

Complaint.

9 F. T. C.

IN THE MATTER OF
AUSTIN, NICHOLS & COMPANY, INCORPORATED.

COMPLAINT, FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SECTION 7 OF AN ACT OF CONGRESS APPROVED OCTOBER 15, 1914.

Docket 745—May 14, 1925.

SYLLABUS.

Where a corporation engaged in the purchase of grocery products and in the sale thereof to retail dealers; pursuant to the purpose of its organization, acquired, in consideration of the issue of stock and the payment of cash, (a) all the stock, business and assets of a corporation similarly engaged, which it succeeded, and also acquired, in consideration of the payment of cash, (b) all the stock of a corporation engaged in the operation of vegetable canning plants, and in the sale of the product thereof solely to wholesale dealers, (c) 51 per cent of the stock of a corporation engaged in the sale solely to wholesale dealers of fish caught and packed by its subsidiary corporations, (d) a vegetable canning plant theretofore belonging to a corporation engaged in the sale and distribution of meat and meat products and in the operation of branch houses and route cars for the handling of such products, and in the purchase of canned vegetables, fruits, and coffee and sale thereof to retail grocers in competition with said acquiring corporation and its predecessor, together with the right to use on such products the trade-marks and brands theretofore used; and where it further appeared that in said last named transaction the corporation concerned did not turn over to said acquiring corporation any list of customers, but retained its stock of canned goods and coffee and continued to sell the same to its regular trade until in compliance with a consent decree entered into with the Government, it withdrew from the wholesale grocery trade:

Held, That such acquisitions did not result in a substantial lessening of competition, and did not constitute a violation of the provisions of Section 7 of the Act of Congress approved October 15, 1914.

Mr. George R. Jackson and Mr. John M. Burkett for the Commission.

Ehlermann & Smyth of Ehlermann, Smyth & Abbott of New York City, *Mr. Jewel P. Lightfoot* of Chicago, Ill., and *Bloodworth & Fort* and *Mr. William Sabine* of Washington, D. C., for respondent.

COMPLAINT.¹

The Federal Trade Commission having reason to believe from a preliminary investigation made by it that Austin, Nichols & Co., Inc., hereinafter referred to as the respondent, has been and is violating the provisions of Section 7 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws

¹ As amended.

against unlawful restraints and monopolies and for other purposes," issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH 1. Respondent is a corporation organized and existing under the laws of the State of Virginia with its principal place of business in the city of Richmond in said State, and with branches in other States of the United States, and is now, and at all times hereinafter mentioned was, engaged in the business of buying and selling, to purchasers in the several other States and Territories of the United States, in wholesale quantities groceries, food and food products and other articles and commodities of personal and household use, causing such commodities to be transported to the purchasers thereof from the State of New York and from other States through and into the several other States and Territories of the United States.

PAR. 2. Austin, Nichols & Co., Inc., is now, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, N. Y., and with branches and subsidiaries throughout the different States of the United States and engaged in the sale of groceries, food products and other articles and commodities of household use, causing such commodities to be transported from the State of New York and from branch houses in other States to the purchasers thereof through and into the several other States and Territories of the United States, and for many years prior to September, 1919, was one of the largest wholesale grocery houses in the United States.

PAR. 3. Wilson & Co., Inc., is now, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York with its principal place of business in the city of Chicago, Ill., and in addition to the meat-packing industry, and among other things, engaged in the operation of plants for the canning of vegetables and fish, and in the wholesale grocery business, in the pursuit of each of which businesses, it caused to be transported the products thereof to purchasers, from the State of Illinois and from other States of the United States, through and into the several other States and Territories of the United States.

PAR. 4. The Fame Canning Co. is now, and at all time hereinafter mentioned was, a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in said State, owning and operating eight plants for the canning of vegetables in the States of Indiana, Michigan, and Wisconsin, and engaged in the wholesale selling of the products of said plants and

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causing such products to be shipped from the States above mentioned to purchasers through and into the several other States and Territories of the United States, and conducted for many years prior to August 23, 1919, as a subsidiary corporation of Wilson & Co., Inc., mentioned in the paragraph next immediately preceding.

PAR. 5. The Wilson Fisheries Co. is now, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Delaware, engaged in the business of owning and operating trap sites and fish canning plants in the State of Washington and the Territory of Alaska, and in the wholesale selling of the products of said plants to purchasers throughout the United States to whom such products are caused to be shipped from the State of Washington and the Territory of Alaska and other States through and into the several other States and Territories of the United States, and for many years prior to August 23, 1919, was owned and operated as a subsidiary of Wilson & Co., Inc., described in paragraph 3 herein.

