

FEDERAL TRADE COMMISSION

v.

MUTUAL CANDY CO., INC.

COMPLAINT IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914.

Docket 275.—July 7, 1919.

SYLLABUS.

1. Where a corporation, organized for the purpose of providing a system of fixing and maintaining standard resale prices at which goods purchased from it by its stockholders and other jobbers should be sold by them to retail dealers and by retail dealers to the public—
 - (a) sold its stock in limited amounts to wholesale dealers only and required that each purchaser should (1) sign an "application for purchasing privilege," designating the corporation as its exclusive purchasing agent for any line of goods it might handle, (2) cooperate with the corporation by selling goods at prices fixed by the corporation, (3) agree to give the trustees of the corporation an option to purchase the stock if at any time the subscriber desired to sell it, (4) agree to forfeit claims to certain purchase dividends should the buyer violate any of the terms of the agreement;
 - (b) enforced the maintenance by stockholders of the prices fixed by it by withholding purchase dividends from such as did not maintain its prices and by forfeiting to the corporation the stock of such offenders;
 - (c) threatened to cease selling to jobbers who did not observe the resale prices fixed by it;
 - (d) purchased outright confections and chewing gum from certain manufacturers and sold them to its stockholders and to the trade, though professedly organized as the purchasing agent for its stockholders; and
2. Where such corporation acted in conjunction with its stockholders and other jobbers in enforcing a system of fixing prices at which retail dealers purchasing from its stockholders and from other jobbers dealing with it, should sell products purchased from them, and as a part of this scheme—
 - (a) induced its stockholders and other jobbers to refuse to sell merchandise purchased from it to retail dealers not maintaining resale prices fixed by the corporation;

Complaint.

2 F. T. C.

(b) refused to sell to jobbers who sold to retail dealers not maintaining its fixed resale 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.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that the Mutual Candy Co., Inc., hereinafter referred to as 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 above-named respondent, Mutual Candy Co., Inc., is now and was at all the times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at the city of New York in said State. That the stock of said corporation consists of 5,000 shares of preferred stock of the par value of \$10 each, and 2,500 shares of common stock of the par value of \$10 each, of which said preferred stock 2,406 shares have been issued and sold to approximately 110 wholesale dealers in confections in what is known as the Metropolitan District, consisting of Greater New York, Long Island, Westchester County, N. Y., and Hudson County, N. J., and the sale of said stock has been limited to wholesale dealers in confectionery, groceries, or drugs, and each of said stockholders was required to purchase at least 10 shares of the preferred stock, and no more than 50 shares of said stock were offered to any one stockholder, and with each 2 shares of preferred stock so sold 1 share of the common stock was given free to such purchaser; that the preferred stock carries a 7 per cent cumulative dividend, but is non-

1

Complaint.

voting, while holders of the common stock are allowed 1 vote per share in all stockholders' meetings. That originally each of said stockholders was required to sign a written instrument designated as "Application for purchasing privilege," in which respondent is designated as the exclusive purchasing agent of said stockholders for any line of goods which respondent might decide to handle, and said stockholder obligated himself to purchase such goods only through respondent and to cooperate with respondent in selling such goods. Each of said stockholders was also required to sign a memorandum of agreement wherein it was provided that in case such stockholder desired to sell his common stock an option to purchase same must be given to certain trustees for the persons constituting the board of directors, in order to prevent any of said stock falling into the hands of anyone who is not a wholesale dealer in confections. Each of said stockholders was further required to agree that he would forfeit all claim to certain purchase dividends should he violate any of the terms of his agreement with respondent or otherwise prove disloyal to the respondent. That in the conduct of its business as hereinabove described the respondent buys goods, wares, and merchandise in various States of the United States and ships the same into the State of New York and various other States other than those in which said goods are bought, and that it there sells such goods, wares, and merchandise in the usual conduct of its business as aforesaid, to various purchasers thereof and transports the same from the place of sale to such purchasers in various States of the United States other than in such States from which they are sold. That in the conduct of such business in buying and selling such goods, wares, and merchandise as aforesaid respondent constantly moves such goods, wares, and merchandise from one State to another, and there is conducted by respondent a constant current of trade in such goods, wares, and merchandise between various States of the United States.

