

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1951, TO JUNE 30, 1952

IN THE MATTER OF

MILTON W. FOLDS, JESSIE D. FOLDS, AND JESSIE MAY
FOLDS, DOING BUSINESS AS KLEEREX CO.

MODIFIED ORDER TO CEASE AND DESIST

Docket 5332. Order, July 6, 1951

Order modifying prior order of Commission of June 6, 1950, 47 F. T. C. 898, in accordance with the opinion and decision of the Court of Appeals for the Seventh Circuit on March 23, 1951, in *Folds et al. v. Federal Trade Commission*, 187 F. (2d) 658, and the court's final decree, which modified the Commission's order by eliminating the prohibition against representing that its "said product will cause pimples to disappear or constitutes an effective treatment for pimples," and inserting, in lieu thereof, a prohibition against representing that application of the preparation "will cause pimples to disappear overnight or that the user thereof will have a clear complexion the day following its use at night," and affirmed the order as thus modified.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. B. G. Wilson for the Commission.

Frank E. & Arthur Gettleman, of Chicago, Ill., for respondents.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondents, testimony and other evidence introduced before a trial examiner of the Commission theretofore duly designated by it, recommended decision and supplemental recommended decision of the trial examiner, and the exceptions filed thereto, and briefs filed in support of and in opposition to the complaint (oral argument not having been requested); and the Commission, having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and issued its order to cease and desist on June 6, 1950; and

Respondents Jessie D. Folds and Jessie May Folds, surviving copartners of Kleerex Co., having filed in the United States Court of Appeals for the Seventh Circuit their petition to review and set aside the order to cease and desist issued herein, and that court having heard the matter on briefs and oral argument and fully considered

Order

48 F. T. C.

the matter, and having, thereafter, on April 18, 1951, entered its final decree modifying and affirming, as modified, the aforesaid order to cease and desist pursuant to its opinion announced on March 23, 1951:

Now, therefore, it is hereby ordered, That respondents Jessie D. Folds and Jessie May Folds, individually and as surviving copartners of Kleerex Co., their officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of a preparation for the treatment of pimples known as Kleerex, under that name or under any other name, or of any product of substantially the same composition as said product Kleerex, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents directly or by implication that the application of said product Kleerex will cause pimples to disappear overnight or that the use thereof will have a clear complexion the day following its use at night.

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce directly or indirectly the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraph 1 hereof.

It is further ordered, That respondents Jessie D. Folds and Jessie May Folds shall, within 90 days after the entry of the aforesaid decree by the United States Court of Appeals for the Seventh Circuit, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Complaint

IN THE MATTER OF

CONSOLIDATED CIGAR CORP. AND G. H. P. CIGAR CO.,
INC.

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION
OF SUBSEC. (D) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914,
AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5865. Complaint, Mar. 27, 1951—Decision, July 7, 1951

Where a corporate manufacturer and its wholly owned selling subsidiary, engaged in the sale and distribution of cigars, including their "El Producto" brand, directly to many large chain stores and large wholesalers and through their branches to thousands of independent retailers and small wholesalers; Paid and contracted to pay money, goods or other things of value to or for the benefit of some of their customers as compensation for display services and facilities furnished by such customers in connection with the processing, handling, sale, or offering for sale of their said cigars, without making such payments or considerations available on proportionally equal terms to all other of their customers competing in the sale and distribution of said cigars, in that some customers received nothing; and others, as determined by individual negotiations, received different percentages of purchases, or varying lump sums; and thus made available such allowances, among others, to seven chain-store customers including some of the largest retail and retail cigar store chains, and included, among payments therefor, over a 4-year period, \$10,000 a year in the case of one, and \$4,000 in that of another; without making available, in any amount, such allowances to thousands of other customer chain stores and small independent retailers which competed with those thus favored:

Held, That such acts and practices, in the particulars noted, violated subsection (d) of section 2 of the Clayton Act as amended.

Before *Mr. Frank Hier*, trial examiner.

Mr. R. E. Schrimsher for the Commission.

Maass, Davidson, Levy & Friedman, of New York City, for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the corporations named in the caption hereof, hereinafter designated as respondents and more particularly 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-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Consolidated Cigar Corp. is a corporation organized, 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 67-73 West Forty-fourth Street, New York, N. Y.

Respondent G. H. P. Cigar Co., Inc., 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 Third and Brown Streets, Philadelphia, Pa. All of its capital stock is owned by, and all of its acts and practices are under the direction and control of respondent Consolidated Cigar Corp.

PAR. 2. Respondents are now and, since prior to June 19, 1936, have been engaged in the business of manufacturing and selling cigars. Certain of these cigars are being, and have been sold under the brand name El Producto by and through the respondent G. H. P. Cigar Co., Inc. Said El Producto cigars were sold directly to many large chain stores and large wholesalers and were sold through respondent's distributing branches to thousands of independent retailers and small wholesalers.

