

Order

IN THE MATTER OF
JAMES KELLEY

MODIFYING CEASE AND DESIST ORDER

Docket 1610. Order, June 15, 1935

Order granting motion of Commission's chief counsel to modify a cease and desist order entered against said respondent in Docket 1610, on April 7, 1930, 13 F. T. C. 284, 290, prohibiting certain misrepresentations by said respondent, his representatives, etc., in connection with the sale of fountain pens, as hereinbelow set forth.¹

Mr. Martin A. Morrison for the Commission.

Koenig, Bachner & Koenig, of New York City, for respondent.

ORDER

In the above-entitled matter, there was this day submitted for the consideration of the Commission:

¹ The entire order against respondent in said case, charged and found to have practiced various unfair methods of competition in connection with the conduct of a mail-order jobbing business in fountain pens, pencils, and specialties purchased from manufacturers and resold to street fakers and peddlers, and doing no manufacturing, though assembling certain of the pens dealt in, and with only a few employees, as reported in 13 F. T. C. 284 et seq., follows as thus modified:

It is now ordered, That respondent, James Kelley, his representatives, agents, servants and employees forthwith cease and desist from—

(1) Representing that he is a manufacturer of fountain pens, pencils and specialties, until and unless said James Kelley engages in the actual manufacturing of fountain pens, pencils and specialties.

(2) Representing that the business of the said James Kelley is that of a large mail order concern, unless and until the volume of business done by the said James Kelley is such as is usually done by a large mail order concern.

(3) Representing that purchasers from the said James Kelley save the "middleman's profit", until and unless said James Kelley manufactures and sells directly to his customers such articles manufactured entirely by him;

(4) Using the name "Iridium" on any part of fountain pens sold by him, until and unless the pen points of such fountain pens are tipped with iridium;

(5) Supplying his customers with fictitious price tags, in the shape of rings to encircle said fountain pens, bearing the figures \$2.50, \$7, \$8, \$10 or any other sum, and supplying his customers with fictitious price tags in any other form;

(6) Assisting, abetting and advising by the use of fictitious price tags and fictitious prices the resale by his customers of fountain pens sold by him to them;

(7) Furnishing his customers with coupons advertising that ultimate purchasers of fountain pens from such customers may obtain such fountain pens at a large reduction for a short time only from a so-called "regular price", stated in such coupons to be of a much greater amount than the price asked in pretended partial consideration of the surrender of said coupons;

(8) Representing the pen points of his fountain pens as being "Warranted 14K", "Warranted" or "14K", until and unless said pen points are 14 carat gold.

(9) Using as a trade name for fountain pens or for pencils the name "Waterson" or any other name in sound or appearance simulating the name "Waterman", or the name of any other manufacturer of fountain pens or of pencils, or any trade name under which any other fountain pens or pencils are commonly known and sold by any other producer or, dealer in, fountain pens or pencils.

(10) Simulating barrel, levers or cap clips or any other part or parts of fountain pens or of pencils manufactured by L. E. Waterman Company or by any other manufacturers of fountain pens or of pencils.

And it is hereby further ordered, That said respondent, James Kelley, shall on or before the first day of August, A. D. 1935, file with this Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist issued by the Federal Trade Commission in the above-entitled proceeding on the seventh day of April, A. D. 1930, as the said order is amended hereby.

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20 F. T. C.

A motion filed in the above-entitled proceeding on the 27th day of May, A. D. 1935, by W. T. Kelley, chief counsel for the Commission, asking that the Commission make and enter in said Docket No. 1610 an order modifying the certain cease and desist order made and entered in said proceeding on the 7th day of April, 1930, in the particulars in said motion to modify specifically set forth.

It appearing that said motion to modify said cease and desist order was on the 28th day of May, A. D. 1935, duly and regularly submitted to the Commission for consideration; that on said day the Commission made and entered in said Docket No. 1610 a certain order, wherein the Commission fixed 2 o'clock p. m. on Monday the 10th day of June, A. D. 1935, at the office of the Commission in the City of Washington, D. C., as the time and place when and where said motion to modify said order would be taken for consideration and action by the Commission; that the Commission as a part of said order so made and entered on the 28th day of May, A. D. 1935, directed the secretary of the Commission to serve due notice upon respondent James Kelley of the filing and pendency of said motion to modify, and of the time and place when and where said motion to modify would be taken up by the Commission for consideration and action; that as a part of said order and as a part of said notice so to be given to respondent by the secretary, the respondent was commanded to appear at said time and place and show cause, if any he has, why said motion to modify should not be sustained by the Commission, or why said order to cease and desist should not be modified as prayed in said motion so filed by the chief counsel; that a copy of the chief counsel's said motion to modify, and a copy of the Commission's said order were by the secretary incorporated in a written notice of the time and place so fixed by the Commission for the consideration of said motion and for action thereon, and said notice was duly served upon the respondent by the secretary; and that attorneys Koenig, Bachner and Koenig, of 70 Pine Street, New York, N. Y., filed with the Commission on May 8, 1935, a written appearance and answer for and on behalf of respondent James Kelley and as his counsel herein; Now, therefore, said motion to modify said cease and desist order, together with said appearance and answer thereto so filed by said counsel for respondent, are now submitted to, and taken up by, the Commission for consideration and action.

