

IN THE MATTER OF

MARLBOROUGH LABORATORIES, INC., MARLBOROUGH
SALES CO., INC., MADISON SALES CORPORATION,
WINDSOR MANUFACTURING CO., INC., AND WILLIAM
ZEFFERT, AS OFFICER THEREOF, ET AL.¹COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3732. Complaint, Mar. 7, 1939—Decision, Mar. 20, 1941*

Where three corporations and an individual, who was the managing head and the controlling and guiding spirit of each, engaged in manufacture of dental and shaving creams, and in interstate sale and distribution thereof in substantial competition with others engaged in similar sale and distribution of such products, including many who do not misrepresent their products—

- (a) Price-marked tubes and cardboard cartons and containers of certain shaving creams with statements "Price 50 cents" or "Price 75 cents," facts being said printed prices did not, as generally understood, and made use of by reputable manufacturers, indicate said items' usual or contemplated retail selling prices, by which, to a substantial extent, public measures quantity, quality, and retail value of an article; items in question were not 50-cent or 75-cent values, but were sold to wholesalers and retailers at 4¾ cents and 6¼ cents, respectively, and to ultimate purchasers at not over 10 cents each; and

Where a shaving cream known as "Palmolive Shave Cream" had been on the market for several years and there had been created among purchasers and users thereof a goodwill of substantial value to its manufacturer and distributor; and thereafter said three corporations and individual above referred to—

- (b) Marketed and branded, and described and referred to shaving cream offered and sold by them, container and package of which simulated in color and general appearance that of aforesaid competitive "Palmolive Shave Cream," as "Palm and Olive Shaving Cream," with tendency to confuse and mislead purchasers and cause them to believe that latter was such competitive product, and as a result of such belief, to purchase same as and for said competitive "Palmolive Shave Cream";
- (c) Made use of letters "D. D. S." and words "Doctors, Dentists, Surgeons" in such statements as "D. D. S. TOOTH PASTE For the Gums. Contains over 51% of Milk of Magnesia. 60¢," and "Doctors Dentists Surgeons DENTAL CREAM," with effect of leading purchasing public erroneously to believe that such tooth pastes were compounded from the formula of a member of the medical or dental profession, or were made and manufactured under direction and supervision of a member thereof;

¹ For reasons set forth in findings, complaint was dismissed as to respondent Marlborough Laboratories, Inc., and other respondents not named above.

1014

Complaint

(d) Enclosed in much larger or "slack filled" cartons, some of its said shaving creams and tooth pastes made and put up in ordinary-sized tubes, and thereby, through employment of deceptive practice of "slack filling," use of which is unfair to honest competitors, misled and deceived purchasers into the belief that they were securing a greater quantity of products in question than they would receive in ordinary package or container;

With effect of diverting trade unfairly to them from their competitors; to the injury of competition in commerce:

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

Before *Mr. John L. Hornor* and *Mr. Lewis C. Russell*, trial examiners.

Mr. Joseph C. Fehr for the Commission.

Shacter, Paris & Goldman, of New York City, for Marlborough Sales Co., Inc., Madison Sales Corp., Windsor Manufacturing Co., Inc., and William Zeffert.

Lichtenstein, Schwartz & Friedenberg, of Hoboken, N. J., for Atlantic Manufacturing Co., Henry Braun, Charles Kleinbeck, and Caesar Muzzi.

Mr. W. W. Corlett, of New York City, for Collapsible Tube Manufacturers Association, intervenor.

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 Marlborough Laboratories, Inc., a corporation; Marlborough Sales Co., Inc., a corporation; Madison Sales Corporation, a corporation; Windsor Manufacturing Co., Inc., a corporation; Harry Silverstein, David Kerman, and William Zeffert, individually and as officers of said Marlborough Laboratories, Inc., Marlborough Sales Co., Inc., Madison Sales Corporation, Windsor Manufacturing Co., Inc.; Frances Chorba, an individual; Atlantic Manufacturing Co., a corporation; and Henry Braun, Charles Kleinbeck, and Caesar Muzzi, individually and as officers of Atlantic Manufacturing Co., hereinafter referred to as respondents, have violated the provisions of the 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. Respondent, Marlborough Laboratories, Inc., is a New York corporation having its principal office and place of busi-

Complaint

32 F. T. C.

ness located at 29 West Fifteenth Street, in the city of New York, in the State of New York.

