

IN THE MATTER OF
BEAR MILL MANUFACTURING COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 25 1914

Docket 2678. Complaint, Oct. 11, 1935—Decision, Apr. 5, 1937

Where a corporation engaged in the sale and distribution of cotton and rayon fabrics and of rayon and cotton mixtures, purchasing unfinished cotton, rayon, and mixed fabrics and having the same processed according to its instructions by a finishing company over which it exercised no control and which it did not own or operate, and selling its said fabrics in substantial competition with those engaged in sale and distribution, or in manufacture, sale, and distribution, of cotton and rayon fabrics and of cotton and rayon mixtures, and including among its competitors many who sell and distribute, but do not manufacture, their said cotton and rayon fabrics, or in any way represent themselves as manufacturers thereof, and competitor manufacturers of cotton and rayon fabrics sold by them who do employ terms "mill" and "manufacturing" or other terms of similar import and meaning—
Represented, through use of terms "Mill" and "Manufacturing" as included in its corporate name, on its stationery and invoices circulated throughout the United States to customers and prospective customers, and on folders containing samples of its said products and carried by its salesmen who travel throughout the United States, to its customers, prospective customers, and general buying public, that it actually owned and operated, or directly and absolutely controlled, a mill wherein its goods were made, the facts being it did not thus own, operate or control any such factory or mill and was not engaged in manufacturing, and was not itself a manufacturer as understood by trade and purchasing public generally, and did not own any print works, dye works, bleach works, finishing works, spinnery or weavery, but was engaged solely in sale and distribution of fabrics made by others as hereinbefore set forth;

With effect of misleading a substantial portion of the purchasing public into the erroneous belief that it actually owned and operated, or directly and absolutely controlled, a mill or mills wherein the products sold by it were manufactured, and with further result that the buying public, as a result of the erroneous belief thus induced, bought a substantial volume of its said products, and trade was unfairly diverted to it from competitors likewise engaged in sale and distribution of cotton and rayon fabrics and who truthfully advertise and represent the nature and character of their respective businesses; to the substantial injury of competition in commerce;
Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Charles F. Diggs*, trial examiner.

Mr. T. H. Kennedy for the Commission.

Mr. Dudley B. Bonsal of Curtis, Mallet-Prevost, Colt & Mosle, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Bear Mill Manufacturing Company, Inc., a corporation, hereinafter referred to as respondent, has been and now is using unfair methods of competition in commerce, as "commerce" is defined in said act; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, states its charges in that respect as follows:

PARAGRAPH 1. The respondent, Bear Mill Manufacturing Company, Inc., is a corporation organized under the laws of the State of New York in 1907, then, ever since and now exists by virtue of the laws of said State, and now has its principal place of business in the City of New York, State of New York. The respondent is, and for more than one year last past has been engaged in supplying rayons and cottons to commission weavers, who, in turn, manufacture or weave the material so supplied them into fabric. The title to the material so supplied said weavers, and in the product manufactured by the said weavers, is retained in the respondent. Respondent, for more than one year last past, has been engaged in the sale and distribution of rayon and cotton cloth or fabric either as an agent for others or on its own behalf. Said operations of respondent have been and are in commerce between and among the various States of the United States. When the products herein referred to are sold, respondent causes them to be shipped from its place of business in the State of New York or other State of origin to purchasers thereof located in various States of the United States and other than the State of New York or other State of origin. In the course and conduct of its business said respondent was at all times hereinafter referred to in competition with other corporations, individuals, firms, and partnerships likewise engaged in the supplying of materials to weavers for manufacture by them and in the sale and distribution in interstate commerce of similar products.

PAR. 2. In the course and conduct of its business, as described in paragraph 1, said respondent adopted as and for its name the words Bear Mill Manufacturing Company, Inc., under which to carry on its business and which name containing the words "Mill" and "Manufacturing" it has used continuously since in or about 1907 and is now using in soliciting the sale of and selling its said products in interstate commerce. Respondent has caused said name "Bear Mill Man-

ufacturing Company, Inc." to appear on its letterheads and other stationery and advertisements circulated, in soliciting the sale of and selling its products in interstate commerce when in truth and in fact said respondent did not manufacture any of the products which it sold and distributed and did not own, control, or operate any mill or factory wherein said products were manufactured or fabricated, which said products respondent sold and distributed in interstate commerce.

