

IN THE MATTER OF
W. A. SHEAFFER PEN COMPANY

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

Docket 2158. Complaint, Jan. 25, 1934—Decision, Apr. 27, 1936

Where a corporation engaged in the manufacture of fountain pens, automatic pencils, ink or writing fluid, and desk sets and adhesives and in the sale and distribution thereof through some 18,000 retailers including stationers, druggists, jewelers, opticians, and gift shops and in some cases department stores, and also, in case of a small number of consumptive items, through a limited number of wholesale outlets, but not to or through chain stores, cigar stores or other cut-price stores;

In pursuance of a policy directed to maintenance of the resale prices fixed by it for sale of products sold by it under its name, including its leading line of "Lifetime" pens, under which, aggressively and successfully pursued and enforced by it and its agents and employees, it attached such prices to its various products and made same known to customers or prospective customers, advised same and trade locally that it would discontinue dealing with price cutters, and did so discontinue and made known to trade its action in so doing, and under which policy it did not sell its said products to any dealer without explaining and emphasizing its aforesaid policy and practice thereunder and satisfying itself as to said dealers favorable reaction thereto, though professing not to desire any undertaking, and rejecting, in form, any agreement to maintain its said prices and cautioning its salesmen or employees not to solicit or accept such undertaking—

- (a) Made use of a so-called "Non-jobbing agreement" with thousands of its retail dealer customers under which they were bound to resell its said products to consumers only and not for resale, under penalty of repossession of the products by it, and payment of liquidation damages by the dealer, and which agreement was understood by some as directed to or requiring observance of its said prices, and made it known to its said wholesalers that they would be cut off for sales to price cutters, and entered into advertising agreements with its said retailers under which latter bound themselves not to advertise its said products at cut prices and placed upon its "do not ship" list and discontinued shipments to and systematically and continually cut off supplies of, dealers ascertained by it, as a result of dealer reports investigated, and use of serial numbers placed by it on its said pens, or otherwise, to be price cutters;
- (b) Solicited and secured assurances, and agreements or promises from customers and prospective customers through its salesmen, instructed to avoid the same, while charged with the responsibility of seeing that dealers in their respective territories observed its said resale prices, and with duty to "sell" the dealer its resale price policy, and accepted accounts and filled orders following satisfactory assurances, and, frequently, promises, which dealer was informed could not be accepted, and, in price cutting cases, similarly treated old customers following assurances of cooperation;

With effect that tacit understandings inevitably resulted, and, under the continuing threat involved in the constant publicizing by it through literature,

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correspondence and salesmen of its action in cutting off and of its intent to cut off price cutters, cooperative action and meeting of the minds in the maintenance of such prices resulted, and object evident to all was obtained, notwithstanding its said disclaimers which merely accentuated the fact that its protestations were to apply only to certain words while accomplishment of same result at same time was contemplated through use of other words or means of expression;

- (c) Supplied to its dealers over a period of years show cases costing it from \$18 to \$120 and in the aggregate over three-fourths of a million dollars, but at no cost to the dealer except for the freight and lighting thereof, under provisions in accordance with which said products could be repossessed in the event of price cutting by the dealer or payment therefor demanded;

With result that said system went far beyond a simple refusal to sell goods to price cutters and hampered and obstructed the free and natural flow of commerce and the freedom of competition in the channels of interstate trade, competition among dealers in its products was practically suppressed and all desiring to deal therein were constrained to sell at its suggested resale prices, wholesalers desiring to supply the trade with such products were unable to secure the same if they sold them to price cutters, freedom of competition was suppressed by said methods and dealer cooperation secured thereby, and it was enabled as effectively as by express agreements to prevent competition in disposition of its said products by wholesalers and retailers by preventing all who did not sell at the resale prices fixed by it from obtaining the same:

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

Before *Mr. John W. Addison*, trial examiner.

Mr. Harry D. Michael for the Commission.

Mr. E. H. Pollard, of Fort Madison, Iowa, 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 W. A. Sheaffer Pen Company has been or 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. Respondent, W. A. Sheaffer Pen Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the city of Fort Madison, State of Iowa. It is now, and has

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been for more than five years last past, engaged in the business of manufacturing fountain pens, automatic pencils, ink, and desk sets, and the sale and distribution thereof to retail dealers throughout the United States. It causes the said products when so sold to be transported from its principal place of business in the city of Fort Madison, State of Iowa, into and through other States of the United States to the purchasers thereof at their respective points of location. In the course and conduct of its said business respondent is in competition with other corporations, partnerships and individuals engaged in the manufacture, sale, and transportation of fountain pens, automatic pencils, ink, and desk sets, in commerce between and among the various States of the United States, and the District of Columbia.