Respondent, Marlborough Sales Co., Inc., is a New York corporation having its principal office and place of business located at 29 West Fifteenth Street, in the city of New York, in the State of New York.

Respondent, Madison Sales Corporation, is a New York corporation with its principal office and place of business located at 29 West Fifteenth Street, in the city of New York, in the State of New York.

Respondent, Windsor Manufacturing Co., Inc., is a New York corporation with its principal office and place of business located at 29 West Fifteenth Street, in the city of New York, in the State of New York.

Respondents, Harry Silverstein, David Kamerman, and William Zeffert, are president, secretary, and treasurer, respectively, of the respondent corporations, Marlborough Laboratories, Inc., and Marlborough Sales Co., Inc. Said individual respondents are also president, secretary-treasurer, and general manager, respectively, of the respondent corporations, Madison Sales Corporation and Windsor Manufacturing Co., Inc. As such officers of said respondent corporations, said individual respondents, Harry Silverstein, David Kamerman, and William Zeffert, have their principal office and place of business at the above-mentioned address of said respondent corporations, and they formulate, control, and direct the policies and practices of said corporate respondents and cooperate with all of the respondents herein in doing the acts and things hereinafter alleged.

Respondent, Frances Chorba, is an individual with offices at 38-44 West Twenty-sixth Street, in the city of New York, in the State of New York, and owns approximately one-third of the capital stock in the aforementioned corporate respondents and, through stock ownership, participates in the formulation, control, and direction of the sales policies and practices of said corporate respondents in cooperation with the aforementioned individual respondents. Said respondent has acted in concert with some or all of the respondents herein named in doing the acts and things hereinafter mentioned.

Respondent, Atlantic Manufacturing Co., is a New Jersey corporation having its principal office and place of business located at 555 Belmont Avenue in the city of Newark, in the State of New Jersey.

Respondents, Henry Braun, Charles Kleinbeck, and Caesar Muzzi, are, respectively, president, vice president and general manager, and secretary-treasurer of respondent, Atlantic Manufacturing Co. As

such officers of said respondent corporation, said individual respondents have their principal office and place of business at the above-mentioned address of said respondent corporation and they formulate, control, and direct the policies and practices of said corporate respondent and cooperate with all of the respondents herein in doing the acts and things hereinafter alleged. Each of said respondents has acted in concert or in cooperation with one or more of the other respondents in doing the acts and things hereinafter alleged.

PAR. 2. Respondents have been for several years last past engaged in the manufacture, sale, and distribution of dental and shaving creams and other drug and cosmetic notions to retail dealers and peddlers purchasing for resale, and also to the public direct. In the course and conduct of their respective businesses, respondents offer said products for sale and sell the same in commerce between the States of New York and New Jersey and the several other States of the United States and in the District of Columbia. When said products are sold, respondents transport, or cause the same to be transported, from their respective places of business in the States of New York and New Jersey to purchasers thereof located in States of the United States other than the States of New York and New Jersey and in the District of Columbia. There has been for several years last past, and still is, a constant current of trade and commerce in said products so sold by respondents between and among the various States of the United States and in the District of Columbia. Respondents are now, and for several years last past have been, engaged in substantial competition with individuals, firms, partnerships, and corporations engaged in the manufacture, sale, and distribution, or in the sale and distribution, of like and similar products in commerce between and among the various States of the United States and in the District of Columbia. Among said competitors are many who do not engage in the acts and practices engaged in by said respondents as hereinafter alleged and who do not, in any manner, misrepresent their products.

PAR. 3. In the course and conduct of their business as aforesaid, the respondents have disseminated and are now disseminating, and have caused and are now causing the dissemination of, false advertisements concerning their said products through the United States mails, by catalogs, price lists, circulars, and other printed or written matter, all of which are distributed in commerce between and among the various States of the United States, as commerce is defined in the Federal Trade Commission Act, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of their said products; and have disseminated and are now disseminating, and have caused

Complaint

32 F. T. C.

and are now causing the dissemination of, false advertisements concerning their said products, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of their said products in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the false statements and representations contained in said advertisements, disseminated and caused to be disseminated as aforesaid, are the following:

CLAYSELL SHAVING CREAM
WITH OIL OF BAY. Price 75 cents.

