

IN THE MATTER OF
THE NEW YORK PHARMACEUTICAL CONFERENCE, INC.

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

Docket 1392. Complaint, July 7, 1926—Decision, Jan. 9, 1928

Where a druggists' incorporated association, managed by delegates of affiliated associations, composed of a majority of the retail druggists and pharmacists of New York City and Westchester County, N. Y.; in seeking to induce the adoption by manufacturers and other vendors concerned of a "Distributor Plan" evolved by its Trade and Welfare Committee, which (1) was directed to remedying price demoralization in the territory involved, (2) had for its purpose the adoption and maintenance of suggested minimum resale retail prices, (3) stressed use of channels of distribution running from manufacturer to wholesaler to retailer to public as the correct and economically sound method of distribution, (4) defended maintenance of resale prices on trade marked and patented goods, and the manufacturer's and distributor's rights to select dealer vendees willing to cooperate, and to decline relations with price cutters, (5) condemned direct dealing between manufacturer and retailer and particularly the granting of special terms and discounts to chain, drug and department stores by the former, and (6) was called to the attention of, and urged upon, such manufacturers and vendors,

- (a) Issued to those manufacturers, wholesalers and jobbers, who satisfied its representatives as to their sales policies being in harmony with, and their own approval of, its aforesaid plan, "Courtesy Cards", for the use of their salesmen, with the result that those not supplied therewith encountered sales resistance and, in some cases, refusals to order or even to accord interviews;
- (b) Published in its trade monthly, current, revised lists of those concerns supplied with the aforesaid cards; and
- (c) Published articles in the aforesaid trade organ and elsewhere, and circulars, emphasizing and urging upon the members the desirability and necessity of adopting price standardization, "keeping to full resale prices," and cooperating with and bestowing their favor and patronage upon, those concerns whose names were listed as above set forth;

With the result that sale and distribution of merchandise by various manufacturers, wholesalers and jobbers engaged in interstate commerce in those articles usually kept for sale in retail drug stores, were impeded and interfered with to a substantial extent, certain manufacturers and vendors were induced to adopt price maintenance policies, and others to maintain such policies more strictly, price cutting was reduced, and retail prices accordingly enhanced:

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

Mr. W. T. Chantland for the Commission.

Mr. S. A. Herzog, of New York City, for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a New York corporation, composed of representatives of local associations of retail druggists doing business in various sections of the city of Greater New York,¹ with undertaking to establish and enforce resale prices, through threats and intimidation, and boycott and threatened boycott of recalcitrant manufacturers and dealers and cutting off and threatened cutting off of latter's sources of supply, in violation of the provisions of section 5 of such act prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, "through its officers, agents, and duly constituted committees, and particularly through its committee known as the trade committee, consisting of one delegate from each member of the conference, undertook to secure the adoption and maintenance by manufacturers, jobbers, and wholesalers engaged in selling and shipping their products and commodities from outside the State of New York, in the city of Greater New York, of resale prices for their respective products and commodities, consisting of drugs and sundries sold by druggists, and the adherence to such resale prices by retail druggists in its member associations; also to influence and induce the retail druggists, members of the local associations constituting the conference, not to purchase goods from manufacturers, jobbers, and wholesalers who fail to adopt such policy of resale price maintenance, and thereby to induce and coerce said manufacturers, jobbers and wholesalers to adopt such policy," seeking to effect the aforesaid purposes by the following methods:

Soliciting agreements by manufacturers to maintain resale prices, in some cases suggested by officers or agents of the conference, advocating cooperation among member associations and their druggist members by refusal to handle goods not sold under such policy, and promising manufacturers and dealers the assistance of the conference in resisting the cutting of resale prices;

Informing retail druggists in the city of those manufacturers, jobbers and wholesalers, who had adopted such resale price policy,

¹ According to the complaint, under respondent's by-laws each member of the association "is entitled to two delegates for the first hundred members or fraction thereof and one delegate for each additional hundred members of such local association, but not more than five delegates," and "the membership in August, 1925, consisted approximately of 61 delegates from 22 local associations, representing collectively 3,200 retail druggists."

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and issuing to those manufacturers, etc., who had agreed thereto "courtesy cards", designed and intended to influence and induce retail druggists in the city to buy only from holders thereof and to boycott those not possessing the same, the aforesaid trade committee refusing such cards to those manufacturers, etc., whose methods did not conform to its resale price maintenance policy;

Threatening recalcitrant retail druggists with investigation by the board of pharmacy, and the narcotic and prohibition authorities and with bodily harm, and with inability, should they fail to join and contribute to respondent conference, to purchase from manufacturers who had joined;

Publishing in its monthly periodical, *The New York Pharmacist*, circulated among retail druggists in the city, lists of the manufacturers, jobbers and wholesalers to whom cards had been issued; and

By using other methods to the same end.

