

Complaint.

FEDERAL TRADE COMMISSION

v.

BUDD TAILORING COMPANY.

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

Docket 853—October 4, 1922.

SYLLABUS.

Where a corporation engaged in conducting a tailoring business, falsely represented to prospective customers, through its agents, that under its so-called "cooperative advertising plan" (whereby the company contracted, in consideration of 60 payments of 50 cents in advance each week, to deliver to the holder of the contract a \$30 suit or overcoat, reserving the right, in consideration of new customers that might be secured by said holder, to discount said price to any extent it might see fit) customers would be organized into groups or "clubs" of 60 each, the name of one of whom would be selected by chance each week to receive a suit or overcoat, without further payment or obligation; the fact being that selections were made arbitrarily and largely without regard to services rendered, by said corporation in such business districts as would best advertise itself and serve to secure other customers, and that customers not so selected, after completing their payment, were compelled to pay an additional amount in order to secure goods of serviceable quality and equal in appearance to garments ordinarily sold at \$30; with the result that through such false representations large numbers of customers were secured:

Held, That the holding out of such false and misleading inducements to purchase, under the circumstances set forth, constituted an unfair method of competition.

COMPLAINT.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that the Budd Tailoring Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce within the District of Columbia, in violation 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 it appearing to the Commission 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:

I.

PARAGRAPH 1. For its first charge herein, the Commission says that respondent is a corporation organized and doing business under and

Complaint.

5 F. T. C.

by virtue of the laws of the State of Maryland and owns and conducts tailoring establishments in various cities of the United States.

PAR. 2. That on or about the 19th day of August, 1919, respondent opened a gentlemen's tailoring establishment in the City of Washington, District of Columbia, at the premises known as 945 Pennsylvania Avenue in said City and District and there engaged in the business of selling gentlemen's clothing to residents of said District and the territory adjacent thereto, in competition with other persons, partnerships, and corporations similarly engaged in said District; that respondent conducted its said business continuously from said date until the 19th day of March, 1921, when respondent ceased and abandoned its said business in the District of Columbia, removed therefrom and has not at any time since said last named date engaged in any business whatsoever in said District.

PAR. 3. That in the conduct of its said business in the District of Columbia, respondent conducted a lottery in violation of the provisions of Section 863 of the code of laws for the District of Columbia in the following manner, to-wit: Respondent solicited customers among the residents of said District and offered to sell to each such customer a suit of clothing or an overcoat as such customer might choose for the price of \$30 upon the following terms and conditions; that such customer should make 60 weekly payments of 50¢ each or until such sum of \$30 had been fully paid in advance whereupon respondent would make to the measure and order of such customer the suit or overcoat so contracted for and deliver same to such customer free of further payments; that respondent would group customers entering into such agreement into groups of 60 customers each, denominated by respondent clubs, and that upon receipt of the first such payment of 50¢ by each member in each such club and each week thereafter until the expiration of 59 weeks respondent would cause the name of one customer in each such club to be drawn by chance and would deliver to each customer so selected the suit contracted for by him free of any further charge or payment other than the payments made by such customer, under the advance payment plan above set out, prior and up to the time of said selection; that by means of the foregoing offer respondent secured large numbers of customers each of whom agreed to purchase a suit from respondent upon the terms and conditions above set out and thereafter respondent proceeded to conduct a lottery and to select by chance the name of one such customer each week for a period of time to the Commission unknown; that upon the selection of each such name by chance, respondent delivered to the customer so selected a suit of clothing free of all further charge or payment other than the payments made

by such customer under the advance payment plan above set out, prior and up to the time of his said selection.

PAR. 4. That the above alleged acts and things so done by respondent constitute an unfair method of competition in commerce within the intent and meaning of Section 5 of an Act of Congress approved September 26th, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

II.

PARAGRAPH 1. For its second separate charge herein the Commission says that respondent is a corporation organized and doing business under and by virtue of the laws of the State of Maryland and owns and conducts tailoring establishments in various cities of the United States.

PAR. 2. That on or about the 19th day of August, 1919, respondent opened a gentlemen's tailoring establishment in the City of Washington, District of Columbia, at the premises known as 945 Pennsylvania Avenue in said City and District and there engaged in the business of selling gentlemen's clothing to residents of said District and the territory adjacent thereto, in competition with other persons, partnerships and corporations similarly engaged in said District; that respondent conducted its said business continuously from said date until the 19th day of March, 1921, when respondent ceased and abandoned its said business in the District of Columbia, removed therefrom and has not since said last named date engaged in any business whatsoever in said District.

PAR. 3. That in the conduct of its said business in the District of Columbia respondent solicited customers among the citizens of said District by means of certain agents employed by respondent for that purpose and denominated by respondent, solicitors; that by and through said agents respondent offered to sell to each customer a suit of clothing or an overcoat as such customer might choose for the sum of \$30 to be paid for by such customer in 60 weekly payments of 50¢ each payable in advance upon the following terms and conditions; that upon the completion of said 60 weekly payments or when said total sum of \$30 had been so paid, respondent would make and deliver to such customer the suit or overcoat so chosen by him as above set out; that the customers so secured by respondent would be grouped into clubs and that upon the initial payment of 50¢ by each customer in each such club, respondent would select the name of one customer in each such club to whom the suit of clothing or overcoat chosen by such customer under the agreement above set out would be made and delivered to him without further charge

Complaint.