PARAMOUNT BRUSHLESS SHAVING
CREAM
For a Good Quick Shave. Price 75¢.

CLAYSELL SHAVING CREAM
BRUSHLESS

Price 50¢.

The retail prices indicated, as above alleged, of 75 cents for "Claysell Shaving Cream," 75 cents for "Paramount Brushless Shaving Cream," and 50 cents for "Claysell Shaving Cream, Brushless," appear on either the carton or tube in which said product is sold to ultimate consumers, and were and are not intended by the respondents, or purchaser purchasing for resale, to represent the true retail prices or the true retail values of such merchandise so price marked. The purported retail prices and values so marked on said merchandise, or the containers thereof, were and are intended by the respondents and by purchasers for resale to be, and they were and are, far in excess of the retail prices intended to be charged, and actually charged, on a sale of such merchandise to the ultimate consumer purchasing in the usual course of trade, and far in excess of the true values of such merchandise so marked. The above-mentioned merchandise is sold by the respondents to purchasers for resale at 6 cents, 7½ cents, and 7½ cents, respectively, per tube, and the retail prices so marked and represented were and are wholly fictitious and in no sense represent the true retail prices or values of said merchandise.

The above and foregoing instances of fictitious price markings are typical of the practices of the respondents with regard to many articles of merchandise, too numerous to set out herein, where the price to the ultimate purchaser is indicated and represented in the advertising matter so disseminated as greatly in excess of the true selling price or value of such merchandise to the ultimate purchaser.

Over a period of many years manufacturers have, in many trades, formed the custom of marking or stamping on the article or item of

manufacture, or on the container thereof, the retail price at which said manufacturers suggest the retailer should sell the item or article to the ultimate consumer purchaser. This suggested retail price, so stamped or marked, is intended to represent the cost of the manufacture of the article plus a reasonable profit for the manufacturer and retailer, and, consequently, to represent the approximate retail sale value of the item. The range of the suggested retail price is intended by the manufacturer to be indicative of the quality and character of the ingredients used and the process by which the item is manufactured. The public generally understands the custom herein detailed and has been led to, and does, place its confidence in the price markings so stamped and the representations thereby made as to the quality of the product to the extent that it purchases a substantial volume of merchandise in reliance on this aforesaid custom.

For many years a substantial portion of the consuming public has expressed, and has had, a marked preference for soaps, dental creams, shaving creams, and other toilet articles that are composed of superior ingredients and are produced by the manufacturer thereof with the intent and design of selling said products for prices in excess of the general and usual range of prices for similar products manufactured with the usual and customary ingredients or with inferior ingredients. Said manufacturers, following the custom herein detailed, have marked or stamped the suggested retail prices on said products as an indication of the superior quality and character of the product and its resulting higher value. Whenever a genuinely superior product, so stamped or marked with the retail price thereof, is offered for sale at a substantially reduced price, the general purchasing public has been led to believe, and does believe, that in purchasing said product it is securing a bargain not ordinarily obtainable in the usual course of trade. The purchasing public has a preference for purchasing genuinely superior products sold at less than the customary retail value thereof over ordinary products sold for the regular price which is lower than the normal retail price of the superior product in the customary course of trade.

The use by the respondents of the above and foregoing false and fictitious price markings on said products places in the hands of so-called peddlers and retailers, buying for resale, an instrument and a means whereby said peddlers and retailers may commit a fraud upon a substantial portion of the consuming public through offering for sale and selling said products as genuinely superior products produced by the manufacturers thereof with the intent and purpose of selling the said products in the usual course of trade to the general con-

Complaint

32 F. T. C.

suming public at and for the retail price stamped on such products or on their containers. In truth and in fact, the merchandise upon which said false and fictitious price markings are placed are not superior products normally sold in the usual channels of retail trade for the retail price indicated or for any price closely approaching the price indicated.

PAR. 4. Among the competitors referred to in paragraph 2 hereof is a manufacturer and distributor of a shaving cream known as, and sold under the name of, "Palmolive Shave Cream." This product has been on the market for several years in the trade territory in which the respondents sell and offer for sale their said shaving creams and other drug and cosmetic notions. Palmolive Shave Cream has long been recognized by the purchasing public as a product of merit and excellence, and there has been created, as a result of the reputation established because of the merit of said product, a goodwill among purchasers and users of said shaving cream of substantial value to the manufacturer and distributor thereof.

