

Syllabus

21 F. T. C.

IN THE MATTER OF
L. & C. MAYERS CO., INC.

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

Docket 2038. Complaint, May 18, 1932—Decision, Oct. 30, 1935

Where a corporation engaged as diamond importer and dealer in jewelry, silverware, diamonds, leather goods, and kindred items, described itself on and in its catalogs as wholesale jeweler, and set forth therein, in accordance with jobbers' and wholesalers' practice, purported list prices and dealer discounts, with intent of inducing purchasing public to buy such articles from it as and from a wholesaler selling retail trade at dealer prices;

The facts being that said supposed list prices did not, discounted as set forth, represent wholesale prices of articles involved, but were higher than those usually charged by wholesale jewelers; well over half its total sales were (1) to industrial concerns, public utilities, banks and other similar organizations, purchasing either for their own use and not in quantity lots, or for resale, for the benefit of their employees, and (2) to mutual buying clubs of fraternities, colleges or universities, and to employees of industrial organizations, purchasing in such way to obtain price and other benefits of such buying, not for resale but for the use of organizations or their members; and it did not in any substantial way solicit the retail jewelry trade by catalogs or salesmen, manufactured less than 10 percent of all the jewelry handled by it, and did not constitute a wholesale jeweler, i. e., seller to the trade for resale, and, excepting only sales to industrial concerns and similar organizations purchasing in quantity lots and not for resale but for their own use, seldom, if ever, seller to the purchasing public;

With effect of misleading and deceiving purchasing public into the belief that the products offered and sold by it were sold at wholesale prices, and that those who bought such articles from it purchased at such prices and saved retailer's profit, and inducing such purchases in reliance upon such erroneous belief, and with capacity and tendency so to do and unfairly divert trade to it from competitors who truthfully describe their status and their prices, to the substantial injury of substantial competition in interstate commerce:

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

Before *Mr. Edward M. Averill*, trial examiner.

Mr. Robert H. Winn and *Mr. Edward L. Smith* for the Commission.

Mr. John C. Gall, of Washington, D. C., and *Mr. Sidney Newborg* and *White & Case*, of New York City, for respondent.

COMPLAINT

Acting in the public interest, 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 charges that L. & C. Mayers Co., Inc., a corporation, hereinafter referred to as respondent has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business in the city of New York in said State. Respondent is now and for more than two years last past has been engaged in the business of importing for resale diamonds and in purchasing for resale from manufacturers or jobbers located in this country, jewelry, silverware, diamonds, clocks, leather goods, and kindred items. The respondent operates one factory in New York in which it manufactures for sale certain jewelry. The jewelry manufactured by respondent amounts to less than 10 percent of the jewelry handled by it. The respondent is engaged in a mail order business by means of which it sells the products so imported, purchased in this country or manufactured by respondent, direct to the consuming public. Respondent causes the said products when sold to be transported from its place of business in the State of New York into and through other States of the United States to the purchasers thereof located in the State or States other than the State of New York. In the course and conduct of its business respondent is in competition with other corporations and with partnerships, firms and individuals engaged in the sale and distribution of similar articles of merchandise in commerce between and among various States of the United States.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, the respondent in and about soliciting the sale of and selling its products as aforesaid has published or caused to be published and has distributed or caused to be distributed to purchasers or prospective purchasers of respondent's products, located in various States of the United States, catalogs in which the products offered for sale and sold by respondent are pictorially and descriptively represented. On the covers of these catalogs and at various places in the said catalogs, the respondent refers to itself as "wholesale jewelers."

A wholesaler is one who sells to the trade but never to the ultimate consumer of an individual unit as such. It is the character of sales to the trade that marks and distinguishes a wholesaler. In

Complaint

21 F. T. C.

truth and in fact the respondent is not a wholesaler but is a mail order house engaged in selling to the consuming public.

