

RAYCO MANUFACTURING COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket 7734. Complaint, Jan. 7, 1960—Decision, July 9, 1960

Consent order requiring one of the nation's largest suppliers of automobile seat covers, convertible tops, mufflers, and related products, to cease entering

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into exclusive-dealing contracts or illegal price-fixing agreements with its independent retail dealers under which it required them also to enter into conspiracies among themselves to sell at uniform prices, etc., to carry a full line of its products or such quantities as it might determine, to advertise its products only in cooperation with other purchasers, accept all its advertising of prices and make payments to it therefor, and under which it had power to arbitrarily terminate agreements with dealers who violated aforesaid requirements, which said dealers were policed by its "Zone Supervisors'" periodic checks upon their operations.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof and hereby made respondents herein, and hereinafter designated and described more particularly, have been and are using unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45), and have been and are violating Section 3 of the Clayton Act (15 U.S.C. Sec. 14), and it appearing to the Commission that a proceeding by it would be to the interest of the public, the Commission hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

Charging violations of Section 5 of the Federal Trade Commission Act, the Commission alleges:

PARAGRAPH 1. Respondent Rayco Manufacturing Company, Inc., hereinafter referred to as Rayco, is a corporation organized, 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 220 Straight Street, Paterson, N.J.

PAR. 2. Respondent Joseph Weiss, hereinafter referred to as Weiss, is an individual and is President of Rayco. Weiss formulates, directs and controls the acts, policies and practices of Rayco, and has his office and principal place of business at the same address as Rayco. The methods, acts and practices hereinafter alleged with respect to Rayco are also alleged with respect to Weiss because of his personal and official responsibility for their adoption and use.

PAR. 3. Rayco has been engaged since 1946 in the manufacture of automobile seat covers and related products, and in the sale and distribution of automobile seat covers, convertible tops, mufflers and related products, which products are sold under the trade name Rayco, and which are hereinafter referred to as Rayco products. Rayco products are nationally advertised and are sold in various

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states of the United States and the District of Columbia. Rayco is the largest, or one of the largest, manufacturers and distributors of automobile seat covers in the United States, its sales currently approximating seven million dollars annually.

Except for six recently established subsidiary retail stores, Rayco now sells, and since 1950 has sold, Rayco products only to independent retail dealers, hereinafter referred to as Rayco dealers, with whom Rayco has executed written contracts. Rayco dealers are located in various States of the United States and in the District of Columbia, and Rayco products, when sold, are transported from Rayco's place of business in the State of New Jersey to the retail stores of Rayco dealers located in other states of the United States and in the District of Columbia. Rayco, at all times mentioned herein, has maintained, and now maintains, a constant current of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Rayco's volume of business in said products in commerce has been and is substantial.

PAR. 4. In the course and conduct of its business, as herein described, Rayco, at all times mentioned herein, has been in substantial competition in the offering for sale and in the sale of automobile seat covers, convertible tops, mufflers and related products in commerce between and among the various States of the United States and in the District of Columbia, with other corporations and with persons, firms and partnerships.

PAR. 5. In the course and conduct of its business, as aforesaid, Rayco has made and is making sales and contracts of sale of Rayco products to Rayco dealers on the expressed and implied conditions, agreements and understandings that said dealers shall not use, or deal in, or sell the automobile seat covers, convertible tops, mufflers or other products supplied by a competitor or competitors of Rayco, or any other products.

Such restrictive conditions, agreements and understandings are implied and enforced by Rayco's method of selling to and policing and supervising the businesses of Rayco dealers. They are also specifically required by Rayco's standard "Dealer Franchise Agreement", pursuant to the terms of which Rayco has contracted to sell its products to all Rayco dealers, which provides, in part, as follows:

The Dealer specifically covenants and agrees: . . . 2. To purchase solely and exclusively from the Supplier, all seat covers and seat cover materials and all other items and materials used for repairs, replacements and additions to any part of automobiles, paying therefor the prevailing invoice prices. 3. To purchase from the Supplier, all other items offered for sale by it through "RAYCO AUTO SEAT COVER" Stores. However, should the Dealer prefer not to purchase any one or more of such auxiliary items of merchandise re-

ferred to in this paragraph, then, and in such case the Dealer hereby covenants and agrees that he will not purchase such item or items from any other source.

