

IN THE MATTER OF
HERB JUICE MEDICINE 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 1469. Complaint, July 16, 1927—Decision, Apr. 10, 1928

Where a corporation engaged in the manufacture and sale of an extensively advertised proprietary medicine; in pursuance of a merchandising policy directed to the maintenance of uniform prices established by it for the resale of its said product,

- (a) Fixed the retail price thereof and made it generally known that dealers would be expected and required to maintain the same, under penalty of refusal of further sales;
- (b) Demanded and obtained agreements from dealers, especially price cutters, as a condition of future sales, that they would maintain its prices;
- (c) Declined to make shipments to jobbers selling to price cutting retailers, unless they would agree not to sell the same, and thereby cut off said price cutters' source of supply;
- (d) Requested and obtained reports from dealer customers regarding price cutting by other dealers and investigated the same and acted thereon by refusing further shipments to the price cutters unless they agreed to maintain prices in the future; and
- (e) Refused to fill orders from jobbers for shipment to price cutting retailers;

With the result that competition in the distribution and sale of said medicine was suppressed, and dealers therein were constrained to sell the same at the prices fixed by it, and were prevented from selling it at such prices as they desired, and ultimate purchasers thereof were thus deprived of the advantages which they would have obtained from the natural and unobstructed flow of commerce in said medicine under conditions of free competition:

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.

Norville & Lyons, of Memphis, Tenn., 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 Tennessee corporation engaged in the manufacture, among other things, of a medicine under the name "Miller's Herb Juice", and in the sale and distribution thereof from its factory at Jackson, Tenn., to wholesale and retail dealers throughout the United States, with maintaining resale prices 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, for about four years last past, in the course and conduct of its said business "has enforced and now enforces a merchandising system adopted by it of fixing and maintaining certain specified uniform prices at which its said medicine shall be sold by dealers handling the same, and respondent enlists and secures the support and cooperation of said dealers and of respondent's officers, agents, and employees in enforcing said system.

"In order to carry out said system, respondent has employed and now employs the following means among others whereby respondent and those cooperating with it undertake to prevent and do prevent dealers handling respondent's said medicine from reselling the same at prices less than the aforesaid resale prices established by respondent":

(a) Establishing uniform minimum prices at which both wholesale and retail dealers handling its said medicine shall resell the same, and issuing to such dealers price lists and catalogues setting forth said prices;

(b) Making it generally known to the trade that it expects and requires all dealers handling its said medicine to maintain and enforce said prices;

(c) Entering into contracts, agreements, understandings, and arrangements with dealers for the maintenance by them of said prices, as a condition of opening accounts with them or continuing their supply;

(d) Procuring groups of dealers in given localities to agree among themselves and with it to observe and maintain said prices;

(e) Seeking and securing from dealers handling its medicine, information concerning and evidence of price cutting by other dealers, and of the sale of its medicine by wholesalers to price cutting retailers;

(f) Employing its salesmen and other agents and employees to ascertain, investigate and secure information concerning and evidence of price cutting by dealers, and of sales by wholesalers to price cutting retailers;

(g) Using information secured through the means set out in paragraphs (e) and (f) above, and otherwise, to induce and coerce price cutting dealers, to observe and maintain prices in the future, and wholesalers to refrain from the further sale of its medicine to price cutters, by exacting promises and assurances from (1) such price cutters that they will in the future maintain its said resale prices, and from (2), wholesalers that they will not in the future supply price cutters;

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(h) Refusing further supplies of its medicine to price cutters unless and until they have given it satisfactory assurances that they will in the future maintain and observe its said prices;

(i) Refusing to sell wholesalers who have been supplying retail price cutters unless and until such wholesalers agree to discontinue further supplying such price cutters; and

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

As alleged, "As a result of said acts and practices respondent's said resale prices have been and now are generally maintained", and "the direct effect and result of the above alleged acts and practices of respondent has been and now is to suppress competition in the distribution and sale of respondent's medicine; to constrain said dealers to sell said medicine at aforesaid prices fixed by respondent and to prevent them from selling said medicine at such less prices as they may desire, and to deprive the ultimate purchasers of said medicine of those advantages in price and otherwise which they would obtain from the natural and unobstructed flow of commerce in said medicine 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".

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, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission issued and served its complaint upon the respondent, Herb Juice Medicine Co., 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 answer to said complaint, hearings were had before a trial examiner, therefore duly appointed, and testimony was heard and evidence received in support of the charges stated in the complaint and in opposition thereto. Thereafter 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 report, stating its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Herb Juice Medicine Co., is a corporation organized in 1913 under the laws of the State of Tennessee, having its principal place of business in the city of Jackson in said State. It is and has been since its incorporation engaged in the manufacture, among other things, of a certain medicinal preparation known as "Miller's Herb Juice" and the sale and distribution thereof to wholesale and retail dealers throughout the United States. It causes Herb Juice when sold to be transported from its principal place of business and factory in the city of Jackson, Tenn., into and through States of the United States other than the State of Tennessee and its vendees at their respective points of location.