The Commission having fully considered the same and being fully advised in the premises, it is ordered:

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1. That said motion to modify said cease and desist order be, and the same hereby is, sustained.

2. That said order to cease and desist heretofore, to wit: April 7, 1930, made entered and issued by the Commission in said Docket No. 1610, be, and the same hereby is, modified and amended in the several particulars hereinafter enumerated, to wit:

1. That said paragraph (9) of said order be amended to read as follows, to wit:

(9) Using as a trade name for fountain pens or for pencils the name "Waterson" or any other name in sound or appearance simulating the name "Waterman", or the name of any other manufacturer of fountain pens or of pencils, or any trade name under which any other fountain pens or pencils are commonly known and sold by any other producer of, or dealer in, fountain pens or pencils.

2. That said paragraph (10) of said order be amended to read as follows, to wit:

(10) Simulating barrel, levers or cap clips or any other part or parts of fountain pens or of pencils manufactured by L. E. Waterman Company or by any other manufacturers of fountain pens or of pencils.

3. That the last paragraph of said order be amended to read as follows, to wit:

And is hereby further ordered, That said respondent, James Kelley, shall on or before the first day of August, A. D. 1935, file with this Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist issued by the Federal Trade Commission in the above-entitled proceeding on the seventh day of April, A. D. 1930, as the said order is amended hereby.

IN THE MATTER OF
DANIEL WALCOFF, DOING BUSINESS AS INTERSTATE
CLOTHING COMPANY, TRANSCONTINENTAL CLOTH-
ING MANUFACTURERS, ETC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLA-
TION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2242. Complaint, Oct. 29, 1934—Decision, June 17, 1935

Where an individual engaged under various trade names in the sale and distribution of men's ready-to-wear clothing, which he purchased from the manufacturers, ready-made and completely finished, and ordered only in "regular" sizes, with no variations, and in inadequate quantities to provide a sufficient stock from which at all times to supply all sizes of the various samples, even in the "regular" sizes, or to enable him properly to fit his customers, which he rarely altered, and did not alter so as to fit as well as clothing usually sold by a ready-to-wear store, and which he sold through agents, called "dealers", who took customer's order, were compensated by receipt, as commission of latter's down payment, and transmitted said order to him, for shipment, by mail, C. O. D. balance, of the clothing ordered, and with place of business consisting of a room used as office and for storage of said clothing and for shipment therefrom by mail to the purchasers, and with office girl and person engaged in such shipping, his only two employees;

In pursuance of a system of business and a method of competition which involved the practice of changing, from time to time, the trade name employed by him and under which he knowingly took advantage of the misrepresentations of his agents, to the detriment of his customers and his own profit, and, notwithstanding frequent notice thereof, took no adequate measures to prevent such misrepresentations or to advise customers thereof other than to insert in contract and receipt form, which the customer usually had no opportunity to read before signing the order and making the down payment, notice that the garments were "kept in stock" and provision intended to relieve himself from misrepresentations of his agents—

- (a) Represented that he operated, owned, or controlled a manufacturing establishment through use of such trade names as Transcontinental Clothing Manufacturers, Interstate Tailoring Company and Lucky Stripe Tailoring Company, and through describing himself as a manufacturer in the order blanks, receipts, and other printed matter used in effecting sales, notwithstanding fact that he neither owned, operated, nor controlled any factory, establishment or place in which the clothing was made, nor had in his employ persons who made the clothing dealt in by him, none of the operations in the manufacture of such clothing was conducted in his place of business or any other place under his direction, supervision, or control, said clothing was cut and made for him by manufacturers on contract and delivered fully made, and at no stage in the processes involved did the goods or partially completed garments pass through his place of business;
- (b) Represented through use of word "Tailoring" and through said agents or so-called "dealers", and the order forms furnished them, with illustrated

directions for taking eight different measurements similar to those taken by tailors, that the garments were tailor-made or made to the purchaser's individual measure, notwithstanding fact that clothing in question was ready-made and completely finished when delivered to him, and failed to advise prospective purchasers as to the facts other than by the aforesaid general statement in contract and receipt form to the effect that garments in question were "kept in stock";

- (c) Represented to prospective customers through said agents that the clothes were made of all-wool cloth, and, in some cases, displayed through them, high-grade all-wool samples superior in quality to those furnished by him, and falsely represented through them that the prices at which said clothing was offered were introductory or advertising prices, or gave other false reasons for their low price, facts being that such clothing was not made of all-wool material or high-grade cloth, but consisted, mostly, of all-cotton material or of cotton with a small mixture of wool, and in many cases was of very poor quality, and the prices charged were the usual and regular prices fixed by said individual;
- (d) Filled orders sent in, in a great number of cases, by sending clothing, which, in material, pattern, or color differed from that ordered by the customer or was inferior to the sample exhibited by the salesman and which, in many cases, varied in a number or all of the aforesaid respects, and supplied, in some instances, suits, the pieces of which failed to match, and, in some cases, filled orders with a garment which differed from that ordered, and frequently sent customers suits and garments which varied widely from those specified, and were wholly unsuited to the wearer; and
- (e) Made very few refunds to customers, who mostly became discouraged after unsatisfactory negotiations and gave up efforts to get adjustments, and failed to refund the money paid, in some cases in which customers refused to accept substitute garments offered in exchange, pursuant to his practice of offering garments, in response to complaints, as unsatisfactory, usually, as the original shipment, and made it a general practice not to refund any of the down payment to the salesman, in cases in which C. O. D. payments for balance had been returned;

