
IN THE MATTER OF
THE LOVABLE COMPANY ET AL.

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

Docket 8620. Complaint, Apr. 20, 1964—Decision, June 29, 1965

Order requiring an Atlanta, Ga., manufacturer and distributor of women's wearing apparel, such as brassieres, girdles, panties and other related products, with annual sales of approximately \$20,000,000, to cease violating Sec. 2(d) of the Clayton Act, by paying promotional and advertising allowances to some customers without making such payments available on proportionally equal terms to all other competing customers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-

(k) "Home Economists" or other formally educated and trained individuals will assist purchasers of respondents' freezer-food plan in planning their food orders;

(l) a trade-in allowance of \$200 will be given with the purchase of a new freezer or refrigerator-freezer combination;

(m) such products or any part thereof are guaranteed in any manner unless the identity of guarantor, the nature and extent of the guarantee and the manner in which the guarantor will perform are clearly and conspicuously disclosed in immediate conjunction with any such representation;

(n) the freezer or refrigerator-freezer is a commercial type or built to commercial standards;

(o) all foods ordered through the freezer-food plan carry an unconditional money-back guarantee; or representing that under any other money-back guarantee that any article or articles carry an unconditional money-back guarantee unless respondents are able to establish that such is the fact;

(p) a member of the freezer-food plan is eligible for a Caribbean Cruise, \$500 in cash, 100,000 Green trading stamps or any other award for which such persons do not have an actual, fair and equal chance of winning or misrepresenting in any manner the benefits to be realized by purchasers participating in respondents' referral plan.

3. Misrepresenting in any manner that the meats supplied to purchasers of their freezer-food plan have been inspected and graded by inspectors of the United States Department of Agriculture.

4. Misrepresenting, in any manner, the minimum monthly plans for, or the kind, quality, grade, quantity availability, or price of the food or food products offered for sale by respondent.

5. Misrepresenting in any manner the savings, cost of purchase or trade-in allowances granted to or realized by purchasers of respondents' freezer-food plan.

PART II

It is further ordered, That respondents Home Delivery Food Service, Inc., a corporation, and its officers and Bernard Brodsky and Abraham J. Tevelov, individually and as officers of said corporation, and respondents' agents, representatives and employees,

tion or in consideration for services or facilities furnished by or through such customers in connection with the handling, offering for sale, or sale of products sold to them by said respondents, and such payments, sometimes hereinafter referred to as promotional allowances, were not available on proportionally equal terms to all other customers competing in the distribution of their products.

PAR. 5. Included among and illustrative of the payments alleged in Paragraph Four were credits, paid by way of check or allowances, as compensation for respondents' share of the cost of promotional services or facilities, including but not limited to newspaper advertising, furnished by customers pursuant to the terms of respondents' various cooperative advertising plans, in connection with the offering for sale or sale of respondents' products.

PAR 6. During 1961 and for some time prior thereto, respondents offered to pay, and did pay, some customers fifty percent of the net cost of a 100-line newspaper advertisement, devoted exclusively to Lovable products, pursuant to a "Cooperative Advertising Policy" plan and such payments were not to exceed $1\frac{1}{2}\%$ of the customer's total purchases for a year. Also, the payments were to be made only if the customer conformed to other conditions specified by respondents

PAR. 7. Respondents supplemented their cooperative advertising plan by a so-called "Lovable Incentive Fund Terms" (LIFT) plan. The additional promotional allowance provided by this plan was alleged to be based upon respondents' net shipments (after discount) of only first class regular "Lovable" brand merchandise for each six-month period, ending December 31 and June 30, and provided in part as follows:

(a) On six-month net shipments to a store that exceeded \$2500 (but less than \$5000) the LIFT plan provided an additional promotional allowance of 2%. No allowance was provided for the first \$2500 in shipments but 2% was granted as soon as that figure was reached.

(b) On shipments that exceeded \$5000 (but less than \$15,000) LIFT provided an allowance of $2\frac{1}{2}\%$ of the amount exceeding \$5000.