PAR. 2. For more than five years last past respondent, in the course and conduct of its said business, has enforced and now enforces a merchandising system whereby it fixes and maintains certain specified uniform prices at which its products shall be resold to the public by retail dealers handling the same. Respondent sells its products only to retail dealers, of whom there are about 20,000 throughout the United States. It enlists and secures the support and cooperation of said dealers, and of its officers, agents, and employees in enforcing and maintaining said system of resale price maintenance. In order to carry out said system, respondent has employed and still employs, among others, the following means whereby it and those cooperating with it undertake to prevent and do prevent retail dealers from selling its products to the public at prices less than the aforesaid retail prices established by respondent:

(a) Respondent fixes uniform resale prices at which its products shall be resold to the public by its retail dealers, and issues to said dealers price lists in which said uniform prices are set forth.

(b) Respondent makes it generally known to the trade by its salesmen and representatives, and by letters, telegrams, advertisements, and other means, that it expects and requires dealers handling its products to maintain and enforce its said resale prices, and that it will refuse to further sell and supply said products to dealers failing to maintain and enforce said prices.

(c) Respondent requires as a condition precedent to opening an account with a retail dealer that such dealer agree to maintain the uniform resale prices fixed by it for resale of its products to the public.

(d) Respondent procures and receives from dealers handling its products reports of the failure of other dealers handling said products to observe and maintain its resale prices.

(e) Respondent employs its salesmen and other agents and employees to ascertain, investigate and secure information concerning the failure of dealers to observe and maintain said resale prices, and as to the sale of said products by dealers to other dealers who fail to maintain said prices.

(f) Respondent uses the information received through the means set out in subparagraphs (d) and (e), or through any other means, to induce and coerce dealers who fail to observe said prices, or who sell to others who fail to observe said prices, to maintain said prices in the future, or to refrain in the future from selling said products to dealers who do not maintain said prices, by dropping said dealers from its approved list of dealers to whom it sells its products and by continuing to refuse to sell such products to said dealers until such time as said offending dealers give assurance that in the future they will maintain said resale prices.

(g) Respondent refuses to further supply its products to dealers who offend in either of the particulars set out in the preceding subparagraph, unless and until such offending dealers have given satisfactory assurances or promises that they will in the future observe and maintain said uniform resale prices, or will refrain from selling said products to dealers who do not observe and maintain said uniform resale prices.

(h) Respondent compiles and maintains in its office records, a "Do Not Ship" list, on which is entered the names of dealers who have sold its products at less than the uniform resale prices fixed by it, or have resold said products to other retail and wholesale dealers, or jobbers, and respondent refuses to further supply such dealers with its products until it receives assurances or promises that they will in the future observe and maintain said uniform resale prices, or will refrain from selling to others than consumers.

(i) In order to prevent its products from falling into the hands of retail dealers, wholesale dealers, or jobbers who will not maintain its uniform resale price policy, and as a part of its merchandising system of maintaining uniform resale prices, respondent requires each retail dealer with whom it opens an account to sign a so-called Non-Jobbing Agreement, in which the dealer agrees that he will not resell respondent's products to any other retail dealer, jobber, or wholesaler of writing materials for the purpose of resale, or to any person when he believes or has reason to believe that such person will resell said products, but will confine his sales solely and exclusively to consumers.

(j) In order to enable it to trace any fountain pens which have been sold to the public at less than the uniform resale prices fixed

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by it, or which have been sold by any of its retail dealers to anyone other than a consumer, respondent marks every fountain pen manufactured by it with a serial number stamped on the outside and inside nib of the pen point. Such serial numbers are so placed on the pen point that if an attempt is made to remove said numbers by buffing or otherwise the pen point is destroyed.

(k) Respondent uses other equivalent cooperative means and methods for the enforcement of its said system of resale price maintenance.

PAR. 3. The direct effect and result of the above alleged acts and practices of the said respondent has been and now is to suppress competition in the distribution and sale of respondent's said products; to constrain dealers to sell said products at the prices fixed by respondent, and to prevent them from selling the products at such less prices as they may desire, and to deprive the ultimate purchasers of said products of such advantages in price which otherwise they would obtain from the natural and unobstructed flow of commerce in said products under conditions of free and untrammelled competition.

PAR. 4. In the course and conduct of its business respondent, for more than two years last past, has required its retail dealers to enter into certain agreements with it regarding the merchandising and display of its products. One such agreement is known as the Non-Jobbing Agreement, and respondent requires that all dealers shall sign said agreement as a condition precedent to being allowed to sell its products. Said Non-Jobbing Agreement provides that the retail dealer will sell respondent's products only to consumers, and will not resell the same to any retailer, wholesaler, or jobber of writing materials for purpose of resale, or to any person when said dealer believes or has reason to believe that such person will resell said merchandise. Said agreement provides that if respondent believes or has reason to believe that the retail dealer has violated said agreement, or if it so elects, respondent shall have the right at any time to take possession of all of its products in the dealer's stock, and all future orders from respondent, on payment in cash of the price paid for said stock by said dealer. A monetary penalty for each violation of the agreement is provided for, as agreed and liquidated damages.