PAR. 6. Wilson & Co. is now, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New Jersey, engaged in the business of owning and operating a vegetable canning plant located at Whiteland, Ind., and in the wholesale selling of the products of said canning plant to purchasers throughout the United States to whom such products were shipped from the State of Indiana and from other States of the United States through and into the several other States and Territories of the United States, and for many years prior to August 23, 1919, was owned and operated as a subsidiary of Wilson & Co., Inc., described in paragraph 3 herein.

PAR. 7. For many years prior to August 23, 1919, the corporations mentioned in paragraphs 4, 5, and 6 herein were the principal producing factors, in the lines made by them, of the wholesale grocery business of Wilson & Co. Inc.

PAR. 8. At all times hereinafter mentioned and prior to August 23, 1919, each of the corporations herein described was in active competition with each and every other corporation herein mentioned, in the same lines of commerce, and in the same territory throughout the United States.

PAR. 9. On or about August 23, 1919, Wilson & Co. Inc. announced and held out to the public that it was about to sell its entire wholesale grocery business to Austin, Nichols & Co. Inc., described in paragraph 2 herein, and pursuant to this announcement respondent was caused to acquire the entire capital stock of Austin, Nichols & Co. Inc., the Wilson Fisheries Co., The Fame Canning

Co., and of Wilson & Co. (or in lieu thereof the entire assets representing the Whiteland Canning Plant referred to in paragraph 6), together with the entire grocery business (including, among other things, labels, brands, trade-marks, good will, etc.) of Wilson & Co. Inc., under a plan whereby Wilson & Co. Inc. retained and still retains, and exercises, control of respondent.

PAR. 10. The effect of the acquisition referred to in the paragraph next immediately preceding may be, was, and is, to—

(a) Substantially lessen competition between respondent and each and every other corporation herein mentioned, and between each corporation herein mentioned and each and every other corporation herein mentioned, and

(b) Restrain such commerce as has hereinbefore been described in various sections or communities of the United States, and

(c) Tend to create a monopoly in the lines of commerce herein mentioned.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an Act of Congress, approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," the Federal Trade Commission issued and served an amended complaint upon the respondent, Austin, Nichols & Company, Inc., charging it with a violation of Section 7 of said Act.

The respondent having entered its appearance by its attorneys, Messrs. Ehlermann, Smyth & Abbott, and having filed its amended answer herein, hearings were had and evidence was thereupon introduced in support of the allegations of said amended complaint, and on behalf of respondent before Warren R. Choate and George McCorkle, examiners of the Federal Trade Commission, theretofore duly appointed.

And thereupon this proceeding came on for decision, and the Commission having duly considered the record, and being fully advised in the premises, makes this its findings as to the facts and its conclusions drawn therefrom:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent, Austin, Nichols & Company, Inc., is a corporation formed under the laws of Virginia on the 21st day of August, 1919, and has its principal offices in the city of New York, with branch offices in many of the largest cities in the United States. It is engaged in the purchase of all kinds of grocery prod-

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ucts and in the sale thereof to retail dealers in all parts of the United States. In the regular course and conduct of its business it competes with many other corporations, partnerships and individuals also engaged in the wholesaling of grocery products in interstate commerce.

The respondent corporation was formed to combine under one organization several other corporations and concerns in pursuance to a plan and for the purposes set out in the succeeding paragraphs.

PAR. 2. Prior to the 23d of August, 1919, the following corporations were in existence and carrying on business of the kind and in the manner as follows:

(a) *Wilson & Co., Inc.*, was and is a New York corporation, with its principal office in the city of Chicago. It is engaged in the operation of a meat-packing plant and in the manufacturing and processing of the by-products from such plant. It owned all of the capital stock of Wilson & Co. of New Jersey, all of the capital stock of the Fame Canning Co. and 51 per cent of the capital stock of the Wilson Fisheries Co.

(b) *Wilson & Co. of New Jersey* was and is a New Jersey corporation, with its principal office in the city of Chicago. It is engaged in the sale and distribution of the meat and meat products prepared by Wilson & Co., Inc., and the operation of branch houses and route cars for the handling of such products. Prior to August 23, 1919, Wilson & Co. of New Jersey was also engaged in the wholesale grocery trade, dealing in canned fruit and vegetables, canned fish and coffee, but it did not handle other staple groceries. It sold canned goods and coffee to retail dealers in several different States. Part of the assets of this company consisted of a vegetable canning plant at Whiteland, Ind., where the catsup and chilli sauce sold by the wholesale grocery department was manufactured.