(c) On shipments that exceeded \$15,000 LIFT provided an allowance of 3% on amounts exceeding \$15,000.

PAR. 8. On or about January 1, 1963, respondents inaugurated a "TOTAL RETAIL PROMOTION PLAN" whereby customers earned a percentage of the total net amount of the merchandise shipped to them during each six-month period, January through June and

Patman Act, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, The Lovable Company, formerly trading as The Lovable Brassiere Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its principal factory and executive offices located at 2400 Piedmont Road, N.E., Atlanta, Georgia. This respondent owns and operates two subsidiary companies, both factories, located in Hollywood, Florida, called the Enterprise Manufacturing Company and the Hollywood Brassiere Company. Respondent corporation also maintains a sales office at 200 Madison Avenue, New York 16, New York, which includes some executive offices and an advertising department.

Arthur Garson, an individual, is president of the above corporation, with principal offices at 200 Madison Avenue, New York 16, New York. Dan Garson, an individual, is executive vice president, with principal offices at 2400 Piedmont Road, N.E., Atlanta, Georgia, and Bernard Howard, an individual, is secretary of the same corporation, with principal offices at 200 Madison Avenue, New York 16, New York. These individual respondents, having acted in the same official capacities in The Lovable Brassiere Company, currently formulate, direct and control the policies, acts and practices of The Lovable Company, the above-named corporate respondent.

PAR. 2. Respondents are now, and for many years past have been engaged in the manufacture of brassieres, girdles, panties and garter belts which are sold and distributed under various trade names, including "Lovable" and "Graduate." Respondents also manufacture and sell similar products for pre-teen-aged girls. Respondents' sales of these products amount to approximately \$20,000,000 per year. The respondents sell these products for resale at retail to many customers, such as department stores, chain stores, women's specialty shops and dress shops, with places of business located in various cities throughout the United States.

PAR. 3. In the course and conduct of their business, respondents engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped their products or caused them to be transported from their principal places of business in the States of Georgia and Florida to customers located in the same and in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensa-

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2. Respondents made or offered to make such allowances to some customers and failed to make or offer to make similar allowances to all competing customers; and

3. Respondents made or offered to make allowances in excess of the amounts specified in these plans to some customers and failed to make or offer to make allowances available on proportionally equal terms to other customers who competed with these favored customers in the resale and distribution of respondents' products.

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

Mr. Austin H. Forkner and *Mr. Francis A. O'Brien* for the Commission.

Blumberg, Singer, Ross & Gordon, by *Mr. Matthew H. Ross* and *Mr. Alfred K. Kestenbaum* of New York City, for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

OCTOBER 30, 1964

Preliminary Statement

On April 20, 1964, the Federal Trade Commission issued its complaint against The Lovable Company, a corporation (hereinafter called Lovable), and Arthur Garson, Dan Garson, and Bernard Howard, individually and as officers of said corporation (all hereinafter collectively called respondents), charging them with granting discriminatory promotional allowances in violation of Section 2(d) of the Clayton Act (hereinafter called the Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act. Copies of said complaint together with a notice of hearing were duly served on respondents.

Respondents appeared by counsel and filed an answer as amended admitting the corporate, commerce, and certain other factual allegations of the complaint, denying any violation of the Act, and alleging certain affirmative defenses. Pursuant to motion, opposed by respondents, their affirmative defense of lack of competitive effect was stricken by order of the undersigned.

Thereafter, pursuant to negotiations between the parties, a stipulation was entered into and made a part of the record, agreeing, *inter alia*, to amend the answer as provided in said stipulation. As so amended, respondents withdrew their affirmative defense of a good faith meeting of competition, and in substance admitted the

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July through December, as a fund to be used by the customer for promoting respondents' "regular-running LOVABLE brassieres, girdles and garter belts presented at nationally advertised or suggested retail prices * * *."

