

Syllabus

IN THE MATTER OF

SILVER ROD STORES SUPPLY COMPANY, INC., AND
DALE DRUG COMPANY, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2955. Complaint, Oct. 22, 1936—Decision, Aug. 4, 1937*

Where a corporation and its subsidiary engaged in distribution and sale, from the warehouse of the former, of aspirin to group of drug and cigar stores in certain other States, as requisitioned from time to time by such stores under arrangement set up and established between them—

(a) Represented that they were the first or original manufacturers or dealers in aspirin, through stamping word "ORIGINAL" in large red letters on all cartons, bottles, and tin containers of their said product, and through such statements, in advertising matter and pamphlets and containers of their tablets, as "Insist upon the Original 'Dale's Aspirin'," "Look for the 'D' on each tablet which is the Original 'Dale's Aspirin'," and "Original 'Dale's Aspirin' is packaged in convenient tins," etc., facts being they were not the first or original manufacturers of or dealers in said product, manufacture of which was begun under patent and continued for many years thereafter by the predecessor of a corporation other than that from which they purchased their said product, thus described and referred to; and

(b) Represented that their said product had a retail value in excess of the actual selling price and in excess of the actual value thereof, through stamping on 100-tablet containers of said "Dale's Aspirin," "Price \$1.00," and on 50-tablet containers, "Price \$.50," notwithstanding fact retail price at which they sold their said product fluctuated between 39¢ and 49¢ for the 100-tablet quantities and was about 23¢ during said period for the 50-tablet units, and said tablets in such quantities at no time sold for \$1.00 or 50¢, as case might be, and prices in question, thus appearing as selling prices thereof, were not those at which tablets were actually sold or intended to be sold, but were greatly in excess of such prices in usual course of trade;

With tendency and capacity to mislead and deceive substantial portion of purchasing public into erroneous belief that all said representations were true, and with result that a substantial number of consuming public, as a consequence of erroneous beliefs induced by such false and misleading statements, purchased substantial volume of its said tablets and trade was unfairly diverted to them from those likewise engaged in distribution and sale of such tablets and who truthfully advertise the same; 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. Edward M. Averill*, trial examiner.

Mr. George Foulkes for the Commission.

Complaint

25 F. T. C.

Mr. Matthew Swerling and Mr. J. E. Weiner, 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," the Federal Trade Commission having reason to believe that the Silver Rod Stores Supply Co., Inc., a corporation, and Dale Drug Company, Inc., a corporation, hereinafter referred to as respondents, have been and are using unfair methods of competition in commerce as "commerce" is defined in said act of Congress, and it appearing to the 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, Silver Rod Stores Supply Co., Inc., is a corporation existing and doing business under the laws of the State of New York, with its principal office and place of business located at 60 Broadway, Brooklyn, N. Y.

Respondent Dale Drug Company, Inc., is a subsidiary of respondent Silver Rod Stores Supply Co., Inc., and is a corporation existing and doing business under the laws of the State of New York, with its principal office and place of business located at 60 Broadway, Brooklyn, N. Y.

Respondent Silver Rod Stores Supply Co., Inc., and respondent Dale Drug Company, Inc., are now and have been for some time engaged in the business of distributing and selling in commerce, as herein set out, a certain pharmaceutical preparation commonly called "aspirin."

PAR. 2. Said respondents, Silver Rod Stores Supply Co., Inc., and Dale Drug Company, Inc., being engaged in business as aforesaid, cause and have caused said aspirin, when sold, to be transported from their respective offices and places of business in the State of New York to purchasers thereof located at various points in States of the United States other than the State from which said shipments were made. Both respondents have maintained and now maintain a constant current of trade and commerce in said aspirin distributed and sold by them between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their respective businesses, both respondents are now, and have been, in substantial competition with other corporations and with individuals and firms likewise engaged in the business of selling and distributing aspirin in com-

merce among and between the various States of the United States and in the District of Columbia. In the course and conduct of their respective businesses, said respondents sell aspirin under the name "Dale Drug Company, Inc.," and represents said aspirin as "Dale's Aspirin."