(c) *The Fame Canning Co.* was an Indiana corporation, with its principal place of business at Indianapolis. It owned eight vegetable canning plants located in Indiana, Michigan, and Wisconsin, and was engaged in the business of operating these plants and selling the output thereof solely at wholesale throughout the United States.

(d) *Wilson Fisheries Co.* was a corporation organized under the laws of the State of Delaware, with its principal office in Seattle, Wash. It held all of the capital stock of certain other corporations which were engaged in catching and packing salmon and herring. It sold these products, as well as fertilizer, solely to wholesale dealers throughout the United States.

(e) *Austin, Nichols & Co., Inc.* (the old concern), was a New York corporation, with its principal place of business at New York

City. It was engaged in the wholesale grocery business, handling a complete line of grocery products which it sold to retail dealers in all parts of the United States.

PAR. 3. During the years 1918 and 1919 the officials of Wilson & Co., Inc. (the parent organization), determined to withdraw from the wholesale grocery business. As a result of negotiations and interviews the following plan was developed and put into effect:

(a) Austin, Nichols & Co., Inc., respondent herein, was organized, as above set out, on the 21st day of August, 1919, under the laws of Virginia. It had an authorized capital stock of \$15,750,000 divided into 300,000 shares of which 150,000 were preferred stock, par value \$100, and 150,000 shares were common stock, without par value, the latter having the exclusive voting power.

(b) On August 23, 1919, Mr. Harry Balfe, on behalf of Austin, Nichols & Co., Inc., of New York (the old concern), offered to sell and transfer to the new corporation all the business and assets, together with all property of every description and the entire capital stock of Austin, Nichols & Co., of New York, for the consideration of \$2,435,662.52 cash and the issue of 17,219 shares of the preferred and 19,478 shares of the common stock of the new company. Mr. Balfe, acting on behalf of himself and other stockholders of the New York corporation, offered to subscribe these shares of stock.

(c) Wilson & Co., Inc. (of Chicago), offered to sell and transfer, or cause to be sold and transferred, to the new corporation the following property and assets:

(1) All the outstanding capital stock of the Fame Canning Co., of Indiana;

(2) Fifty-one per cent of the entire capital stock of the Wilson Fisheries Co., of Seattle, Wash.;

(3) The vegetable canning plant located at Whiteland, Ind.; and,

(4) An exclusive and perpetual license to use on grocery products the trade-marks and brands then used by Wilson & Co., Inc., on such products.

These properties and assets were offered for a cash consideration of \$2,607,959.73.

(d) The offers described above were accepted by the new corporation on August 23, 1919, and the proposed transfers were made. The entire deal was financed by a combination of banks and security companies under an agreement which provided, among other things, for the common stock of the new corporation to be placed in a voting trust. This trust was to be administered by a board of trustees whose appointment was provided for in the agreement.

The directors of the New Austin, Nichols & Co., Inc., were elected by the voting trustees above mentioned. They selected twelve men, four of whom represented the banks, four represented Wilson & Co., Inc., and the remaining four represented the interests of the old Austin, Nichols & Co.

(e) The deal was a straight cash sale all the way through. The banking syndicate paid to Austin, Nichols & Co., Inc. (the old concern), cash to the amount stated in the agreement and later caused to be issued to the individual stockholders who subscribed therefor the amounts of stock which were also stated in the transfer agreement. The banking syndicate paid to Wilson & Co., Inc., the full amount of cash stated in the same agreement. None of the capital stock of Wilson & Co., Inc., nor of Wilson & Co. of New Jersey was transferred, but those corporations remained just as they were formerly, with the exception of the sale to the new corporation of Austin, Nichols & Co., as above described. Subsequently, the old corporation of Austin, Nichols & Co. was dissolved, and also the old Fame Canning Co. was reorganized under a new corporate charter but retained the same name, the old corporation being dissolved.

(f) Wilson & Co. of New Jersey retained the stock of canned goods and coffee which it had and did not turn over to the new corporation any list of customers. It continued to sell canned goods and coffee to its regular trade until it was compelled to stop as hereinafter stated.

PAR. 4. Subsequent to the transactions noted above, a suit was instituted by the Attorney General of the United States to compel the meat-packing companies to get out of all other kinds of business in food products. As a result of such suit a consent decree was handed down by the Supreme Court of the District of Columbia by the terms of which Wilson & Co., Inc., together with the other so-called "big packers," was ordered to dispose of its grocery business and completely withdraw from same within a period of two years from date of the order. Wilson & Co. of New Jersey continued to sell its stock of canned goods and coffee until the period of probation was over, which was in February, 1922, at which time it withdrew from the wholesale grocery trade in compliance with the consent decree.

