

Syllabus

IN THE MATTER OF

COMMONWEALTH MANUFACTURING CO. AND HARRY DUSHOFF, DOING BUSINESS UNDER THE TRADE NAMES AND STYLES HARRY DUSHOFF & COMPANY AND CHICAGO MANUFACTURING COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1367. Complaint, Mar. 1, 1926¹—Decision, June 25, 1927

Where a corporation, and an individual, the organizer, owner, and operator thereof, engaged in the sale and distribution of prison-made binder twine, and prison-made shoes, which simulated the general appearance of those long used by and manufactured under the supervision and specifications of the War Department, though greatly inferior thereto in quality and workmanship, and of surplus prison-made shirts available for sale and distribution after supplying the needs of the State's public institutions (made by the State, at the State prison, by prison labor, in its own factory building and with its own manufacturing machinery, augmented by some sewing machines furnished by them, along with some cloth and trimmings); and doing no manufacturing, nor owning, controlling nor operating any shirt factory;

- (a) Included in their corporate and trade names the word "manufacturing" and featured said names upon their order forms, letterheads, billheads, shipping tags, and other business stationery used in carrying on their aforesaid businesses, together with such statements as "Manufacturers and Distributors of BINDER TWINE," "Mills: Michigan City, Indiana. Buy DIRECT," "Manufacturers and distributors, SHOE DEPARTMENT," "Manufacturers, SHIRT DEPARTMENT, Factory: Michigan City, Indiana," "SPECIAL OFFER OF HIGH-GRADE WORK SHIRTS AT A LOW PRICE. Buy direct from the manufacturer," and in carrying on the sale of the shirts dealt in by them, held themselves out to customers and prospective customers as the manufacturers thereof; with the capacity and tendency to mislead and deceive the purchasing public into believing them to be the manufacturers of the aforesaid products, and that in buying from them they were obtaining the same directly from the manufacturers thereof, thereby eliminating and saving the costs and profits of middlemen, and to cause them to purchase said products in the aforesaid erroneous belief; and
- (b) Sold the aforesaid shoes branded with the letters "U. S." on the soles thereof, in large and conspicuous type, surrounded by an outline of the United States shield, together with the brand "Munson Army Last" in smaller letters, and invoiced and billed the same to its customers as "United States Army Munson Last Work Shoes," with the capacity and tendency to mislead and deceive the consuming public into believing said shoes to be genuine army shoes or shoes manufactured under the supervision and specifications of the United States Government, and cause the pur-

¹Amended complaint, Mar. 23, 1926.

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chase thereof in such belief, and with the effect of thereby enabling retailers with or without further representations, to pass off said shoes to the consuming public as genuine army shoes as above set forth;

With the effect of unfairly diverting trade from and otherwise injuring the business of competitors engaged as manufacturers in the sale of the aforesaid products and rightfully representing themselves as such, competitors neither manufacturing such products so dealt in by them nor so representing themselves, and competitors engaged in the sale of shoes under truthful representations, whether formerly owned by or manufactured under the supervision and specifications of the United States Government, or not:

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

Mr. G. Ed. Rowland and Mr. Henry Miller for the Commission.
McNab, Holmes & Long, of Chicago, Ill., for respondents.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent Commonwealth Manufacturing Co., an Illinois corporation, and respondent Dushoff, president, principal stockholder, and manager and operator thereof, both with principal office and place of business in Chicago and engaged in the sale of binder twine, shirts, and shoes to wholesale and retail dealers, which commodities they purchased from the manufacturers and resold at a profit to themselves, they doing no manufacturing, with adopting and using misleading trade or corporate name, misrepresenting business status, advertising falsely or misleadingly, and misbranding or mislabeling in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondents, as charged, in soliciting business under their aforesaid names from wholesale and retail dealers through circulars, pamphlets, leaflets, and other similar advertising matter, featured their aforesaid names, together with such statements as "Manufacturers and Distributors of Binder Twine," "Manufacturers of Work Shirts," "Buy direct from the manufacturer," "Manufacturers and Distributors, Shoe Department," and "Manufacturers, Shirt Department," with the capacity and tendency to mislead and deceive and with the effect of misleading and deceiving retail and wholesale dealers into believing that in dealing with respondents they were purchasing from the manufacturers of the commodities concerned, and, in the case of the former, at a saving to them through the elimination of the middlemen, and to cause said dealers to make purchases of respondents in such beliefs, and with the tendency to divert business from and otherwise injure and prejudice competitors, many of whom, as manufacturers, sell their commodities to retail

or wholesale dealers, as the case may be, and others of whom, purchasing the commodities dealt in by them and reselling the same at a profit, in nowise represent themselves as the manufacturers thereof.