With tendency and capacity to confuse, mislead, and deceive members of the public into the belief that he owned, operated, or controlled an establishment in which clothing was made, his clothing was all wool and tailor-made or made to individual measure, and would fit the customer and be of the material, pattern, and color selected from samples, and that orders given would be filled by sending garments of the kind and description ordered, and to induce members of the public to order said clothing and pay therefor because of the erroneous beliefs thus engendered, and divert trade to him from competitors, including those who in no wise misrepresent their product in the particulars or manner above set forth or otherwise, or use such methods, and to their substantial injury and prejudice, and with the effect of defrauding his customers, in that they were sent articles of clothing of a kind and description which they did not order or intend to buy and which, in many cases, they could not use:

Held, That such practices, under the conditions and circumstances set forth, were all to the injury and prejudice of the public and competitors, and constituted unfair methods of competition in commerce, in violation of the provisions of Section 5.

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Mr. Harry D. Michael for the Commission.

Obermeier & Gardener, of New York City, for respondent.

COMPLAINT

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, having reason to believe that Daniel Walcoff, doing business at various times under various trade names including Interstate Clothing Company, Transcontinental Clothing Manufacturers, Nation Wide Clothing Company, Coast to Coast Clothing Company, Interstate Trouser Company, Specialty Clothing Company, and Interstate Tailoring Company, as well as other trade names, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be to the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. That said respondent, Daniel Walcoff, trading under one or another of the trade names as aforesaid, as well as other trade names, is now and has been for more than two years last past engaged in the sale and distribution in interstate commerce of men's ready-made clothing, with his office and principal place of business in the City of New York in the State of New York. That said respondent in the course and conduct of his said business causes his said clothing, consisting of men's suits, trousers, overcoats, and topcoats, to be transported in interstate commerce from his said place of business in New York to, into, and through States of the United States other than New York to various and numerous persons in such other States to whom said clothing is or has been sold.

PAR. 2. That during the time above mentioned, other individuals, firms, and corporations in various States of the United States are and have been engaged in the sale and distribution in interstate commerce of men's clothing, consisting of suits, trousers, overcoats, and topcoats, and such other individuals, firms, and corporations have caused and do now cause their said clothing, when sold by them, to be transported from various States of the United States to, into, and through States other than the State of origin of the shipment thereof. Said respondent has been, during the aforesaid time, in competition in interstate commerce in the sale of his said clothing with such other individuals, firms, and corporations.

PAR. 3. That said respondent in his order blanks, in his receipts and elsewhere in his printed matter describes himself as a manufac-

turer of clothing. That in the trade name most recently used by respondent, to wit, Transcontinental Clothing Manufacturers, and in a previous trade name used by him, to wit, Interstate Tailoring Company, it was and is represented thereby that respondent operates or owns or controls a manufacturing tailoring establishment. That, in truth and in fact, respondent did not during said period and does not now own, operate, or control a factory or place where clothing is manufactured or made, nor does he have nor has he had during said period persons in his employ who make the clothing which he sells. That respondent's sole place of business used in the conduct of his business as aforesaid is a combined office and storeroom where the ready-made clothing which he sells is stored and from which it is shipped out to the persons to whom it is sold. That the only persons in his employ in the conduct of said business are a girl or woman who attends to the office work and a boy or young man who attends to shipping out the said ready-made clothing.

PAR. 4. That respondent, in conducting the sale of his ready-made clothing, makes use of salesmen who are designated as dealers but who, for all practical purposes, are the agents and representatives of respondent. That such so-called dealers receive as payment for their services the down payments made by purchasers which are in fact commissions on such sales. That respondent furnishes his said representatives with sample kits, order forms, and receipts, and fixes the prices at which his said clothing is to be sold. That orders are signed by the ultimate purchaser and not by the so-called dealer and are forwarded to respondent and accepted by him as orders from the customers. That such orders are filled by respondent by direct shipment to the purchaser by C. O. D. mail without the intervention of the so-called dealer in any way. That many of such representatives of respondent have been accustomed to and do represent to prospective customers that respondent's clothes are made of all-wool cloth, and that they are tailor-made or made to the purchaser's individual measure. That, in truth and in fact, respondent's clothing is not made of all-wool cloth and is not tailor-made or made to the purchaser's individual measure but is procured by respondent in large quantities in stock sizes and not even minor alterations are made to conform to the purchaser's measurements.

