

Syllabus

IN THE MATTER OF

STERLING PRODUCTS CORPORATION, AND STERLING
PRODUCTS CORPORATION TRADING AS PAUL HART-
MANN AGENCYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2779. Complaint, Apr. 23, 1936—Decision, Sept. 12, 1939*

Where a corporation engaged in sale by mail order of drugs, pharmaceuticals, surgical instruments, dressings, and surgical supplies, to purchasers thereof in other States; in advertising matter consisting of catalogs, folders, circulars, circular letters, post cards, and other forms of printed advertising mailed from New York City to some 16,000 customers and prospective customers in various other States—

- (a) Represented that ethyl chloride tubes, ethyl chloride, distilled water, and glass ampules used to hold distilled water, were being sold by competitors as wholly of domestic origin, although they had been made in and imported from a foreign country by competitors involved, notwithstanding fact number of competitors did in fact sell and offer for sale said various products made in United States and entirely of domestic origin, with capacity and tendency to mislead and deceive customers and prospective customers of such competitors and induce them to withhold contemplated orders for articles in question from said competitors and give such orders to it;
- (b) Represented that it was closing out its stock of foreign-made surgical instruments, and that in future it would deal only in such instruments made in the United States, notwithstanding fact it was then purchasing, and continued to purchase, for resale surgical instruments made in foreign country, and to accept and fill any orders that came to it for such instruments thus made, with capacity and tendency to deceive members of public into purchasing such instruments from it in the erroneous and mistaken belief that when it had thus closed out its foreign-made stock it would sell only such instruments made in the United States, as preferred by substantial portion of purchasing public in case of such products and medical supplies, etc.; and
- (c) Represented that all of the surgical and medical products listed in its said circulars were made in the United States, notwithstanding fact certain dressing so listed was not there made, but was made in foreign country and imported, with capacity and tendency to cause members of purchasing public to buy said merchandise in erroneous and mistaken belief that it was made in the United States, preferred as aforesaid by substantial part thereof;

With direct result that trade in commerce among the various States, by reason of said false and misleading statements and representations, was unfairly diverted to it from its competitors who deal only in surgical instruments of American manufacture and who do not falsely represent the place of manufacture of their respective merchandise or of the merchandise of their competitors:

Complaint

29 F. T. C.

Held, That such acts, practices, and representations, under the circumstances set forth, were to the prejudice and injury of the public and competitors, and constituted unfair methods of competition in commerce.

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

Mr. A. W. DeBirny and *Mr. R. P. Bellinger* for the Commission.

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 Sterling Products Corporation, trading under its own name and as Paul Hartmann Agency, 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 respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, Sterling Products Corporation, is a corporation chartered and existing under and by virtue of the laws of the State of New York, and maintains its principal office and place of business at 118-120 East Twenty-fifth Street in the city of New York, within the State of New York. Said respondent is now and for a number of years last past has been engaged in the wholesale and retail sale of drugs and surgical instruments and supplies and the distribution thereof between and among the various States of the United States, both under its own name and under the name of Paul Hartmann Agency. Respondent causes said drugs and surgical instruments and supplies, when sold by it, to be transported to the purchasers thereof located in the State of New York and in the various other States of the United States. There is now and has been for a long time, to wit, for more than 2 years last past, a constant current of trade and commerce by respondent in drugs and surgical instruments and supplies between and among the various States of the United States. Said respondent in its retail business has operated and now does operate under its corporate name, and in its wholesale business has operated and now does operate under the name of Paul Hartmann Agency.

In the course and conduct of its said business respondent is now and for a long time, to wit, for more than 2 years last past, has been in substantial competition in commerce, between and among the various States of the United States, with other corporations, partnerships, firms, and individuals engaged in the interstate sale and distribution of drugs and surgical instruments and supplies.

PAR. 2. Among the drugs and surgical instruments and supplies sold and distributed by respondent in interstate commerce are ethyl chloride tubes, ethyl chloride, distilled water, and glass ampules used to hold distilled water. The ethyl chloride tubes and the ethyl chloride sold or offered for sale and distributed by said respondent are of German manufacture and are imported from Germany. Most of the surgical instruments sold or offered for sale and distributed by the said respondent are of German manufacture and are imported by said respondent from Germany.

PAR. 3. Since the adoption by the German Government of its present policies with regard to people of Jewish origin or faith and residing within its borders, there has arisen in the United States, and particularly among Jewish citizens and residents of the United States, a marked antipathy and aversion toward and refusal to purchase any article of German manufacture or origin. The antipathy and aversion to German-made goods so aroused in the Jewish race in the United States is especially noticeable among the professional classes and amounts almost to a boycott so that importation of German-made goods has shown a marked tendency to decrease.