Respondents further, as charged, stamped and imprinted the legend "U. S. Munson Army Last" upon shoes sold by them to wholesale and retail dealers, said shoes not being originally Government surplus property nor "Army Shoes" but shoes obtained from manufacturers in the ordinary course of trade, and in some instances, stamped the words "T. J. Healy, Inspector," thereon, thereby placing in the hands of others the means of committing a fraud upon the consuming public by enabling unscrupulous dealers to offer said shoes for sale to said public as and for surplus army shoes, considered, in accordance with the general belief among the public throughout the United States, as sold to the civilian trade at prices greatly below the fair wholesale value thereof, and as resold by said retail trade to the consuming public at prices substantially below their fair retail value, and below prevailing retail prices for comparable shoes, procured from the manufacturer through the ordinary channels of trade, and thus causing many among such consuming public to purchase said shoes, acting in that belief; with the tendency to divert and with the effect of diverting business from and otherwise injuring and prejudicing competitors who sell surplus army shoes procured from the Government and rightfully and truthfully so represent the same, and competitors who sell shoes, not surplus army, without in anywise so representing them.

Such acts and practices of respondents were, as charged, all to the prejudice of the public and respondent's competitors.

Upon the foregoing complaint, the Commission made the following

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 an amended complaint upon the respondents Commonwealth Manufacturing Co., a corporation, and Harry Dushoff, doing business under the trade names and styles Harry Dushoff & Co. and Chicago Manufacturing Co., charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. Respondents having failed to file their answers herein to said amended complaint, hearings were had upon due notice thereof to respondents, and evidence and testimony was thereupon introduced in support of the allegations of said amended complaint before a trial examiner of the Federal Trade Commission theretofore duly ap-

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pointed, upon which evidences and testimony respondents elected to stand without thereafter availing themselves of full opportunity which was given them to file briefs and present oral argument before the Commission in opposition to the charges of said amended complaint.

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

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Commonwealth Manufacturing Co., is a corporation organized in July, 1921, under, and existing by virtue of, the laws of the State of Illinois, with its branch office and place of business in the city of Chicago in said State. Its business is and has been the selling and distributing of prison-made products to wholesale and retail dealers and consumers throughout the United States. Said products and the respective periods during which respondent corporation marketed the same are as follows: Men's shirts, sold and distributed at all times since the date of respondent corporation's organization as aforesaid; binder twine, sold and distributed during the years 1921, 1922, and 1923; and shoes, sold and distributed for about three years next preceding July, 1925. In addition to carrying on business under its corporate name, part of respondent corporation's shirt business is and for more than three years last past has been conducted under the trade name and style of "Chicago Manufacturing Co." The authorized capital stock of said corporation is \$50,000, only \$5,000 of which has been issued and is outstanding, all of which outstanding stock is held by respondent Harry Dushoff, its president, except two shares, one of which is held by each of two individuals for the purpose only of enabling them to qualify as directors of the corporation.

PAR. 2. Respondent Harry Dushoff is an individual having his office and place of business in the city of Chicago, State of Illinois, and has been engaged ever since prior to July, 1921, in the business of selling and distributing to wholesale and retail dealers and consumers throughout numerous States of the United States prison-made shirts; and during the years 1921 and 1922, prison-made binder twine. He also has since the date of its organization managed and controlled the affairs, business and policies of respondent corporation Commonwealth Manufacturing Co. Respondent Dushoff conducted his said unincorporated business of selling and distributing shirts and binder twine under the trade name and style "Harry

Dushoff & Co.," to and until June, 1922. Thereafter and for more than three years last past he conducted, and is still conducting, his said shirt business under the trade name and style "Chicago Manufacturing Co."

PAR. 3. At all times in the course and conduct of said businesses, respondents Commonwealth Manufacturing Co. and Harry Dushoff solicited trade and orders for their products through and by means of circular letters, price lists, and similar trade literature, which they mailed from time to time to their customers and prospective customers throughout several States; and also through and by means of traveling salesmen, about ten in number, whom respondents employed on a commission basis and who on behalf of respondents called upon and solicited trade from customers and prospective customers throughout numerous States and offered for sale and sold said products of respondents. In distributing and supplying said products to their customers, respondents caused said merchandise to be transported in commerce from Michigan City, Ind., the place of manufacture, through and into other States of the United States, to the respective purchasers thereof in such other States; and in so carrying on their business respondents are and were at all times herein mentioned in direct active competition with many other persons, partnerships and corporations similarly engaged in selling and distributing similar products in commerce between and among various States, particularly those States into which respondents sold and distributed their products.