That respondent, in the order forms furnished by him, provides for numerous measurements to be taken for the clothing ordered and thereby causes the customer to believe that the clothing offered for sale is made to measure and contributes to and encourages the misrepresentations of the salesmen. That many of said salesmen have represented on numerous occasions that the prices at which respond-

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ent's clothing is sold are introductory or advertising prices or that they are below the regular or usual prices when, in fact, the prices charged are the usual and regular prices at which respondent's said clothing is sold. That respondent is well aware of all of such misrepresentations and practices used by his salesmen and has done nothing to prevent the same or to inform prospective purchasers thereof before orders are signed and payments made. That respondent has sought to relieve himself from liability for such misrepresentations and practices by restrictive provisions in his form of receipt.

PAR. 5. That respondent, in filling orders sent in by his salesmen, as aforesaid, in a great number of cases has filled the same by sending clothing of different material, pattern, or color from that ordered, or of inferior material to the sample shown. In some cases the different pieces of suits have not matched in material, pattern, or color. In some cases orders have not been filled as given, but an article of clothing different from that ordered has been sent to the purchaser. In a great number of cases suits and other articles of clothing have been sent to purchasers in sizes widely at variance from the sizes ordered and wholly unsuited to the wearer. That, in many of such cases, when complaint is made, respondent offers to make exchanges, but the exchanges are usually as unsuitable and unsatisfactory to the customers in one or more of the particulars as aforesaid as were the original shipments. That in some cases where customers have refused to accept substitute garments, respondent has failed to make refund of the money paid.

PAR. 6. That the representations of respondent and his salesmen as aforesaid have had and do have the tendency and capacity to confuse, mislead, and deceive members of the public into the belief that respondent owns or operates or controls an establishment where clothes are made, that his clothing is all-wool and that it is tailor-made or made to individual measure, that clothing ordered will fit the customer and will be of the material, pattern, and color as selected from sample, and that orders given will be filled by sending garments of the kind and description ordered, when such are not the facts.

That respondent's practices in filling orders as aforesaid result in defrauding his customers in that they are sent articles of a kind and description which they did not order or intend to buy.

That said representations of respondent and his salesmen have the tendency and capacity to induce members of the public to order respondent's clothing and to pay money therefor because of the erroneous beliefs engendered as above set forth, and to divert trade to respondent from competitors engaged in the sale of men's clothing in

interstate commerce. That respondent has been enabled to continue his practices as herein set out by frequent change of the trade name under which he operates.

PAR. 7. The above acts and things done by respondent are all to the injury and prejudice of the public and the competitors of respondent 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", approved September 26, 1914.

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, Daniel Walcoff, doing business under the various trade names as above set forth, charging him with the use of unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act.

Respondent having entered his appearance and filed his answer to said complaint, hearings were had and evidence was introduced in support of the allegations of said complaint and in opposition thereto before a trial examiner of the Federal Trade Commission theretofore duly appointed.

Thereupon this proceeding came on for final hearing, and counsel for the Federal Trade Commission and counsel for respondent having submitted briefs, and the matter having been set down for oral argument before the Commission, and counsel for respondent having failed to appear after due notice of the same, the matter is now considered upon the record and upon the briefs filed without oral argument, and the Commission, having duly considered the record and being fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Daniel Walcoff, was, at the time of issuance of the complaint and during the period of time in which hearings were conducted in this case, engaged in the sale and distribution in interstate commerce of men's ready-to-wear clothing with his office and principal place of business located in the City of New York in the State of New York. Respondent had been so engaged in said business for a period of five years or more prior to the is-

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suance of complaint herein. Respondent has conducted said business under various trade names among which were those named in the title hereof, to wit: Interstate Clothing Company, Transcontinental Clothing Manufacturers, Nation Wide Clothing Company, Coast to Coast Clothing Company, Interstate Trouser Company, Specialty Clothing Company, and Interstate Tailoring Company. For the most part, said names were used at different times and one trade name succeeded another in the conduct of the sale of respondent's clothing.

The said name "Interstate Clothing Company" appears to have been used by respondent in certain transactions such as banking relations and relations with the clothing industry during the greater part of said period. It was also used as a trade name in the sale of clothing for considerable time. The trade name "Transcontinental Clothing Manufacturers" was the last trade name used generally by respondent in the sale of clothing. The trade name "Interstate Trouser Company" was used by respondent for a time in the sale of trousers only. Other trade names used by respondent were "Grand Clothing Company" and "Lucky Stripe Tailoring Company." Respondent, in the course and conduct of his business, has caused his said clothing, consisting of men's suits, trousers, overcoats, and topcoats, to be transported in interstate commerce from his place of business in the State of New York to, into, and through States of the United States other than the State of New York to various and numerous persons in such other States to whom such clothing has been sold.

PAR. 2. During the period of time above mentioned, other individuals, firms, and corporations in various States of the United States are and have been engaged in the sale and distribution in interstate commerce of men's clothing consisting of suits, trousers, overcoats, and topcoats, and such other individuals, firms, and corporations have caused and do now cause their said clothing, when sold by them, to be transported from various States of the United States to, into, and through States other than the State of origin of the shipment thereof. The respondent has been, during the aforesaid time, in direct and substantial competition in interstate commerce in the sale of his said clothing with such other individuals, firms, and corporations.