Respondent, as charged, has, by the aforesaid methods and practices, "to a substantial extent procured the boycotting by retail druggists in the city of New York of manufacturers, jobbers and wholesalers engaged in selling and shipping their products and commodities from outside the State of New York in the city of Greater New York, who have not conformed to the policy of retail price maintenance advocated by it, * * * and many retail druggists in New York City have refused and continue to refuse to purchase from such manufacturers, jobbers and wholesalers as the result of said methods and practices by the respondent," and have the effect of depriving manufacturers, etc., as above set forth, of sales to retail druggists in the city, "unless they conform to the practices as above set forth, and are an unlawful restraint of trade, in interstate commerce, and constitute unfair methods of competition under section 5 of the Federal Trade Commission Act."

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 a complaint upon the respondent charging it with unfair methods of competition in commerce in violation of the provisions of said act. Thereafter, after certain testimony had been taken both for the Commission and for respondent, the counsel for the Commission and the counsel for the respondent agreed upon and tendered to the Commission the following as the proper findings of fact, and the Commission being fully advised in the premises makes said stipu-

lated findings its findings of fact, and makes its conclusions drawn therefrom as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, The New York Pharmaceutical Conference, Inc., is a corporation organized under the laws of the State of New York in June, 1924, having its principal place of business at 245 Fifth Avenue, New York City. Its business is conducted by delegates from its affiliated pharmaceutical associations, which affiliated associations were and are composed in the aggregate at various times from 1924 to 1927 of from 2,382 to about 3,200 retail druggists and pharmacists of the city of New York and Westchester County out of an average total of approximately 3,850, for the years 1924 to 1927, druggists and pharmacists in said territory.

PAR. 2. Said respondent, prior to incorporation, had existed for many years as a voluntary association with activities solely along legislative and administrative lines. Beginning about August, 1924, its activities were changed, and commercial and trade activities began. A so-called trade and welfare committee was organized (generally referred to as the "trade committee"), consisting of members from various of the affiliated associations, which devoted itself exclusively to the commercial and trade problems. This committee made a study and survey of the trade conditions of the retail druggists in its territory. As a result of such a study and survey and the price demoralization situation which it disclosed, which in turn the committee ascribed in part to illicit liquor dealings, several proposed plans of remedy were suggested and discussed.

PAR. 3. The plan finally adopted as the one to be urged upon manufactureres and vendors, was the one that came to be known as the "distributor plan". This plan was announced in circular letters sent to about 500 manufacturers and vendors of goods generally sold in retail drug stores, urging its adoption. Its adoption was urged also by officers of the conference in personal interviews with manufacturers and other vendors. Much of the time of one of such officers was daily devoted to such work for a period of about four months in 1923.

PAR. 4. The purpose of the plan was to procure the adoption of suggested minimum prices in resale at retail on the various articles covered, and the maintenance of such suggested minimum resale retail prices. The distributor plan was as follows:

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THE DISTRIBUTOR PLAN

NEW YORK PHARMACEUTICAL CONFERENCE, INC.

The New York Pharmaceutical Conference recognizes as fundamentally and economically sound the present scheme for the distribution of merchandise. In any discussion of this subject the rights and privileges and the necessity of—

1. The Manufacturer. 2. The Wholesaler. 3. The Retailer. 4. The Public. In this general scheme of distribution neither should be overlooked or evaded.

MANUFACTURER

The manufacturer has well defined and valuable rights which when protected by trade-marks or patents is fairly entitled to the good-will accruing from the same. The conference believes that direct sale of such merchandise to either retailer or physicians is contrary to the generally accepted theory of merchandise distribution. Moreover, the conference believes that direct selling to retail dealers and so-called wholesalers at terms equal to or better than those offered to legitimate service jobbers is unfair discriminatory and demoralizing to the trade as a whole.

We believe in and urge the manufacturers to adopt the selective distributor plan for the marketing of their product through those wholesale organizations willing to cooperate with you and us, in so far as is legal, in urging the full resale price upon the retail pharmacists.

It is our opinion that when such exclusive rights are so given to the distributor in any territory that said distributor has the right to sell or not to sell any retail pharmacists whom in his judgment, may be injuring your good-will by the cutting of the price of your article.