5 F. T. C.

or payment other than the payments made by such customer, under the advance payment plan above set out, prior and up to the time of his said selection and that each week thereafter for a period of 59 weeks respondent would similarly select and deliver a suit or overcoat to one customer in each such club; that said terms and conditions were calculated to create and did create the belief among the persons so solicited by respondent that in selling and distributing suits and overcoats under such offer, respondent would conduct a lottery wherein one customer would win a suit or overcoat each week by chance; that by means of such offer respondent secured a large number of customers in the District of Columbia each of whom agreed to purchase a suit or overcoat upon the terms and conditions above set out; that thereafter and in pursuance of said method of conducting its said business, respondent proceeded from time to time arbitrarily to select the name of one such customer to whom respondent delivered a suit of clothing free of any further charge or payment on the part of the customer so selected other than the payments made by such customer, under the advance payment plan above set out, prior and up to the time of his said selection; that a large majority of the persons entering into said agreement with respondent regularly made the weekly payments of 50¢ therein provided for until, in each instance, the customer had been selected by respondent to receive a suit in advance of full payment as above set out, or had paid to respondent the full amount of \$30 provided for in said agreement; that the above alleged acts and things were done by respondent in order to evade the provisions of Section 863 of the code of law for the District of Columbia and for the purpose of simulating a lottery whereby persons solicited by respondent might be induced and were induced to purchase suits and overcoats upon the plan, terms and conditions hereinbefore set out;

PAR. 4. That the above alleged acts and things done by respondent constitute an unfair method of competition in commerce within the intent and meaning 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."

III.

PARAGRAPH 1. For its third separate charge herein the Commission says that respondent is a corporation organized and doing business under and by virtue of the laws of the State of Maryland and owns and conducts tailoring establishments in various cities of the United States.

PAR. 2. That on or about the 19th day of August, 1919, respondent opened a gentlemen's tailoring establishment in the City of Washington, District of Columbia, at the premises known as 945 Pennsylvania Avenue in said City and District and there engaged in the business of selling gentlemen's clothing to residents of said District and the territory adjacent thereto, in competition with other persons, partnerships and corporations similarly engaged in said District; that respondent conducted its said business continuously from said date until the 19th day of March, 1921, when respondent abandoned its said business in the District of Columbia, removed therefrom and has not since said last named date, engaged in any business whatsoever in said District;

PAR. 3. That in the conduct of its said business in the District of Columbia respondent by and through agents employed for that purpose solicited customers among the citizens of said District and offered to sell each such customer a suit of clothing or overcoat at the choice of such customer upon the following terms and conditions to wit: that each customer should pay to respondent the sum of 50¢ per week for a period of 60 weeks or until the total sum of \$30 had been paid by such customer whereupon respondent would make and deliver such customer a suit or overcoat chosen by him; that respondent was then selecting each week from among its customers and would continue to so select each week thereafter for an indefinite period one customer who would be given a made to order suit of clothing or overcoat directly after such selection, without further charge or payment on his part other than the payments made by such customer, under the advance payment plan above set out, prior and up to the time of his said selection; that the customer so selected would be chosen by respondent in consideration of and in return for services theretofore rendered by such customer to respondent which said services respondent represented to be the securing by such customer of other customers for respondent or the doing of such other acts or things as may have been requested by respondent and performed by such customer; that each person entering into an agreement to purchase a suit upon the terms hereinbefore set out had an equal chance with all other customers of respondent to secure new customers or render other services and thus to be selected to receive in return therefor a suit of clothing or an overcoat as he might choose without further charge or payment on his part other than the payments made by such customer, under the advance payment plan above set out, prior and up to the time of his said selection; that upon the agreement of the person so solicited to purchase a suit under the terms and conditions above set out, respondent issued to such person a booklet

Complaint.

5 F. T. C.

in which all the payments made by such person were recorded in spaces provided for that purpose and numbered so as to show the number, amount and date of the collection of each such payment; that in each said booklet appeared the following contract which said contract respondent required said person to execute:

CONTRACT.

In consideration of 60 payments of 50¢ in advance each week, The Budd Tailoring Company agrees to deliver to the holder of this contract a gent's suit or coat to the price of \$30.00.

In order to advertise our clothing on a broader principle and to continually increase our sales, the company reserves the following privileges as a special and separate advantage to customers holding this contract, who in return agree to use their influence in getting us new customers.

The company reserves the right to discount the above price of one suit to any extent it may see it fit, to increase our sales, provided new customers are secured by the party. Said credit being for services rendered. The above is not an inducement for the original purchase.

No money can be lost during the life of this contract, as the amount paid in will be credited to your account and can be applied to any \$30 garment any time.

No orders are accepted on clothing sold for less than \$30, and no money will be returned.

With the consent in writing, of the Company, the holder of this contract may assign same to any other person, and said party shall upon completing payments be entitled to merchandise to the price of \$30.

Agents are expressly prohibited from making any agreement contrary to the terms herein specified and customers are warned that we will not be responsible in any manner, shape or form other than the expressed terms, of this agreement.

It is expressly understood that this contract in no wise embraces any scheme of chance, gift enterprise or plan governed by chance, but the discount allowed is solely on account of services rendered the Company in making sales to their friends and acquaintances.