It is further provided in said non-jobbing agreement that legal title to all merchandise purchased by the dealer from respondent, either on hand or on future orders, shall remain in respondent as security for the purchase price, and as security for the performance by the dealer of the conditions of said agreement. It is then further provided that nothing contained in said agreement shall change or affect

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the dealer's obligation to pay for all merchandise purchased from respondent in accordance with the terms on the invoices for such merchandise.

The aforesaid non-jobbing agreement by respondent is unfair to the retail dealers who sell respondent's products because (1) it results in a control by respondent of its products after said products have passed out of its possession and have been paid for and are owned by its several dealers; (2) it subjects said dealers to payment of a monetary penalty for selling merchandise which is owned by said dealers and to which respondent no longer possesses any title; and (3) it attempts to restrain said dealers from freely selling or otherwise disposing of merchandise which is owned solely by them. Said agreements have a capacity and tendency to hinder competition and to place a restraint upon trade in products manufactured and sold by respondent.

PAR. 5. In the course and conduct of its business respondent provides attractive showcases in which said dealers may display its products, and undertakes to induce its dealers to use said showcases. In order to procure one of the showcases, said dealers are required by respondent to sign an agreement known as the showcase agreement. There are two forms of said agreement provided by respondent, called showcase agreement No. 1 and showcase agreement No. 2, which differ only in their first paragraphs. Said agreement provides that the dealer shall display in said showcase only products manufactured by respondent, shall keep the case lighted at all times while the dealer's store is open for business, and shall place the showcase in a prominent position in said store. The said agreement also requires the dealer to display and handle the complete line of products manufactured and sold by respondent. By paragraph 4 of showcase agreement No. 1, and paragraph 5 of showcase agreement No. 2, said dealers agree:

"To feature products manufactured by and sold under the name of W. A. Sheaffer Pen Company so that a majority of the combined sales by the dealer of the following articles; Fountain Pens, Desk Sets, Automatic Pencils, Pen Skrip and Pencil Skrip shall be products manufactured by the W. A. Sheaffer Pen Company."

It is further provided in said agreements that the showcases are supplied to the dealers without cost so long as none of its terms are violated by the dealer, but that the dealer may purchase said showcase at any time by paying the amount set forth in the agreement, upon which payment all control over the showcase by respondent shall cease. Since 1929, when the showcase agreement was first put into use, respondent has distributed more than 7,900 showcases among its 20,000 dealers.

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Said Showcase Agreement, as used by respondent, is unfair to its competitors and its dealers because it requires that a majority of the combined sales of fountain pens, desk sets, automatic pencils, ink and pencil leads made by said dealers shall be products manufactured by respondent; it tends to prevent dealers from buying and distributing products of competitors of respondent; and tends to force dealers to buy a full line of products manufactured by respondent when the said dealer's normal and actual needs are for but part of said products. By the use of said showcase agreements trade is diverted to respondent from its said competitors, and trade in products manufactured and sold by said competitors is hindered and restrained.

Wherefore, Said acts and practices of respondent as above set out are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning 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 on January 25, 1934, issued and served its complaint in this proceeding upon respondent, W. A. Sheaffer Pen Company, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

After the issuance of said complaint, and the filing of respondent's answer thereto, testimony and evidence, in support of the allegations of said complaint, were introduced by Harry D. Michael, attorney for the Commission, before John W. Addison, an examiner of the Commission theretofore duly designated by it, and in defense of the allegations of the complaint by E. H. Pollard, attorney for the respondent; and said testimony and evidence was duly recorded and filed in the office of the Commission.

Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and evidence, briefs in support of the complaint and in defense thereto, and the oral arguments of counsel aforesaid; 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 AS TO THE FACTS

PARAGRAPH 1. The respondent, W. A. Sheaffer Pen Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the city of Fort Madison, State of Iowa. It is now and has been since the year 1914 engaged in the business of manufacturing fountain pens, automatic pencils, ink or writing fluid (called by respondent "Scrip"), desk sets, and adhesives, and the sale and distribution thereof to retail dealers throughout the United States. Its highest priced fountain pens are known as "Lifetime" pens. This is the leading line made and sold by respondent. There are at present about 18,000 retail dealers to whom respondent sells its said products. Previously there were more. These retailers include stationers, druggists, jewelers, opticians, and gift shops. In some cases department stores are sold also. Chain stores, cigar stores, and stores that pursue a general policy of selling at cut prices are not sold. A small number of minor products which might be called consumptive items are sold through a limited number of wholesale outlets in addition to their direct sale to retailers. Respondent causes its said products, when so sold, to be transported from its principal place of business in the city of Fort Madison, State of Iowa, into and through other States of the United States to the purchasers thereof at their respective points of location. Branch offices are maintained by respondent at New York, N. Y., Chicago, Ill., and San Francisco, Calif. A supply of goods is kept at the New York office for filling orders in several Eastern States.