WHOLESALE

We believe that the wholesaler has a real place in the economic scheme of distribution and is indispensable to manufacturer and retailer. We believe that the legitimate service jobbers should be protected against that form and type of competition which recognizes no responsibility to either the manufacturer or retailer, and moreover, we believe that in the selection of your distributors care should be taken to select only those willing to cooperate with you in the proper and legitimate distribution of your products.

RETAILERS

We are unalterably opposed to granting special terms and discounts to the chain drug and department stores by the manufacturers. We believe that with total retail pharmacist outlets of 51,000 that we are entitled to that degree of protection against the inroads this type of competition has made in the business of the pharmacists, particularly in the larger centers.

In brief, literally interpreted, we believe that the present agencies offer the most economic and scientific method of distribution, i. e., manufacturer to jobber to retailer to consumer.

PAR. 5. The three chief methods by which it was sought to induce manufacturers and other vendors of said goods to adopt and enforce

the distributor plan were, first, the use of a so-called "courtesy card"; second, the publication in the official organ of the conference, i. e., *The New York Pharmacist*, of a list of those manufacturers and wholesalers and jobbers to whom such courtesy card had been issued; and third, propaganda and publicity of which the distributor plan was one form.

PAR. 6. Prior to the issuance of courtesy cards for the use of salesmen of the manufacturers, wholesalers, and jobbers of such articles, the representatives of respondent required generally a complete statement orally or in writing signed by a responsible officer, of the sales policies of such concern, including the fact of suggested resale prices and good faith statements of attempts by each of said concerns to enforce same. The issuance of such cards was not entirely confined to those who had resale price policies. Manufacturers and other vendors were not advised by the conference of the issuance or requirement as to said courtesy cards, but discovered the fact through requests and sales resistance encountered by their salesmen when calling upon the trade immediately before and at the time of the adoption of said courtesy cards, and a few refusals to order, or even to interview salesmen who did not have and present such courtesy cards. One affiliated organization caused placards to be printed and posted in a number of the stores of its members bearing the following:

SALESMEN PLEASE PRESENT

NEW YORK PHARMACEUTICAL CONFERENCE

INTRODUCTORY CARD

BEFORE INTERVIEW.

PAR. 7. Following such difficulties on the part of their salesmen, manufacturers, or their representatives, usually called upon officers of respondent to learn the requirement for obtaining such cards. At such conference the distributor plan was generally presented to them, and invariably discussed and, as above stated, request was made that such concerns present in writing, signed by a responsible party, a statement of their sales policy substantially in accord with such distributor plan, together, with their statement of the method by which they were attempting, or would attempt, in good faith to enforce such policy, including as therein set out, the "urging of full resale prices upon the retail pharmacist". In a few instances where the statement furnished was deemed insufficient, requests for a more definite and complete statement were made, and in a few instances statements of salesmen were refused and the persons responsible for the sales

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policies required to appear and discuss same. Such applications were generally considered and acted upon by the trade committee, and rejections made in the name of the trade committee of respondent. In some instances cards were issued to concerns of widely known, high standing as inducement to procure others to apply for cards, and adopt the desired policy. New cards were issued monthly, and changed in color with each issue so that the pharmacists would know that there had been no change in its status in relation to the conference.

PAR. 8. Ninety-eight concerns were issued courtesy cards as published in the May, 1925, issue of the Pharmacist, 143 in the June issue; 161 in the July issue; and 173 in the August issue, which was gradually increased to 282 in the October, 1926, issue.

PAR. 9. The list published in the New York Pharmacist was revised from month to month, or as issued. This official organ was circulated to all of the personnel membership of the affiliated organizations of respondent and to those manufacturers and other vendors whose names appeared upon the list therein. Articles published in said Pharmacist, or other papers and circulars issued by constituent associations of respondent, from time to time up to the present time, emphasized and urged the desirability and necessity of respondent's personnel membership adopting price standardization; "keeping to full resale prices", and cooperating with the concerns whose names appeared on said list, which should be favored and patronized.

PAR. 10. As an effect and result of the aforescribed plan, purposes and activities of respondent through the courtesy card and publication of the lists of those having it, the sale and distribution of merchandise by various manufacturers, wholesalers, and jobbers engaged in interstate commerce in those articles usually kept for sale in retail drug stores were impeded and interfered with to a substantial extent.

PAR. 11. As a result of the propaganda and publicity work carried on by respondent, certain manufacturers and vendors were induced to adopt price maintenance policies, and certain manufacturers who already had such policies were induced to maintain them more strictly.