PAR. 3. In the course and conduct of its business as described in paragraph 1 hereof, the respondent, in connection with the offering for sale and sale of its products in interstate commerce under a trade status designated by it "wholesaler", has quoted in connection with each of the items listed in its catalogs heretofore referred to certain figures termed by the respondent "list prices." An insert in the said catalogs advises prospective customers, members of the consuming public, that the said "list prices" of all items in respondent's catalogs are "subject to a dealer's discount of 50 percent and an additional cash discount of 6 percent" on the remaining 50 percent making a total discount from the "list price" of 53 percent. The term "list price" is a trade term used by manufacturers, jobbers or wholesalers in connection with sales to the retail trade. The term "list price" as used by respondent and the discounts therefrom are used by the respondent for the purpose of inducing the consuming public to buy its merchandise under the belief that it is a wholesaler engaged in selling to the retail dealer trade and that the consuming public is buying from respondent at retail dealer prices. In truth and in fact the so-called "list prices" are not "list prices" but are figures that will, when reduced by the discount of 53 percent, be prices which will show the price of respondent's merchandise offered for sale to the members of the consuming public. The said prices at which the respondent's goods are sold to the consuming public are not wholesale prices of such articles but are the usual and customary prices charged by retail dealers to members of the consuming public.

PAR. 4. The aforesaid practices of respondent have had and have the capacity and tendency to mislead and deceive the purchasing public into the belief that the products offered for sale and sold by it are sold at wholesale prices and that such persons as purchase such articles from the respondent may buy at the wholesale prices and save the retail dealer's profit and to induce the purchase of the respondent's products by members of the purchasing public in reliance upon such erroneous belief.

The aforesaid practices of respondent have had and have and each of them has had and has the capacity and tendency unfairly to divert trade to the respondent from competitors who truthfully describe their status and prices at which their products are regularly sold.

PAR. 5. The above named acts and practices of respondent are to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in 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."

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, on May 18, 1932, issued and served its complaint in this proceeding against respondent L. & C. Mayers Co., Inc. After the filing by respondent of its answer to said complaint, testimony and evidence were received, duly recorded and filed in the office of the Commission. Thereafter, the proceeding came on for final hearing before the Commission on the said complaint, the said answer, testimony and evidence, and a stipulation entered into May 10, 1933 between the chief counsel of the Commission and counsel for the respondent, and briefs of counsel for the Commission and counsel for the respondent, but without oral argument (counsel for respondent having waived oral argument). Subsequent thereto, upon the application of the chief counsel of the Commission, the proceeding was ordered reopened for the purpose of affording counsel for the Commission opportunity to introduce further testimony and evidence, and for the purpose of giving respondent an opportunity to introduce such testimony and evidence as it might desire by way of defense to such additional testimony and evidence.

Such testimony and evidence were received, duly recorded and filed in the office of the Commission, and thereafter the proceeding came regularly on for final hearing before the Commission on the said complaint, the said answer, said stipulation, testimony and evidence received, recorded and filed in the office of the Commission prior to the said order reopening the case, the briefs which had theretofore been filed, the additional testimony and evidence received, recorded and filed after the order of the Commission reopening the case for the taking of such additional testimony and evidence, and brief of counsel for the Commission and brief of counsel for the respondent, but without oral argument (counsel for the respondent having waived oral argument); and the Commission having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

Findings

21 F. T. C.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, L. & C. Mayers Co., Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business in the city of New York in said State. Respondent is now, and for more than two years last past has been engaged in the business of importing diamonds for resale, and in purchasing for resale, jewelry, silverware, diamonds, clocks, leather goods, and kindred items. Respondent operates, and for more than two years last past has operated, a factory in New York, where it manufactures certain lines of jewelry which it sells. Such jewelry manufactured by respondent amounts to less than 10 percent of all of the jewelry handled by it. Respondent causes, and for more than two years last past has caused, the articles dealt in by it, when sold, to be shipped to the purchasers thereof, some of whom are located in the State of New York and others located in various other States of the United States; and there is now, and has been for more than two years last past, a constant current of trade and commerce by respondent in the aforesaid articles in which it deals, between and among the various States of the United States. Respondent sells in practically all of the States of the United States. In the course and conduct of its business, respondent is, and has been for more than two years last past, in substantial competition with other corporations and with partnerships, firms and individuals engaged in the sale and distribution of similar articles of merchandise in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, respondent, in soliciting the sale of and in selling the articles dealt in by it, has published and caused to be published, and has distributed and caused to be distributed to purchasers or prospective purchasers of the articles dealt in by respondent (which said purchasers and prospective purchasers, as hereinbefore mentioned, are located in the various States of the United States), catalogs in which many of the articles offered for sale and sold by it are pictorially and descriptively represented. Such catalogs are sent chiefly to industrial concerns, cooperative buying bureaus, State governments, municipal governments and purchasing clubs. On the covers of such catalogs and at various places therein, respondent refers to itself as, and calls itself, "wholesale jewelers".