Pursuant to this program customers earned up to 4% of the total net amount of merchandise shipments, of which 2% could be used for cooperative advertising payments and 2% for all "Store Assistance (fixtures, display cards, mats, etc.)." The customer employing newspaper advertising could receive allowances up to 3% of its purchases for that purpose and 1% for "Store Assistance." The customer who did not or could not use cooperative newspaper advertising could receive a maximum of 3% of its net shipments for "Store Assistance."

In connection with its requirements for newspaper ads the plan provided for a maximum size ad of 200 lines to qualify for a 50% payment and payments of 62½% and 75% for ads consisting of 400 lines or more for a series of such larger ads.

The materials and services under the "Store Assistance" portion of respondents' plan consist of fixtures, display materials, mats, demonstrators and other promotional aids made available to the customer by respondents at values fixed by respondents and chargeable against the customer's promotional allowance fund established as indicated above. In addition, requests for certain Lovable fixtures must be accompanied by specified minimum orders and the expense of crating those fixtures is billed to the customer.

PAR. 9. In addition to the payments for advertising services made under the cooperative advertising plans referred to in Paragraphs Six, Seven and Eight, respondents have also granted allowances, hereinafter referred to as "P.M.'s," or "Push or Prize Monies," to sales employees of certain customers to promote the sale of respondents' products, and such payments have not been made available on proportionally equal, or any terms, to customers competing with the customers so favored in the resale at retail of respondents' products.

PAR. 10. Payments made by respondents pursuant to the plans referred to in Paragraphs Six, Seven and Eight, were not made available on proportionally equal terms to all of respondents' customers competing in the resale and distribution of respondents' products in that:

1. The term and conditions of respondents' plans were and are such as to preclude some competing customers from accepting and enjoying the benefits to be derived from these plans;

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II. Interstate Commerce

Lovable is now and has been engaged in the manufacture and sale of brassieres, girdles, panties and garter belts under various trade names, including "Lovable" and "Graduate," and similar products for pre-teen-age girls, with annual sales of approximately \$20,000,000. Lovable sells these products for resale at retail to department stores, chain stores, women's specialty shops and dress shops located in various cities throughout the United States. In the course and conduct of its business, Lovable is engaged in commerce as "commerce" is defined in the Act.

III. The Unlawful Practices

A. Section 2(d)

Section 2(d) of the Act makes it illegal for any person engaged in commerce to:

*** pay *** to a customer *** for any services *** furnished by or through such customer in connection with the *** sale *** of any products *** manufactured *** by such person, unless such payment *** is available on proportionally equal terms to all other customers competing in the distribution of such products ***.

As noted above, respondents admit a violation of Section 2(d) in that the terms and conditions of some of Lovable's cooperative advertising plans preclude some competing customers from their use, and in that Lovable made or offered allowances in excess of the amounts specified in the plans to some customers and failed to make or offer similar allowance to other competing customers, and accordingly it is so concluded and found. Respondents also admitted that the individual respondents formulate, direct and control the policies, acts and practices of Lovable, and accordingly it is concluded and found that, as individuals, they are responsible and liable for such practices and should be included in the order in their individual capacities.²

B. Voluntary Discontinuance

Respondents alleged as a defense, but offered no proof, that the practices found above were voluntarily discontinued, either before or upon receipt of notice that the Commission intended to issue a complaint, and will not be resumed. The Commission and the

² *Pacific Molasses Co.*, 65 F.T.C. 675, D.N. 7462 (1964); *Flotill Products, Inc.*, 65 F.T.C. 1099, at p. 21 [p. 1118], D.N. 7226 (1964), and cases cited therein and in the initial decision.

allegations of Paragraph 10 (1) and 10 (3) of the complaint, *i.e.*, that the terms and conditions of Lovable's cooperative advertising plans precluded some competing customers from their use, and that Lovable made or offered allowances in excess of the amounts specified in the plans to some customers and failed to make or offer similar allowances to other competing customers, respectively. Respondents further admitted that such admitted acts and practices violated Section 2(d) of the Act.

