

Syllabus

IN THE MATTER OF

CARL E. KOCH AND EUGENE F. HEFLEBOWER, TRADING AS CO-OPERATIVE BUYERS' SERVICE AND AMERICAN BEAUTY PRODUCTS COMPANY

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

Docket 2529. Complaint, Nov. 17, 1936¹—Decision, Mar. 7, 1938

Where two partners and a corporation, which they served as president and vice president, respectively, and stock of which they owned, with same principal place of business and representing a common enterprise, engaged in sale and distribution of beauty and barber shop supply products consisting of a large number of different items, such as permanent-waving machines, scissors, brushes, lotions and oils, and other related products, through catalogs, correspondence, bulletins, and monthly trade literature, and with branch offices in seven American cities—

- (a) Represented business conducted by them as that of a cooperative, through selecting and using trade name "Co-Operative Buyers' Service" for business conducted by the two partners, and represented to customers and prospective customers, through long stories and articles in their said trade literature and in other ways, that business done under aforesaid trade name was that of a cooperative and that prices at which said products were offered were cost prices, and that only profit which enured to their benefit for purchase of their said products, at prices listed, was service charge paid on order;

Facts being business was not in any sense a cooperative, prices included a profit to them over and above such charge, and there was no difference in the method and manner of conduct of business done under said trade name and that done by said corporation, conducted from same office, by same personnel, and with same overhead expense, and trade literature of both listed same products at same price quotations, and orders to either were filled from same stock, in same manner, and at identical prices, excepting addition of service charge in case of so-called "cooperative";

- (b) Falsely represented in their trade literature that they had branch offices in San Francisco and Paris; and
- (c) Adopted and pursued plan and practice of advertising and offering for sale in their trade literature nationally known patented and trade-marked products of manufacturers who refused to sell same to them, at prices substantially below said products' prevailing market prices, and filled many orders therefor with products of inferior quality and grade to those called for;

Notwithstanding fact they did not keep in stock and were unable to purchase in natural channels of trade sufficient quantities of such nationally known products to fill, supply, and service a normal and anticipated number of orders therefor at prices advertised, and in many instances did not have any of such products in stock and were unable to obtain any substantial

¹ Amended.

quantities thereof; and with no expectation of filling all or any substantial portion of orders therefor, but with intent and effect of creating confusion and dissatisfaction in trade, to the injury of good will which had attached to products offered and sold by competitors, and to create impression and belief on part of customers that they were able to fill and service a normal number of orders therefor; and

Where such trade names as "Mar-O-Oil," "Vita Tonic," "Oil of Pine," "Oil-O-Castor," "Realistic," and "Revivatone" had long been used in connection with sale and distribution of competing products, and same had become well and favorably known and were closely associated in minds of the purchasing public with said brand names, and there was a substantial preference on part of portion of consuming public for said trade-marked, patented, and nationally known products over any other competing goods; and thereafter aforesaid partners and corporations, engaged as above set forth—

- (d) Selected and adopted such brand names for products offered by them as "Marlow," "Vita Tone," "Oil-O-Pine," "Oil of Castor," "Realistic," and "Revitasheen," in furtherance of plan and practice adopted, used and pursued, of simulating nationally known and advertised products of competitors, and of selecting and adopting brand names for their products similar in letters, sound, and appearance to those under which nationally known and advertised competing products had long been offered, as aforesaid;
- (e) Selected and used cartons, packages, bottles, designs, labels, slogans, and verbiage in connection with promotion and sale of their own products similar to and imitative of those long used in connection with manufacture, sale, and distribution of nationally known and advertised articles;
- (f) Selected and used such language as "A substitute for" and "Similar to" in loose and disconnected association with brand names under which nationally known and advertised competing goods were distributed and sold, and adopted and used such statements as "Modern science is able to reproduce any product," "The days of secret formulas are gone forever," "The products listed will give the same results as the most expensive advertised items," and many others to same effect and import;

Notwithstanding fact that products offered, listed, and advertised as aforesaid were not substitutes for the designated nationally known and advertised brands, and were not similar thereto in quality or composition and would not produce the same results;