PAR. 2. That while respondent was organized ostensibly for the purpose of acting as the purchasing agent for its stockholders, it now claims to perform the functions of a jobber of confections and chewing gum manufactured by

Complaint.

2 F. T. C.

the Beech-Nut Packing Co. and other manufacturers, but the primary object of such organization was and is to adopt and maintain a system of fixing a schedule of standard resale prices at which goods purchased from respondent by its stockholders and other jobbers should be sold by such stockholders and other jobbers to retail dealers, and each of said stockholders was given to understand that the provisions of his "Application for purchasing privilege," described in paragraph 1 hereof, to the effect that he would cooperate with the respondent in the resale of said goods, obligated such stockholder to maintain said resale prices fixed by respondent. That price cutting, or the resale of goods by such stockholders at prices below those fixed by respondent, was designated by respondent as "cut-throat practices," and respondent repeatedly stated in its printed matter and letters to its stockholders that one of the objects of respondent's organization was to induce jobbers to discontinue such practices. That the maintenance by the stockholders of respondent of resale prices as fixed by respondent for products sold by it was enforced by respondent by withholding from any stockholder who failed or refused to observe said resale prices the purchase dividend which would otherwise accrue on said stock and by the forfeiture of such stock to respondent. That jobbers purchasing merchandise from respondent who were not stockholders in respondent corporation were coerced into maintaining such resale prices by threats that respondent would refuse to sell merchandise to anyone who failed or refused to observe such resale prices.

PAR. 3. That in addition to the system of fixing prices at which goods purchased from respondent by its stockholders and other jobbers should be resold, as set out in paragraph 2 herein, said respondent, acting in conjunction with said jobbers, further maintains a system of fixing prices at which retail dealers who sell products purchased by them from the stockholders or other jobbers dealing with respondent shall resell such products to the consuming public, thereby enlisting the active cooperation of such retail dealers in enlarging the sale of such price-maintained products and depriving such retail dealers of their right to sell such products at

1

Findings.

such prices as they may deem adequate and warranted by their selling efficiency; and, as a part of its scheme to maintain such resale prices, respondent, for more than two years last past, has induced its stockholders and other jobbers to whom it sells merchandise to refuse to sell merchandise to retail dealers who fail or refuse to sell said merchandise to the consuming public at the specified selling prices fixed and determined by respondent as aforesaid. As a means of enforcing observance of such resale prices by retail dealers who handled the products sold by respondent, said respondent refused and continues to refuse to sell products handled by it to jobbers who will resell same to a retail dealer who will not observe the resale prices fixed by respondent, thereby cutting off the source of supply of any jobber purchasing merchandise from the respondent who would resell such merchandise to a retail dealer who would not observe such resale prices.

PAR. 4. That in carrying out the system of resale price maintenance set out in paragraphs 2 and 3 hereof, respondent has occupied the dual rôle of selling agent for the products manufactured by the Beech-Nut Packing Co. and other manufacturers of confections and chewing gum and the purchasing agent for its stockholders, although ostensibly purchasing such products outright from the manufacturer and reselling same to its stockholders.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

The Federal Trade Commission, having issued and served its complaint herein, wherein it alleged that it had reason to believe that the above-named respondent, Mutual Candy Co., Inc., 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 thereof would be to the interest of the public, and fully stating its charges in this respect, and the respondent having filed its answer, signed

Findings.

2 F. T. C.

by its president and general manager, admitting that the matters and things alleged in the said complaint and each paragraph thereof are substantially true and correct in the manner and form therein set forth, with the exception of certain allegations contained in paragraph 4 thereof, and agreeing and consenting that the Commission shall forthwith proceed to make and enter its report, stating its findings as to the facts, its conclusions of law, and its order disposing of this proceeding without the introduction of testimony, and waiving and relinquishing any and all right to the introduction of such testimony, the Commission, having duly considered the record and being fully advised in the premises, now makes its report and findings as to the facts so admitted and its conclusions of law.

