

JEFFERSON-TRAVIS INCORPORATED

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

Docket 7970. Complaint, June 23, 1960—Decision, Oct. 10, 1962

Order dismissing—respondent having divested itself of the distribution business involved—complaint charging a wholly owned subsidiary of Emerson Radio & Phonograph Corporation with violating Secs. 2(a) and 2(d) of the Clayton Act, respectively, by selling “Emerson” brand appliance products to some purchasers at higher prices than it charged their competitors, and by grant-

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ing discriminatory promotional payments to certain customers in connection with their advertising of Emerson products.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Jefferson-Travis Incorporated has violated and is now violating the provisions of subsections (a) and (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues this complaint, stating its charges with respect thereto as follows:

COUNT I

Charging violation of subsection (a) of Section 2 of the amended Clayton Act, the Commission alleges:

PARAGRAPH 1. Respondent Jefferson-Travis Incorporated is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 32-50 Ross Street, New York, N.Y.

PAR. 2. Respondent is a wholly owned subsidiary of Emerson Radio & Phonograph Corporation (hereinafter referred to as either Emerson Corporation or parent corporation). Said parent corporation, among other things, is engaged in the business of manufacturing and distributing for consumer use television and radio receiving sets, high fidelity phonographs, air conditioning units and other consumer appliance products. Emerson Corporation's net sales exceeded \$58,000,000 in 1958.

Respondent manufactures television cabinets exclusively for the Emerson Corporation. In addition, respondent purchases from its parent corporation television and radio receiving sets, high fidelity phonographs, air conditioning units and other consumer appliance products manufactured by said parent corporation under the brand name "Emerson". It sells and distributes these products to retail outlets through divisions which it operates in various parts of the country. Included among the consumer appliance distributing divisions operated by respondent in large metropolitan areas in various parts of the nation are: Emerson-Midwest Division which operates in the Chicago, Illinois metropolitan area; Emerson-Michigan Division which operates in the Detroit, Michigan metropolitan area; Emerson West Coast Division which operates in the San Francisco, California metropolitan area; and Emerson-Columbus Division which operates in the Northern Ohio area.

Respondent's net sales exceeded \$13,000,000 in 1958.

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PAR. 3. In the course and conduct of its business, respondent has been engaged and is presently engaged in commerce, as "commerce" is defined in the amended Clayton Act, by selling and distributing its products throughout various States of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent has been and is now in competition with other corporations, partnerships, firms and individuals engaged in the manufacturing, selling and distributing of various consumer appliance products, including television and radio receiving sets, high fidelity phonographs and air conditioning units.

PAR. 5. In the course and conduct of its business in commerce, respondent has sold and is now selling certain "Emerson" brand consumer appliance products to some purchasers at prices substantially higher than those charged other purchasers of these products of like grade and quality who have been and are now competing with said unfavored purchasers.

For example, in the Chicago, Illinois area, respondent has granted Polk Bros. substantial price concessions in connection with Polk Bros.' purchase from respondent of "Emerson" appliance products. Respondent did not offer or grant these price concessions to other purchasers competing with Polk Bros.

PAR. 6. The effect of respondent's discriminations in price, as alleged above, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with purchasers of respondent who receive the benefit of such price discriminations.

PAR. 7. The acts and practices of the respondent, as alleged above, violate subsection (a) of Section 2 of the amended Clayton Act.

COUNT II

Charging violation of subsection (d) of Section 2 of the amended Clayton Act, the Commission alleges:

PAR. 8. Paragraphs 1 through 3 of Count I hereof are hereby repeated and made a part of this count as fully and with the same force and effect as though here again set forth in full.

PAR. 9. In the course and conduct of its business in commerce, 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, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of "Emerson" appliance products sold

to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing with said favored customers in the distribution of such products.

For example, respondent has granted and is presently granting Polk Bros., of Chicago, Illinois, substantial promotional payments or allowances in connection with the advertising by Polk Bros. of respondent's products in newspapers and on radio and television stations. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Polk Bros.

