

FEDERAL TRADE COMMISSION

v.

OPPENHEIM, OBERNORF & COMPANY, INCORPORATED, DOING BUSINESS UNDER THE TRADE NAME AND STYLE SEALPAX COMPANY.

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

Docket 887—April 19, 1924.

SYLLABUS.

Where a corporation engaged in the manufacture of underwear and in the sale thereof to jobbers and wholesalers under its trade or brand name; in pursuance of a plan or policy adopted by it and directed to the maintenance of the resale prices fixed by it, which it made known to the trade through circulars, price lists, etc., together with requests for and insistence upon their observance under penalty of refusal of further sales, to the end that it might thereby provide for, and insure to, all its jobber and wholesaler customers the full profit arbitrarily fixed and established by it for the handling of its goods and obtain their active support and cooperation in eliminating price cutting;

- (a) Placed upon its bills and invoices a legend to the effect that the sale involved was made in consideration of the maintenance of its resale prices by the purchaser;
- (b) Notified jobber and wholesaler customers that its prices must be maintained;
- (c) Guaranteed those who maintained its prices, against any decline in the prices of its products to them, as a consideration for their so doing, together with notice that any price cutting on their part would work a forfeiture of such privilege;
- (d) Requested its said customers to notify it of price cutting; and made such reports the basis of investigation and of appreciative acknowledgment to those making the same;
- (e) Eliminated price cutters reported by competitors in those communities where competition was keen, and its prices were not strictly maintained;
- (f) Kept a card list wherein price cutters were noted as concerns to be refused further supplies;
- (g) Reinstated price cutters upon the receipt of assurances that they would thereafter respect its prices; and
- (h) Added new customers to its list only upon the giving of similar assurances;

With the result that the active support and cooperation of jobbers and wholesalers, including the less efficient and higher cost concerns, was enlisted in enlarging the sale of said price maintained product, to the prejudice of competing manufacturers who did not require maintenance of resale prices on their products, price competition in the distribution of said underwear among jobbers and wholesalers was eliminated, jobbers and wholesalers and especially the lower cost and more efficient establishments were prevented from selling its products at prices which they

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deemed adequate and warranted by their costs and selling efficiency, and such portions of the public as required or preferred its products were compelled to pay enhanced prices therefor:

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

Mr. Thomas H. Baker, jr., for the Commission.

Haman, Cook, Chesnut & Markell, of Baltimore, Md., for respondent.

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 Oppenheim, Oberndorf & Company, Incorporated, doing business under the trade name and style Sealpax Company, 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 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 Maryland with its home office and a place of business in the City of Baltimore in said State. It also operates a place of business in the City of New York, State of New York. Respondent at all times hereinafter mentioned has been and still is engaged in the manufacture of ready made clothing, underwear and other garments and the sale thereof to wholesale dealers throughout the United States. As one branch of its aforesaid business, respondent is engaged in the manufacture of a certain brand of underwear named by it "sealpax" which said underwear it deals in and sells to said wholesale dealers under the trade name and style of "Sealpax Company." The charges of this complaint relate only to respondent's said business in "sealpax" underwear, hereinafter referred to as underwear. Respondent delivers said underwear when sold by it as above set out by causing the same to be transported from its said place of business in the City of Baltimore or from its said place of business in the City of New York to said purchasers at points in various States of the United States in addition to and other than the States of New York and Maryland. In the course and conduct of its said business, respondent is in competition with other individuals, partnerships and corporations similarly engaged in the manufacture and/or sale of underwear in interstate commerce, and with the trade generally.

PAR. 2. For more than two years last past, respondent has maintained and enforced and still maintains and enforces a schedule of uniform prices fixed by it at which its aforesaid wholesaler-vendees were and are required by respondent to resell said underwear to retail dealers, and adopted and employed and still employs a system for the maintenance and enforcement of said resale prices wherein respondent secured and still secures the cooperation of said wholesale-dealer vendees. In the course of said cooperative enforcement of said system, respondent has employed and still employs the following means, among others, by which respondent and its said wholesale customers undertake to prevent others from obtaining respondent's products at less than the prices designated by it:

(a) Makes it generally known to the trade through letters, personal interviews and other means that it expects and requires said vendees to maintain and enforce said resale prices;

