

IN THE MATTER OF
MAISEL TRADING POST, 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 2037. Complaint, May 17, 1932—Decision, Aug. 21, 1933

Where the terms "Indian" or "Indian made", generally coupled with the word "jewelry", or with the word or words "bracelet", "ring", "concha belt", or other words descriptive of various articles of jewelry, had long come to be known by the public as defining silver jewelry products made by Indians of the Southwest, by hand processes exclusively, and to be purchased by the public as such, and jewelry sold to the public under said terms had acquired a reputation for beauty, artistic character, individuality, and wearing qualities, and enjoyed a wide, popular demand and distribution, and the Indians and Indian traders concerned had a valuable goodwill in said terms as applied to products hand-hammered and fashioned exclusively by hand tools and processes (enhanced by the widespread sentiment in favor of the Indians, and the products of their arts and handicrafts); and thereafter a corporation engaged in the production of silver jewelry by machinery, with Indian employees, white foreman, officers and sales forces, and in the sale of said jewelry in competition both with Indian traders and others selling jewelry made by Indian silversmiths, and with those engaged in the sale of machine made silver jewelry, in styles similar to those used by the Indians, under such designations as "Indian design" jewelry,

Designated its said products as "Indian" or "Indian made" and sold the same to dealer customers throughout the country as "Indian jewelry" and "Indian made jewelry", and so labeled, and described the same in catalogs and advertising literature furnished to its said customers, with the effect that some were misled and deceived into buying said much more cheaply made products as and for those made exclusively by hand as aforesaid, there was put into the hands of others, not misled, the means whereby the public might be induced to buy its said machine-made products as and for the much more costly and artistic products made by hand, and hand tool processes, exclusively, by Indians, its own customers were aided in substantial numbers in selling its said products to numbers asking for jewelry under said terms without realizing that they were made in large part, or in any part, by machinery, and the public was thereby caused to purchase its said less costly and lower priced jewelry as and for that hand-hammered, fashioned, and ornamented by Indians by the use of hand tools and processes, exclusively, and was induced in a large proportion of cases to purchase said articles which it otherwise would not have purchased; and

With the result that it was thereby enabled to undersell competitors selling true Indian hand-made jewelry, retailers were induced to stock and sell its said machine-made products by reason of the great advantage thus

enjoyed over retailers stocking and selling the much more costly Indian jewelry, made by hand, exclusively, and with the tendency thereby to eliminate true hand-made Indian jewelry from many outlets of trade, to the detriment of the manufacturers and vendors of such jewelry, and with great resulting hardship to Indian silversmiths throughout the Southwest, great numbers of whom could not dispose of the hand-made products of their skill, and the depression in the Indian jewelry line was thereby increased, and with the further result that competitors selling machine-made jewelry, in Indian hand-made styles, as "Indian design", were injured due to retailer's trade advantage in stocking and selling machine-made articles sold to and by them under terms understood by the public as designating the more costly, artistic, durable and prized hand-made products, as above set forth:

Held, That such acts and practices, under the circumstances set forth, were to the prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. Eugene W. Burr for the Commission.

Mr. John S. Simms, of Albuquerque, N.Mex., 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 Mexico corporation engaged in the manufacture and sale of silver jewelry, and with factory and principal place of business at Albuquerque, N.Mex., with misrepresenting nature, or nature of manufacture of product dealt in, and advertising falsely or misleading in said respect, in violation of the provisions of Section 5 of said Act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged as aforesaid in the manufacture of such jewelry by machinery, by Indian workmen, supervised by white foremen and operating modern equipment, including rollers, dies, punching machine, acetylene torches, lathes and stamping machinery, represents its said jewelry products as "Indian Made" and as made by the "Navajos", and (in certain advertising) as made by the Indians by the primitive methods of hand production, in soliciting the purchase of its said product by means of oral representations and by advertisements, circulars, leaflets, catalogs, and other ways; notwithstanding fact that said products are machine made, of lower cost, and less beautiful than the Indian hand-made products with their popularity and reputation for beauty and wearing qualities which the consuming public many years ago came to associate, and still associates, with the term "Indian" and "Navajo"

Findings

18 F.T.C.

as applied to silver jewelry¹ and said various machine made articles do not, as do those made by the Indians, differ, one from another, but are uniform within the respective types.

