

IN THE MATTER OF

LUXOR, LTD.

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

Docket 3736. Complaint, Mar. 10, 1939—Decision, July 31, 1940

Where a corporation which was engaged in manufacture of toilet articles and cosmetics and in sale thereof to purchasers in each of the several States and in the District of Columbia, and which, as thus engaged in sale of its said products to retailers in the various States, was in competition with others who made and thus sold like articles and products to retailers who purchased products of said corporation and those of said other manufacturers and were in competition with each other in business of selling and reselling same to purchasing public;

In carrying on its business as above indicated and set forth, in connection with which it (1) sold and shipped its products to retail druggists and drug jobbers in every State, (2) made contracts fixing minimum resale price thereof in all States in which it was permissible by law so to do, called on retail druggists who did not receive direct shipments from it, and maintained its pricing policies with druggists not under contract and who purchased indirectly through jobbers, and (3) packaged for resale some of its most popular complexion powders, creams and rouge in "standard" or "regular" size packages and in "junior" size containers having about one-fifth capacity of others and resale price of 10 cents, as compared with 49 cent resale price of "standard" or "regular" size packages; and (4) accorded to novelty, variety, syndicate and five and ten cent stores both service or facility of such "standard" size packaging or packages, further division of which by retailer was impracticable and undesirable, and such "junior" size packaging, for which there was public demand from all classes of consumers, irrespective of financial conditions or position in life, by reason, in part, of convenience, reduction of waste and retention of fragrance and freshness, and by which packaging resale was facilitated.

Refused to furnish service or facility of such "junior" size packaging to competing purchasers of identical products, including retail druggists upon whom there was demand for its products in said "junior" size and whose practice it was to seek to maintain stock in their stores for which there was public demand, and who endeavored to obtain its products in such "junior" size and were in direct competition in same cities with, and often in close proximity to, said novelty, variety, syndicate and five and ten cent stores to whom it furnished its "junior" size facilities, in or through which convenience in display and sale was promoted, and lack of which, through such druggists' inability to furnish same in response to public call therefor, resulted in loss of sale and sometimes loss of regular customer:

Held, Subsection (e) of Section 2 of act of Congress approved October 15, 1914, as amended by act of Congress approved June 19, 1936, violated by it.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. P. C. Kolinski for the Commission.

Mr. R. F. Feagans, of Chicago, Ill., for respondent.

COMPLAINT

Pursuant to the provisions of an act of Congress approved October 15, 1914 (The Clayton Act), as amended by an act approved June 19, 1936, the Robinson-Patman Act (15 U. S. C. A. sec. 13 (e)), the Federal Trade Commission hereby issues its complaint against Luxor, Ltd., stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Luxor, Ltd., is a corporation organized and existing under the laws of the State of Maine, with its principal place of business at 1355 West Thirty-first Street, Chicago, Ill. For more than a year last past respondent has been engaged in the manufacture of toilet articles and cosmetics and the sale thereof to retail dealers, causing the said products when sold to be shipped from its place of business in the State of Illinois to purchasers thereof located in the several States of the United States and in the District of Columbia. Such customers of respondent have been and are now in competition with each other in the business of selling and retailing said products to the purchasing public.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent, since June 19, 1936, has been and now is discriminating in favor of certain of its purchasers against other purchasers of its said products bought for resale, by contracting to give and furnish, and by giving and furnishing, certain services and facilities in connection with the handling, sale, or offering for sale, of its said products so purchased by its customers, not accorded to all such purchasers on proportionally equal terms. Specifically, said respondents are favoring certain purchasers, as aforesaid, of their said commodities, cosmetics, and toilet preparations bought for resale, by contracting to furnish or furnishing to such favored purchasers, packages, containers, and mounted sales cards of a special size and capacity for the vending of certain of their toilet articles and cosmetics known as Luxor Complexion Powder, Luxor Rouge, and Luxor Cold, and Cleansing, Vanishing, and Foundation, Special Formula, Tissue, and Hand Creams, without similarly according such said package, container and sales card facilities to other such purchasers on proportionally equal terms.

