

Complaint

12 F. T. C.

IN THE MATTER OF
SCOTT & BOWNE

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

Docket 1470. Complaint, July 20, 1927—Decision, July 26, 1928

Where a corporation engaged in the manufacture of various products including a medicine sold and distributed under a trade name in large quantities to wholesale and retail dealers throughout the United States; in pursuance of a plan and policy adopted by it for the maintenance of suggested resale prices on its goods,

- (a) Issued and sent out a list of selected wholesale distributors, following announcements of its aforesaid plan and policy, with request for adherence thereto in the matter of suggested minimum prices, from which were omitted names of many concerns who had theretofore long handled its goods without question as to dealings or credit, and to which it restored concerns thus omitted only after receipt of satisfactory assurances of conformance to its policy and suggestion in the matter of the maintenance of its minimum resale prices; and
- (b) Generally refused to sell at wholesale prices to those of its prior distributors who failed or refused to give it the requested assurance in proper form and advised the same that they could buy from its approved distributors at retail buying prices, including in those thus demoted to the status of retailers, compelled to pay retailers' prices, the so-called cooperative wholesalers, who paid their members discounts based on purchases rather than on total business transacted,

With the result of securing the substantial maintenance of its suggested minimum prices by its vendees, and of lessening and suppressing competition in the sale and distribution of its products and particularly of the medicine above referred to, and of thereby preventing said vendees from selling its said products at such different or less price as they might desire, and depriving them and their purchasers of the advantages of free competition in the sale and purchase thereof:

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. John Walsh, of Washington, D. C., 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 Jersey corporation engaged in the manufacture, among other things, of a medicine known as "Scott's Emulsion" and in the sale thereof to purchasers in other States, and with principal office and place of business at Bloomfield, N. J., 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, since about November 16, 1925, in the course 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 dealers, both wholesalers and retailers, handling its said medicine shall resell same, and issuing to said dealers price lists setting forth said uniform minimum 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 supplies of such medicine;

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

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

(f) Employing its salesmen, agents and other employees to ascertain, investigate and secure information and evidence relating to the matters immediately above set forth (par. e).

(g) Using information secured as set forth in paragraphs (e) and (f) and otherwise to induce and coerce price-cutting dealers to observe and maintain prices thereafter and wholesalers to refrain from further sales to price cutters, by exacting promises and assurances from (1) said price cutters that they will in the future maintain such prices, and (2) from wholesalers that they will not thereafter supply price cutters;

(h) Refusing to further supply its medicine to price cutters unless and until they have given it satisfactory assurances that they will

Findings

12 F. T. C.

in the future maintain and observe its said prices, such assurances usually including "favorable responses to inquiry as to what concerns with price maintenance policies have chosen them on their list as a 'selected service jobber,' a term now well-known in the drug trade, as a jobber who willingly agrees to conform to any price maintenance sales plan of a manufacturer."

(i) Refusing to sell wholesale dealers who have been supplying price cutting retailers unless and until said wholesalers agree to discontinue further supplying such price cutters;

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

(k) Offering retailers a special refund on condition that they submit the wholesaler's invoice of the goods on which the refund is claimed, and (2) requesting copies of wholesaler's catalogues, circulars and advertising matter relating to respondent's product, in order to check up on the wholesale prices.

As a result of said acts and practices, as alleged, respondent's said resale prices have been and now are generally maintained, and further, the direct effect and result thereof, as charged, "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, the Federal Trade Commission issued and served a complaint upon the respondent, Scott & Bowne, 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 to the complaint herein, hearings were had, and evidence was introduced upon behalf of the Commission and respondent, before a trial examiner of the Commission duly appointed thereto, and said trial exam-

iner having filed his findings of fact herein and counsel for the Commission and for respondent having filed their exceptions thereto.

Thereupon this proceeding came on for final decision on the record herein. And the briefs having been filed and oral arguments having been heard and duly considered and the Commission 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. Respondent, Scott & Bowne, is now and for many years has been a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business in the city of Bloomfield, in said State.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture among other products of a certain medicine known as "Scott's Emulsion" and the sale and distribution thereof in large quantities and of substantial value from its factory at Bloomfield, N. J., to wholesale and retail dealers throughout the various States of the United States. In the course and conduct of its said business respondent has been and is in competition with other individuals, partnerships, and corporations engaged in the sale and transportation of similar medicines and medicines for similar purposes in interstate commerce between and among the various States of the United States.

PAR. 3. As of date November 16, 1925, and under the guise of re-classifying its distribution, respondent sent out generally to the trade and to all its theretofore distributors a form letter which set forth a plan and policy of respondent for price maintenance by its dealers which included suggestion and request of adherence by its distributors to suggested minimum resale prices in accordance with price lists which accompanied said letter. It is admitted that such plan was general and covered respondent's entire business. The testimony and documentary evidence in the record clearly establishes the fact that the policy and plan was not merely a paper plan but was one which respondent actively sought to enforce.

PAR. 4. As of date November 17, 1925, respondent issued and sent out generally its new list of selected wholesale distributors, from which list were omitted many concerns which had theretofore and for many years handled the goods of respondent as wholesale distributors, without question or controversy as to dealings or credit. Among such omitted concerns were a number of admitted and commonly recognized high standing.

Findings

12 F. T. C.

PAR. 5. By the specific admission of the general sales manager of respondent who was in charge of the carrying out of its new plan and policy for resale price maintenance, not any distributor who was omitted from the list of November 17, 1925, was reinstated by respondent until satisfactory assurance either written or verbal was received by respondent that such omitted distributor was ready and anxious and willing to follow and go along with respondent's policy and suggestions which included such maintenance of suggested minimum resale prices.