Rayco's competitors and others have been, and are now, unable to make sales to Rayco dealers which they could have made but for the conditions, agreements and understandings described herein. Rayco dealers have been restricted and hampered in their businesses as a result of being unable to purchase products competitive with Rayco products at lower prices or upon other more favorable terms than those granted by Rayco, and as a result of being unable to purchase products other than those sold and distributed by Rayco.

PAR. 6. In the course and conduct of its business, as aforesaid, Rayco has established and maintains a policy whereby it fixes certain specified prices and discounts at which Rayco products are to be resold by Rayco dealers. Such prices and discounts are published in price lists and advertisements prepared by Rayco, or are otherwise made known to said dealers by Rayco, either directly or through its employees or representatives, and Rayco dealers are required to adhere to such prices and discounts.

The direct effect of said policy and practices of Rayco has been to cause Rayco dealers to sell Rayco products at the prices and discounts fixed and established by Rayco; to prevent said dealers from selling Rayco products at prices, either greater or less than those fixed and established by Rayco, which they might deem adequate and warranted by their respective selling costs and by trade and competitive conditions generally; to suppress competition among said dealers in the distribution and sale of Rayco products; to suppress competition among said dealers and others in the distribution and sale of automobile seat covers, convertible tops, mufflers and related products; and to deprive the ultimate purchasers of such products of the advantages in price which they would otherwise obtain from a free and unobstructed flow of commerce in such products.

PAR. 7. In the course and conduct of its business, as aforesaid, Rayco has entered into and is now carrying out conspiracies with Rayco dealers, and has required Rayco dealers to enter into and carry out conspiracies among themselves, to sell Rayco products at uniform prices, discounts, terms and conditions of sale fixed and established or approved by Rayco, for the purpose and with the effect of lessening and suppressing competition among said dealers and with others in the distribution and sale of automobile seat cov-

ers, convertible tops, mufflers and related products, and of depriving the ultimate purchasers of such products of the advantages in price which they would otherwise obtain from a free and unobstructed flow of commerce in such products.

PAR. 8. In the course and conduct of its business, as aforesaid, in furtherance of the restrictive conditions, agreements and understandings expressed and implied in its contracts and course of dealing with Rayco dealers, as alleged in Paragraph 5 hereof, and in pursuance of the policy and conspiracies to fix and maintain resale prices, discounts, terms or conditions of sale, as alleged in Paragraphs 6 and 7 hereof, Rayco has employed, and now employs, the following methods, acts and practices, among others:

(a) Rayco has caused to be inserted in its contracts with Rayco dealers certain oppressive conditions and agreements involving, among other things, the right of Rayco to terminate such contracts under conditions which adversely affect the future business activity of the dealers whose contracts are terminated or cancelled. To this effect, Rayco's standard "Dealer's Franchise Agreement" provides, in part:

Should the Dealer violate any of the undertakings and covenants hereinabove contained, the Supplier shall have the right to terminate this agreement and/or agreements, giving ten days notice to the Dealer of its desire to do so, and the terms of this contract shall end on the day fixed in the aforesaid notice of termination. . . .

In the event of the termination of this agreement before the expiration of any term . . . such termination date shall be further known as the "severance date," and the Dealer hereby covenants and agrees that he will not re-enter either directly or indirectly as agent, servant, employee, individual, proprietor, or as officer of a corporation the business of merchandising, sale or installation of automobile seat covers, and convertible tops, for a period of five (5) years from said "severance date" in the City of ----- or within a radius of fifteen (15) miles of the City Limits of the City of ----- nor within a radius of fifteen (15) miles of any "RAYCO AUTO SEAT COVER" store wherever such store shall be located at the time the dealer shall desire to re-enter said business. The Dealer hereby agrees that the Supplier shall have the absolute legal right to promptly enjoin any violation of this covenant by appropriate summary proceedings filed in any competent Court having jurisdiction over the Dealer.

