

disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

B. Fails to disclose that the fur product is "secondhand", when such is the fact.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF
SOUTHWESTERN SUGAR & MOLASSES COMPANY ET AL.

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

Docket 7463. Complaint, Apr. 1, 1959—Decision, Sept. 12, 1962

- Consent order requiring distributors of "blackstrap" molasses—the largest purchasers of domestic and "offshore" molasses in the United States—with main office in New York City and a direct branch in Houston, Tex.,
- To cease their attempts to eliminate competition in the sale of blackstrap molasses, in the course of which they engaged in such unfair practices as coercing independent competitor customers to maintain prices they established and policed, including un-incurred freight charges; refusing to sell to independent competitor-customers or "hot truckers" who sold at lower delivered prices than they prescribed or, in the alternative, leasing trucking equipment to preclude price-cutting; and requiring truckers to provide "kick-backs" in order to continue hauling blackstrap molasses under lease arrangements; and
- To cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by such practices as selling their molasses to certain favored distributors at a discount of $\frac{1}{4}$ -cent to $\frac{1}{2}$ -cent per gallon from the established market price.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45) and subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, ap-

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proved June 19, 1936 (U.S.C., Title 15, Sec. 13) and it appearing to the Commission 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

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

PARAGRAPH 1. Respondent Southwestern Sugar & Molasses Company 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 at 115 Broadway, New York, N.Y. Respondent operates a direct branch in Houston, Texas.

Respondents Abraham I. Kaplan, Peter Berdeshevsky, and Lutz H. Frieler, are president, vice president and secretary-treasurer, respectively, and Stanley J. Posner is an employee, of said corporation. The individual respondents formulate, direct and control the policies, acts and practices of the corporate respondent herein named.

PAR. 2. All herein named respondents are now and have been for several years last past, engaged in the purchase, storage, sale and distribution of the commodity "blackstrap" molasses to users and distributors of livestock feed and others. The corporate respondent is the largest purchaser of domestic and "offshore" molasses in the United States. In 1955, sales of the corporate respondent were approximately \$20,000,000.

PAR. 3. In the regular and usual course and conduct of their business, respondents cause, and for the past several years have caused, their commodity "blackstrap" molasses, when purchased and sold, to be transported from places in the States of Louisiana and Texas, among others, to purchasers and sellers thereof located in various States of the United States.

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in "blackstrap" molasses in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act, among and between the various States of the United States.

PAR. 4. In the course and conduct of their business, the respondents have been and are now in substantial competition in the sale of "blackstrap" molasses with other sellers of such product. In many areas, respondents sell their products to two or more molasses distributors, who are in substantial competition each with the other in the resale of said product.

PAR. 5. From time to time as hereinafter alleged, respondent South-

western Sugar & Molasses Co., acting individually and through its respondent officers and employees, its wholly owned subsidiaries and affiliate companies or "satellites," has engaged in certain acts and practices for the purpose and with the objective of eliminating and suppressing, or attempting to eliminate and suppress, the competition of others engaged in the sale and distribution of "blackstrap" molasses, and of otherwise furthering the dominant position of the corporate respondent in the purchase, sale and distribution of the aforesaid product in commerce.

PAR. 6. Pursuant to and in order to effectuate and carry out such purpose and objectives in the purchase, distribution and sale of said product in commerce, respondents from time to time have engaged in, performed, and carried out, by various means and methods, the following acts and practices, among others:

1. Persuaded, induced, coerced, intimidated, compelled, caused or otherwise influenced or attempted to influence certain independent competitor-customers of said respondents to maintain and not sell below prices established and policed by respondent Southwestern, which prices included charges for freight in certain instances where no freight charges were incurred;

2. Refusing to sell molasses to independent competitor-customers, or "hot truckers," who resold said product at delivered prices which were lower than those prescribed by Southwestern; or in the alternative, leasing the trucking equipment of independent competitor-customers ("hot truckers") in order to preclude any "cutting" of prices established and maintained by respondent Southwestern;

3. Requiring truckers to provide rebates or "kick-backs" in order to continue hauling "blackstrap" molasses under lease arrangements.

PAR. 7. The acts and practices as hereinabove alleged, have had and now have the tendency and capacity unlawfully to restrain, lessen, and eliminate competition in the purchase, distribution and sale of the aforesaid product in commerce; and do restrain, lessen and eliminate competition; and in consequence thereof, injury has been done, and is now being done, by respondents to competition in commerce among and between the various States and said acts and practices are all to the prejudice and injury of the public, and of respondents' competitors, and constitute unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

COUNT II

Charging violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the Commission alleges:

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PAR. 8. Paragraphs 1 through 4, are hereby incorporated by reference and made a part of the charge as fully and with the same effect as though here again set forth verbatim.