It is hereby jointly agreed that this is essentially a cooperative contract between us and each and every contract holder wherein said holder agrees to waive any and all claims, now or during

the life of this contract, contrary to the printed terms herein specified.

THE BUDD TAILORING Co.

that respondent through its said solicitors represented to the person solicited by it that said contract was intended to and did provide for the weekly selection of a customer to receive a suit or overcoat free of further payment as hereinbefore alleged; that pursuant to said representations and the execution of said agreement respondent did from time to time select from among its said customers one who should receive and did receive the suit of clothing or overcoat so contracted for by him free of any further charge or payment; that said customers so selected either rendered no services for said selection or rendered services of a negligible character and value therefor; that the suits and overcoats so delivered by respondent to the customers thus selected were of good quality and workmanship and well worth the price of \$30, by reason whereof other customers and prospective customers of respondent were led to believe and did believe that in the event they were similarly chosen to receive a suit before the payment of the entire agreed price of \$30, or in any event upon the payment of said entire sum of \$30, they would receive suits equal in quality and value to those given by respondent to customers specially selected by it as above set out; that after large numbers of customers had paid said entire amount of \$30 and had thus become entitled to a suit or overcoat as provided for in said contract, respondent supplied no suits or overcoats of a quality and value equal to those theretofore delivered to selected customers as above set out, but offered to such customers who had paid said full amount of \$30, materials from which suits or overcoats might be selected, which were far inferior to the materials theretofore furnished by respondent in the suits and overcoats delivered to said selected customers and the suits and overcoats made by the respondent from said materials so offered to said customers who had so paid in full were not of the reasonable value of \$30; that when such customers who had paid in full complained to respondent that the quality and value of the garments and materials so offered to such customers for selection was far below the quality and value of the materials, suits and overcoats which respondent had furnished to aforesaid specially selected customers, respondent refused to give such complaining customers suits or materials of any better quality or value than those first offered to them unless and until such customers had paid to respondent an additional sum of money, and further refused to return to such customers the money paid by them to respondent under said contract.

Findings.

5 F. T. C.

PAR. 4. That the above alleged acts and things done by respondent constitute an unfair method of competition in commerce within the intent and meaning 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to 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," the Federal Trade Commission issued and served complaint upon the respondent herein, Budd Tailoring Company, charging it with the use of unfair methods of competition in violation of the provisions of said Act.

The respondent, Budd Tailoring Company, having entered its appearance and filed its answer and pursuant to the order and designation of the Federal Trade Commission hearings were had before an examiner of the Commission and testimony and evidence having been introduced in behalf of the Commission and in behalf of the respondent;

Thereupon this proceeding came on for final hearing before the Commission upon the testimony and evidence introduced, the Examiner's report and exceptions thereto and upon briefs for both sides, and the Commission having duly considered the record, and being now fully advised in the premises, makes this its findings as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent, Budd Tailoring Company, is a corporation organized under the laws of the State of Maryland, December 1919, with an authorized capital stock of \$10,000. Its principal place of business in the District of Columbia from its incorporation to and including the 19th day of March, 1921, was located in the Franklin National Bank Building, at 945 Pennsylvania Avenue, Northwest.

PAR. 2. The respondent's predecessor prior to December, 1919, and the respondent since its incorporation, conducted in the District of Columbia, a men's custom tailoring establishment, for a period of nineteen months, from the 19th day of August, 1919 to the 19th day of March, 1921, on which latter date said respondent ceased and abandoned its business in the said District of Columbia, removed therefrom and has not at any time since the last named date engaged in any business whatsoever in the said District.

PAR. 3. The respondent, while engaged in the men's custom tailoring business and selling clothing to residents of the District of Columbia, was in competition with other persons, partnerships and corporations similarly engaged in said District. Said respondent owns and conducts tailoring establishments, operated on like plans, in other and various cities of the United States.

PAR. 4. The respondent in order to solicit the purchase or sale of men's suits of clothing or overcoats to prospective purchasers in the District of Columbia, under what was termed its "cooperative advertising plan," provided for this purpose a contract in writing by the terms of which said agreement it was provided as follows:

In consideration of 60 payments of 50¢ in advance each week, The Budd Tailoring Company agrees to deliver to the holder of this contract a gent's suit or coat to the price of \$30.00.

In order to advertise our clothing on a broader principle and to continually increase our sales, the company reserves the following privileges as a special and separate advantage to customers holding this contract, who in return agree to use their influence in getting us new customers.

The company reserves the right to discount the above price of one suit to any extent it may see fit, to increase our sales, provided new customers are secured by the party. Said credit being for services rendered. The above is not an inducement for the original purchase.

No money can be lost during the life of this contract, as the amount paid in will be credited to your account and can be applied to any \$30.00 garment any time.

No orders are accepted on clothing sold for less than \$30.00, and no money will be returned.

With the consent in writing, of the Company, the holder of this contract may assign same to any other person, and said party shall upon completing payments be entitled to merchandise to the price of \$30.00.

Agents are expressly prohibited from making any agreement contrary to the terms herein specified, and customers are warned that we will not be responsible in any manner, shape or form other than the expressed terms of this agreement.