(b) Receives from said vendees reports of the names of wholesalers who fail to observe and maintain said resale prices, and upon obtaining said reports urges the offenders to cease selling below said resale prices, and seeks to coerce said offenders into such maintenance by methods of intimidation and coercion as hereinbelow set out;

(c) Threatens to refuse to sell and does refuse to sell its underwear to wholesale dealers who fail to observe and maintain said resale prices;

(d) Exacts promises and assurances from said offenders that they will thereafter maintain said resale prices, as a condition of further supplying them with its said underwear;

(e) Enters into informal arrangements, agreements and understandings with various wholesale dealers, including said offenders, for the maintenance by them of said resale prices as a condition of opening accounts with said dealers or of continuing to fill their orders for its products;

(f) Uses other equivalent cooperative means to enforce said system of resale price maintenance.

PAR. 3. The above alleged acts and things done by respondent had and still have the capacity and tendency to constrain all wholesale-dealers handling respondent's said underwear to uniformly sell the same to their dealer-customers at said prices fixed by respondent, to prevent said wholesale dealers from selling said products at such less prices as they might and may deem to be adequate and warranted by their respective selling costs and efficiency, and hence to hinder and suppress all competition in the wholesaling of said products,

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and to hinder and restrain competition between retail dealers therein. Respondent's said practices therefore tended and still tend unduly to restrain the natural flow of commerce and the freedom of competition in the channels of interstate trade.

PAR. 4. 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, the Federal Trade Commission issued and served a complaint upon the respondent, Oppenheim & Oberndorf, Inc., doing business under the trade name and style, Scalpax Company, charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said Act.

The respondent, Oppenheim, Oberndorf & Company, Inc., having filed its answer, and testimony having been taken, thereupon this proceeding came on for final hearing, and the Commission being fully advised in the premises, upon consideration thereof makes this its findings as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. Respondent, Oppenheim, Oberndorf & Company, Inc., is now and for more than two years last past has been a corporation organized and existing under the laws of the State of Maryland, with its home office and place of business in the City of Baltimore in said State. It also operates a place of business in the City of New York, State of New York, and manufacturing plants in Maryland, Pennsylvania and Virginia. For more than two years last past respondent has been and is now engaged in the manufacture of underwear and other garments and in the sale thereof in interstate commerce to wholesale dealers throughout the United States. As one branch of its aforesaid business, respondent is engaged in the manufacture of a certain brand of underwear named by it "Scalpax", which said underwear it deals in and sells to jobbers and wholesalers under the trade name and style of "Scalpax Company", the said "Scalpax" underwear being inclosed or sealed in a glassine paper envelope. The findings of facts herein relate only to respondent's said business in "Scalpax" underwear, hereinafter re-

ferred to as underwear. Respondent delivers the said underwear, when sold by it as above set out, by causing the same to be transported from its said place of business in the City of Baltimore to the purchasers thereof at points in various States of the United States and the District of Columbia. In the course and conduct of its said business, respondent is in competition with other individuals, partnerships and corporations similarly engaged in the manufacture of underwear and in the sale thereof in interstate commerce.

PAR. 2. Respondent sells its product to jobbers and wholesalers engaged in the drygoods and notions business, who, in turn, resell to retailers in this line. The said jobbers and wholesalers number between 300 and 400, and are located in the larger cities of the various States of the United States and in the District of Columbia, where they are engaged in active competition with each other in their respective localities in the sale of respondent's said products.

PAR. 3. Respondent, in the sale and distribution of its Sealpax products, has adopted and maintained, and still maintains, a method, or plan, of procuring and enforcing the maintenance of resale prices established by it on said commodities manufactured by it, when resold in interstate commerce, in the furtherance and execution of which method or plan it requests and enlists the active participation of jobbers and wholesalers selling said product so manufactured by it.