Among the shaving creams offered for sale and sold by the respondents as aforesaid is a shaving cream which is marketed and branded, and described and referred to by the respondents as, "Palm and Olive Shaving Cream." The container and package of respondents' shaving cream resemble in size and general appearance the container and package in which the competitive product "Palmolive Shave Cream" is offered for sale and sold. Respondents' said product "Palm and Olive Shaving Cream" is not the product long known as and sold under the name "Palmolive Shave Cream."

The use by the respondents of the name "Palm and Olive Shaving Cream" and the use of a package and container similar in size and appearance to that of the competitive product confuse and mislead purchasers of shaving creams and lead many such purchasers to believe that respondents' said product is the competitive product, "Palmolive Shave Cream," and as a result of this mistaken and erroneous belief to purchase respondents' said product as and for the competitive product, "Palmolive Shave Cream," thereby unfairly diverting trade in said commerce to the respondents from their said competitor.

PAR. 5. Among the statements and representations used by the respondents in designating, describing, and referring to certain tooth paste offered for sale and sold by them are the following:

D. D. S. TOOTH PASTE
For the Gums. Contains over 51%
of Milk of Magnesia. 60¢

1014

Complaint

Doctors

Dentists

Surgeons

DENTAL CREAM

The letters "D. D. S." are used to indicate and designate a doctor of dental surgery and are so recognized and understood by the purchasing public. The use of the letters "D. D. S." and the words "Doctors," "Dentists," and "Surgeons" in designating, describing, and referring to said tooth paste leads the purchasing public mistakenly and erroneously to believe that said tooth paste was compounded from the formula of a member of the dental or medical profession or that the same was made and manufactured under the direction and supervision of a member of the dental or medical profession.

In truth and in fact, said tooth paste is not compounded or manufactured under the direction or supervision of a member of the dental or medical profession, nor is it manufactured under a formula prepared by a member of either of said professions.

Many members of the purchasing and consuming public prefer a dental cream manufactured from a formula prepared by, or under the direction and supervision of, a member of the dental or medical profession, and the use of the letters "D. D. S." and the words "Doctors," "Dentists," and "Surgeons" causes many members of the public to purchase respondents' said dental cream because of the mistaken and erroneous belief engendered as aforesaid.

Respondents designate, describe, mark, and refer to many of their said shaving creams, tooth pastes, and other drug and cosmetic products as "Giant Size," when in truth and in fact no greater quantity of the product so designated, described, marked, and referred to is delivered to the ultimate purchaser than is usually and ordinarily found in containers for such product which are not designated, described, marked, and referred to as "Giant Size," though in many instances the respondents use a "Giant Size" pasteboard carton or container in which to place said ordinary-sized metal tubes, thereby leading the purchasing public erroneously and mistakenly to believe that they are securing a greater quantity of such product than they would receive in the ordinary package or container.

PAR. 6. Respondent, Atlantic Manufacturing Co., and its aforesaid officers, Henry Braun, Charles Kleinbeck, and Caesar Muzzi, manufacture, sell, and distribute to the other respondents named herein the metal tubes used by them in connection with the packaging, sale, and distribution of their dental and shaving creams and other drug and cosmetic notions. These metal tubes, when manufactured, are

Complaint

32 F. T. C.

labeled and branded with the false statements and representations hereinabove set out and with other statements and representations of similar import and effect, and the respondents, Atlantic Manufacturing Co., and its aforesaid officers, Henry Braun, Charles Kleinbeck, and Caesar Muzzi, thus place in the hands of the other respondents named herein an instrument and a means whereby a fraud may be committed upon a substantial portion of the purchasing public, enabling such other respondents, and the retailers buying from them for resale, to misrepresent to the ultimate consumer the content of said metal tubes.

PAR. 7. The use by the respondents of the foregoing false, deceptive, and misleading statements and representations in advertisements, disseminated as aforesaid, with respect to said products, has had and now has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public by inducing them erroneously and mistakenly to believe—

1. That the various items of merchandise described in respondents' catalogs, price lists, circulars and other printed or written matter were and are of superior value and were and are sold and distributed by the respondents with the intent, purpose, and expectation that said products should be sold at retail prices closely approximating the prices represented and indicated by the respondents.

