

Complaint

IN THE MATTER OF

DAVID RUBENSTEIN AND HERMAN SCHWARTZ DOING
BUSINESS AS NU-WAY SHOE CO.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2560. Complaint, Sept. 26, 1935—Decision, June 23, 1936*

Where a firm engaged in sale of shoes at wholesale—

- (a) Stamped or printed upon boxes, cartons, invoices, and other printed matter used by them in the sale of certain brands of their said product, labels or titles "Dr. Carol's Health Shoes," "Dr. Martin's Walk-O-Pedic", and "Dr. Rubenshaw's Supreme Stout," and caused such labels and titles to be affixed and sewn into the interlining of said products, facts being said shoes, were not made in accordance with design, or under supervision of, a doctor, and there was no such doctor employed by or connected with them as indicated by aforesaid fictitious names; with capacity and tendency to mislead some of the trade and many ultimate consumers into the belief that said shoes were or had been fashioned or designed by a doctor; and
- (b) Caused word "Manufacturers" to be printed on certain invoices, stationery and billheads, and other printed matter used by them in the course and conduct of their business, notwithstanding fact they neither owned, operated, nor controlled any factory in which their shoes were made; with capacity and tendency to mislead and deceive purchasers of their said products into the belief that in buying from them they were dealing with manufacturers and thereby gaining an advantage in saving the middle-man's profit; and

With capacity and tendency unfairly to divert trade from or otherwise injure and prejudice competitors, among whom there are those who manufacture and sell at wholesale shoes which do contain special features designed to correct and alleviate certain foot ailments and weaknesses, and those who similarly sell shoes made along standard lines and over standard lasts and for which no special feature representations or claims are made, and among whom are also many manufacturers who rightfully call themselves such; to the substantial injury of competition throughout the various States:

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. Robert S. Hall*, trial examiner.

Mr. Morton Nesmith for the Commission.

Mr. Alexander Bicks, of New York City, for respondents.

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,"

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the Federal Trade Commission, having reason to believe that David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., hereinafter referred to as respondents, have been and are 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 thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. David Rubenstein and Herman Schwartz are copartners doing business as the Nu-Way Shoe Co., with their principal place of business at 142 Duane St., in the city of New York, State of New York. The respondents have for more than 10 years last past been and are still engaged in the business of selling shoes, being a wholesaler thereof between and among the different States of the United States. Said respondents have caused and still cause their shoes when so sold to be transported and shipped from their said place of business in the State of New York to purchasers thereof located in States other than the State of New York.

In the course and conduct of their business as aforesaid the respondents are and have been in competition with other individuals, partnerships, corporations, and associations likewise engaged in the business of wholesaling shoes and distributing said shoes in commerce between and among the different States of the United States.

PAR. 2. The respondents, David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., in the course and conduct of their business as aforesaid, in soliciting the sale of and selling their shoes in interstate commerce, for several years last past have caused the words

Dr. Carol's Health Shoe

to be imprinted, stamped, or printed upon boxes, cartons, invoices, and other printed matter used by them in the sale of a certain brand of their shoes, and also caused the said words to be affixed to a label sewn into the lining of said shoe.

The respondents, David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., in the course and conduct of their business as aforesaid, in soliciting the sale of and selling their shoes in interstate commerce, for several years last past have also caused the words

Dr. Martin's Walk-O-Pedic

to be imprinted, stamped, or printed upon boxes, cartons, invoices, and other printed matter used by them in the sale of a certain brand

of their shoes, and also caused the said words to be affixed to a label sewn into the lining of said shoe.

The respondents, David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., in the course and conduct of their business as aforesaid, in soliciting the sale of and selling their shoes in interstate commerce, for several years last past have also caused the words

Dr. Rubenshaw's Supreme Stout

to be imprinted, stamped, or printed upon boxes, cartons, invoices, and other printed matter used by them in the sale of a certain brand of their shoes, and also caused the said words to be affixed to a label sewn into the lining of said shoe.