PAR. 3. The services and facilities in connection with the handling, sale and offering for sale of its products furnished by respondent to certain of its customers consist of the following:

The toilet and cosmetic article known as "Luxor Complexion Powder" is packed in square cardboard containers with approximate dimensions of $3\frac{1}{4}$ inches per side, and a depth of $1\frac{3}{8}$ inches. The capacity of such container is approximately $2\frac{1}{2}$ ounces of said complexion powder, and to its customers respondent suggests the price of this article for resale to the public at 55 cents.

To certain other of its customers respondent furnishes said complexion powder of identical grade and quality in smaller square cardboard containers with approximate dimensions of $2\frac{5}{8}$ inches per side and a depth of five-eighths of an inch. The capacity of such smaller container is approximately one-half ounce, and to its customers respondent suggests the price of this article for resale at the public at 10 cents.

The toilet and cosmetic articles known as Luxor Cold and Cleansing Cream, Luxor Vanishing and Foundation Cream, Luxor Tissue Cream, and Luxor Hand Cream, are packed in opaque glass jars of an approximate capacity of 4 ounces of such creams, and respondent suggests to its customers the resale of said products to the public at the price of 55 cents. To some of its customers, respondent furnishes the same grade and quality of Luxor Cold and Cleansing Cream, Luxor Vanishing and Foundation Cream, Luxor Tissue Cream, and Luxor Hand Cream in opaque glass jars of a much smaller size with a capacity of approximately three-quarters of an ounce, and to such customers respondent suggests the price of said articles for resale to the public at 10 cents.

Respondent manufactures and sells an additional cosmetic cream known as Luxor Special Formula Cream. This article is packed in a collapsible metal tube of a capacity of approximately 2 ounces of said cream, and its resale to the public is suggested by respondent at a price of 55 cents. To some of its customers respondent furnishes the identical cream, as to grade and quality, in small opaque glass jars having a capacity of approximately one-half ounce of said cream. To customers who are supplied with this article respondent suggests a price of 10 cents for its resale to the public.

The cosmetic article known as Luxor Rouge is packed in metal containers known as compacts, having a capacity of approximately one-fifth ounce of said produce. Respondent suggests to customers to whom it sells this product a price of 55 cents for its resale to the public. For some of its customers respondent packs Luxor Rouge of the identical grade and quality in much smaller metal compacts. The capacity of such smaller compacts is approximately one-twentieth of an ounce, and they are mounted singly on paper cards of the approximate dimensions—3 by 4 inches. Respondent suggests to customers to whom

it supplies this produce on mounted sales cards, a resale price to the purchasing public of 10 cents.

Respondent designates its said toilet and cosmetic products packed and mounted as aforesaid in smaller containers, "Luxor 10 Cent Toiletries," and accords the facilities of small packaging and sales card mounting only to so-called novelty, variety, syndicate and 5- and 10-cent stores.

There exists among the purchasing and consuming public a demand for said cosmetic and toilet products, designated "Luxor 10 Cent Toiletries."

Respondent furnishes the services and facilities of small packaging and sales card mounting in the 10-cent size designated as aforesaid, to certain of its said customers. Respondent does not accord said services and facilities to other of its said customers competitively engaged with the favored customers. Respondent's failure to accord to the latter class of customer the services and facilities hereinbefore described, has the capacity and tendency to divert trade from, and to cause competitive disadvantage to, such latter class of customer.