PAR. 4. Said businesses of respondent corporation, Commonwealth Manufacturing Co., and respondent Harry Dushoff, are conducted jointly and as a single unit by and under the active management and control of respondent Harry Dushoff. The place of business, equipment and employees of respondent corporation and of respondent Dushoff are identical. They occupy office space of about 15 feet by 20 feet and employ two clerical assistants, besides aforesaid traveling salesmen. Only one set of books is kept of the businesses of both respondents.

PAR. 5. Throughout the operation of their binder-twine business during the years 1921, 1922, and 1923, as aforesaid, respondents' combined sales of such binder twine amounted to 18,000 to 20,000 pounds per year, which was sold and distributed by them to dealers, farm organizations and farmers throughout several States, particularly the States of Kansas and Minnesota. At all times in the offering for sale, selling, and distributing of said binder twine to their customers, respondent Harry Dushoff, trading under the trade name and style Harry Dushoff & Co., and respondent Commonwealth Manufacturing

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Co., acting under the domination, management and control of respondent Dushoff, used and carried on such business with order forms, letterheads, billheads, shipping tags, and other business stationery containing the following representations set forth in large and conspicuous lettering, to wit:

HARRY DUSHOFF AND COMPANY
Manufacturers and Distributors of
BINDER TWINE

Manufacturers and Distributors of
STANDARD AND
SISAL TWINE

Mills: Michigan City, Indiana.

COMMONWEALTH MANUFACTURING COMPANY
Manufacturers and Distributors of
BINDER TWINE

Manufacturers and Distributors of
STANDARD AND
SISAL TWINE

Mills: Michigan City, Indiana.

Buy Direct * * *

COMMONWEALTH MANUFACTURING COMPANY.

In truth and in fact neither of said respondents have ever manufactured binder twine, and in carrying on said binder-twine business they were in fact dealers or middlemen and not the manufacturers thereof. Said binder twine was manufactured by the State of Indiana in the Indiana State Prison, Michigan City, Ind., and with the labor of the prisoners there incarcerated. Respondents purchased said twine from the State of Indiana and resold and distributed same to their customers. The aforesaid statements and representations on respondents' letterheads, order blanks, billheads, shipping tags, and other business stationery were and are false and their use as set forth above had the capacity and tendency to mislead and deceive purchasers of said twine into the erroneous belief that said respondents were the manufacturers of said twine and that in buying from said respondents they were buying directly from the manufacturer and thereby eliminating and saving the costs and

profits of middlemen; and to thereby cause said purchasers to purchase said twine in such belief.

PAR. 6. The shoe business of respondent Commonwealth Manufacturing Co. was carried on for the space of about three years next preceding July, 1925, under the management, domination and control of respondent Harry Dushoff. Throughout said period respondent corporation's sales of said shoes were made in the name "Commonwealth Manufacturing Co." to jobbers, department stores, and so called Army and Navy goods stores throughout numerous States of the United States at the rate of from 50 to 60 pairs per day. In offering for sale, selling and distributing said shoes respondent corporation used letterheads, invoices, order forms, shipping tags, and other business stationery containing the following representations in conspicuous lettering, to wit:

COMMONWEALTH MANUFACTURING COMPANY

Manufacturers and Distributors

SHOE DEPARTMENT.

Neither of the respondents have ever been the manufacturers of shoes. The shoes dealt in by respondent corporation as aforesaid were manufactured by the State of Indiana in the Indiana State Prison, Michigan City, Ind., and with the labor of prisoners there incarcerated by said State. Said shoes were sold by the warden of said prison to respondent corporation which in reselling and distributing them to its customers as aforesaid was in truth only a dealer or middleman. The use by respondents of said corporate name Commonwealth Manufacturing Co. with or without said other representations and assertions, all as set forth in this paragraph above, was false and misleading and had the capacity and tendency to mislead and deceive the purchasing public into, and to cause said purchasers to buy said shoes in, the erroneous belief that respondent corporation was the manufacturer thereof and that in so buying from respondent corporation they were purchasing said shoes directly from the manufacturer and thereby eliminating and saving the costs and profits of middlemen.

PAR. 7. In carrying on and conducting said shirt business respondent Dushoff, trading under the name and style of Chicago Manufacturing Co., and respondent Commonwealth Manufacturing Co., acting under the management and control of respondent Dushoff, sold and are selling jointly from 40,000 to 50,000 dozen shirts per annum. At all times in conducting said shirt business both respondents held themselves out to their customers and prospective customers as the manufacturer of said shirts, and offered for sale, sold, and distributed said shirts in the corporate name "Commonwealth Man-

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ufacturing Co." and in the trade name "Chicago Manufacturing Co."; and in circular letters, pamphlets, leaflets, letterheads, billheads, invoices and other business stationery, respondents caused the following representations and assertions to be set forth prominently and conspicuously:

COMMONWEALTH MANUFACTURING COMPANY

Manufacturers

SHIRT DEPARTMENT

Factory: Michigan City, Indiana.