The power of Rayco under said contract provisions arbitrarily to terminate such contracts and to restrict the future business activity of any dealer whose contract has been so terminated causes Rayco dealers to be subservient to Rayco's wishes and will in the conduct of their businesses and to acquiesce in requirements imposed by Rayco with respect thereto.

(b) Rayco has caused to be inserted in its contracts with Rayco dealers the following provision, requiring said dealers to carry a full line of Rayco products:

Dealer must always maintain his inventory in compliance with the recommendations and advice of the Supplier, and as further provided by the Supplier's "Master Inventory Chart." Deviations therefrom for any reason whatsoever, regardless of season, from the specific and varied inventory requirements of such "Master Inventory Chart," are not permissible unless Supplier consents thereto in writing.

Rayco's "Master Inventory Chart" includes all Rayco products.

(c) Rayco has required and requires that Rayco dealers refrain from any and all independent advertising of prices and products; that Rayco dealers acquiesce in any and all advertising undertaken by Rayco, including advertising of prices; that such advertising be in common with other Rayco dealers at Rayco's option; that Rayco dealers pay Rayco at regular intervals, as an advertising assessment, a certain percentage set by Rayco of the dealer's retail sales or of the dealer's purchases from Rayco; and that the advertising which Rayco provides for any given dealer has no necessary, direct or constant relation to the amount of the advertising assessment paid to Rayco by such dealer. Rayco has also required and requires that Rayco dealers conform with and abide by any and all promotional or other merchandising requirements established by Rayco.

(d) Rayco has maintained, and now maintains, a number of field representatives, designated "Zone Supervisors", who are instructed by Rayco to call, and who do periodically call, on Rayco dealers, and, by various methods, check upon the operations of said dealers for the purpose of ascertaining whether or not they are using, dealing in or selling products supplied by competitors of Rayco or by others; whether or not they are adhering to the resale prices and discounts set by Rayco, either directly or through said Zone Supervisors; and whether or not they are otherwise failing to comply with the requirements of Rayco in the operation of their businesses.

PAR. 9. The acts and practices of respondents, as herein alleged, are all to the injury and prejudice of competitors of respondents, of purchasers from respondents, and of the public; have a tendency and effect of obstructing, hindering, lessening and preventing competition in the sale of automobile seat covers, convertible tops, mufflers and related products in commerce within the intent and meaning of the Federal Trade Commission Act; and constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

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COUNT II

Charging violations of Section 3 of the Clayton Act, the Commission alleges:

Paragraphs 1, 2, 3, 4 and 5: The allegations of paragraphs 1, 2, 3, 4 and 5 of Count I of this complaint are incorporated herein by reference and constitute the allegations of paragraphs 1, 2, 3, 4 and 5 of Count II, except that the reference in paragraph 3 of Count I to the Federal Trade Commission Act is eliminated herein, and reference to the Clayton Act is substituted therefor.

PAR. 6. In the course and conduct of its business, as aforesaid, in furtherance of the restrictive conditions, agreements and understandings, expressed and implied, in its contracts and course of dealing with Rayco dealers, as alleged in paragraph 5 hereof, Rayco has employed, and now employs, the following methods, acts and practices, among others:

(a) Rayco has caused to be inserted in its contracts with Rayco dealers certain oppressive conditions and agreements involving, among other things, the right of Rayco to terminate such contracts under conditions which adversely affect the future business activity of the dealers whose contracts are terminated or cancelled. To this effect, Rayco's standard "Dealer Franchise Agreement" provides, in part:

Should the Dealer violate any of the undertakings and covenants hereinabove contained, the Supplier shall have the right to terminate this agreement and/or agreements, giving ten days notice to the Dealer of its desire to do so, and the terms of this contract shall end on the day fixed in the aforesaid notice of termination. . .