PAR. 2. The said Herb Juice is a proprietary medicine compounded and advertised to be curative or alleviative of constipation, backache, loss of appetite, indigestion, biliousness, nervousness, liver trouble, weak kidneys, tired physical conditions, run down physical conditions, worn out physical conditions and other ailments and is manufactured from a formula owned by respondent.

PAR. 3. In the course and conduct of its said business respondent is in competition with other individuals, partnerships and corporations engaged in the manufacture, sale and transportation in interstate commerce between and among the various States of the United States, of medicines compounded and advertised as curative or alleviative of one or more of the ailments hereinbefore mentioned.

PAR. 4. Respondent having prior thereto manufactured and sold Herb Juice to a limited extent, began in 1925 to extensively advertise same, with the purpose of increasing the demand for and sale thereof, in many parts of the United States, including Missouri, Alabama, and Virginia, and thereupon adopted and thereafter enforced a merchandising system of fixing and maintaining certain specified uniform prices at which Herb Juice should be sold by dealers handling same, and enlisted and secured the support and cooperation of said dealers in enforcing said system.

PAR. 5. In order to carry out said system, respondent employed the following means, among others, whereby respondent and those cooperating with it undertook to prevent and did prevent dealers handling Herb Juice from reselling same at prices less than the resale prices established by respondent.

(a) Respondent fixed the retail price of said medicine at 98 cents and \$1 per single bottle, or \$2.50 for three bottles, and made it generally known to the trade, through its agents and by correspondence, that respondent expected and required dealers to maintain said fixed

retail prices. Respondent's policy and practice in this respect is shown by Commission's Exhibit 1-C, a letter written by respondent to a St. Louis retailer, under date of November 11, 1925:

It is our policy not to sell any dealer that cuts the price on our product below the price maintained by our demonstration store in any city, namely, \$1 per bottle, or three bottles for \$2.50. Therefore this is to advise you that we cannot accept any further orders from you unless we have your assurance that you will not sell Herb Juice for less than 98 cents per bottle.

(b) Respondent frequently through its agents and by correspondence demanded and obtained as a condition of future sales, agreements from dealers, especially from those dealers reported to be price cutters, to maintain the retail prices fixed by respondent.

(c) Respondent, through its agents and by letters, declined to make shipments to jobbers who sold to retailers deviating from the established prices, unless said jobbers would agree not to sell such retailers. Such agreements were in some cases obtained, and the price cutters' source of supply thereby cut off. Typical of correspondence in this respect are:

(1) A letter written to a St. Louis jobber under date of November 14, 1925 (Commission's Exhibit 3-B):

Our representative in St. Louis informs us that one of the department stores the past week advertised and sold Herb Juice for 83 cents per bottle. In view of this fact we are writing you this letter with the view of cutting off the supply of any dealer that sells Herb Juice for less than 98 cents per bottle, or three bottles for \$2.50. Therefore we would appreciate it if you will notify all of your customers that they must not sell Herb Juice for less than 98 cents per bottle, or three bottles for \$2.50, otherwise you will be forced to cut off their supply. We are going to hold up the price on Herb Juice in St. Louis if we have to discontinue selling every jobber, and before we accept any further orders from any jobber in St. Louis we must have their assurance they will not sell Herb Juice to any dealer that cuts the price less than 98 cents per bottle, or three for \$2.50. We trust, therefore, you can see your way clear to give us such assurance before placing your next order.

(2) Letter to a Mobile jobber under date of December 4, 1925 (Commission's Exhibit 11-I):

We are very much pleased to note that you agree not to sell any more Herb Juice to the department store in Mobile that has cut the price to a ridiculous low figure. In accordance with this agreement we are pleased to advise that so long as you adhere to this request from us not to sell these people, we will be pleased to supply you with our goods. Assuring you that it is not our intention in the least to cut off your supply to the regular drug trade, but simply trying to prevent price-cutting of our preparation in your city, your future order, therefore, will have our best attention, so long as you do not supply those people that persist in cutting the price on Herb Juice.

(d) Respondent requested from its dealers reports as to the cutting of prices by other dealers, investigated and acted upon such reports by declining further shipments if the price cutter did not agree to maintain prices in the future.

(e) Respondent refused to fill orders received from jobbers for Herb Juice to be shipped to price cutting retailers.