PAR. 4. Said respondent in the regular course and conduct of its said business, which it conducts to a large extent by mail, has caused and is causing to be mailed to its customers and to its prospective customers located in the various States of the United States, catalogs, circulars, folders, letters, and cards, which various catalogs, circulars, folders, letters, and cards have described and do now describe the items sold and offered for sale by said respondent, and said catalogs, circulars, folders, letters, and cards have been used and are now being used by said respondent as a means of and for the purpose of furthering and aiding in the interstate sale and distribution of the items sold or offered for sale by said respondent.

Said respondent in its catalogs, circulars, folders, letters, and cards used by it as a means of furthering its sales, has caused to be made and is now causing to be made various false, deceptive, disparaging, and misleading statements concerning articles sold or offered for sale by its competitors and concerning various articles sold or offered for sale by said respondent. Among said statements which said respondent has made and is now causing to be made in its said catalogs, circulars, folders, letters, and cards, are statements to the effect that ethyl chloride tubes, ethyl chloride, distilled water, and glass ampules sold or offered for sale by its competitors are either "German made" goods or are not "a 100% American product" and originate, in whole or in part in Germany. Whereas, in truth and in fact, the ethyl chloride tubes, ethyl chloride distilled water, and glass ampules sold

Complaint

29 F. T. C.

or offered for sale by many of respondent's competitors were or are not made in Germany, are a 100 percent American product, and bear on them the statement "Entirely a product of United States," which said statement is true in fact.

Said respondent has caused and is causing to be sold or offered for sale many and various surgical instruments, which said surgical instruments were made in Germany and imported by said respondent. Nevertheless said respondent in the course and conduct of its said business has, in its catalogs, circulars, folders, letters, and cards, caused, and is causing to be made statements to the effect that it is holding a "clearance" sale of German-made products and "New deal after January 1st. Strictly American supreme quality goods in our new listing," and that it had stopped and was stopping the importation of German goods; whereas such statements were and are false, deceptive, and misleading, because in truth and in fact said respondent did not have a "clearance" sale of its German-made products and did not sell or offer for sale and is not now selling or offering for sale strictly American-made goods, and did not and has not ceased the importation of German-made goods, but has restocked and sold or offered for sale in increasing quantities German-made products.

Said respondent in its catalogs, circulars, folders, letters, and cards, has made and is now causing to be made false, deceptive, and misleading statements to the effect that customers purchasing goods in certain stated amounts will be given free goods varying in amount according to the size of the purchase; whereas in truth and in fact said statements are false because the customer is not given free goods, the cost of said goods so given to the customer being borne out of the profits of the goods sold to the customer.

Respondent in its said catalogs, circulars, folders, letters, and cards has created and is creating upon the public, and especially that portion of the public buying surgical instruments and drugs, the impression that by dealing with competitors of said respondent they are purchasing goods made in whole or in part in Germany; whereas in truth and in fact many of said respondent's competitors sell or offer for sale strictly American-made products. Said respondent in its said catalogs, circulars, folders, letters, and cards, has created and is creating upon the public, and especially that portion of the public purchasing drugs and surgical instruments, the impression that by purchasing from respondent they are obtaining strictly American-made products, and that whenever they purchase a stated amount of goods they are receiving free goods; whereas in truth and in fact said goods purchased from said respondent are not strictly American-made goods, but are for the most part products manufactured in Germany, and the

supposedly free goods which purchasers receive are not free but the cost of said free goods is borne out of the profits on the goods sold to the said recipient of the so-called free goods.

PAR. 5. The use by the said respondent, Sterling Products Corporation, and Sterling Products Corporation trading as Paul Hartmann Agency, of the foregoing false, deceptive, disparaging, and misleading representations alleged to be used by the said respondent in paragraph 4 hereof, have had and do now have the capacity and tendency to mislead and deceive the public into the erroneous and untrue belief that when they purchase from competitors of said respondent they are in truth and in fact purchasing German-made goods and that when they purchase from said respondent they are in truth and in fact purchasing strictly American-made goods and are receiving along with the goods purchased by them, free goods, and has thereby induced and does now induce the consuming public, and especially the purchasers of drugs and surgical instruments and supplies, acting in said erroneous belief, to purchase their drugs, surgical instruments, and supplies from respondent instead of drugs, surgical instruments, and supplies sold or offered for sale by other corporations, partnerships, firms, and individuals. As a result of such false, deceptive, disparaging, and misleading representations on the part of said respondent, trade is diverted to respondent from such corporations, partnerships, firms, and individuals dealing in drugs, surgical instruments, and supplies as do not make such false, deceptive, disparaging, and misleading representations concerning their products, and thereby injury has been done and is being done by the respondent.