2. That the said products were and are composed of superior ingredients and were and are products which ordinarily retail in the usual course of trade for prices closely approximating those represented and indicated by the respondents.

3. That certain of said products were and are put up and offered for sale and sold in larger packages than the usual and customary size in which such products are offered for sale and sold.

4. That the product designated, described, and referred to by the respondents as "Palm and Olive Shaving Cream" is "Palmolive Shave Cream," the product manufactured and sold by a competitor.

5. That certain of the tooth pastes offered for sale and sold by the respondents are compounded and manufactured under the direction and supervision of, and from a formula prepared by, a member of the dental or medical profession.

PAR. 8. As a result of the mistaken and erroneous beliefs engendered as aforesaid, a substantial portion of the purchasing public has purchased substantial quantities of respondents' said products and trade has been diverted unfairly to the respondents from their competitors in said commerce. In consequence thereof, injury has been and is now being done by respondents to competition in commerce

1014

Findings

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

PAR. 9. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and of respondents' competitors, 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 7, 1939, issued and served its complaint in this proceeding upon the respondents, Marlborough Laboratories, Inc., a corporation; Marlborough Sales Co., Inc., a corporation; Madison Sales Corporation, a corporation; Windsor Manufacturing Co., Inc., a corporation; Harry Silverstein, David Kamerman, and William Zeffert, individually and as officers of Marlborough Laboratories, Inc., Marlborough Sales Co., Inc., Madison Sales Corporation, Windsor Manufacturing Co., Inc.; Frances Chorba, an individual; Atlantic Manufacturing Co., a corporation; and Henry Braun, Charles Kleinbeck, and Caesar Muzzi, individually and as officers of Atlantic Manufacturing Co., 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. After the issuance of said complaint, and the filing of answer thereto on behalf of Marlborough Sales Co., Inc., Madison Sales Corporation, Windsor Manufacturing Co., Inc., corporate respondents herein; and William Zeffert, one of the individual respondents named herein, and a separate answer thereto on behalf of Atlantic Manufacturing Co., a corporate respondent; and Henry Braun, Charles Kleinbeck, and Caesar Muzzi, individually and as officers of said Atlantic Manufacturing Co., testimony and other evidence in support of the allegations of said complaint were introduced by Joseph C. Fehr, attorney for the Commission, and in opposition to the allegations of the complaint by Julius Lichtenstein, attorney for respondent, Atlantic Manufacturing Co., and Henry Braun, Charles Kleinbeck, and Caesar Muzzi, individually and as officers of said Atlantic Manufacturing Co.; and William Zeffert, acting as his own counsel, before John L. Horner and Lewis C. Russell, examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office

Findings

32 F. T. C.

of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the aforesaid answers thereto, testimony and other evidence, brief in support of the complaint (respondents not having filed briefs and oral argument not having been requested); and the Commission having duly considered the matter, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents, Marlborough Sales Co., Inc., Madison Sales Corporation, and Windsor Manufacturing Co., Inc., are corporations organized and existing under and by virtue of the laws of the State of New York with their principal offices and places of business located at 29 West Fifteenth Street, in the city of New York in the State of New York. For several years last past respondents, Marlborough Sales Co., Inc., and Madison Sales Corporation, have engaged in the manufacture and the sale and distribution of dental and shaving creams manufactured for them by respondent, Windsor Manufacturing Co., Inc., to retail dealers and peddlers purchasing for resale, and also to the public direct. When said products were sold, respondents transported, or caused the same to be transported, from their respective places of business in the State of New York to purchasers thereof located in States of the United States other than the State of New York and in the District of Columbia, and for several years last past have maintained, and do maintain a constant current of trade and commerce in said products between and among the various States of the United States and in the District of Columbia.

Respondents are now, and for several years last past have been, engaged in substantial competition with individuals, firms, partnerships, and corporations engaged in the sale and distribution of like and similar products in commerce between and among the various States of the United States and in the District of Columbia. Among said competitors are many who do not engage in the acts and practices hereinafter noticed and who do not, in any manner, misrepresent their products.

