

Syllabus.

IN THE MATTER OF
HARRIET HUBBARD AYER, INC.

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

Docket 1148—October 7, 1925.

SYLLABUS.

Where a corporation engaged in the manufacture of cosmetics, and in the sale thereof chiefly to retail dealers; in pursuance of a policy directed to the observance of the prices fixed by it for the sale of its products at retail, which prices it incorporated in price lists sent to retail dealers and to the trade and also in circulars placed in the containers of its products, and printed on the invoices rendered to dealers and customers, and which policy it made generally known to customers and the trade by letters, circular letters, and salesmen's interviews, together with its purpose to refuse further sales to those who did not respect the same;

- (a) Requested dealer customers, and required its own representatives, to report instances of price cutting to it;
- (b) Advised dealers reported to it as cutting prices, that they had been so reported, that it would not countenance such practice, and that it refused further orders from dealers who persisted therein, and sent notices to reporting customers of action taken by it as above set forth, together with requests for prompt advice as to further price cutting by offending dealers;
- (c) Investigated cases of price cutting brought directly to its attention through advertisements and price lists of customers by communicating with the price cutters and other customers;
- (d) Refused further sales to price cutting dealers, or to those supplying the same, pending the giving of assurances that such dealers would thereafter maintain the desired prices;
- (e) Filled orders from persistent price cutters without filling the same, at times advising such price cutters that it regarded them as undesirable customers, and at other times without comment;
- (f) Sought and received assurances, agreements or understandings from price cutters, in which the offending dealers undertook thereafter to respect its prices, as a condition precedent to further business dealings; and
- (g) Sought and secured such agreements in localities where price cutting had been reported, either between itself and the various dealers, or between the dealers themselves;

With the result that dealers sold its products to consumers at the uniform prices fixed by it, and were prevented from selling the same at such lower prices as they might consider warranted by their respective selling costs and trade conditions generally, and competition between them in respect of its products was thereby suppressed:

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

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Mr. E. J. Hornibrook for the Commission.*Marlow & Hines*, of New York City, 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 Harriet Hubbard Ayer, Inc., hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of 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 principal office and place of business in the City of New York, in said State. It is engaged in the manufacture of perfumes, cosmetics and allied products, and the sale thereof to wholesale and retail dealers located at points in various States of the United States. It causes said products when so sold to be transported from its said principal place of business in the City and State of New York into and through other States of the United States to said purchasers at their respective points of location. 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 perfumes, cosmetics and allied products in interstate commerce.

PAR. 2. In the course and conduct of its aforesaid business respondent enforces a merchandising system adopted by it of fixing and maintaining certain specified uniform prices at which its aforesaid products shall be resold by retail dealers handling same, and respondent enlists and secures the support and cooperation of dealers handling said products, and of respondent's officers, agents and employees in enforcing said system. In order to carry out said system respondent employs the following, among other means, whereby respondent and those cooperating with it, undertake to prevent and do prevent dealers handling respondent's said products from reselling the same at prices less than aforesaid resale prices established by respondent:

(a) Respondent fixes uniform minimum prices at which retail dealers handling respondent's said products shall resell the same, and issues and sends to said dealers and to the trade price lists in which said uniform minimum prices are set forth.

(b) Respondent makes it generally known to the trade by letters, circulars, salesmen's interviews, and by other means, that it expects

and requires all dealers handling its said products to maintain and enforce said minimum resale prices, and that respondent will refuse to further sell and supply said products to dealers failing to maintain and enforce said resale prices.

(c) Respondent enters into agreements, understandings and arrangements with dealers for the maintenance by them of said resale prices as a condition of opening accounts with such dealers or of continuing their supply of said products.

(d) Respondent solicits and procures from dealers handling its said products reports of failure of other dealers handling same to observe and maintain said resale prices.

(e) Respondent employs its salesmen and other agents and employees to ascertain, investigate and secure information as to the failure of any dealers to observe and maintain said resale prices.

(f) Respondent uses the information secured through the means set out in Specifications (d) and (e), or through any other means to induce and coerce dealers who fail to observe said prices to maintain said prices in the future, by exacting promises and assurances from said dealers that they will in future maintain said prices, and by threatening said dealers that if they do not maintain said prices respondent will refuse to further supply them with said products.

(g) Respondent refuses to further supply with said products dealers who fail to maintain said resale prices and who sell at less than said prices, unless and until such offending dealers have given satisfactory assurances of undertakings that they will in future observe and maintain said prices.