CHICAGO MANUFACTURING COMPANY

Not Inc.

Manufacturers of

WORK SHIRTS

Special Offer of

HIGH-GRADE WORK SHIRTS AT A LOW PRICE

Buy direct from the manufacturer

\$6.50 PER DOZEN, F. O. B. FACTORY

COMMONWEALTH MANUFACTURING COMPANY

Said shirts sold by respondents were manufactured by the State of Indiana in the Indiana State Prison, a penal institution of said State located at Michigan City, Ind. In a factory building owned by it, and within the walls of said prison, said State operates a shirt factory under its direct and absolute control and with the labor of the prisoners there incarcerated. Said State is and has been for many years last past engaged in manufacturing in and by such factory and with such prison labor large quantities of shirts. Said shirts are, in accordance with the laws of the State of Indiana, used primarily to supply the needs of the public institutions of the State of Indiana, numbering some 22. The surplus of the shirts so manufactured above and beyond the requirements of said State institutions is sold by the warden of said State prison in the open market,

and the shirts dealt in by respondents are and were sold and supplied by said warden to respondent from such surplus. Respondents pay said State for their shirts a certain stated price in cash and furnish some sewing machines, which the State uses to augment its other manufacturing machinery, and also furnish some cloth and trimmings which are manufactured by the State into shirts. Neither of respondents is nor has either ever been the manufacturer of the shirts sold by them as aforesaid. They do not own, control or operate a shirt factory.

PAR. 8. Respondents' representations that they are the manufacturers of the shirts sold by them and their use of the names "Commonwealth Manufacturing Co." and "Chicago Manufacturing Co." with or without said other statements and representations, all as set out in paragraph 7 hereof, are and were false and misleading and have and had the capacity and tendency to mislead and deceive the purchasing public into, and to thereby cause them to purchase said shirts in, the erroneous belief that respondents are and were the manufacturers of said shirts and that in buying from respondents they are buying and obtaining said shirts directly from the manufacturers thereof thereby eliminating and saving the costs and profits of middlemen.

PAR. 9. The prison-made shoes dealt in and sold by or in the name of respondent Commonwealth Manufacturing Co., as aforesaid, were a type of heavy work shoe simulating in general appearance shoes which have for many years been used by, and manufactured under the supervision and specifications of the War Department, a branch of the Government of the United States, large quantities of which were sold to the public by the Government after the close of the World War as surplus Government property, and which shoes so sold have been and still are quite extensively marketed as such among the trade and to the consuming public throughout the United States. Said shoes sold as surplus Government property are in great demand by the consuming public and are generally considered by the consuming public to be of high quality, sold at low prices and to have been made for and under the supervision and specifications of the United States Government. Respondent corporation's shoes were never owned by or manufactured for or under the supervision or specifications of the United States Government but were greatly inferior to such shoes in quality and workmanship. Said shoes of respondent corporation when sold by it to its customers, and when purchased by the consuming public in the ordinary course of trade, contained branded and embedded on the soles thereof the letters "U. S." in large conspicuous type surrounded by an out-

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line of what is commonly known and recognized by the public as the shield of the United States, below which in smaller letters and less conspicuous appeared the brand "Munson Army Last." With the full knowledge and consent of respondents said brands and words were placed on the shoes under the direction of the warden of the Indiana State Prison, Michigan City, Ind., for the purpose of aiding the salability of said shoes to the consuming public. Said shoes were invoiced and billed by respondent to its customers as "United States Army Munson Last Work Shoes."

PAR. 10. The use by respondent corporation, in connection with its shoes, of the letters "U. S." under the circumstances and conditions set forth in paragraph 9 above was misleading and had the capacity and tendency to mislead and deceive the consuming public into, and to thereby cause them to purchase said shoes in, the erroneous belief that same were genuine army shoes or shoes manufactured under the supervision and specifications of the United States Government. In selling its shoes with said brands, as set forth above, respondent corporation thereby placed in the hands of retailers the means by which such retailers could, with or without further representations, pass off said shoes to the consuming public as genuine army shoes or shoes made under the supervision and specifications of the United States Government.