PAR. 3. The respondents in the course and conduct of their business as aforesaid caused and still cause to be printed on certain invoices, stationery, billheads, and other printed matter to be printed for them the word "Manufacturers," which invoices, stationery, billheads, and other printed matter were and are used by the respondents in the course and conduct of their business in interstate commerce.

PAR. 4. In truth and in fact the shoes so marked, stamped, labeled, branded, advertised, and sold, as described in paragraph 2 hereof, were not made in accordance with the design of or under the supervision of a doctor and did not contain special orthopedic features which were the results of medical advice or services, all of which has a capacity and tendency to mislead many among the aforesaid trade and among the purchasing public into the belief that said shoes had been fashioned or designed by a doctor or someone with a special orthopedic knowledge.

PAR. 5. In truth and in fact the respondents, David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., are not manufacturers of shoes, nor do they own, operate, or control any factory wherein their shoes are made or manufactured. Said representation made by respondents on their invoices, stationery, billheads, and other printed matter that they are "Manufacturers" is false and misleading and has a capacity and tendency to mislead and deceive purchasers of respondents' shoes into the belief that when purchasing from respondents they are dealing with manufacturers, thereby gaining an advantage and saving the middleman's profit.

PAR. 6. The respondents, David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., in the sale of their shoes as aforesaid, ship and distribute to their retail dealers their shoes, and said retail dealers resell the same so labeled and branded to the consuming public.

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PAR. 7. There are among the competitors of the respondents many persons, firms, corporations, and associations who manufacture and sell at wholesale shoes which contain special features designed to correct and alleviate certain foot ailments and weaknesses. There are also among the competitors of the respondents many persons, firms, corporations, and associations who manufacture and sell at wholesale shoes manufactured along standard lines, over standard lasts and for which no special feature representation or claims are made, and the use by the respondents of the abbreviation "Dr." in connection or conjunction with the name, brand, or designation of their shoes or in the advertisement of same, together with other special feature representations, and the further representation by respondents that they are manufacturers when they are not, has the capacity and tendency to unfairly divert trade from or otherwise injure and prejudice respondents' competitors in interstate commerce.

PAR. 8. The above alleged acts and things done by the respondents are all to the injury and prejudice of the public and of the competitors of the respondents in interstate commerce, and constitute unfair methods of competition in interstate commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," 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 September 30, 1935, issued and served its complaint in this proceeding upon the respondents, David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

Thereafter respondents filed their answer to said complaint, denying the material allegations thereof. Subsequently on June 13, 1936, respondents filed a motion to withdraw said answer, and substituted answer, which substituted answer admitted all of the allegations of the complaint, and consented that the Commission make its findings as to the facts and conclusion. Respondents also executed a stipulation as to the facts, admitting the material allegations of the complaint, and in their substituted answer consented that the Commission could make its findings as to the facts and conclusion from the facts so stipulated and to enter, issue, and serve upon them an order to cease and desist from the practices alleged in said complaint. The

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Commission thereafter granted respondents' motion to withdraw its original answer and received and filed respondents' substitute answer. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, substituted answer and stipulation as to the facts; 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 respondents, David Rubenstein and Herman Schwartz, are copartners doing business as the Nu-Way Shoe Co., with their principal place of business at 142 Duane St. in the city of New York, State of New York. The respondents have for more than 10 years last past been and are still engaged in the business of selling shoes, being wholesalers thereof between and among the different States of the United States. They have caused and still cause their shoes when so sold to be transported and shipped from their said place of business in the State of New York to purchasers located in States other than the State of New York.

In the course and conduct of their business, the respondents are and have been in competition with other individuals, corporations, and associations likewise engaged in the business of wholesaling shoes and distributing said shoes in commerce between and among the different States of the United States.