PAR. 9. In the course and conduct of their business in commerce, the respondents have been and are now, in each of several trading areas, and in particular in the Houston, Texas, area, discriminating in price in the sale of "blackstrap" molasses of like grade and quality by selling said product to favored distributor-customers at significantly lower prices than they are selling to nonfavored distributor-customers who are competitively engaged, each with the other, in the resale of said product. One or more of sales involved in such discriminations have been and are now in commerce, and said commodity has been and now is sold for resale within the United States.

Respondents have effected said discriminations between and among their customers in the manner and by the method hereinafter described.

In the course and conduct of their business in commerce, respondents sell "blackstrap" molasses to favored distributor-customers at the established market price of said product less a specified discount of $\frac{1}{4}$ -cent to $\frac{1}{2}$ -cent or more per gallon, while respondents sell to nonfavored distributor-customers at the established market price of said product without any discount whatsoever. Because of the highly competitive nature of the particular business, $\frac{1}{4}$ -cent to $\frac{1}{2}$ -cent discount per gallon readily determines the loss or retention of resale customers by the distributor-customers of the respondents.

PAR. 10. In addition to the practices alleged in paragraph 9 herein, which are acts and practices in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, it is further alleged that in the course and conduct of their business in commerce, respondents entered into long term contracts of different time periods with certain of their customers. Each of the contracts provided for the sale and purchase of specified quantities of said product at agreed upon price and shipping terms less specified discounts. In addition, the contracts, within certain specified price ranges, provided for protection against market price fluctuations during the period covered by the contracts.

Contracts with favored customers provided for larger discounts, longer shipment periods and greater price protection against market fluctuations, among other provisions. During approximately the same period, contracts made with nonfavored customers provided for smaller discounts, shorter shipment periods and less price protection against market price fluctuations among other provisions.

PAR. 11. The effect of respondents' discriminations in price and

terms of sale, as above alleged, may be substantially to lessen, injure, destroy or prevent competition in the line of commerce in which respondents are engaged, and between and among respondents' favored and nonfavored customers.

PAR. 12. The acts and practices of respondents as above alleged constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Mr. Eugene Kaplan supporting the complaint.

Berlack, Israels & Liberman, by *Mr. Harris Berlack* and *Mr. Monroe S. Singer*, of New York, N.Y., for respondents other than Berdeshevsky.

Curtis, Mallet-Prevost, Colt & Mosle, of New York, N.Y., for respondent Berdeshevsky.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on April 1, 1959, charging them, in Count I thereof, with the use of unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act by engaging in certain acts and practices to eliminate competition in the sale and distribution of "blackstrap" molasses and, in Count II thereof, with violating Section 2(a) of the Clayton Act, as amended, by discriminating between various customers as to price and terms of sale. After being served with said complaint respondents appeared by counsel and thereafter filed their respective answers to the complaint, except for respondent Kaplan. A motion to dismiss was filed as to respondent Kaplan based on the ground that he was deceased. Said motion was granted by order of the undersigned, dated July 7, 1959, to the extent that provision for dismissal as to said respondent would be made in the initial decision to be issued at the conclusion of this proceeding.

Thereafter, all of the respondents, except respondents Kaplan and Berdeshevsky, entered into an agreement dated June 21, 1962, containing a consent order to cease and desist, purporting to dispose of all of this proceeding as to all parties except respondents Kaplan and Berdeshevsky. Said agreement, which has been signed by all respondents who are parties thereto, by counsel for said respondents and by counsel supporting the complaint, and approved by the Director of the Commission's Bureau of Restraint of Trade and the Chief of the Division of Discriminatory Practices, of said Bureau,

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 published May 6, 1955, as amended; the parties having heretofore filed the requisite notice of their desire to avail themselves of the privilege of disposing of this proceeding by consent agreement.

The signatory respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and 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 such 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 such 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 record herein shall consist solely of the complaint and said agreement, and that 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. The order agreed to provides for the dismissal of Count II of the complaint as to respondents Frieler and Posner, as individuals, and of so much of said count as alleges "primary line injury", for the reasons set forth in said agreement.

There has also been filed in this proceeding a motion to dismiss the complaint as to the remaining respondent, Peter G. Berdeshevsky, on the grounds that said respondent has had no connection with the corporate respondent or the other respondents since October 8, 1957, that he has not been engaged in any way since that date in the distribution of blackstrap molasses, and that prior thereto he did not individually participate in the activities charged in the complaint. Counsel supporting the complaint in his answer to said motion, states that he has no reason to disagree with the facts set forth in the motion to dismiss and therefore does not oppose the granting thereof.