In the event of the termination of this agreement before the expiration of any term . . . such termination date shall be further known as the "severance date," and the Dealer hereby covenants and agrees that he will not re-enter either directly or indirectly as agent, servant, employee, individual, proprietor, or as officer of a corporation the business of merchandising, sale or installation of automobile seat covers, and convertible tops, for a period of five (5) years from said "severance date" in the City of ----- or within a radius of fifteen (15) miles of the City Limits of the City of ----- nor within a radius of fifteen (15) miles of any "RAYCO AUTO SEAT COVER" store wherever such store shall be located at the time the dealer shall decide to re-enter said business. The Dealer hereby agrees that the Supplier shall have the absolute legal right to promptly enjoin any violation of this covenant by appropriate summary proceedings filed in any competent Court having jurisdiction over the Dealer.

The power of Rayco under said contract provisions arbitrarily to terminate such contracts and to restrict the future business activity of any dealer whose contract has been so terminated, causes Rayco dealers to be subservient to Rayco's wishes and will in the conduct

of their businesses and to acquiesce in requirements imposed by Rayco with respect thereto.

(b) Rayco has caused to be inserted in its contracts with Rayco dealers the following provision, requiring said dealers to carry a full line of Rayco products:

Dealer must always maintain his inventory in compliance with the recommendations and advice of the Supplier, and as further provided by the Supplier's "Master Inventory Chart." Deviations therefrom for any reason whatsoever, regardless of season, from the specific and varied inventory requirements of such "Master Inventory Chart," are not permissible unless Supplier consents thereto in writing.

Rayco's "Master Inventory Chart" includes all Rayco products.

(c) Rayco has required and requires that Rayco dealers refrain from any and all independent advertising of the products in which they deal; that Rayco dealers acquiesce in any and all advertising undertaken by Rayco; and that Rayco dealers conform with and abide by any and all promotional or other merchandising requirements established by Rayco. Under said requirements, Rayco has the power to regulate, and does regulate, the advertising and promotion of products sold by Rayco dealers so as to prevent said dealers from advertising or otherwise offering for sale any products other than Rayco products.

(d) Rayco has maintained, and now maintains, a number of field representatives, designated "Zone Supervisors," who are instructed by Rayco to call, and who do periodically call, on Rayco dealers and, by various methods, check upon the operations of said dealers for the purpose of ascertaining, among other things, whether or not they are using, dealing in, or selling products supplied by competitors of Rayco, or by others.

PAR. 7. The effect of said sales and contracts for sale on such conditions, agreements and understandings, and of the acts and practices in furtherance thereof, may be to substantially lessen competition, and to injure, destroy and prevent competition in the line of commerce in which Rayco is engaged and in the line of commerce in which Rayco dealers are engaged; or may be to tend to create a monopoly in Rayco in the commerce aforesaid in automobile seat covers, convertible tops, mufflers, and related products.

PAR. 8. The aforesaid acts and practices of Rayco constitute violations of Section 3 of the Clayton Act.

Mr. Wilmer L. Tinley and Mr. Martin F. Connor supporting the complaint.

Mr. Lowell B. Mason, of Washington, D.C., and *Mr. Joseph L. Klein*, of New York, N.Y., for respondents.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on January 7, 1960, charging them in Count I thereof with the use of unfair methods of competition and unfair acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act by entering into various agreements, with retail dealers, and using various practices, restricting said dealers in the sale of competitive products and fixing the resale prices of respondents' products; and in Count II thereof with violating Section 3 of the Clayton Act by entering into agreements and understandings with retail dealers that said dealers shall not use, deal in, or sell the products of respondents' competitors. After being served with said complaint, respondents appeared by counsel and filed their answer thereto. Thereafter the parties entered into an agreement, dated May 12, 1960, containing a consent order to cease and desist purporting to dispose of all of this proceeding as to all parties. Said agreement, which has been signed by all respondents, by counsel for said respondents, and by counsel supporting the complaint, and approved by the Director and Associate Director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint, and have agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with said agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing, and that the complaint may be used in construing the terms of said order. It has also been agreed that the aforesaid 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.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all of the allegations of the complaint and provides for an

