

Complaint

63 F.T.C.

IN THE MATTER OF

JOSEPH A. KAPLAN & SONS, INC.

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

Docket 7813. Complaint, Mar. 10, 1960—Decision, Nov. 15, 1963

Order requiring a Yonkers, N. Y., manufacturer of shower curtains, shower curtain sets and accessories under the trade name of "Jakson", to cease discriminating in price in various ways in its favored treatment of, among others, some 26 large retail customers which were the stockholders of a corporate wholesaler they organized in 1946—soon after the Commission issued a desist order against their knowingly inducing and receiving discriminations in price through a corporate agency created by them for such purpose, *Associated Merchandising Corp. (AMC) et al.*, Docket 5027, 40 F.T.C. 578—for the purpose of providing special prices to them; respondent's price discriminations including charging differences in cost of as much as 18 percent in favor of AMC stores and regularly favoring the AMC stores with markdown allowances resulting in lower net prices which were not made to AMC's competitors, in violation of Sec. 2(a) of the Clayton Act; negotiating with AMC and other customers on an individual basis in granting advertising allowances on close-out sales while not making such allowances to competing stores, in violation of Sec. 2(d); and accepting the return of merchandise from some of its customers but not all, thus providing those favored with a service not provided others, in violation of Sec. 2(e).

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13) hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Joseph A. Kaplan & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with office and place of business located at 1 Jakson Place, Yonkers, New York.

PAR. 2. Respondent Joseph A. Kaplan & Sons, Inc., is now, and for many years has been, engaged in the business of manufacturing, selling and distributing shower curtains, shower curtain sets and accessories under the trade name "Jakson".

Said products are now and have been manufactured from various materials including rubber, cotton and plastics.

Respondent is one of the leaders in the industry. Its sales of said products amount to approximately \$2,500,000 annually.

PAR. 3. Respondent manufactures its products in Yonkers, New York, from which point the products are shipped to purchasers located in various cities and states of the United States.

Respondent sells said products for use, consumption or resale within the United States, and, when said products are sold, respondent ships or causes the products to be shipped to purchasers thereof located in states other than the state wherein said products are manufactured. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products among and between the various states of the United States and the District of Columbia.

PAR. 4. Respondent, in the course and conduct of its business as aforesaid, is now and for many years has been engaged in active and substantial competition with others engaged in the manufacture, sale and distribution of products of like grade and quality in commerce between and among the various states of the United States and in the District of Columbia.

Many of the purchasers of respondent's products are competitively engaged with each other and with customers of respondent's competitors in the resale of shower curtains and shower curtain sets. Among said purchasers are retailers such as specialty shops, variety and department stores.

PAR. 5. Respondent, in the course and conduct of its business as aforesaid, has been and is now, directly or indirectly, discriminating in price between different purchasers of its products of like grade and quality by selling said products to some purchasers at higher prices than those charged competing purchasers.

PAR. 6. Illustrative of, but not limited to the method or methods by which respondent has discriminated, and is now discriminating in price as referred to in Paragraph Five, and illustrative of, but not limited to the times and trading areas involved in such discriminations is the following:

For many years past, and specifically during the period from 1958 to date, and in many areas including but not limited to Boston, Massachusetts, Stamford, Connecticut and Philadelphia, Pennsylvania, respondent sold and is now selling products of like grade and quality to purchasers who compete with the purchasers receiving the favored prices. The favored purchasers are billed by, and submit

payments to, respondent through an intermediary corporation owned and controlled by said purchasers. Said intermediary is sometimes hereinafter referred to as the "buying agency".

In return for the price advantages granted said favored purchasers, respondent seeks and obtains, through the buying agency or otherwise, all or substantially all of said purchasers' business in shower curtains and shower curtain sets. In addition, respondent's products are displayed and sold exclusively, or substantially so, in the most advantageous sales space in said purchasers' stores, namely, the housewares departments.

PAR. 7. The effect of such discriminations in price made by respondent, as alleged in Paragraphs Five and Six, may be to substantially lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and its favored purchasers are respectively engaged, or to injure, destroy, or prevent competition with the respondent, its purchasers who receive the benefits of such discriminations, or with customers of either of them.

PAR. 8. The aforesaid acts and practices of respondent constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

COUNT II

PAR. 1. Paragraphs One through Three of COUNT I are hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 2. 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 by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution of its products.

PAR. 3. Included among and illustrative of the payments alleged in Paragraph Two of COUNT II, were payments, or credits paid by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services or facilities, including newspaper and magazine advertising, furnished by customers in connection with the offering for sale or sale of respondent's products.

During the time and in the areas as alleged in Paragraph Six, COUNT I, respondent offered to pay and paid, some customers varying percentages of the cost of promotional services or facilities fur-

1308

Complaint

nished by such customers in promoting the sale of respondent's products.

The respondent did not offer, or otherwise make such allowances available, or did not make the allowances available in proportionally equal terms to all customers competing in the sale or offering for sale of respondent's products.

PAR. 4. The acts and practices of respondent as alleged above violate subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

COUNT III

PAR. 1. Paragraphs One through Three of COUNT I are hereby adopted and made part of this COUNT as fully as if herein set out verbatim.