PAR. 11. Among the competitors of respondents mentioned in paragraph 3 hereof are many who manufactured and sold shoes, binder twine and shirts in competition with respondents and who rightfully and truthfully represented themselves to be the manufacturers of such products. There are also many among said competitors who did not manufacture the shirts, binder twine or shoes which they sold in competition with respondents and who in nowise represented themselves to be the manufacturers of said products. There are likewise many of said competitors who sold in competition with respondent corporation and under truthful representations certain shoes which were and certain other shoes which were not owned by, or manufactured for or under the supervision and specifications of, the United States Government. The false and misleading practices indulged in by respondents as hereinbefore set forth tend to and do unfairly divert trade from and otherwise injure the business of said competitors and are to the prejudice of the public.

CONCLUSION

The acts and things done by respondents under the conditions and circumstances described in the foregoing findings are to the injury and prejudice of the public and respondent's competitors, and are

unfair methods of competition in interstate commerce and constitute a violation 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 amended complaint of the Commission, the testimony and evidence; and the Commission having made its findings as to the facts with its conclusion that respondents have violated the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, (1) That respondent corporation Commonwealth Manufacturing Co., its officers, directors, agents and employees, and respondent Harry Dushoff, his agents, representatives, and employees, cease and desist from carrying on the business of selling shirts, shoes, binder twine, or other merchandise in commerce among the several States of the United States under a trade name or corporate name which includes the word "manufacturing," or a word or words of like import, and from making representations through advertisements, letterheads, order forms, billheads or other business stationery, or by any other means whatsoever in connection with such business; that respondents, or either of them, are the manufacturers of said product, unless and until such respondent actually owns and operates, or directly and absolutely controls a factory in which the products so sold and distributed by such respondent are manufactured.

(2) That respondent corporation Commonwealth Manufacturing Co., its officers, directors, agents, servants, and employees cease and desist from selling and distributing in interstate commerce any shoes which are branded or labeled with the letters "U. S." or with letters or words of similar import, or with a simulation of what is commonly recognized as the shield of the United States, or any other device of similar import, unless all of said shoes so sold and distributed were made for and under the supervision and specifications of the Government of the United States.

It is further ordered, That respondents Commonwealth Manufacturing Co. and Harry Dushoff shall within 60 days after the service upon them of a copy of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinbefore set forth.

IN THE MATTER OF
AMERICAN SNUFF COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1100. Complaint, Dec. 17, 1923¹—Decision, June 30, 1927

Where a corporation engaged in the manufacture and sale of Strong Scotch snuff in competition with two concerns, to which it had theretofore conveyed factories and brands formerly owned by it, in compliance with a decree entered, pursuant to a mandate of the Supreme Court, in a suit by the United States against the American Tobacco Co. and subsidiary and affiliated companies, including itself, requiring it to dispose of approximately two-thirds of its business (amounting at the time to over 96 per cent of the snuff manufactured and sold in the United States);

- (a) Employed a cooperative system or plan directed to the maintenance and observance by its jobber customers, and said jobbers' retail dealer customers, of the resale prices fixed by it and made known to such jobbers and dealers through price lists, orders, correspondence, and salesmen's interviews, and in pursuance of the aforesaid scheme or plan, in which it sought and received the cooperation of such jobbers and dealers;
- (1) Entered into agreements and understandings binding them to maintain its said resale prices;
 - (2) Refused to sell its products to jobbers, or to make drop shipments thereof to retailers, who respectively either failed to observe its prices or would not agree to maintain the same in the future, or to sell to jobbers who resold to retail dealers who would not so agree, and, with the cooperation of its jobbers, prevented retail dealers falling to maintain such prices and refusing to so agree, from obtaining its products;
 - (3) Reinstated upon its list of customers, jobbers and retailers previously refused shipments on account of price cutting, upon their agreeing to maintain prices thereafter;
 - (4) Solicited and secured reports and information from jobber customers and retail dealers relative to prices at which others were selling its products, required its salesmen to investigate price cutting thus or otherwise brought to their attention, and notified reporting customers of cooperation and action on its part to stop price cutting so reported;
 - (5) Notified jobber customers of instances of price cutting by their retail dealers and that it would refuse to make drop shipments to such dealers, and received and accepted cooperation from the aforesaid jobbers in obtaining agreements from said dealers binding them thereafter to sell its products at its designated resale prices;
 - (6) Maintained a "Don't Ship List" upon which it enrolled the names of price-cutting jobbers and retailers, and supplied jobbers with lists of price-cutting retailers to whom it refused to make shipments, notifying them that it would decline to make shipments to or for the account of those who supplied such retailers;
 - (7) Removed the names of retailers, entering into agreements and understandings thereafter to maintain its prices or indicating such a purpose, from

¹Amended complaint, June 6, 1924.