It is expressly understood that this contract in no wise embraces any scheme of chance, gift enterprise or plan governed by chance, but the discount allowed is solely on account of services rendered the Company in making sales to their friends and acquaintances.

Findings.

5 F. T. C.

It is hereby jointly agreed that this is essentially a cooperative contract between us and each and every contract holder wherein said holder agrees to waive any and all claims, now or during the life of this contract, contrary to the printed terms herein specified.

PAR. 5. In the conduct of its business in the District of Columbia, respondent solicited customers among the residents of said District by means of certain agents employed for that purpose and denominated solicitors. Said agents or solicitors represented on behalf of the respondent that groups were being organized under its cooperative advertising plan, consisting of sixty customers each, denominated by respondent clubs and by and through said agents or solicitors, respondent offered to sell to each such customer a suit of clothing or an overcoat, as such customer might choose, for the sum of \$30.00 to be paid for by such customer in sixty weekly payments, or when said total sum of \$30.00 had been so paid, respondent would make to the measure and order of such customer, the suit of clothing or overcoat so contracted for and deliver same to such customers free from further payments; said agent or solicitor on behalf of said respondent further represented to such customer, or prospective customers, entering into such agreement, that upon the receipt of the first such payment of 50¢ from each member in each such club, and each week thereafter until the expiration of fifty-nine weeks, respondent would cause the name of one customer in each such club or group to be drawn or selected by chance and would deliver to each customer so drawn or so selected, the suit of clothing or overcoat contracted for by him, free of any further charge or payment, other than the payments made by such customer under the advanced payment plan above set forth.

Pursuant to the agreement or contract set forth in Paragraph Four hereof and the representations made by the agents or solicitors on behalf of the respondent, some three or four thousand customers in the District of Columbia agreed to and did purchase a suit of clothing or overcoat from respondent upon the terms and conditions of said contract or agreement and the said representations made by the agents and solicitors of the said respondent.

PAR. 6. The respondent did not group or attempt to group its customers into clubs of sixty each, or any other denomination, but arbitrarily selected from time to time such contract holders as it so desired and gave certainly one hundred, but not more than two hundred customers, suits of clothing or overcoats before said customers had completed their payments of \$30.00 and without further charge or payment other than the payments made by such customers prior and up to the time of said selection.

The customers chosen by respondent to receive suits of clothing or overcoats were arbitrarily selected in such business districts or in such business sections of the District of Columbia, as would best advertise its business in order to secure other customers under its so-called cooperative advertising plan. Such selections were made largely without regard to services rendered and in one instance where the customer had only paid one weekly payment of 50¢ and had not rendered any service whatsoever to the respondent company.

That notwithstanding the respondent company contracted or agreed to sell men's custom made suits of clothing or overcoats at the specified price of \$30.00 each, no reference being made to goods of higher price or quality, when said payments were completed the samples of the goods submitted from which such selection of clothing was to be made, were of such inferior quality that the customer was obliged to and did pay to the respondent company an additional sum of money in order to obtain goods of the appearance and quality usually made into suits sold at said price. About 60% of the customers who had previously contracted for \$30.00 suits were obliged to pay or did pay over or above that amount in order to acquire goods of serviceable quality.

PAR. 7. The said customers were led to believe and did believe from the statements made by the agents of the respondent on behalf of the respondent that said respondent was selling suits of clothing and overcoats at the specified price of \$30.00, dividing its customers into groups or clubs of sixty customers each, and as the further result of such representations or inducements of said agents or solicitors that a member would be drawn each week from each such club to receive a suit of clothing or overcoat free from any further charge or payment, more than three thousand customers or prospective customers were induced by such representations to enter into the agreement hereinbefore referred to, in the belief that each had equal chance with the other members of the so-called club of sixty to procure a suit of clothing or overcoat before completing the sixty weekly payments of 50¢ each.

PAR. 8. The arbitrary selection of customers from time to time by respondent to receive suits of clothing or overcoats free from any further charge or payment, was not as a reward for services rendered by said customers but rather as an inducement to secure additional customers through respondent's said form of solicitation or advertisement, and that additional customers were so influenced and secured through such representations made by respondent's agreement that the said customers or prospective customers had equal chance with the other fifty-nine alleged club members to secure a suit of clothing or overcoat before completing the sixty weekly payments.

Order.

5 F. T. C.

CONCLUSION.

The practices of said respondent, as set forth in the foregoing findings as to the facts, are unfair methods of competition in commerce and constitute a violation 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.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, the testimony and evidence submitted, the trial examiner's report upon the facts, and the exceptions thereto, and the Commission having made its findings as to the facts with its conclusion that the respondent has violated the provisions 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,"

It is now ordered, That the respondent, Budd Tailoring Company, its officers, agents, solicitors, representatives, servants, and employees, cease and desist from directly or indirectly:

1. Falsely representing through its agents, or by or through any other means whatsoever, to its customers or prospective customers, its method of marketing its merchandise in commerce, and especially from,

2. Falsely representing through its agents or by or through any other means whatsoever, to its customers or prospective customers, that in the sale of suits of clothing or overcoats customers would be divided into clubs or groups of sixty persons each and that from such clubs or groups each week the names of persons would be drawn or otherwise selected by chance to receive a suit of clothing or overcoat without further charge or payment.