PAR. 10. The acts and practices of respondent, as alleged above, are in violation of the provisions of subsection (d) of Section 2 of the amended Clayton Act.

Mr. Jerome Garfinkel supporting the complaint.

Weisman, Allan, Spett & Sheinberg, by *Mr. Harry I. Rand*, of New York, N.Y., for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

As this matter is before the undersigned hearing examiner on respondent's motion filed June 11, 1962, for a dismissal of the complaint herein "on the grounds [1] that respondent is no longer engaged in the distribution and sale of the products forming the subject of this proceeding [involving charges of violations of subsections (a) and (d) of the Clayton Act as amended by the Robinson-Patman Act] and [2] does not intend to resume such business and [3] that the public interest will not be served by the continuation of the proceeding." The motion is supported by various annexed documents to which reference will be made below.

Complaint counsel by answer filed June 19, 1962, to said motion states that he "does not oppose respondent's motion to dismiss the complaint". He further avers that the supporting documents attached to respondent's motion would "sustain a finding that a cease and desist order in this proceeding would serve no useful purpose" and asserts that under the facts which appear from said documents he "does not deem it appropriate to engage in costly litigation to obtain cease and desist order having no proscriptive value."

The complaint in this proceeding, involving as heretofore indicated charges of violations of Sections 2 (a) and (d) of the amended Clayton Act, was issued on June 23, 1960. An answer to the complaint was duly filed on November 4, 1960, and an amendment to the answer was filed on November 10, 1960. After the present hearing examiner

was substituted on July 19, 1961, for the original hearing examiner herein, respondent on October 18, 1961, filed an amended answer pursuant to leave granted on respondent's unopposed motion for such leave. The only new matter in the amended answer are affirmative defenses which may be briefly described for present purposes as the so-called "cost justification" and "meeting of competition" defenses to the said Sections 2 (a) and (d) charges of the complaint.

This matter has been in the prehearing stage up to the present time. Pursuant to an order dated August 14, 1961, the first prehearing conference herein was held on September 26, 1961, which was concerned primarily with procedures required for the production of documents desired by complaint counsel from the files and records of respondent. The second prehearing conference herein, originally scheduled for December 4, 1962, but postponed from time to time at request of complaint counsel, was held on April 9, 1962, when the examiner was advised (1) that respondent was in the process of divesting itself from that part of its business which gave rise to the complaint, (2) that the divestiture would be completed on or before June 14, 1962, and (3) that respondent on or before June 14, 1962, would present a motion for the dismissal of the complaint on the ground that it was no longer engaged in that portion of its business which gave rise to the complaint.

Upon indication from complaint counsel that he would not oppose the proposed motion for dismissal of the complaint when made, the examiner continued the prehearing conference then in session to allow the indicated time required for the presentation of such motion and for its consideration but fixed times for additional prehearing conferences and for the hearing proper herein after June 14, 1962, to cover the possibility that the motion would not be presented or that the motion, if presented, might be denied upon due consideration. Respondent's motion to dismiss the complaint, as heretofore indicated, was filed on June 11, 1962.

The complaint herein consists of two counts. The first count charges violation of Section 2(a) of the amended Clayton Act. The second count charges violation of Section 2(d) of the amended Act.

The following allegations of the complaint are established as facts under both counts of the complaint by the pleadings of the parties herein, except that with respect to one of the sentences herein-after indicated the facts stated therein are established by documents attached to respondent's aforementioned motion to dismiss the complaint:

PARAGRAPH 1. Respondent Jefferson-Travis Incorporated is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 32-50 Ross Street, Brooklyn, N.Y.

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PAR. 2. Respondent is a wholly owned subsidiary of Emerson Radio & Phonograph Corporation (hereinafter referred to as either Emerson Corporation or parent corporation). Said parent corporation, among other things, is engaged in the business of manufacturing and distributing for consumer use television and radio receiving sets, high fidelity phonographs, air conditioning units and other consumer appliance products. Emerson Corporation's net sales exceeded \$58,000,000 in 1958.

