Syllabus

IN THE MATTER OF

WORTHALL, LTD.

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

Docket 2690. Complaint, Jan. 24, 1936—Decision, Dec. 13, 1937

Where a corporation engaged as distributor of its "Drury Lane English Lavender" line of cosmetics and toilet preparations, including soaps, perfumes, toilet water, face powder, rouge, lipstick, and other similar products, ordinarily compounded or manufactured and packed and labeled for it by the manufacturers thereof and sold and distributed by it to drug stores and other retail outlets, principally, at points in the various States and in the District of Columbia, in competition with those engaged in manufacture, distribution, and sale, or in distribution and sale, of similar toilet preparations and cosmetics in commerce among the various States and in the District of Columbia—

Caused products thus dealt in and sold by it to be packed, wrapped, assembled, and labeled by the respective manufacturers with packages and labels conceived, designed, printed, and prepared and furnished by it to said compounders or manufacturers, and bearing legend, as attached by them, "Drury Lane English Lavender," along with name of individual preparation, and "Distributed by Worthall, Ltd., London, Montreal and New York," and also, at bottom of the various containers and entirely detached from aforesaid labels, small and inconspicuous and readily removable paper stickers containing words "Made in U. S. A.," facts being products in question were made for it at domestic plants of aforesaid domestic manufacturers and were not compounded or made in England, and contained no English materials or ingredients, and were not in any sense products of English manufacture or English in origin, and it had no branch or office in London, England, or Montreal, Canada;

With effect of misleading and deceiving members of the purchasing public into the mistaken and erroneous belief that said toilet preparations, distributed as aforesaid under name "Drury Lane English Lavender," were genuine English products prepared and compounded in England of English ingredients by an English concern, and subsequently imported from England into the United States, as preferred by substantial portion of purchasing public to similar domestic toilet preparations, and as implied from such terms as "English," "Made in England," etc., and of inducing members of purchasing public, acting in such mistaken and erroneous beliefs thus engendered, to buy its said toilet preparations, and thereby unfairly divert trade to it from its competitors who do not misrepresent the materials and place of origin of their respective products, or the ingredients thereof, and from competitors who actually sell and distribute toilet preparations of English origin and manufacture and truthfully represent the same:

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

Before *Mr. John W. Bennett*, trial examiner.
Mr. Allen C. Phelps for the Commission.
Boyd & Holbrook, 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 Worthall, 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, and it appearing to the 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. Worthall, Ltd., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 160 Fifth Avenue, in the city of New York, N. Y. The officers of said respondent, Worthall, Ltd., are: H. A. Woods, president; Philip F. Cohen, executive vice president; C. C. Payne, first vice president; E. R. Albright, second vice president; Max Rosenwald, secretary and treasurer, and Joseph Rosenwald, assistant secretary and treasurer. The directors of said respondent corporation are: H. A. Woods, Philip F. Cohen, C. C. Payne, E. R. Albright, and Max Rosenwald.

PAR. 2. Respondent, Worthall, Ltd., since prior to September 1934, has been and now is engaged in the business of causing to be compounded and manufactured, of offering for sale, selling and distributing a line of toilet preparations and cosmetics, including soaps, perfumes, toilet water, face powder, rouge, lipstick, and other similar products, to purchasers in the various States of the United States. Said respondent ordinarily causes said products to be compounded or manufactured, packed and labeled in the State of New York, and sells and distributes the same to various retail outlets, principally drug stores, located in the different States of the United States, including the District of Columbia, said products being in turn sold by said retail outlets to the public. In the course and conduct of its said business, said respondent causes its said products to be transported from the State of New York through and into other States of the United States, including the District of Columbia, and in the conduct of said business said respondent was and is in competition with

other individuals, firms, partnerships, and corporations likewise engaged in the manufacture and compounding, sale and distribution in interstate commerce of similar products.

PAR. 3. During the time above mentioned, respondent Worthall, Ltd., in the course and conduct of its said business, caused and now causes to be manufactured, compounded, wrapped, packed, offered for sale, and sold and distributed a line of toilet preparations which were and now are so sold and distributed in interstate commerce under the trade name or brand of "Drury Lane English Lavender." The labels attached to the containers and packages in which said toilet preparations were and are packed, sold, and distributed were and are conceived, designed, printed, and prepared by said respondent and furnished by respondent to the manufacturer or compounder of said products, who attaches said labels to the packages and containers of said products at the request of the respondent.

