

IN THE MATTER OF
GENERAL MOTORS CORPORATION

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 2(d) OF THE CLAYTON ACT AND SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket 9114. Complaint, July 19, 1978—Final Order, June 21, 1984

This order dismisses the Commission's complaint charging a Detroit, Mich. motor vehicle manufacturer with allegedly violating the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act by failing to make promotional allowances available on proportionally equal terms to all competing rental and leasing firms. In its opinion, the Commission noted that "in light of the Commission's public interest mandate" the Commission and the courts must be careful "not to expand the ambit of legislation beyond that set forth by Congress" and the Commission will therefore "eschew efforts to broaden application of the Robinson-Patman Act beyond that established by law."

Appearances

For the Commission: *Renee S. Henning.*

For the respondent: *Frederick Rowe, Kirkland & Ellis, Washington, D.C.,*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, General Motors Corporation [hereinafter referred to as GM], has violated and is now violating the provisions of Section 2(d) of the Clayton Act, as amended (15 U.S.C. 13), and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. GM is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 3044 West Grand Boulevard, Detroit, Michigan.

PAR. 2. GM is the largest manufacturer of automobiles in the United States. In 1977, GM sold approximately 6.6 million automobiles, trucks and coaches in the United States. During 1977, GM's net sales exceeded \$54,961,000,000. GM's net income during 1977 exceeded \$3,337,000,000.

PAR. 3. In the course and conduct of its business, GM has been and

is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and GM's methods of competition are and have been in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended. [2]

The acts and practices herein described in connection with GM's offers and grants of advertising allowances and other expenses [hereinafter collectively referred to as agreements] are and have been in commerce, as "commerce" is defined in the Clayton Act, as amended, and are now and have been in or affecting commerce as the term "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. GM sells its automobiles and trucks [hereinafter referred to as vehicles] to dealers which, in turn, sell the vehicles to rental and leasing companies [hereinafter referred to as GM customers]. As more particularly described herein, GM deals directly with GM customers in administering its agreements in connection with the sale of its vehicles.

PAR. 5. In the course and conduct of its business, GM has paid or contracted for the payment of something of value to or for the benefit of some of its GM customers, as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such GM customers in connection with the distribution of vehicles sold by GM. GM has not made or offered to make such payments for services or facilities available on proportionally equal terms to all of its other GM customers competing with such favored GM customers.

For instance, GM has engaged in agreements with certain GM customers, including but not limited to, National Car Rental System, Inc., whereby payments have been made for advertisements linking vehicles sold by GM with the vehicles offered for rent or lease by GM customers to the value and benefit of said customers. Typical are advertisements placed by National Car Rental System, Inc., which include phrases such as: "We feature General Motor Cars." Payments for these agreements have been made by GM to GM's customers, or their agents. GM has not offered to pay, has not paid or otherwise made payments available on proportionally equal terms to all of its GM customers competing with the favored GM customers. [3]

COUNT I

Alleging violation of Section 2(d) of the Clayton Act, as amended.

PAR. 6. The allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. The acts and practices of respondent, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13).

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 8. The allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 9. The aforesaid acts and practices of respondent GM violate the policy of Section 2(d) of the Clayton Act, as amended; all to the prejudice of the public; have the tendency and effect of preventing and hindering competition and may tend to create a monopoly in the vehicle rental or leasing businesses; and constitute unfair methods of competition in commerce and unfair acts or practices in or affecting commerce, within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 29, 1983

PRELIMINARY STATEMENT

By Complaint issued on July 19, 1978, respondent General Motors ("GM") is charged with violation of Section 2(d) of the Robinson-Patman amendment to the Clayton Act, 15 U.S.C. 13(d), and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

The Complaint alleges that GM sells automobiles and trucks to dealers which, in turn, sell the vehicles to rental and leasing companies, and that GM deals directly with rental and leasing companies in administering its advertising agreements in connection with the sale of its vehicles. (Complaint, ¶ 4)

The Complaint also alleges that GM has paid some rental and leasing companies for advertising furnished by such companies in connection with the distribution of vehicles sold by GM, and that GM has not made such payments available on proportionally equal terms to all other competing rental and leasing companies. (*Id.*, ¶ 5) As an example, the Complaint alleges that GM has entered into advertising agreements with National Car Rental System, Inc., whereby GM pays for advertisements placed by that firm which include phrases such as: "We Feature General Motors cars." (*Id.*)

In Count I, the Complaint alleges that GM's acts and practices violate Section 2(d) of the Clayton Act. In Count II, the Complaint alleges that the same acts and practices violate Section 5 of the FTC

Act, in that they allegedly (a) violate the policy of Section 2(d) of the Clayton Act, to the prejudice of the public; (b) have the tendency and effect of preventing and hindering competition and may tend to create a monopoly in the vehicle rental or leasing businesses; and (c) constitute unfair methods of competition in commerce and unfair acts or practices in or affecting commerce. (*Id.*, Count II)

In its Answer filed on August 17, 1978, GM generally denies the various allegations of the Complaint. The Answer affirmatively alleges that: (a) to support the retail sales efforts of GM dealers in offering GM vehicles to the new car consuming public, GM purchases advertising from many sources and media, occasionally including rental and leasing companies or systems which promote and feature GM products in their advertising, (b) GM does not purchase, nor is it obligated to purchase, advertising from all media or other potential suppliers of advertising, (c) rental and leasing firms are engaged in the business of offering a service to their customers which includes the opportunity for potential new car customers to "test drive" GM products, (d) there is no connection between GM's purchases of advertising and the rental and leasing [2] companies' purchase of GM or other vehicles from independent franchised GM dealers, and (e) GM's purchases of advertising are a lawful, procompetitive activity. (Answer, ¶ 5)

