
IN THE MATTER OF
SIMMONS COMPANY

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

Docket 8116. Complaint, Sept. 16, 1960—Decision, Mar. 4, 1961

Consent order requiring a manufacturer of mattresses, box springs, upholstered sofas, and other household furniture, with headquarters in New York City, to cease violating Sec. 2(d) of the Clayton Act by paying favored customers for advertising or other services furnished in connection with the sale of its products, while not making such payments available on

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proportionally equal terms to their competitors—paying, for example, amounts exceeding \$2,400 and \$4,000, respectively, to John Wanamaker and to Lit Bros., both of Philadelphia, for such services.

COMPLAINT

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

PARAGRAPH 1. Respondent, Simmons Company is a corporation organized, 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 300 Park Avenue in the City of New York, State of New York.

PAR. 2. Respondent is now and has been engaged in the manufacture and sale of mattresses, box springs, dual purpose upholstered sofas and other household furniture. Sales are made by respondent directly to department stores, furniture stores and other retailers throughout the United States. Net sales by respondent for the year ended December 31, 1959, were in excess of \$132,600,000.

PAR. 3. In the course and conduct of its business, respondent has engaged, and is now engaging in commerce, as "commerce" is defined in the Clayton Act as amended. Respondent operates 11 plants and 60 warehouses in various cities throughout the United States and causes its products to be transported from their place of manufacture and storage to its customers in various states throughout the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, during the years 1959 and 1960, respondent 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 said respondent and such payments were not made available on proportionally equal terms to all customers competing in the sale and distribution of products purchased from respondent. For example, since January 1, 1959, respondent has been using the Simmons Cooperative Advertising Plan, also known as SCAP, the terms of which are tailored to exclude all but respondent's larger customers.

As an example of this plan, during the year 1959, respondent contracted to pay, and did pay, to John Wanamaker and to Lit Bros., both of Philadelphia, Pennsylvania, amounts exceeding \$2,400 and

\$4,000 respectively, as compensation or as allowances for advertising or other services or facilities furnished by or through said John Wanamaker and Lit Bros., in connection with their offering for sale or sale of products sold to them by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with John Wanamaker and Lit Bros. in the sale and distribution of products purchased from respondent.

Respondent has similarly favored other large customers in Philadelphia and in other cities over competing customers in such cities.

PAR. 5. The acts and practices of respondent as alleged above, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Frederic T. Suss, Esq., and Philip F. Zeidman, Esq., Supporting the Complaint.

James B. Burke, Esq., of Burke & Burke, of New York, N.Y., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The complaint was issued in this proceeding on September 16, 1960, charging respondent with violating §2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, §13) by contracting 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 without making such payments available on proportionally equal terms to all customers competing in the sale or distribution of products purchased from respondent. A true and correct copy of the complaint was served upon respondent as required by law. Thereafter respondent appeared by counsel and agreed to dispose of this proceeding without a formal hearing pursuant to the terms of an agreement dated December 6, 1960, containing consent order to cease and desist. The agreement was submitted to the undersigned hearing examiner on January 5, 1961, in accordance with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The agreement purports to dispose of this proceeding as to the respondent and contains the form of a consent cease-and-desist order which the parties have represented is dispositive of the issues involved in this proceeding. The agreement has been signed by the Executive Vice President and General Manager of respondent corporation and by the attorneys for the parties and has been approved by the Associate Director and Director of the Bureau of

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Litigation of the Federal Trade Commission. In said agreement respondent admits all of the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been made in accordance with such allegations. In the agreement the respondent waives: (a) any further procedural steps before the hearing examiner and the Commission; (b) the making of findings of fact or conclusions of law; and (c) all rights respondent may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The parties further agree, in said agreement, that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the 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 Federal Trade Commission; that the order to cease and desist entered in this proceeding by the Commission may be entered without further notice to respondent, and when so entered such order will have the same force and effect as if entered after a full hearing. Said order may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

The parties have covenanted that the 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.

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 which is approved in and by said agreement disposes of all the issues presented by the complaint as to all of the parties involved, said agreement is hereby accepted and approved as complying with §§3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The undersigned hearing examiner, having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, makes the following findings and issues the following order:

FINDINGS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;
2. Respondent Simmons Company 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 300 Park Avenue, New York, New York.

3. Respondent is engaged in commerce as "commerce" is defined in the Federal Trade Commission and the Clayton Acts;

4. The complaint filed herein states a cause of action against the respondent, under both the Federal Trade Commission and the Clayton Acts; and this proceeding is in the public interest. Now, therefore,

It is ordered, That Simmons Company, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of mattresses, box springs, upholstered sofas and other furniture, 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 advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of the respondents' products, unless such payment is made 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 4th day of March 1961, become the decision of the Commission; and accordingly:

It is ordered, That respondent Simmons Company, 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.