(h) Respondent keeps records upon which are entered the names of dealers who sell at less than said resale prices, which said records respondent and those cooperating with it use in and about the enforcement of said system of resale prices.

(i) Respondent seeks and secures the cooperation of all dealers handling its said products, and of respondent's agents and employees generally, in and about preventing dealers who have failed to maintain said resale prices from obtaining respondent's said products.

(j) Respondent uses other equivalent cooperative means and methods for the enforcement of said system of resale prices.

As the result of said acts and practices respondent's said resale prices are generally maintained.

PAR. 3. For more than two years last past respondent and those cooperating with it have engaged in the above alleged acts and practices, in the manner, under the circumstances, and with the result all hereinbefore set out.

PAR. 4. The direct effect of the above alleged acts and practices of respondent has been, and now is, to suppress competition among afore-

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said dealers in the sale of respondent's products, to constrain retail dealers to sell said products at aforesaid prices fixed by respondent, and to prevent them from selling said products at such less prices as they may desire, and to deprive the ultimate purchasers of said products of the advantages in price and otherwise which they would obtain from the natural and unobstructed flow of commerce in said commodities under conditions of free competition. Wherefore, said acts and practices of respondent are all to the prejudice of the public 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, Harriet Hubbard Ayer, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

Respondent having entered its appearance and filed its answer herein, hearings were had and evidence was thereupon introduced on behalf of the Commission and the respondent before John W. Bennett, an examiner of the Federal Trade Commission, duly appointed.

Thereupon this proceeding came on for decision and the Commission having fully 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 is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in New York City. It is engaged in the manufacture of cosmetics, such as perfumes, face creams and the like. It sells and ships the same to retail dealers and jobbers in every State of the United States. It employs nine salesmen who sell its products in the different States of the United States, and upon the taking of an order for respondent's said products from a customer who resides outside of the said State of New York, the said order is filled by respondent at its manufacturing plant in the said City of New York and the order is shipped by respondent to said customer to his place of business outside of the said State of New York. It receives many orders for its goods through the mails

from customers who reside outside of the State of New York and upon the receipt of such order the same is filled by packing and shipping the products of respondent at its principal place of business in the said City of New York, State of New York, and the order is then shipped by respondent to such customer to his place of business outside of the State of New York. It is in competition with Richard Hudnut, The Melba Co. and many others who manufacture, ship and sell similar articles to retailers and jobbers located in the different States of the United States. Respondent is the third largest manufacturer of cosmetics in the United States. It was incorporated April 29, 1907. In 1923, its total sales were \$2,800,000. It does not advertise in the papers and magazines but employs demonstrators who go among its retail customers and demonstrate the merits of its products. It also uses signs and window displays for advertising purposes. Since 1918 the growth of respondent has been rapid and it is at this time doing about eight times the business that it did in 1918. Its principal business is with retail merchants. It has about 8,000 customers.

PAR. 2. During the four years last past, the respondent, in the course and conduct of its said business, enforces and has enforced a merchandising system, adopted by it, through which it fixes and maintains specified uniform prices at which its products are and have been sold by retail dealers handling such products in the different States of the Union, and respondent enlists and secures the support and cooperation of such dealers handling such products, and of respondent's officers, agents and employees, in enforcing such system. In the carrying out of such system respondent employs the following means by which respondent and those cooperating with it undertake to prevent and do prevent dealers handling respondent's products in the various States of the United States from reselling them at prices less than the retail prices established by respondent:

(a) Respondent fixes and has fixed uniform prices at which retail dealers handling respondent's products shall resell them and respondent has apprised retail dealers and others of such prices by sending to such dealers and to the trade generally price lists in which such uniform prices are set forth in detail. It also names such resale prices upon circulars placed in the containers in which its products are sold and distributed and upon the invoices which it renders to dealers and customers of goods purchased.

(b) Respondent gives to such retail dealers a discount of $33\frac{1}{3}$ per cent upon such fixed retail price, this being the margin between the purchase price of goods demanded by respondent and the sales price secured by the dealer from the ultimate consumer. In addition to the $33\frac{1}{3}$ per cent discount there is a discount of 1 per cent for

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payment of the invoice within 10 days after date. Jobbers get exactly the same discount, figured in the same way, except where they buy goods in gross lots, in which case they secure 1 dozen of the commodity ordered, free of charge with each gross. This is regarded as an additional jobber's discount, and increases the jobber's discount when he buys in gross quantities, to 40 per cent of the resale price fixed by the respondent. These retailers who buy from jobbers are compelled to pay a higher price for the product of the respondent than if they dealt directly with respondent.