3. From representing to customers or prospective customers that under respondent's plan of marketing its merchandise each and every customer would have an equal chance or opportunity with other customers in the selection and designation of those who were to receive suits of clothing or overcoats at a price under the full payment of \$30.00, when in truth and in fact no equality of opportunity is given.

It is further ordered, That the respondent, within sixty (60) days after the service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

Syllabus.

FEDERAL TRADE COMMISSION

v.

ESKAY HARRIS FEATURE FILM COMPANY.

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

Docket 741—October 17, 1922.

SYLLABUS.

Where a corporation engaged in the business of buying, selling and leasing motion picture films,

- (a) Purchased, slightly altered, and retitled a picture made up in large part of film from a production which as "Your Obedient Servant" had been widely exhibited to the public, and so advertised, offered and leased the same without clearly indicating that said photoplay had already been exhibited under another title;
- (b) Used as a new title therefor the name "Black Beauty," the fact being that the story therein set forth was not that of the famous novel of that name, and that a competitor was already engaged in the preparation of a so-called superproduction faithfully portraying the story of "Black Beauty" (a fact well known in the trade and motion picture industry), had given said production said title, and had at large expense extensively advertised the same;
- (c) Used as advertising matter in connection therewith letters, lithographic posters, heralds, booklets, etc., which had a capacity and tendency to, and did, cause exhibitors and the motion picture theater going public to believe that said rebuilt photoplay had been made or produced by it, and had never theretofore been distributed or exhibited under any other name;
- (d) In connection with the lease and distribution of said rebuilt photoplay, prominently featured in its letters and advertising matter the name of the author of the novel "Black Beauty" and styled its production "An American adaptation of the world famous autobiography of a horse," with the effect of deceiving and misleading the trade and motion picture theater going public into the erroneous belief that said photoplay set forth the story thereof, and that its photoplay and that of said competitor were one and the same, and of thereby enabling it to appropriate the advertising values created by said competitor; and
- (e) Advertised in a trade publication of general circulation that it controlled the motion picture rights and title in the name "Black Beauty" and would prosecute any infringement to the full extent of the law, and so notified said competitor, which had itself theretofore registered in the Copyright Office the title so claimed; the fact being that said corporation had never registered such a claim, had no such rights as asserted, instituted no such threatened suits, and advertised and circulated such warning notice to unduly hinder said competitor in the lease and distribution of its aforesaid superproduction:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Complaint.

5 F. T. C.

COMPLAINT.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that Eskay Harris Feature Film Company, hereinafter referred to as respondent, has been and is using unfair methods of competition 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 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 is a corporation organized and existing under the laws of the State of New York, with its principal place of business at New York City, in said State.

PAR. 2. That respondent is engaged in the business of producing moving picture films, purchasing, leasing and reissuing moving picture films made by others and selling or leasing such films for use in moving picture theatres and other public places in various States of the United States, and causes such films, when sold or leased, to be transported to the purchasers or lessees thereof, from the State of New York, through and into other States of the United States, and carries on such business in direct, active competition with other persons, partnerships and corporations similarly engaged.

PAR. 3. That respondent in the course of its business, as described in Paragraph Two hereof, on July 27, 1920, closed negotiations, which had been begun in February 1920, with the owner thereof, for five positive prints of a moving picture film entitled "Your Obedient Servant," each in three reels of aggregate length of about 2,656 feet, which prints were delivered to respondent on September 13, 1920; this film had been produced by Thos. A. Edison Co. inc., copyrighted and released on or about September 20, 1917, and thereafter extensively exhibited in moving picture theaters throughout the United States under the said title "Your Obedient Servant" and such film became well-known to patrons of moving picture theaters throughout the United States; that such film was described in the certificate of copyright registration, issued by the Copyright Office of the United States, Library of Congress, as "A drama suggested by Anna Sewell's story of 'Black Beauty'; directed by Edw. H. Griffith. Photoplay by Thos. A. Edison Co. inc. * * *;" that said film was and is not a strict adaptation from said story, but is for the most part foreign thereto.

PAR. 4. That after the acquisition of the prints of "Your Obedient Servant," as set out in Paragraph Three hereof, respondent made additional scenes aggregating about 300 feet of film which were added to the original material of said film "Your Obedient Servant" and a number of its original subtitles and captions were deleted and a larger number of subtitles and captions were added, same having been selected from the book entitled "Black Beauty" by Anna Sewell, which added subtitles and captions covered about 1,000 feet of film, and the film as thus rebuilt was enlarged from three reels to four reels and aggregated approximately 3,500 feet, and the film as thus rebuilt by respondent was entitled "Black Beauty," and was extensively advertised by respondent and offered for exhibition purposes upon lease contracts to proprietors of moving picture theatres and other places of amusement under that title, without clearly and distinctly showing to lessees and the patrons of moving picture theatres that such film entitled "Black Beauty" was an old film changed and re-issued under a new title as herein set out.

PAR. 5. That prior to the acquisition by respondent of the film "Your Obedient Servant" as set out in Paragraph Three hereof, the Vitagraph Company of America was having prepared a scenario based on the novel by Anna Sewell, entitled "Black Beauty," which scenario was completed on July 17, 1920, and immediately thereafter said Vitagraph Company announced that it was about to produce a moving picture entitled "Black Beauty" embodying such scenario, and thereupon inaugurated an extensive advertising and publicity campaign with the view of acquainting the proprietors and patrons of moving picture theaters with said film and creating a great demand therefor, which film was completed in December, 1920; that said Vitagraph Company is one of the pioneers in the production and leasing of moving picture films, and for a number of years has carried on an extensive business, causing films to be transported to the purchasers or lessees thereof, from the States of New York and California, through and into various other States of the United States and foreign countries.

