

*It is further ordered*, That respondents Congress Sportswear Company, Inc., a corporation, and its officers, and Norman F. Grossman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any textile fiber product is not misbranded or falsely invoiced under the provisions of the Textile Fiber Products Identification Act.

*It is further ordered*, That the respondents herein 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 this order.

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IN THE MATTER OF

VIVIANO MACARONI COMPANY

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

*Docket 8666. Complaint, Sept. 21, 1965—Decision, Feb. 19, 1968*

Order requiring a Carnegie, Pa., manufacturer of macaroni and other food products to cease discriminating in prices, promotional allowances and services in sales to competing retailers who resell its products.

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, Viviano Macaroni Company is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located on Noblestown Road, Collier Township, Pennsylvania. Mail addressed to respondent is directed

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\*Reported as amended by Hearing Examiner's order of Dec. 21, 1965, by changing the name of respondent from Vimco Macaroni Products Company to Viviano Macaroni Company.

through Post Office Box 546, United States Post Office, Carnegie, Pennsylvania.

PAR. 2. Respondent has been, and is now, engaged in the manufacture, sale and distribution of macaroni, macaroni products, egg noodles, prepared foods, and sauces. Respondent sells its said products to a large number of customers, located principally in the State of Ohio and in the Commonwealth of Pennsylvania, who purchase such products for use, consumption, or resale. Respondent's customers are, primarily, wholesale grocers and retail chain stores, but also include manufacturers, independent retail stores, restaurants, and institutions. Respondent's sales of its products are substantial, exceeding \$4,000,000 in the year 1962.

PAR. 3. Respondent sells and causes its products to be transported from its manufacturing plant and principal place of business in the Commonwealth of Pennsylvania to purchasers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, respondent is now, and has been, in substantial competition with other corporations, individuals, partnerships, and firms, engaged in the manufacture, sale, and distribution of macaroni, macaroni products, egg noodles, prepared foods, and sauces.

Many of the purchasers of respondent's products of like grade and quality, and customers of some of said purchasers, are in substantial competition with each other in the resale and distribution of such products within the trading areas where said purchasers are located.

PAR. 5. In the course and conduct of its business in commerce, and particularly during and since 1963, respondent has been, and is now discriminating in price between different purchasers of its products by selling said products to some purchasers at higher and less favorable prices than those prices charged competing purchasers for products of like grade and quality.

For example, most of respondent's major customers are located within a trade area composed of eastern Ohio and western Pennsylvania. Respondent's largest customer, located within the above described market area, is the Youngstown-Pittsburgh Division of National Tea Company, a corporation of the State of Illinois, with its Youngstown-Pittsburgh Division offices located at 650 Meridian Road, Youngstown, Ohio. This division of National Tea Company is comprised of 114 individual retail food stores, doing business as Loblaw, Inc., and/or Loblaw Markets. During the year 1963, respondent

granted this division of National Tea Company freight allowances which were 45.5%, or approximately \$9,000, in excess of the actual cost of freight transportation. As an introductory offer, respondent also gave this division of National Tea Company more than 6,600 cases of respondent's products, free of any cost, with an approximate value of \$25,000. The aforesaid inflated freight allowance was also allowed on this free merchandise, creating a total introductory allowance having an approximate value of \$26,800.

The excessive freight allowances and the free merchandise referred to above resulted, directly or indirectly, in a substantial discount from the prices at which respondent sold goods of like grade and quality to other purchasers competing in the resale and distribution of respondent's products with National Tea Company.

As a further example, in the trade area composed of eastern Ohio and western Pennsylvania, respondent sells its products to a majority of its retail and wholesale customers, including, *e.g.*, The Kroger Company, Giant Eagle Super Markets, Thorofare Markets, and Golden Dawn Foods, Inc., at prices corresponding to those prices published in respondent's price lists. Said prices were not offered or granted by respondent to other purchasers, who purchased respondent's products on a cash basis at prices averaging 2.5 percent to 13 percent above respondent's highest prevailing published list prices, and who compete with the said favored purchasers in the sale and distribution of respondent's products of like grade and quality.

PAR. 6. The effect of the discriminations in price made by respondent in the sale of its products, as hereinbefore set forth, has been or may be substantially to lessen competition in the line of commerce in which respondent is engaged, and in which said favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, or its purchasers who receive the benefits of such discriminations.

PAR. 7. The discriminations in price made by respondent in the sale of its products, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

#### COUNT II

PAR. 8. Paragraphs One through Four of Count I hereof are hereby incorporated by reference, and made a part of this Count, as fully, and with the same effect, as if quoted herein verbatim.

PAR. 9. In the course and conduct of its business in commerce, and particularly during and since 1962, respondent has 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 have not been made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

For example, respondent has offered and paid various payments and allowances to certain of its customers, which payments and allowances have not been offered, or paid, or otherwise made available to all of respondent's customers competing with the said favored customers. These payments or allowances included, but were not limited to: (1) free merchandise for store openings, anniversary sales, and other promotional purposes; (2) payments and allowances under "Cooperative Merchandising Agreements" for printed handbill, radio, television, or newspaper advertising of respondent's products; (3) payments or allowances for various periodic promotions of respondent's products; and (4) payments or allowances for radio or television advertising in excess of any payments or allowances which the customer might be entitled to under the aforesaid "Cooperative Merchandising Agreements."