PAR. 3. Respondent, in the conduct of his business, as aforesaid, has represented that he operates, owns, or controls a manufacturing tailoring establishment. Some of such representations have been made through the use of some of the names under which he has conducted his business, to wit: Transcontinental Clothing Manufactur-

ers, Interstate Tailoring Company, and Lucky Stripe Tailoring Company. In truth and in fact, respondent did not during the period when such representations were made own, operate, or control a factory, establishment, or place where clothing was manufactured nor has he had, during such period, persons in his employ who made the clothing which he has had for sale. None of the operations in the manufacture of the clothing which he has had for sale was conducted in his place of business or at any other place under his direct supervision or control. During said period respondent's place of business has consisted of one room, used as an office and also as a storeroom where the ready-made clothing, which he has had for sale, has been stored, and from which it has been shipped out by mail to the persons to whom it has been sold. The only persons in his employ have been an office girl, who attended to the office work, and a young man, who attended to shipping out the ready-made clothing. Said clothing was cut and made for respondent by clothing manufacturers on contract and delivered fully made. At no stage of such processes did the goods or partially completed garments pass through respondent's place of business.

In addition to the aforesaid representations by use of said trade names, respondent has described himself as a manufacturer in the order blanks, receipts, and other printed matter used by him in effectuating sales.

PAR. 4. Respondent, in conducting the sale of his ready-made clothing, has made use of salesmen who are designated by him as "dealers". Such salesmen received as payment for their services the down payments made by purchasers. Respondent furnished said salesmen with sample kits, printed order forms and receipts. He fixed the prices at which his clothing was to be sold. Orders were signed by the ultimate purchasers and not by the so-called "dealers". Such signed orders were forwarded to respondent by the salesmen and were accepted and acted upon by respondent as orders from the purchasers by sending clothing by C. O. D. mail direct to such purchasers and receiving the C. O. D. payments made as a result thereof. Such so-called "dealers" had no connection with the transactions after mailing the orders taken to respondent. Such salesmen were, at least for the purposes of this case, the representatives or agents of respondent and were not independent dealers, as usually understood. They bought nothing from respondent. They neither acquired title to the clothing ordered nor did they handle the same in any way. The down payments received by said salesmen were, in fact, commissions on the sales they made.

Many or all of the representatives of respondent were accustomed to and did falsely represent to prospective customers that respondent's clothes were made of all-wool cloth, that they were tailor-made or made to the purchaser's individual measure. On the order forms furnished by respondent were directions for taking eight different measurements, together with pictures illustrating the same. These measurements are similar to those taken by tailors in taking measurements for suits made to individual measure. Such directions and pictorial representations imply that the clothing for which such measurements are taken will be made to measure. Other instructions given on the order form add to the implication that the clothing will be tailor made or made to measure. In some cases, respondent's salesmen have used high grade all-wool samples superior in quality to the samples furnished by respondent.

The clothing shipped by respondent to his customers was not tailor-made or made to measure. It was not made of all-wool material or of high-grade cloth. In most cases it was made of all-cotton material or of cotton with a small admixture of wool. Much of it was a very poor quality. Many of respondent's salesmen were accustomed to falsely represent and did represent to prospective customers that the prices at which respondent's clothing was offered were introductory or advertising prices, contrary to the facts, or gave other false reasons to explain the low price thereof, when in fact the prices charged were the usual and regular prices as fixed by respondent.

Respondent is and has been at all times well aware of the practices of his salesmen in thus falsely representing his clothing, as aforesaid. He has continually received complaints of such misrepresentations from customers detailing the nature of such misrepresentations as aforesaid. Such complaints have numbered well into the hundreds during the course of only a few months. Respondent has taken no adequate measures to prevent such practices or to advise customers of the same or to properly adjust their transactions on account thereof. The only measure taken to inform prospective purchasers in this regard is a general statement in the contract and receipt forms to the effect that the garments involved "are kept in stock" and also a provision intended to relieve respondent from liability for misrepresentations. These provisions are rarely read by customers and then only after the transaction has been closed. Customers usually have no opportunity to read such contract and receipt before the order is signed and the down-payment made.

Respondent's clothing is ready-made and completely finished when delivered to him. He orders it only in what is called "regular" sizes.

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He has no variations in any one size. No alterations are made by him except in very rare instances. He has not kept a sufficient stock on hand at all times to supply all sizes of the various samples, even in regular sizes. He has not carried a stock of clothing so as to enable him properly to fit his customers nor has he had alterations made so that the clothing would fit as well as that usually sold by a ready-to-wear store.