Respondent manufactures television cabinets exclusively for the Emerson Corporation. In addition, respondent purchases from its parent corporation television and radio receiving sets, high fidelity phonographs, air conditioning units and other consumer appliance products manufactured by said parent corporation under the brand name "Emerson".¹ It sells and distributes these products to retail outlets through divisions which it operates in various parts of the country. Included among the consumer appliance distributing divisions operated by respondent in large metropolitan areas in various parts of the nation are: Emerson-Midwest Division which operates in the Chicago, Illinois metropolitan area; Emerson-Michigan Division which operates in the Detroit, Michigan metropolitan area; Emerson West Coast Division which operates in the San Francisco, California metropolitan area; and Emerson-Columbus Division which operates in the Northern Ohio area.

Respondent's net sales exceeded \$13,000,000 in 1958.

PAR. 3. In the course and conduct of its business, respondent has been engaged and is presently engaged in commerce, as "commerce" is defined in the amended Clayton Act, by selling and distributing its products throughout various States of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent has been and is now in competition with other corporations, partnerships, firms and individuals engaged in the manufacturing, selling and distributing of various consumer appliance products, including television and radio receiving sets, high fidelity phonographs and air conditioning units.

With reference to the first count, the complaint sets forth the following additional allegations which are denied by respondent's pleadings:

PAR. 5. In the course and conduct of its business in commerce, respondent has sold and is now selling certain "Emerson" brand consumer appliance products to some purchasers at prices substantially higher than those charged other purchasers of these products of like grade and quality who have been and are now competing with said unfavored purchasers.

For example, in the Chicago, Illinois area, respondent has granted Polk Bros. substantial price concessions in connection with Polk Bros.' purchase from respondent of "Emerson" appliance products. Respondent did not offer or grant these price concessions to other purchasers competing with Polk Bros.

PAR. 6. The effect of respondent's discrimination in price, as alleged above, may be substantially to lessen competition or tend to create a monopoly in the

¹ The facts stated in the foregoing sentence are denied in respondent's amended answer but are conceded in respondent's aforementioned motion to dismiss the complaint. However, see page 973 herein wherein it is established by documentary evidence that respondent's purchases of the described commodities are not from the parent corporation, Emerson Radio & Phonograph Corporation, but the latter's wholly owned subsidiary, Emerson Radio, Inc.

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lines of commerce in which respondent and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with purchasers of respondent who receive the benefit of such price discriminations.

PAR. 7. The acts and practices of the respondent, as alleged above, violate subsection (a) of Section 2 of the amended Clayton Act.

With reference to the second count, the complaint after incorporating in paragraph 8 thereof by reference the allegations shown in paragraphs 1 through 3 above, sets forth the following additional allegations which are denied by respondent's pleadings:

PAR. 9. In the course and conduct of its business in commerce, 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, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of "Emerson" appliance products sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing with said favored customers in the distribution of such products.

For example, respondent has granted and is presently granting Polk Bros. of Chicago, Illinois, substantial promotional payments or allowances in connection with the advertising by Polk Bros. of respondent's products in newspapers and on radio and television stations. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Polk Bros.

PAR. 10. The acts and practices of respondent, as alleged above, are in violation of the provisions of subsection (d) of Section 2 of the amended Clayton Act.

As heretofore indicated respondent's amended answer filed on October 18, 1961 sets forth certain affirmative defenses briefly described above as the "cost justification" and "meeting of competition" defenses. The full text of these defenses as set forth in the amended answer are as follows:

11. Alleges that such differences in prices, if any, respondent charged to different purchasers of commodities of like grade and quality reflect due allowances for differences in the cost of manufacture, sale and delivery resulting from the differing methods or quantities in which such commodities were sold or delivered.

