

Complaint

IN THE MATTER OF

ARROW FOOD PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SECS. 2(a), 2(d), AND 2(e) OF
THE CLAYTON ACT

Docket 8212. Complaint, Dec. 7, 1960—Decision, June 26, 1962

Consent order requiring Dallas, Tex., wholesalers of dried beans and peas and other food products which they purchased and packaged under the trade names "Arrow" and "Rose" and private brands and sold to distributor-customers principally in the southwest and southeast, to cease discriminating among such purchasers in violation of the Clayton Act by:

- I. Such practices as giving to certain large retail chains and wholesalers (1) one case free with each 10 purchased, (2) so-called "advertising" and "promotional" allowances for which no services were rendered, and (3) special selling terms and conditions of sale such as trucking allowances, cash discounts, and advance notice of price changes of as much as 30 days, in violation of Sec. 2(a);
- II. Making to a limited number of large purchasers allowances for advertising their products in catalogs, price lists, and on radio; paying "push money" to customers' salesmen; and making allowances for promotions of their products at new retail store openings and for other special promotions, in violation of Sec. 2(d); and
- III. Furnishing only to certain large purchasers special packaging in connection with aforesaid promotions, and prizes in the form of their products for special promotional contests, in violation of Sec. 2(e); and,

With regard to the alleged violation of Sec. 5, of the Federal Trade Commission Act covered by Count IV of the complaint, to cease representing falsely that their food products conformed to standards established by the U.S. Department of Agriculture.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents named in the caption hereof and hereinafter more particularly designated and described have violated the provisions of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C Title 15, Sec. 13), and Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent Arrow Food Products, Inc., is a corporation organized, existing and doing business under and by virtue

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of the laws of the State of Texas with its principal office and place of business located at 5051 Sharp Street, Dallas, Tex.

Respondents Markus Rosenberg, Emanuel Rohan and David Rosenberg are brothers and are President, Vice President and Secretary-Treasurer, respectively, of the corporate respondent, with their addresses the same as that of the corporate respondent. These individual respondents formulate, direct and control the policies, acts and practices of the corporate respondent.

The individual respondents first started business as a partnership in Dallas, Texas, in 1950. On June 5, 1956 they incorporated under Texas law and the name Arrow Spice and Food Company, Inc., was adopted. On December 16, 1958, a charter amendment was made, changing the corporate name to Arrow Food Products, Inc.

PAR. 2. Respondents are now, and for some years last past have been, engaged in the wholesale distribution of spices, dried fruits, candies, dried beans and peas and other food products. Respondents' sales for 1958 were approximately \$4,600,000, most of which were in the sale of various types of dried beans and peas (hereinafter referred to as "dried beans").

Respondents buy dried beans from growers and shippers located in various States, principally California, Colorado, and Michigan. Respondents process and package these dried beans and sell them under the trade names "Arrow" and "Rose", and under private brands, to food distributors located in several States within the United States, principally in the Southwest and Southeast sections of the country, including Texas, Arkansas, Tennessee, Mississippi, Alabama and Louisiana, among others. These food distributor-customers include principally wholesalers, wholesaler-retailers and retail grocery chains, among others.

PAR. 3. In the course and conduct of their business, respondents are now, and at all times mentioned herein have been, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and in the Federal Trade Commission Act, by virtue of purchasing their products in various States of the United States and, after processing and packaging them, transporting said products, or causing them to be transported, from their place of business in the State of Texas to customers with places of business located in the State of Texas and other States of the United States.

PAR. 4. In the course and conduct of their business, respondents are now, and at all times mentioned herein have been, in substantial competition with other corporations, partnerships, individuals and firms engaged in the packaging and processing of comparable products

for resale and distribution to the wholesale and retail food products trade.

Many of the wholesale purchasers of respondents' products are competitively engaged with each other in the resale of said products; many of the retail purchasers of respondents' products are competitively engaged with each other in the resale of said products; and many of respondents' wholesale purchasers resell to retail outlets who are competitively engaged with one another and with respondents' direct buying retail customers.

PAR. 5. Respondents, in the course and conduct of their business, as aforesaid, have been, and now are, discriminating in price, directly or indirectly, between different purchasers of dried beans by selling such products of like grade and quality to some of their purchasers at substantially higher prices than to other of their purchasers.