Such acts and things, done by respondent, as alleged, "have the capacity and tendency to mislead and deceive and do actually mislead and deceive the purchasing public into the belief that the products manufactured and offered for sale and sold by respondent as aforesaid, are products manufactured by hand by American Indians; and they have the tendency and capacity to induce and have induced the purchase of respondent's jewelry in reliance upon such belief; and thereby have diverted and now divert trade from and otherwise injure competitors of respondent", who include in their number numerous "manufacturers, dealers and distributors of jewelry who market such products under representations such as not to be misleading or deceptive to the purchasing and consuming public."

Use by respondent, as charged, of such misleading and deceptive terms and statements constitutes practices or methods of competition, "which tend to and do (a) prejudice and injure the public, (b) unfairly divert trade from and otherwise prejudice, and injure respondent's competitors, and (c) operate as a restraint upon and a detriment to the fair and legitimate competition afforded by hand-made Indian jewelry in interstate trade", and "said false, misleading and deceptive acts, practices and methods of respondent under the circumstances and conditions hereinabove alleged are unlawful 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, Maisel Trading Post, Inc., charging it with the use of unfair methods of competition in commerce in

¹ As alleged in the complaint "there are in the southwest portion of the United States tribes of Indians, including the Navajo Indians in New Mexico and Arizona who for many years have made, and still make, jewelry from silver by hand processes; and the said Indians have through several generations developed great skill and artistic ability in the said craft. The said craft has acquired certain tribal and religious significance and it is part of the practice and tradition therein that no articles so produced by Indian hand labor are identical, one with another. The said 'Indian' or 'Navajo' jewelry has acquired a reputation for beauty and wearing qualities and a wide popularity and distribution, and said Indians have a valuable good will in the terms 'Indian jewelry' and 'Navajo jewelry' as applied to said hand made products. The consuming public many years ago came to associate, and still associates, with the said terms 'Indian' and 'Navajo', as applied to silver jewelry, the significance of hand-made products fashioned and produced by Indian craftsmen."

violation of the provisions of said act. Respondent appeared and filed its answer. Thereafter hearings were held at Gallup, Santa Fe, and Albuquerque, N.Mex., and evidence, both oral and documentary, in support of the complaint and in defense, was introduced before a trial examiner duly appointed by the Commission. The proceeding was submitted on briefs and oral argument and has been brought on for final determination.

Now, therefore, the Commission, having considered the pleadings, the oral and written argument and the record herein and, being duly advised in the premises, makes this its report stating its findings as to the facts and the conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent is a corporation organized and existing under the laws of the State of New Mexico with its plant and principal place of business at Albuquerque in said State. About 1927 a business for the production and sale of silver jewelry was established by one Maurice Maisel, now president of respondent, and this respondent was incorporated and took over the said business about 1930. Respondent has since conducted the said business.

PAR. 2. Respondent, in the regular course of said business, sends sales agents, and advertising material from its said principal place of business in New Mexico into other States and causes its said jewelry when sold to be shipped from its said place of business in the State of New Mexico to purchasers thereof located in numerous States of the United States.

PAR. 3. In the regular course and conduct of its business respondent has uniformly been and still is, in constant competition with other corporations and with individuals and partnerships which are engaged in the sale and distribution of silver jewelry products in trade among the States. Certain of respondent's said competitors are so-called Indian traders and others who buy jewelry made by Indian silversmiths or employ Indian silversmiths and sell the products of said Indians in various States of the country. Both respondent and the said described competitors designate their merchandise as "Indian" or "Indian made" which merchandise is produced by Indians. Others of respondent's said competitors are engaged in the manufacture and sale of silver jewelry not made by Indians, but made in styles similar to those employed by Indians, and these competitors designate their products as "Indian design" jewelry. Respondent and both groups of competitors seek to sell their products to the same class of customers, to wit, curio dealers throughout the United States.

