

Syllabus

IN THE MATTER OF
BLEECKER-FOSTER, INC.

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

Docket 2679. Complaint, May 22, 1936¹—Decision, June 23, 1938

Where a corporation engaged in sale and distribution of food flavors, novelties, and certain toilet preparations—

(a) Represented, in publications of general interstate circulation, that its salesmen, representatives, or dealers earned up to \$25 a day and secured very large numbers of new customers in specified period, through such statements as "I want 500 more men—to earn up to \$25.00 a day! Be a branch manager for George F. Foster," "C. Angel, of Milwaukee, secured 25,000 George F. Foster's customers in six months," "* * * In six months the G. F. Foster's fast-selling products and plan put Angel out of debt and established him in a business so big, so profitable, that it was almost unbelievable. Thousands of other G. F. Foster's agents, distributors and branch managers can tell similar stories of amazing earnings and success";

Facts being the average earnings of its salesmen, etc., in ordinary course of business under normal conditions, were less than the amounts thus represented as being earned;

With intent and effect of enabling it to make contacts with prospective dealers, representatives, or salesmen and persons who were seeking employment and who would purchase the commodity offered for sale by it and sold by it to such dealers, etc., with payment in full required before receipt by them for resale to the consuming public on their own account;

(b) Grossly misrepresented the values and regular selling prices of its products, through transmitting and delivering to its representatives, etc., commodities and merchandise under such plan of advertising as "Look! You can sell a \$6. Flash for only 99¢ and make 50¢ on every deal you hand out," and depicted in such connection a photostatic reproduction of a box containing a purported pearl necklace with a price tag of \$2.50 attached thereto, 3-ounce bottle of perfume, box of face powder, and jar of facial cream;

Facts being retail value of the necklace was approximately ten cents, and that of the other three items, twelve cents, eight cents, and fifteen cents, respectively; and

(c) Caused fictitious price marks, greatly in excess of the usual and customary retail prices for the products involved, to be affixed to other goods offered by it, including its "Jersey Maid Baking Powder," sold ordinarily by its representatives, etc., for 25 cents and price-marked 50 cents, and its "The Eternal Youth Crystals," sold customarily by it to its dealers, etc., for 24 cents and retailed by them for 75 cents, and price-marked \$1.50;

With effect of causing prospective dealers, representatives and salesmen, members of the purchasing public, to form the erroneous and mistaken belief

¹ Amended.

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that such statements and representations were true and, in reliance thereon, to purchase the commodities offered by it in preference to similar products offered by its competitors, and of inducing such representatives, etc., of competitors to cease their business with latter and enter into contracts with it to purchase its commodities in preference to those of such competitors, in the mistaken and erroneous belief that by so doing they would be able to increase their earnings, and of causing trade to be diverted unfairly to it from competitors engaged in selling and distributing similar products in commerce among and between the various States, and who do not falsely represent potential profits to be realized by prospective salesmen, etc., or affix to the respective commodities vended by them fictitious representations as to the true retail value or price thereof:

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

Before *Mr. William C. Reeves*, trial examiner.

Mr. Alden S. Bradley and *Mr. John N. Wheelock* for the Commission.

Mr. J. M. George, of Winona, Minn., and *Mr. John D. Bleeker*, of St. Paul, Minn., for respondent.

AMENDED 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 *Bleecker-Foster, Inc.*, hereinafter referred to as respondent, has been and now is using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, *Bleecker-Foster, Inc.*, is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, having its principal office and place of business at 253 East Fourth Street, St. Paul, Minn. Respondent is now and since January 1, 1932, has been engaged in the business of selling and distributing food flavors, novelties, and certain toilet preparations, and transporting and causing the same to be transported to purchasers of the same located in the various States of the United States other than the State of domicile of respondent and in the District of Columbia. Respondent now does maintain and, at all times herein mentioned, has maintained in the commodities which it vends a constant current of trade and commerce in and among the various States of the United States and the District of Columbia.

Respondent in the course and conduct of its business is, and has been, engaged in competition with other persons, firms, copartnerships, and corporations who likewise have sold, transported, and delivered in and between the various States of the United States commodities of like nature and kind, and who conduct and cause to be conducted a sales program for the purpose of securing customers and for the purpose of securing patronage from potential customers located throughout the various States of the United States.