PAR. 6. That the adoption by respondent of the title "Black Beauty" for the film reconstructed by it from the old film entitled "Your Obedient Servant," as set out in Paragraph Four hereof, was calculated to and has enabled respondent to wrongfully utilize and appropriate the value created by the said advertising and publicity campaign carried on by said Vitagraph Company for its said film "Black Beauty"; and in thus utilizing it, to

(a) deceive the motion picture distributors, exhibitors and theatre patrons by making them believe that respondent's said reconstructed

Findings.

5 F. T. C.

film was and is the same film as that of the same name made by the Vitagraph Company as aforesaid; and

(b) deceive the motion picture distributors, exhibitors and theatre patrons by making them believe that respondent's said reconstructed film was and is a strict adaptation from Anna Sewell's said story entitled "Black Beauty," whereas the same did not strictly or substantially follow said story, but was for the most part foreign thereto; that respondent in order further wrongfully to utilize the value of the advertising done by said Vitagraph Company, and in order to intimidate distributors and exhibitors of motion picture films and cause them to refuse to advertise, sell, distribute or produce the release of said film when issued by the Vitagraph Company, published in various trade journals an advertisement containing a statement to the effect that it controls the motion picture rights and title of "Black Beauty," and will prosecute any infringement to the full extent of the law, and a warning is given that anyone showing a motion picture entitled "Black Beauty" without respondent's permission does so at his own risk; whereas respondent did not control the motion picture rights and title of the name "Black Beauty," but published the said notice for the purpose of intimidating distributors of motion picture films and causing them to refuse to advertise the forthcoming release of said film, made by the Vitagraph Company, or to distribute it when released.

PAR. 7. That by reason of the facts recited, the respondent is using an unfair method of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to 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," the Federal Trade Commission issued and served a complaint upon the respondent, Eskay Harris Feature Film Company, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said Act. The respondent, Eskay Harris Feature Film Company, entered its appearance by its attorneys, O'Brien, Malevinsky & Driscoll, and having filed its answer herein, hearings were had and evidence was thereupon introduced in support of the complaint and the answer before an examiner of the Federal Trade Commission theretofore duly appointed, and thereupon this

proceeding came on for final hearing and the Commission having heard argument of counsel and having duly considered the record, and being now fully advised in the premises, makes this its findings as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. That the respondent, Eskay Harris Feature Film Company, is a corporation organized under the laws of the State of New York in the year 1915 with an authorized capital stock of \$200,000 of which \$71,000 has been issued, with its principal office and place of business located at 126 West 46th Street in the city and state of New York, and is engaged in the business of dealing in motion picture films. That its said business is confined almost entirely to purchasing or leasing motion picture films made by others and then selling or leasing the same to exhibitors both theatrical and non-theatrical, located throughout the various states of the United States, and in the conduct of such business respondent causes these films to be transported by common carriers from the makers thereof through different states of the United States in and to the city and state of New York where they are so leased to exhibitors and then transported by common carriers from the city and state of New York through, to and into other states of the United States, and there is continuously and has been at all times hereinafter mentioned a constant current of trade and commerce in such motion picture films between and among the several states of the United States, and more particularly from different states of the United States, in and to the city and state of New York and therefrom through and into other states of the United States, and the respondent so conducts and carries on its business in direct competition with other persons, firms and corporations similarly engaged including the Vitagraph Company of America.

PAR. 2. That the Vitagraph Company of America is a corporation organized under the laws of the state of New York with its principal office in the city of Brooklyn, New York, with an authorized capital stock of \$24,000,000 of which there has been issued 3,250,000 preferred and 3,250,000 common, and is engaged in the business of producing, distributing and leasing motion picture films. That in the conduct of its business the Vitagraph Company of America owns and operates studios located in the cities of Los Angeles, state of California, and Brooklyn, state of New York, where it makes and produces motion picture films by photographing upon celluloid film scenes which when projected through a machine upon a screen de-

Findings.

5 F. T. C.

picts what is known as a motion picture, and in the making of these films large quantities of unexposed celluloid film from which the negative print is made are shipped from Rochester, state of New York, to these studios and the negative prints are then shipped and transported to the laboratory located in Brooklyn, New York, where the positive prints are produced; and in the photographing of the scenes in its studios the corporation employs numerous actors, actresses, directors, continuity and title writers, camera men and designers and other artists and artisans who are assembled from different states of the United States, and also causes a large amount of scenery, paraphernalia, costumes and similar stage properties to be moved and transported from different states in and to such state where the same are used in connection with the production of these films; that the corporation from its principal office in the city of Brooklyn, New York, makes and enters into contracts or leases for the exhibition of the positive prints with exhibitors throughout the United States and foreign countries by correspondence and through traveling salesmen and its branch offices, and after these positive prints are produced in the laboratories it causes them to be moved and transported by common carriers to its branch offices or exchanges and from there to theaters in the principal cities and towns of the United States and Canada where they are displayed and exhibited to the public after which they are moved and transported to other theaters in different states and countries for exhibition; and there is continuously and has been at all times herein mentioned a constant current of trade and commerce in such motion picture films between and among the several states of the United States and foreign countries, and more particularly from different states of the United States through other states in and to the city of Brooklyn, state of New York, and the city of Los Angeles, state of California, and therefrom through and into other states of the United States and foreign countries.