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. That the respondent, Mutual Candy Co., Inc., is now and was at all times mentioned in the complaint a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at the city of New York, in said State. That the stock of said corporation consists of 5,000 shares of preferred stock of the par value of \$10 each and 2,500 shares of common stock of the par value of \$10 each, of which said preferred stock 2,406 shares have been issued and sold to approximately 110 wholesale dealers in confections in what is known as the Metropolitan District, consisting of Greater New York; Long Island; Westchester County, N. Y.; and Hudson County, N. J.; and occasionally elsewhere in the States of New York and New Jersey; and the sale of said stock has been limited to wholesale dealers in confectionery, groceries, or drugs, and each of said stockholders was required to purchase at least 10 shares of the preferred stock, and no more than 50 shares of said stock were offered to any one stockholder, and with each 2 shares of preferred stock so sold 1 share of the common stock was given free to such purchaser; that the preferred stock carries a 7 per cent cumulative dividend but is non-voting, while holders of the common stock are allowed 1 vote per share in all stockholders' meetings.

1

Findings.

PAR. 2. That originally each of such stockholders was required to sign a written instrument designated as "Application for purchasing privilege," in which respondent was designated as the exclusive purchasing agent of said stockholders for any line of goods which respondent might decide to handle, and said stockholder obligated himself to purchase such goods only through respondent and to cooperate with respondent in selling such goods.

PAR. 3. That each of such stockholders was also required to sign a memorandum of agreement wherein it was provided that in case such stockholder desired to sell his common stock, an option to purchase same must be given to certain trustees for the persons constituting the board of directors, in order to prevent any of said stock falling into the hands of anyone who was not a wholesale dealer in confections.

PAR. 4. That each of such stockholders was further required to agree that he would forfeit all claim to certain purchase dividends should he violate any of the terms of his agreement with respondent, or otherwise prove disloyal to the respondent. That the maintenance by the stockholders of respondent of resale prices as fixed by respondent for products sold by it was enforced by respondent by withholding from any stockholder who failed or refused to observe said resale prices the purchase dividend which would otherwise accrue on said stock and by the forfeiture of such stock to respondent.

PAR. 5. That in the conduct of its business, as hereinabove described, the respondent buys goods, wares, and merchandise in various States of the United States and ships the same into the State of New York and various other States other than those in which said goods are bought, and that it there sells such goods, wares, and merchandise in the usual conduct of its business as aforesaid to various purchasers thereof and transports the same from the place of sale to such purchasers in various States of the United States other than in such States from which they are sold.

PAR. 6. That in the conduct of such business in buying and selling such goods, wares, and merchandise as aforesaid,

Findings.

2 F. T. C.

respondent constantly moves such goods, wares, and merchandise from one State to another, and there is conducted by respondent a constant current of trade in such goods, wares, and merchandise between various States of the United States.

PAR. 7. That while respondent was organized ostensibly as the purchasing agent for its stockholders, in reality it bought outright confections and chewing gum from the Beech-Nut Packing Co. and other manufacturers and resold same to its stockholders and the jobbing confectionery trade generally; and the primary object of such organization was and is to adopt and maintain a system of fixing a schedule of standard resale prices at which goods purchased from respondent by its stockholders and other jobbers should be sold by such stockholders and other jobbers to retail dealers, and each of said stockholders was given to understand that the provisions of his "Application for purchasing privilege," described in paragraph 2 hereof, to the effect that he would cooperate with the respondent in the resale of said goods, obligated such stockholder to maintain said resale prices fixed by respondent.

PAR. 8. That jobbers purchasing merchandise from respondent who were not stockholders in respondent corporation were coerced into maintaining such resale prices by threats that respondent would refuse to sell merchandise to anyone who failed or refused to observe such resale prices.