The Answer affirmatively alleges that GM's purchases of advertising have benefited competition within the automobile industry and within the rental and leasing industry and have benefited consumers of both new cars sold by dealers and of services offered by rental and leasing companies. (*Id.*, ¶ 9) The Answer also affirmatively alleges that the Complaint fails to state a claim upon which relief can be granted because, *inter alia*, (a) rental and leasing companies are not customers of General Motors, (b) the advertising purchased by General Motors is not purchased in connection with the sale or resale of any product or commodity, and (c) rental and leasing companies do not resell any products or commodities, but rather provide a service to their customers. (*Id.*, ¶ 10)¹

On April 28, 1980, the parties signed a consent agreement proposing to settle the proceedings. By order dated May 23, 1980, the consent agreement was certified to the Commission, which in turn withdrew the matter from adjudication pending its consideration of the proposed settlement. The consent agreement was ultimately not approved, and by Commission order dated March 12, 1982, the matter was returned to adjudication. By order dated March 17, 1982, the

¹ The Answer asserts additional two affirmative defenses: discriminatory enforcement and violation of the terms of a protective order entered in *In re Hertz Corp.*, Docket No. 9033. (Answer ¶ 11) GM elected to waive its protective order violation defense at hearing. (tr. 1519-21) The other affirmative defense will be dismissed as a matter of law. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Indus. v. FTC*, 355 U.S. 411, 413 (1958).

proceeding was assigned to me for hearing because of my predecessor's retirement.

On April 21, 1982, I adopted a stipulation by which, complaint counsel abandoned any claim that GM's acts and practices in issue caused any injury to competition. In the Stipulation, complaint counsel agreed that "they will not pursue the third of their general theories of violation of Section 5, *i.e.*, the Section 5 injury theory." (Stip., ¶ 7) Specifically, the abandoned theory was that the GM acts and practices covered by the Complaint allegedly "constitute a violation of Section 5 because of their effect on competition." (Stip., ¶ 1(c)) Based on complaint counsel's decision to drop their Section 5 injury theory, the parties agreed that "[n]either the effects on competition nor the lack of effects on competition of the GM acts and practices covered by the [3] complaint are in issue in this case" and that "[e]vidence regarding the competitive effects, as well as evidence regarding the lack of competitive effects, of these GM acts and practices is irrelevant and inadmissible and, therefore, will not be offered in this case by complaint counsel or GM." (*Id.*, ¶¶ 5, 6)

With the adoption of the Stipulation, complaint counsel's theories of violation of Section 5 of the FTC Act are as follows:

(a) That the GM acts and practices covered by the complaint violate Section 5 of the Federal Trade Commission Act because they constitute a violation of Section 2(d) of the Clayton Act.

(b) That these GM acts and practices also violate the spirit of Section 2(d) and, thereby, violate Section 5. Under this theory, Section 5 would fill gaps, if any, in the proof of the Section 2(d) violation. (Stip., ¶ 1)

On September 14, 1982, less than three weeks before the trial was scheduled to commence, complaint counsel filed a motion for summary decision. By order dated October 4, 1982, complaint counsel's motion was denied as tardy. As required by Rule 3.24(a)(5) of the Commission's Rules of Practice, an order specifying facts that appear without substantial controversy was entered on October 8, 1982.

Trial commenced on October 5, 1982 in Washington, D.C. and concluded there on November 15, 1982. Complaint counsel called 13 witnesses; GM called three. Additional testimony was received from four other Commission witnesses by deposition, affidavit and interrogatories. The record includes 3,177 transcript pages and 485 exhibits, many multi-paged. On April 18, 1983, the parties filed proposed findings and post-hearing briefs. On June 24, 1983, the parties filed reply findings and briefs.

The parties were directed to prepare document lists in accordance with the Commission's guidelines in *General Motors Corp.*, 99 F.T.C.

464, 555 n. 1 (1982). The parties complied and those lists were admitted as exhibits CX 1A-Z-30, CX 2A-R, and RX 144A-O, and the record was closed on August 15, 1983.

Any motions not specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of facts made herein are based on a review of the entire record and upon consideration of the demeanor of the witnesses who gave testimony in the proceeding. [4]

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.

Abbreviations

The following abbreviations are used in references to the record of this proceeding:

- tr. - Transcript page and line number, sometimes preceded by witness' name
- CX - Complaint counsel's exhibit, followed by its number and in some cases pages
- RX - Respondent's exhibit, followed by its number and in some cases pages
- f. - Finding, followed by its number
- ff. - Findings
- RAD-Supp- Respondent's response to request for admissions, dated August 23, 1982, followed by a reference to a numbered paragraph.
- GM - General Motors Corporation
- GMAC - General Motors Acceptance Corporation
- car - automobile and/or truck
- Avis - Avis Rent-A-Car System, Inc.
- Budget - Budget Rent-A-Car Corporation
- Hertz - Hertz Corporation
- National - National Car Rental System, Inc.

Definitions

a. *Fleet* is a new car customer registering at least ten new vehicles annually, and includes commercial companies, political subdivisions, and rental and leasing firms. (Vader tr. 3018, Vader CX 7780Z-10; McClintock tr. 1138, 1242) [5]

b. *Leasing transaction* is the lease of a car to a customer for a period of six months or longer, normally ranging from twenty-one to thirty-

