

Syllabus

IN THE MATTER OF
SHAW & DAVIS, INC., AND ABNER SHAW AND JANET
SHAW

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

Docket 3635. Complaint, Oct. 25, 1938—Decision, July 7, 1939

Where a corporation and two individuals, officers thereof and in control of its advertising policies and business activities, engaged in importing diamonds for resale, and in purchasing, from manufacturers or jobbers in this country, jewelry, silverware, diamonds, watches, clocks, leather goods, and kindred products, and in selling such various items or articles to consuming public by mail order; acting in cooperation and in concert with one another in the below set forth acts and things—

- (a) Described themselves as "wholesalers" in their catalogs and thereby represented that they were wholesalers engaged in sale and distribution of merchandise to trade for resale, notwithstanding fact substantially all of their sales were made to members of buying and consuming public who do not purchase for resale purposes, and they were not wholesalers of jewelry, sellers to trade for resale, but seldom, if ever, to consumer or purchasing public, and were not "wholesalers," marked and distinguished by character of sales to trade, but constituted corporate mail-order house engaged in sale to consuming public; and
- (b) Quoted, in connection with each of items listed in aforesaid catalogs, "list prices", so-called, and advised prospective customers and members of consuming public, through catalog insert, that such "list prices" for dealers of all items in such catalogs were "subject to discounts of 50% and 2% additional for cash" on the remaining 50 percent, making total discount on "list prices" of 51 percent, notwithstanding fact said prices were not list prices or retail prices in connection with sales to retail trade, as understood from trade term as used by manufacturers, jobbers, and wholesalers to designate such price, but figures which, reduced by discount aforesaid, would show prices of articles as offered to members of purchasing public, and their said prices were not wholesale prices thereof, but usual and customary prices charged by them in usual course of business;

With result of causing consuming public to buy their merchandise under belief that said corporation was wholesaler engaged in selling to retail dealer trade, and that consuming public was buying from it at retail dealer prices, and with capacity and tendency to mislead and deceive substantial portion of purchasing public into belief that products offered and sold by them were sold at wholesale prices and that such persons as purchased from them might buy at such prices and save retail dealer's profit, and to induce purchase of their said products by members of purchasing public through reliance upon such erroneous belief, and with effect of diverting trade unfairly to it from competitors engaged in distribution and sale in commerce of products aforesaid:

Held, That such acts and practices, under the conditions and circumstances set forth, were all to the prejudice and injury of the public and constituted

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unfair methods of competition and unfair and deceptive acts and practices in commerce.

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. John M. Russell for the Commission.

Mr. Herman Goldman, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Shaw and Davis, Inc., a corporation, and Abner Shaw and Janet Shaw, individuals, hereinafter referred to as respondents, have violated the provisions of 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 complaint stating its charges in that respect as follows:

PARAGRAPH 1. Shaw and Davis, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and respondents Abner Shaw and Janet Shaw, individuals, are president and vice president, respectively, thereof. The individual respondents have dominant control of the advertising policies and business activities of said corporate respondent, and all of said respondents have cooperated each with the other and have acted in concert in doing the acts and things hereinafter alleged. Respondents' office and place of business is located at 20 West 47 Street, city of New York, State of New York.

PAR. 2. Respondents now are and for more than two years last past have been engaged in the business of importing for resale diamonds and in purchasing for resale from manufacturers or jobbers located in this country jewelry, silverware, diamonds, watches, clocks, leather goods, and kindred items. Respondents are engaged in a mail order business by means of which they sell the products above mentioned direct to the consuming public. Respondents cause said products, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in other States of the United States and in the District of Columbia.

Respondents maintain and at all times mentioned herein have maintained a course of trade in said articles of merchandise in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of said business, respondents are in active and substantial competition with other corporations

and individuals and with firms and partnerships engaged in the sale and distribution of similar products in commerce among and between the various States of the United States and in the District of Columbia. Among such competitors there are many who do not make any misrepresentations or false statements as to the nature and character of their business and as to the value and prices of the articles sold by them respectively.

PAR. 4. In the course and conduct of their business as described in paragraph 2 hereof, the respondents in soliciting the sale of and selling their products as aforesaid have published or caused to be published and have distributed or caused to be distributed to purchasers or prospective purchasers of respondents' products located in various States of the United States and in the District of Columbia catalogs in which the products offered for sale and sold by the respondents are pictorially and descriptively represented. On the first pages of and at various places in said catalogs said respondents refer to themselves as "wholesalers." A wholesaler is one who sells to the trade but never to the ultimate consumer of an individual unit as such. It is the character of the sales to the trade that marks and distinguishes a wholesaler. In truth and in fact, the respondents are not wholesalers but said corporate respondent is a mail order house engaged in selling to the consuming public.