(c) Respondent makes it generally known to the trade, by letters, circular letters and salesmen's interviews that it expects and requires all retail dealers handling its products to maintain and enforce the resale prices which appear on said circulars and invoices, and that respondent will refuse further to sell or supply such products to dealers failing to maintain and enforce said resale prices.

(d) Respondent lets it be known that it views with disfavor the selling of any of its products by dealers at resale prices below those set forth in its price list, and respondent solicits dealers handling its products to report to it instances coming to the customer's attention of price cutting by competing dealers and has received many such reports from dealers and has acted thereon in the manner hereinafter found. Respondent also requires its traveling salesmen to ascertain from dealers cases where dealers have cut the respondent's fixed resale prices and report such instances to the respondent. When such reports are received they are acted upon as hereinafter found. When respondent is apprised through its salesmen or through letters from customers that a retail dealer is cutting prices upon respondent's products, it sends to the reported price cutter a form letter known as "Form B" (Commission's Ex. No. 2), in which it calls attention to the report that the dealer is cutting prices, advises him that the company is very insistent upon having its resale prices upheld, and will not knowingly permit any customer to lower the esteem in which respondent's products are held by the buying public by cutting prices. Respondent states in such letters that very few dealers cut prices on its articles against its wishes and respondent refuses new orders from dealers that persist in cutting prices.

(e) At the same time the form letter (B) is sent to the price cutter, respondent sends a letter which is called "Form AA" (Commission's Ex. No. 1)¹ to the customer who complained of the price cutting. This letter advises the complaining customer that a letter has been written to the price cutter protesting against the cutting of prices and asking the complaining customer promptly to notify the respondent should the price be continued.

¹ published.

(f) When the attention of respondent is called to the cutting of its resale prices through advertisements and lists of prices put out by customers it solicits information in respect thereto from the price cutting customer and other customers and is furnished in response with reports or information of the cutting of resale prices by customers. Where it learns by such means that customers are or were cutting its resale prices or selling to others who are or were, it has been and is its uniform policy to refuse and it does refuse further sales to such price cutting customers until assured that they will restore and maintain the resale prices.

(g) In instances where the price cutter continues to cut prices on the products of the respondent and the respondent becomes advised of the fact the respondent regards this price cutter as an undesirable customer and any future orders from such customer are filed unfilled. In many instances the respondent informs the price cutter that he is an undesirable customer and that it will not fill any more orders from him; in other like instances orders are filed unfilled and no comment is made by the respondent.

(h) When a jobber customer of the respondent sends in an order for a direct shipment to a retail dealer who sold respondent's products at less than its designated prices, respondent refuses to fill the order of the jobber. If by any means the respondent ascertains that goods being purchased by the jobber are intended for resale to a retail dealer who sells below respondent's designated prices it also refuses to fill the order.

(i) Respondent has at times sought and received customers' assurances of the observance of its resale prices, amounting in substance to agreements or understandings to that end. This is not done at the time the customer initially opened an account with the respondent. It occurs only after the customer has become known to the respondent as a price cutter of its products. Usually such an agreement or understanding is entered into after a customer of respondent has been reported by another customer as a price cutter and the complaining customer has asked respondent for protection from such price cutting. In such cases respondent has written letters to the price cutting customer threatening him with cutting off his supplies if he persists in cutting prices on respondent's products, and suggesting to him that he express himself as to whether or not he has abandoned the price cutting and whether the retail prices of respondent's products have been restored. On receiving assurances from the price cutting customer that he will cooperate with respondent in the maintenance of its resale prices the customer is restored to good standing among the customers of respondent.

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(j) In some instances the respondent sends its salesmen to cities where price cutting has been reported among its customers and has them secure understandings or agreements on the part of such customers to cease cutting the resale prices of respondent. At times salesmen have succeeded in making such agreements or bringing about such understandings. In some instances respondent has suggested to customers that they themselves get together and agree with one another to maintain prices upon respondent's products. Usually when a customer cuts the price on the respondent's products, where two or more dealers are handling respondent's products in any city, the competitors of the price cutter report the price cutter to respondent. In some instances respondent solicits from its customers the reporting of price cutting on the part of other customers or other dealers. Where such price cutting is reported, respondent endeavors to secure agreements or understandings by which thereafter price cutting upon respondent's products will be eliminated.