- With effect of enabling them to pass off their own products as and for those nationally advertised, patented, and trade-marked goods sold by their competitors, and with result of confusion and deception of purchasers respecting identity of their said goods;
- (g) Falsely represented in their trade literature that said corporation was manufacturer and importer, facts being it did not manufacture or import any substantial portion of goods offered and sold;
- (h) Falsely represented that certain merchandise would be given free to purchasers who bought a certain quantity of their products, facts being total cost of both items and profit thereon were included in resale prices of articles sold at purported bargain prices;
- (i) Falsely represented that their products had regular retail prices and were customarily sold for sums greatly in excess of those charged, and that offers made of certain products were limited offers or based on purchase of limited quantities;

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- (j) Represented that products offered and sold were of exactly same nature, quality, and substance as those made, distributed, and sold by competitors under well and favorably known trade names and brands which enjoyed substantial demand among purchasers thereof, facts being they were not comparable thereto, nor of same nature, quality, and substance, but were other and different articles, inferior in grade and quality; and
- (k) With intent and effect of unfairly disparaging competitors, made many and varied unfounded or unwarranted representations and statements to effect that competitors did not deal with customers on a fair and honest basis but defrauded and cheated same and took unfair advantage of them, used "gyp" equipment and effected fake trade-ins, and were racketeers, and that businesses thereof were rackets;

With effect of deceiving, confusing, and misleading purchasers into buying products which they did not intend to buy and of unfairly diverting to them trade of competitors engaged in selling products of the same kind and nature as their own or other products designed for similar usage, and truthfully advertised, represented, and described, and with capacity and tendency so to deceive, confuse, mislead, and divert; to the substantial injury of substantial competition in commerce among and between the various States:

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. John Darsey, for the Commission.

Mr. Clinton O. Thompson, of Chicago, Ill., for respondents.

AMENDED COMPLAINT¹

Whereas, The Federal Trade Commission did heretofore, to wit, on the 26th day of August 1935, issue its complaint herein charging that respondents herein have been, and are, using unfair methods of competition in commerce, as "commerce" is defined in 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"; and

Whereas, This Commission has reason to believe that respondents herein have been, and are, using unfair methods of competition in commerce, as "commerce" is defined in said act, other than and in addition to those in relation to which the Commission issued its complaint as aforesaid, and it appearing to the Commission that a further proceeding by it in respect thereof would be in the public interest;

Now, therefore, Acting in the public interest, pursuant to the provisions of the Act of Congress aforesaid, the Federal Trade Commission charges that Carl E. Koch and Eugene F. Heflebower, trading as Co-operative Buyers' Service and American Beauty Prod-

¹ Published as finally amended to conform to proof by order of March 7, 1938.

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ucts Company, a corporation, have been, and are now, using unfair methods of competition in commerce and hereby issues its amended complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents, Carl E. Koch and Eugene F. Heflebower, are residents of Chicago, Ill., and are partners trading under the name and style of Co-operative Buyers' Service, with the principal place of business of said partnership located in the city of Chicago in the State of Illinois. They are now, and for more than 1 year last past have been, engaged in the sale and distribution in commerce, between and among various States of the United States, of beauty shop supplies.

American Beauty Products Company is a corporation organized, chartered, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business located in the city of Chicago in the State of Illinois. It is now, and for more than 1 year last past has been, engaged in the sale and distribution in commerce, between and among the various States of the United States, of beauty shop supplies.

PAR. 2. Said Carl E. Koch and Eugene F. Heflebower, as individuals and as partners, trading and doing business as Co-operative Buyers' Service and American Beauty Products Company, in the course of their said business were, at all times hereinbefore referred to, and now are, in competition with other corporations, partnerships, firms, and individuals likewise engaged in the sale and distribution in interstate commerce of similar products.

PAR. 3. The Federal Trade Commission is advised, believes to be true, and consequently charges that the said respondents, Carl E. Koch and Eugene F. Heflebower, own and control the entire capital stock of respondent, American Beauty Products Company, or else own a majority of such stock and are in full and complete control of the business operated and conducted by said respondent, American Beauty Products Company, a corporation, and dictate and direct its business policy.

PAR. 4. In the course and conduct of their business as described in paragraph 1 hereof, said respondents in soliciting the sale of and selling their products in interstate commerce, respectively used and employed, and still do use and employ the following methods and practices, to wit:

(a) Said Carl E. Koch and Eugene F. Heflebower, trading under the name and style, "Co-operative Buyers' Service," use and employ the following methods and practices:

1. They adopted as and for a trade name and partnership name under which to carry on their said business the words "Co-operative Buyers' Service," and use such name in advertisements and advertising matter circulating through interstate commerce, which advertisements and advertising matter contain such statements and representations as:

Your International Purchasing Agent.