PAR. 3. That in the year 1917 the Thomas A. Edison, Inc., a corporation of Orange, New Jersey, produced a certain motion picture photoplay which it named and titled *Your Obedient Servant*, registering such name in the copyright office of the United States of America on the 20th day of September, 1917, and thereafter this picture was shown and exhibited under and by such name and title in approximately 5,000 theaters located throughout all the different States of the United States, and in the year 1918, said Thomas A. Edison, Inc., sold the negative of said motion picture photoplay to one George Kleine, of Chicago, Illinois, who continued to distribute prints of the same to exhibitors generally throughout the United States, who,

in turn, exhibited the picture to the public, and neither said Thomas A. Edison, Inc., or the said George Kleine, or any exhibitor who leased from them ever used any name or title in connection with such other than that of Your Obedient Servant. That the aforesaid motion picture photoplay depicts and portrays a drama during the period of the Civil War in the United States in which a horse is featured and such photoplay was suggested by the story of Black Beauty which is an autobiography of a horse written about forty years ago by Anna Sewell, an English authoress, and which has been extensively read and both the story and the name of Black Beauty have become and are well and favorably known to the American public. The said photoplay, Your Obedient Servant, does not depict or portray the scenes, episodes, incidents or characters set out in the Sewell Book other than that a horse named Black Beauty is cast to take a leading and prominent part therein, and the story in the photoplay Your Obedient Servant is not the Anna Sewell story of Black Beauty and none of the subtitles appearing in such photoplay are taken from the book written by Anna Sewell.

PAR. 4. That in the year 1918 Samuel Kantrowich, the aforesaid President, Treasurer and General Manager of the respondent corporation saw the photoplay Your Obedient Servant at a public exhibition at Jersey City, New Jersey, under and by such name and thereafter, to wit, on or about July 12, 1920, requested the Photo Products Export Company, the New York representative of said George Kleine, for a showing of the same, and shortly after July 21, 1920, the Picture was screened for him, and on August 19, 1920, the said Kantrowich, acting for and on behalf of the respondent corporation ordered five positive prints of the same at and for an agreed price of \$863.20, and on September 13, 1920, the Photo Products Export Company received these prints from Chicago and thereafter delivered them to the said respondent. That the negotiations for the sale of these five prints were entered into by and between Frank A. Tichenor, president of said Photo Products Export Company and the said Kantrowich, between whom it was mutually understood and agreed as one of the conditions of the sale that the respondent should use the prints for non-theatrical purposes only and that the respondent paid the purchase price of \$863.20 on the 21st day of September, 1920, and thereafter claimed and asserted the right to and did use such prints for theatrical purposes.

PAR. 5. That after the five prints of the picture, Your Obedient Servant, had been delivered on September 13, 1920, as aforesaid, the respondent made minor changes in the wording and phraseology of

Findings.

5 F. T. C.

the fifty-three subtitles in such picture and added thereto sixteen new subtitles, seven of which were taken from the Anna Sewell book of *Black Beauty*, and also added scenes of a mare and colt taken in a meadow at Ossining, New York, and of animals taken at a farm near Mt. Kisco, New York, and approximately 20 feet of film depicting a race horse scene. That this added film was approximately 900 feet, 700 feet of which consisted of subtitles and 200 feet of scenes. That the original motion picture photoplay *Your Obedient Servant* was in three reels of approximately 2,400 feet in length and the picture was thus enlarged by respondent to four reels aggregating approximately 3,500 feet, and to this rebuilt photoplay the respondent gave the name of *Black Beauty* and proceeded to advertise, lease and offer to lease the same in commerce aforesaid under and by such name and title to exhibitors both theatrical and non-theatrical generally throughout the United States without clearly, distinctly, definitely and unmistakably showing or stating that such rebuilt picture had been formerly released and exhibited to the public under the name and title of *Your Obedient Servant*, and the advertising matter which included letters, lithographic posters, heralds, booklets, newspaper advertisements and slides, used by the respondent in so offering and holding out its said rebuilt picture to the trade and general public as aforesaid had the capacity and the tendency to and did cause exhibitors and the motion picture theatre going public to believe that this rebuilt motion picture photoplay was one which had been made or produced by the respondent and never theretofore distributed or exhibited under any name or title other than *Black Beauty*.

PAR. 6. That in November, 1919, the Vitagraph Company of America decided to produce a motion picture photoplay entitled *Black Beauty* which would faithfully and truly depict and portray Anna Sewell's story of a horse and in the winter of 1919 sent an announcement to this effect by means of news items to approximately 2,300 newspapers of general circulation throughout the United States. That the continuity of said photoplay was finished in January, 1920, whereupon the preliminary work of the production commenced. On July 12, 1920, the first scenes were photographed in its studio at Los Angeles, California, the last scenes being taken on December 4, 1920, and on January 5, 1921, the picture was released for exhibition and thereafter shown in more than 1,500 motion picture theatres throughout the United States. That this photoplay is composed of two stories, to wit, a melodrama interwoven with the autobiography of a horse and all of the principal characters, scenes,

219

Findings.

incidents and episodes of the book *Black Beauty* by Anna Sewell are faithfully, truly and correctly depicted and portrayed therein. That said photoplay is what is known in the industry as a superproduction being in six reels of approximately 1,000 feet per reel, and in so producing such picture the Vitagraph Company of America expended and paid out the sum of \$209,000.01 of which amount \$57,557.65 was expended for advertising purposes.