In the course and conduct of its said business respondent is and has been in competition with other corporations, partnerships, and individuals engaged in the manufacture, sale, and transportation of fountain pens, automatic pencils, ink, writing fluid, desk sets, and adhesives, in commerce between and among the various States of the United States, and the District of Columbia.

PAR. 2. Since the organization of respondent company in 1914, respondent, in the course and conduct of its said business, has enforced and now enforces a merchandising system whereby it fixes and maintains certain specified uniform prices at which its products bearing the Sheaffer name shall be resold to the public by retail dealers handling the same. The same policy was followed for the two years or more the business was conducted prior to the incorporation of respondent company. A similar policy is pursued and the same results achieved in the sale of certain minor products through wholesale houses. Through its officers, agents and employees, re-

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respondent enlists and secures the support and cooperation of its dealers in enforcing and maintaining its said system of resale price maintenance. Respondent's efforts to maintain its announced resale prices are almost one hundred percent successful in that less than one percent of its dealers fail to adhere to the resale prices fixed by it. The policy has been a very strict and stringent one and has been vigorously and aggressively pursued and enforced by respondent, its officers, agents, and employees.

The means and instrumentalities employed to effect this result have been many and varied. In the first place, respondent fixes uniform resale prices at which its products shall be resold to the public by its retail dealers and issues to said dealers price lists in which said uniform prices are set forth. It also affixes to each fountain pen and other articles sold by it a price tab on which the retail price is plainly imprinted. Respondent also makes it generally known to the trade by its salesmen and representatives, and by letters, telegrams, advertisements, publications, and circular matter of various sorts, and by other means, that it expects and requires dealers handling its products to maintain and enforce its said resale prices, and that it will refuse to further sell and supply said products to dealers failing to maintain and enforce said prices. In regard to those items sold to wholesalers for resale to retail dealers, the resale prices are announced and such wholesalers are informed that such products are not to be sold to price cutters but only to dealers who maintain the resale prices fixed by respondent. No new account is opened until said policies and practices as heretofore stated are fully set forth and explained to the prospective customer by a representative of respondent and until the respondent and its representative are convinced and assured that such prospective customer is willing to cooperate in and conform to such policies.

Such conviction and assurance is the result of the prospective customer's expressed or implied reaction to respondent's policy and his attitude thereto although he is usually cautioned not to express a promise or to give assurance in so many words. Respondent continually receives from many of its dealers reports of price cutting by other Sheaffer dealers. These are not solicited by respondent directly but are encouraged by respondent's efforts to maintain its resale prices and the information furnished dealers that respondent will and does cut off dealers who cut prices. Such reports are acted upon by respondent, after verification in some cases, by cutting off the price cutter from receiving further orders.

Respondent uses its salesmen as well as its officers and other representatives to ascertain, investigate, and secure information concern-

ing the failure of its dealers to observe and maintain its resale prices, and also as to the sale of respondent's products by its dealers to unauthorized dealers. Respondent uses the information thus received and obtained through its dealers or as a result of the activities of its representatives, or through other means, to induce and coerce its dealers to observe its fixed resale prices, by dropping said dealers, who sell at cut prices or who sell to unauthorized dealers, from its approved list of dealers to whom it sells its products, and by continuing to refuse to sell its products to such dealers until such times as respondent, or its representative, has received from such dealers such assurances or such indication of intention to cooperate as to cause respondent to believe that its resale price policy will be adhered to in the future by such dealers and that they will refrain from reselling to unauthorized dealers or to others for resale.

As a part of such system of procedure, respondent compiles and maintains in its office records a "Do Not Ship" list, consisting of a system of cards on which are entered the names of dealers who have sold its products at less than the uniform resale prices fixed by it or who have resold said products to other dealers or to others for resale. As a means of distinguishing such dealers from others cut off for different reasons, their cards are marked "Unethical Practices." In cases where such dealers are reinstated, such reinstatements are not made until respondent is convinced that they will conform to its price policy in the future. Such reinstatements are usually made only after personal interviews by representatives of respondent and some indication of the dealers' attitude toward respondent's resale price policy.