PAR. 6. Respondents have been, and now are, effecting said discriminations in price in the sale of dried beans between and among their customers by many methods and means, some, but not all, of which are more particularly described as follows:

(a) Allowances in the form of free goods generally, but not always, consisting of one case free with each ten purchased.

(b) So-called "advertising allowances" in varying amounts, such as six or ten cents per case, for which services are neither required by respondents nor rendered by the purchaser.

(c) So-called "promotional allowances" in varying amounts, such as fifteen, twenty, twenty-five or fifty cents per case, for which services are neither required by respondents nor rendered by the purchaser.

(d) Special terms and conditions of sale, including, but not limited to, drayage or trucking allowances in varying amounts; cash discounts in varying amounts and with varying payment terms, and advance notice of price changes to some customers, of as much as thirty days, with either shorter or no advance notice to other customers.

Among customers receiving some or all of such price reductions are:

(1) *Merchants Company, Jackson, Mississippi*. A wholesale grocery company selling to retailers within a sixty mile radius of Jackson, Mississippi.

(2) *McCarty-Holman Company, Jackson, Mississippi*. A wholesale grocery company which owns fourteen retail outlets located in Mississippi, known as Jitney Jungle Stores. This company also sells at wholesale to many independent retail customers operating under the Jitney Jungle Stores franchise, as well as to other retail customers, all located principally in Mississippi.

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(3) *Liberty Cash Grocery Company, Memphis, Tennessee.* A wholesale grocery company selling to retailers located principally in Arkansas, Tennessee, Louisiana and Mississippi.

(4) *National Tea Company.* A national chain of retail food stores. Respondents sell their products thereto for distribution to National Tea retail outlets located principally in Tennessee, Alabama and Mississippi.

(5) *The Kroger Company.* A national chain of retail food stores. Respondents sell their products thereto for distribution through the Child's Big Chain Division to Kroger retail stores located principally in Arkansas, Louisiana and Texas.

(6) *Operator's Warehouse, Inc.* A wholesale grocery company located in Shreveport, Louisiana, selling principally to independent franchised Piggly-Wiggly retail stores located principally in Arkansas, Mississippi, Texas and Louisiana.

(7) *W. B. Mallory & Sons, Memphis, Tennessee.* A wholesale grocery company selling to independent retail outlets located principally in Arkansas, Tennessee and Mississippi.

(8) *Lewis Grocer Company, Indianola, Mississippi.* A wholesale grocery company which owns twelve retail outlets, known as Sunflower Food Stores, located in Mississippi and Arkansas. This company also sells at wholesale to approximately twenty-three franchised Sunflower Food Stores in various States, which are independently owned retail outlets, and to about 475 other independent retail outlets located principally in Mississippi, Tennessee, Arkansas and Louisiana.

Respondents' discriminations in price vary in amount or terms and conditions of sale among and between the above-named customers. In addition, the great majority of respondents' more than 300 customers are smaller wholesale grocery companies than those wholesale grocery companies designated above and they receive no such price reductions at all or, if so, receive them in lesser amounts or on less favorable terms and conditions of sale than the above-named customers.

PAR. 7. The effects of such discriminations in price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and their customers are respectively engaged, or to injure, destroy or prevent competition with respondents or with purchasers therefrom who receive the benefits of such discriminations, or with customers of either of them.

PAR. 8. The aforesaid acts and practices of respondents constitute violations of the provisions of subsection (a) of Section 2 of the

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Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13).

COUNT II

PAR. 9. The allegations of paragraphs 1 through 4 of this complaint are hereby adopted and incorporated herein by reference and made a part of Count II as if they were repeated herein verbatim.

PAR. 10. In the course and conduct of their business in commerce, and at all times mentioned herein, respondents have paid, or contracted for the payment of, something of value to or for the benefit of some of their 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 respondents, and such payments were not made available on proportionally equal terms to all customers competing in the resale and distribution of respondents' products.

PAR. 11. The payments as alleged in paragraph 10 are made by various methods and means including, but not limited to, the following:

(a) Allowances for advertisements of respondents' products in catalogs, price lists, and on radio.

(b) "Push money" paid directly to customers' salesmen for services performed by the latter in promoting the sale of respondents' products.