PAR. 6. The direct tendency and result of the above acts and practices of respondent has been to suppress competition in the distribution and sale of respondent's medicine and constrain said dealers to sell said medicine at the prices fixed by respondent and prevent them from selling such medicine at such prices as they may desire and thus to deprive the ultimate purchasers of said medicine of the advantages which they would have obtained from the natural and unobstructed flow of commerce in such medicine under conditions of free competition.

PAR. 7. There is no evidence that the respondent actively employed any of the methods and practices hereinbefore found to have been employed after June, 1926. The respondent, however, in its answer filed herein, did not plead any abandonment of the methods charged, but denied that any unfair methods had ever been employed by respondent. The respondent later, in its brief filed before the Commission, states as follows:

Insofar as the immediate application of the questions to be determined in this proceeding is concerned, it is in the nature of an abstraction, for whether or not the respondent was guilty of unfair business methods during the latter five months of 1925, the respondent by January 1, 1926, had voluntarily abandoned them and has not resumed them. As business exigencies in the future may require respondent to take measures to protect itself from like occurrences, it would not like to be precluded by an order entered in this cause.

The Commission finds upon the whole record that there is a dangerous probability that the respondent will in the future resume said methods and practices unless restrained by the Commission.

CONCLUSION

The practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are to the prejudice of the public and are unfair methods of competition in commerce in violation 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".

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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, the testimony and evidence, briefs and oral argument, and the Commission having made its findings as to the facts and its conclusion that the respondents have 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, Herb Juice Medicine Co., its officers, agents, and employees do cease and desist from carrying into effect, or attempting to carry into effect, its policy of securing the maintenance of resale prices for its products by cooperative methods in which the respondent and its distributors, customers and agents undertake to prevent the sale of its products for less than said resale price:

(1) By entering into contracts, agreements or understandings with any dealer that respondent's products are to be resold by such dealer at prices specified or fixed by respondent;

(2) By procuring, or attempting to procure, by threats, or otherwise, promises or assurances from any dealer that the prices fixed by respondent shall be maintained by such dealer;

(3) By procuring, or attempting to procure, by threats or otherwise, agreements, promises or assurances from any jobber that such jobber shall refuse to sell respondent's products to retailers not maintaining the price specified or fixed by respondent.

(4) By requesting dealers to report the names of other dealers who do not maintain respondent's resale prices or who are suspected of not maintaining the same, or in any manner enlisting the cooperation of dealers in the maintenance of any resale prices specified or fixed by respondent.

It is further ordered, That the respondent shall, within 60 days after the service upon it of a copy of this order, 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
CHIPMAN KNITTING MILLS AND CHAS. CHIPMAN'S
SONS CO., 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 1295. Complaint Mar. 17, 1925—Decision, Apr. 16, 1928

Where a corporation engaged in the manufacture and sale of hosiery, including a woman's stocking, of which only the instep, sole and toe were knit on flat machinery permanently giving the article the desired shape, that is to say, so shaped in the knitting by the process of "narrowing" and "widening," as is "fashioned" hose, and of which the leg, shaped at the ankle by cutting, was made on a regular circular knitting machine, and which, in its seam up the back, mostly imitation, in its "fashion marks" at the back of the calf on each side of the seam, and under the knee, in its opening on the inside of the welt, and in its heel, cut to shape, and with its full fashioned instep, sole, and "diamond point" toe closely simulated a "fashioned" or "full fashioned" stocking, that is, hosiery knit on flat machinery as above set forth; and said corporation's corporate selling agency;

- (a) Advertised, labeled and branded said stockings as "form fashioned"; and
- (b) Supplied advertising material and literature so describing said hosiery to jobbers and retailers;

With the effect of causing confusion in the minds of the trade and purchasing public, and with the capacity and tendency to cause purchasers and prospective purchasers to buy said stockings, so named and labeled, as and for the better shape retaining and ordinarily more expensive genuine "fashioned" or "full fashioned" hosiery made on flat machines as above set forth:

Held, That such false and misleading advertising, and such misbranding or mislabeling, under the circumstances set forth, constituted unfair methods of competition.

Mr. G. Ed. Rowland for the Commission.

Fraley & Paul, of Philadelphia, Pa., for respondents.

Greene & Hurd, of New York City, for intervenors, National Association of Hosiery & Underwear Manufacturers.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent Chipman Knitting Mills, a Pennsylvania corporation engaged in the manufacture of hosiery and in the sale thereof in wholesale and/or retail quantities throughout various States, and with principal or executive offices and manufacturing plant in Easton, Pa., and respondent Chas. Chipman Sons Co., Inc., a New York