Based on the facts set forth in the motion to dismiss as to respondent Berdeshevsky, which are not substantially disputed by counsel supporting the complaint, and in view of the lack of opposition to the granting of said motion, it is the opinion of the hearing examiner that this proceeding may appropriately be dismissed as to said re-

spondent, subject to this decision's becoming the decision of the Commission with respect to the remaining respondents.

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 signatory thereto, and that this proceeding will otherwise be appropriately disposed of as to all remaining parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings published May 6, 1955, as amended, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Respondent Southwestern Sugar and Molasses Company 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 55 Fifth Avenue, in the city of New York, State of New York. Said corporate respondent operates a direct branch in the city of Houston, State of Texas. Respondents Lutz H. Frieler and Stanley J. Posner are employees of said corporate respondent. The respective addresses of respondents Lutz H. Frieler and Stanley J. Posner are 1110 Fair Oaks, Houston, Texas, and 309 Quincy, El Paso, Texas. (Said corporate respondent formerly had its principal office and place of business located at 115 Broadway, New York, New York, and it is so designated in the complaint. Respondent Lutz H. Frieler formerly was secretary-treasurer of said corporate respondent and is designated as such in the complaint.)

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named in paragraph 1, hereof. The complaint states a cause of action against said respondents under the Federal Trade Commission Act and the Clayton Act, as amended, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents Southwestern Sugar and Molasses Company, a corporation, its officers, representatives, agents and employees, and Lutz H. Frieler and Stanley J. Posner, individually and as employees of said corporation, their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of blackstrap molasses in commerce, as "commerce" is defined in the Federal

Trade Commission Act, do forthwith cease and desist from doing or performing any of the following acts and practices:

(a) Entering into, continuing, maintaining, or enforcing any agreement or understanding, express or implied, with any purchaser of blackstrap molasses to fix, establish or maintain the price at which such product is to be resold by such purchaser or by which such purchaser agrees or undertakes to include in any delivered price or price quotation any freight or other charge which is different from actual cost incurred.

(b) Persuading, inducing, coercing, intimidating, compelling or attempting to cause or influence any customer of said respondents:

(i) To adopt, maintain, or sell or offer to sell such product at any particular price or prices; or

(ii) To include in any delivered price or price quotation any freight or other charge which is different from the actual cost incurred.

(c) Refusing to sell or offer to sell to, or otherwise deal with, any competitor-customer or prospective competitor-customer of blackstrap molasses for the reason that such purchaser or prospective purchaser has resold, or is reselling, such product at prices lower than those prescribed by said respondents.

(d) Requiring any trucker or other hauler of blackstrap molasses to pay rebates or "kickbacks" to the said respondents in order to haul respondents' blackstrap molasses.

It is further ordered, That respondents Southwestern Sugar and Molasses Company, a corporation, its officers, representatives, agents and employees, and Lutz H. Frieler and Stanley J. Posner, as employees of said corporation, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of blackstrap molasses in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(a) Discriminating, directly or indirectly, in the price of blackstrap molasses by selling said product from a terminal owned or operated by respondents to any purchaser at a net price which is higher than the net price charged any other purchaser of blackstrap molasses of like grade and quality from the same terminal who in fact competes with the purchaser paying the higher price in the resale and distribution of said blackstrap molasses as such, or in fact competes with such purchaser in the resale and distribution of said blackstrap molasses as an ingredient of other products.

(b) Discriminating, directly or indirectly, in the price of blackstrap molasses by selling said product for shipment from a point other than a terminal owned or operated by respondents to any purchaser at a net price which is higher than the net price charged any other purchaser of blackstrap molasses of like grade and quality (for shipment in the manner described in this subparagraph (b)) who in fact competes with the purchaser paying the higher price in the resale and distribution of said molasses as such, or in fact competes with such purchaser in the resale and distribution of said blackstrap molasses as an ingredient of other products.

For the purpose of determining "net price" as used in this order, there shall be taken into account rebates, allowances, commissions, discounts, terms and conditions of sale and delivery, or other forms of direct or indirect price reductions, by which net prices are effected.

It is further ordered, That the allegation in Paragraph 11 of the complaint that the effect of respondents' alleged discriminations in price and terms of sale may be substantially to lessen, injure, destroy or prevent competition in the line of commerce in which respondents are engaged be dismissed.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice as to respondents Lutz H. Frieler and Stanley J. Posner as individuals, insofar as it relates to the allegations under Count II of the complaint; and as to respondent Abram I. Kaplan (incorrectly named in the complaint as Abraham I. Kaplan) in its entirety.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to respondent Peter Berdeshevsky, subject to this decision's becoming the decision of the Commission as to the other respondents in the proceeding.

FINAL ORDER

The Commission by its previous order having placed this case on its docket for review; and

The Commission now having concluded that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed July 6, 1962, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Southwestern Sugar and Molasses Company, Lutz H. Frieler and Stanley J. Posner shall,