(k) Salesmen of respondent report the cutting of prices by customers when such price cutting is called to their attention and usually refuse to take orders from price cutters, or if orders are taken by them they forward such orders to respondent with the statement that the customer has been cutting prices. Salesmen in such cases either ask respondent not to fill the order, or submit the order to respondent to be filled or not according to its best judgment. In such cases, also, respondent through correspondence or through its salesmen, endeavors to reach an understanding or agreement with the price cutting customer that such price cutting shall be eliminated, and unless such an understanding or agreement is reached, the price cutter (if he persists in cutting the price on respondent's products) is considered an undesirable customer by respondent and its further orders for respondent's products are refused.

(l) When an order is received from a customer of respondent, who is considered by respondent a price cutter, and is therefore deemed an undesirable customer, it is turned over to the vice president or sales manager of respondent who writes or stamps on the order the word "File." The order is not filled and is placed in respondent's files. In the customer ledger accounts are carried forward in the names of the customers. When a customer is regarded by respondent as a persistent price cutter, therefore an undesirable customer, his account is stricken from the customer ledger. The names of price cutters are carried in the memories of the vice president, sales manager and the routine force of respondent. When an order is received a member of the routine force of respondent first goes to the customer ledger to ascertain whether an account of the person giving the order appears therein. If the account of the one

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giving the order does not appear in the customer ledger the order is referred to the vice president or sales manager of respondent, and if the order be from a price cutter it is filed away unfilled as aforesaid.

(m) The effect of such cooperative system has been, and is, that dealers handling respondent's products generally throughout the United States have sold and sell such products to consumers at the uniform prices fixed by respondent, and that such dealers are thus prevented from selling respondent's products at such lower prices as might be deemed by them to be warranted by their respective selling costs and by trade conditions generally, thus suppressing competition between them in respect to respondent's products in interstate commerce.

CONCLUSION.

The practices of the respondent under the conditions and circumstances herein set forth are unfair methods of competition in interstate commerce and constitute a violation of Section 5 of the Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

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 and the testimony and evidence submitted, the trial examiner's report upon the facts and exceptions thereto, and the Commission having made its findings as to the facts and its conclusions 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,"

Now therefore it is ordered, That the respondent, Harriet Hubbard Ayer, Inc., its officers, directors, agents, servants, employees and successors do cease and desist from maintaining or carrying into effect its policy of securing observance of resale prices for its products by cooperative methods in which the respondent and its distributors, customers and agents undertake to and do prevent others from obtaining the company's products at less than the prices designated by it, or from selling to others who fail to observe such prices, by—

(1) Procuring or entering into agreements or understandings, oral or written, with dealers or any of them, whereby the dealer

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promises to resell products purchased from respondent at prices specified by respondent.

(2) Requesting dealers to report competitors who do not observe the resale prices suggested by respondent or acting on reports so obtained by refusing or threatening to refuse sales to dealers so reported.

(3) Requiring from dealers previously cut off promises or assurances of the maintenance of respondent's resale prices as a condition of reinstatement.

(4) Utilizing any other equivalent cooperative means of accomplishing the maintenance of uniform resale prices fixed by the respondent.

It is further ordered, That the respondent within sixty days after the service upon it of a copy of this order shall 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.

Complaint.

IN THE MATTER OF
GARNETT S. ZORN AND H. VOLTZE DOING BUSINESS
UNDER THE TRADE NAME AND STYLE OF S. ZORN &
COMPANY

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

Docket 1083—October 31, 1925.

SYLLABUS.

Where a firm engaged in the sale of grain, sold as and for oats, oats grown in certain Midwestern States, with which it had caused to be mixed very substantial proportions of "screenings"; to the injury of competitors who did not engage in such practice, of the ultimate purchasers of such mixture, who paid for something which was not what it purported to be, and of the growers of clean cultivated oats in the aforesaid Midwestern States:

Held, That the sale of products adulterated as above set forth, constituted an unfair method of competition.

Mr. M. Markham Flannery for the Commission.

Mr. H. E. McElwain, jr., of Louisville, Ky., 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 Garnett S. Zorn and H. Voltze, doing business under the trade name and style of S. Zorn & Co., hereinafter referred to as respondents, have been and are 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. Respondents are partners, doing business under the trade name and style of S. Zorn & Co., with their principal place of business in the city of Louisville, State of Kentucky, and are engaged in the business of selling grain of various kinds, including oats, to customers in various States of the United States, and cause the grain so sold by them to be shipped from their said principal place of business in the city of Louisville, State of Kentucky, into and through other States of the United States to said customers at their several points of location. In the course and conduct of their said business, respondents are in competition with other individuals, partnerships and corporations similarly engaged in the sale of grain, including oats, in interstate commerce.