PAR. 6. There is claim and some evidence by respondent that in some instances matters other than prices and price maintenance entered into the respondent's omission or cutting off and reinstatement, but the preponderance of the evidence is that as to all such distributors where assurances were called for, given, and received, respondent's entire plan and policy was included, which included assurances and agreement to resell respondent's products at not less than the suggested minimum resale prices.

PAR. 7. To those of their prior wholesale distributors who failed or refused to give respondent the requested and required assurances in proper form, respondent thereafter generally refused to sell at wholesale prices, but advised them that they could buy from respondent's selected list of wholesale distributors at the retailer's buying prices, copies of which retailer's buying price lists being furnished them. This was equivalent to continuing to cut off such wholesalers in that wholesalers could not buy at such disadvantage and supply their trade at any profit to themselves.

Some wholesalers thus discriminated against did actually continue to buy and pay such adverse discriminatory prices in order to maintain their complete line of products for their customers.

PAR. 8. That the suggestion and requirement of assurances of accord with respondent's plan and policy were more than pro forma is established by the following among other matters of record:

Whenever first assurances were not deemed adequate or not made by a sufficiently responsible member of the proposed purchasing concern, additional inquiry and request for adequate responsible assurance was demanded, and in many instances personal interviews were arranged for at respondent's headquarters with the managing officers of respondent which in most instances resulted in satisfactory assurances and accord.

PAR. 9. The so-called cooperative wholesalers which paid to their members discounts or rebates based on purchases rather than on total business transacted, were by respondent regarded as price cutters to the extent of such discount and rebate and so were generally not re-

instated as jobbers but demoted to the status of retailers and compelled to pay retailers' prices.

PAR. 10. In one instance a wholesaler of high credit standing with eleven hundred customers, with which no question as to dealings had theretofore arisen, which had been placed on respondent's new list of selected wholesalers of November 17, 1925, wrote respondent that its practice was to allow 5 per cent from the list price for cash within 10 days, which it did not consider a cut price and asked respondent's view on that practice. Respondent in answer repeated its prior request that its products be sold at list price without discount except the generally termed "cash discounts" of not in excess of 1 per cent or 2 per cent. Thereafter respondent refused to fill repeated orders placed by said concern, until after this proceeding was commenced, when another order placed with respondent was filled.

PAR. 11. In other instances concerns whose orders were refused prior to the commencement of this proceeding have had orders filled which were placed after the commencement of this proceeding. However, respondent has not abandoned its plan and policy but on the contrary asserts its right to continue it.

PAR. 12. The effect of respondent's policy, plan, and practices, as set forth in the preceding findings, has been to secure the substantial maintenance of its suggested minimum resale prices by its vendees, and to lessen and suppress the competition in the sale and distribution of respondent's products, particularly "Scott's Emulsion", thereby preventing its vendees from selling its products at such different or less price as they might desire, and thereby depriving them and their purchasers of the advantage of free competition in the sale and purchase of such products of respondent.

CONCLUSION

1. The practices of the respondent in furtherance of its plan and policy in the procurement of the maintenance of its resale prices for its products as set forth in the foregoing findings, under the conditions and circumstances described therein, have a tendency to, and do, to a substantial degree, unduly lessen and restrict competition between the distributors of respondent's products, wholesalers and retailers.

2. Said policy, plan, and practices so described 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".

By the Commission, Commissioner Myers not participating.

Order

12 F. T. C.

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 testimony and evidence submitted, the trial examiner's report upon the facts and exceptions thereto, and briefs and oral argument, and the Commission having made its findings as to the facts and its conclusion 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, Scott & Bowne, its officers, directors, agents, employees, and successors do cease and desist from carrying into effect or attempting to carry into effect its plan or policy of securing the maintenance of uniform resale prices for its products by any or all of the following means:

(1) Seeking or securing or entering into contracts, agreements, or understandings with customers or prospective customers that they will maintain the resale price specified by respondent.

(2) Procuring either directly or indirectly from its customers promises or assurances that the prices specified by respondent will be observed by such customers.

(3) From directly or indirectly, as a part of any plan or policy, requiring or exacting, from those wholesalers or distributors who fail or refuse to adopt, follow, or abide by respondent's suggested resale prices, higher prices than those at which respondent sells generally to its wholesalers or distributors.

It is further ordered, That the respondent, Scott & Bowne, 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.

Complaint

IN THE MATTER OF

AUTOMATIC BURNER CORPORATION AND A. B. C. OIL
BURNER SALES CORPORATION

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

Docket 1492. Complaint,¹ May 17, 1928—Decision, Sept. 10, 1928

Where a corporation engaged in the manufacture of oil burners, and in the sale thereof through its corporate selling agency, and said agency, advertised that as a result of tests made by the United States Department of Agriculture their burner had been officially proven and stated by said department to have an "over-all efficiency of over 80 per cent" and "topped all other burners", the fact being that in the tests made upon the foregoing and other burners, a large number of separate "runs", showing wide variations, were made for each burner, that due to lack of proper equipment and other matters said tests were not regarded nor promulgated by said department as conclusive, and that the most favorable "run" for the aforesaid burner was selected by said corporation; with the intent and effect of creating the false impression that there was presented a fair compilation and analysis of the complete test, duly promulgated as a Government report:

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

Mr. W. T. Chantland for the Commission.

Ryan, Condon & Livingston, 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 Automatic Burner Corporation, engaged in the manufacture and sale of oil burners for heating homes and business establishments, and respondent A. B. C. Oil Burner Sales Corporation, its sales subsidiary, both Illinois corporations, with principal offices and places of business in Chicago, with claiming Government indorsement falsely or misleadingly and advertising falsely or misleadingly in regard thereto, 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, engaged as above set forth, following

- (1) the undertaking of certain tests of various oil burners by the United States Department of Agriculture, which tests, for lack of

¹ Amended.