PAR. 4. The foregoing alleged acts of said respondent are a violation of subsection (e) of section 2 of the 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 said act approved June 19, 1936.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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," 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,' " the Federal Trade Commission, on the 10th day of March 1939, issued, and on the 13th day of March 1939, served its complaint in this proceeding upon the respondent, Luxor, Ltd., charging said respondent with violating the provisions of subsection (e) of section 2 of said act as amended. 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 P. C. Kolinski, attorney for the Commission, and in opposition to the allegations of the complaint by R. F. Feagans, attorney for the respondent, before Webster Ballinger, an examiner of the Commission, theretofore duly appointed by it, and said testimony and other evidence

were duly 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, briefs in support of the complaint, and in opposition thereto, respondent having waived oral argument, and the Commission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Luxor, Ltd., is a corporation organized and existing under the laws of the State of Maine, with its principal place of business at 1355 West Thirty-first Street, Chicago, Ill.

PAR. 2. Respondent is now, and has been since June 19, 1936, engaged in the manufacture of toilet articles and cosmetics, and in the sale thereof has caused, and is causing said products, when sold, to be shipped from its said place of business in Illinois to the purchasers thereof located in each of the several States of the Union, and in the District of Columbia.

PAR. 3. Respondent is now, and has been since June 19, 1936, in competition with other manufacturers of like toilet articles and cosmetics, and in the sale thereof to retail dealers located in the various States of the Union, which said manufacturers cause their said products, when sold, to be shipped from their respective places of business in certain States of the Union to said purchasers located in other and different States of the Union. The said retail dealers, located in various States of the Union, purchase respondent's products and the products of other manufacturers, and are in competition with each other in the business of selling and retailing said products to the purchasing public.

Respondent sells and ships its products to retail druggists and drug jobbers in every State of the Union, and employs 20 salesmen to call on this particular trade, which salesmen frequently secure orders from retailers which orders they turn over to jobbers for delivery of respondent's products. Respondent makes contracts fixing the minimum resale price of its products in all of the States of the Union wherein it is permissible by law to make such contracts. Respondent's salesmen call on retail druggists who do not receive direct shipments from respondent, and respondent's pricing policies on its products are maintained as to retail druggists who are not under contract and purchase indirectly through drug jobbers in the same manner in which they are maintained in the case of druggists who are under contract to maintain prices and receive direct shipments from respondent. The Com-

mission finds that retail druggists who purchase the respondent's products indirectly from drug jobbers are under the circumstances of this case purchasers within the meaning of section 2 (e) hereinabove cited.

PAR. 4. The respondent, in connection with the sale of some of its most popular complexion powders, creams and rouge, packages each of such products in both "standard" or "regular" size packages, and in containers known as "junior" size which have approximately one-fifth the capacity of the "regular" or "standard" packages. The resale prices of the "regular" size are 49 cents, and of the "junior" size, 10 cents. Each of the respective products packages in the two sizes are identical. These products packaged in the "regular" or "standard" size are sold to all types of retailers, novelty, variety, syndicate, 5- and 10-cent stores, and retail druggists both directly from the respondent and indirectly through jobbers. The Commission finds that the "junior" size packaging facilitates the resale of products so packaged.

The respondent, in connection with the sale of these products, accords the service or facility of the "junior" size packaging and the "standard" size packaging to purchasers known as novelty, variety, syndicate and 5- and 10-cent stores, and refuses to furnish the service or facility of such "junior" size packaging to competing purchasers of the identical products. The Commission further finds that the furnishing of the "junior" size packaging constitutes a service or facility supplied in connection with the handling, sale, or offering for sale of such commodities.

PAR. 5. In the course and conduct of its business respondent, since June 19, 1936, continuously in selling its aforesaid products to various classes of purchasers has refused and now refuses to accord the service or facility of packaging in small sized containers for all competing purchasers of such commodities upon proportionally equal terms, or upon any terms whatsoever.