PAR. 3. In the course and conduct of its business as described in paragraphs 1 and 2 hereof, the respondent, in connection with the offering for sale and sale of the articles dealt in by it in interstate commerce, under the trade status designated by itself as "whole-

saler", has quoted and still quotes, in connection with each of the items listed by it in its said catalogs hereinbefore referred to, certain figures termed by respondent "list prices." Inserts in the said catalogs suggest to proposed purchasers, members of the purchasing public, that the said "list prices" of all items in respondent's catalogs are subject to a dealer's discount of 50 percent and an additional cash discount of 6 percent on the remaining 50 percent, making a total discount from the "list price" of 53 percent. The term "list price" is a trade term used by manufacturers, jobbers and wholesalers in connection with sales to the retail trade. The term "list price" as used by respondent, and the discounts therefrom are used by the respondent, for the purpose of inducing the purchasing public to buy the articles dealt in by the respondent, under the beliefs that respondent is a wholesaler engaged in selling to the retail dealer trade, and that the purchaser is buying from respondent at retail dealer prices. In truth and in fact, the so-called "list prices" are not "list prices", but are figures which will, when reduced by the discount of 53 percent, be figures which will show the prices of respondent's articles as offered for sale to members of the purchasing public. The said prices at which respondent's articles are sold to the purchasers thereof are not, and have not been wholesale prices of such articles but are higher than the usual and customary prices charged by wholesalers of jewelry to purchasers thereof.

PAR. 4. A wholesaler of jewelry is one who sells to the trade for resale and seldom, if ever, to the purchasing public, with the exception that sales to industrial concerns, public utilities, banks and other similar organizations, which purchase in quantity lots (i. e., simultaneous sales of more than one of a given item), not for resale, but for use by such organizations, are considered as wholesale transactions. It is the character of sales to the trade that makes and distinguishes a wholesaler. The jewelry industry has defined a wholesaler to be a distributor whose principal business is selling to the retail dealer. It is the practice and custom of wholesalers of jewelry through and by means of their salesmen calling upon retailers and by means of catalogs sent to retailers to solicit purchases by retailers. Only a small proportion of respondent's catalogs are sent to retailers and few retailers are called upon by respondent's salesmen, who are few in number. Many retail jewelers in business for a substantial number of years had never heard or known of respondent until they testified in this proceeding. They had never received respondent's catalogs nor had they ever been solicited by respondent. Such retailers are from the States of New Jersey, Vermont, Florida, New Hampshire, New York, Wisconsin, Nebraska, North Carolina, and

Findings

21 F. T. C.

Ohio. Many manufacturers of jewelry selling to the wholesale trade do not sell to respondent because such manufacturers do not consider respondent to be a wholesaler. In truth and in fact, respondent is not a wholesaler but is a mail order house engaged chiefly in selling to the purchasing public.

PAR. 5. During the year from October 1, 1930, to September 30, 1931, respondent sold merchandise in commerce between and among the various States of the United States of the approximate value of \$1,035,000. The character of the business done in that year by the respondent is typical of its business from year to year and is divisible into seven groups hereinafter described, which groups are herein numbered 1 to 7 respectively. These groups are respectively, the following:

Group 1

Vendees in this group include industrial concerns, public utilities, banks and other similar organizations to which merchandise was sold and shipped by the respondent, not for resale, but for use by such organizations. The sales to this group include various articles, but do not include purchases in quantity lots.