PAR. 5. In the course and conduct of said business as described in paragraph 2 hereof, the respondents, in connection with the offering for sale and sale of their products in said commerce under a trade status designated by them as "wholesalers," have quoted in connection with each of the items listed in their catalogs heretofore referred to certain figures termed by the respondents "list prices." An insert in said catalogs advises prospective customers, members of the consuming public, that the said "list prices" for dealers of all items in respondents' catalogs are "subject to discounts of 50 percent and 2 percent additional for cash" on the remaining 50 percent making a total discount from the "list prices" of 51 percent. The term "list prices" is a trade term used by manufacturers, jobbers or wholesalers in connection with sales to the retail trade. The term "list prices" as used by respondents and the discounts therefrom are used by them for the purpose of inducing the consuming public to buy their merchandise under the belief that the said corporate respondent is a wholesaler engaged in selling to the retail dealer trade and that the consuming public is buying from said corporate respondent at retail dealer prices.

In truth and in fact, the so-called "list prices" are not "list prices" but are figures that will, when reduced by the discount of 51 percent.

be the usual and customary prices charged by retail dealers to members of the consuming public.

PAR. 6. The aforesaid practices of the respondents have had and have the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the belief that the products offered for sale and sold by them are sold at wholesale prices and that such persons as purchase such articles from the respondents may buy at the wholesale prices and save the retail dealer's profit, and to induce the purchase of the respondents' products by members of the purchasing public in reliance upon such erroneous belief.

The aforesaid practices of respondents have had and have, and each of them has had and has, the capacity and tendency unfairly to divert trade to the respondents from competitors who truthfully describe their status and the prices at which their products are regularly sold.

PAR. 7. The above named acts and practices of the respondents are all to the prejudice of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on the 25th day of October 1938, issued and served its complaint in this proceeding upon said respondents, Shaw and Davis, Inc., a corporation, and Abner Shaw and Janet Shaw, individuals, charging them with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. On November 12, 1938, the respondents filed their answers in this proceeding. At the hearing on December 14, 1938, in New York City, a conditional stipulation was entered into by the attorney for the respondents and the trial attorney for the Federal Trade Commission, subject to the approval of the Commission, which was made a part of the record herein, whereby it was stipulated and agreed that a statement of facts set forth therein may be taken as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint, or in opposition thereto, and that the said Commission may proceed upon said statement of facts to make its report stating its findings as to the facts and its conclusion based thereon and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs. Thereafter a

supplemental stipulation was executed by respondents and their counsel Herman Goldman, whereby it was stipulated and agreed that the conditional nature of said prior stipulation should be eliminated. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answers stipulations, said stipulations having been approved, accepted and filed, 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 its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Shaw and Davis, Inc. is a corporation organized and existing and doing business under and by virtue of the laws of the State of New York, and respondents Abner Shaw and Janet Shaw, individuals, are president and vice president, respectively, thereof. The individual respondents have dominant control of the advertising policies and business activities of said corporate respondent, and all said respondents have cooperated each with the other, and have acted in concert, in doing the acts and things hereinafter alleged. Respondents' office and place of business is located at 20 West Forty-seventh Street, city of New York, State of New York.

PAR. 2. Respondents now are, and for more than 2 years last past have been, engaged in the business of importing for resale, diamonds, and in purchasing from manufacturers or jobbers located in this country, jewelry, silverware, diamonds, watches, clocks, leather goods and kindred items. Respondents are engaged in the mail order business by means of which they sell the products above-mentioned to the consuming public. Respondents cause said products when sold to be transported from their place of business in the State of New York to purchasers thereof located in other States of the United States and in the District of Columbia.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in such articles of merchandise in commerce among and between the various States of the United States and in the District of Columbia. In the course and conduct of its business the corporate respondent is in active and substantial competition with other corporations and with individuals and partnerships engaged in the sale and distribution of jewelry, silverware, diamonds, watches, clocks, leather goods, and kindred items, in

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commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their business as described in paragraph 2 hereof, the respondents in soliciting the sale of and selling their products as aforesaid have published or caused to be published, and have distributed or caused to be distributed to purchasers or prospective purchasers of respondents' products located in various States of the United States and in the District of Columbia, catalogs in which the products offered for sale and sold by respondents are pictorially and descriptively represented. In the first pages of, and at various places in, said catalogs, said respondents refer to themselves as "wholesalers." By this means the respondents represent that they are wholesalers engaged in the sale and distribution of merchandise to the trade for resale. In truth and in fact substantially all of the sales made by the respondents are made to members of the buying and consuming public who do not purchase for resale purposes. A wholesaler of jewelry is one who sells to the trade for resale but seldom if ever to the ultimate consumer or purchasing public. It is the character of the sales to the trade that marks and distinguishes a wholesaler. The respondents are not wholesalers, but said corporate respondent is a mail order house engaged in selling to the consuming public.