PAR. 5. Respondent, in filling orders sent in by his salesmen, as aforesaid, in a great number of cases has filled the same by sending clothing of different material, pattern, or color from that ordered or of inferior material to the sample shown, and, in many cases, variations have occurred in a number or all of such particulars. In some cases the different pieces of suits have not matched. In some cases orders have not been filled as given but an article of clothing different from that ordered has been sent to the purchaser. In a large number of cases suits and other articles of clothing have been sent to purchasers in sizes widely at variance from the sizes ordered and wholly unsuited to the wearer. When complaints have been made in all of such cases as aforesaid, respondent has pursued the practice of offering to make exchanges, but the clothing sent in exchange has been usually as unsuitable and unsatisfactory to the customer in one or more of the particulars as aforesaid, as were the original shipments. Refunds of money paid have been very few. In most cases as hereinbefore set out, customers of respondent have become discouraged after unsatisfactory negotiations and have given up efforts to get adjustments. In some cases where customers have refused to accept substitute garments, respondent has failed to make refund of the money paid. Respondent has made it a general practice not to refund any of the money paid to salesmen in cases where C. O. D. payments have been refunded.

PAR. 6. Respondent's practices as heretofore outlined became so general and continued for such a period of time as to become a system of business and a method of competition. He has knowingly and deliberately, over a period of years, taken advantage of the misrepresentations and fraudulent practices of his salesmen to the detriment of his customers. He has knowingly profited by such transactions and has continued to do so after notice of the practices involved had been specifically brought to his attention.

PAR. 7. The representations of respondent and his salesmen, as aforesaid, have the tendency and capacity to confuse, mislead, and deceive members of the public into the belief that respondent owns or operates or controls an establishment where clothing is made; that respondent's clothing is all-wool and that it is tailor-made or

made to individual measure; that clothing ordered from him will fit the customer and will be of the material, pattern, and color as selected from samples; and that orders given will be filled by sending garments of the kind and description ordered, when such are not the facts as he had said and from statements said fit of quantity and quality.

Respondent's practices in filling orders and his methods as aforesaid result in defrauding his customers in that they are sent articles of clothing of a kind and description which they did not order or intend to buy and which, in many cases, they cannot use, because of the said representations of respondent and his salesman have the tendency and capacity to induce members of the public to order respondent's clothing and to pay money therefor because of the erroneous beliefs engendered as above set forth, and to divert trade to respondent from competitors engaged in the sale of men's clothing in interstate commerce. Respondent has been enabled to continue his said practices and methods by changes of the trade names under which he has operated.

PAR. 8. There are and have been among the competitors of respondent in the sale of men's clothing, those who in no wise misrepresent their clothing in the particulars or in the manner as above set forth or otherwise, or who in no wise use the methods of respondent as above set forth, and respondent's acts and practices as hereinbefore set forth have tended to divert business to respondent from his competitors, to the substantial injury and prejudice of such competitors.

CONCLUSION. The practices of said respondent, under the conditions and circumstances described in the foregoing findings, are all to the injury and prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce and are 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."

ORDER TO CEASE AND DESIST.

This proceeding having been duly heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, the testimony in support of the charges of said complaint and in opposition thereto and briefs filed herein, oral argument not having been had on account of failure of counsel for respondent to appear at the time and place fixed therefor after notice thereof duly given, and the Commission having made its findings as

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to the facts and its conclusion that said 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."

It is ordered, That respondent, Daniel Walcott, doing business under his own name or under any trade name including the following, to wit: Interstate Clothing Company, Transcontinental Clothing Manufacturers, Nation Wide Clothing Company, Coast to Coast Clothing Company, Interstate Trouser Company, Specialty Clothing Company, Interstate Tailoring Company, Grand Clothing Company, and Lucky Stripe Tailoring Company, or directly or indirectly in any other way, name or manner, his agents, representatives, servants, and employees, in connection with the sale, offering for sale, or distribution in interstate commerce and in the District of Columbia of men's clothing, do cease and desist from:

1. Representing directly or by implication or by the name under which his business is conducted or through salesmen or by other means that he is manufacturer of men's clothing unless and until he owns and operates or controls and operates a clothing manufacturing establishment.

2. Representing directly or by implication or by the use of the word "Tailoring" or word of like signification in the name under which his business is conducted, or otherwise, that he conducts a tailoring establishment unless and until he owns and operates or controls and operates an establishment where tailor-made clothing is made to the customer's individual measures.

3. Representing directly or by implication or through salesmen that the material from which his clothing is made is all-wool or of high-grade or that his clothing is tailor-made or made to measure, unless and until such are the facts, or accepting and failing to refund money collected by him and his salesmen where money has been paid as a result of such misrepresentations where refunds have been demanded by customers who have returned the clothing received or who offer to do so.

4. Filling orders for clothing with articles other than those ordered or in sizes wholly unsuited to the customers and at unreasonable variance from the sizes ordered.

It is further ordered, That respondent within 60 days from and after the date of the service upon him of this order shall file with the Commission a report in writing, setting forth in detail the manner and form in which he is complying with the order to cease and desist hereinabove set forth.

Complaint

20 F. T. C.

IN THE MATTER OF
DEWAN LABORATORIES, INC.