PAR. 2. The respondents, doing business as the Nu-Way Shoe Co., in the course and conduct of their business, and in soliciting the sale of and selling their shoes in interstate commerce, did for several years cause to be stamped or printed upon boxes, cartons, invoices, and other printed matter used by them in the sale of certain brands of their shoes, the following labels or titles: "Dr. Carol's Health Shoes," "Dr. Martin's Walk-O-Pedic," "Dr. Rubenshaw's Supreme Stout."

The respondents also caused these labels and titles to be affixed and sewn into the interlining of their shoes.

The respondents, copartners doing business as the Nu-Way Shoe Co., have, however, discontinued the use of these labels and have not used the same since March 4, 1934.

PAR. 3. The respondents, in the course and conduct of their business, for several years last past, did cause to be printed on certain invoices, stationery, and billheads and other printed matter, the word "Manufacturers," which invoices, stationery, billheads, and other printed matter were used by them in the course and conduct

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of their business in interstate commerce. However, at the present time the respondents have discontinued this practice and do not use the word "Manufacturers" on any of their printed matter or advertising.

PAR. 4. The shoes advertised as "Dr. Carol's Health Shoes," "Dr. Martin's Walk-O-Pedic" and "Dr. Rubenshaw's Supreme Stout" were not made in accordance with the design of or under the supervision of a doctor, neither is there a Dr. Carol, a Dr. Martin, or a Dr. Rubenshaw employed by the respondents or connected with them, these names being entirely fictitious. This advertising has a capacity and tendency to mislead some of the shoe trade and many ultimate consumers into the belief that respondents' shoes were or had been fashioned or designed by a doctor.

PAR. 5. The respondents, doing business as Nu-Way Shoe Co. do not own, operate, or control any factory wherein their shoes are made or manufactured and their use of the word "Manufacturers" is false and misleading and has a capacity and tendency to mislead and deceive purchasers of their shoes into the belief that when purchasing from respondents they are dealing with manufacturers, thereby gaining an advantage and saving the middleman's profit.

PAR. 6. There are many persons, firms, and corporations in competition with the respondents and among them those who manufacture and sell at wholesale shoes which do contain special features designed to correct and alleviate certain foot ailments and weaknesses. Some of respondents' competitors are those who sell shoes at wholesale, manufactured along standard lines over standard lasts and for which no special feature representations or claims are made. There are also many manufacturers of shoes who rightfully call themselves such. The use by respondents of the abbreviation "Dr." in connection and conjunction with the name, brand, or designation for their shoes or in the advertisement of same and the representation that respondents are manufacturers when they are not, has the capacity and tendency to unfairly divert trade from or otherwise injure and prejudice respondents' competitors in interstate commerce.

PAR. 7. The aforesaid advertisements, representations, and statements made by the respondents as set forth in the foregoing paragraphs hereof have had the capacity and tendency to divert trade to said respondents from competitors. Competition throughout the various States of the United States has been substantially injured by said respondents through the use of, or by means of such representations and statements.

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CONCLUSION

The aforesaid acts and practices of respondents under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and respondents' 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

The respondents, David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., having heretofore on October 18, 1935, filed an answer herein denying the material allegations of the complaint, and subsequently on the 13th day of June 1936, respondents having filed with the Commission a motion that they be permitted to withdraw said answer and be permitted to file in lieu thereof their substituted answer which is incorporated in said motion, and respondents having also executed a stipulation as to the facts in lieu of testimony; and the Commission having duly considered said motion, substituted answer, and stipulation as to the facts, and being fully advised in the premises.

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, that the said substituted answer be and the same is hereby filed in lieu of the said answer so withdrawn.