PAR. 4. For a long period of time the terms "English," "Made in England," "Imported from England," and similar terms, when used in connection with toilet preparations such as perfumes, soaps, toilet water, face powder, rouge, and similar articles have had and still do have a definite significance in the minds of wholesalers and retailers and the ultimate purchasing public, to wit: Such toilet preparations and products have for some years been compounded, blended, and manufactured in England, by English companies, of English materials, and imported into the United States, and which products so compounded and imported have been appropriately labeled and branded for sale and distribution in various States of the United States.

Such terms as the above, when applied to toilet preparations not made of English materials or manufactured by an English company, or imported from England, are false and misleading, and a substantial portion of the purchasing public prefers to buy genuine English toilet preparations produced as aforesaid, rather than imitations thereof which are not of English origin or manufacture.

PAR. 5. In the course and conduct of its said business as aforesaid, respondent has caused and does cause its products so manufactured, sold and distributed in interstate commerce to be labeled and branded with the words, "Drury Lane," "English Lavender," "Distributed by Worthall, Ltd., London, Montreal, New York," when, in truth and in fact, the said Worthall, Ltd., is not a limited corporation, nor is it an English company, nor does it have, nor has it had, any branch or office in London or Montreal which has any connection with

the manufacture, compounding, labeling, or packaging of said products, nor are or have been any of said products so sold and distributed in interstate commerce manufactured or compounded in London, or in England, nor are or have been the same imported from England or made from English material or ingredients. On the contrary, Worthall, Ltd., is a New York corporation; all of said products have been and are manufactured and compounded in the United States, principally of materials produced in this country, and the same were not and are not in any sense products of English manufacture, or English in origin.

PAR. 6. The representations so made and being made by respondent, as above set forth, and the use of the word "Limited," or the abbreviation "Ltd.," instead of "Incorporated" or "Inc." by said corporation, in combination with the words "London Montreal New York" and the trade name "Drury Lane" together with the words "English Lavender" are calculated and intended to, and do, have the capacity and tendency to, and did and do mislead and deceive dealers and the purchasing public into the belief that the toilet preparations so caused to be manufactured and compounded, and so sold and distributed by respondent, are genuine English products, and that respondent is an English corporation with manufacturing branches or offices in London and Montreal, and that said products are prepared and compounded in England and are of English origin and imported from England into the United States, when such is not the fact. Said representations have the capacity and tendency to, and did and do induce dealers and the purchasing public, acting on such beliefs, to purchase the said imitation toilet preparations, thereby diverting trade to respondent from its competitors who do not, by their corporate trade names or by false and misleading labels and advertising, or in any other manner, misrepresent the nature and character of their products, and from competitors who actually do sell and distribute toilet preparations of English origin and manufacture, and thereby, respondent does substantial injury to competitors and to the purchasing public, in interstate commerce.

PAR. 7. The acts and things above alleged to have been done and the false representations alleged to have been made by respondent are to the prejudice of the public and the competitors of respondent 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 January 24, 1936, issued and served its complaint in this proceeding upon respondent Worthall, 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 thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Allen C. Phelps, attorney of the Commission, before John W. Bennett, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Boyd and Holbrook, attorneys for 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 answers thereto, testimony and other evidence, and brief in support of the complaint (no brief having been filed by respondent and no oral argument having been applied for), 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. Respondent, Worthall, Ltd., is a corporation, organized in 1932 and existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 160 Fifth Avenue, in the city of New York, State of New York. Since prior to September 1934, respondent, Worthall, Ltd., has been engaged in business as a distributor of cosmetics and toilet preparations, including soaps, perfumes, toilet water, face powder, rouge, lipstick, and other similar products, all of which are distributed under the name "Drury Lane English Lavender." Worthall, Ltd. ordinarily causes said toilet preparations and cosmetics to be compounded or manufactured, and packed and labeled by the manufacturer thereof. Respondent's soap sold under the name "Drury Lane English Lavender" is manufactured by Lightfoot Schultz Company and the other preparations above named are manufactured by B. H. Krueger, Inc., both of which manufacturers have their plants located in the State of New York. Respondent

sells and distributes said toilet preparations and cosmetics to its customers, principally drug stores and other retail outlets, which are located at points in the various States of the United States and in the District of Columbia. Said products are in turn sold by said retail outlets to individual members of the purchasing public. In the course and conduct of its business, said respondent causes said toilet preparations and cosmetics, when sold, to be transported from the State of New York, where said products are compounded, manufactured, and labeled, to the purchasers thereof located in various States of the United States other than the State of New York and in the District of Columbia.