(c) Allowances for the promotion of respondents' products at new retail store openings, either in the form of money or free goods.

(d) Payments for special promotions of respondents' products, such as the 1959-1960 Sugar Bowl contest whereby the winner was awarded a free trip to New Orleans, Louisiana, for the annual Sugar Bowl events.

Compensation or allowances for the foregoing illustrative services or facilities were made to a limited number of large purchasers, including Lewis Grocer Company, Indianola, Mississippi, a wholesale-retail customer, and Liberty Cash Grocery Company, Memphis, Tennessee, and W. B. Mallory & Sons Co., Memphis, Tennessee, wholesale customers, among others. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to other customers competing with the favored customers in the resale and distribution of respondents' products.

PAR. 12. The acts and practices of respondents as alleged in paragraphs 10 and 11 above in Count II violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

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COUNT III

PAR. 13. The allegations of paragraphs 1 through 4 of this complaint are hereby adopted and incorporated herein by reference and made a part of Count III as if they were repeated herein verbatim.

PAR. 14. In the course and conduct of their business in commerce, and at all times mentioned herein, respondents have discriminated in favor of some purchasers and against other purchasers of their products brought for resale by contracting to furnish or furnishing services or facilities connected with the handling, resale, or offer for resale of such products so purchased upon terms not accorded to all competing purchasers on proportionally equal terms.

PAR. 15. The services or facilities accorded in a discriminatory manner as alleged in paragraph 14 include, but are not limited to, the following:

(a) Special packaging in connection with the promotion of respondents' products, such as the 1959-1960 Sugar Bowl promotion contest.

(b) Prizes, in the form of respondents' products, for special promotional contests.

The foregoing illustrative services or facilities were accorded to a limited number of large purchasers, including Lewis Grocer Company, Indianola, Mississippi, a wholesale-retail customer, and W. B. Mallory & Sons Co., Memphis, Tennessee, a wholesale customer. Such services or facilities were not offered or otherwise made available or furnished on proportionally equal terms to other purchasers competing with the favored purchasers in the resale and distribution of respondents' products.

PAR. 16. The acts and practices of respondents as alleged in paragraphs 14 and 15 above in Count III violate subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

COUNT IV

PAR. 17. The allegation of paragraphs 1 through 4 of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count IV as if they were repeated herein verbatim.

PAR. 18. In the course and conduct of their business in commerce, and at all times mentioned herein, respondents have pursued a course of conduct by which they represent, through labels and otherwise, that their food products conform in quality or type to standards established for the industry by the United States Department of Agricul-

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ture, when in fact respondents' products do not at all times conform to such quality or type standards.

Such misrepresentations in the offering for sale, sale and distribution of respondents' products are illustrated by the following examples, among others:

(a) In 1959, the State of Texas issued an invitation to bid on dried beans of United States Department of Agriculture Grade No. 1 (U.S.D.A. Grade No. 1) quality. Respondents were awarded the contract on U.S.D.A. Grade No. 1 Blackeye Peas, having submitted the lowest bid thereon. Deliveries were subsequently made pursuant to such contract, at which time, or times, respondents certified that the products were of U.S.D.A. Grade No. 1 quality. Subsequent tests by the United States Department of Agriculture at the request of the State of Texas disclosed that such products were actually U.S.D.A. Grade No. 3, an inferior quality to U.S.D.A. Grade No. 1.

(b) In 1956, respondents sold dried beans known in the trade as "Michigan Peas" under labels designating them as California small white beans, a type of dried bean which resells at a higher price than the aforesaid Michigan type.

PAR. 19. The acts and practices of respondents, as alleged in paragraph 18 of Count IV, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. James P. Timony supporting the complaint.

Mr. William L. Keller of Clark, Reed & Clark, of Dallas, Tex., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 7, 1960, charging in four separate counts, violations respectively of subsections (a), (d) and (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), and of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45).

On August 14, 1961, the parties filed with the Secretary of the Federal Trade Commission a notice advising him that they wished to avail themselves of the privilege of disposing of this proceeding by a consent order.

An agreement dated April 24, 1962 and duly executed by respondents, their counsel, and counsel supporting the complaint was on

May 11, 1962 submitted to the undersigned because of proceedings in the matter heretofore had before him.