PAR. 4. The Indians of the southwestern section of the United States were not workers in silver before the Spanish conquest. The making of silver jewelry was early taught to them by the Spaniards. For generations many members of the Navajo tribe and of the Zuni and other Pueblo tribes of New Mexico and Arizona have made silver jewelry exclusively by hand tools and processes. These Indians have developed great skill and artistic ability in this craft and their products are widely recognized both by experts and the public as a form of genuine art. The Indians in earlier times received the silver in the form of coins, generally Mexican pesos. They now usually receive it in the form of "slugs" of the standard fineness of "coin silver". After applying heat the Indian silversmith beats the softened silver into the desired form, whether a bracelet, ring, concha for a belt, pendant or other article by hand-hammering and fashions and decorates it by hand tools and processes. The article is often decorated in part by precious stones of which the turquoise is by far the most commonly used. The turquoises are received from whites in finished form ready for mounting.

Many Indian silversmiths use modern hand tools and equipment made by whites including acetylene torches, American or French draw plates for drawing wire, dies, and molds. Others use more primitive tools, dies, molds, and draw plates, largely made by themselves. Machinery is not in use by Indian silversmiths except that the stress of competition from producers of jewelry largely made by machinery, intensified by respondent's misleading trade terms, as hereinbelow in paragraph 10 described, has resulted in the introduction by a very few Indians of machine rollers to replace hand-hammering. Almost all Indian silversmiths working outside of respondent's plant, however, maintain the exclusively hand methods of production. After the article of jewelry is completely fashioned and decorated there is a nonlustrous, white appearance which would in time be removed by wear, but which until removed renders the article unattractive to the public. This is best removed by machines, buffing wheels, which are in use by many Indian silversmiths.

These wheels when legitimately used are not means of production. They are, however, sometimes used dishonestly to wear down new jewelry so as to simulate and to sell, as old, articles of jewelry, which have long been worn by Indians, and have for that reason a sentimental value and a higher price on the market as "Old Pawn". The silver jewelry now made for a nation-wide distribution has a greater variety than that formerly made for the Indians themselves. In the early days of the craft the Indians made and acquired jewelry largely for personal ornamentation and as a means

of investment of family savings. Articles once unknown to the Indian craft are now fashioned by Indian silversmiths for sale to whites, such as cigarette holders, knives, spoons and many others. The tendency of the craft is also strongly toward lighter weight articles as contrasted with the massive jewelry which the Indians formerly made for themselves and other Indians. Genuine "Old Pawn" articles are generally massive in their silver content and are purchased chiefly by connoisseurs and collectors.

PAR. 5. Respondent employs in its plant only Indians as makers of its jewelry products. The number so employed by respondent has varied from about 12 to about 60. They are supervised by a white foreman. The officers and sales forces of respondent are whites.

Respondent buys its silver in the form of sheets of various gauges and rolls the same to the required thickness by machine rollers in lieu of hand-hammering. The sheet is then stamped out by machinery as nearly in the required shape as practicable and is then smoothed by hand-filing processes. If ornamented by turquoises the latter are mounted by hand. If the ornamentation is wholly or in part by design to be superimposed upon, or cut completely through the article of jewelry, this ornamentation is produced by machine. If the ornamentation is by the use of dies, the dies may be inserted in a machine and the ornamentation made mechanically or, in other cases, such ornamentation is added by the use of hammer upon hand-manipulated dies.

Conchas for belts are made by machinery. There are processes of annealing, bending, punching and soldering, which are necessarily done by hand even in respondent's plant. Among types of machines in respondent's plant used for making jewelry are the following: Hand and power drop press, double-gear power rolling mill, foot press, screw press, double bench crank machine, flexible shaft and motor outfit and draw bench crank machine, together with other machines for making tools to be used in silver jewelry making. The use of machinery enables respondent to turn out many times the output per workman, which is possible under exclusively hand methods. The greatest curtailment of time is in the substitution of machine rolling for hand-hammering. The cost of production of respondent's products is far less than that of Indian hand-made jewelry made in like designs and weight of material.

PAR. 6. The individuality, the artistic quality and the beauty of the article is lessened to the extent that machine work replaces hand work in any process of production of silver jewelry. The fashioning of an article of jewelry by the hand application of a hammer is a process of creation into which the silversmith puts his individual

powers as a craftsman and artist. The substitution of mechanical rollers, which reduce the silver to a sheet of precisely the thickness required, diminishes greatly the quality of the product. Persons who are familiar with silver jewelry made in Indian styles can in general correctly sort the exclusively hand-made jewelry from that made with the aid of machinery, on their quality distinctions, and in particular they can distinguish jewelry which has been hand-hammered from machine rolled products. At times, however, pieces on the border line of quality or pieces especially made to disguise the method of production cannot be accurately distinguished. Hand-hammered jewelry is superior to that rolled by machinery in temper and durability.

