

Complaint.

6 F. T. C.

FEDERAL TRADE COMMISSION

v.

PRICHARD & CONSTANCE, INC.

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

Docket 740—July 9, 1923.

SYLLABUS.

Where a corporation engaged in the manufacture and sale of cosmetics and toilet articles,

- (a) Made, or attempted to make the acceptance of its invoices to constitute contracts binding retail dealers to maintain the prices fixed by it for its products;
- (b) For the purpose of securing the cooperation of dealers,
- (1) Offered and gave a monthly bonus in goods to such dealers as agreed to, and did, maintain its prices;
- (2) Announced that its products were not for sale to price cutters and that it would refuse them such bonus, without their written assurances of price maintenance, and did so refuse; and
- (3) Urged price cutters to conform to its prices, claiming control of the situation by reason of its method of marketing its products, and offering to exchange for its products not found to move readily at the prices fixed by it, other articles;
- (c) Threatened to, and did, withdraw quantity discounts theretofore extended to jobbers, due to their failure to conform to prices fixed by it; but
- (d) Allowed certain favored jobbers who had given assurances of cooperation and price maintenance, an additional discount for so doing; and
- (e) By offer of various benefits sought to induce dealers who had been reported to it by its salesmen and customer dealers as being price cutters, to refrain from further price cutting;

With the intent and effect of bringing about a cooperative working arrangement between it and a large number of its customers, and a general maintenance of the resale prices fixed by it:

Held, That the use of such a plan or system of price maintenance, under the circumstances set forth, constituted an unfair method of competition.

AMENDED COMPLAINT.

Acting in the public interest 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 charges that Prichard & Constance, Inc., hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of New York with its office and principal place

of business in the city of New York in said State. It is, and at all times hereinafter mentioned has been, engaged in the manufacture of cosmetics and toilet articles, and the sale thereof to jobbers, wholesalers, and retailers throughout the United States. It causes its product so sold to be transported from its said place of business in the city of New York to said purchasers at various points in various States of the United States. In the course and conduct of its said business respondent continuously has been and now is in competition with other persons, partnerships, and corporations similarly engaged in the sale of cosmetics and toilet articles in interstate commerce and with the trade generally.

PAR. 2. For more than five years last past the respondent has adopted and employed, and still employs, a system of fixing and maintaining certain specified standard prices at which the articles manufactured and sold by it shall be resold by jobbers, wholesalers, and retailers to the consuming public, and in pursuance of this purpose it has adopted and pursued the following practices:

PAR. 3. It has offered and given special discounts and bonuses to (1) jobbers and wholesalers, and (2) retailers, respectively, on the condition and in consideration of promises by them that they would maintain resale prices which the respondent named and requested them to observe, and has solicited from (1) jobbers and wholesalers, and (2) retailers, assurances and promises in writing that they would maintain such resale prices, and has sold its products and merchandise at such discounts and bonuses as aforesaid, to (1) jobbers and wholesalers, and (2) retailers, respectively, who have promised to maintain such resale prices, and has refused to sell its products and merchandise at such discounts and bonuses to jobbers and wholesalers and retailers who have not promised to maintain such resale prices.

PAR. 4. It has cooperated with jobbers, wholesalers, and retailers and has sought their cooperation to carry into effect a system of maintaining resale prices named by respondent, by the following means, by which respondent and its distributors, customers, and agents have undertaken to prevent others from obtaining the respondent's products at less than the prices designated by it:

(a) Inviting reports from customers and dealers, wholesale and retail, of competitors who cut its resale prices;

(b) Using the information in such reports to induce such price cutters to maintain its resale prices, by pointing out that the special terms in the form of discounts and bonuses offered by it to dealers who maintain its resale prices, are given by it only

Findings.

6 F. T. C.

to those who maintain its resale prices and in consideration of so maintaining them;

(c) Employing salesmen or agents to assist in such scheme of resale price maintenance by reporting dealers who do not observe such resale prices, and

(d) Other equivalent cooperative means to maintain its resale prices.

PAR. 5. The acts of respondent alleged in the two last preceding paragraphs tend to constrain all jobbers, wholesalers, and retailers handling the respondent's products and merchandise to sell the same uniformly at the prices fixed by respondent, to retailers and to the public, and to prevent them from selling such products and merchandise at such lower prices as they deem to be adequate and warranted, and are adequate and warranted, by their respective selling costs and efficiency, and thus tend to suppress competition in the sale of said products and unduly to hinder and obstruct the free and natural flow of commerce in the channels of interstate trade, and tend to enhance the cost of such products to the public.