The prices in this Value Index are at cost. Our service charge of \$1.00 on orders over \$3.00 and 50¢ on smaller orders is our only profit. Many beauty supply jobbers make a 50% gross profit on sales. You share profits. In July and January of each year a part of our service charges are rebated to our regular clients, according to our profit participation plan. Co-operation of this sort puts money into your cash register. Co-operation makes these low prices possible. Here you buy at cost plus a small service charge.

HERE'S WHAT WE MEAN BY CO-OPERATION. The relationship between Co-operative Buyers' Service and beauty shop owners is strictly a matter of co-operation. This becomes clear to you when you give a moment's consideration to the basic difference between our practice and that of the jobber operating on the conventional basis of merchandising. The jobber must look to "price mark up" to produce his profits, while a small service charge added to any order sent to us entitles you to our service as your purchasing agent in the markets of the world. Marking up the price of each individual item we sell has no place in our merchandising plan.

When in truth and in fact, said Co-operative Buyers' Service was not and is not operated cooperatively by said Carl E. Koch and Eugene F. Heflebower; they did not and do not act as purchasing agents, and did not and do not sell their merchandise at cost plus a service charge.

2. They stated and represented in advertisements and advertising matter circulated in interstate commerce that Co-operative Buyers' Service had offices in San Francisco, Calif. and Paris, France; when in truth and in fact, said Co-operative Buyers' Service had no office or offices either in San Francisco, Calif. or in Paris, France.

3. For the purpose and with the intent and effect of creating confusion and dissatisfaction in the trade, to the end of injuring competition and the good-will of the products so advertised, and inducing the impression that they are able to fill and service a normal number of orders for such products, the respondents adopted, use, and pursue a plan of practice of advertising and offering for sale through the trade literature of the Co-Operative Buyers' Service and the American Beauty Products Company, at prices below the prevailing market prices of such products, nationally known, patented, and trade-marked products of manufacturers who refuse to sell respondents such products. The respondents do not keep in stock and are unable to purchase in the natural channels of trade sufficient quantities of such products

to fill, supply, and service a normal and anticipated number of orders for the same at the prices advertised. In many instances the respondents do not have any of such products in stock and are unable to obtain any substantial quantities thereof, and many orders for such products, when received, are filled with products of inferior quality and grade to those actually ordered; they do not expect to fill all orders received for such products, and the purpose of the adoption and execution of such plan and practice is to prejudice and injure competition, rather than the legitimate sale of such products.

4. For the purpose and with the intent and effect of passing off their products for those of competitors, the respondents adopted, use and pursue a general plan and practice of simulating nationally known and advertised products of competitors. Illustrative, but not all-inclusive, of the acts and things done in accomplishment of this plan and program are the following:

The selection and adoption of trade names for products by them offered for sale, similar in letters, sound, and appearance to those under which nationally known and advertised competing products have long been offered for sale; the selection and use of cartons, packages, bottles, designs, labels, slogans, and verbiage in connection with the promotion of sale and sale of their products, similar to those long used in connection with the manufacture, sale, and distribution of nationally known and advertised competing products; the selection and use of such language as "a substitute for" and "similar to" in loose and disconnected association with the trade names under which nationally known and advertised competing products are distributed and sold; the adoption and use of such statements as "Modern science is able to reproduce any product," "The days of secret formulas are gone forever," "The products listed will give the same results as the most expensive advertised items," and many other statements to the same effect, gist, or meaning.

The products offered for sale, listed, and advertised as aforesaid, are not substitutes for the designated nationally known and advertised brands; they are not similar to in quality and composition, and will not produce the same results as the nationally known and advertised brands for which they are offered as substitutes. The practice of simulating products of competitors, as set forth hereinabove, has a tendency and capacity to confuse, mislead, and deceive purchasers respecting the identity of said products.

(b) Said respondent, American Beauty Products Company, a corporation, employed the following practices and methods, to wit:

1. It caused advertisements of its products to be circulated in interstate commerce among customers and prospective customers, in

which advertisements and advertising matter the following statements and representations appeared:

AMERICAN BEAUTY PRODUCTS CO.
MANUFACTURER—AGENTS—IMPORTER

WHO IS AMERICAN BEAUTY PRODUCTS COMPANY? An Illinois corporation founded several years ago by Carl E. Koch and Eugene F. Heflebower * * *

The said respondent, American Beauty Products Company, a corporation, further stated and represented in its catalog as follows:

It is against the law for a dealer to break up and sell separately items of merchandise in a package that is packed as and intended to be sold as a unit package;

when, in truth and in fact, said corporation was not a manufacturer, nor an importer; it was not "founded several years ago," but was organized in 1934; and there was no law forbidding the breaking up and selling separately of units of packages.