PAR. 4. Amongst the said jobbers and wholesalers handling Sealpax products, a divergence in the overhead costs, or operating expenses, of doing business exists; said divergence is substantial and ranges from 12½ to 18.7 per cent. The purpose and intent of the respondent company in its said merchandising policy is:

(a) To provide for all of its said jobbers and wholesalers a profit which was and is the full profit arbitrarily fixed and established by respondent according to its system of uniform resale prices, the maintenance of which respondent requires and enforces upon all its said jobbers and wholesalers;

(b) To provide for all its said jobbers and wholesalers protection in securing such full profit on the Sealpax products manufactured by respondent;

(c) To obtain the active support and cooperation of all its jobbers and wholesalers in preventing and eliminating all sales of said products at lower prices than its fixed, uniform resale prices.

PAR. 5. In carrying out said policy and to secure such cooperation, the respondent—

(a) Has issued and still issues circulars, price lists, and letters to the wholesale trade generally, showing suggested uniform resale

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prices, both wholesale and retail, to be charged for its Sealpax products, at which said wholesale prices, respondent expects its said jobbers and wholesalers to sell its said Sealpax products to retailers, and which said retail prices respondent expects its said wholesalers to communicate to the said retailers purchasing said Sealpax products;

(b) Has requested and still requests and insists that the aforesaid jobbers and wholesalers resell said products only at the suggested resale prices;

(c) Has made and now makes it generally known to such jobbers and wholesalers that if they or any of them fail to sell said products at the resale prices suggested by the respondent, as aforesaid, respondent will refuse to sell further Sealpax products to them or any of them.

PAR. 6. Respondent in carrying out said policy—

(a) Has placed on all its bills and invoices for said products the following legend:

The sale of goods mentioned in this order is made in consideration of the purchaser named in this order maintaining the suggested jobbing prices on Sealpax products as established from time to time.

(Signed) SEALPAX COMPANY.

(b) Has notified certain of its said jobbers and wholesalers by its salesmen in the course of business dealings that the said resale prices fixed by respondent upon its Sealpax products "must be maintained";

(c) Has guaranteed all said jobbers and wholesalers who maintain respondent's resale prices against any decline in the prices of the said products and notified them that any deviation from the "suggested" prices would work a forfeiture of this privilege;

(d) Has within the time aforementioned eliminated and does eliminate said jobbers and wholesalers selling Sealpax underwear who have been reported by competitors as not maintaining said prices in those communities where competition is keen and respondent's resale prices are not strictly maintained;

(e) Has within the time aforementioned kept and does keep a card list of its said jobbers and wholesalers selling said Sealpax underwear and has placed after the names of those said jobbers and wholesalers who do not maintain its prices for said underwear the words or initial letters "Do not sell," "Do not solicit" and "D. N. S.," respectively, the abbreviation standing for "Do not sell" or "Do not solicit" said phrases and abbreviations for same indicating that the said jobber or wholesaler was not in the future

to be solicited to purchase respondent's products; in fact, to be refused any further supply of Sealpax goods on account of failure to maintain respondent's prices;

(f) Has within the time aforementioned reinstated and does reinstate said jobbers and wholesalers previously cut off for failure to resell said products at prices suggested by respondent upon the basis of declarations, assurances, statements, promises and similar expressions, as the case may be, by said jobbers and wholesalers, respectively, which satisfy the respondent that such jobbers and wholesalers will thereafter resell said products at the prices suggested by respondent;

(g) Has within the time aforementioned added and does add to its list, new jobbers and wholesalers reported by its representatives as declaring that they intend to, or will resell at the prices suggested.

PAR. 7. Pursuant to said plan of cooperation between respondent and its dealer customers, the said jobbers and wholesalers handling respondent's Sealpax underwear have repeatedly reported to respondent instances of price cutting in said products in their respective localities and in many cases have reported specifically the name of such price cutter and in some instances have requested respondent to discontinue selling to them, and respondent has approved and furthered such action on the part of said jobbers and wholesalers handling its Sealpax underwear by repeatedly expressing its appreciation of such notification in letters of reply to such jobbers and wholesalers, and has aided and abetted its said jobbers and wholesalers in such reporting of price cutters by repeatedly requesting its said jobbers and wholesalers to supply the name of such price cutters, and, upon receipt of such report, respondent has had its salesmen to investigate, and when such salesmen have confirmed reported price cutting, has refused further to supply the price cutter with its said products.