PAR. 9. That in addition to the system of fixing prices at which goods purchased from respondent by its stockholders and other jobbers should be resold, as set out in paragraph 7 herein, said respondent, acting in conjunction with said jobbers, further maintains a system of fixing prices at which retail dealers who sell products purchased by them from the stockholders or other jobbers dealing with respondent shall resell such products to the consuming public, thereby enlisting the active cooperation of such retail dealers in enlarging the sale of such price-maintained products and depriving such retail dealers of their right to sell such products at such prices as they may deem adequate and warranted by their selling efficiency; and, as a part of its scheme to maintain such resale prices, respondent, for more than two years

1

Order.

last past, has induced its stockholders and other jobbers to whom it sells merchandise to refuse to sell merchandise to retail dealers who fail or refuse to sell said merchandise to the consuming public at the specified selling price fixed and determined by respondent as aforesaid.

PAR. 10. That as a means of enforcing observance of such resale prices by retail dealers who handled the products sold by respondent, said respondent refused, and continues to refuse, to sell products handled by it to jobbers who will resell same to a retail dealer who will not observe the resale prices fixed by respondent, thereby cutting off the source of supply of any jobber purchasing merchandise from the respondent who would resell such merchandise to a retail dealer who would not observe such resale prices.

CONCLUSIONS.

That the methods of competition set forth in the foregoing findings as to the facts in paragraphs 2, 4, 7, 8, 9, and 10, and each and all of them, are under the circumstances therein set forth 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."

ORDER TO CEASE AND DESIST.

The Federal Trade Commission, having issued and served its complaint herein, wherein it alleged that it had reason to believe that the above-named respondent, Mutual Candy Co., Inc., 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 thereof would be to the interest of the public, and fully stating its charges in this respect, and the respondent having filed its answer, signed by its president and general manager, admitting that the matters and things alleged in the said complaint, and

Order.

2 F. T. C.

each paragraph thereof, are substantially true and correct in the manner and form therein set forth, with the exception of certain allegations contained in paragraph 4 thereof, and agreeing and consenting that the Commission shall forthwith proceed to make and enter its report, stating its findings as to the facts, its conclusions of law, and its order disposing of this proceeding without the introduction of testimony, and waiving and relinquishing any and all right to the introduction of such testimony, and the Commission having made and filed its report containing its findings as to the facts and its conclusions that the 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," which said report is hereby referred to and made a part hereof: Now, therefore,

It is ordered, That the respondent, Mutual Candy Co., Inc., its officers, directors, agents, servants, and employees, cease and desist from directly or indirectly recommending, requiring, or by any means whatsoever bringing about the resale by dealers, whether jobbers, wholesalers, or retailers, of the products handled by it, according to any system of prices fixed or established by respondent, and more particularly including any or all of the following means:

(1) Entering into contracts, agreements, or understandings with dealers, whether jobbers, wholesalers, or retailers, including its stockholders, to the effect that such dealers, or any of them, in reselling the products handled by respondent, will adhere to any system of prices fixed or established by respondent.

(2) Securing contracts, agreements, or understandings from such dealers to the effect that they will adhere to any such system of resale prices.

(3) Entering into any contracts, agreements, or understandings with its jobber-stockholders providing for the payment of so-called "purchase dividends" upon condition that resale prices fixed by respondent shall be maintained.

(4) Discriminating in favor of or against its jobber-stockholders or other dealers by means of any system of so-called

1

Syllabus.

“purchase dividends” or otherwise, conditioned upon the maintenance of resale prices fixed by respondent.

(5) Refusing or threatening to refuse to sell to any such dealer because of failure to adhere to any such system of resale prices.

(6) Refusing or threatening to refuse to sell to any jobbers or wholesalers because of their having resold said products to retailers who shall have failed to maintain the resale prices fixed by respondent.

(7) Enforcing or threatening to enforce forfeiture of the stock of any of its jobber-stockholders for failure to maintain such resale prices.

(8) Securing or seeking to secure the cooperation of its jobber-stockholders or other dealers in maintaining or enforcing any system of resale prices whatsoever.

FEDERAL TRADE COMMISSION

v.

JOSEPH SIMMONDS, DOING BUSINESS UNDER
THE TRADE NAME AND STYLE OF W. H. PRO-
DUCTIONS CO.