2. Said respondent, American Beauty Products Company, a corporation, advertised for sale, sold, and distributed in interstate commerce, a product designated as "Marlow Soapless Oil Shampoo," which was a simulation of the name under which a similar product had for several years been manufactured and sold by J. W. Marrow Manufacturing Company of Chicago, Ill., to wit, "Mar-O-Oil Shampoo," and which simulation had and has a tendency and capacity to confuse, mislead, and deceive purchasers respecting the identity of said products.

PAR. 5. Carl E. Koch and Eugene F. Heflebower, as individuals and as partners, trading and doing business as Co-operative Buyers' Service and American Beauty Products Company, a corporation, for the purpose of inducing the purchase of various items of merchandise sold by them, have caused advertisements purporting to describe said merchandise to be circulated in interstate commerce to customers and prospective customers. Said advertisements contain statements and representations to the effect: (1) That upon the purchase of a certain quantity of respondents' merchandise, other merchandise would be given to the purchaser free or at a very slight cost; (2) that the merchandise sold by respondents had regular retail values and customarily sold for sums greatly in excess of the prices charged for said articles by respondents; (3) that certain articles of merchandise offered for sale and sold by the respondents are of exactly the same nature, quality and substance as other articles manufactured, distributed, and sold by established and well-known manufacturers under well and favorably known trade names and brands which enjoy a substantial demand among purchasers there-

of; and (4) that offers made in such advertisements were limited offers or offers based on a limited quantity.

In truth and in fact, the respondents do not give other merchandise free or at a slight extra cost when purchases of certain articles are made at respondents' regular resale prices. The total cost to the respondents of both items of merchandise, as well as the respondents' profit thereon, is included in the resale prices of the articles sold at the purported regular prices. Articles of merchandise sold by the respondents do not have regular values greatly in excess of the prices actually charged by the respondents and are not customarily sold by others for sums greatly in excess of the prices charged by respondents. The articles of merchandise sold by the respondents and represented to be of the same nature, quality, and substance as competitive articles manufactured and sold by well-established manufacturers under well-known trade names are not, in fact, comparable to said articles and are not of the same nature, quality, and substance, but are, in fact, other and different articles of merchandise and less valuable than the articles to which they are compared. The purported limited offers or offers based on limited quantity purchases are not limited or qualified offers but the prices quoted by said respondents in said offers are the regular and customary prices charged by them for said merchandise irrespective of limits as to quantity and time of purchase.

The respondents named herein, in the course and conduct of their business and for the purpose of inducing the purchase of their products, have adopted and followed, and now follow, a course of action designed to, and having the effect of unfairly disparaging their competitors. Respondents have represented that said competitors do not deal with their respective customers on a fair and honest basis but defraud and cheat said customers and take unfair advantages of them in business dealings. Respondents also represent that said competitors charge high and exorbitant prices for the articles of merchandise sold by them so as to result in substantially more than a legitimate profit to said competitors. Respondents also charge and represent that said competitors are racketeers and that the businesses conducted by said competitors are rackets because of high and exorbitant prices charged for merchandise and for other reasons.

In truth and in fact, said competitors are engaged in business in a legitimate way and operate on a reasonable profit. They do not charge high and exorbitant prices for the merchandise which they sell as to result in substantially more than legitimate profits to them. They are not racketeers and the businesses which they conduct are

not rackets but are, in fact, legitimate businesses operated on reasonable margins of profit.

PAR. 6. The said respondents, Carl E. Koch and Eugene F. Heflebower, as individuals, and said Koch and Heflebower, partners, trading and doing business as Co-operative Buyers' Service and American Beauty Products Company, a corporation, all have the same and identical place of business, to wit, 2568 Lincoln Avenue, Chicago, Ill.; and all of said respondents are engaged in the same business, to wit, the selling, in interstate commerce, of beauty shop supplies. Therefore, the Federal Trade Commission, on information and belief, charges that the said partnership and the said corporation are instrumentalities under which the said Carl E. Koch and Eugene F. Heflebower conduct the business hereinbefore described, and that the said Carl E. Koch and Eugene F. Heflebower are engaged in a joint enterprise, and therefore the said Carl E. Koch and Eugene F. Heflebower are joined and made parties respondent herein, both as individuals and as partners trading and doing business under 'the name and style of Co-operative Buyers' Service, along with respondent American Beauty Products Company, a corporation.