By statements and representations in advertising matter, pamphlets and on containers of aspirin tablets, said respondents represent that they are, or either of them was, the first, or original manufacturers of, or dealers in, aspirin. Such advertisements and statements are as follows:

Insist upon the original "Dale's Aspirin."

Look for the "D" on each tablet, which is the "Original Dale's Aspirin."

Original Dale Aspirin is packed in convenient tins of 12s for the pocket or purse.

On each bottle containing said aspirin tablets is stamped the word "original" in red letters.

In truth and in fact, said representations of both respondents that they are, or either of them was the first or original manufacturer of or dealer in aspirin, are false, misleading, and untrue. In truth and in fact, Dale's Aspirin is not the original aspirin, and the respondents are not the original manufacturers of or dealers in aspirin.

PAR. 4. By markings and statements on cartons containing aspirin respondents represent to customers and prospective customers that Dale's Aspirin has a retail value in excess of the actual selling price and in excess of the actual value thereof.

The retail prices stamped on said cartons, as aforesaid, are in excess of the actual selling prices of Dale's Aspirin by the respondents to the consuming public, and are in excess of the true and actual value of said aspirin.

The retail prices so stamped or printed as aforesaid are false and fictitious and in no sense represent either the true value or true selling price of the aspirin so price marked.

Such statements and representations made by the respondents regarding the selling prices and value of Dale's Aspirin are as follows:

100 Dale's Aspirin Tablets, price \$1

50 Dale's Aspirin Tablets, price 50¢

The prices appearing on said cartons as to the value of said aspirin were not and are not the prices at which the same were or are expected or intended to be sold, but were and are greatly in excess of the prices at which the same were sold or intended to be sold in the usual course of trade.

PAR. 5. Each and all false and misleading representations made by both respondents, as hereinabove set forth, in their advertising matter, in offering for sale and selling "Dale's Aspirin," had and now has the tendency and capacity to mislead and deceive a large portion of the purchasing public into the erroneous belief that all said representations are true. Further, as a direct consequence of these false, misleading and erroneous beliefs induced by advertisements and statements of both respondents, as hereinabove enumerated, a number of the purchasing public purchased a substantial volume of respondents' aspirin with a result that trade has been unfairly diverted to respondents from individuals, firms, and corporations likewise engaged in the business of selling aspirin, who truthfully advertise their products. As a result thereof, substantial injury has been done and is being done by both respondents to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 6. The aforementioned methods, acts, and practices of respondents are all to the prejudice of the public and respondents' competitors as hereinabove alleged. Said methods, acts, and practices 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," 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 October 22, 1936, issued and served its complaint in this proceeding upon respondents, Silver Rod Stores Supply Company, Inc., a corporation, and Dale Drug Company, Inc., a corporation, charging them 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 respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by George Foulkes, attorney for the Commission, before Edward M. Averill, an examiner of the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint, by J. E. Weiner, attorney for the respondents, 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, and brief in support of the complaint; 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 Silver Rod Stores Supply Co., Inc., is a corporation organized in the year 1919 under the laws of the State of New York and existing and doing business under said laws with its principal office and place of business located at 60 Broadway, Brooklyn, N. Y.

Respondent Dale Drug Company, Inc. is likewise a New York corporation and the subsidiary of respondent Silver Rod Stores Supply Co., Inc., with its office and principal place of business located at 60 Broadway, Brooklyn, N. Y.

Both respondents Silver Rod Stores Supply Co., Inc., and Dale Drug Company, Inc., are now, and have been for more than one year last past, engaged in the business of distributing and selling in interstate commerce a certain pharmaceutical preparation, commonly called "aspirin."

PAR. 2. Both respondents have maintained, and now maintain, a constant current of trade in commerce in said aspirin between and among the various States of the United States.

Respondent Silver Rod Stores Supply Co., Inc., maintains a warehouse in the State of New York from which it distributes products and supplies to a group of drug and cigar stores located in the State of New York and in the State of New Jersey.

Among said stores is a group operated by the Silver Rod Stores, Inc. of New Jersey, which is a corporation organized under the laws of New Jersey, and is a wholly owned subsidiary of the respondent Silver Rod Stores Supply Co., Inc. of New York.