PAR. 3. There is a preference on the part of certain of the retail merchants in the different States of the United States for goods, wares and merchandise, to be resold at retail to the public, bought directly from the mill owner or manufacturer thereof, and there is an impression and belief existing among certain of said retail merchants that by dealing directly with the mill owner or manufacturer they can buy goods at a cheaper price and on more favorable terms than they can from jobbers or corporations, associations, individuals, firms, and partnerships not manufacturing goods, wares, and merchandise they sell to such retail dealers by eliminating the profits of the middleman and that a more uniform line of goods can be purchased from a mill operator than from one who does not operate a mill. The use by respondent of the words "Mill" and "Manufacturing" in its name in respondent's letterheads, billheads, invoices, stationery, and otherwise has a tendency and capacity to mislead and deceive purchasers who are customers and prospective customers of respondent by causing them to believe that respondent actually owns and operates, or directly and absolutely controls the mill or mills in which said products are made or manufactured, or that respondent himself makes or manufactures his products, and that thereby such customers or prospective customers save and will save the middleman's profit; and the use by respondent of the words "Mill" and "Manufacturing" has a tendency and capacity unfairly to divert trade to respondent from other corporations, associations, individuals, firms, and partnerships, who are actually manufacturing products similar to the products of respondent for sale in interstate commerce and those competitors of respondent who do not manufacture similar or like products to those of respondent for sale and distribution in interstate commerce, but who truthfully advertise and label same and who do not claim or represent themselves to be manufacturers.

PAR. 4. The practices of respondent described in paragraph 2 hereof are all to the prejudice of the public and the respondent's competitors and constitute unfair methods of competition in interstate commerce in violation of 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."

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 October 11, 1935, issued and served its complaint in this proceeding upon respondent Bear Mill Manufacturing Company, Inc., 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 other evidence in support of the allegations of said complaint were introduced by Thomas H. Kennedy, attorney for the Commission, before Charles F. Diggs, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Dudley B. Bonsal, attorney for the respondent; and said testimony and other evidence were 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 other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; and the Commission having duly considered the same, and being now 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, Bear Mill Manufacturing Company, Inc., is a New York corporation, organized in 1907. Its principal office is at 361 Broadway, New York, N. Y.

It is now, and since its incorporation has been, engaged in the sale and distribution of cotton fabrics. During more recent years it has added rayon fabrics and rayon and cotton mixtures to its line of merchandise. When orders are received for respondent's goods it either ships them from its place of business in New York, N. Y., or from the point at which the goods are processed, to the purchasers thereof located at various points in States of the United States other than the State of origin of shipment. The respondent has, at all times during the past several years, maintained a constant current of trade and commerce among and between the various States of the United States

and in the District of Columbia in the merchandise which it sells. Its dollar volume of sales for the year 1935 approximated \$2,500,000 and for 1936 \$3,500,000.

At all times during the last several years, the respondent has been in substantial competition with other corporations and with individuals and partnerships likewise engaged in the sale and distribution, or in the manufacture, sale, and distribution, of cotton fabrics, rayon fabrics, and cotton and rayon mixtures in commerce, among and between the several States of the United States and the District of Columbia.

PAR. 2. The respondent's corporate name, "Bear Mill Manufacturing Company, Inc.," appears on its stationery and invoices circulated throughout the United States to customers and prospective customers. Its salesmen, who travel throughout the United States, carry samples of respondent's products, the folders of which bear the respondent's corporate name. Its corporate name also appears in the New York City telephone directory.

The use of the terms "mill" and "manufacturing", as a part of its trade name, serves as a representation to respondent's customers, prospective customers and the general buying public that the respondent actually owns and operates or directly and absolutely controls a mill wherein its goods are manufactured.

PAR. 3. The respondent does not, in fact, own, operate or control any factory or mill wherein its said products are manufactured. It is not engaged in the business of manufacturing and is not itself a manufacturer as those terms are understood by the trade and the purchasing public generally. It does not own any print works, dye works, bleach works, finishing works, spinnery or weavery, but is engaged solely in the sale and distribution of fabrics manufactured by others. It buys unfinished cotton, rayon, and mixed fabrics and has said fabrics processed, according to its own instructions, by a finishing company over which it exercises no control and which it does not own or operate.

PAR. 4. A substantial portion of the fabric-buying public has a preference for dealing direct with a manufacturer of the fabrics being purchased. Said purchasers believe they obtain better prices, superior quality, and other advantages in dealing direct with a manufacturer rather than a broker or middleman.