PAR. 7. The use by the respondents of the false and misleading advertisements, representations, and practices set out herein has had and now has a capacity and tendency to mislead and deceive the purchasing public, and to unfairly divert trade to the respondents from other corporations, firms, and individuals engaged in a like or similar business to that of the respondents, and who honestly and truthfully advertise and represent their said products. As a result thereof, substantial injury is done by respondents, both to the public and to competition in interstate commerce.

PAR. 8. The acts and things done as herein alleged by respondents are to the injury and prejudice of the public and competitors of respondents, 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 November 17, 1936, issued and served its amended complaint in this proceeding upon respondents, Carl E.

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Koch and Eugene F. Heflebower, as individuals and as partners, trading and doing business under the name and style of Co-Operative Buyers' Service and American Beauty Products Company, 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 amended complaint, and the filing of respondents' answer thereto, testimony and other evidence in support of the allegations of said amended complaint were introduced by John Darsey, attorney for the Commission and in opposition to the allegations of the amended complaint by Clinton O. Thompson, attorney for the respondents, before W. W. Sheppard, an examiner of the Commission, theretofore duly designated by it, 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 amended complaint, the answer thereto, testimony and other evidence, and briefs in support of the amended complaint and in opposition thereto (respondents having not requested oral argument herein); 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 respondents are Carl E. Koch and Eugene F. Heflebower in their individual capacities and as partners trading and doing business under the name and style of Co-Operative Buyers' Service, and the American Beauty Products Company, an Illinois corporation. The above-named individuals manage and control the business operated under the name and style of Co-Operative Buyers' Service, and are the sole parties at interest therein. They are also president and vice president respectively of the American Beauty Products Company, the respondent corporation, and own all of the stock of said corporation. The aforesaid individual respondents direct and control the sales policies and general business activities of the corporate respondent. All of the parties respondent herein have the same principal place of business located at 1157 Fullerton Avenue, Chicago, Ill. The respondents are engaged in the sale and distribution of beauty and barber shop supply products, consisting of a large number of different items such as permanent-waving machines, scissors, brushes, combs, mirrors, lotions and oils, and other related products. The method of doing business adopted and used by all of the parties respondent is that of a mail order house. The beauty and barber shop trade is circularized through the medium of catalogs,

correspondence, bulletins, and other trade literature. When orders are received in response to this advertising campaign, respondents fill such orders by shipping and transporting such merchandise through the medium of the United States mail and such other public utility transportation services as the occasion may suggest from their aforesaid principal place of business, or from one of their branch offices, to customers residing in various States of the United States other than the State within which the principal office or the branch offices filling such orders are located. The respondents have branch offices located in Atlanta, Ga.; Dallas, Tex.; Kansas City, Mo.; Minneapolis, Minn.; Newark, N. J.; Pittsburgh, Pa.; Salt Lake City, Utah. Orders of customers are usually addressed to one of the respondents at the nearest branch office. All of the parties respondent use the same branch offices and the same office force and personnel maintained therein.

PAR. 2. There are many other corporations, firms, partnerships, and individuals engaged in the sale of like and similar products, and of products used for the same and similar purposes, who seek the patronage and trade of the same customers, and who cause their respective products, when sold, to be transported from their respective places of business to purchasers thereof residing in the various other States of the United States. In the course and conduct of their said business as aforesaid, all of the parties respondent have been, and are, in competition in commerce among and between the various States of the United States with such other corporations, partnerships, firms, and individuals.

PAR. 3. In the course and conduct of their businesses as aforesaid, and for the purpose of promoting the sale of their said products, the respondents have adopted and they now pursue a plan of representing the business conducted by them to be that of a cooperative. In furtherance of such a plan, the individual respondents selected as a trade name under which to do business the name "Co-Operative Buyers' Service." All respondents have represented to customers and prospective customers through long stories and articles which they cause to be inserted in their trade literature and in other ways, that the business done under such trade name is that of a cooperative, that the prices at which the aforesaid products are offered for sale are cost prices, and that the only profit which enures to the benefit of the respondents from the purchase of their products at the prices listed is a service charge paid on such orders.

