

Syllabus

IN THE MATTER OF
MIAMI WHOLESALE DRUG CORPORATION ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (f) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3377. Complaint, Apr. 11, 1938—Decision, Feb. 9, 1939

Where a corporation engaged in wholesale drug business and in purchasing, as thus engaged, goods, wares, and merchandise from manufacturers and sellers in the various States, in competition with others similarly engaged and in similar purchase, and in publishing, along with certain individuals, its officers, and in pursuance of a purchasing policy and practice designed and intended to induce favorable discriminatory prices for it on its purchases of goods, wares, and merchandise of like grade and quality to those bought by competitor purchasers, and not as an independent business operated in good faith, a magazine—

Induced and persuaded manufacturers and sellers to enter into contracts with it for insertion of advertisements therein under agreements or understandings that charges therefor, for which no substantial benefits and considerations accrued to manufacturers and sellers, would be credited on the purchase price of the goods, wares, and merchandise bought by it from such manufacturers and sellers, and thus obtained substantial discriminations in price, amounting to differentials in favor of it of from 33½ percent to 50 percent over other wholesalers competing with it and with customers of it, through credits, discounts, and allowances made on purchases of goods, wares, and merchandise bought by it, by virtue of such contracts and agreements for advertising space in periodical aforesaid, value of which as advertising medium was not substantial;

With result that it was thereby enabled to and did offer and sell to other wholesalers at prices lower than competitors of its wholesaler-customers could purchase the same commodities or those of like grade and quality from the manufacturers, and as said wholesaler-customers were enabled to and did offer and sell such commodities to retailers at prices lower than other wholesalers competing with it and its said customers could profitably sell such commodities to such dealers, effect of such discriminations in price induced and received by them was substantially to lessen competition and to tend to create a monopoly in the sale and distribution of drug products, and to injure, destroy, and prevent competition between and among it and its customers on the one hand, and their competitors on the other, and between and among customers of each:

Held, That such acts and practices, as above set forth, constituted violation of Section 2 (f) of act of Congress approved October 15, 1914, as amended by act of Congress approved June 19, 1936.

Mr. John Darsey for the Commission.

Mr. Aaron M. Kanner, of Miami, Fla., for respondents.

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COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof, since June 19, 1936, have violated and are now violating the provisions of section 2 (f) of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by section 1 of the Act of Congress entitled "An Act to amend section 2 of the act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title sec. 13), and for other purposes," approved June 19, 1936, (the Robinson-Patman Act), hereby issues this its complaint against respondents and states its charges with respect thereto as follows, to wit:

PARAGRAPH 1. The respondent, Miami Wholesale Drug Corporation, is a corporation organized and existing under the laws of the State of Florida, having an office and principal place of business in Miami, Fla. It is now, and for several years last past has been, engaged in the wholesale drug business.

The individual respondents, Arthur S. Lavine, Vivian L. King, and Sam S. Lavine, are president, vice president, and treasurer, respectively, of the respondent corporation.

Respondent Rodney S. Pullen, Jr., is in active charge of the management of the business of the respondent corporation as well as the business conducted under the trade name "Miami Magazine."

In the course and conduct of the wholesale drug business of the respondent corporation as aforesaid, goods, wares, and merchandise are purchased from manufacturers and sellers located in the various States of the United States, pursuant to which purchases the said goods, wares, and merchandise are shipped and transported to the respondent corporation from the States in which the various manufacturers and sellers are located, and the respondent corporation causes said goods, wares, and merchandise so purchased to be sold, shipped, and distributed, to other wholesalers and to retailers residing in the various States of the United States.

There are other corporations, partnerships, firms, and individuals, engaged in the wholesale drug business, who purchase goods, wares, and merchandise from manufacturers and sellers thereof, pursuant to which said purchases, goods, wares, and merchandise are shipped and distributed into and through the various States of the United States to the respective purchasers thereof, and with such corporations, partnerships, firms, and individuals, the respondent corpora-

tion and its customers are, and at all times mentioned herein have been, in competition.

PAR. 2. In the course and conduct of the business as hereinabove described, the respondent corporation, with the active cooperation, aid, and assistance of the individual respondents, adopted, follows, and pursues a purchasing policy and practice designed and intended to induce favorable discriminatory prices for the respondent corporation in its purchases of goods, wares, and merchandise of like grade and quality to those purchased by competing purchasers. Pursuant to, and in furtherance of, the said purchasing plan and policy, the parties respondent cause a magazine to be published under the trade name "Miami Magazine." Manufacturers and sellers are persuaded and induced to enter into contracts or agreements authorizing advertisements to be inserted in the said magazine, which contracts or agreements either provide, or it is understood, and so carried out, that the charges made for said advertisements shall be credited on the purchase price of the goods, wares, and merchandise purchased by the respondent corporation from such manufacturers and sellers. Many of such contracts or agreements have been so induced, entered into, and executed since June 19, 1936.