PAR. 8. The effect of such cooperative plan of price maintenance enforced as aforesaid, has been and is:

(a) To secure for the respondent, Oppenheim, Oberndorf & Company, Inc., in the sale of Sealpax underwear manufactured by it, the trade of jobbers and wholesalers, including especially the relatively high cost and more inefficient, and to enlist the active support and cooperation of said jobbers and wholesalers in enlarging the sale of the said price-maintained products manufactured by respondent to the prejudice of competing manufacturers who do not fix, require or enforce the maintenance of resale prices upon their similar products;

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(b) To eliminate competition in prices among jobbers and wholesalers, respectively, handling Sealpax underwear manufactured by the respondent, thus preventing jobbers, wholesalers and especially the lower cost and more efficient establishments, from selling respondent's said products at prices which they deem adequate, and which are warranted by their cost and selling efficiency as heretofore set out, whereby such portions of the public as require or prefer the said products of the respondent are compelled to pay enhanced prices therefor.

CONCLUSION.

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

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and answer of respondent, the testimony and evidence submitted, the trial examiner's report upon the facts and exceptions thereto, and the Commission having duly made its findings as to the facts with its conclusion that 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 respondent, Oppenheim, Oberndorf & Company, Inc., doing business under the trade name and style of Sealpax Company, its officers, agents, servants and employees, do cease and desist from directly or indirectly carrying into effect by cooperative methods a system of resale prices in which respondent, its customers and agents undertake to prevent others from obtaining the Sealpax products of respondent at less than the prices designated by it:

(1) The practice of reporting the names of jobbers and wholesalers who do not observe such resale prices.

(2) Causing jobbers and wholesalers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the Sealpax products of the company unless and until they have given satisfactory assurance of their purpose to maintain such designated prices in the future.

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(3) By employing its salemen or agents to assist in any plan of reporting jobbers and wholesalers who do not observe such resale prices for said products.

(4) By utilizing any other equivalent cooperative means of accomplishing the maintenance of prices fixed by respondent for said products.

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

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v.

PHILIP MOSKOWITZ, TRADING UNDER THE NAME AND
STYLE OF ROCHESTER CLOTHING COMPANY.

Docket No. 826—April 23, 1925.

MODIFIED ORDER TO CEASE AND DESIST.¹

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and 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;"

Now, therefore, it is ordered, That the respondent, Philip Moskowitz, individually and trading under the name of Rochester Clothing Company, his partners, agents, servants, representatives and employees, do cease and desist from:

(1) Using on tags or labels on clothing manufactured in New York City, New York, or any place other than Rochester, New York, and sold and shipped, or sold for shipment, in interstate commerce, the words "Rochester Clothing Company," or the word "Rochester" alone or in combination with other word or words, unless following such words or brand, and in type or lettering equally conspicuous with them appear the words, "Made in New York City," or "Manufactured in New York City," if the clothing is, in fact, made in New York City, N. Y., or by the words "made in" or "manufactured in," or words of equivalent meaning, followed by the name of the city or place and State where such clothing is made.

(2) Displaying or using the words or brand "Rochester Clothing Company," or "Rochester" alone or in combination with other words, on stationary and billheads used in the business of making, selling and shipping, or selling for shipment, clothing in interstate commerce, or in advertising clothing made elsewhere than in Rochester, New York, in newspapers, trade journals or elsewhere in interstate commerce, unless following such words or brand, and in type or lettering equally conspicuous with them appear the words "Made in New York City" or "Manufactured in New York City," if the cloth-

¹ The complaint, findings, and original order are reported in 6 F. T. C. 259.

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ing in fact is made in New York City; or by the words "made in" of "manufactured in" or words of equivalent meaning, followed by the name of the city, town or place and State where such clothing is made or manufactured.

It is further ordered, That respondent Philip Moskowitz, trading under the name and style of Rochester Clothing Company, shall within sixty (60) days after the service upon him of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist hereinbefore set forth.

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FEDERAL TRADE COMMISSION

v.

GREENHALGH MILLS, J. BRAUMHALL, J. W. BIRD, W. C.
BAYLIES, ROBERT AMORY, CHARLES CREHORE, AND
B. F. MEFFERT, COPARTNERS, TRADING UNDER THE
NAME AND STYLE OF AMORY, BROWNE & COMPANY.