The business conducted by the individual respondents under the trade name "Co-Operative Buyers' Service" is not in any sense that of a cooperative. The prices at which products are offered

for sale and sold under said trade name to customers are not cost prices plus a service charge, but are prices which include a profit to the respondents over and above the service charge paid. There is no difference in the method and manner of the conduct of the business done by the individual respondents under the trade name "Co-Operative Buyers' Service" and that done by the respondent, American Beauty Products Company. The businesses of both are conducted from the same office, by the same personnel, and with the same overhead expense. The trade literature of both businesses conducted by respondents contains listings of the same products with the same price quotations, and an order addressed to one is filled from the same stock in the same manner that an order for the same product would be filled if addressed to the other. The products are sold at identical prices in either instance except that, if sold by the individual respondents, trading as Co-Operative Buyers' Service, the applicable service charge is added. The trade literature in which the respondents cause the aforesaid articles to be described and the aforesaid representations to be made is published by the respondents periodically, usually once a month, and is distributed by them to the trade located in the various States of the United States. The trade name "Co-Operative Buyers' Service" is false and potentially deceptive in character. The aforesaid representations and statements contained in the stories and articles published in respondents' trade literature and otherwise brought to the attention of their customers have no foundation in fact and are wholly false and untrue.

PAR. 4. In connection with the promotion of sale and sale of their products as aforesaid, the respondents cause representations and statements to appear in their trade literature to the effect that branch offices are maintained by them in the cities of San Francisco, Calif., and Paris, France. The respondents do not maintain any branch offices in the aforesaid cities, and such representations and statements are wholly false and untrue.

PAR. 5. In connection with the promotion of sale and sale of their own products, and for the purpose and with the intent and effect of creating confusion and dissatisfaction in the trade to the injury of the goodwill which has attached to products offered for sale and sold by competitors, and for the purpose of creating and inducing the impression and belief on the part of customers that they are able to fill and service a normal number of orders for such products, the respondents adopted and now use and pursue a plan and practice of advertising and offering for sale in their trade literature at prices substantially below prevailing market prices of such products, nationally known, patented, and trade-marked products of manu-

facturers who refuse to sell their products to respondents. The respondents do not keep in stock, and are unable to purchase in the natural channels of trade, sufficient quantities of such products to fill, supply, and service a normal and anticipated number of orders for the same at the prices advertised. In many instances, the respondents do not have any of such products in stock and are unable to obtain any substantial quantities thereof. Many orders for such products, when received, are filled with products of inferior quality and grade to those actually ordered. The respondents do not expect to and do not in fact fill all or any substantial portion of the orders so received with such nationally known and trade-marked products. The purpose of the adoption and execution of such a plan and practice is to prejudice and injure the reputation of competitors and the goodwill which may attach to the products sold by them, rather than the legitimate sale of such products.

PAR. 6. For the purpose and with the intent and effect of passing off their own products for those of competitors, the respondents adopted and now use and pursue a general plan and practice of simulating nationally known and advertised products of competitors. In furtherance of such a plan, the respondents have selected and adopted brand names for products by them offered for sale, similar in letters, sound, and appearance to those under which nationally known and advertised competing products have long been offered for sale, such as the brand names "Marlow," "Vita Tone," "Oil-O-Pine," "Oil of Castor," "Realistic," and "Revitasheen," which trade names are similar to and variations respectively of the brand names "Mar-O-Oil," "Vita Tonic," "Oil of Pine," "Oil-O-Castor," "Realistic," and "Revivatone." The aforesaid brand names "Mar-O-Oil," "Vita Tonic," "Oil of Pine," "Oil-O-Castor," "Realistic," and "Revivatone" have long been used in connection with the sale and distribution of competing products designed for similar usage and such products are well and favorably known by and are closely associated in the minds of the purchasing public with said brand names. There is a substantial preference on the part of a portion of the consuming public for the aforesaid trade marked, patented, and nationally known products over any other competing products. Respondents have selected and now use cartons, packages, bottles, designs, labels, slogans, and verbiage, in connection with the promotion of sale and sale of their products, similar to and imitative of those long used in connection with the manufacture, sale, and distribution of nationally known and advertised competing products. They have selected and now use such language as "A substitute for" and "similar to" in loose and disconnected association with the brand

