

IN THE MATTER OF
LAMBERT PHARMACAL COMPANY

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

Docket 3749. Complaint, Mar. 29, 1939—Decision, Aug. 12, 1940

Where a corporation engaged in manufacture, offer, sale, and distribution of its "Listerine Antiseptic" mouth wash and allied products, between and among the various States and in the District of Columbia, to purchasers in States other than that in which its place of business was located, in substantial competition with others engaged in manufacture of such products and offer, sale, and distribution thereof in commerce—

In offering and selling its said products, as aforesaid, under practice by which it allowed, from list price for each product, 5 percent trade discount to all customers and additional discount of 1 percent cash with freight prepaid on all shipments, and under which it further (1) granted and allowed to certain group of wholesalers, in consideration for carrying warehouse stocks and furnishing selling services and facilities, as compensation, sum equal to 10 percent of its net billing prices of products sold by group members referred to during previous month, (2) similarly granted to other group of wholesalers, in consideration for carrying warehouse stocks, sum equal to 5 percent of previous month's purchases, and (3) paid to retailer group, in consideration for certain advertising and selling services and facilities, sum equal to 10 percent of previous month's purchases, and (4) similarly paid to other retailer group, in consideration for services and facilities less extensive than those furnished by 10-percent group, sum equal to 5 percent of previous month's purchases, and (5) under which it required \$50 minimum orders of all wholesale customers and \$20 minimum orders of all retail customers, regardless of whether above-mentioned compensation was received or not, with smaller minimums applicable in case of 10-cent merchandise—

- (a) Failed and refused to make compensation allowed, paid and granted to some of its customers, for services or facilities furnished by them in connection with handling, sale or offer for sale of commodities purchased by such customers from it, available to all of its competitor customers in distribution of such commodities on proportionally equal terms, through contracting for payment, and paying and allowing, to some of its wholesale and retail customers compensation for services and facilities furnished by them in connection with such handling, etc., of commodities purchased by them, while failing and refusing to make available or pay and allow compensation for similar and same services and facilities offered to be furnished by such other customers in connection with such handling, etc., of commodities in question, even though requested to do so by said customers last referred to; and
- (b) Refused requested 10 percent compensation payment to certain of its various wholesale and retail customers to whom it had paid compensation in an amount equal to 5 percent of previous month's purchases for various services and facilities, and who claimed to be able and willing to furnish services and

facilities for which it paid amount equal to 10 percent to others of its customers competitively engaged with former:

Held, That under facts and circumstances as above set forth, said corporation granted and allowed compensation to certain of its customers for facilities and services without making available to all other competing customers such payments on proportionally equal terms, in violation of subsection (d) of Section 2 of Clayton Act, as amended.

Mr. John T. Haslett for the Commission.

Root, Clark, Buckner & Ballantine, of Washington, D. C., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent, named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Lambert Pharmacal Co., is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 2101 Locust Street, St. Louis, Mo. Respondent corporation is now, and has been since June 19, 1936, engaged in the business of manufacturing, offering for sale, selling and distributing "Listerine," an antiseptic mouthwash, and other allied products. Respondent sells and distributes said products in commerce between and among the various States of the United States and in the District of Columbia and as a result of said sales causes said products to be shipped and transported from the place of origin of the shipment to the purchasers thereof who are located in the various States of the United States and in the District of Columbia, other than the State of origin of the shipment. There is and has been, at all times mentioned, a continuous current of trade and commerce in the said products across State lines between respondent's factory and the purchasers of said products. Said products are sold and distributed for resale within the various States of the United States and the District of Columbia.

PAR. 2. In the course and conduct of its business, as aforesaid, respondent is now, and during the time herein mentioned has been, in substantial competition with other corporations, and with individuals, partnerships, and firms engaged in the business of manufacturing, selling, and distributing antiseptic mouthwash and other allied products in commerce.

PAR. 3. In the course and conduct of its business, as described in paragraph 1 hereof, respondent since June 19, 1936, has been and now is allowing certain percentage rebates to certain of its customers who are selected by the respondent, hereinafter designated as favored customers, in addition to regular trade discounts generally allowed to all of the respondent's customers. Such favored customers, to whom the respondent allows such percentage rebates, furnish the respondent with certain advertising, selling or warehousing facilities and place with the respondent a certain minimum order for its said products. Such percentage rebates are paid to said favored customers on their previous month's purchases in consideration for such services. The respondent pays these percentage rebates to its favored customers without making such payments available on proportionately equal terms to all other customers competing with such favored customers in the distribution of respondent's said products.

Said percentage rebates are allowed by the respondent to its favored customers as follows:

(a) The respondent pays to a certain group of the aforesaid customers, wholesalers, handling the respondent's products, in consideration of certain warehousing and selling facilities furnished by such wholesaler, a 10 percent rebate on each month's purchases, such rebate being paid in the form of a check by the respondent during the month subsequent to that in which such purchases are made.