PAR. 2. Respondent in the course and conduct of its business, as aforesaid, has generally traded, in the doing of the acts hereinafter related, as the G. F. Foster Products Co., and in its endeavor to secure the services of agents, representatives, or salesmen, has advertised and caused to be advertised in trade magazines, newspapers, and other periodicals having an interstate circulation, statements of the following nature and to the following effect:

I want 500 more men—to earn up to \$25.00 a day! Be a branch manager for George F. Foster.

C. Angel, of Milwaukee, secured 25,000 George F. Foster customers in six months.

Mr. Angel had been hard hit by the depression; savings gone, debts piling up, reduced to a humble, poorly-paid job, he was down but not out. In six months the G. F. Foster fast-selling products and plan put Angel out of debt and established him in a business so big, so profitable, that it was almost unbelievable. Thousands of other G. F. Foster agents, distributors and branch managers can tell similar stories of amazing earnings and success.

and the further statement,

Make big pay the Foster way.

The statements herein set out, together with other statements of similar import and effect, have been circulated in various trade magazines, newspapers and other periodicals having an interstate circulation, and serve as representations on the part of respondent that the average income earned by all of its salesmen and representatives is comparable to the income represented as being earned by certain of its salesmen and representatives as detailed in said advertisements.

PAR. 3. In truth and in fact, the average earnings of the salesman, representative or agent of respondent under normal conditions is but a small percentage of the amount as represented by such statements, and under normal circumstances and conditions consistent earnings in the due course of business in the amount as represented by the advertisements are impossible.

PAR. 4. Respondent in the course and conduct of its business aforesaid has sold and caused to be sold to members of the general public

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various commodities and merchandise under the following scheme of advertising and bearing the following inscriptions and legends:

Look! You can sell a \$6.00 Flash for only 99 cents and make 50 cents on every deal you hand out.

Said representation and others of similar tenor and effect appeared in various periodicals, magazines, and other publications having an interstate circulation, at various times during the corporate existence of respondent, but particularly in November 1935. Accompanying such representations was a photographic reproduction of a box wherein were the following articles:

A purported pearl necklace with a price tag of \$2.50 attached thereto; a three ounce bottle of perfume; a box of face powder; and a jar of facial cream.

In truth and in fact, the value of the purported pearl necklace is 10 cents; the value of the perfume is 12 cents; the value of the face powder is 8 cents; and the value of the facial cream never in excess of 15 cents.

Upon various other commodities likewise respondent caused false and fictitious values to be attached, to be advertised and to be represented to the purchasing public. Among these were:

Jersey Maid Baking Powder falsely represented to have a value of 50 cents, but continuously and habitually offered for sale and sold for 25 cents.

Eternal Youth Crystals falsely represented to have a value of \$1.50 and falsely represented formerly to have sold at such price when the same is usually and habitually offered for sale and sold for 24 cents.

Numerous other items of merchandise bearing price marks purporting to indicate the retail value of said commodities or the price at which said commodities should be sold at retail have been offered for sale and sold by respondent, generally at prices substantially lower than the purported retail price so marked, indicated, and advertised on said merchandise.

PAR. 5. In the course and conduct of its business respondent advertised for sale, sold and transported and caused to be transported in interstate commerce, as aforesaid, a certain commodity which was designated as being chocolate flavored, sweetened malted milk and which respondent represented to be "manufactured by G. F. Foster Products Company." This commodity consisted of various ingredients such as malted milk, cocoa, and sugar compounded and packed by respondent at its own plant. The essential ingredient of such commodity consisted of malted milk which was not compounded or prepared by respondent.

Through the medium of falsely advertising the character, nature, and quality of its products and through exaggerated claims of the volume of business done by it, the number of prizes given by it, the comparative value of the commodities vended by it, by obtaining services of salesmen and representatives through the medium of false and misleading advertising materials herein above set out and through falsely representing that it is a manufacturer when in truth and in fact it is not, respondent has misled and deceived members of the purchasing public into the false belief that the representations made by the respondent are true. Such members, believing them to be true, have purchased quantities of the products of respondent. Respondent has, through the medium of the practices as above set forth, been enabled to obtain a large staff of salesmen and representatives. All and each of said acts above named have caused a substantial diversion of trade from competitors of the respondent in interstate commerce to the respondent, and each and all of said practices were and are to the hurt and injury of such competitors and of members of the purchasing public.