In the course and conduct of its business, respondent was, and is, in competition with other corporations and with individuals, firms, and partnerships likewise engaged in the manufacture, distribution, and sale, or in the distribution and sale, of similar toilet preparations and cosmetics, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Since September 1934, the respondent, Worthall, Ltd., in the course and conduct of its business, has caused Lightfoot Schultz Company and B. H. Krueger, Inc. to compound or manufacture, and to label, pack, wrap, and assemble said toilet preparations which are sold and distributed by respondent, in commerce as herein described, and which are designated and described with the name "Drury Lane English Lavender." The labels attached to the containers and packages in which said toilet preparations are packed for distribution and sale were conceived, designed, printed and prepared by said Worthall, Ltd. and by it furnished to the compounders or manufacturers of said products which attached said labels to the packages and containers thereof at the direction of the respondent.

PAR. 3. The labels and packages furnished to the manufacturers by the respondent and used by them in preparing said toilet preparations and cosmetics for distribution and sale by the respondent herein bear statements such as the following: "Drury Lane English Lavender," together with the name of the individual preparation such as toilet water, astringent lotion, and the words "Distributed by Worthall, Ltd., London, Montreal, and New York." On the bottom of the containers of the various toilet preparations, herein referred to, sometime appear small paper stickers containing the words "Made in U. S. A." These stickers are inconspicuously placed on the bottom of the container and are not in close conjunction to, or equal prominence with, the other phraseology hereinabove set out, and are not readily discernible. Said stickers bear no relation whatever to the principal labels appearing on said products and may be readily

removed from the containers of said products by retail dealers or others without in any way affecting the appearance of the labels, or the salability of the products.

For a long period of time, the terms "English," "Made in England," "Imported from England," and similar terms suggesting English origin, when used in connection with toilet preparations such as perfumes, soaps, toilet water, face powder, rouge and similar articles, have had, and still do have, a definite significance in the minds of retail dealers in, and ultimate purchasers of, said products; and the use of such terms signify to them that the toilet preparations and other products so branded and labeled have been actually compounded or manufactured in England and have been compounded, blended or manufactured from English materials by English companies and subsequently imported into the United States for sale and distribution. A substantial portion of the purchasing public prefers to buy such genuine English toilet preparations produced as aforesaid rather than similar toilet preparations which are of domestic origin and are not of English origin or manufacture.

PAR. 4. In truth and in fact, Worthall, Ltd. is a New York corporation and is not an English concern. It has never maintained any branch or offices in London, England or Montreal, Canada. None of said toilet preparations or similar products are compounded or manufactured in England and none of said products are made from English materials or ingredients. All of said toilet preparations are compounded and manufactured in the United States, principally from materials produced in this country. Said toilet preparations are not in any sense products of English manufacture and are not English in origin.

PAR. 5. The use of such terms as "English," and "Drury Lane English Lavender," particularly when accompanied with the representation that the distributor of said preparations maintains offices and places of business in Montreal and London, serves as representations to the purchasing public that said toilet preparations were made of English materials and ingredients and were manufactured by an English company in England and subsequently imported into the United States.