(b) The respondent pays to another group of such aforesaid customers, wholesalers, a 5 percent rebate on each month's purchases paid during the subsequent month, in consideration of such rebate said wholesaler is to furnish warehouse facilities for the respondent's products.

(c) The respondent pays to certain of such aforesaid customers, retailers, a 10 percent rebate on each month's purchases, payable during the subsequent month, in consideration of which the purchasers agree to furnish the respondent with certain advertising facilities and sales services for the respondent's products.

(d) The respondent pays to certain other of such aforesaid customers, retailers, a rebate of 5 percent of each month's purchases payable during the subsequent month, in consideration of certain advertising facilities to be furnished by such retailer for the respondent's products.

In order to be eligible for such rebates paid by the respondent, its said favored wholesale customers must place orders of a minimum of \$50 for the respondent's products, to be made in one shipment.

In order to be eligible for such rebates, respondent's said favored retail customers must place orders of a minimum of \$36 for the respondent's products, to be made in one shipment.

PAR. 4. The above-described acts and practices of respondent are in violation of subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, sec. 13).

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, entitled "An act to amend section 2 of an 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 March 29, 1939, issued and served its complaint in this proceeding upon the party respondent named in the caption hereof, charging respondent with violating the provisions of subsection (d) of section 2 of said act as amended. After the issuance of said complaint and the filing of respondent's answer, a stipulation was entered into between W. T. Kelley, chief counsel for the Commission, and the respondent, containing a statement of certain facts which it was agreed might be taken as the facts solely for the purpose of this proceeding and authorizing the Commission to proceed upon such statement 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, this proceeding regularly came on for final hearing before the Commission on said complaint, the above-mentioned stipulation of certain facts and the answer, briefs and oral argument of counsel having been waived, and the Commission, having duly considered the same and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Lambert Pharmacal Co., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2117 Franklin Avenue, St. Louis.

PAR. 2. Respondent corporation is now and has been, since June 19, 1936, engaged in the business of manufacturing, offering for sale, selling, and distributing "Listerine Antiseptic," an antiseptic mouthwash, and allied products. Respondent sells and distributes its products in commerce between and among the various States of the United States and in the District of Columbia and, as a result of such sales, causes said products to be shipped and transported from its place of business to purchasers thereof who are located in States of the United States other than the State in which respondent's place of business is located. There is and has been at all times mentioned a continuous course of trade and commerce in the said products across State lines between respondent's factory and the purchasers of said products. The respondent's said products are sold and distributed for use and resale within the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business as aforesaid, respondent is now, and during all the time herein mentioned has been, in substantial competition with other corporations and with individuals, partnerships and firms engaged in the business of manufacturing antiseptic mouthwash and other allied products and the offering for sale, sale, and distribution of same in commerce.

PAR. 4. Respondent offers and sells its said products at one list price for each product, from which all customers, both wholesalers and retailers, are allowed by the respondent a 5 percent trade discount and an additional discount of 1 percent for cash, with freight prepaid on all shipments.

The respondent in the course and conduct of its business has granted and allowed compensation to a group of wholesalers in consideration for carrying warehouse stocks and furnishing selling services and facilities. To members of this group the respondent has paid a sum equal to 10 percent of the respondent's net billing prices of the products sold by such members during the previous month.

To another group of wholesalers in consideration for carrying warehouse stocks the respondent has paid a sum equal to 5 percent of the previous month's purchases.

To a group of retailers, in consideration for certain advertising and selling services and facilities, the respondent has paid a sum equal to 10 percent of the previous month's purchases.

To another group of retailers in consideration for services and facilities less extensive than those furnished by 10-percent retailers, the respondent has paid a sum equal to 5 percent of the previous month's purchasers.

All wholesale customers are required to place minimum orders of \$50 and all retail customers minimum orders of \$20 regardless of whether they receive the above-mentioned compensation; smaller minimums apply in the case of 10-cent merchandise.

In the course and conduct of its said business, the respondent, in many instances, has contracted for the payment, and has paid and allowed, to some of its wholesale and retail customers, compensation for services and facilities furnished by such customers in connection with the handling, sale, or offering for sale of the commodities purchased by such customers. To other of its wholesale and retail customers, comparatively engaged with the former, the respondent has failed and refused to make available or to pay and allow compensation for the similar and same services and facilities offered to be furnished by such customers in connection with the handling, sale, or offering for sale of such commodities, even though requested so to do by such customers. In so doing the respondent has failed and refused to make the compensation allowed, paid and granted to some of its customers for services or facilities furnished by them in connection with the handling, sale, or offering for sale of the commodities purchased by them from respondent, available to all of its customers competing in the distribution of such commodities on proportionally equal terms.

In the course and conduct of its said business, the respondent has sold its products to various wholesale and retail customers to whom it has paid compensation in an amount equal to 5 percent of the previous month's purchases for various services and facilities. Some of these customers claim that they were able and willing to furnish services and facilities for which the respondent paid an amount equal to 10 percent of the previous month's purchases to other of its customers competitively engaged with the former. Some such 5-percent compensation customers have requested the respondent to pay such compensation to them and even though requested, the respondent has refused to pay the 10-percent compensation to such customers.

