

Further ordered, that until such time as the respondent may be engaged in the manufacture of floor covering made essentially in accordance with the expired patents of Frederick Walton and composed of oxidized oil and gums intimately mixed with ground cork or wood flour, the respondent shall cease and desist from using the word "linoleum" as part of its corporate title in connection with the sale and advertisement of floor coverings manufactured by it.

FEDERAL TRADE COMMISSION *v.* THE ELI LILLY & CO.

COMPLAINT IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF THE ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914, AND OF THE ALLEGED VIOLATION OF SECTIONS 2 AND 3 OF THE ACT OF CONGRESS APPROVED OCTOBER 15, 1914.

Docket No. 155.—May 27, 1919.

SYLLABUS.

Where a corporation engaged in the manufacture and sale of drugs, pharmaceuticals, and similar products, the quantity of whose products manufactured and sold constituted a substantial and important item of commerce—

- (a) Sold the same to selected wholesale distributors under contracts, agreements, or understandings whereby such distributors agreed to adhere to and maintain resale prices fixed and determined by the manufacturer;
- (b) Refused to sell to distributors who resold its products at less than the prices fixed;
- (c) Discriminated in price against those distributors who failed to adhere to the prices fixed; and
- (d) Discriminated in price in favor of such distributors as did adhere to said fixed prices;

Held, That a scheme of resale price maintenance, substantially as described, constituted an unfair method of competition in violation of section 5 of the act of September 26, 1914.

COMPLAINT.

I. The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that The Eli Lilly & Co., hereinafter referred to as the respondent, has been and is using unfair methods of competition in interstate

commerce in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect, on information and belief, as follows:

PARAGRAPH 1. That the respondent, The Eli Lilly & Co., is now and was at all times hereinafter mentioned a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, having its principal factory, office, and place of business located at the city of Indianapolis, in said State, and with branch offices located at the city of New York, State of New York; St. Louis, State of Missouri; Chicago, State of Illinois; Kansas City, State of Missouri; and New Orleans, State of Louisiana, now and for more than two years last past engaged in the manufacture and sale of drugs and similar products among the several States of the United States, the Territories thereof, the District of Columbia, and in foreign countries, in direct competition with other persons, firms, copartnerships, and corporations similarly engaged.

PAR. 2. That the respondent, The Eli Lilly & Co., in the conduct of its business, manufactures such drugs so sold by it in its factory located at the city of Indianapolis, State of Indiana, and purchases and enters into contracts of purchase for the necessary component materials needed therefor in different States of the United States, the Territories thereof, and foreign countries, causing the same to be transported to its factory, where they are made into the finished product, sold and shipped to the purchasers thereof; that after such products are so manufactured they are continuously moved to, from, and among other States and Territories of the United States, the District of Columbia, and foreign countries, and there is continuously and has been at all times hereinafter mentioned a constant current of trade and commerce in the said products between and among the various States of the United States, the Territories thereof, the District of Columbia, and foreign countries, and especially to and through the city of Indianapolis, State of Indiana, and therefrom to

and through other States and Territories of the United States, the District of Columbia, and foreign countries.

PAR. 3. That the respondent, The Eli Lilly & Co., has adopted and maintains a system of fixing prices at which its products shall be resold by jobbers and wholesalers, with the effect of securing the trade of such jobbers and wholesalers and of enlisting their active cooperation in enlarging the sale of its price-maintained products to the prejudice of competitors who do not fix and require the maintenance of the resale prices of their products, and with the effect of eliminating competition in price among the jobbers and wholesalers in its goods and thereby depriving jobbers and wholesalers of their right to sell such goods at such prices as they may deem adequate and warranted by their selling efficiency, and with other effects; and that for the purpose of maintaining said standard resale prices and of inducing and compelling its customers to maintain and keep such standard prices, the respondent for more than one year last past has refused and is still refusing to sell its products to customers or dealers who will not agree to maintain such specified standard resale prices or who do not resell such products at the specified standard selling prices so fixed and determined by the respondent as aforesaid, and has made and is still making contracts with jobbers and wholesalers whereby respondent discriminates in price, and otherwise, in their favor in consideration of their maintaining said resale price.

PAR. 4. That respondent for more than one year last past by means of contracts and by other means has been and now is discriminating in price and in allowances of cost of transportation and otherwise in favor of certain jobbers and wholesalers (1) on the condition that such jobbers and wholesalers will furnish and supply respondent's products on all orders not specifying any particular make, and (2) on the condition that such jobbers and wholesalers will instruct their sales force, both house and traveling, from time to time, to push respondent's goods in preference to all other makes, and (3) on other conditions of similar nature; and that respondent's said methods of marketing its goods are designed and calculated to, and do, cause such jobbers and

wholesalers to confine their purchases, either largely or exclusively, to the products of the respondent, and hinder and prevent respondent's competitors from making sales of similar products to such jobbers and wholesalers.