PAR. 3. Coincident with the use and operation of respondent's resale price maintenance policy, respondent has made use of a form of agreement known and designated as a "Non-jobbing agreement." This form of agreement reads as follows:

NON-JOBGING AGREEMENT

As part consideration for the acceptance by the W. A. Sheaffer Pen Company of the order to which this agreement is attached, the dealer agrees that, except in the event he goes out of business, he will sell the merchandise described in said order, and in all future orders from said Pen Company, only to consumers and will not sell to any wholesaler, jobber or retailer of writing materials for purpose of resale or to any person when he believes or has reason to believe that such person will resell said merchandise. In the event said Pen Company believes or has reason to believe that the dealer has violated this agreement, or if said Pen Company so elects, said Pen Company shall have the right at any time to take possession of any part or all of the Sheaffer merchandise on this order, or on the dealer's future orders from said Pen Company, provided said merchandise is still in the dealer's hands, by paying

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the dealer in cash the price at which said dealer purchased from said Pen Company the merchandise thus repossessed, or by crediting the dealer's account, if same shows a balance in favor of said Pen Company, with such purchase price, or by thus crediting the dealer's account to the extent of the balance due thereon to said Pen Company and by paying the dealer cash for the amount by which such purchase price exceeds the balance due from the dealer to said Pen Company on said dealer's account. If the dealer violates this agreement, he shall pay said Pen Company the sum of \$— for each and every violation, as agreed and liquidated damages. The legal title to all merchandise in this order, and in the dealer's future orders from said Pen Company shall remain in said Pen Company until sold by the dealer in the ordinary course of trade as security for the payment of the purchase price thereof by the dealer and as security for the performance by the dealer of the foregoing conditions.

Nothing contained in this agreement shall change or effect the dealer's obligation to pay for all merchandise which has been purchased from and has not been repossessed by said Pen Company in accordance with the terms for payment shown on the invoices for such merchandise.

Dated this-----day of-----19----

By-----

The use of the above form of agreement began about 1927 and continued until May 13, 1935. More than 7,000 of these agreements were executed by respondent's customers. Salesmen were instructed to have these agreements executed by all new customers. Such instructions were carried out. In many cases old customers were required to and did execute those agreements. In some cases dealers who had not sold to others for resale but who were suspected of price cutting or who were found to have cut prices were required to and did execute such agreements although some refused and were thereupon placed on the "Do Not Ship" list. Old dealers who were suspected of selling Sheaffer merchandise for resale or who were found to have done so were likewise required to execute these agreements in order to receive further shipments. Respondent has claimed that this part of its merchandising policy was separate and distinct from its resale price maintenance policy and has so instructed its salesmen and in many instances so stated to its customers. All outstanding agreements of this type were cancelled by respondent on May 13, 1935, by circular letters addressed to its customers after most of the evidence in support of the complaint had been introduced in this case.

By this agreement the dealer is purportedly bound (except when going out of business) to sell products bought from respondent to consumers only and not even to them if the dealer believed or had reason to believe the goods were being bought for resale. Violation of the agreement entails liability to pay a stated sum of money as "agreed and liquidated damages", and the company retains title

to all goods sold the dealer and remaining in his possession unsold as security for the purchase price and for said damages. In practice the amount inserted in the contract to be paid on breach was fixed to approximate the size of the order given by the dealer. It was \$100 in the majority of cases, but was as high as \$1,000 in some cases. The contract purports to give the company the right at any time to take possession of any or all goods in the dealer's possession bought from it at the prices paid by the dealer if the company believes or has reason to believe the dealer has violated the agreement or "if said Pen Company so elects."

Respondent has pursued a policy of selecting its dealer outlets for announced and apparent purposes other than resale price maintenance. It has contended that the said non-jobbing agreement was used for the purpose of effecting these ends. There was, however, a tendency on the part of some of respondent's dealer customers to regard this contract as a weapon for enforcing maintenance of resale prices. Some dealers have in fact so regarded it and considered it and interpreted it as such or as binding them to maintain the resale prices as fixed by respondent. At least one of respondent's salesmen, who was discharged for this and other causes, tried to leave dealers under the impression that said agreement was intended for the purpose of enforcing the maintenance of resale prices.

Respondent company made no practice of demanding payment of the "liquidated damages" from dealers found to be selling its products for resale and did not make demands under it to repossess its products from customers who cut prices to consumers. It ceased, in many cases, to sell dealers from whose stocks Sheaffer pens were traced to the possession of other dealers regardless of whether or not they were cutting prices and regardless of whether or not they knew how the goods came into the possession of the price cutters.

Respondent cancelled the non-jobbing agreements in effect, as heretofore stated, after it had appeared in the hearings in this case that some of its customers had believed that such agreements bound them not to sell Sheaffer products to consumers, except at full list price.

Said non-jobbing agreement, by its provisions, attempts to control the use and disposition of property after the title thereto would ordinarily have passed but for the provisions of the contract and even after full payment for the goods bought. It further specifically reserves title in the goods until sold, even though paid for. It applies not only to the order for goods given at the time of execution thereof but to "all future orders."