While denying the allegations of Paragraph 10 (2) of the complaint that they failed to make or offer allowances under the cooperative advertising plans to all competing customers, respondents in said stipulation agreed that if an order in the form prayed for in the complaint be entered, the failure thereafter of Lovable to offer any such cooperative promotional plan to all competing customers shall be deemed a violation of such order. Respondents did not withdraw two affirmative defenses, namely: one, voluntary discontinuance of the alleged practices, and two, their contention that because of the prevalence of such practices in the industry either an order should not be issued or if issued should be held in abeyance pending like orders against their competitors.

As a result of said stipulation, both parties waived hearings and the submission of proposed findings, conclusions, orders and reasons in support thereof, reserving however the right of appeal from the initial decision. Upon the entire record in this case the undersigned makes the following findings of fact, conclusions and order.

FINDINGS OF FACT

I. Corporate Organization and Individual Responsibility ¹

Lovable, formerly called The Lovable Brassiere Company, is a Georgia corporation with a factory and executive offices at 2400 Piedmont Road N.E., Atlanta, Georgia, and sales and executive offices at 200 Madison Ave., New York 16, New York.

Arthur Garson, an individual, formerly president, is now Chairman of its Board of Directors, with his principal office at said New York address. Dan Garson, an individual, formerly executive vice president, is now President, and Bernard Howard, an individual, formerly secretary, is now Vice President, with their principal offices at said Atlanta address. Said individual respondents formulate, direct and control the policies, acts and practices of Lovable.

¹ All facts found are based upon respondents' admission in their answer as amended, inasmuch as the case was submitted on the pleadings and there are no other facts in the record.

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as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.⁵

It will be noted that the Court referred to various relevant facts and factors. No proof having been offered in this proceeding in support of respondents' alleged defense, there is no evidence in the record with respect to any such facts or factors. To the contrary, in fact the Commission has issued a Section 2(d) cease and desist order against one of respondents' competitors based upon substantially the same practice.⁶ Accordingly, respondents' alleged defense cannot be sustained.

CONCLUSION OF LAW

The acts and practices of respondents, as above found, violate Section 2(d) of the Act.

ORDER

It is ordered, That respondents, The Lovable Company, a corporation, and its officers, and Arthur Garson, Dan Garson, and Bernard Howard, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture, sale and distribution of women's wearing apparel, such as brassieres, girdles, panties, garter belts and other related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondents, as compensation for or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of said products, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution or sale of such products.

⁵ *Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411, 413 (1957).

⁶ *Exquisite Form Brassiere, Inc.*, 64 F.T.C. 271, D.N. 6966 (1964).

courts in scores of decisions have delineated the circumstances under which discontinuance or abandonment warrants dismissal. In general, when the discontinuance is after the commencement of investigation, *i.e.*, when the Commission's "hand is on one's shoulder," such dismissal is not granted. The Commission recently summarized the applicable principle as follows:

In weighing pleas of abandonment or discontinuance, the Commission considers a wealth of factors, but in the final analysis the decision must be based upon a conviction that the practice has been surely stopped and will not be resumed in the future. *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 330-331 (7th Cir. 1934).³

Since no proof was offered by either party, there is no evidence in the record of any discontinuance, let alone when and under what circumstances, nor any evidence that the practice will surely not be resumed. Accordingly, it is concluded and found that such defense has not been sustained.

C. Common Competitive Practice

Respondents also alleged as a defense, but offered no proof, that the discriminatory practices found above are common and widespread in the industry and that therefore the Commission in the public interest and in fairness to respondents should either not issue a cease and desist order or hold such order in abeyance pending the issuance of like cease and desist orders against respondents' competitors. As the Commission recently observed:

As has been held many times, the *fact* that an unfair method of competition is widespread in an industry is not a defense on the merits to an action brought against a single competitor, although it should be considered by the Commission in exercising administrative discretion as to how most effectively to stop the practice. *Moog Industries, supra*, at 413. (Emphasis added.)⁴

The Supreme Court has held that such action is within the specialized, experienced judgment and administrative discretion of the Commission, and delineated some of the relevant factors in making such a determination. The Court said:

Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant "industry" within which the particular respondent competes and whether or not the nature of that competition is such

³ *Chesebrough-Ponds, Inc.*, 66 F.T.C. 252, D.N. 8491 (1964).