PAR. 4. In the course and conduct of said business as hereinabove described, the respondents, in connection with the offering for sale and sale of their products in said commerce, under a trade status designated by them as "wholesalers," have quoted in connection with each of the items listed in their catalogs heretofore referred to, certain figures termed by the respondents "list prices." An insert in said catalogs advises prospective customers and members of the consuming public that the said "list prices" for dealers of all items in the respondents' catalogs are "subject to discounts of 50% and 2% additional for cash" on the remaining 50 percent, making a total discount from the "list prices" of 51 percent. The term "list prices" is a trade term used by manufacturers, jobbers and wholesalers to designate retail price in connection with sales to the retail trade and are so understood by members of the purchasing, buying and consuming public. The term "list prices" as used by respondents, and the discounts therefrom, and used by them cause the consuming public to buy their merchandise under the belief that the said corporate respondent is a wholesaler engaged in selling to the retail dealer trade, and that the consuming public is buying from said corporate respondent at retail dealer prices.

In truth and in fact, so-called "list prices" are not "list prices" but are figures that will, when reduced by the discount of 51 percent, be figures which will show the prices of respondents' articles as offered for sale to members of the purchasing public. The said prices at which respondents' articles are sold to the purchasers thereof are not, and have not been, wholesale prices of such articles, but are the usual and customary prices charged by respondents in the usual course of business.

PAR. 5. The aforesaid practices of the respondents have had, and have, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the belief that the products offered for sale and sold by them are sold at wholesale prices, and that such persons as purchase such articles from the respondents may buy at the wholesale prices and save the retail dealer's profit, and to induce the purchase of respondents' products by members of the purchasing public by reliance upon such erroneous belief, with the result that trade has been diverted unfairly to the corporate respondent from its competitors likewise engaged in the business of distributing and selling jewelry, silverware, diamonds, watches, clocks, leather goods, and kindred items, in commerce between and among the various States of the United States and in the District of Columbia.

CONCLUSION

The acts and practices of respondents, under the conditions and circumstances described in the foregoing findings, are all to the prejudice and injury of the public, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 answers of the respondents, a stipulation as to the facts entered upon the record, and a supplemental stipulation executed by respondents and their counsel, which stipulations provide among other things that without further evidence or other intervening procedure the Commission may issue and serve upon the respondents herein findings as to the facts and conclusion based thereon, and an order disposing of the proceedings, and the Commission having made its findings as to the facts and conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

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It is ordered, That the respondents, Shaw and Davis, Inc., a corporation and its officers, and Abner Shaw and Janet Shaw, and their respective agents, representatives, and employees, directly or through any corporate or other devices, in connection with the offering for sale, sale and distribution of jewelry, silverware, diamonds, watches, clocks, leather goods, or any other merchandise to the purchasing public other than the retail trade in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Designating, describing or representing the corporate or individual respondents as "Wholesalers" or "Wholesale Jewelers" in catalogs, printed matter, or in any other manner.

2. Using the terms "list prices" or "discount," or representing that the price at which respondents offer for sale and sell their various products constitutes a discount to the purchaser or is a wholesale price, when in fact said price is the usual and customary price at which the respondents sell said products in the normal and usual course of business.

It is hereby further ordered, That the respondents shall, within 60 days from the date of service upon them of this order, file with this Commission a report in writing setting forth the manner and form in which they have complied with this order.

Syllabus

IN THE MATTER OF
WYETH CHEMICAL COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 23, 1914

Docket 3754. Complaint, Apr. 7, 1939—Decision, July 7, 1939

Where a corporation engaged in sale and distribution of "Freezone," preparation for removal of corns and callouses, to purchasers in other States and in the District of Columbia, in substantial competition with others engaged in sale and distribution of like and similar products or other products and treatments designed, intended and used for similar purposes, in commerce as aforesaid, and in said District—

- (a) Represented, in its advertising in newspapers and periodicals of general circulation, and in bulletins and other advertising literature circulated to prospective purchasers in various States and in said District, that use of said "Freezone" would cure corns and callouses and prevent their formation and recurrence, and promptly stop the pain which they caused and prevent its recurrence;

Facts being that, while such preparation might have analgesic effect and mitigate pain caused by corns, use thereof would not promptly stop such pain and prevent recurrence, and its said statements and representations with respect to therapeutic value of its said product and effectiveness thereof were false, misleading and untrue;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that all of its said representations were true, and with result, as direct consequence of such erroneous and mistaken belief, that number of purchasing public bought substantial volume of its product, and trade in commerce was diverted unfairly to it from competitors likewise engaged in sale and distribution of like and similar products, or other products and treatments intended, designed and used for similar purposes, and who truthfully advertise their products and effectiveness thereof; to the substantial injury of competition in commerce among the States and in said District:

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

Where said corporation engaged in sale and distribution of its said "Freezone," for removal of corns and callouses, to purchasers in other States and in the District of Columbia, as aforesaid; in advertisements which it disseminated through the mails, through insertion in newspapers and periodicals of general circulation, and through other printed or written matter distributed in commerce among the various States, and through continuities broadcast from radio stations of extrastate audience, and through other means, and which were intended and calculated to induce purchase of its said product—

- (b) Represented, directly and by implication, that corns had roots, and that said preparation would remove such roots and deaden pain caused by corns and prevent their recurrence, and that entire corn could be removed by the fingers through one application, through such statements, among others,