12. Alleges that lower prices, if any, charged to purchasers of commodities of like grade and quality were so charged in good faith to meet an equally low price of a competitor.

13. Alleges that disproportionate, promotional payments or allowances granted by respondent, if any, reflected due allowances for the differences in the costs of manufacture, sale and delivery resulting from the differing methods or quantities in which such commodities were sold or delivered.

14. Alleges that disproportionate promotional payments or allowances granted by respondent, if any, were granted in good faith to meet the promotional payments, services or facilities furnished by a competitor.

The most noteworthy fact for present purposes is that although the complaint alleges that respondent is engaged both in the (1) business of manufacturing television cabinets exclusively for the parent corporation Emerson Radio & Phonograph Corporation and in the (2) business of selling and distributing the aforementioned Emerson brand products² to retail outlets through divisions which respondent operates in various parts of the country, the complaint charges respondent with violations of the involved sections of the amended Clayton Act only with respect to respondent's *second* mentioned business function. Stated more directly, the complaint does not charge respondent with violations of any of the involved provisions of the Act with respect to that portion of respondent's business which is devoted solely to the manufacturing of television cabinets exclusively for the parent corporation. Respondent's motion to dismiss the complaint asserts that respondent's "sole business activity at the present time is the manufacture of cabinets exclusively for Emerson Radio & Phonograph Corporation, its parent company."

From the uncontested facts reflected in the supporting documents attached to respondent's motion to dismiss the complaint, the following facts are established:

1. Respondent's supplier of "Emerson" brand products has been Emerson Radio, Inc., another wholly owned subsidiary of respondent's parent company, the aforementioned Emerson Radio & Photograph Corporation, and not the said parent company as alleged in the complaint.

2. Respondent had eight contracts, each dated January 1, 1962, with the aforementioned Emerson Radio, Inc., each of which is entitled "Distributor Franchise Agreement 1962". Under the terms of each contract, respondent was given a distributorship "for the sale of Emerson television, radio, high fidelity and stereophonic instruments and phonographs, and air conditioners, parts and accessories therefor, and other products" in a franchised territory for a period of one year commencing January 1, 1962. The eight contracts cover the territories described in paragraph 2 of the complaint as set forth above. Although the contracts are for terms of one year, each contract is expressly made subject to termination by either party by 30 days notice. Each contract provides that upon its termination, the re-

² For the convenience of the reader, these are again identified as Emerson brand television and radio receiving sets, high fidelity phonographs, air conditioners and other consumer appliance products alleged in the complaint to be manufactured by Emerson Radio & Phonograph Corporation but which are actually manufactured, as will be shown below, by Emerson Radio, Inc., a wholly owned subsidiary of the said Emerson Radio & Phonograph Corporation.

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spondent "agrees to remove and not thereafter to use all signs containing the word 'Emerson' and immediately to cease using all stationery, advertising matter and other printed matter in its possession or under its control containing the word 'Emerson'. Numerous other provisions of these distributor franchise agreements are not particularly pertinent here.

3. At a meeting of its board of directors held on March 7, 1962, respondent resolved to discontinue "as soon as possible" its distributorships of "Emerson" brand products. Pertinent minutes of the said meeting relating to this subject are as follows:

RESOLVED, that this Corporation should discontinue as soon as possible the distribution of "Emerson" brand radios, television sets, phonographs (including high-fidelity and stereophonic sets) separately or in combination with each other and air-conditioning units and divest itself of ownership, direction and control of all its distributorships which are now located in Chicago, Illinois, San Francisco, California, Columbus, Ohio, Pittsburgh, Pennsylvania, Buffalo, New York, Detroit, Michigan and Cleveland, Ohio, and

FURTHER RESOLVED, that this Corporation as soon as possible should no longer engage in the distribution of such products, nor should it have any connection with, or exercise any direction or control of any distributors of such products; and

FURTHER RESOLVED, that the written resignations received from all of the officers and directors of the Corporation are accepted, effective as of the close of this meeting.