The publication of the aforesaid magazine by the parties respondent is not an independent business operated in good faith on a profit basis, but is a subterfuge operated solely as an incident to the wholesale drug business engaged in by the respondent corporation, for the purpose of obtaining the discriminations in price as aforesaid. The said magazine has no substantial value as an advertising medium, and there are no substantial benefits and considerations accruing to manufacturers and sellers for the credits, discounts, and allowances made on purchases of goods, wares, and merchandise by the respondent corporation by virtue of the contracts and agreements for advertising space therein.

The discriminations in price thus obtained are substantial, amounting to differentials in favor of respondent of from $33\frac{1}{3}$ percent to 50 percent over other wholesalers competing with respondent and with customers of respondent; enable respondent to offer and sell, and respondent does offer and sell, to other wholesalers at prices lower than competitors of respondent's said wholesaler customers can purchase the same commodities, or commodities of like grade and quality, from the manufacturers thereof; and enable respondent and its said wholesaler customers to offer and sell, and they do offer and sell, said commodities to retailers at prices lower than other wholesalers competing with respondent and its said customers can profitably sell such commodities to retailers.

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PAR. 3. The effect of the aforesaid discriminations in price, induced and received by the respondents, has been, and may be, substantially to lessen competition and tend to create a monopoly in the sale and distribution of drug products, and to injure, destroy, and prevent competition between and among the respondent and its customers, on the one hand, and their competitors, on the other hand, and between and among customers of each.

PAR. 4. The foregoing alleged acts of the respondents are in violation of section 2 (f) of said Act of Congress approved June 19, 1936, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by section 1 of the Act of Congress entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes," approved June 19, 1936 (the Robinson-Patman Act).

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (The Clayton Act), as amended by section 1 of the Act of Congress entitled "An Act to amend section 2 of the act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C. title 15, sec. 13), and for other purposes," approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission on April 11, 1938, issued, and subsequently served, its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the violation of section 2 (f) of the Clayton Act, as amended.

On November 10, 1938, the respondents filed their answer, in which answer they admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to the facts. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint and answer thereto, 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, Miami Wholesale Drug Corporation, is a corporation organized and existing under the laws of the State of Florida, having an office and principal place of business in Miami, Fla. It is now, and for several years last past has been, engaged in the wholesale drug business.

The individual respondents, Arthur S. Lavine, Vivian L. King, and Sam S. Lavine, are president, vice president and treasurer, respectively, of the respondent corporation.

Respondent Rodney S. Pullen, Jr., is in active charge of the management of the business of the respondent corporation, as well as of the business conducted under the trade name "Miami Magazine."

In the course and conduct of the wholesale drug business of the respondent corporation as aforesaid, goods, wares, and merchandise are purchased from manufacturers and sellers located in the various States of the United States. The said goods, wares, and merchandise are shipped and transported to the respondent corporation from the States in which the various manufacturers and sellers are located, and the respondent corporation thereupon causes said goods, wares, and merchandise so purchased to be sold, shipped and distributed to other wholesalers and to retailers residing in the various States of the United States.

There are other corporations, partnerships, firms, and individuals, engaged in the wholesale drug business, who purchase goods, wares, and merchandise from manufacturers and sellers thereof, pursuant to which said purchases, goods, wares, and merchandise are shipped and distributed into and through the various States of the United States to the respective purchasers thereof. The respondent corporation and its customers are, and at all times mentioned herein have been, in competition with such corporations, partnerships, firms, and individuals.

PAR. 2. In the course and conduct of the business as hereinabove described, the respondent corporation, with the active cooperation, aid and assistance of the individual respondents, adopted, follows, and pursues a purchasing policy and practice designed and intended to induce favorable discriminatory prices for the respondent corporation in its purchases of goods, wares, and merchandise of like grade and quality to those purchased by competing purchasers.

Pursuant to, and in furtherance of, the said purchasing plan and policy, the parties respondent cause a magazine to be published under the trade name "Miami Magazine." Manufacturers and sellers are persuaded and induced to enter into contracts or agreements authorizing advertisements to be inserted in the said magazine, which con-

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tracts or agreements either provide, or it is understood and so carried out, that the charges made for said advertisements shall be credited on the purchase price of the goods, wares, and merchandise purchased by the respondent corporation from such manufacturers and sellers. Many of such contracts or agreements have been so induced, entered into, and executed since June 19, 1936.

The Commission finds that the publication of the aforesaid magazine by the parties respondent is not an independent business operated in good faith on a profit basis, but is a subterfuge operated solely as an incident to the wholesale drug business engaged in by the respondent corporation, for the purpose of obtaining the discriminations in price as aforesaid.

The Commission further finds that the said magazine has no substantial value as an advertising medium, and there are not substantial benefits and considerations accruing to manufacturers and sellers for the credits, discounts, and allowances made on purchases of goods, wares, and merchandise by the respondent corporation by virtue of the contracts and agreements for advertising space therein.