Respondents, Marlborough Sales Co., Inc., Madison Sales Corporation, and Windsor Manufacturing Co., Inc., are stock corporations, still in existence as corporations, but have not been actively engaged in business since the latter part of 1938. In 1938 respondent, Marl-

1014

Findings

borough Sales Co., Inc., was succeeded by respondent, Madison Sales Corporation, and subsequently the assets of respondent, Madison Sales Corporation, were sold to the National Gibson Co., a corporation, not a respondent herein.

During all the times mentioned herein, respondent, William Zeffert, has been, de facto, the managing head of each and all of said corporate respondents. Respondents, Harry Silverstein and David Kamerman, were for a time officers of and financially interested in said corporate respondents, Marlborough Sales Co., Inc., Madison Sales Corporation, and Windsor Manufacturing Co., Inc. Respondent, Frances Chorba, was for a time an officer of Marlborough Sales Co., Inc., and was also financially interested in Madison Sales Corporation, but not in Windsor Manufacturing Co., Inc. Neither said Frances Chorba, Harry Silverstein, nor David Kamerman were ever active in the management of any of the respondent corporations, or exercised any control over them at any time while they were connected with them, being interested only to the extent of investing money in or lending money and putting up machinery, crockery, and transferring other assets to the said corporate respondents. The managerial, controlling, and guiding spirit in all said respondent corporations, other than Atlantic Manufacturing Co., was respondent, William Zeffert.

The evidence shows that no such corporation as Marlborough Laboratories, Inc., has existed or had any connection with the matters and things hereinafter set forth.

The allegations against Atlantic Manufacturing Co., a corporation; and Henry Braun, Charles Kleinbeck, and Caesar Muzzi, individually and as officers of said Atlantic Manufacturing Co.; Harry Silverstein, David Kamerman, and Frances Chorba have not been sustained.

The term "respondents," when hereinafter used, shall include only Marlborough Sales Co., Inc., Madison Sales Corporation, Windsor Manufacturing Co., Inc., all corporate respondents, and William Zeffert.

PAR. 2. Among the products made by the Windsor Manufacturing Co., Inc., which were sold in commerce, as herein set out, first by Marlborough Sales Co., Inc., and later by its successor, Madison Sales Corporation, were items marked as follows:

CLAYSELL SHAVING CREAM
WITH OIL OF BAY. Price 75 Cents.

Findings

32 F. T. C.

PARAMOUNT BRUSHLESS SHAVING
CREAM

For a Good, Quick Shave. Price 75¢

CLAYSELL SHAVING CREAM
BRUSHLESS
Price 50¢

These items of merchandise were so designated and price-marked on the tubes as well as on the cardboard cartons and containers thereof. None of them were ever sold or intended to be sold either to jobbers, retailers, or ultimate purchasers at the prices marked on them, and are not 50-cent or 75-cent values. As a matter of fact these items were sold by respondents to wholesalers at a price not exceeding 4¾ cents each or \$7.20 a gross; were sold to the retail dealer at a price not exceeding 6¼ cents each or 75 cents per dozen; and were never sold to the ultimate purchaser for more than 10 cents each.

PAR. 3. To a substantial extent the public measures the quality and retail value of an article of merchandise by its usual selling price. When a printed retail selling price appears on an article of merchandise, it is generally understood that it indicates the usual retail selling price. A comparatively high price conveys an impression to the public of higher quality. Reputable manufacturers price-mark articles of merchandise sold by them to retailers with the intention that the suggested prices will be followed, at least approximately.

PAR. 4. Among the competitors referred to in paragraph 1 hereof is a manufacturer and distributor of a shaving cream known as, and sold under the name of, "Palmolive Shave Cream." This product has been on the market for several years in the trade territory in which the respondents sell and offer for sale their said shaving creams and other drug and cosmetic notions. "Palmolive Shave Cream" has long enjoyed a substantial demand on the part of the purchasing public and there has been created a goodwill among purchasers and users of said shaving cream of substantial value to the manufacturer and distributor thereof.

Among the shaving creams offered for sale and sold by the respondents as aforesaid is a shaving cream which is marketed and branded, and described and referred to, by the respondents, as "Palm and Olive Shaving Cream." The container and package of respondents' said shaving cream simulate in color and general appearance the container and package of said competitive product, "Palmolive Shave Cream."