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

Docket 2259. Complaint, Dec. 11, 1934—Order, June 19, 1935

Consent order requiring respondent, its officers, agents, etc., in connection with the sale or offer of any depilatory in interstate commerce, forthwith to cease and desist from—

- (a) Using the word "Permanent" or any other word of similar meaning, or the word "Perm-Nent" or any other word coined from the word "Permanent" as the name of any depilatory made by it;
- (b) Representing in advertisements, catalogs, bulletins, or otherwise that such depilatory devitalizes the hair roots and causes destruction of the hair bulb;
- (c) Representing as aforesaid that such depilatory will not cause any burning, smarting, or irritation of the skin; provided that nothing herein shall prohibit the use of such representations if coupled in all cases with the statement in advertisements, and every other form of printed matter, that such burning, etc., will not be caused only if directions furnished by it for the use of such depilatory are strictly followed; or
- (d) Representing as aforesaid that such depilatory gives lasting results and retards further regrowth of the hair, unless such representations be qualified by appropriate language to the effect that such depilatory will not, in all instances, give lasting results or retard such further regrowth.

Mr. Edward L. Smith and Mr. John W. Hildrop for the Commission.

Petit, Olin & Overmyer, of Chicago, Ill., for respondent.

COMPLAINT

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, having reason to believe that DeWan Laboratories, Inc., hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, DeWan Laboratories, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the city of Chicago in said State. It is now

and for more than two years last past has been engaged in the manufacture and sale, in commerce between and among the various States of the United States, of a certain alleged depilatory, and has caused and still causes said alleged depilatory, when sold by it, to be shipped from its place of business in the city of Chicago aforesaid to the purchasers thereof located in the State of Illinois and in States other than the State of Illinois, and there is now and has been at all times hereinafter mentioned a constant current of trade and commerce by said respondent in said alleged depilatory between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business the respondent is now and has been at all times hereinafter mentioned in substantial competition with other corporations and with partnerships, firms, and individuals engaged in interstate commerce in the sale and distribution of products offered for sale and sold for the purposes for which respondent's alleged depilatory is advertised and represented, as hereinafter set forth, to be useful and effective.

PAR. 2. The said alleged depilatory manufactured and sold by the respondent, as hereinabove mentioned, has been and is designated by it as "DeWans Perm-Nent Hair Remover", "DeWans Permanent Hair Remover", and "DeWans Special Facial Hair Remover". In the course and conduct of its business, as described in paragraph 1 hereof, the respondent, in soliciting the sale of the aforesaid alleged depilatory manufactured and sold by it, has falsely represented and still falsely represents in its advertisements, circulars and catalogs, and in other printed matter distributed by it generally through the mails, among other things, as follows:

- (1) "A facial hair remover that gives lasting results."
- (2) "It actually gives lasting results."
- (3) "Without smarting or reddening the skin, even the least little bit."
- (4) "Definitely discourages further regrowth."
- (5) "No burning or smarting."
- (6) "Really lessens the regrowth."
- (7) "'* * * not irritating even in the slightest."
- (8) "Won't smart or irritate."
- (9) "Doesn't smart or irritate."
- (10) "It immediately dissolves and removes all surface hair and a portion of each hair below the skin surface. But DeWans does not attack or irritate the skin and does not make the skin rough, red or coarse."

(11) "DeWans tends to devitalize the roots of the hairs to which it is applied, to discourage hair growth. If regrowth does

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and come it is the soft, downy hair, you knew as a child, not the stiff, coarse stubble charged to razors and other less modern ways. (12) "Leave on for four minutes, but if, using on the arms or legs where the hair has been coarsened by shaving, leave on five to seven minutes. Then, rinse off gently with water." (13) "Before using DeWans, put a clock in front of you and time your treatment. Apply whenever necessary. Usually, every two or three weeks will suffice, but more frequent and consistent treatments, not oftener than once every four days, will tend to more quickly bring about a change in the hair growth and, in time, should cause a destruction of the bulb." (14) "Don't attempt to use DeWans on your eyebrows. A small portion of the powder or paste might get into your eyes and cause a very painful irritation. Take your bottle of DeWans to a beauty shop, where, with your head in a reclining position and your eyes covered, the eyebrow treatment may be safely given." (15) "Don't allow the water used in removing DeWans to get into your eyes." (16) "Don't apply DeWans twice the same day or the same evening." (17) "Always apply cold cream after removing DeWans." PAR. 3. In truth and in fact said alleged depilatory, when used on the face or skin, will not permanently remove hair therefrom or definitely discourage or lessen future regrowth or devitalize the hair roots; and in truth and in fact said alleged depilatory will not safely remove hair from the body or accomplish any of the results represented by the respondent as set out in paragraph 2 hereof, or any of such results; and in truth and in fact the use of the said alleged depilatory will cause burning, smarting, and irritation (and will have other deleterious effects upon the skin or parts treated).

PAR. 4. The "aforesaid misrepresentations" of the respondent, as set out in paragraph 2 hereof, and its use of the words "Permanent" and "Perm-Nent" as a part of the name of its alleged depilatory have the capacity and tendency to mislead and deceive and have misled and deceived purchasers and prospective purchasers into the beliefs that the misrepresentations made by the respondent, (as set out in paragraph 2 hereof, are true and it, (the respondent), has caused the purchase of such alleged depilatory from respondent in such beliefs, thereby trade has been diverted to respondent from competitors engaged in interstate commerce in the sale of depilatories, and as a consequence thereof substantial injury has been done by the respondent to substantial competition in interstate commerce.