PAR. 6. There are among members of the purchasing public a substantial number who have an actual preference for purchasing commodities directly from the manufacturer of the same in the belief that by eliminating the profit of the so-called "middleman" they effect a substantial financial saving and also secure other advantages.

The acts and practices of the respondent as above related likewise have a capacity and tendency to, and do in fact, mislead and deceive a substantial number of potential representatives, salesmen, or employees into the false belief that the earnings to be gained in vending the commodities of the respondent are greatly in excess of those actually to be so gained. A substantial number of such representatives, salesmen, or employees have relied upon the false representation of the respondent as aforesaid and were thus induced to enter into contracts with it.

PAR. 7. There are among the competitors of respondent other persons, firms, corporations, and copartnerships engaged in the business of selling and distributing in interstate commerce merchandise of like kind and character to that vended by respondent who advertise and cause to be advertised statements reflecting the potential possibilities of salesmen, representatives, or employees for the purpose of securing such salesmen, representatives, or employees, but who do not falsely represent in such advertisements the potential profits to be realized by such salesmen, representatives, or employees to be far in excess of the profit actually possible; and who do not affix, or cause to be affixed, to commodities vended by them false and fictitious

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representations of the true value thereof, which such represented value is in substantial excess of the actual value of the same and of the price at which same were and are intended to be sold; and who do not by falsely representing a commodity or commodities to have been manufactured by them mislead and deceive substantial numbers of the members of the purchasing public into purchasing the same.

PAR. 8. The above acts and things done and caused to be done by respondent are to the prejudice of the public and of respondent's competitors as herein named and constitute unfair methods of competition in commerce within the meaning and intent 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 the Federal Trade Commission Act, the Federal Trade Commission, on the 22nd day of May 1936, issued and on May 25, 1936, served its complaint in this proceeding upon respondent Bleecker-Foster, Inc., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Alden S. Bradley, attorney for the Commission, and in opposition to the allegations of the complaint by J. M. George and John D. Bleecker, attorneys for the respondent, before W. C. Reeves, trial 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 complaint, the answer thereto, testimony and other evidence, and brief in support of the complaint (respondent not having submitted a brief or requested oral argument), and the Commission having duly considered the matter, and being now fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Bleecker-Foster, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Minnesota and having its principal office and place of business at No. 253 East Fourth Street, St. Paul, Minn. Respondent is

now, and since January 1, 1932, has been, engaged in the business of selling and distributing food flavors, novelties, and certain toilet preparations, and in transporting and causing said products to be transported from its place of business in the city of St. Paul, Minn., into and through the various States of the United States other than the State of Minnesota to the purchasers thereof. Respondent now maintains, and has maintained at all times mentioned, a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business respondent now is, and has been, engaged in competition with other persons, firms, and corporations who likewise sell, transport, and deliver in commerce among and between the various States of the United States, food flavors, novelties, and toilet preparations of a type similar to those sold and offered for sale by the respondent.

PAR. 3. Respondent, in the course and conduct of its business as aforesaid, has generally traded, in the doing of the acts hereinafter related, under the name and style of G. F. Foster Products Co. In its endeavor to procure the services of dealers, representatives or salesmen and to sell the commodities vended by it to such dealers, representatives, or salesmen, the respondent has caused the following statements and representations to be inserted in publications having a general interstate circulation:

I want 500 more men—to earn up to \$25.00 a day! Be a branch manager for George F. Foster.

C. Angel, of Milwaukee, secured 25,000 George F. Foster's customers in six months.

Mr. Angel had been hard hit by the depression; savings gone, debts piling up, reduced to a humble, poorly-paid job, he was down but not out. In six months the G. F. Foster's fast-selling products and plan put Angel out of debt and established him in a business so big, so profitable, that it was almost unbelievable. Thousands of other G. F. Foster's agents, distributors and branch managers can tell similar stories of amazing earnings and success.

Make big pay the Foster way.