PAR. 5. Prior to August 23, 1919, the date of the transactions noted above, the following competitive conditions between the various corporations described were as follows:

(a) Wilson & Co. of New Jersey competed with Austin, Nichols & Co., Inc., of New York in the sale of canned vegetables, canned fruit, and coffee, which were the only kinds of goods handled by both. The Austin, Nichols & Co. besides this sold all classes of

grocery products. These companies were both buying the products on which they competed from the same general sources of supply and were selling to the same class of customers, that is, the retail grocery trade.

(b) There was no substantial competition between Austin, Nichols & Co. of New York and the Fame Canning Co. of Indiana, for Austin, Nichols & Co. sold its merchandise to retail dealers whereas the Fame Canning Co. packed its own vegetable products and sold them to wholesale customers only, among whom was Austin, Nichols & Co.

(c) There was no substantial competition between Austin, Nichols & Co. of New York and the Wilson Fisheries Co. of Seattle, Wash., because Austin, Nichols & Co. sold its merchandise to retail grocers, whereas the Wilson Fisheries Co. canned its own products and sold them to wholesale grocers, among whom was Austin, Nichols & Co.

(d) There was no competition between the Fame Canning Co. and the Wilson Fisheries Co., for they were canning and selling different products, which were, respectively, vegetables and fish. They both sold to wholesalers exclusively and often sold to the same wholesalers, but the products did not compete because of their different characters.

(e) There was no competition between Wilson & Co. of New Jersey and either the Fame Canning Co. or the Wilson Fisheries Co., because Wilson & Co. bought its products and resold them to retail dealers exclusively, to which trade Fame Canning Co. and the Wilson Fisheries Co. did not sell. The fact is that Wilson & Co. of New Jersey bought a considerable portion of its supplies from the two others named.

PAR. 6. The issue of the existence or the nonexistence of competition prior to August 23, 1919, between the above-named corporations is the principal one of this proceeding and the evidence offered thereon by counsel for the Commission (respondent not offering any witness on this point) is as follows:

CINCINNATI.

Charles W. Stone.—Former employee of Austin, Nichols & Co., selling in Cincinnati, until some time in 1916. Remembered soliciting business from both retailers and wholesalers for Austin, Nichols. Could not sell the big buyers canned goods because they could buy cheaper from the canners. Most sales to retailers. (NOTE.—Witness was ill and his testimony is rambling and contradictory in places.)

O. L. Cox.—A merchandise broker. Sold Fame Canning Co. products to many accounts in Cincinnati, but they were all wholesalers except one who was the manager of chain stores and was sold on the same basis as a wholesaler. That is a trade custom. Could not sell to wholesalers and retailers too, as in that way he would be competing with his own patrons.

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S. H. Tenover.—Buyer for the Foltz Grocery & Provision Co., which operates a chain of grocery stores, in and around Cincinnati. His firm is rated as a jobber when buying and can generally get as good rates from the canner as a jobber. Bought some condiments and similar products from Austin, Nichols, and some canned goods from the Fame Canning Co. Does not remember buying any canned goods from Austin, Nichols.

Mrs. Lola E. Lansdowne.—Assistant buyer of canned goods for Geo. F. Eaton & Co., wholesale grocers of Cincinnati. Testified that she remembered having bought canned goods from Austin, Nichols & Co., and also from the Fame Canning Co. during the years from 1915 to 1918. Under cross-examination, she said that she would have to look up her records to be sure what she had bought from Austin, Nichols, as her firm also handled condiments and canned fruits from that company. Ordinarily she bought from the canner or the canner's representative and not from other wholesalers. Testimony of this witness is contradictory. (The records which the witness referred to have not been made a part of this record, and there is no evidence that an attempt was made to secure them.)

Robert F. Bruns.—Partner in the wholesale grocery house of Bruns & Brothers. Remembered buying a small quantity of canned corn, peas, and tomatoes from Austin, Nichols & Co. during the years from 1915 to 1919. Also bought from the Fame Company. Did not ordinarily buy from Austin, Nichols because they were higher than the cannery and their brokers.

John S. Gavin.—Buyer for the Cincinnati Wholesale Grocery Co. Identified a ledger page from his company's books showing purchases from and payments to Austin, Nichols Co. during the years 1913 to 1919. Was not able to state what kind of goods they were. Also identified ledger entries showing purchases from the Fame Canning Co. for the same period. Does not know what kind of goods they were.

George Dunn.—Statistician for the McAlpin Co., a department store in Cincinnati. It handles canned goods in its grocery department. Identified entries from his company's ledger showing payments to Austin, Nichols Co., and the Fame Canning Co., up to the Fall of 1918. Does not know what kind of goods they were.