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PAR. 4. Respondent during the years 1929-33 spent over three-fourths of a million dollars in equipping customers with attractive showcases costing it from \$18 to \$120 each with no cost to the dealer except freight and keeping the case lighted. The majority of these cases were supplied under an agreement requiring the dealer to surrender the case on retiring from business or using it other than for the sole purpose of displaying respondent's products. Many of them were supplied under forms of agreement giving the dealer the choice of buying the case at the price named in the contract and using it as he saw fit or of holding it for the sole purpose of prominently displaying respondent's products and so featuring the full line of these products that a majority of his combined sales of fountain pens, desk sets, automatic pencils, pen Skrip and pencil Skrip should be products made by respondent. Less than 1 percent of the cases have been bought by dealers. Most of the contracts are still in force for the life of the cases or until the dealer fails to observe their terms. The life of a case is estimated at from ten to twelve years. More than 7,810 showcases were supplied to dealers by respondent under one or the other of the various contract forms used from time to time. Under said contract, the showcases could be repossessed by respondent when dealers having them were cut off for cutting prices or for violating the non-jobbing agreement for such dealers would then not be handling the Sheaffer line. The usual course pursued when showcase agreements were terminated was for the showcase to be transferred to some other Sheaffer dealer.

One form of such contract used provides that the dealer shall handle the complete line of respondent's products. Other forms used from time to time contained provisions by which the dealer is bound "to specialize in the Sheaffer line of products to the exclusion of all competing lines", and also providing for making payments on the price of the showcase proportioned upon the percentage of competing lines carried. Some of the showcase agreements used were combined in one contract with non-jobbing agreements as heretofore discussed.

PAR. 5. Respondent, in the conduct of its business, has also used to a limited extent a form of agreement known and designated as an anti-advertising agreement. By this contract the dealer is not to advertise Sheaffer merchandise at less than the retail prices fixed by the company "in the dealer's show windows or in any manner outside of the dealer's store." Violation of the agreement calls for the payment of a stated sum "as agreed and liquidated damages" as well as the right to repossess the merchandise. Title is reserved in

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the company to assure performance. Such an agreement serves to prevent all but a possible insignificant amount of business at cut prices. For practical purposes, as regards any appreciable volume of business, it is an agreement to maintain resale prices as fixed by respondent. In some instances dealers who have been cut off for price cutting or who have been suspected of price cutting have been requested to execute the anti-advertising agreement before receiving further orders from respondent. A dealer signing such an agreement and abiding by the same loses all sales that cut-price advertising might bring him.

PAR. 6. Respondent marks its Lifetime fountain pens, guaranteed for the life of the buyer, now constituting 16 percent of its sales and at one time reaching a high of over 40 percent, with a serial number stamped on the outside and inside nib of the pen point. The numbers are so placed that removal of them by buffing or otherwise is made difficult. Respondent contends, and the contention is reasonable, that such numbering is for the purpose of providing the company with some check on the expiration of the guarantee. It also enables respondent to trace pens that have been stolen and serves to discourage such thefts. Respondent has used its numbering system in tracing violations of its non-jobbing agreements and non-jobbing policy and has pursued a policy of cutting off its dealers to whom such pens were so traced. In this way, it has reduced to a minimum sales of its Lifetime pens at cut prices by so-called unauthorized dealers who were willing to accept a smaller margin of profit than permitted by respondent's fixed resale prices and who had secured their supplies of such merchandise from regular Sheaffer dealers. Such use of serial numbers by respondent has resulted in largely cutting off the sources of supply of such so-called unauthorized dealers and to practically eliminate any appreciable price competition in Lifetime fountain pens. Said numbering system is also susceptible of being used for the purpose of tracing such pens sold at cut prices by regular authorized dealers although respondent claims that such use thereof is not necessary because cut-price sales are always made public in one way or another. Lifetime pens are widely advertised and a desirable item of merchandise. Unauthorized dealers would like to have them for sale and, if they could be secured by them, some price competition in the line would naturally result.

PAR. 7. In the conduct and operation of its resale price maintenance policy, respondent has pursued a continued and consistent practice of cutting off dealers who violate such policy. Such practice as well as the fact that dealers are actually cut off for such violation are

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consistently and persistently announced to and impressed upon its dealers and the trade generally. Respondent informs its wholesale dealers that it will refuse to further sell and supply them with its products if they continue to sell to dealers known to be cutting prices on these products. Wholesalers are, however, informed that they cannot legally require the dealer to promise or agree to maintain the resale prices fixed by respondent.