4. At a meeting of the board of directors of Emerson Radio & Phonograph Corporation held on April 25, 1962, the Chairman informed the board of the decision of its said wholly owned subsidiary, Emerson Radio, Inc., to discontinue respondent as a distributor of Emerson products in all territories. He further advised the board that the discontinuance of the distributorships was then in process and would be completed shortly.

5. Between the dates of April 2 and June 4, 1962, Emerson Radio, Inc., entered into new distributor franchise agreements with seven successor distributor corporations to respondent for the territories formerly franchised to respondent. The new contracts run from the dates in 1962 on which respondent's aforementioned franchise agreements with Emerson Radio, Inc., were terminated, to the end of 1962. The general provisions of the new distributor franchise agreements issued by Emerson Radio, Inc., to respondent's successor distributor corporations are identical with those theretofore issued by Emerson Radio, Inc., to respondent, as described above.

6. Respondent, between the dates of April 2 and June 7, 1962, sold all of the assets of that portion of its business relating to the distribution of "Emerson" products to the aforementioned seven successor

distributor corporations for an aggregate net sum of \$5,246,925. These assigned assets included inventories, accounts and notes receivable, and deferred charges.

7. There is no corporate relationship between Emerson Radio & Phonograph Corporation (as seen, respondent's parent company) or any of said parent company's subsidiaries, on the one hand, and any of the successor distributor corporations of respondent, on the other.

8. At the present time the sole business of respondent is the manufacture of cabinets exclusively for its said parent company, Emerson Radio & Phonograph Corporation. These cabinets are built to specifications provided by this parent company and are suitable for use only in products manufactured by the parent company.

9. Respondent does not intend to manufacture or sell any cabinets for anyone other than its said parent company.

10. Respondent does not intend to resume the distribution of "Emerson" brand products or to engage in any other business except the manufacture and sale of cabinets for the parent company.

In summary, the facts show that respondent has completely and totally discontinued that portion of its business relating to the sale and distribution of "Emerson" brand name products. This discontinuance is signified (1) by the surrender of its franchise agreements with Emerson Radio, Inc., for the sale of "Emerson" products, (2) by the appointment of successor-distributor corporations by Emerson Radio, Inc., to take over the franchise arrangements theretofore enjoyed by respondent, and (3) by respondent's sale of all of its "Emerson" distributorship assets, aggregating more than \$5,000,000, to successor distributor corporations. All of respondent's officers and directors have resigned as of March 7, 1962. Under all of these circumstances, the likelihood of respondent's resumption of its former business activities as a franchised distributor of "Emerson" products, although theoretically possible because respondent's corporate relationship to the parent company Emerson Radio & Phonograph Corporation, appears for all practical purposes to be quite remote. Respondent's remaining business is the manufacture of cabinets exclusively for the parent company. Since such cabinets are built to the specifications of the parent company and are suitable only for use in the products manufactured by or in behalf of the parent company, their sale to other manufacturers appears to be wholly unlikely. Respondent's present remaining business as a manufacturer of cabinets for the exclusive use of the parent company obviously cannot lead to violations of the antidiscriminatory practices prescribed by the amended Clayton Act. From this analysis, the examiner concludes

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that no useful purpose would be served by the prosecution of this proceeding. Accordingly, respondent's motion to dismiss the complaint is granted, subject, however, to the condition that the dismissal shall be without prejudice to the right of the Commission to reopen the instant proceeding if future circumstances warrant, and a formal order calling for the dismissal of the complaint, subject to the same condition, is entered below.

ORDER

It is ordered, That the complaint in this proceeding be, and the same hereby is, dismissed, subject, however, to the right of the Commission to reopen the matter if future circumstances warrant.

DECISION OF THE COMMISSION

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall, on the 10th day of October 1962, become the decision of the Commission.

IN THE MATTER OF

PURE GOLD, INC.