PAR. 6. The above alleged acts and things done by respondent are all to the prejudice of the public and respondent's competitors and constitute unfair methods 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 (38 Stats. 717), the Federal Trade Commission issued and served a complaint upon the respondent, Prichard & Constance, Inc., charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said act.

The respondent having entered its appearance by its attorney John J. Egan, by Andrew D. Sharp, and having filed its answer, and testimony having been taken before an examiner of the Federal Trade Commission, and evidence having been introduced on behalf of the Commission and on behalf of respondent, argument having been waived, 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. Prichard & Constance, Inc., the respondent, is a corporation organized under the laws of the State of New York,

with its office and principal place of business in the city of New York in said State. It is, and has been since 1912 engaged in the manufacture of cosmetics and toilet articles and in the sale thereof to jobbers and retailers throughout the United States. It causes its products so sold to be transported from its place of business in the city of New York to purchasers of its said products at various points in various States of the United States, and is engaged in interstate commerce and is, and has been in competition with other persons, partnerships and corporations similarly engaged in the sale of cosmetics and toilet articles in interstate commerce.

PAR. 2. The respondent at the inception of its business sold its products direct to retailers and did not sell to jobbers, but as its business enlarged and as its products increased in popularity a demand was created among the jobbers for the products of the respondent and the respondent opened accounts with jobbers in various States but continued to also sell direct to retail dealers, and on May 18, 1922, at the time of the issuance of the amended complaint and for more than two years prior thereto, respondent was selling its products to both jobbers and to retailers.

PAR. 3. In connection with the sale of its products, respondent has, from time to time, issued price lists, which lists set forth the prices at which the various articles manufactured and sold by the respondent were to be sold to the ultimate consumer, and in selling to jobbers or retailers, respondent computed its prices by allowing certain discounts from the prices shown in these lists. The early discounts allowed retailers were 25% and 10% off list, plus 2% for cash, plus an additional 5% for quantity, and such discounts remained in force until on or about April, 1922, when respondent changed same to a flat 33 $\frac{1}{3}$ % off lists.

In selling to jobbers, respondent computed its prices by allowing a regular discount of 15% off the dealers' price in addition to which it gave jobbers extra discounts of 10% and 2% on 5 gross lots, and 10% and 5% on 25 gross lots. These discounts to jobbers remained in effect up to and until September 1st, 1920.

PAR. 4. Some time during 1913, respondent issued a leaflet, pasted in an illustrated catalogue, which was circulated by it through the mail to retail customers of the respondent in the various States. In said leaflet appeared the following language:

TO THE TRADE

This List shows what we have done in the production of artistic, appealing preparations. We undertake to create equally new and successful specialties under retailer's own title.

Findings.

6 F. T. C.

The prices are the minimum retail prices for the British Isles, America and France respectively, and the acceptance of our invoice constitutes a contract to maintain them.

WHOLESALE RATES.	25% from Retail Prices.
Additional	10% in dozen quantities.
do	5% off invoices over \$75.00 net.

Two per cent for cash in 10 days or net 30 days.

N. B. Additional Discounts will not be allowed unless the published retail prices are maintained.

Less quantities than $1\frac{1}{2}$ dozen at Retail Prices.

In order to secure the cooperation of its retail dealers in the maintenance of the resale prices announced by respondent, it put into effect a system of giving bonuses, in the form of free goods, and in its circulars, announcing such bonus offers, used the following language:

In order to secure the cooperation of Retailers with a view to the prevention of price cutting we shall henceforth distribute a monthly bonus of 10% in goods to those dealers who maintain full prices and whose purchases amount to over \$30.00 net monthly. This bonus will be payable in any of our products agreeable to the dealer. We wish to emphasize the point that this Bonus has no relation to the purchase price of our goods, it is simply payment on our part in order to secure dealer good will. Price cutting is an unmixed evil.

We take this opportunity of thanking you for cooperation in the past which we trust shall be merited in the future and remain.

Thereafter, respondent adopted, and enclosed to retail customers with invoices for merchandise sold by it to retailers, the following form letter:

BONUS FOR PRICE MAINTENANCE.

