

Syllabus

IN THE MATTER OF
WALLY FRANK, LTD.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3148. Complaint, June 9, 1937—Decision, Nov. 13, 1937*

Where a corporation engaged in sale and distribution of pipes and smokers' supplies to purchasing and consuming public in various States and in the District of Columbia, from its place of business in New York City, in substantial competition with those engaged in similar sale and distribution, or manufacture, sale, and distribution, of such products; in advertising in newspapers and periodicals and through depictions and labels and its own monthly publication, and in various other ways—

(a) Represented that it was a British or English concern with place of business in London, and that it dealt exclusively in goods imported from foreign countries, and that some of its pipes were prepared in accordance with and in conformity to certain famous and well-known processes, and that it offered and sold well-known and established brands at prices greatly reduced from the standard prices at which such pipes were customarily sold, facts being it did not sell any standard brand pipes, free from imperfections, at less than their usual and customary selling prices; and

(b) Represented that it was a manufacturer, through display in catalog mailed by it to prospective customers of reproduction of sign on its store in aforesaid city displaying, along with its corporate name, words "Pipe Manufacturers and Tobacconists," notwithstanding fact it did not manufacture pipes offered and sold by it, nor own, operate, or directly and absolutely control, a factory wherein such pipes are made;

With tendency and capacity to mislead and deceive purchasers of its said products into belief that in buying from it they were dealing with the manufacturer of pipes involved and thereby obtaining bargain by saving middleman's profit and other advantages, as commonly believed by purchasing public through association of such and other advantages, including superior merchandise, with such direct purchase, and with the effect of misleading and deceiving substantial portion of such public into erroneous belief that such representations were true, and into purchase of substantial quantities of pipes and smokers' supplies by reason thereof, and of unfairly diverting thereby trade to it from competitor-manufacturers and distributors of such products who advertise, sell and distribute their said products in commerce as above set forth, and do not misrepresent the status or nature of their business, origin or character of their products, or price at which sold, or otherwise publish untrue claims therefor; 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. W. W. Sheppard*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

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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 Wally Frank, Ltd., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, 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, Wally Frank, Ltd., is a corporation, organized in 1933, and doing business under the laws of the State of New York. Its principal office and place of business is at 10 East 45th Street, New York, N. Y.

Respondent is now, and since the date of its incorporation has been, engaged in the sale and distribution of pipes and smokers' supplies to the purchasing and consuming public located in various States of the United States and in the District of Columbia. Respondent now causes, and since 1933 has caused, its products, when sold by it, to be shipped from its place of business in New York, N. Y., to the purchasers thereof located in the various States of the United States and in the District of Columbia. There is now, and has been at all times since respondent has been in business, a constant current of trade and commerce by the respondent in smokers' supplies, between and among the various States of the United States and in the District of Columbia.

Respondent is, and since 1933 has been, in substantial competition with other corporations and with firms and individuals engaged in the sale and distribution of smokers' supplies in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. During the time respondent has been in business, as described in paragraph 1 hereof, it has represented, and, in certain particulars, still represents, through various types of advertising media, such as newspapers, magazines, pictorial representations, labels, its publication "Pipe Lore Monthly," and in various other ways, that it is a British concern, or that it has an office and does business in London; that it deals exclusively in goods imported from foreign countries; that some of its pipes are prepared in accordance with certain famous and well-known processes; and that it offers for sale and sells well-known and established brands of pipes at a price

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which has been greatly reduced from the standard price at which said pipes are customarily sold.

In truth and in fact, the respondent is not a British concern and has no office or place of business in London. It does not deal exclusively in imported goods. Its pipes are not prepared according to any famous and well-known process. It does not sell any standard brand pipes, which are free from imperfections, at less than the usual price for which said pipes are customarily sold.

PAR. 3. Respondent has represented in its advertising matter that it is a pipe manufacturer and that its pipes are shipped direct from the manufacturer to the purchaser. A sign on its store at 10 East 45th Street, New York, reads:

WALLY FRANK LTD.