PAR. 7. With the increase of tourist travel to the southwest and the development of the Indian curio business throughout the entire country, the public demand for Indian hand-made jewelry has gradually increased. The silver jewelry products made by Indians by exclusively hand processes have long been sold to the public as "Indian" or "Indian made", terms generally coupled with the word "jewelry" or with the word or words "bracelet", "ring", "concha belt" or others descriptive of various classes of articles. The public have long known and purchased the said exclusively hand-made jewelry produced by Indians under these terms, constantly understanding by said terms that the product has been, not merely made by Indians, but made by Indians by hand. The jewelry sold to the public under the said terms has acquired a reputation for beauty, artistic character, individuality and wearing qualities and a wide popularity, demand and distribution. The Indians and Indian traders have a valuable goodwill in the said terms as applied to products hand-hammered and fashioned exclusively by hand tools and processes. This goodwill is greatly enhanced by a widespread sentiment in favor of the Indians and the products of their arts and crafts. This public regard for articles purchased under the said described trade terms adheres to the jewelry products of Indians only so far as these products are exclusively made by hand tools and processes. The desire to purchase and retain an article of "Indian" jewelry is almost entirely destroyed if the ultimate buyer believes or learns that the Indian maker thereof employed machinery in the rolling or fashioning of the silver as a partial or entire substitute for hand-hammering and hand-ornamentation.

PAR. 8. Respondent sells its products to dealer customers throughout the country as "Indian jewelry" and "Indian made jewelry" furnishing these dealer customers with catalogs, advertising literature and labels on its jewelry bearing these terms. The said cat-

30

Findings

alogs, advertising literature and labels come to the attention of the ultimate buyer.

PAR. 9. One effect of respondent's trade terms, as in paragraph 8 hereinabove described, is to mislead and deceive some dealer customers, though a minority thereof, into buying respondent's products in the belief that these products are made exclusively by hand. Another effect is to put into the hands of other dealer customers, who know that respondent's products are largely made by machinery, the means whereby the public may be induced to buy, the products of respondent as and for products exclusively made by hand tools and processes by Indians. Dealer customers of respondent are thus in substantial number aided by respondent's said trade terms in selling said products, and do sell them, to numerous customers who ask for jewelry under the said mentioned terms and who do not realize that respondent's products are made in large part, or in any part, by machinery. The said use by respondent of said trade terms causes the public to purchase respondent's jewelry in the belief that said jewelry has been hand-hammered and fashioned by Indians exclusively by the use of hand tools and processes. Thereby the public is induced in a large proportion of cases to purchase articles of respondent's jewelry which, but for the use of respondent's trade terms hereinabove described, they would not purchase.

PAR. 10. The respondent, through the use of rollers and other machines, is able to produce as many times greater output than can be produced by the same number of craftsmen producing by hand tools and processes exclusively. Respondent can therefore undersell its competitors who make and market jewelry exclusively made by hand. By the use of respondent's said described misleading trade terms respondent obtains a great advantage over competitors who sell true Indian hand-made jewelry. Retailers who stock and sell respondent's products have an advantage over retailers who stock and sell Indian jewelry made exclusively by hand. The public, not realizing that respondent's jewelry is produced in large, or in any, part by machinery tend to buy the lower priced article of jewelry; hence retailers are induced to stock respondent's goods in preference to Indian jewelry made exclusively by hand tools and processes.

The tendency is to eliminate true hand-made Indian jewelry from many outlets of trade to the detriment of the manufacturers and vendors of Indian hand-made jewelry. This results in great hardship to Indian silversmiths throughout the southwest section of the United States. Of the large Navajo tribe one-tenth approximately, or 4,500 are dependent for their livelihood on the silver jewelry

craft. Of the smaller Zuni tribe one-fifth and in other tribes many are dependent upon this craft. Great numbers of Indian silver-smiths who employ exclusively hand methods of production cannot dispose of the products of their skill. This is only in part due to the economic depression which strikes especially at luxury merchandise. Other products of Indian skill equally in the luxury class have been notably less curtailed in sales than Indian jewelry. The depression in the Indian jewelry line has been increased by the trade terms of respondent.