PAR. 6. The Commission finds that the public demand for the "junior" size of cosmetics comes from all classes of consumers irrespective of financial condition or position in life, and is in part due to the fact that such "junior" size is more convenient to carry, that such size reduces the element of waste, and adds to the retention of fragrance and freshness. The retail drug stores have demand for respondent's products in the "junior" size and have endeavored to obtain respondent's "junior" size products. Retail druggists seek to maintain stock in their stores for which there is a public demand. The novelty, variety, syndicate, and 5- and 10-cent stores, to whom respondent furnishes its "junior" size facilities, are located in the

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same cities of the various States of the Union in which the retail drug stores to whom respondent refuses to accord its "junior" size facilities are located, the two classes of stores being in direct competition and often located in close proximity to each other. Thirty-eight percent of the dollar volume of respondent's products is packaged for customers in the "junior" size. The aforesaid "junior" size facilities promote convenience in display and sale of respondent's products, and it is impractical and undesirable for retailers to divide the "standard" size packages into smaller quantity units. The inability of the retail druggists to furnish the "junior" size of respondent's products when called for by the public results in the loss of a sale and sometimes the loss of a regular customer.

CONCLUSION

The Commission concludes that subsection (e) of section 2 of the said 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 the 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'" has been violated by the respondent.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence, taken before Webster Ballinger, an examiner for the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed in support of said complaint and in opposition thereto, and the respondent having waived oral argument, and the Commission having made its findings as to the facts and its conclusion with respect to the violation of 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 Luxor, Ltd., and its officers, representatives, agents, and employees, in connection with the sale and

distribution of toilet articles and cosmetics in commerce among the several States and in the District of Columbia, cease and desist from furnishing any such commodity packaged in containers of a certain size and style unless all purchasers competing in the resale of such commodities are accorded the facility of packaging in containers of like size and style, on proportionally equal terms.

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
**MONROE CHEMICAL COMPANY AND MARY T.
GOLDMAN COMPANY¹**

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

Docket 3274. Complaint, Nov. 26, 1937—Decision, Aug. 5, 1940

Where a corporation, and a second concern, which acquired controlling interest therein and controlled business policies thereof, engaged, as aforesaid directly and indirectly, in manufacture and sale of various preparations, including said corporation's "Mary T. Goldman's Gray Hair Color Restorer," to purchasers in various States and in the District of Columbia, in substantial competition with others engaged in distribution and sale, in commerce as aforesaid, of hair tonics, hair dyes, or other products for treating various conditions of hair and scalp, and for coloring or dyeing gray hair, and including many who distribute and sell such hair tonics and other preparations and who do not in any way misrepresent quality or character or effectiveness thereof; in advertising their said "Color Restorer" in newspapers and periodicals of general circulation and in advertising folders distributed to members of the purchasing public in various States—

- (a) Represented, directly or by implication, that use of product in question would restore original or youthful color to gray, streaked or faded hair and would erase or remove all trace of gray hair, through use of word "restorer" in designation of product in question, and through such statements as "Just comb colorless liquid through hair—youthful color comes—nothing to wash or rub off on clothing," and "Gray Hair Gone," and "We will show you how to bring youthful color to every hair in your head," facts being product in question does not restore original color to gray, faded or streaked hair or user, but acts as dye or stain, color produced by use thereof is artificial and it will not color or restore color to hair as aforesaid, except in the sense that it may dye the same, all trace of such hair is not removed or erased, as repeated applications are required in order to prevent new growth showing gray, faded, or streaked above scalp line, and preparation acts, as above set forth, as dye or stain on that portion exposed above such line; and
- (b) Represented that originator of preparation in question was a living person, personally recommending use of such product and personally corresponding with users and prospective users thereof with respect thereto and effectiveness thereof, through displaying, in advertisements and other literature disseminated by them, purported facsimile signature of one Mary T. Goldman, notwithstanding fact individual in question, and originator of formula for producing so-called "restorer," and their predecessor in sale of preparation in question, had long since deceased and was not living at times letters and advertisements concerned were published and used by corporation and concern aforesaid;

¹ The Commission on August 5, 1940, modified findings as to the facts, through modifying, as published herein, par. 10 of the original findings.