PAR. 5. The aforesaid complaint and the foregoing findings relate to the respondent's compensation plan in effect at the date of said complaint. While denying in its answer dated May 16, 1939, that the plan complained of was in violation of law, the respondent has since adopted a revision of such plan deemed by the respondent to eliminate questions as to such violation.

Order

31 F.T.C.

CONCLUSION

Under the facts and circumstances as set forth in the foregoing findings as to the facts, the Commission concludes that the respondent, Lambert Pharmacal Co., has granted and allowed compensation to certain of its customers for facilities and services without making such payments available to all other competing customers on proportionally equal terms, in violation of subsection (d) of section 2 of the Clayton Act, as amended by 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, the answer of the respondent and the stipulation as to the facts entered into between the respondent herein and William T. Kelley, chief counsel for the Commission, which provides, among other things, that without the presentation of argument or other intervening procedure the Commission may issue and serve upon the respondent 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 respondent has violated the provisions of subsection (d) of section 2 of an Act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," the Clayton Act, as amended by the Robinson-Patman Act.

It is ordered, That the respondent, Lambert Pharmacal Co., its officers, representatives, agents, and employees cease and desist from:

1. Granting, or allowing compensation to any wholesale customer of the respondent, of an amount equal to 10 percent of the respondent's net billing prices of the products sold by such customer during the previous month, for services or facilities furnished by or through such customer in connection with the handling, sale, or offering for sale of respondent's products, unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

2. Granting or allowing compensation, of an amount equal to 5 percent of the previous month's purchases, to any wholesale customer of the respondent, for services or facilities furnished by or through such customer in connection with the handling, sale, or offering for sale of respondent's products unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

3. Granting or allowing compensation, of an amount equal to 10 percent of the previous month's purchases, to any retail customer of the respondent for services or facilities furnished by or through such customer in connection with the handling, sale, or offering for sale of respondent's products unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

4. Granting or allowing compensation, of an amount equal to 5 percent of the previous month's purchases, to any retail customer of the respondent for services or facilities furnished by or through such customer in connection with the handling, sale, or offering for sale of respondent's products unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

It is further ordered, That the respondent Lambert Pharmacal Co., a corporation, its officers, directors, representatives, agents, and employees, in connection with the sale and distribution of its "Listerine Antiseptic" and allied products, do forthwith cease and desist from granting or allowing to any customer of the respondent any compensation for services or facilities furnished by or through such customer in connection with the handling, sale or offering for sale of respondent's products, unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

It is further ordered, That 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
IMOGENE SHEPHERD, LTD.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 3625. Complaint, Oct. 7, 1938—Decision, Aug. 14, 1940

Where a corporation engaged in sale and distribution of its "Baby Skin Oil" and "Baby Skin Oil Soap," to purchasers at various points in the several other States and in the District of Columbia, in competition, in commerce as aforesaid, with others selling and distributing cosmetics, toileteries, and similar merchandise, and including many engaged in manufacture and sale or sale thereof who do not employ and maintain below enumerated and described practices, but truthfully represent and vend said products; in advertising its said preparations through newspapers, periodicals and other advertising literature—

- (a) Represented that its said oil was "a skin normalizer, not a cosmetic," which made "any skin more healthy" and restored to adult "soft and silken texture of baby skin," and that it was "scientifically recognized that modern living and washing routine removes indispensable fatty acids generally known as lipids) from the skin, resulting in deficiency symptoms such as dryness, roughness of the skin, eczema and acne," and that such blemishes and skin irregularities were "becoming more commonly known as 'vitamin F deficiency' in the skin," and that said oil was "designed to restore to the skin by absorption the normal balance of lipids" and that person associated with corporate name had, by "brilliant experiments," "discovered that vitamin F could be reintroduced into the system by absorption by the skin," and that through use of its said products permanent benefits would result to skin on account of Vitamin E and "Vitamin F" content;

Facts being unsaturated fatty acids or "lipids" contained in human skin are supplied in food and distributed through the body in natural process of metabolism, administration of vitamins or fatty acids topically by massage is impracticable and will not affect condition of skin, any possible existing deficiency in any of the vitamins or fatty acids being corrected by giving needed elements by mouth, no "Vitamin F," used by it to describe "substances" not chemically identified, but associated with such lipids, is known as such in scientific world or recognized officially by American Medical Association or any other scientific organization, and vitamin E, obtained in abundance in the daily diet, does not, as revealed by any evidence, play any role in normal life and nutrition of human skin, removal of certain fatty substances, which cannot be replaced by topical inunction and are normally secreted by skin, by cloths or in washing will not adversely affect appearance thereof, and, while regular use of its said products may improve appearance of skin as superficial and largely psychological result, "baby skin" cannot be simulated or produced in older person through use thereof, and any beneficial effects therefrom by virtue of emollient and protective action and aid in correction of dryness, are independent of vitamin E and so-called "Vitamin F" content; and