PIPE MANUFACTURERS AND TOBACCONISTS

A picture of the store showing said sign appears in the 1937 "Annual Pipe Lore," a catalog which is mailed by respondent to prospective customers.

In truth and in fact the respondent does not manufacture the pipes offered for sale and sold by it, nor does it own, operate, or control a factory wherein said pipes are made.

It is a common belief among the purchasing public that a superior grade of merchandise can be purchased direct from the manufacturer thereof at a considerable saving in price and that other advantages can be secured by so purchasing. Representations made by respondent, as alleged in paragraph 3 hereof, have the tendency and capacity to mislead and deceive the purchasers of respondent's pipes into the belief that when they purchase said pipes from respondent they are dealing with the manufacturer of said pipes and thereby are obtaining a bargain by saving the middleman's profit and by obtaining other advantages.

PAR. 4. The use by respondent of the representations set forth herein 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 such representations are true and into the purchase of substantial quantities of said smokers' supplies as a result of such erroneous belief. There are among the competitors of respondent, as mentioned in paragraph 1 hereof, manufacturers and distributors of pipes and smokers' products who do not misrepresent the status or nature of their businesses, the origin or character of their products, and the price at which their products are sold, or otherwise publish claims for their products

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which are untrue, who likewise advertise, sell and distribute their smoker's supplies among the various States of the United States and in the District of Columbia. By the representations aforesaid, trade is unfairly diverted to respondent from such competitors and as a result thereof, substantial injury is being, and has been done, by respondent to competition in commerce as herein set out.

PAR. 5. The above alleged acts and practices of respondent are all to the injury and prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," 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 June 9, 1937, issued, and on June 10, 1937, served, its complaint in this proceeding upon respondent, Wally Frank, Ltd., a corporation, 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, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, briefs and oral arguments of counsel having been waived, 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

PARAGRAPHS 1. Respondent, Wally Frank, Ltd., is a corporation, organized in 1933, and doing business under the laws of the State of New York. Its principal office and place of business is at 10 East 45th Street, New York, N. Y. Respondent is now, and since the date of its incorporation has been, engaged in the sale and distribution of pipes and smokers' supplies to the purchasing and consuming

public located in various States of the United States and in the District of Columbia.

When orders are received for respondent's products, it causes them to be shipped from New York, N. Y., to the purchasers thereof located at various points in States of the United States other than the State of New York. Since 1933 the respondent has maintained a constant current of trade in said products, in commerce among and between the various States of the United States and in the District of Columbia.

At all times since respondent entered into said business, it has been in substantial competition with other corporations and with partnerships and individuals engaged in the sale and distribution, or in the manufacture, sale and distribution of pipes and smokers' supplies, in commerce among and between the several States of the United States and in the District of Columbia.

PAR. 2. During the time respondent has been in business, as described in paragraph 1 hereof, it has represented, and, in certain particulars, still represents, through various types of advertising media, such as newspapers, magazines, pictorial representations, labels, its publication "Pipe Lore Monthly," and in various other ways, that it is a British concern and has a place of business in London, England; that it deals exclusively in goods imported from foreign countries; that some of its pipes are prepared in accordance with and conformity to certain famous and well-known processes; and that it offers for sale and sells well-known and established brands of pipes at prices which have been greatly reduced from the standard prices at which said pipes are customarily sold.

The representations set forth above are untrue in that respondent is not a British concern nor does it have an office or place of business in London. It does not deal exclusively in imported goods. Its pipes are not prepared according to any famous and well-known process. It does not sell any standard brand pipes, which are free from imperfections, at less than the usual price for which said pipes are customarily sold.

PAR. 3. Respondent also represented in its advertising matter that it is a pipe manufacturer and that its pipes are shipped direct from the manufacturer to the purchaser. A sign on its store at 10 East 45th Street, New York, reads:

WALLY FRANK LTD.

PIPE MANUFACTURERS AND TOBACCONISTS.

A picture of the store showing said sign appears in the 1937 "Annual Pipe Lore," a catalog which is mailed by respondent to prospective customers.

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The above representation is untrue in that the respondent does not manufacture the pipes offered for sale and sold by it, nor does it own, operate or directly and absolutely control a factory wherein said pipes are made.