PAR. 6. Said false, deceptive, and misleading representations of said respondent contained in its catalogs, circulars, folders, letters, and cards have resulted in injury to respondent's competitors and in prejudice to the buying public, 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 23, 1936, issued its complaint in the above-entitled proceeding and caused same to be served upon the respondent, the Sterling Products Corporation and Sterling Products Corporation trading as Paul Hartmann Agency, charging it with the use of unfair methods of competition in commerce in

Findings

29 F. T. C.

violation of the provisions of said act. The respondent entered its appearance herein on May 16, 1936, and filed an answer to said complaint and thereafter testimony was introduced and evidence received at New York, N. Y., on June 4 and 5, 1936, and on August 7, 1936, at the instance of A. W. DeBirny, counsel for the Commission, and at New York, N. Y., on August 7, 1936, at the instance of David B. Levy, manager and vice president of said respondent before Edward M. Averill, an examiner for the Commission, duly designated by it, and said testimony was reduced to writing and filed in the office of the Commission together with numerous pieces of documentary evidence received as exhibits. Thereafter this proceeding regularly came on for final hearing before the Commission upon the Complaint herein, the answer thereto, the testimony taken and evidence received and brief by counsel for the Commission. No brief was filed by or on behalf of respondent and oral argument was waived by it, and the Commission having duly considered the matter and being 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, Sterling Products Corporation, is a corporation organized under the laws of the State of New York with its principal office and place of business in New York City in said State. For a number of years said respondent has been engaged in the business of the sale of drugs, pharmaceuticals, surgical instruments, dressings, and surgical supplies and has caused same, when sold, to be transported from its place of business in the city and State of New York through and into or into other States of the United States to the respective purchasers thereof, and in the course and conduct of its said business, respondent has been and is now in active competition with various persons and partnerships and other corporations also engaged in the sale of drugs, pharmaceuticals, surgical instruments, surgical dressings, and supplies in commerce among several of the States of the United States. Said respondent has carried on a portion of its business under the name and style of Paul Hartmann Agency. The business done by respondent consists of sales made as a result of mail orders sent to it by customers in various States of the United States.

PAR. 2. Respondent in the course of its business as set-out in paragraph 1 hereof, has caused catalogs, folders, circulars, circular letters, post cards, and other forms of printed advertising matter to be mailed from New York City in the State of New York to about 16,000 cus-

tomers and prospective customers in various other States of the United States in which advertising matter false and deceptive statements and representations were made concerning the drugs, pharmaceuticals, surgical instruments, surgical dressings, and supplies offered for sale and sold by respondent, also concerning those sold by some of its competitors. The evidence shows and the Commission finds that a substantial part of the purchasing public prefer medical supplies, surgical instruments, surgical dressings, and supplies of American manufacture to those of foreign manufacture. Among the false and deceptive statements and representations contained in the advertising matter so distributed by respondent, were statements and representations to the effect ethyl chloride tubes, ethyl chloride, distilled water, and glass ampules used to hold distilled water, were being sold by competitors as being wholly of domestic origin although such articles had been manufactured in a foreign country and imported from that country by such competitors; whereas a number of the competitors do in fact sell and offer for sale ethyl chloride tubes, ethyl chloride, and glass ampules for holding distilled water, all of which are manufactured in the United States and are entirely of domestic origin. Respondent also, in its said advertising matter, made statements to the effect that it was closing out its stock of foreign-made surgical instruments and that in the future would deal only in surgical instruments made in the United States. In fact, respondent was at the times said advertisements were disseminated, and continued thereafter, to purchase for resale surgical instruments manufactured in a foreign country and respondent continued to accept and fill any orders that came to it for surgical instruments manufactured in a foreign country. Various of the circulars disseminated by the respondent as aforesaid contained statements and representations to the effect that all of the surgical and medical products listed in said circulars were made in the United States. In truth and in fact, a medicated dressing listed in said circulars and designated "Kosmoplast" was not made in the United States but was made in a foreign country and imported into the United States.