All of the stores including the New Jersey stores requisition whatever merchandise they require from the warehouse maintained by Silver Rod Stores Supply Co., Inc., in the State of New York which thereupon ships the merchandise to Silver Rod Stores, Inc. of New Jersey and charges each store for the merchandise it receives.

Each store of the Silver Rod Stores, Inc. of New Jersey and the Silver Rod Stores of New York makes daily deposits in separate banks, and sends duplicate slips to the respondent Silver Rod Stores Supply Co., Inc.

Respondent Silver Rod Stores Supply Co., Inc. thereupon makes withdrawals from said bank by checks drawn against accounts of Silver Rod Stores, Inc. in payment of the merchandise requisitioned by said stores and shipped to them as aforesaid by respondent Silver Rod Stores Supply Co., Inc.

Said respondents Silver Rod Stores Supply Co., Inc., and Dale Drug Company, Inc., by engaging in business as aforesaid, cause and have caused aspirin, when sold, to be transported from their respective offices and places of business in the State of New York to purchasers thereof located at various points in States of the United States other than the State from which said shipments were made.

PAR. 3. In the course of the operation of their respective businesses, both respondents are now, and have been, in substantial competition with other corporations and with individuals and firms likewise engaged in selling and distributing aspirin in commerce among and between the various States of the United States.

Respondents market their aspirin product under the name of "Dale's Aspirin."

Respondents' "Dale's Aspirin Tablets" are sold in small bottles which are packaged in cardboard containers. Respondents also sell aspirin in small tin cartons.

In each cardboard carton containing a bottle of "Dale's Aspirin Tablets" is enclosed a small leaflet upon which certain statements are made relative to the quality of respondents' aspirin.

In all of the containers of respondents' "Dale's Aspirin," and in all of respondents' literature about said aspirin tablets is featured the word "ORIGINAL."

On all cartons, bottles, and tin boxes containing respondents' aspirin, the word "ORIGINAL" is stamped in large red letters. By statements and representations in advertising matter, pamphlets and on containers of aspirin tablets as aforesaid said respondents represent that they are the first or original manufacturers or dealers in aspirin. Such advertisements and statements are as follows:

Insist upon the Original "Dale's Aspirin";

Look for the "D" on each tablet which is the Original "Dale's Aspirin";

Original "Dale's Aspirin" is packaged in convenient tins of 12s for the pocket purse.

Respondents do not manufacture the aspirin which they sell, but purchase the same from the Norwich Drug Company of Norwich, N. Y.

The respondents are not the first or original manufacturers of or dealers in aspirin.

The drug which is today commonly known as aspirin and chemically known as acetylsalicylic acid was first introduced in the United States in 1899 by a company named Farben Fabriken.

The Farben Fabriken Company obtained a patent for the manufacture of the drug in 1900, which patent expired in 1917.

The Farben Fabriken Company was the predecessor of the present Bayer Company, a New York corporation engaged in the manufacture and interstate sale of aspirin, and throughout the period of the patent, the Bayer Company and its predecessors were the exclusive manufacturers of the substance today commonly known as aspirin.

PAR. 4. On the cartons containing respondents' "Dale's Aspirin" are markings and statements by which respondents represent to customers and prospective customers that "Dale's Aspirin" has a retail value in excess of the actual selling price and in excess of the actual value thereof.

On the carton containing 100 tablets of "Dale's Aspirin," respondents represent the retail price to be \$1.00, and on the cardboard carton containing 50 tablets of "Dale's Aspirin," respondents represent the retail price to be 50¢.

Said representations are made in the following manner:

Price \$1.00

Price \$.50

Respondents have at no time sold 100 aspirin tablets for \$1.00, or 50 aspirin tablets for 50¢.

The retail price at which respondents sold said aspirin during the last two or three years has fluctuated between 39¢ and 49¢ for 100 tablets and around 23¢ for 50 tablets of aspirin.

The prices appearing on said cartons as the selling price of said aspirin tablets were not and are not the prices at which the same were and are actually sold or intended to be sold but were, and are, greatly in excess of the prices at which the same are sold or are intended to be sold in the usual course of trade.

PAR. 5. Each and all of the false and misleading statements made by respondents as hereinabove set forth, in offering for sale and selling their aspirin tablets, had, and now have, a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that all of said representations are true.