⁴ *Max Factor & Company*, 66 F.T.C. 184, D.N. 7717, n. 2, p. 251.

(3) that the individual respondents should not be named in the order because they did not personally authorize or participate in the challenged practices,

(4) that the challenged practices are flagrant and industry-wide and that respondents should not therefore be singled out.

The simple answer to the first alleged ground for appeal is that we have no way of knowing whether it has merit because there is no factual basis in the record for it.

In regard to the breadth of the Commission's order, respondents would have the Commission limit the order to plans of the precise kind involved in this proceeding and not draft it in terms having plenary application to all of respondents' promotional and advertising practices.

Such a limitation is obviously unwarranted since there is nothing in the record suggesting that, having violated Section 2(d) through the instrumentality of the two plans involved, the likelihood is that any future violations would occur only within the framework of identical plans. Respondents have violated Section 2(d) and because the violation took a particular form there is no justification for the Commission confining the proscriptive effect of its order to violations of precisely the same kind. *Federal Trade Commission v. Ruberoid*, 343 U.S. 470, 473. There is nothing unique about the advertising plans of respondents in this case so as to require a specially tailored order. As we said recently in *All-Luminum Products*, Docket No. 8485 (1963) [63 F.T.C. 1268, 1279], "Respondents' conduct * * * might be repeated in a variety of ways difficult to anticipate precisely in the future." An order sufficiently broad to cover variations on the basic theme of discriminatory promotional allowances is warranted. *Vanity Fair Paper Mills v. Federal Trade Commission*, 311 F. 2d 480 (1962).

In the case of the applicability of the order to the individual respondents, we feel that respondents' argument has merit. There is nothing in the record justifying an assumption by the Commission that these individual respondents might in the future violate Section 2(d) *in their individual capacities*. Respondents admit only that the individual respondents formulate, direct and control the policies, acts and practices of respondent corporation. There is no warrant in the record for finding that they do any of these things except in their capacities as officers. To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future *as an individual*. To argue otherwise would be to hold that in every order

It is further ordered, That the failure of The Lovable Company after the date hereof to offer any cooperative promotional plan to all competing customers shall be deemed a violation of this order.

OPINION OF THE COMMISSION

This matter is before the Commission on appeal of the respondents from the initial decision of the hearing examiner.

The complaint, issued April 20, 1964, charged the corporate and three individual respondents with granting of discriminatory promotional and advertising allowances in violation of subsection (d), Section 2, of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act.

Respondent corporation is engaged in the manufacture and sale of women's wearing apparel including brassieres, girdles, panties, garter belts and other related products.

In an amended answer and stipulation respondent corporation admitted: (a) the material allegations of the complaint, (b) that by virtue of some of the terms and conditions of respondents' promotional plans some competing customers were precluded from accepting and benefiting from these plans and (c) that respondents made or offered allowances in excess of the limitations specified in the plans to some customers and failed to make them available on proportionally equal terms to other competing customers. Respondents further admit that the foregoing acts and practices violated Section 2(d) of the Clayton Act, as amended.

As to the individual respondents, the answer admits "* * * that the individual respondents formulate, direct and control the policies, acts and practices of respondent corporation."

The hearing examiner made findings of fact and conclusions based upon the record consisting solely of the complaint, answer and stipulation and issued an order in statutory language prohibiting the payment of discriminatory advertising and promotional allowances.

Having reserved their right of appeal, respondents have argued before the Commission:

(1) that the challenged practices have been voluntarily abandoned in good faith without likelihood of resumption and that therefore an order is inappropriate,

(2) that the order is too sweeping in its language prohibiting violations generally when the practices forming the basis of complaint were specific and the products limited,

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1. Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent, as compensation for or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of said products, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution or sale of such products,

2. Failing to offer any cooperative promotional plan to all competing customers when a plan is offered to any of respondent's customers.

It is further ordered, That respondent 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.

Commissioner Elman concurring in the result.