NEW YORK CITY.

E. C. Haslam.—Secretary and treasurer of Killian & Clark, canned food brokers. Identified ledger sheets showing purchases from Wakefield & Co., located on the Pacific coast, during the years 1917-18. Could not say what the merchandise so purchased was, but thought it was canned salmon and herring. Killian & Clark sold this merchandise on commission to wholesalers in New York. Did not sell to retailers. Sold some goods to Austin, Nichols & Co. Remembers buying from them a few times during this period but does not remember what kind of goods. Was not a regular customer of theirs. Witness does not know whether or not Wakefield & Co., for whom he sold, was selling the goods of the Wilson Fisheries Co., except as shown in letters from Wakefield, which were offered as exhibits.

Harry G. Rosenfeld.—Member of the firm of Rosenfeld & Son, wholesale grocers. Has bought salmon from Killian & Clark during the years 1917-1919. Has also bought a few times from Austin, Nichols & Co. Thinks they would make him an offer when they had a surplus. Remembers buying about 100 cases of canned salmon from Austin, Nichols & Co. during his entire experience. Handles about 1,500 cases a year. Sometimes sold to Austin, Nichols

It is not unusual for wholesalers to offer surplus goods to each other. Only bought from Austin, Nichols to fill up unexpected shortages.

Louis Karp.—He is a wholesaler selling only to delicatessen stores. Handles a small amount of canned salmon and large quantities of herring. Bought some goods from Killian & Clark does not recall any purchases from Austin, Nichols & Co. from 1917–1919. Witness very confused as to whether or not he bought anything from either. Imported most of his supplies.

PAR. 7. During the period after August 23, 1919, when the transactions above described took place, Wilson & Co. of New Jersey continued to compete with the new corporation of Austin, Nichols & Co. until February, 1922, when the above-described consent decree went into effect and compelled Wilson & Co. to withdraw from the wholesale grocery business. Since August 23, 1919, Austin, Nichols & Co., Inc., has obtained and now holds the balance of the stock of the Wilson Fisheries Co., of which only 51 per cent had been turned over to it as a result of the merger. There is now no competition between Austin, Nichols & Co., the Fame Canning Co. and the Wilson Fisheries Co., and Wilson & Co. of New Jersey is no longer in the wholesale grocery business. Neither was there any substantial competition between these various companies and Austin, Nichols & Co. at any time, as shown by the facts heretofore found, and therefore the acquisition of the stock of the various companies by the transaction herein described did not result in a substantial lessening of competition.

CONCLUSION.

The foregoing facts do not constitute a violation of Section 7 of the Act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes."

ORDER OF DISMISSAL.

This proceeding having been heard by the Federal Trade Commission on the amended complaint of the Commission, the amended answer of the respondent, the testimony and evidence and the argument of counsel, and the Commission having made its findings as to the facts with its conclusion that the respondent has not violated Section 7 of the provisions of the Act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes,"

It is ordered, That this proceeding be, and the same hereby is, dismissed.

Commissioners Nugent and Thompson dissent.

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IN THE MATTER OF
**JOHN MOIR ET AL., DOING BUSINESS UNDER THE
TRADE NAME AND STYLE CHASE & SANBORN.**

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

Docket 1147—May 16, 1925.

SYLLABUS.

Where a firm engaged in the roasting and packing of coffee and in the sale thereof principally to retail grocers; in pursuance of a policy directed to the observance of the minimum prices fixed by them for the sale of their product at retail, which prices they furnished to their customers from time to time,

- (a) Entered into and procured contracts or agreements with dealers binding them to observe such prices;
- (b) Requested their dealer customers to report the names of price cutters or suspected price cutters;
- (c) Sought the cooperation of dealers in making effective their aforesaid policy by cutting off reported price cutters and by informing dealers that reported price cutters who would not give assurance of adherence to the suggested resale prices had been or would be refused further sales;

With the result that competition among retail dealers in the distribution and sale of their product was suppressed, such dealers were constrained to sell said product at the prices fixed and were prevented from selling the same at such lower prices as they might consider warranted by their respective selling costs and by trade conditions generally, and competition in respect of said products was suppressed and hindered:

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

Mr. Alfred M. Craven for the Commission.

Elder, Whitman, Weyburn & Crocker of Boston, Mass., for respondents.

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 John Moir, William T. Rich, Harry L. Jones, Fred A. Flood, Warren F. Kimball, Charles R. Butler, Carlton Moseley, and Henry T. Brown, partners doing business under the trade name and style