PAR. 12. As a result of respondent's activities, price cutting was reduced and retail prices enhanced accordingly, during 1925.

CONCLUSION

The practices of respondent and its officers, committees, and members, both association and individual members, as set forth in para-

graphs 3 to 11, inclusive, of the foregoing findings as to the facts, in the circumstances therein set forth, constitute and are systematic and concerted actions to enforce price maintenance and the standardization and adoption of price maintenance policies by makers and vendors, through coercion, intimidation, boycott and threats of boycott by said respondent and its members, and so said practices are to the injury and prejudice of the public and of manufacturers and of vendors both at wholesale and retail, including the competitors of the individual members of the constituent association of said respondent, and said practices constitute unfair methods of competition in commerce in violation of 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."

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 stipulated and agreed facts, and upon briefs and oral argument submitted by respective counsel, and the Commission having made its findings as to the facts in harmony with said agreed facts, and having reached its conclusion that the respondent and its membership have violated the provisions 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",

Now therefore it is ordered, That the respondent association, its officers, both individually and in their said official capacity, and its individual members, their agents, representatives and employees or any group of such respondents or their agents, either with or without the cooperation of persons not parties hereto, cease and desist from following a common course of action pursuant to mutual understanding, combination, agreement or otherwise reached, for the purpose or with the effect, directly or indirectly, of lessening competition in the course of trade in drugs, proprietaries, drug sundries, and other articles usually sold in retail drug stores or pharmacies, or any of them, entering the State of New York from other States, by all or any of the following methods, to wit:

(1) By compelling or attempting to compel makers or vendors of articles usually handled by retail druggists and pharmacists to establish and promulgate price standardization or suggested resale price of such merchandise at retail by all or any of the following means, to wit, coercion, intimidation, boycott or threat of boycott, or by any

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suggestion or intimation of boycott or of other retaliatory or prejudicial action in case such makers and vendors do not conform to the wishes of the respondents in respect of a resale price maintenance policy.

(2) By the issuance of the so-called "courtesy card" or any card of similar import, purpose or effect, to manufacturers, jobbers, or wholesalers or to or for their representatives, with the purpose or effect either expressly or impliedly of aiding in carrying out vendors' policies of retail resale price maintenance.

(3) By the publication in respondent's trade paper or any other publication, or promulgation in any other manner, or any list of maker or vendor concerns to whom have been issued the so-called "courtesy card", or any card of similar import, purpose or effect, or by the publication or promulgation of any list of similar import.

Complaint

IN THE MATTER OF
HEWITT BROTHERS SOAP 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 873. Complaint, Mar. 30, 1922—Decision, Jan. 16, 1923

Where a corporation engaged in the manufacture and sale of soaps and washing compounds;

Named, labeled, and advertised as a naphtha soap, a laundry soap containing no petroleum ingredient other than the petroleum distillate, kerosene, amounting to less than one-sixth of 1 per cent by weight of such soap, designating and labeling the same as "Easy Task White Naphtha Soap," together with the legend "a pure white naphtha soap made of the highest grade soap materials by a * * * combination of naphtha," etc., and featuring the word "naphtha" in customer brands when not sold direct to consumers; notwithstanding the fact that soap products containing a petroleum distillate amounting to 1 per cent or less by weight do not contain the same in an amount sufficient to be effective as a cleansing ingredient nor substantially to enhance the cleansing value of such products to the consuming public, and that the substantially cheaper kerosene is uniformly distinguished from naphtha by the trade and purchasing and consuming public;

With the effect of inducing said public to purchase such soap as and for a product containing genuine naphtha and in a sufficient amount to be effective as a cleansing ingredient, substantially enhancing the effectiveness and value of the soap, and of causing manufacturers of genuine naphtha soap, sold in competition with such product, loss of trade:

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

Mr. Eugene W. Burr and Miss Anna Boyle for the Commission.

McMahon, Corwin, Landis & Markham, of Dayton, Ohio, for respondent.

SYNOPSIS OF COMPLAINT

Reciting the public interest involved in such a proceeding by it, the Commission charged respondent, an Ohio corporation, engaged in the manufacture and sale of soaps and other commodities, either direct to the consuming public through its salesmen, or to chain store and other large retail establishments, and with principal place of business in Dayton, and with branch selling office in Chicago, with using unfair methods of competition in commerce, in naming product misleadingly, misbranding or mislabeling, and advertising falsely or misleadingly, in violation of the provisions of section 5 of the Federal Trade Commission Act.