II. The Federal Trade Commission having reason to believe from a preliminary investigation made by it, that The Eli Lilly & Co., hereinafter referred to as the respondent, has violated and is violating the provisions of sections 2 and 3 of the act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," hereinafter referred to as the Clayton Act, issues this complaint, stating its charges in that respect, on information and belief, as follows:

PARAGRAPH 1. That the respondent, The Eli Lilly & Co., is now and was at all times hereinafter mentioned a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, having its principal factory, office, and place of business located at the city of Indianapolis, in said State, and with branch offices located at the city of New York, State of New York; St. Louis, State of Missouri; Chicago, State of Illinois; Kansas City, State of Missouri; and New Orleans, State of Louisiana; now and for more than two years last past, engaged in the manufacture and sale of drugs and similar products among the several States of the United States, the Territories thereof, the District of Columbia, and in foreign countries, in direct competition with other persons, firms, copartnerships, and corporations similarly engaged, as more fully alleged and set forth in paragraph 2 of Section I of this complaint.

PAR. 2. That the respondent, The Eli Lilly & Co., for more than one year last past, in the course of interstate commerce, in violation of section 2 of the Clayton Act, has discriminated in price and is now discriminating in price between different purchasers of drugs, which said drugs are sold for use, consumption, or resale within the United States and the Territories thereof, and the District of Columbia, and that the effect of such discrimination may be, and is to substantially lessen competition or tend to create a monopoly in the business of manufacturing and selling drugs.

PAR. 3. That the respondent, The Eli Lilly & Co., for more than one year last past, in the course of interstate commerce, in violation of section 3 of the Clayton Act, has sold and made contracts for sale of large quantities of drugs for use and consumption throughout the United States, the Territories thereof, and the District of Columbia, and has fixed and is now fixing the price charged therefor or discount from, or rebate upon such price on the condition, agreement, or understanding that the purchaser thereof shall not use the goods, wares, merchandise, supplies, or other commodities of a competitor or competitors of respondent and that the effect of such sales, and contracts of sale, or such conditions and agreements, or understandings may be, and is to substantially lessen competition and to tend to create a monopoly.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, The Eli Lilly & Co., has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it in respect of such alleged violation would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by George L. Denny and Henry H. Hornbrook, its attorneys, and having duly filed its answer admitting certain of the allegations of said complaint and denying certain others thereof, and attorneys for both parties having signed and filed an agreed statement of facts wherein and whereby it was stipulated and agreed that said statement of facts should be taken by the Commission in lieu of testimony herein and that the Commission should forthwith proceed upon such agreed statement of facts to make and enter its report stating its findings as to the facts, and its conclusions and its order disposing of this

proceeding; the Commission having duly considered the record and being fully advised in the premises, now makes its report and findings as to the facts and conclusions.

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. That the respondent, The Eli Lilly & Co., is a corporation organized and doing business under the laws of the State of Indiana, and having its principal factory, office, and place of business located in the city of Indianapolis, in said State, and with branch offices located in the city of New York, State of New York; city of St. Louis, State of Missouri; city of New Orleans, State of Louisiana, and elsewhere, and is now and has been for more than two years last past engaged in the manufacture and sale of drugs, pharmaceuticals, and similar products among the several States of the United States, the Territories thereof, and the District of Columbia, and in foreign countries in direct competition with other persons, firms, copartnerships, and corporations similarly engaged.

PAR. 2. That in the conduct of its said business respondent manufactures such drugs, pharmaceuticals and similar products as sold by it in its factory located in the city of Indianapolis, State of Indiana, and purchases and enters into contracts of purchase for the necessary component materials needed therefor in the different States of the United States, the Territories thereof, and the District of Columbia, and in foreign countries, transporting the same to said city of Indianapolis, State of Indiana, where they are made into the finished products which are thereafter sold and shipped to the purchasers thereof throughout the country; that after such products are so manufactured they are continuously moved to, from, and among other States and Territories of the United States, and there is continually, and has been at all times hereinafter mentioned, a constant current of trade and commerce in said products among the various States of the United States, the Territories thereof, and the District of Columbia, and in foreign countries.

PAR. 3. That the quantity of such products so manufactured and sold and distributed by respondent has been and

is substantial, and forms an important item of commerce among the several States and Territories of the United States, the District of Columbia, and in foreign countries, and that the total gross sales therein amount to several million dollars annually.

PAR. 4. That for many years respondent has and still does, market its drugs solely through wholesale druggists throughout the country. These druggists are known as respondent's selected wholesale distributors, and such distributors are generally known to the wholesale drug trade throughout the United States.

PAR. 5. That for more than two years last past the said respondent, The Eli Lilly & Co., has adopted and maintained in the sale and distribution of its products, and still maintains, a system of fixing and determining the prices at which the products manufactured by it shall be resold by said selected wholesale distributors throughout the country, and has made a practice of entering into contracts with all such selected wholesale distributors wherein and whereby each of said distributors has agreed to adhere to and maintain such resale prices so fixed and determined by respondent, upon the resale of its products to the retail trade or to the consuming public.