Respondent formerly bought back the stocks of its goods in the hands of dealers cut off for price cutting and estimates that it has spent \$100,000 in so buying back its goods from price cutters, but this practice was discontinued during the depression. Since this discontinuance, respondent has not regarded the sale of noncurrent or obsolete Sheaffer products at any price necessary to move them as a violation of its policy so long as the goods were not advertised at cut prices, and even where they were so advertised, respondent has been more lenient in reinstating dealers who restricted their cut-price advertising to such noncurrent merchandise. During the six years 1929-34, respondent has cut off 1,318 dealers for failure to observe its prices. Of these, 119 were later reinstated when the company believed that they would maintain prices in the future.

Respondent instructs its salesmen that in opening an account with a retail dealer they are to "sell" the dealer its resale price policy but are also to avoid the words assurance, cooperation, and understanding. Salesmen are also instructed not to solicit any promises or assurances that resale prices will be maintained and that if promises or assurances are given or volunteered they cannot be accepted. In many cases dealers do give such promises or assurances in response to the salesmen's statements in regard to resale price maintenance. As a general rule such accounts are accepted and orders filled after the customer is informed that his promise or assurance cannot be accepted. The same is generally true as regards old customers where questions of price cutting have arisen. If assurances of cooperation are given, the customers are notified that such assurances cannot be accepted but nevertheless they are frequently continued as dealers unless there have been unexplained instances of price cutting. Respondent continually cautions its dealers in correspondence with them not to give promises.

In spite of respondent's instructions, its salesmen have in various instances solicited and secured agreements, assurances, and promises from customers or prospective customers. In some cases where the instructions were strictly followed, dealers have understood from the statements made that promises and assurances were thus solicited and that they were under agreement to observe respondent's resale

prices. In general, statements of resale policy by respondent's representatives to dealers, and conversation and correspondence in regard thereto, have resulted in cooperation of the dealer in that regard and the observance of resale prices. Both salesmen, in some instances, and dealers, in considerable number, have been unable to distinguish a line of demarcation between solicitation of promises and assent thereto and a statement of policy where a specific result is plainly desired and where enough is said, or implied from what is said, to convince the salesman that the dealer intends to follow the policy. In instances where non-jobbing agreements have been executed in connection with negotiations with dealers, some have believed erroneously that they contained specific provisions against price cutting. In some cases dealers have thought such contracts were intended to effectuate resale price maintenance.

PAR. 8. Respondent's salesmen were, in effect, charged with the responsibility of seeing that dealers in their respective territories observed resale prices as fixed by respondent. Such result to be achieved was plain to them and was well known to respondent's dealers. The fact that the words "promise", "agreement", "understanding", "assurance" or "cooperation" might have been avoided, generally speaking, in accordance with instructions, would not, as a consequence of such avoidance alone, negative the fact that implied agreements, understandings and cooperative efforts resulted regardless of the particular words used. The results to be obtained were clear to all and they were in fact obtained. No distinction can be made between customers' approval or acceptance of a resale price policy expressed in any manner sufficiently to satisfy the salesman that such policy will be followed and any other method of securing implied agreements, assurances and cooperative efforts. Respondent's constant reiteration and insistence that no promises were solicited or would be accepted and its repeated instructions directly to the trade and through its salesmen necessarily carried the implication that assurances were desired in some manner or form but merely with the avoidance of the particular form of expression specified. The practical object to be attained was evident to all concerned in all cases. The result was the same and as effective as if the forbidden words were used. Tacit understandings, under such circumstances, resulted and were inevitable. Moreover, respondent has not been content to merely cut off price-cutting dealers but constantly through its literature, correspondence and salesmen publicised the fact that it did and would cut off dealers who cut the Sheaffer fixed resale prices. This became a continuing threat and had the effect of putting dealers under coercion and

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resulted in cooperative action in maintaining prices. Respondent's continued protestations against promises, agreements, and understandings merely accentuate the fact that such protestations apply only to the use of certain words and at the same time contemplate the accomplishment of the same result by the use of other words or other means of expression with no difference in meaning and no difference in the resulting effect. Disclaimers constitute, under such circumstances, mere lip service or, in other words, a mere formality. The facts themselves show cooperation and meeting of the minds.

PAR. 9. Respondent's resale price maintenance policy, in operation and effect, is inseparably connected with and is affected by all other factors entering into its merchandising policy. There is no practical way of separating one from the other. This is true in regard to those factors heretofore mentioned herein, to wit: resale price maintenance, non-jobbing agreements, showcase agreements, and anti-advertising agreements. All combined determine the relationship between the respondent and its customers. The mental attitude of the customer and his conception of his obligations thereunder are determined by all such factors as may have been in existence in his particular case. Moreover, their general effect is not the effect of one but of all. This combined general effect and the effect upon the individual customer is little diminished, or not at all, by ostensible efforts or statements, even though with the best intentions, to keep them separate. Said non-jobbing agreements, showcase agreements, and anti-advertising agreements, tended to and had the effect of putting signers thereof under constraint and obligation to follow respondent's general policies including its resale price maintenance policy. These agreements had a tendency to maintain respondent's resale prices and did in fact assist in producing such result. The result of all these factors is and has been to produce agreements, express or implied, understandings and cooperative efforts between respondent and its customers whereby the resale prices of its products are and have been maintained.

