

Complaint

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IN THE MATTER OF

AUSTIN BISCUIT CORPORATION ET AL.

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

Docket 7730. Amended Complaint, May 23, 1963—Decision, December 20, 1963

Consent order requiring a corporation in Baltimore engaged in packaging crackers, cookies, peanut butter sandwiches, salt peanuts, etc., and selling them, principally through vending machines, in 5¢ and 10¢ packages, along with the corporation which acquired its assets and business in January 1961, and continued its challenged activities, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by such practices as paying rebates based on a schedule of cumulative monthly purchases and, later, on a single order quantity discount schedule with an additional discount to vending machine purchasers favoring their products, as specified.

AMENDED AND SUPPLEMENTAL COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and more particularly designated and described hereinafter, have violated, and that respondent Fairmount Foods Company is now violating, 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, hereby issues its amended and supplemental complaint, stating its charges with respect thereto, as follows:

PARAGRAPH 1. Respondent Austin Biscuit Corporation, sometimes hereinafter referred to as Austin, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 2930 Washington Boulevard, Baltimore, Maryland.

PAR. 2. Respondent Fairmount Foods Company, sometimes hereinafter referred to as Fairmount, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3201 Farnam Street, Omaha, Nebraska.

PAR. 3. Austin was incorporated in 1939 as Austin Packing Company, and has been engaged since that time in the business of packaging, distributing and selling crackers, cookies, peanut butter sandwiches, salted peanuts and related products. Purchasers of such products from Austin resell such products principally through vending machines. Such products have been packaged to resell at retail for 5¢ and 10¢ per package.

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Austin has operated one plant which is located in the city of Baltimore, Maryland, and has had access to warehouse space in the city of Chicago, Illinois. From these two points Austin has shipped its products to various purchasers. In the year 1958, total sales by Austin were in excess of \$3,000,000.

In the year 1959, the name Austin Packing Company was changed to Austin Biscuit Corporation, although the operation and location of the business continued without other change.

PAR. 4. Fairmont has been engaged, for many years, either directly or through wholly owned subsidiaries or both, in the business of manufacturing, processing, distributing and selling dairy products, including milk, cream and butter and in the business of distributing and selling eggs, poultry and miscellaneous frozen foods.

During the month of June 1960, Fairmont acquired all the outstanding capital stock of Austin and thereafter exercised control over the operations of Austin. During the month of December, 1960, Fairmont directed that Austin be dissolved as a corporation, that the assets of Austin be acquired by Fairmont and that the liabilities of Austin be assumed by Fairmont. Since January, 1961, the business formerly conducted by Austin under the names Austin Packing Company and Austin Biscuit Corporation has been operated, under the control of Fairmont, under the name "Austin Biscuit Company, Division of Fairmont Foods." Fairmont is the legal successor to the business formerly conducted by Austin and has acquired all rights, title and interest in said business.

Since December, 1960, the former president of Austin has been employed by Fairmont as manager of Austin Biscuit Company, Division of Fairmont Foods.

PAR. 5. Said respondents, in the course and conduct of their respective businesses, have been engaged, and respondent Fairmont is now engaged, in commerce, as "commerce" is defined in the amended Clayton Act. They have sold and distributed their products, and Fairmont now sells and distributes its products, to purchasers located in States other than the State of origin of shipment and, either directly or indirectly, have caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States. There has been a constant course and flow of trade and commerce in such products between respondents and purchasers located in other States, and there is now a constant course and flow of trade and commerce between Fairmont and purchasers located in other States. Such products have been and are now sold for use, consumption or resale within the United States.

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PAR. 6. In the course and conduct of its business in commerce, Austin has sold its products, and Fairmont now sells the products formerly marketed by Austin, to purchasers some of whom are in competition with each other, and with customers of competitors of respondents in the purchase, resale and distribution of such products.

PAR. 7. Austin, either directly or indirectly, since 1955 had been discriminating in price between different purchasers of such products by selling the said products to some purchasers at substantially higher prices than the prices at which Austin sold products of like grade and quality to other purchasers some of whom were in competition with the less favored purchasers in the purchase, resale and distribution of such products.

Since June, 1960, Fairmont has been and is now discriminating in price between different purchasers of products formerly marketed by Austin in the same manner and by the same means.

PAR. 8. As an example of the practices alleged herein, Austin, on or about October 15, 1958, inaugurated a discount schedule which provided for the receipt of rebates by purchasers; such rebates were based on cumulative monthly purchases. That rebate schedule is set forth below:

Volume of purchases:	Percent of rebate
\$200.00 to \$499.99.....	1
\$500.00 to \$999.99.....	1½
\$1,000.00 to \$1,999.99.....	2
\$2,000.00 to \$2,999.99.....	2½
\$3,000.00 to \$3,999.99.....	3
\$4,000.00 and over.....	3½

Said rebate schedule was continued by Austin until its capital stock was acquired by Fairmont and was continued thereafter by Austin under the control of Fairmont until approximately August, 1961.

As a further example of the practices alleged herein, Austin, under the control of Fairmont, during or about August, 1961, inaugurated a schedule of single order quantity discounts which is used in the sale of its products. That discount schedule is set forth below:

Single order purchase:	Discount (percent)
\$00.00 to \$49.99.....	0
\$50.00 to \$99.99.....	1
\$100.00 to \$149.99.....	2
\$150.00 to \$199.99.....	2½
\$200.00 to \$249.99.....	3
\$250.00 and over.....	3½

An additional discount of 1% is granted to those purchasers who operate vending machines and who either continuously display at least one Austin brand product in all of such purchaser's vending

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machines or purchase at least two varieties of Austin brand products in each order.

This single order quantity discount schedule inaugurated in or about August 1961, has been continued since then and to the present time.

PAR. 9. The effect of the discriminations in price, as alleged above, may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which the purchasers receiving the preferential prices are engaged, or to prevent, injure or destroy competition between and among the purchasers of such products from respondents.

PAR. 10. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

ORDER ACCEPTING AGREEMENT CONTAINING ORDER TO CEASE AND DESIST

This matter having come before the Commission upon the hearing examiner's certification of the agreement between the parties containing a consent order to cease and desist, and it appearing that the agreement that has been entered into affords an adequate basis for an appropriate disposition of this proceeding and should be accepted, and that the Commission itself should initially decide this matter, and forthwith issue its decision and order:

The agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Austin Biscuit Corporation was a corporation existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2930 Washington Boulevard, in the city of Baltimore, State of Maryland. The corporate name of said respondent was changed from Austin Packing Company prior to the institution of this proceeding. Respondent Fairmont Foods 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 3201 Farnam Street, Omaha, Nebraska. Respondent Fairmont Foods Company is the corporate successor to respondent Austin Biscuit Corporation.

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

It is ordered, That respondent Austin Biscuit Corporation, formerly Austin Packing Company, a corporation, and respondent Fairmont Foods Company, a corporation, and their officers, representatives, agents and employees, directly or through any corporate or

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other device in connection with the sale and distribution of crackers, cookies, peanut butter sandwiches, salted peanuts, and related products, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating in price by selling such products of like grade and quality to any purchaser at prices higher than those granted to other purchasers, who in fact compete with the unfavored purchaser in the resale and distribution of such products.

It is further ordered, That respondents 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.