And the respondents in and by their substituted answer having admitted the allegations contained in the complaint, consented that the Commission make its findings as to the facts and conclusion from the facts stipulated, and having consented to the entry, issuance, and service upon them of an order to cease and desist from the practices alleged in the complaint; and the Commission being fully advised in the premises and having made its findings as to the facts and its conclusion that respondents have 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 hereby further ordered, That the respondents, David Rubenstein and Herman Schwartz, copartners doing business as Nu-Way Shoe Co., their agents, servants, representatives, and employees, in connection with soliciting the sale of and selling their shoes in interstate commerce, forthwith cease and desist from:

(1) Representing directly or indirectly through advertisements or on labels, stationery, invoices, and other printed matter, or in any

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other manner that their shoes are made in accordance with the design or under the supervision of a doctor, when such is not the fact.

(2) Directly or indirectly using or causing to be used the word "Doctor" or the abbreviation "Dr." in connection or in conjunction with the name or with any word or words or in any way as a trade name in the advertising or designation of their shoes; or in any way which may have the capacity and tendency to confuse, mislead or deceive purchasers into the belief that said shoes are made in accordance with the design or under the supervision of a doctor, when such is not the fact.

(3) Directly or indirectly using or causing to be used the word "Doctor" or the abbreviation "Dr." in connection or in conjunction with a name or with any word or words or in any way as a trade name, brand, label, or designation on their shoes; or in any way which may have the capacity and tendency to confuse, mislead, and deceive purchasers into the belief that said shoes are made in accordance with the design or under the supervision of a doctor, when such is not the fact.

(4) Representing directly or indirectly through the use of the word "manufacturer" alone, or in conjunction with other words, or through the use of any other word or words of similar import or meaning in their advertising matter, or in or through other means, that they are manufacturers.

It is further ordered, That the respondents shall within 60 days after the service upon them of a copy of this order file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF

AMERICAN SHEET & TIN PLATE CO. ET AL.

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

Docket 2741. Complaint, Mar. 26, 1936¹—Decision, June 24, 1936

Where some fifteen corporations engaged in (1) manufacture of tin plate and in sale thereof to tin plate jobbers and to metal container and tin can manufacturers, including the two principal purchasers of such plate's below described "production" grade and consumers of approximately sixty-five per cent of the domestic production; and in the course of their said business, (2) producing the (a) "production plate" grade made in accordance with customers' specifications and constituting bulk of tin plate made by them, (b) "stock plate" grade of overruns, seconds and warming-up sizes accumulated in large quantities without specific orders therefor in course of manufacture of former and theretofore sold, in substantial part, to such jobbers, and, by resale by latter, to small can manufacturers and packers unable to carry "production" in stock in various sizes and quantities required, and (c) "waste-waste," in which defects are so great as not to permit same to qualify as seconds—

- (a) Agreed not to quote prices on "stock" nor to offer same to jobbers and manufacturers, and to restrict and eliminate competition in interstate sale and distribution of such tin plate to jobbers thereof and to metal container and tin can manufacturers, through certain conferences resulting in elimination of the "stock plate" classification and in requirement that buyers of "production" accept seconds up to twenty-five per cent of their orders;
- (b) Refused, in pursuance of their aforesaid agreement, to quote prices on "stock" or to offer or sell same to jobbers and manufacturers, although producing it in substantial quantities, and sold as "production," at prices higher than those theretofore received for "stock," some of latter produced and accumulated by them; and
- (c) Cut up some of such "stock" into such shapes as to render it unfit for manufacture of tin cans or other metal containers, and classified and sold same as "waste-waste" for domestic consumption, while classifying and selling as "waste-waste," "stock" for export, without mutilation;

With result that there was an undue tendency to substantially lessen, restrict, and suppress competition in interstate sale of tin plate throughout the United States and particularly in sale of "stock," and to enhance prices of latter above those which had theretofore prevailed and which would prevail under normal, natural, and open competition between them, and there was a tendency to destroy business of tin plate jobbers and force them out and to create a monopoly in manufacture of tin containers in two aforesaid companies by depriving their small manufacturer competitors of their normal source of supply of tin plate, and such small tin can and metal container manufacturers who had theretofore purchased their neces-

¹ Amended.