PAR. 10. The system used by respondent goes far beyond the simple refusal to sell goods to dealers who will not sell at the prices fixed by respondent. It results in hindering and obstructing the free and natural flow of commerce and the freedom of competition in the channels of interstate trade. Competition among dealers in respondent's products is practically suppressed. All who would deal in respondent's products are constrained to sell at respondent's suggested resale prices. Wholesale dealers who would supply the trade with respondent's products handled by them may not get respondent's goods if they sell to those who do not observe the retail prices fixed

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by respondent. Freedom of competition is suppressed by methods as herein set out by which respondent secures the cooperation of its dealers. These methods are as effectual as express agreements to accomplish the same purpose. By such methods respondent is enabled to prevent competition in the disposition of its line of goods by wholesale and retail dealers by preventing all who do not sell at the resale prices fixed by respondent from obtaining them.

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 heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and evidence taken before John W. Addison, an examiner of the Commission theretofore duly designated by it, in support of the charges of said complaint and in opposition thereto, briefs filed herein, and oral arguments by Harry D. Michael, counsel for the Commission, and by E. H. Pollard, counsel for the respondent, and the Commission having made its findings as 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, W. A. Sheaffer Pen Company, its 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 fountain pens, automatic pencils, ink or writing fluid, desk sets, adhesives, and kindred products, do cease and desist from:

(1) Entering into, either directly or indirectly, contracts, agreements, or understandings, with its dealer purchasers, that respondent's products, or any of them, are not to be advertised, offered for sale, or sold by such purchasers at prices less than those specified or fixed by respondent, or procuring such result, either directly or indi-

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rectly, by promises or assurances on the part of such purchasers or by cooperative methods between respondent and its dealers.

(2) Maintaining or seeking to maintain uniform resale prices on respondent's products, or any of them, by procuring, either directly or indirectly, from dealer purchasers, contracts, agreements, understandings, promises or assurances that respondent's products, or any of them, are not to be sold by such dealers to other dealers or to others for resale;

(3) Maintaining or seeking to maintain uniform resale prices on respondent's products, or any of them, by furnishing show cases or other articles of value to its dealers without cost to them or definite obligation to pay for the same, but with agreements or understandings under which respondent may reclaim such show cases or other articles of value, or demand payment for the same, in the event such dealers, so furnished such show cases or articles of value, fail to maintain the prices fixed by respondent at which its products are to be sold.

(4) Utilizing any other equivalent means of enforcing or maintaining uniform resale prices specified or fixed by respondent.

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

Syllabus

IN THE MATTER OF
CHICAGO SILK COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2551. Complaint, Sept. 13, 1935—Decision, Apr. 27, 1936*

Where a corporation, engaged in the sale of hosiery and lingerie throughout the various States—

Employed in the sale thereof a scheme or plan by which it secured the names and services of persons to act for it in selling its said hosiery through sale of push card chances so arranged that amount of money paid, if any, for chance depended upon particular number selected, and acquisition of two pairs or of one pair of hosiery depended upon correct chance selection from list displayed on each card of various feminine names;

With result that its said hosiery and amount paid therefor, if any, by particular consumer or participant was determined by lot or chance, many purchasers of hosiery and lingerie were attracted by element of chance involved and induced to purchase its merchandise in preference to that of competitors who do not use such methods involving sale of a chance rather than merchandise, and violation of established public policy and unanimous condemnation of competitors who refuse to and refrain from use of such a plan of disposing of their merchandise as not in the public interest, contrary to public policy and good morals, and not in harmony with business ethics or trade morality, and recognized by trade and public as constituting, in effect, a lottery or gambling scheme, and one under which every customer is not treated alike, and under which more people lose than win, and as a detriment to legitimate business; or who so refrain and decline to uphold their reputations and avoid criticism, or because unwilling to lower themselves on moral ground thus to compete; and

With effect of diverting trade and custom to it from competitors who do not use such methods, and with tendency and capacity unfairly to divert and to lessen competition in trade involved and to create a monopoly thereof in it by excluding therefrom actual and potential competitors who do not use said method for some or all of the aforesaid reasons, and to deprive the public of the benefit of free competition in said trade:

Held, That such acts and practices were all to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. John W. Norwood*, trial examiner.

Mr. R. L. Kennedy for the Commission.

Nash & Donnelly, 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 Com-