Group 2

Vendees in this group include industrial concerns, public utilities, banks and other similar organizations which buy merchandise from the respondent in quantity lots (i. e., simultaneous sales of more than one of a given item), not for resale, but for use by such organizations.

Group 3

Vendees in this group include industrial concerns, public utilities, banks and other similar organizations, which buy merchandise from the respondent, not for resale but for the benefit of their employees. Such merchandise is sometimes shipped by the respondent directly to the employee for whom the merchandise is ultimately intended, and in other instances is shipped by the respondent to the organization purchasing same. In the majority of cases the organization purchasing the merchandise pays the respondent therefor with its check and the organization obtains reimbursement from the employees. In some instances the employee's money order or personal check is forwarded to the respondent by the organization making the purchase. In some instances the organizations keep the cash discount and in other instances they give the benefit of such cash discount to the employee.

Findings

Group 4

Vendees in this group include industrial concerns, mines and other similar organizations maintaining commissary stores. Merchandise purchased from the respondent by vendees in this group is resold by said vendees.

Group 5

Vendees in this group are all wholesale or retail distributors of merchandise which purchase such merchandise from respondent for resale. This group includes building supply dealers, college book stores, clothiers, drug stores, export associations, general stores, glove vendors, garage and filling stations, gift shops, grocery and food stores, hotel news stands, hardware stores, jewelers, lumber companies, radio stores, sporting goods stores and seed stores.

Group 6

Vendees in this group include army canteens, army post exchanges and ships' service stores, which are maintained by army posts, forts, camps and naval ships and stations, and which resell the merchandise which they purchase from the respondent.

Group 7

The vendees in this group include mutual buying clubs maintained by fraternities, colleges and universities and the employees of some large industrial, public utility or similar organizations, for the purpose of obtaining the benefits in price and otherwise, of such buying. Merchandise bought from the respondent by vendees in this group is not resold by the vendees, but is applied to their own use or the use of the members of such organizations.

The sales of \$1,035,000 above stated, for the year October 1, 1930, to September 30, 1931, were allocated as follows:

To vendees in group 1, approximately-----	\$39, 000
To vendees in group 2, approximately-----	82, 000
To vendees in group 3, approximately-----	569, 000
To vendees in group 4, approximately-----	92, 000
To vendees in group 5, approximately-----	175, 000
To vendees in group 6, approximately-----	38, 000
To vendees in group 7, approximately-----	40, 000

Of the aforesaid groups, those designated as group 1, group 3 and group 7 aggregating \$648,000 out of a total of \$1,035,000 business done by respondent, are retail business.

Order

21 F. T. C.

PAR. 6. The aforesaid practices of respondent have had and have the capacity and tendency to mislead and deceive the purchasing public into the belief that the products offered for sale and sold by it are sold at wholesale prices and that such persons as purchase such articles from the respondent may buy at the wholesale prices and save the retail dealer's profit and to induce the purchase of the respondent's products by members of the purchasing public in reliance upon such erroneous belief, and the aforesaid practices of respondent have misled and deceived the purchasing public into the belief that the products offered for sale and sold by respondent are sold at wholesale prices and that such persons as purchase such articles from the respondent may buy at wholesale prices and save the retail dealer's profit and have induced the purchase from respondent by members of the purchasing public in reliance upon such erroneous belief.

PAR. 7. The aforesaid practices of the respondent have had, and still have the capacity and tendency to unfairly divert trade to the respondent from competitors who truthfully describe their status and the prices at which the articles dealt in by them are regularly sold. Thereby substantial injury has been done and is being done by respondent to substantial competition in interstate commerce.