PAR. 11. Other competitors of respondent who manufacture and sell jewelry made in general in the styles of Indian hand-made jewelry but who designate their products "Indian design" jewelry are injured by respondent's use of the above described trade terms. By their term "Indian design" jewelry these competitors at least partially place the trade and the public on notice that their products are not necessarily exclusively made by hand tools and processes. There is a trade advantage to the retailers in placing on stock an article which is sold to them, and can the better be sold by them, under trade terms which are understood by the public to describe hand-made jewelry, over placing in stock so-called "Indian design" jewelry.

CONCLUSION

Respondent's trade terms are literally true but mislead and deceive the public and divert trade from respondent's competitors to respondent.

The use of said trade terms by respondent without such explanation as will prevent the misleading and deception of the public is unfair and unlawful.

The acts and practices of respondent under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in interstate commerce within the intent and meaning of Section 5 of an act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been considered by the Federal Trade Commission upon the pleadings, the evidence received, and the oral and written argument, and the Commission having made its findings as to the facts and the conclusion that respondent, Maisel Trading Post, Inc., has violated the provisions of an act of Congress approved

30

Order

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, That respondent, its agents, representatives, and employees, shall cease and desist from designating, describing or offering any of its silver jewelry products, made partly by machinery, for sale in interstate commerce by label, stamp, catalog, advertisement or otherwise, as "Indian" or "Indian made", either with or without the addition of the word "jewelry" or the addition of a word, or words for the class of article, as "bracelet", "ring" "concha belt", or the like, unless the label, stamp, catalog or advertising shall clearly and expressly state, in immediate context with the said descriptive terms in conspicuous lettering at least three-quarters as high and three-quarters as wide as the lettering of said descriptive terms, either that the jewelry so designated, described or offered:

(a) has been rolled by machine, or

(b) has been pressed by machine, or

(c) has been partly ornamented by machine, or

(d) that there has been used in its production a combination of rolling, pressing and/or partial ornamentation by machine, as may have been respectively the method of the manufacture of respondent's various products so designated, described or offered for sale: *Provided, however*, That the use of hand tools or nonmechanical equipment of whatsoever kind in production, and further that the use of buffing wheels for the polishing of fully fashioned pieces of jewelry, shall not preclude the use by respondent of the terms "Indian" or "Indian made" for any hand-made product, without the making of any explanatory statement.

It is further ordered, That 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 and conformed to the order to cease and desist hereinabove set forth.

Complaint

18 F.T.C.

IN THE MATTER OF

M. B. LYTLE

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

Docket 2093. Complaint, Mar. 7, 1933—Decision, Aug. 22, 1933

Where an individual engaged in Utah in producing and marketing alfalfa seed, including a variety thereof commonly designated and known as "Grimm", and in the shipment of said seed in bags into and through various other States, to retail grain dealers, and direct to ultimate purchasers, placed upon bags of his said seed, official Utah seed certification blue tags, which he had caused to be taken and transferred from other bags of seed inspected and certified by the State Department of Agriculture, notwithstanding fact that his aforesaid bags had neither been inspected nor certified by said Department and did not contain the highest quality of certified seed obtainable, nor seed of pure "Grimm" variety as understood from extensive use of such blue tag certification; with effect of misleading prospective purchasers and purchasers into the erroneous belief that said seed was of the same purity of variety and pedigree and had been subjected to the same careful verification of origin, purity of variety, pedigree of quality, freedom from noxious weeds, and hardness as Grimm alfalfa seed of the highest quality, inspected and certified by aforesaid Department for the State of Utah, and with a tendency so to mislead, and to divert trade from competitors to himself:

Held, That such practices, under the circumstances set forth, were to the prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. PGad B. Morehouse for the Commission.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent individual, engaged at or near the town of Delta, Utah, in producing and marketing alfalfa seed, including a variety thereof commonly designated and known as "Grimm", and in shipping said seed into and through various other States, with misbranding or mislabeling as to official indorsement or sponsorship, in violation of the provisions of Section 5 of such Act, prohibiting the use of unfair methods of competition in interstate commerce, in that respondents as alleged, places upon bags of his said seed, neither containing highest quality of certified seed obtainable, nor seed of pure Grimm variety, and neither inspected nor certified by the Utah De-