The discriminations in price thus obtained are substantial, amounting to differentials in favor of respondent of from 33 $\frac{1}{3}$ percent to 50 percent over other wholesalers competing with respondent corporation and with customers of respondent corporation. The discriminations in price enable respondent corporation to offer and sell, and respondent corporation does offer and sell, to other wholesalers at prices lower than competitors of respondent's said wholesaler customers can purchase the same commodities, or commodities of like grade and quality, from the manufacturers thereof.

The discriminations in price enable respondent corporation and its said wholesaler customers to offer and sell, and they do offer and sell, said commodities to retailers at prices lower than other wholesalers competing with respondent corporation and its said customers can profitably sell such commodities to retailers.

PAR. 3. The effect of the aforesaid discriminations in price, induced and received by the respondents, has been substantially to lessen competition and to tend to create a monopoly in the sale and distribution of drug products, and to injure, destroy, and prevent competition between and among the respondent corporation and its customers, on the one hand, and their competitors on the other hand, and between and among customers of each.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are in violation of section 2 (f) of said Act of Congress

approved June 19, 1936, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by section 1 of the Act of Congress entitled "An Act to amend section 2 of the act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes," approved June 19, 1936 (the Robinson-Patman Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer filed on behalf of the parties respondent, in which answer the respondents admit all the material allegations of fact set forth in said complaint, and state that they waive all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said parties respondent have violated 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," as amended by an Act of Congress approved June 19, 1936, entitled "An Act to amend section 2 of the act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C. title 15, sec. 13), and for other purposes."

It is ordered, That the respondent, Miami Wholesale Drug Corporation, its officers, representatives, agents, and employees, and the respondents, Rodney S. Pullen, Jr., Arthur S. Lavine, Sam S. Lavine, Vivian L. King, Esther S. King, and Elizabeth R. King, in connection with the purchase of drug commodities in interstate commerce by either of said parties respondent, do forthwith cease and desist from:

1. Inducing sellers to contract with either of the parties respondent herein, in connection with the purchases of commodities by either of said parties respondent, for the payment for advertising space in any magazine or publication, published by either of said parties respondent, at prices greater than the recognized value of such space as an advertising medium to the sellers paying therefor.

2. Inducing sellers to discriminate in price between either of the said parties respondent and other purchasers of commodities of like grade and quality, by granting, allowing, and paying to either of the said parties respondent herein, in connection with the purchases

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of either of said parties respondent, any advertising allowances, or anything of value in lieu thereof, which are not granted by such sellers to all of their customers on proportionately equal terms.

3. Receiving and accepting any discriminatory price or the benefit of any discrimination in price obtained in the manner set forth in, and prohibited by, subparagraphs (1) and (2) of this order.

It is further ordered, That the parties respondent shall, within 60 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.

Syllabus

IN THE MATTER OF
BLOOMINGDALE BROS., INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3564. Complaint, Aug. 30, 1938—Decision, Feb. 9, 1939*

Where a corporation engaged in operating a department store, and in selling therefrom, among other things, men's and women's wearing apparel to members of the purchasing public in the various States and in the District of Columbia, in substantial competition in commerce with others engaged in sale and distribution of such apparel made from silk, wool, rayon, cotton, and other fibers, and including those who do not misrepresent the nature, character or content of the articles of wearing apparel offered by them; in advertising its said apparel in newspapers of general circulation in various States—

- (a) Represented and described certain coats there offered as "all wool," notwithstanding fact such coats were not composed wholly of wool, or fleece, or hair of the sheep, as long definitely understood from word in minds of consuming public and associated, in coats thus described, with fabric entirely made from the hair or fleece of the sheep, and held in high esteem in products thereof for their preeminent qualities and qualities of warmth, durability, and beauty, but were composed of a mixture of wool and rayon;
- (b) Represented, as aforesaid, as "celanese, cotton, and 'Terry' polo shirts," certain garments thus offered, facts being said shirts were not composed of a mixture of celanese or rayon, of cotton, and cotton of the terry weave, but were composed, in case of some, wholly of rayon, in case of others wholly of cotton, and in case of still others wholly of cotton of so-called terry type of weave; and
- (c) Represented, as aforesaid, certain dresses thus offered as "Acetate Chiffon," notwithstanding fact said garments were not composed wholly of silk, as long associated in the public mind with word "chiffon" as designating dress goods and other similar products as made of said long, well and favorably known and highly esteemed product of the cocoon of the silk worm, but were made wholly of rayon;

With capacity and tendency to cause members of public, through association and meaning of words "wool" and "chiffon" as aforesaid, and inadequate understanding of words "celanese" and "acetate" as trade names of rayon manufacturer or rayon process used only in connection with rayon fabrics, to purchase such articles in erroneous belief that they were composed, as case might be, wholly of wool, of mixture of celanese, cotton, and cotton of terry type of weave, and of silk wholly, and to divert thereby trade to it from its competitors; to the injury of competition in commerce:

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

Mr. George W. Williams for the Commission.

Proskauer, Rose & Paskus, of New York City, for respondent.