CONCLUSION

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 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 heard by the Federal Trade Commission on the complaint of the Commission, the answer of the respondent, the testimony and briefs of counsel for the Commission and counsel for the respondent, respectively (but without oral argument, counsel for the respondent having waived the oral argument), and the Commission having made its report in which it stated its findings as to the facts, with its conclusion that the respondent has violated the provisions of Section 5 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", and the Commission being fully advised in the premises—

Now, therefore, it is hereby ordered, That the respondent, L. & C. Mayers Co., Inc., its officers, agents, servants, and employees, in connection with the sale and the offering for sale by said L. & C. Mayers Co., Inc., of jewelry and similar articles in interstate commerce in the following described kinds and classes of its business, forthwith cease and desist from representing itself in and by its catalogs, and in every other way, to be a wholesale jeweler or wholesaler, the said kinds and classes of its business being as follows:

(1) Sales to industrial concerns, public utilities, banks and other similar organizations of articles not for resale but for use by such organizations where the sales are not in quantity lots.

(2) Sales to industrial concerns, public utilities, banks and other similar organizations buying merchandise not for resale but for the benefit of their employees, the merchandise being shipped by respondent directly to the employee for whom the merchandise is ultimately intended or to the organization purchasing the same, the organization paying the respondent therefor with its check and obtaining reimbursement from the employees, or the employees' money orders or personal checks being forwarded to the respondent by the organization making the purchase.

(3) Sales to mutual buying clubs maintained by fraternities, colleges or universities and to the employees of industrial, public utility or similar organizations of articles purchased for the purpose of obtaining benefits in price and otherwise of such buying, where the merchandise purchased by such purchasers is not resold, but is applied to their own use or to the use of members of such organizations.

(4) Sales in any other manner to an individual or individuals purchasing for their own use and not for resale, and sales to an individual or individuals for the use of such individual or individuals as owner or owners of industrial organizations carried on by them, when such sales are not in quantity lots.

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

Syllabus

21 F. T. C.

IN THE MATTER OF

HENRY ROSS, DOING BUSINESS UNDER THE NAMES
AND STYLES OF TIVOLI CLOTHES, BREWSTER
CLOTHES, GOOD WILL CLOTHES, WINDSOR WOOLEN
COMPANY AND UNITED WOOLEN COMPANYCOMPLAINT AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2535. Complaint, Aug. 30, 1935—Order, Oct. 30, 1935*

Consent order requiring respondent, doing business as aforesaid and as an individual, and his agents, etc., in connection with the sale and offer in commerce among the several States and in the District of Columbia, of suits of clothing for men, to cease and desist from—

- (a) Advertising or representing in any way to the purchasing public or to prospective agents the character and quality of the garments sold by him through use of such words or phrases as "all wool", "the best woolens", "distinctive woolens", "trimmed with silk serge lining"; until and unless such garments are actually manufactured from the quality of woolen and other materials represented and in the manner or at the place represented;
- (b) Advertising, etc., that he buys woolens and other materials in large quantities and at close prices, and owns or operates a manufacturing plant or plants, with resulting prices lower than those of comparable competitive merchandise, through such statements as "Windsor's tremendous buying and manufacturing facilities make these prices possible", "We have purchased a large quantity of woolens and linings of every number in the sample outfit; this has enabled us to price our line considerably lower than the present market price", or "The lowest priced quality line on the market", or advertising or representing in any way that he has dealers in principal cities, until and unless he actually owns, operates, or controls manufacturing facilities of sufficient size and purchases woolens and other materials in sufficient quantities to enable him actually to secure closer prices on all of said merchandise than are secured by others selling merchandise of competitive quality, or has such dealers, other than itinerant vendors, as aforesaid claimed;
- (c) Advertising, promising, or in any way representing to the purchasing public that satisfaction is guaranteed with respect to his garments, which are guaranteed to fit and satisfy and to be exactly as represented by the swatches of the various sample books, and that he has the ability, resources, and willingness to make adjustments as represented, until and unless such representations are in fact true; or
- (d) Placing in the hands of salesmen and other representatives sample books containing swatches of cloth that do not truthfully illustrate or depict the design or quality of the cloth from which the garments sold by respondent are made, or using or placing in the hands of agents and representatives for use in taking orders from customers, order books containing the statement, "We cut from first choice, if possible", or words of similar import indicating that the garment delivered is actually tailored for the purchaser in conformity with the measurements set out on said order blank, or adver-