PAR. 3. The use by the respondent of the aforesaid statements and representations to the effect that ethyl chloride tubes, ethyl chloride, and glass ampules, offered for sale and sold by competitors of respondent, were manufactured in a foreign country, when in truth and in fact said products were manufactured in the United States, has had and now has, the capacity and tendency to mislead and deceive customers and prospective customers of such competitors and to induce them to withhold orders for such articles which they had contemplated giving to such competitors of respondent and to give such

Order

29 F. T. C.

orders to respondent. The statements and representations in such advertising matter to the effect that respondent was closing out its stock of surgical instruments made in a foreign country and would in the future deal only in surgical instruments made in the United States, has had and now has, the capacity and tendency to deceive the members of the public into purchasing such instruments from respondent in the erroneous and mistaken belief that when respondent closed out its stock of foreign-made instruments it would then sell only surgical instruments made in the United States. The statements and representations in said circulars to the effect that said medicated dressing was made in the United States when in fact said merchandise was made in a foreign country has had, and now has, the capacity and tendency to cause members of the purchasing public to purchase said merchandise in the erroneous and mistaken belief that said merchandise was made in the United States. As a direct result of the aforesaid false and misleading statements and representations by the respondent, trade in commerce among and between the various States of the United States has been unfairly diverted to the respondent from its competitors who deal only in surgical instruments of American manufacture and who do not falsely misrepresent the place of manufacture of their respective merchandise or of the merchandise of their competitors.

CONCLUSION

The acts, practices, and representations of the respondent, Sterling Products Corporation and Sterling Products Corporation, trading as Paul Hartmann Agency, as herein found, are to the prejudice and injury of the public and of competitors of respondent, and constitute unfair methods of competition in commerce within the intent and meaning of the provisions 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 Edward M. Averill, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed by counsel for the Commission, respondent not having filed brief, and oral argument not having been requested, 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, Sterling Products Corporation, trading under its own name and trading as Paul Hartmann Agency, or trading under any other name or names, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of drugs, pharmaceuticals, surgical instruments, dressings, and surgical supplies, in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that ethyl chloride tubes, ethyl chloride, or any other merchandise of respondent's competitors were made in whole or in part in a foreign country, when in fact said products were made wholly in the United States.

2. Representing that respondent is closing out its stock of foreign-made surgical instruments, when such is not the fact.

3. Representing that respondent deals only in surgical instruments manufactured wholly in the United States, when in fact respondent fills orders or causes orders to be filled for surgical instruments manufactured in whole or in part in a foreign country.

4. Representing that respondent's surgical supplies or other merchandise were made in the United States, when in fact said surgical supplies or other merchandise were made in whole or in part in a foreign country.

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.

IN THE MATTER OF

C. R. ANTHONY COMPANY, BURRELL-BERGER, INC., MISS
PLAZA, INC., SAMUEL R. PARNES, INC., AND GORGEOUS
FROCKS, INC.

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

Docket 3834. Complaint, June 27, 1939—Decision, Sept. 12, 1939.

Where (a) four corporations which (1) were engaged in sale of merchandise to corporate operator of 57 retail department stores in Oklahoma, Kansas, Texas, and New Mexico, in active competition with other manufacturers and sellers of similar merchandise engaged in selling and distributing their said products to said operator and its competitors, and which (2) were fairly representative of large group of sellers likewise engaged, as aforesaid indicated, in manufacture and sale of women's apparel, allied and other merchandise, in interstate commerce to said operator and other purchasers; and (b) other sellers—

Transmitted, paid, and delivered to said operator, under separate name employed by it in thus purchasing from its New York office for its stores aforesaid, so-called brokerage fees and commissions, consisting of various percentages on quoted sales prices, as agreed upon between each of said sellers and said corporate operator, and in connection with which no services whatsoever were rendered to, for, or in behalf of, aforesaid four, or any other, sellers by said corporate operator, under either its own name or name employed by it in thus purchasing, as above set forth; and

Where said corporate operator engaged as aforesaid, under separate name employed by it in purchasing from its New York office and through its own employees for its aforesaid stores—

Received and accepted, and was enabled to receive and accept, through instrumentality of said separate name thus made use of by it, so-called brokerage fees or commissions upon merchandise purchased by it from said various sellers aforesaid, and in or as result of transactions in which it was sole party in interest and actual purchaser, and in connection with which, as above set forth, it rendered in neither capacity any services whatsoever to such sellers:

- Held*, (1) That such payments by sellers aforesaid of fees and commissions to said corporate operator under name employed by it as above set forth, and upon its said purchases, constituted violation of subsection (c) of section 2 of Clayton Act, as amended, and
- (2) That such receipt and acceptance of fees and commissions paid as brokerage by and from aforesaid and other sellers, by said corporate operator under name employed by it as aforesaid and in connection with merchandise purchased by it, and through and by means of instrumentality of separate name employed as aforesaid, constituted violation of subsection (c) of section 2 of statute in question.