In fact, the average earnings of the salesmen, dealers, or representatives of the respondent in the ordinary course of business under normal conditions are less than the amounts represented, by the respondent, in such advertisements as being earned by such salesmen, dealers, or representatives.

PAR. 4. The purpose and effect of the statements and representations of the respondent made in the advertisements described above were to enable the respondent to make contacts with prospective dealers, representatives, or salesmen, persons who were seeking employment, and who would purchase the commodities offered for sale by

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the respondent and resell same to the consuming public on their own account. When responses to such advertisements are received by the respondent, it sends to each of such prospects who answer such advertisements, an outline of its plan of operation and attempts to induce such prospects to enter into a contract with the respondent to purchase the commodities offered for sale by the respondent. If the respondent is successful in inducing such prospects to purchase the commodities offered for sale by the respondent, such commodities are shipped from the place of business of the respondent in the State of Minnesota to the purchasers thereof situated in various other States of the United States and in the District of Columbia. The respondent requires the purchasers of such commodities to pay in full for the same before such commodities are received by the purchasers and the respondent exercises no control over the commodities or the purchasers thereof, by contract or otherwise, after the commodities are purchased from the respondent.

PAR. 5. Respondent in the course and conduct of its business has sold and caused to be sold, and pursuant to such sale has transported and delivered to representatives, dealers, and salesmen situated in various States of the United States, commodities and merchandise under the following plan of advertising:

Look! You can sell a \$6 Flash for only 99c and make 50c on every deal you hand out.

Accompanying such representation was a photostatic reproduction of a box wherein was contained the following:

Purported pearl necklace with a price tag of \$2.50 attached thereto; a three-ounce bottle of perfume; a box of face powder; and a jar of facial cream.

In fact, the retail value of the purported pearl necklace is approximately 10 cents. The retail value of the perfume is approximately 12 cents. The retail value of the face powder is approximately 8 cents. The retail value of the facial cream is approximately 15 cents. Such representation has appeared at various times in periodicals and magazines and other publications having an interstate circulation. Other representations of similar tenor and effect have been circulated to prospective dealers, representatives, and salesmen in the form of literature, circulars, and letters of the respondent corporation.

Upon various other commodities offered for sale and sold by the respondent to prospective dealers, representatives, and salesmen, the respondent has caused price marks to be affixed, which price marks have been fictitious and greatly in excess of the prices for which said commodities are customarily and ordinarily sold at retail.

Respondent sells and offers for sale to prospective dealers, representatives, and salesmen situated in various States of the United States a commodity designated as "Jersey Maid Baking Powder" which respondent represents, through fictitious price markings and otherwise, as having a retail value and price of 50 cents. In fact, such commodity has been habitually and customarily sold and offered for sale by representatives, dealers, and salesmen to the ultimate consumer for the sum of 25 cents.

Respondent sells and offers for sale to prospective dealers, representatives, and salesmen situated in various States of the United States a commodity designated as "The Eternal Youth Crystals" which respondent represents, through fictitious price markings and otherwise, as having a retail value and price of \$1.50. In fact, such commodity has been customarily and ordinarily sold by the respondent for the sum of 24 cents and by such dealers, representatives and salesmen usually and customarily retailed to the consumer thereof for the sum of 75 cents.

PAR. 6. There are among the competitors of respondent, persons, firms, corporations, and copartnerships who are engaged in the business of selling and distributing in commerce among and between the various States of the United States, commodities of like kind and character to those vended by respondent who make statements and representations as to the earnings of their salesmen, representatives or dealers for the purpose of procuring the services of other salesmen, representatives, or dealers but who do not falsely represent the potential profits to be realized by prospective salesmen, representatives, or dealers; and who do not affix or cause to be affixed to the respective commodities vended by such competitors fictitious representations as to the true retail value or price thereof.

PAR. 7. The above-described statements and representations of the respondent have the tendency and capacity to, and do, cause prospective dealers, representatives, and salesmen, who are members of the purchasing public, to form the erroneous and mistaken belief that such statements and representations are true and, in reliance upon such statements and representations, to purchase the commodities offered for sale by the respondent in preference to similar commodities offered for sale by competitors of respondent. Representatives, salesmen, and dealers of competitors of respondent have been induced to cease their business with such competitors and enter into contracts with respondent to purchase commodities vended by the respondent in preference to commodities vended by such competitors in the mistaken and erroneous belief that by so doing they would be able to increase their earnings. The acts and practices of respondent

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ent as herein set out have caused, and now cause, trade to be diverted unfairly to respondent from its competitors engaged in selling and distributing similar products in commerce among and between the various States of the United States who do not engage in the practices herein described.