PAR. 4. It is a common belief among the purchasing public that a superior grade of merchandise can be purchased direct from the manufacturer thereof at a considerable saving in price and that other advantages can be secured by so purchasing. Representations made by respondent, as alleged in paragraph 3 hereof, have the tendency and capacity to mislead and deceive the purchasers of respondent's pipes into the belief that when they purchase said pipes from respondent they are dealing with the manufacturer of said pipes and thereby are obtaining a bargain by saving the middleman's profit and obtaining other advantages.

PAR. 5. The use by respondent of the representations set forth herein has had, and now has, the capacity and tendency to mislead and deceive, and has misled and deceived, a substantial portion of the purchasing public into the erroneous belief that such representations are true and into the purchase of substantial quantities of pipes and smokers' supplies on account of such erroneous belief.

There are among the competitors of respondent, as mentioned in paragraph 1 hereof, manufacturers and distributors of pipes and smokers' products who do not misrepresent the status or nature of their businesses, the origin or character of their products, or the price at which their products are sold, or otherwise publish claims for their products which are untrue, who likewise advertise, sell and distribute their pipes and smokers' supplies in commerce as herein described. By the representations aforesaid, trade is unfairly diverted to respondent from such competitors and as a result thereof substantial injury is being, and has been, done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondent Wally Frank, Ltd., 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."

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Order

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer filed on November 11, 1937, by respondent admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, 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 the respondent, Wally Frank, Ltd., a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of pipes and smokers' supplies in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing, directly or in any manner:

1. That it is a British or English concern;
2. That it has a place of business in London, England, or any other city where it does not actually maintain and operate a place of business;
3. That it deals exclusively in goods imported from foreign countries until and unless such is a fact;
4. That certain of its pipes are prepared in accordance with certain famous, well-known and established processes when such is not a fact;
5. That certain of its established and well-known brands of pipes are offered for sale and sold at prices which have been greatly reduced from the standard prices until and unless such is a fact;
6. That it is a manufacturer or that its pipes are shipped direct from the manufacturer until and unless it actually owns and operates, or directly and absolutely controls a factory or a mill wherein its 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.

IN THE MATTER OF
PHOEBE PHELPS CARAMEL COMPANY

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

Docket 3079. Complaint, Mar. 16, 1937—Decision, Nov. 16, 1937

Where a corporation engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and one of which consisted of number of individually wrapped penny caramels of uniform size and shape, with small number thereof having different colored stripe, and of number of small packages of candy, to be given as prizes to chance purchasers of such striped penny caramels—

Sold, to wholesalers and to retailers for display and resale to purchasing public, in accordance with aforesaid sales plan, said assortments, and thereby supplied to and placed in the hands of others the means of conducting, and under which they did conduct, lotteries in the sale of its said product in accordance with such plan, contrary to public policy long recognized by the common law and criminal statutes and to an established public policy of the United States Government, and in competition with many who, unwilling to offer or sell candy so packed and assembled, or otherwise arranged and packed for sale to purchasing public, as to involve a game of chance, refrain therefrom, and with many who are unwilling to adopt and use said method or any method involving game of chance for sale of a chance to win by chance, or any other method contrary to public policy;

With capacity and tendency to induce purchasers to buy its said products in preference to candy offered and sold by its competitors, and with result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing same and by element of chance involved in sale thereof as above described, and were thereby induced to purchase its said candy, so packed and sold by it, in preference to that offered and sold by its competitors who do not use same or equivalent method, and with tendency and capacity, because of said game of chance, to divert trade and custom from its competitors as aforesaid, exclude from candy trade all competitors who are unwilling to and do not use such or an equivalent method as unlawful, lessen competition therein, and tend to create a monopoly thereof in it and such other distributors as do use same or equivalent method, deprive purchasing public of benefit of free competition in trade in question, and eliminate from said trade all actual, and exclude therefrom all potential, competitors who do not adopt and use such or an equivalent method;

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

Mr. Henry C. Lank and Mr. P. C. Kolinski for the Commission.