PAR. 6. That respondent periodically issues a list of its wholesale distributors which is circulated among all of the wholesale druggists of the country handling its said products, and on which is conspicuously printed the following notice:

EXPLANATORY.—Wholesale prices on Lilly products are made only to the dealers mentioned in this list.

Lilly goods are sold to retailers at fixed and uniform prices and through our selected list of wholesale distributors only. These prices are never departed from by us and are to be strictly adhered to by our distributors.

We reserve the right to refuse all orders from parties who do not adhere to our prices and terms.

We also reserve the right to decide for ourselves the desirability of entering or removing names from this list.

Changes in prices due to market fluctuations are promptly sent to dealers on this list.

PAR. 7. That the respondent makes it generally known to all of such selected wholesale druggists handling its prod-

ucts that if they or any of them fail to adhere to said prices so specified by respondent in the resale of said products as aforesaid, respondent reserves the right to refuse to fill further orders for its said products from such wholesale druggists.

PAR. 8. That as a result of the adoption and maintenance of this policy the great majority of respondent's wholesale distributors have in the past usually adhered and still do adhere in substantially all cases to the said resale prices so specified by respondent, and that while respondent has reserved the right to refuse to sell to any of said distributors for failure to adhere to said prices, yet, as a matter of fact, respondent has only been called upon to exercise this right in a few cases during the past five years.

PAR. 9. That respondent's said system of price maintenance has been in force during the past 25 years and its said list of wholesale distributors has been built up during that time, and that the result has been that the relationship between the respondent and its said distributors has been and is a close one, and said distributors have all, as a general rule, favored said price-maintenance policy and cooperated with respondent in maintaining the same.

PAR. 10. That wholesale druggists generally prefer to handle and push products on which there is a constant fixed margin of profit rather than those sold by manufacturers who do not suggest resale prices or maintain the same by any means whatsoever.

PAR. 11. That in the conduct of said business respondent employs a large force of traveling salesmen, who call upon said selected wholesale distributors of respondent's products as well as upon the retail trade and physicians generally, and that through said traveling salesmen respondent received reports as to the methods by which said wholesale distributors are handling respondent's said products, including price cutting. Such reports, however, are not of a formal character and not systematically required by respondent, but through these salesmen respondent, in a general way, keeps informed as to conditions among its wholesale distributors and the wholesale drug trade generally.

PAR. 12. That the costs of doing business of wholesale druggists, including the said respondent's selected wholesale distributors show divergencies owing to differences in selling methods, and that the gross profit margins allowed in said specified resale prices are the same for all such distributors.

PAR. 13. That the form of contract attached to said agreed statement of facts marked "Exhibit A" is the one usually signed by said wholesale distributors of respondent's products, and that Exhibit B annexed to said agreed statement of facts, is a copy of respondent's list of wholesale distributors, revised to February 1, 1917, and contains the names of 248 wholesale druggists throughout the United States handling the respondent's said products under the terms and conditions above set forth.

CONCLUSIONS.

That the methods of competition set forth in the foregoing findings are, and each of them, is under the circumstances therein set forth, unfair methods of competition in interstate commerce in violation of the provisions of an act of Congress, approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, The Eli Lilly & Co., has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it in respect of such alleged violation would be to the interest of the public, and fully stating its charges, and the respondent having duly entered its appearance by George L. Denny and Henry H. Hornbrook, its attorneys, and having duly filed its answer admitting certain of the allegations of said complaint and denying certain others thereof, and said attorneys having signed and filed

an agreed statement of facts wherein and whereby it was duly stipulated and agreed that said statement of facts should be taken by the Commission in lieu of testimony herein, and that the Commission might forthwith proceed upon such agreed statement of facts to enter its report and its findings as to the facts, its conclusions, and its order disposing of this proceeding, and the Commission of the date hereof having made and filed its report containing its findings as to the facts and its conclusions that respondent has violated section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and which said report is hereby referred to and made part hereof: Now, therefore,

It is ordered: That respondent, The Eli Lilly & Co., and its officers, directors, agents, servants, and employees, cease and desist from directly and indirectly recommending, requiring, or by any means whatsoever bringing about the resale by its wholesale distributors of the drugs and pharmaceuticals and similar products manufactured by it according to any system of prices fixed or established by respondent, and more particularly by any or all of the following means:

(1) Entering into contracts, agreements, or understandings with such distributors to the effect that such distributors in reselling such products will adhere to any system of resale prices fixed or established by respondent;

(2) Securing from such distributors contracts, agreements, or understandings that they will adhere to any such system of resale prices;

(3) Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices;

(4) Discriminating in prices against such distributors because of their failure to adhere to any such system of resale prices;

(5) Discriminating in prices in favor of such distributors because of their adherence to any such system of resale prices;

(6) Carrying out or causing others to carry out a price maintenance policy by any other means:

Provided, That nothing herein contained shall prohibit respondent from issuing price lists or printed prices in its advertising matter, or upon containers, of its said products, so long as respondent shall refrain from directly or indirectly recommending, requiring, or by any means whatsoever,