PAR. 10. The acts and practices of respondent, as alleged herein, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

#### COUNT III

PAR. 11. Paragraphs One through Four of Count I hereof are hereby incorporated by reference, and made a part of this Count, as fully, and with the same effect, as if quoted herein verbatim.

PAR. 12. In the course and conduct of its business in commerce, and particularly during and since 1962, respondent has discriminated in favor of certain purchasers of its products, purchased for resale, by contracting to furnish, contributing to the furnishing of, or furnishing, to such favored purchasers, services or facilities connected with the handling, sale, or offering for sale of such products so purchased, while not according such services or facilities to all competing purchasers on proportionally equal terms.

For example, respondent has, directly or indirectly, through Merchant's Broadcasting System, a corporation located in Pittsburgh, Pennsylvania, furnished, or contributed to the furnishing of, broadcasting equipment, and taped background music and commercial announcements to certain retail grocery stores in the Greater Pittsburgh.

Pennsylvania, area. During the period November 5, 1962, to October 23, 1963, respondent paid a total of \$18,540.91 for the Merchant's Broadcasting System service, approximately 95.5 percent of which expenditure was paid for the furnishing of the above detailed services to the individual grocery markets of four large chain grocery stores who are engaged in interstate commerce. Such services or facilities were not accorded to all competing purchasers on proportionally equal terms.

As a further example, respondent has, directly or indirectly, through Super Market Broadcasting Systems, Inc., a corporation located in Chicago, Illinois, furnished, or contributed to the furnishing of, broadcasting equipment, and taped background music and commercial announcements to the retail grocery customers of two of respondent's wholesale grocer customers, who transact business in both the Commonwealth of Pennsylvania, and the State of Ohio. In the years 1962 and 1963 respondent paid \$3,056 and \$3,309, respectively, for the above described service. Such services or facilities were not accorded to all competing purchasers on proportionally equal terms.

PAR. 13. The acts and practices of respondent, as alleged herein, are in violation of subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

*Mr. Ernest G. Barnes, Mr. Thomas P. Athridge, Jr., Mr. Charles A. Price and Mr. Hans C. Nolde* supporting the complaint.

*Whitlock, Markey and Tait*, Washington, D.C., by *Mr. Edward T. Tait and Mr. William D. Matthews* for respondent.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

AUGUST 31, 1966

The Federal Trade Commission issued its complaint against respondent on September 21, 1965, charging it with violations of the Clayton Act as amended by the Robinson-Patman Act. The charges were that respondent had violated subsections 2(a), 2(d) and 2(e) of the Clayton Act as amended in selling its products to certain of its customers. The respondent filed an answer in which it admitted certain allegations of the complaint and denied that it had violated any of the subsections of the Clayton Act as amended and alleged certain defenses discussed hereafter.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence and the proposed findings of fact and conclusions and memoranda and briefs filed by counsel for respondent and counsel supporting the complaint. Consideration has been given

Initial Decision

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to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not herein-after specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom and issues the following order:

## FINDINGS OF FACT

1. The respondent, Viviano Macaroni Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located on Noblestown Road, Collier Township, Pennsylvania. Mail address of respondent is Post Office Box 546, United States Post Office, Carnegie, Pennsylvania. (Comp. and Ans. Pars. One.)<sup>1</sup>

2. Respondent has been, and is now, engaged in the manufacture, sale and distribution of macaroni products, including spaghetti of various thicknesses and cuts, egg noodles, prepared foods, and sauces. Respondent sells its said products to a large number of customers, located principally in the State of Ohio and in the Commonwealth of Pennsylvania, who purchase such products for use, consumption, or resale. Respondent's customers are, primarily, wholesale grocers and retail chain stores, but also include manufacturers, independent retail stores, restaurants, and institutions. Respondent's sales of its products are substantial, exceeding 4 million in the years 1962 and 1965, and exceeding 3 million in 1963 and 1964. (Comp. and Ans. Pars. Two—Tr. 85.) Approximately 70 percent of respondent's total sales are of three macaroni products—elbow macaroni, regular spaghetti, and thin spaghetti. (Tr. 85.) Macaroni products are semiperishable in nature and are an important and staple product in the grocery industry. Stocks of these products, because of their nature, are constantly required in retail grocery stores and because of their semiperishable nature comparatively small inventories are kept on hand, necessitating frequent orders. (Tr. 347-348, 1521, 1538.)

3. Respondent sells and causes its products to be transported from its manufacturing plant and principal place of business in the Commonwealth of Pennsylvania to purchasers located in other States of the United States.

<sup>1</sup> In its answer, respondent admitted Paragraph One of the complaint, but asserted that the name of the respondent as it appeared in the complaint "Vimco Macaroni Products Company" no longer existed, but that the name had been changed to the present style. Counsel in support of the complaint moved that the complaint be amended to show this correction and an order to this effect was entered by the hearing examiner.