PAR. 7. That in the spring of 1920 said Vitagraph Company sent circulars announcing its forthcoming production to all the humane societies throughout the United States and caused to be inserted a similar announcement in the *Motion Picture News*, a trade paper with a general circulation throughout the motion picture industry, in its issue of August 7, 1920, which issue was released to the trade and the public on Friday, July 30, 1920; thereafter said Vitagraph Company caused to be inserted other announcements of its forthcoming production which appeared in this and similar trade papers every week throughout the months of August, September, October and November, 1920, and the fact that the said Vitagraph Company was producing a photoplay entitled *Black Beauty* was well known in the trade and motion picture industry during the months of July, August, September and October of 1920. That after the completion of its said motion picture photoplay, to wit, on the 24th day of January, 1921, the Vitagraph Company of America registered in the copyright office of the United States of America a claim to copyright its said picture registering the same under the name of *Black Beauty*.

PAR. 8. That the respondent caused to be inserted a paid advertisement in the issue of December 22, 1920, of *Wid's Daily*, a trade paper published daily with a general circulation throughout the motion picture industry in the words and figures as follows, to wit:

WARNING.

Anyone showing a motion
picture entitled
"BLACK BEAUTY"
without our permission
DOES SO AT THEIR OWN RISK.
We control the motion picture
rights and title of the name of
"Black Beauty" and will prosecute any infringement to the
full extent of the law.

ESKAY HARRIS FEATURE FILM CO., INC.
126 West 46th St., N. Y. C.

Conclusion.

5 F. T. C.

and thereafter the respondent sent copies of this Warning by registered mail to the managers of the twenty-four branch offices of the Vitagraph Company of America located throughout the United States. That the respondent never registered in the copyright office of the United States of America a claim to copyright its motion picture photoplay rebuilt from that of Your Obedient Servant as aforesaid, and did not control "the motion picture rights and title of the name of 'Black Beauty'" and has not instituted any suit at law or in equity for any alleged infringement; that such warning notice was so advertised and circulated to unduly hinder the Vitagraph Company of America in the leasing and distribution in commerce as aforesaid of its superproduction entitled and named Black Beauty.

PAR. 9. That the respondent in leasing and distributing its rebuilt motion picture photoplay in commerce as aforesaid in its letters and advertising matter, in addition to titling and naming said photoplay as Black Beauty, had prominently featured the name Anna Sewell and has styled its photoplay as "An American adaptation of the world famous autobiography of a horse." That such letters and advertising matter had the capacity and the tendency to and did deceive and mislead the trade and motion picture theater going public into the erroneous belief that such photoplay depicted and portrayed the characters, scenes, incidents and episodes appearing in the book of Anna Sewell entitled Black Beauty, and misled the trade and motion picture theater going public into the erroneous belief that respondent's photoplay and that of the Vitagraph Company of America were one and the same, thereby enabling the respondent to appropriate the advertising values created by the extensive campaign carried on by the Vitagraph Company of America in advertising its photoplay Black Beauty.

CONCLUSION.

That the methods of competition set forth in the foregoing findings as to the facts on each and all thereof, under the circumstances therein set forth, constitute unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of the Federal Trade Commission Act, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

219

Order.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the pleadings, and the testimony and evidence received by an Examiner duly appointed by the Commission and the argument of counsel for the Commission and brief of the respondent, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated 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," which said report is hereby referred to and made a part hereof, now, therefore:

It is ordered, That the respondent, Eskay Harris Feature Film Company, its agents, representatives and employees cease and desist from directly or indirectly;

1. Procuring motion picture photoplays which have been exhibited to the public under and by given titles and changing such titles and advertising, selling, leasing, or offering to sell or lease the films depicting such retitled photoplays unless the fact that such photoplays have been formerly exhibited under other titles be stated and set forth in the photoplay itself and in any and all advertising and publicity matter used in connection therewith in letters and type equal in size and prominence to those used in displaying the new title.

2. From using the words "Black Beauty" standing alone or in conjunction with other words as a title for or an identification of the film depicting in whole or in part the photoplay produced in 1917 by Thomas A. Edison, Inc., titled "Your Obedient Servant" or in any lantern slides, posters, heralds, booklets, or in any advertising or publicity matter used in connection with such film.

3. Publishing or circulating any warning notice threatening to bring suit against anyone showing a motion picture entitled "Black Beauty" without the permission of the Eskay Harris Feature Film Company and asserting that the motion picture rights and title to the name of Black Beauty are controlled by said company.

It is further ordered, That the respondent, Eskay Harris Feature Film Company, within thirty (30) days from the date of service of this order upon it file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order of the Commission herein set forth.

230

FEDERAL TRADE COMMISSION DECISIONS.

Complaint.

5 F. T. C.