names under which nationally known and advertised competing products are distributed and sold. They have adopted and now use such statements as "Modern science is able to reproduce any product," "The days of secret formulas are gone forever," "The products listed will give the same results as the most expensive advertised items," and many other statements to the same effect and import. The products offered for sale, listed, and advertised as aforesaid are not substitutes for the designated nationally known and advertised brands; they are not similar thereto in quality or composition, and will not produce the same results as the nationally known and advertised brands for which they are offered as substitutes. The practice of simulating products of competitors as hereinabove set forth has enabled respondents to pass off their own products as and for those nationally advertised, patented, and trade-marked articles sold by their competitors and has resulted in confusion and deception of purchasers respecting the identity of respondents' products.

PAR. 7. The respondents have caused representations and statements to appear in their said trade literature, which is distributed as aforesaid, to the effect that respondent, American Beauty Products Company, is a manufacturer and importer. The American Beauty Products Company is not a manufacturer or importer and does not manufacture or import any substantial proportion of the products offered for sale and sold by it.

PAR. 8. In connection with the promotion of sale and sale of their products as aforesaid, the respondents have caused representations and statements to appear in their trade literature to the effect that certain merchandise will be given free to purchasers who purchase a certain quantity of respondents' products; that products sold by respondents have regular retail prices and are customarily sold for sums greatly in excess of the prices charged for said products by respondents; that products offered for sale and sold by respondents are of exactly the same nature, quality, and substance as products manufactured, distributed, and sold by competitors under well and favorably known trade names and brands which enjoy a substantial demand among purchasers thereof; and that the offers made of certain products by respondents are limited offers or offers based on the purchase of limited quantities. The respondents do not give merchandise free with purchases of certain quantities of products offered for sale by them. The total cost to the respondents of both items of merchandise, as well as the respondents' profit thereon, is included in the resale prices of the articles sold at the purported bargain prices. The articles of merchandise offered for sale and sold by the respondents do not have regular values greatly in excess of the prices actually

charged by them and are not customarily sold by others for sums greatly in excess of the prices charged by respondents. The articles of merchandise represented to be of the same nature, quality, and substance as those offered for sale and sold by competitors under well known trade names are not comparable to such products and are not of the same nature, quality, and substance, but are, in fact, other and different articles of merchandise of inferior grade and quality to those with which they are compared. The purported limited offers, or offers based on limited quantity purchases, are not limited or qualified offers, but the prices quoted by the respondents in said offers are their regular and customary prices irrespective of limits as to quantity and time of purchase.

PAR. 9. In the course and conduct of their businesses and for the purpose of inducing the purchase of their products, the respondents have adopted and follow a course of action designed to and having the effect of unfairly disparaging their competitors. In pursuance of such a plan, the respondents have made many and varied representations and statements to the effect and meaning that their competitors do not deal with their customers on a fair and honest basis, but defraud and cheat their customers and take unfair advantages of their customers in business dealings; that their competitors use gyp equipment and effect fake trade-ins; that their said competitors are racketeers and that the businesses conducted by them are rackets. The aforesaid statements and representations unfairly disparage the respondents' competitors and their respective businesses and the record in this case shows an absence of any proof on the part of the respondents that the aforesaid disparaging statements and representations are truthful.

PAR. 10. The foregoing statements, representations, practices, and methods set forth in paragraphs 3 to 9 inclusive herein are false and misleading and have the capacity and tendency to deceive, confuse, and mislead and have deceived, confused, and misled purchasers into buying products which they did not intend to buy. The aforesaid acts, practices, and methods of the respondents have the capacity and tendency to divert unfairly, and they have unfairly diverted, to said respondents the trade of competitors engaged in selling, in interstate commerce, products of the same kind and nature as those of respondents, or other products designed for similar usage, all of which products are truthfully advertised, represented, and described. Substantial injury is thereby done by respondents to substantial competition in commerce among and between the various States of the United States.