PAR. 2. In the course and conduct of its business in commerce, and during the time and in the areas as alleged in Paragraph Six of COUNT I, respondent discriminated in favor of some purchasers against other purchasers of its products bought for resale by contracting to furnish or furnishing, or by contributing to the furnishing of services or facilities connected with the handling, sale or offering for sale of such products so purchased upon terms not accorded to all competing purchasers on proportionally equal terms.

PAR. 3. Included among and illustrative of the services or facilities furnished some customers, as alleged in Paragraph Two of COUNT III, is that of accepting the return for credit of unsold Jakson products.

This service consists of periodically accepting, from some purchasers, the return of unsold merchandise thereby enabling said favored purchasers to maintain and display a more readily saleable, fresh and newly styled stock of respondent's shower curtains and shower curtain sets.

PAR. 4. During the same period of time, respondent sold its products to retailers competing with said favored purchasers and has not furnished or offered to furnish the services or facilities as set forth in Paragraph Three of COUNT III herein, to said nonfavored retailers on proportionally equal terms.

PAR. 5. The acts and practices of respondent as alleged above violate subsection (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Mr. Peter J. Dias, supporting the complaint.

Mr. Gilbert H. Weil, New York, N.Y., for the respondent.

Initial Decision

63 F.T.C.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

MAY 21, 1962

The Federal Trade Commission issued its complaint charging Joseph A. Kaplan & Sons, Inc., the respondent herein, with violations of the provisions of subsections (a), (d), and (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13). Respondent, in its answer, denied the violations charged. Pursuant to notice, hearings were held in New York, New York, Philadelphia, Pennsylvania, and Boston, Massachusetts, where extensive testimony was given and many exhibits received in evidence. Proposed findings and briefs have been submitted by the parties, and oral argument held thereon. Upon the record thus constituted, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Joseph A. Kaplan & Sons, Inc., hereinafter sometimes referred to as Kaplan, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with office and place of business located at 1 Jakson Place, Yonkers, New York.

2. Respondent is now, and for many years has been, engaged in the business of manufacturing, selling, and distributing shower curtains, shower curtain sets, and accessories under the trade name "Jakson." Said products are now, and have been, manufactured from various materials, including cotton and plastic. Respondent is one of the leaders in the industry. Its sales of said products amount to approximately \$2,500,000 annually.

Respondent's products, although classified in certain price lines, are identifiable and catalogued by pattern as well. Patterns have a considerable effect upon the sales appeal and the consumer acceptance of the product. These products are considered to have style and fashion attributes.

3. Respondent sells said products for use, consumption, or resale within the United States and ships, or causes the products to be shipped, from Yonkers, New York, its manufacturing point, to purchasers located in other states. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products among and between the various states of the United States and the District of Columbia.

4. Many of the purchasers of respondent's products, referred to above, are competitively engaged with each other in the resale of those products.

5. Among the purchasers to whom sales and shipments of respondent's products were made in 1958 and 1959 were Bloomingdale's in Stamford, Connecticut, Filene's in Boston, Massachusetts, and Strawbridge & Clothier in Philadelphia, Pennsylvania.

6. The three stores referred to in Finding No. 5, above, are three of 26 retail department stores located in various States of the United States which together wholly own a subsidiary corporation known as Associated Merchandising Corporation, hereinafter referred to as AMC, located at 1440 Broadway, New York City. Each of these 26 stores owns one share of Class A voting stock and a certain quantity of Class B non-voting common stock. The voting stock is held by each stockholding store in the name of a nominee. The record is silent as to the amount of Class B non-voting stock each store owns. The brief of the respondent advises, however, that such stock is distributed among the stores on the relative basis of each store's volume of retail sales at the time it first became a shareholder.

7. The shareholding stores of AMC paid for their shareholdings at the time they became shareholders. AMC operates on an expense budget, the monies for which are received from the stores on a service charge formula, which is based on sales made by the stores. While there are 26 stockholding stores, the service charge is computed on the basis of 27 stores, since two of the stores are treated separately for service charge purposes, but as one for stockholding purposes. The service charge is paid by the stores in monthly installments.

8. The directors of AMC are chosen by the Class A stockholders from among the Class A stockholders. Each director of AMC is also an officer or director of the respective stockholding store. The officers of AMC are chosen by the directors of AMC and are in no other way connected with or related to the stockholders of AMC.

9. AMC's principal functions are: researching operating problems found in department stores such as receiving, marketing, display and fixturing, publicity, personnel problems, electronic methods; merchandising services by representatives who constantly scout the market for new and exciting merchandise and communicate their findings to the stores. Occasionally, AMC will buy as an agent at the direct request of a store, but that is not its prime function. AMC does not purchase any merchandise from respondent.

AMC's operating level parallels that of a department store. Thus, there are AMC merchandise representatives who are counterparts to store buyers, and who consult with store buyers to determine their desires and advise the buyers as to sources of supply for desirable merchandise at the most favorable price. This AMC merchandise representative works on a so-called "steering committee," consisting