PAR. 6. The aforesaid misrepresentations made by the respondent through the use of the term "Drury Lane English Lavender," as descriptive of, or as a designation for, its toilet preparations, and through the use of the words "London" and "Montreal," were calculated and intended to have, and do have, the capacity and tendency to, and do, mislead and deceive members of the purchasing public into the mistaken and erroneous belief that said toilet preparations

distributed by the respondent under the name "Drury Lane English Lavender" are genuine English products prepared and compounded in England of English ingredients by an English concern, and subsequently imported from England into the United States. The respondent's aforesaid representations also have the capacity and tendency to, and do, induce members of the purchasing public, acting in said mistaken and erroneous beliefs induced as aforesaid, to purchase respondent's said toilet preparations thereby unfairly diverting trade to the respondent from its competitors who do not misrepresent the materials and place of origin of their respective products, or the ingredients thereof, and also from competitors who actually sell and distribute toilet preparations of English origin and manufacture and who truthfully represent said preparations.

CONCLUSION

The aforesaid acts and practices of the respondent, Worthall, Ltd., are to the prejudice of the public and the competitors of respondent 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 answers of respondent, testimony and other evidence taken before John W. Bennett, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, and brief on behalf of the Commission filed herein, and the Commission having made its findings as to the facts and its conclusion that respondent Worthall, Ltd., a corporation, 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 Worthall, Ltd., a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution, in interstate commerce or in the District of Columbia, of toilet preparations and cosmetics compounded and manufactured in the United States, including perfumes, soaps, toilet water, face powder, and similar articles, do forthwith cease and desist from:

1. Representing, through the use of the term "Drury Lane English Lavender," or any other term or words as a designation or brand name

for its various toilet preparations and cosmetics, or through any other means or device, or in any other manner, that said products are of English manufacture or origin, or are imported from England;

2. Representing that said products contain ingredients of English origin when such is not the fact;

3. Representing, through the use of the words "Montreal" and "London," or through the use of any other name of a foreign city or country, that it maintains branches and places of business in England, Canada, or any other foreign country.

It is further ordered, That the respondent, Worthall, Ltd., a corporation, 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

ENGLANDER SPRING BED 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 2602. Complaint, Oct. 30, 1935—Decision, Dec. 14, 1937

Where a corporation engaged in manufacture, sale, and distribution of bed mattresses to purchasers in other States and in the District of Columbia, in substantial competition with those similarly engaged, including those who do not misrepresent the regular and customary retail price of their respective products and do not use the below set forth methods in sale and distribution thereof in commerce; in pursuance of so-called "sales stimulator plan" adopted by it—

(*a*) Furnished retailers, for their use in running advertisements in local newspapers, mats bearing such statements as "Englander's Famous Regular $39.50 PROPEREST Mattresses ½ off sale! $19.75. We are able to buy these nationally advertised $39.50 damask covered mattresses and bed springs at a drastic price concession," with, in some cases, figure $29.75 as supposed regular price, and urged use of such advertisements upon retailers in connection with offer for sale of its said products;

(*b*) Attached to mattresses, to which reference was made as aforesaid, label bearing such words as "Finest Quality Since 1895. PROPEREST reg. U. S. Pat. Off. $39.50, manufactured by ENGLANDER SPRING BED CO., INC. New York, Brooklyn," or figure $29.75 in those cases in which such figure had been made use of in aforesaid mats; and

(*c*) Supplied to retailers, in further connection with its aforesaid "sales stimulator plan" and for use in their showrooms in connection with offer and sale of its aforesaid mattresses, variously labeled as above set forth, embossed advertising cards displaying illustrations of its said products, together with dealer's name, and statement in regard to regular price, as aforesaid, of such mattresses, and including, as typical, some such statement as "Never before sold for Less than $39.50. $22.50 All Sizes" and "Nationally advertised at $29.75 NOW $19.75";

Notwithstanding fact aforesaid supposed retail prices of $39.50 or $29.75, as above displayed in advertisements and on labels and in display advertising cards, were not the regular and customary retail prices of the mattresses thus advertised, labeled and mentioned, nor those at which it was contemplated by it that said merchandise would be sold, but were greatly in excess of retail price at which sale by retailers involved was contemplated and intended by it, such retail price was wholly fictitious, mattresses thus advertised and labeled were greatly inferior in quality and workmanship to those which regularly and customarily retail for $39.50 and $29.75, and regular and customary retail price at which products in question were offered and sold was $22.50 or $19.75, depending upon quality of particular mattress;

With result that prospective purchasers were led to believe that mattresses thus advertised and branded were products of kind and quality that regularly and customarily sell at retail for prices indicated, and that, when offered