GENTLEMEN: We are this day forwarding merchandise recently ordered by you via invoice herewith.

Included in the case you will find bonus of ----- on the above purchase which amounts to -----.

While this bonus reduces the cost of our merchandise to you, we wish to emphasize the fact that it is intended as a payment on our part for price maintenance. Price cutters will not receive bonuses until we have their written assurance that they will maintain the price of AMAMI Perfumery products.

There are so many manufacturers who are indifferent as to whether their products are cut or not that we feel confident that when our bonus system becomes thoroughly understood, our products will no longer be cut in price.

We wish to thank you for ----- cooperation in the past and remain.

Hundreds of copies of this circular were forwarded by respondent to retail dealers during the years 1919 and 1920 and up to and until on or about April, 1922, when said circular was discontinued.

In another circular issued by respondent to its retail trade, the following language was used:

AMAMI PERFUMERY is not for sale to dealers who cut the retail prices. We give Retailers the same terms as Jobbers which enables us to control the situation.

When respondent received information that any retailer was reselling its products at less than the prices fixed by it, it addressed to such alleged price cutter a form letter in the following terms:

DEAR SIR: We have received a letter from one of your neighbors this morning to the effect that you sell our AMAMI Shampoo at \$.10 per envelope, whereas AMAMI Shampoo retails at \$.15 an envelope or \$1.00 per carton.

There are so many manufacturers who don't care much whether their goods are cut or not that we feel sure that you would be willing to cooperate with us in maintaining the prices of our articles.

If at any time you feel that you can not dispose of any of our items at the nominal prices, we shall be glad to exchange same for more saleable items.

We enclose a stamped, addressed envelope. Will you kindly let us know whether or not you are willing to cooperate with us in PRICE MAINTENANCE?

With compliments, we remain,

During the year 1920 and 1921, respondent, in writing retail customers, in many letters used the following language:

While this bonus reduces the cost of our merchandise to you, we wish to emphasize the fact that it is intended as a payment on our part for price maintenance. Price cutters will not receive bonuses until we have their written assurance that they will maintain the prices of AMAMI PERFUMERY products.

On the invoices sent dealers during this period, the bonus goods were listed as "Bonus for Price Maintenance."

PAR. 5. To many of the letters, above described, respondent received replies from its retail customers, in which replies the customers promised and agreed to maintain the resale prices as announced by respondent, and to cooperate with respondent in the carrying out of its resale price system.

PAR. 6. Pursuant to the bonus offers above set forth, respondent did, during the years 1919, 1920, and 1921, and up to and until on or about April, 1922, give bonuses in the form of free goods, to customers from whom it had received assurances of cooperation and who had agreed with respondent to maintain the prices fixed by it; and to at least one dealer who declined to give such assurance such bonus was refused.

Findings.

6 F. T. C.

PAR. 7. On or about April, 1920, respondent found that certain jobbers were underselling the respondent with some of its retail customers, and during April, 1920, respondent circularized the jobbing trade, such circular letters reading as follows:

APR. 5, 1920.

GENTLEMEN: Recently we have received numerous complaints from out of town retailers and jobbers that they could purchase AMAMI Henna Shampoo more cheaply from New York jobbers than from ourselves; our own road salesmen have made similar complaints to the effect that they are undersold by New York jobbers.

The story of price cutting has been told over and over again and we are not going to go over it again in this letter. With the present high cost of doing business, however, price cutting is now not only unfair competition, it is suicidal.

As you know, our jobber's discounts of 15% and 2% are about eaten up with your cost of turning the goods over while our quantity discounts of 15%, 10%, and 2% for five gross quantities and 15%, 10%, and 5% for twenty-five gross quantities are made with the idea of making it really worth while for jobbers to handle our stuff and not to serve as an extra margin to allow price cutting.

An out of town jobber has written to us that we should not allow an extra discount to quantity purchasers as thereby the latter are enabled to undersell to the local jobber's trade, using our item as a leader to secure an account.

We have repeatedly received assurances of price maintenance from New York jobbers although price cutting complaints have not abated; therefore we shall be compelled to revert to a straight 15% and 2% jobber's discount if our request for price maintenance is ignored.

Trusting to hear from you in the affirmative, we remain.