As a consequence of the erroneous beliefs induced by the false and misleading statements of respondents as hereinabove set out, a substantial number of the consuming public has purchased a substantial volume of respondents' aspirin tablets, with the result that trade

Order

25 F. T. C.

has been unfairly diverted to respondents from corporations, firms, and individuals likewise engaged in the business of distributing and selling aspirin tablets, and who truthfully advertise their aspirin tablets.

As a result thereof, substantial injury has been done, and is now being done, by respondents to competition in commerce among and between the various States of the United States.

CONCLUSION

The aforesaid acts and practices of respondents Silver Rod Stores Supply Co., Inc., a corporation, and Dale Drug Company, Inc., a corporation, are to the prejudice of the public and of respondents' 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 respondents, testimony and other evidence taken before Edward M. Averill, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, by George Foulkes, counsel for the Commission, and by J. E. Weiner, counsel for the respondents, and brief in support of the complaint, and the Commission having made its findings as to the facts and its conclusion that said 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 ordered, That the respondents, Silver Rod Stores Supply Co., Inc., a corporation, and Dale Drug Company, Inc., a corporation, their respective officers, agents, and employees in connection with the offering for sale, sale and distribution of a pharmaceutical preparation, commonly known as aspirin, and chemically designated acetylsalicylic acid, do forthwith cease and desist from representing:

1. That they are, or either of them was, the first or original manufacturers of or dealers in aspirin.
2. That the prices marked or stamped on or affixed to said product, or on the containers thereof, are the regular or customary retail prices for such products, when said price marks are fictitious and

683

Order

greatly in excess of the regular and customary prices at which said products are sold or offered for sale at retail.

It is further ordered, That respondents shall, within 30 days from the date of the service upon them of this order, file with the Commission a report in writing setting forth the manner and form in which they have complied with the order herein set forth.

IN THE MATTER OF

H. E. WAGLEY, INDIVIDUALLY AND TRADING AS
NATIONAL SALES AND PARAMOUNT SALES

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 3147. Complaint, June 5, 1937—Decision, Aug. 4, 1937

Where an individual engaged in the sale and distribution of clocks and other articles of merchandise to purchasers in the various States, in competition with those engaged in manufacture of clocks and other merchandise and sale and distribution thereof in commerce between and among the various States—

- (a) Furnished devices and plans of merchandising, together with descriptive literature and instructions, which involved operation of games of chance, gift enterprises, or lotteries in distribution to ultimate consumers, wholly by lot or chance, or his said products, and consisted of push cards, through use of which, and under scheme or plan followed, substantially, purchasers paid for right to select one of names of girls set forth on card, in accordance with number pushed by chance, and received article of merchandise involved, of a value exceeding amount paid for chance, or nothing other than right to make a selection, in accordance with their success in selecting name corresponding to that concealed under card's master seal; in violation of public policy long recognized in the common law and criminal statutes, and contrary to an established public policy of the United States Government, and in competition with many who make and sell merchandise and are unwilling to adopt and use said or any method involving game of chance or sale of a chance to win by chance, or any other method contrary to public policy, and refrain therefrom;

With result that many dealers in and ultimate purchasers of his said merchandise were attracted by said method and element of chance involved in sale thereof as above set forth, and were thereby induced to buy and sell or distribute his said products in preference to those offered and sold by said competitors who do not use same or equivalent method, and trade was thereby diverted to him from them, and with capacity and tendency so to divert trade and custom, because of said game of chance, to him from his said competitors who do not use such or an equivalent method;

- (b) Caused representation to be made to his customers and prospective customers, through use of words "factory representative," that he was a direct purchaser from, or a direct distributor of, the manufacturer of the merchandise sold and distributed, notwithstanding fact he was not such representative, but purchased merchandise sold in open market from middlemen, jobbers, or wholesalers;

With effect of misleading and deceiving many of his said customers into the erroneous belief that he was such a direct representative, and that persons dealing with him were buying such merchandise from such direct representative and thereby eliminating profits of middleman and obtaining various advantages not to be had by those buying goods from middlemen, such as, as considered by substantial portion of purchasing public, who