PAR. 5. Many of respondent's competitors who sell and distribute cotton and rayon fabrics in interstate commerce do not manufacture the products sold by them and do not in any way represent that they are the manufacturers of said products. There are also among respondent's competitors manufacturers of cotton and rayon fabrics

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which they sell in interstate commerce, who do employ the terms "mill" and "manufacturing" or other terms of similar import and meaning, in their corporate names and advertising.

PAR. 6. Respondent's practice of designating and representing itself as a manufacturer through the use of the terms "mill" and "manufacturing" as parts of its corporate name, which appears on its stationery, invoices, in the telephone directory, and on its advertising matter, has had, and now has, the capacity, and tendency to mislead and deceive, and has misled, a substantial portion of the purchasing public into the erroneous belief that respondent actually owns and operates or directly and absolutely controls a mill or mills wherein the products which it sells are manufactured. As a result of the erroneous belief induced by the false and misleading representation above referred to, the buying public has purchased a substantial volume of respondent's products with a result that trade has been unfairly diverted to the respondent from its competitors likewise engaged in the business of selling and distributing cotton and rayon fabrics, who truthfully advertise and represent the nature and character of their respective businesses. Thereby substantial injury has been and is now being done by respondent to competition in commerce among and between the various States of the United States and of the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondent, Bear Mill Manufacturing Company, Inc., 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, 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 other evidence taken before Charles F. Diggs, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by Thomas H. Kennedy, counsel for the Commission, and by Dudley B. Bonsal, 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

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a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondent, Bear Mill Manufacturing Company, Inc., its officers, representatives, agents, and employees, in connection with the sale and distribution of cotton and rayon fabrics, in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

Representing, directly or by implication, through the use of the words "mill" or "manufacturing," alone or in conjunction with other words, as part of its corporate or trade name, or in any other manner, or through any other means or device, that it manufactures the product which it sells until and unless it actually owns and operates or directly and absolutely controls the mill or factory wherein such products are made.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF

H. WILL ELDERS

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

Docket 2673. Complaint, Dec. 28, 1935—Decision, Apr. 5, 1937

Where an individual engaged in sale and distribution, under name "Dr. H. Will Elders," or "Dr. Elders," as case might be, of his so-called "Private Prescription" for women, "Laxative Lozenges" and "Private Prescription Sanitary Douche"; in advertising the same in periodicals circulated to the purchasing public in the various States and through circulars, letters, and other advertising material, and through publication of testimonials of others—

- (a) Represented, directly or by implication, that his said preparations constituted a cure, remedy, or competent and adequate treatment for sterility in women, facts being that causes of such condition are many and varied, and in many cases are not due to functional weakness, but are result of disease and anatomical abnormalities, and that while his said "Filled Prescription," by virtue of its action as a general tonic, and tendency to aid nutrition, tended to relieve sterility in cases not due to any diseased or abnormal condition by aiding and restoring patient to normal health, and might be beneficial to some of such cases due to functional weakness, it could not be beneficial in all of such cases, including those where such weakness was result of disease, only effect of said lozenges in connection with treatment of sterility was to give temporary relief in constipation where such condition might exist and thus be associated with such other conditions to be treated, said "Private Prescription Sanitary Douche" did not, in itself, have curative properties in many causative pathological conditions producing sterility, and his said medicines, used either together or singly, did not constitute a cure, remedy, or competent and adequate treatment for such condition in women, nor for diseased conditions which are most frequently the cause thereof, and in cases of sterility due to disease or to anatomical abnormalities would not be effective in removing the same; and
- (b) Represented, as aforesaid, that his said prescriptions constituted a cure, remedy, or competent and adequate treatment for similar diseases generally, and especially for leucorrhea and delayed, painful, and suppressed menstruation, facts being that, while his said "Filled Prescription" acted as a palliative and gave some relief from pain, it had no curative effects where any definite pathology existed, and would not cure or remedy ovarian pains and various other conditions and ailments included in the term "female diseases," and had no effect on the causes underlying or forming the basis of such diseases where a pathological condition existed, and that, while said "Private Prescription Sanitary Douche" was a cleansing sanitary wash and had inhibitory antiseptic properties and some slight inhibitory germicidal properties, it was not a general germicide, and while its use might be beneficial to women, whether suffering from female disorders or not, and use thereof would tend to be beneficial in some ways in