PAR. 3. In the course and conduct of said business, respondents engaged in commerce, as commerce is defined in the Clayton Act as amended by the Robinson-Patman Act, having shipped said cigars or caused them to be transported from their various plants, and from Philadelphia, Pennsylvania, and other places where such cigars are stored, to their customers having places of business located in the same and other States of the United States and the District of Columbia. Said cigars were sold by respondents to said customers for resale within the United States.

PAR. 4. In the course of said business in commerce respondents paid, and/or contracted to pay, money, goods, or other things of value to or for the benefit of some of their customers as compensation or in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers, in connection with the processing, handling, sale, or offering for sale, of said cigars which respondents manufacture, sell, or offer for sale; and respondents did not make, or contract to make, such payments or considerations available on proportionally equal terms to all other of their customers competing in the sale and distribution of said cigars.

PAR. 5. Illustrative of and included among the payments alleged in paragraph 4 hereof were the payments of money for display services or facilities in connection with the offering for sale and sale of El Producto cigars, hereinafter referred to as display allowances. Said display allowances were available from respondents, and respondents paid or contracted to pay them, upon the following proportionally unequal terms:

Said display allowances were available in some amount to some customers, but said allowances were not available to all other and competing customers in any amount.

As to those customers to which said allowances were available in some amount, the amounts were different percentages or proportions of the dollar amount of purchases among competing customers, the amounts paid in some cases being predetermined as different percentages of purchases, and in other cases being lump sums, the amounts in each case being arbitrarily determined in individual negotiations with individual customers.

The display services or facilities furnished by said customers to which said display allowances were available in some amount, were indeterminate in number, kind, and amount, they being, like said display allowances, arbitrarily determined in individual negotiations with individual customers.

PAR. 6. Included among the customers receiving display allowances from respondents in the manner alleged in paragraph 5 hereof were seven chain-store customers, including some of the largest chain retail drug stores and chain retail cigar stores. Said customers received said display allowances in each of the years 1946 to 1949, inclusive. One such customer received \$10,000 and another received \$5,000 in each of those years.

Said display allowances were not available in any amount to thousands of respondents' other customers, including chain stores and small independent retail stores, many of which compete with said chain-store customers that received display allowances.

PAR. 7. The acts and practices of the respondents as above alleged violate subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. title 15, sec. 13).

DECISION OF THE COMMISSION

Pursuant to rule XXII of the Commission's rules of practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated July 7, 1951, the initial decision in the instant matter of trial examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, TRIAL EXAMINER

Pursuant to the provisions of the Clayton Act as amended by the Robinson-Patman Act approved June 19, 1936 (15 U. S. C., sec. 13), the Federal Trade Commission on March 27, 1951, issued and subsequently served its complaint in this proceeding upon Consolidated Cigar Corp., a corporation, and upon G. H. P. Cigar Co., Inc., a cor-

poration, charging them with violation of subsection (d) of section 2 of said act as amended, and fixing May 15, 1951, as the time for hearing on the charges in said complaint. On May 14, 1951, respondents filed their joint answer, admitting, for the purposes of this proceeding only, all the material allegations of fact set forth in said complaint, except two, to which respondents admitted the facts to be slightly different than alleged, and counsel in support of the complaint agreed that the facts stated in said answer were the facts. Said answer waived the filing of proposed findings and conclusion and all intervening procedure and further hearing as to the facts but reserved the right to appeal under rule XXIII of the Rules of Practice of the Commission.

The initial hearing set in the complaint was thereupon canceled and the record closed by the trial examiner. Thereafter, the proceeding regularly came on for final consideration by the above-named trial examiner theretofore duly designated by the Commission upon said complaint and answer thereto and said trial examiner, having duly considered the record herein, makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Consolidated Cigar Corp. is a corporation organized, 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 67-73 West Forty-fourth Street, New York, N. Y.

Respondent G. H. P. Cigar Co., Inc., 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 647 Fifth Avenue, New York, N. Y. All of its capital stock is owned by, and all of its acts and practices are under the direction and control of, respondent Consolidated Cigar Corp.

PAR. 2. Respondent Consolidated Cigar Corp. is now and since prior to June 19, 1936, has been engaged in the business of manufacturing and selling cigars. Respondent G. H. P. Cigar Co., Inc., since January 1941, has been and is now selling cigars but has not and does not manufacture cigars. Certain of these cigars are being, and have been sold under the brand name El Producto by and through respondent G. H. P. Cigar Co., Inc. Said El Producto cigars were sold directly to many large chain stores and large wholesalers and were sold through respondent's distributing branches to thousands of independent retailers and small wholesalers.

PAR. 3. In the course and conduct of said business, respondents engaged in commerce, as commerce is defined in the Clayton Act as