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CONCLUSION

The aforesaid acts and practices of the respondents, Carl E. Koch and Eugene F. Heflebower, as individuals and as partners, trading and doing business under the name and style of Co-Operative Buyers' Service and American Beauty Products Company, 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 amended complaint of the Commission, the answer of respondents, testimony and other evidence taken before W. W. Sheppard, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said amended complaint and in opposition thereto, and briefs filed herein (respondents having not requested oral argument), 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, Carl E. Koch and Eugene F. Heflebower, in their individual capacities and as partners doing business under the trade name "Co-Operative Buyers' Service," or any other trade name, their agents, representatives, and employees, and the American Beauty Products Company, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of beauty and barber shop supply products in interstate commerce or in the District of Columbia, do forthwith cease and desist from, directly or indirectly:

1. Representing, through use of the trade name "Co-Operative Buyers' Service," or of any other name of like import and meaning, or through any other means or device, or in any other manner, that the business conducted by the respondents is that of a cooperative.

2. Representing that such products are sold at cost prices or at prices substantially less than those at which products of equal grade and quality may be purchased from others or under a plan eliminating the profits and other charges of middlemen with resultant savings to the purchasers.

3. Representing that respondents maintain branches in San Francisco, Calif., and Paris, France, or in any other place in which they do not maintain such branch.

4. Representing, through listing and offering for sale well-known or trade-marked products of others who refuse to sell to respondent which they do not have on hand and are unable to purchase in the regular channels of trade, or through any other means or device, or in any manner, that respondents are able to service and fill orders for such products unless and until they have on hand, or can secure through the normal channels of trade, a sufficient quantity of such products to be able to service and fill a normal number of orders or demands for such products.

5. Substituting products of a different grade and quality for well-known or trade-marked products.

6. Using trade or brand names, or cartons, packages, bottles, designs, labels, and slogans, in connection with the sale of respondents' products, which simulate and imitate those long used in connection with the manufacture, sale, and distribution of well-known or trade-marked competing products through similarity of letters, sound, or appearance, or in any other manner, or which have the tendency and capacity to confuse and deceive the purchasing public in relation to the origin, identity, or quality of the products so designated and described.

7. Representing that the respondent corporation is the manufacturer of any of said products, or that purchasers therefrom deal direct with the manufacturer.

8. Representing that the respondent corporation is an importer, or that any substantial portion of the products offered for sale by it is of foreign origin.

9. Representing that merchandise will be given free or without additional charge to purchasers of designated quantities of respondents' products, or that offers of designated products are limited as to time or quantity, or any other respect, when such is not the fact.

10. Representing, through use of purported special sale prices which are in fact respondents' regular prices, or through any other means or device, that such products have regular retail values or prices and are customarily sold for sums in excess of the prices charged for such products by respondents.

11. Representing that such products are of exactly the same or substantially the same nature, quality, and substance as well-known or trade-marked competing products when such is not the fact.

12. Circulating, representing, or publishing, or causing to be circulated, represented, or published in the trade, any false or deceptive

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or misleading statement respecting or concerning the business methods of competitors, or the character or integrity of the managements of competitors.

It is further ordered, That the respondents shall, within 30 days after service upon them 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 this order.

Complaint

IN THE MATTER OF

BARNETT C. HELZBERG, TRADING AS HELZBERG'S
DIAMOND SHOP

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

Docket 3295. Complaint, Jan. 4, 1938—Decision, Mar. 8, 1938

Where an individual engaged as sole owner and general manager of retail jewelry stores in five midwestern cities; in advertising certain diamonds and diamond rings in newspapers of interstate circulation—

- (a) Represented "They are perfect according to the specifications of the United States Federal Trade Commission of Washington, D. C.," and "Certified perfect diamonds. Certified perfect diamonds are 'perfect' according to the specifications approved by the Federal Trade Commission of Washington, D. C."; and
- (b) Furnished to purchasers of said diamonds and diamond rings certificates containing, among other things, statements and representations to same effect as those used in aforesaid advertisements in regard to said diamonds being perfect according to specifications of, or approved by, said commission;

Facts being it had neither fixed nor promulgated any standard of perfect or other diamonds, nor inspected, found or certified said or any other diamonds as perfect;

With effect of misleading and deceiving dealers and substantial portion of purchasing public into erroneous belief that said representations were true, and into purchase of said articles on account of such erroneous and mistaken beliefs thus induced, and with result that substantial trade in said commerce was unfairly diverted to him from competitors who do not misrepresent and guarantee their diamonds and diamond rings, and with capacity and tendency so to mislead, deceive, and divert to said competitors' substantial injury:

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

Mr. Wm. T. Chantland for the Commission.

Mr. Joseph Cohen, of Kansas City, Kans., 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 Barnett C. Helzberg, trading under the name Helzberg's Diamond Shop, 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 said Commission that a proceeding by it in