The agreement provides for the entry without further notice of a consent order and was duly approved by the Directors of the Bureaus of Restraint of Trade and Deceptive Practices and by the Chief of the Division of Discriminatory Practices.

The hearing examiner finds that said agreement includes all of the provisions required by Section 3.25(b) of the Rules of the Commission, that is:

A. An admission by respondents of all jurisdictional facts alleged in the complaint.

B. Provisions that:

1. The complaint may be used in construing the terms of the order;
2. The order shall have the same force and effect as if entered after a full hearing;

3. The 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;

4. The entire record on which any cease and desist order may be based shall consist solely of the complaint and the agreement;

5. The order may be altered, modified, or set aside in the manner provided by statute for other orders.

C. Waivers of:

1 The requirement that the decision must contain a statement of findings of fact and conclusions of law;

2 Further procedural steps before the hearing examiner and the Commission;

3 Any right to challenge or contest the validity of the order entered in accordance with the agreement.

In addition the agreement contains the following provisions:

A. A statement that the signing of said 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.

B. This agreement disposes of all of this proceeding as to all parties. All parties agree that the allegations of discriminations in price insofar as they relate to primary line injury, as set forth in paragraphs 5 and 6, Count I, of the complaint, and the alleged effects thereof insofar as they relate to primary line injury, as set forth in paragraph 7, Count I, of the complaint, be dismissed. From the information in the files and the investigational report, and facts discovered subsequent to the issuance of the complaint, there can be gleaned no evidence that respondents engaged in systematic price differences through territorial

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price discrimination. Furthermore, the facts in this case show that if there was injury to the primary line it was caused by discriminations between competing purchasers in the secondary line of commerce. Therefore, any injury to the primary line which has resulted from respondents' price discriminations will be effectively remedied by an order which prohibits discriminations between competing purchasers.

Having considered said agreement, including the proposed order, and being of the opinion that it provides an appropriate basis for settlement and disposition of this proceeding; the hearing examiner hereby accepts the agreement but orders that it shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The following jurisdictional findings are made and the following order issued:

1. Respondent Arrow Food Products, Inc., 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 5051 Sharp Street, in the city of Dallas, State of Texas.

2. Respondents Marcus Rosenberg (erroneously named in the complaint as Markus Rosenberg) and David Rosenberg are President and Secretary-treasurer, respectively, of the corporate respondent, with their addresses the same as that of the corporate respondent. Respondent Emanuel Rohan is Vice President and an employee of said corporate respondent, with his address the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondent Arrow Food Products, Inc., a corporation, and its officers, representatives, agents and employees, and respondents Marcus Rosenberg, Emanuel Rohan and David Rosenberg, individually and as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of food products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale and distribution of the respondents' products with the purchaser, or the customer of the purchaser, paying the

higher price. "Net" price as used in this order shall mean the ultimate net cost to the purchaser.

2. Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondents as compensation or in consideration for advertising, promotional, or any other services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of food products processed, manufactured, sold or offered for sale by respondents, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution of such products.

3. Furnishing, contracting to furnish, or contributing to the furnishing of, services or facilities in connection with the handling, processing, sale or offering for sale of respondents' food products to any purchaser from respondents of such products bought for resale, when such services or facilities are not accorded, affirmatively offered or otherwise made available on proportionally equal terms to all other purchasers from respondents who resell such products in competition with such purchasers who receive such services or facilities.

It is further ordered, That the allegations of discriminations in price insofar as they relate to primary line injury, as set forth in paragraphs 5 and 6, Count I, of the complaint, and the alleged effects thereof insofar as they relate to primary line injury, as set forth in paragraph 7, Count I, of the complaint, be dismissed.

It is further ordered, That respondent Arrow Food Products, Inc., a corporation, and its officers, representatives, agents and employees, and respondents Marcus Rosenberg, Emanuel Rohan, and David Rosenberg, individually and as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of food products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing that their food products conform in quality or type to standards established for such products by the United States Department of Agriculture, when such is not a fact, or in any other manner misrepresenting the quality, type, origin, or other characteristics of such food products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing

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examiner shall, on the 26th day of June 1962, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Arrow Food Products, Inc., a corporation, and Marcus Rosenberg (erroneously named in the complaint as Markus Rosenberg), Emanuel Rohan and David Rosenberg, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a