PAR. 8. It is alleged in the complaint that respondent sells an item described as "Chocolate Flavored Sweetened Malted Milk" and falsely represents that such item is manufactured by the G. F. Foster Products Co. The evidence shows that the ingredients of this preparation include sugar, cocoa, powdered milk, and salt. Respondent purchases such ingredients on the market and from a formula originated and owned by it mixes and blends such ingredients and adds sufficient liquids to produce the finished product which has the character or appearance of a sweetened milk drink flavored with cocoa and malted milk. The facts do not sustain the allegation that the respondent is not the manufacturer of such malted milk drink.

CONCLUSION

The aforesaid acts and practices of the respondent, Bleecker-Foster, Inc. are to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before W. C. Reeves, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief in support of the complaint (respondent not having submitted a brief, and not having requested oral argument) and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Bleecker-Foster, Inc., trading under its own name or under any other trade name, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of food flavors, novelties, toilet preparations, and other products, in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Representing that salesmen, representatives, or dealers of the respondent, earn "up to \$25.00 a day," or any other amount or

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amounts, whether expressed in terms of money or in words indicative of the same, until and unless such salesmen, representatives, or dealers consistently earn such amount or amounts in the ordinary course of business under normal conditions and circumstances.

2. Representing that salesmen, representatives, or dealers of the respondent procure a stated number of customers within any specified length of time until and unless such salesmen, representatives, or dealers consistently procure such stated number of customers within such specified length of time in the ordinary course of business under normal conditions and circumstances.

3. Representing, through fictitious prices marked or stamped on or affixed to said products, or on the containers thereof, or through any other means or device or in any manner, that said prices so marked, stamped or affixed are the regular or customary retail prices for such products.

4. Representing, as the customary or regular retail prices for such products, prices which are in fact fictitious and greatly in excess of the prices at which said products are regularly and customarily offered for sale and sold at retail.

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.

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IN THE MATTER OF
SOFT-LITE LENS COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 3 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 2717. Complaint, Feb. 10, 1936—Decision, June 23, 1938

Where a corporation engaged in causing to be manufactured, offering, selling, marketing, and distributing optical glass lenses and lens blanks, including single vision and bifocal lenses, uncut lenses and blanks, and edged and prescription lenses made in four densities of tint or color known and designated in the trade as rose or flesh, and sold, marketed, and distributed under the general trade name of "Soft-Lite," used alone to identify said products and used in combination with other trade terms or descriptive words, such as "Panoptik," "Kryptok," "Duo-Rede," "Duo-Site," "Duo-Vis," "Thin Lite," "No Glare," "C V," "Unisite," and others, and in the sale of such "Soft-Lite" products to wholesalers only for resale to retailers and by later to ultimate consumer or user—

Required many retailers to enter into certain written agreements designated as "a registered dispensing license," in response, as a rule, to retailer's application therefor subscribing to the "high professional standards and trade principles upon which the Soft-Lite lenses are made and sold," and under which agreements, among other undertakings, retailer or licensee agreed "not to sell or deal in any lens similar in tint, color, shade or type to Soft-Lite lenses";

With the result that more than 4,000 individual identical or substantially similar agreements were in full force and effect between it, as licensor, and numerous and divers retailers and retail dealers in all parts of the United States, as licensees, and with effect that competition might be substantially lessened in the optical lens business in the United States between it and its competitors:

Held, That such acts and practices constituted a violation of Section 3 of an Act of Congress approved October 15, 1914.

Before *Mr. Edward M. Averill*, trial examiner.

Mr. Allen C. Phelps for the Commission.

Lehrich & Lehrich, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," the Federal Trade Commission, having reason to believe that the Soft-Lite Lens Co., Inc., a corporation, is violating or has violated the provisions of section 3 of the above-entitled act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the