On June 24, 1920, the respondent wrote E. J. Barry, a jobber in New York City, and said letter read as follows:

We wish to draw your attention to your catalogue as mailed to dealers quoting AMAMI HENNA SHAMPOO at \$7.50 per dozen cartons, less 10%, which is 14c. per dozen below the jobber's price, this notwithstanding your written assurance to us, dated April 7, that the conditions contained in our letter of April 4 were satisfactory to you, namely that you would uphold the full wholesale price of our products.

We are aware of the uncertain interpretation of the laws regarding price cutting, and while we are not sure whether we would be within our rights in discriminating against price cutters, we do know that we shall abolish the quantity discounts to jobbers unless they as a whole refrain from cutting the price of our goods.

Since we circularized the jobbing trade in April, we have had no complaint regarding any other jobber save yourself.

Will you kindly let us know whether we may or may not expect your cooperation in the distribution of our goods at standard prices?

Respondent's request as contained in its circular letter of April, 1920, was ignored in certain quarters, and during the latter part of August, 1920, it gave notice to the trade in the form of a circular letter that the discounts allowed to the jobbing trade on and after September 1, 1920, would be only 15% and 2%. Said notice was worded as follows:

GENTLEMEN: On April 5th, 1920, we issued a circular letter to the Jobbing Trade requesting them to desist from using the quantity discounts to cut the wholesale price of AMAMI Shampoo, and notifying them that in self-defense we would be compelled to eliminate these quantity discounts if price cutting were persisted in.

We regret to state that in certain quarters our request was ignored, therefore, kindly note that after September 1, 1920, the jobbing discounts on AMAMI Shampoo in any quantity will be 15% and 2% cash in ten days.

Your attention will oblige.

The evidence shows that the policy enunciated in these letters was the policy of the company and that respondent had received repeated assurances of price maintenance from jobber customers.

PAR. 8. The evidence further shows that subsequent to September 1, 1920, respondent did allow certain favored jobbers, who had given it assurances of cooperation and maintenance of its fixed prices, an additional discount of 10%; said discount in some instances being a straight discount for price maintenance—in others, masked in the guise of a compensation to the jobber for advertising.

PAR. 9. This selling policy or system of merchandising, established by the respondent, through contracts and agreements with customers, and through the payment of bonuses for price maintenance to those giving assurances of cooperation, and the refusal of such bonuses to those declining to give such assurances, was intended by the respondent to, and had the effect of bringing about a cooperative working arrangement between the respondent and a large number of its customers, and resulted in the general maintenance of the resale prices fixed by respondent in its said lists.

PAR 10. The evidence establishes the fact that salesmen of the respondent and dealers who were cooperating with the respondent in the maintenance of resale prices reported to the respondent from time to time dealers who were not maintaining the resale prices fixed by the respondent, and that the respondent endeavored to induce such customers as had been reported to it as being price cutters to refrain from such practice and to sell the products of the respondent at the prices fixed by the respondent, but these endeavors were limited for the most part to offers of various benefits if the said custo-

Order.

6 F. T. C.

mers would agree to maintain the resale prices fixed by the respondent.

PAR. 11. The respondent did not as a means of carrying out its attempts to maintain resale prices actually refuse to sell to price cutters. The evidence developed only one instance in which the respondent declined to sell to a price cutter.

CONCLUSION.

That the methods of competition set forth in the foregoing facts are in 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.

This proceeding having been heard by the Federal Trade Commission upon the pleadings, testimony, and evidence received by an examiner duly appointed by the Commission, and the brief prepared by counsel for the Commission, 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,"

It is now ordered, That the respondent, Prichard & Constance, Inc., its officers, directors, agents, servants, and employees, cease and desist from employing or carrying into effect any selling policy or system of merchandising, whereby respondent through cooperation with its customers, fixes or controls, or undertakes to fix or control the prices at which its products shall be resold by others—more particularly, through any of the following means:

1. By giving or offering to give special discounts, bonuses or terms of sale, to jobbers or retailers, conditional upon their observance of or promise to observe the resale prices fixed by respondent.

2. By otherwise contracting or entering into agreements or understandings with jobbers or retailers, providing for the maintenance of such prices.

3. By cooperation with its customers in establishing or maintaining a system of resale prices.

4. By utilizing any other cooperative means, directly or indirectly, to bring about the maintenance of the resale prices fixed by respondent.

KING-FERREE CO., INC.

253

Complaint.