appropriate disposition of this proceeding as to all parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to Section 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Respondent Rayco Manufacturing Company, Inc., 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 221 State Highway No. 4, in the City of Paramus, State of New Jersey (formerly 220 Straight Street, Paterson, N.J.). Individual respondent Joseph Weiss is president of the corporate respondent, and has the same address as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act and the Clayton Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That the respondent, Rayco Manufacturing Company, Inc., a corporation, and its officers, and respondent Joseph Weiss, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of automobile seat covers, convertible tops, mufflers and any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement, or understanding, expressed or implied, that the purchaser thereof shall not use, or deal in, or sell, or shall not advertise or otherwise promote the sale of any such products supplied by any competitor or competitors of respondents, or of products supplied by any others; or that the purchaser thereof shall not use, or deal in, or sell, or shall not advertise or otherwise promote the sale of, any such products supplied by any competitor or competitors of respondents, or of products supplied by any others, without the prior consent of respondents;

2. Selling or making any contract or agreement for the sale of any such products on any conditions, agreement, or understanding, expressed or implied, which in any manner or to any extent shall

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limit the freedom of the purchaser thereof to use or deal in or sell or advertise or otherwise promote the sale of any such products supplied by any competitor or competitors of respondents, or of products supplied by any others;

3. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding, expressed or implied, that the purchaser thereof shall not advertise, offer for sale, or sell, any such products at prices and discounts other than those specified or fixed by the respondents;

4. Entering into, cooperating in or carrying out any planned common or concerted course of action, or any understanding, agreement or conspiracy with independent dealers in any such products, or with any others, to fix, establish or maintain the prices, discounts, terms or conditions of sale of any such products;

5. Selling, or making any contract or agreement for the sale of, any such products on the condition, agreement or understanding, expressed or implied, that the purchaser thereof shall be required to: (a) carry a full line of respondents' products; or (b) carry such specified quantities of respondents' several products as may be determined by respondents; or (c) refrain from the independent advertising of any such products, or any other products, or of the prices thereof; or (d) enter into cooperative advertising of prices with other purchasers thereof; or (e) accept or acquiesce in any and all advertising of prices undertaken on his behalf by respondents; or (f) make payments to the respondents, or at the direction of the respondents, to defray the costs of any advertising where done in furtherance of any of the acts and practices from which respondents are required to cease and desist by this paragraph and paragraphs 1, 2, 3 and 4 hereof;

6. Entering into any contract, agreement or understanding which will permit respondents to cancel, or cancelling, or, directly or by implication, threatening to cancel, any contract, franchise or selling agreement with purchasers of any such products because of the failure or refusal of such purchasers to comply with any of the conditions, agreements or understandings referred to in paragraphs 1, 2, 3 or 5 hereof;

7. Entering into any contract, agreement or understanding which enjoins, or by any means enjoining or attempting to enjoin, any purchasers of any such products from engaging in the business of buying and selling any such products for a period of five years following the termination of any contract, agreement or understanding with respondents, or for any other period; provided, however, that nothing contained herein shall be construed so as to prevent purchasers of any such products from respondents from voluntarily

terminating any such contract subject to such reasonable restrictions concerning their re-entry into business as may be lawful within the jurisdiction in which any such purchaser is located;

8. Policing, enforcing or continuing in operation or effect any condition, agreement, understanding, act or practice from which respondents are ordered to cease and desist by the foregoing sections hereof;

9. Performing any act of intimidation or coercion through statements, oral or written, made by representatives of respondents, either at the time when a purchaser agrees to purchase any such products from respondents or during the course of any calls made upon such purchasers at their places of business or at any other place, or using any other plan, practice, system or method of doing business, for the purpose or with the effect of intimidating, coercing, or requiring purchasers of any such products from respondents to do anything which respondents are ordered to cease and desist from requiring such purchasers to do by any of the foregoing paragraphs hereof.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondents may enter into in conformity with Section 5 of the Federal Trade Commission Act as amended by the McGuire Act (15 U.S.C. Sec. 45).

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 9th day of July 1960, 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.

IN THE MATTER OF

KADIAK FISHERIES COMPANY ET AL.

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