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PAR. 5. The above alleged acts and things done by respondent are all to the injury and prejudice of the public and competitors of the respondent in interstate commerce (within the 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", approved September 26, 1914.

ORDER TO CEASE AND DESIST

The respondent herein having filed its answer to the complaint in this proceeding and having subsequently filed with this Commission its motion that it be permitted to withdraw its said answer and that it be permitted to file in lieu thereof as a substituted answer, the draft of a proposed substituted answer annexed to the said motion; and the Commission having duly considered the said motion—

It is hereby ordered, That the said motion be and the same is hereby granted; that the said answer be and the same is hereby withdrawn; and that the said proposed substituted answer be, and the same is hereby filed in lieu of the said answer so withdrawn.

And the said respondent in and by its said substituted answer having waived hearings on the charges set forth in the complaint in this proceeding, and having stated in its said substituted answer that it does not contest the said proceeding, and having consented in its said substituted answer that the Commission, without trial, without evidence, and without findings as to the facts or other intervening procedure, might make, enter, issue and serve upon the said respondent, an order to cease and desist from the methods of competition charged in the complaint; and the Commission being fully advised in the premises—

It is hereby further ordered, That the respondent, DeWan Laboratories, Inc., its officers, agents, servants, and employees in connection with the sale or the offering for sale by said DeWan Laboratories, Inc., of any depilatory in interstate commerce, forthwith cease and desist from using the word "Permanent" or any other word of similar meaning, and the word "Perm-Nent" or any other word coined from the word "permanent" as the name of any depilatory manufactured and sold by it.

And it is hereby further ordered, That the said DeWan Laboratories, Inc., its officers, agents, servants, and employees in connection with the sale or the offering for sale by said DeWan Laboratories, Inc., of any depilatory in interstate commerce, forthwith cease and desist from representing in and by advertisements, catalogs, bulletins, or in any other way:

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1. That such depilatory devitalizes the hair roots and causes destruction of the hair bulb;

2. That such depilatory will not cause any burning, smarting or irritation of the skin; provided that nothing herein shall prohibit the use of such representations if the representations in all cases are coupled with the statement in advertisements, catalogs, bulletins, and every other form of printed matter, that burning, smarting or irritation of the skin will not be caused only if directions furnished by said DeWan Laboratories for the use of such depilatory are strictly followed;

3. That such depilatory gives lasting results and retards further regrowth of the hair unless such representations be qualified by appropriate language to the effect that such depilatory will not, in all instances, give lasting results or retard further regrowth of the hair.

And it is hereby further ordered, That the said respondent shall within 60 days from the day of the date of the service upon it of this order, file with this Commission its report in writing stating the manner and form in which it shall have complied with this order.

Syllabus

IN THE MATTER OF

BUTTERICK PUBLISHING CO. ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 2171. Complaint, Apr. 26, 1934—Decision, June 20, 1935*

Where five corporations engaged in publication and sale of various periodicals among the States and Territories, and three corporations engaged in the sale and distribution thereof, with an aggregate business amounting to substantially more than 12,000,000 copies of each issue, and in competition with one another and with other publishers and sellers of periodicals, and also with distributors of the much lower priced, second-hand or back-number magazines, including two dealers in whole back-number magazines, distributed by them in eastern Massachusetts through some eight hundred retailers, 90 percent of whom dealt also in current periodicals; acting through a committee created by them to deal with the matter—

- (a) Notified some thirteen wholesalers distributing to the above involved territory, 90 percent. of whose retailer outlets therein were included among those through whom the two aforesaid dealers distributed their whole back-number magazines, that they, the retailers, would no longer be permitted to handle both back-number magazines and current issues, and must choose between the two, and that if they continued dealing in the former, they would be denied supplies of the latter;

With the result that about half of the retail dealers affected in said territory by the aforesaid notice and demand, duly transmitted to and made upon, them by said wholesalers, discontinued dealing in the back-number periodicals of the said two distributors thereof, and they had difficulty in securing other retail outlets; and

- (b) Sought to interfere with the sources of supply of back-number distributors by bringing pressure to bear upon the Salvation Army and other sources of supply of back-number magazines, to prevent their sale to those concerns distributing the same to retail dealers;

With the result that competition between them and their wholesalers on the one hand, and said distributors of back-number magazines on the other, was substantially lessened, and the public, to a substantial extent, was deprived of the benefits that would normally flow therefrom;

Held, That such acts and practices, under the circumstances set forth, were to the injury of competitors and to the prejudice of the public, and constituted unfair methods of competition in violation of Section 5.

Mr. Robt. N. McMillen for the Commission.

Mr. Manheim Rosenzweig, of New York City, for Butterick Publishing Co. and International Circulation Co., Inc., who also appeared along with *Mr. Chester W. Johnson*, of Minneapolis, Minn., and *Mr. John F. McGovern*, of Washington, D. C., for Midwest Distributors, Inc.

Mr. Joseph Schultz, of New York City, for McFadden Publications, Inc., and Street & Smith Publications, Inc.