. Miles*, supporting the complaint.

*James & Conner*, by *Mr. George M. Conner*, of Fort Worth, Tex., for respondent.

## Findings

56 F.T.C.

## INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On March 17, 1959, the Federal Trade Commission issued its complaint against the above-named respondent charging it with violating the provisions of Subsection (a) of Section 2 of the Clayton Act, as amended, in connection with the sale and distribution of its premium quality assorted chocolates and confections.

On May 22, 1959, the respondent and its attorney and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist in accordance with Section 3.25(a) of the Rules of Practice and Procedure of the Commission. The agreement disposes of the matters complained about.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; and the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusions of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said 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.

The undersigned hearing examiner having considered the agreement and proposed order hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

## JURISDICTIONAL FINDINGS

Respondent Pangburn Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1301 West Seventh Street in Fort Worth, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under the Clayton Act, as amended.

## ORDER

*It is ordered,* That the respondent Pangburn Company, Inc., a corporation, and its officers, representatives, agents, or employees, directly or through any corporate or other device, in connection with the sale and distribution of its assorted chocolates and confections, or other related products, in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Discriminating in price by means of an annual cumulative quantity discount system, or by using the combined purchases of the various outlets of a chain or group purchaser as a basis for determining any such discount, or by any other means, which results in selling to any one purchaser, its products of like grade and quality, at net prices higher than the net prices charged any other purchaser competing with the purchaser paying the higher price, in the resale of respondent's products; provided, however, that nothing herein shall prohibit the respondent from showing as a defense in any proceeding instituted for enforcement of this order that its differing prices make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such products are sold or delivered.

## DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision herein, filed May 29, 1959, accepting an agreement containing a consent order theretofore executed by the respondent and counsel in support of the complaint, service of which was completed on June 12, 1959; and

It appearing that through inadvertence the word "of" appears in the penultimate line of the order contained in the initial decision, whereas the corresponding word in the order agreed upon by the parties is "or"; and

The Commission being of the opinion that this clerical error should be corrected:

*It is ordered,* That the initial decision of the hearing examiner be, and it hereby is, modified by substituting the word "or" for the word "of" after the word "methods" in the next to last line of the order contained in said initial decision.

*It is further ordered,* That the initial decision, as so modified, shall, on the 15th day of July, 1959, become the decision of the Commission.

*It is further ordered,* That the respondent, Pangburn Company, Inc., shall, within sixty (60) days after service upon it of this deci-