1014

Findings

The use by the respondents of the name "Palm and Olive Shaving Cream" and the use of a package and container similar in color and general appearance to that of the competitive product tend to confuse and mislead purchasers and to cause them to believe that respondents' said product is the competitive product, "Palmolive Shave Cream," and as a result of this mistaken and erroneous belief to purchase respondents' said product as and for the competitive product, "Palmolive Shave Cream."

PAR. 5. Among the statements and representations used by the respondents in designating, describing, and referring to certain tooth pastes, offered for sale and sold by them are the following:

D. D. S. TOOTH PASTE
For the Gums. Contains over 51%
of Milk of Magnesia. 60¢

Doctors
Dentists
Surgeons
DENTAL CREAM

The use of the letters "D. D. S." and the words "Doctors, Dentists, Surgeons" has the capacity and tendency to, and does, lead the purchasing public mistakenly and erroneously to believe that said tooth pastes are compounded from the formula of a member of the dental or medical profession or that the same are made and manufactured under the direction and supervision of a member of the dental or medical profession.

In truth and in fact, said tooth pastes are not compounded or manufactured under the direction or supervision of a member of the dental or medical profession, nor are they manufactured under a formula prepared by a member of either of said professions.

PAR. 6. Some of the shaving creams and tooth pastes made and sold by respondents are put up in ordinary-sized tubes and then enclosed in much larger cartons. This method of filling misleads and deceives purchasers of such products into the belief that they are securing a greater quantity of such products than they would receive in the ordinary package or container. The packaging of products in such a manner is known in the trade as "slack filling," a practice which misleads and deceives the purchasing public and is unfair to honest competitors.

PAR. 7. The foregoing acts and practices of respondents have the capacity and tendency to divert, and do divert, trade unfairly to the respondents from their said competitors. In consequence thereof injury has been and is now being done by respondents to competition

Order

32 F. T. C.

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

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice of the public and of respondents' competitors, 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 respondents, Marlborough Sales Co., Inc., a corporation; Madison Sales Corporation, a corporation; Windsor Manufacturing Co., Inc., a corporation; William Zeffert, individually and as managing head of said corporations; and Atlantic Manufacturing Co., a corporation; and Henry Braun, Charles Kleinbeck, and Caesar Muzzi, individually and as officers of Atlantic Manufacturing Co., testimony and other evidence in support of the allegations of said complaint and in opposition thereto taken before John L. Hornor and Lewis C. Russell, examiners of the Commission, theretofore duly designated by it, and upon brief filed herein by counsel for the Commission (respondents 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 respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Marlborough Sales Co., Inc., a corporation; Madison Sales Corporation, a corporation; Windsor Manufacturing Co., Inc., a corporation; and William Zeffert, individually and as an officer and directing manager of said corporations, and their respective agents, representatives, and employees, in connection with the offering for sale, sale, and distribution of cosmetics, tooth pastes, and shaving creams, or other toilet articles, in commerce between and among the various States of the United States and in the District of Columbia, do forthwith cease and desist from:

1. Representing, as the customary or regular retail prices for such products, prices which are in fact fictitious and in excess of the prices at which said products are regularly and customarily offered for sale and sold, and intended to be offered for sale and sold.

1014

Order

2. Designating, by marking or otherwise, its products by name or phrases simulating the name or phrases by which similar products of a competitor are designated, or selling or offering for sale its products packed in containers or wrappers simulating the containers or wrappers used by a competitor for similar products.

3. So packaging their products, through the device of slack-filling or otherwise, that the ordinary-sized units appear to be of "giant size" or that the quantity contained in such package appears to be greater than is actually contained therein.

4. Representing that any of the said products are compounded under the supervision of a doctor or dentist or one possessing special knowledge of dental hygiene and pharmacology, when such is not the case.

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

It is further ordered, That as to Marlborough Laboratories, Inc., Atlantic Manufacturing Co., and Henry Braun, Charles Kleinbeck, Caesar Muzzi, Harry Silverstein, David Kamerman, and Frances Chorba, the complaint here be, and the same hereby is, dismissed.

IN THE MATTER OF

ERIE LABORATORIES, INC., ALSO TRADING AS MACK
PHARMACAL COMPANY, ALLIED PHARMACAL CO., ALSO
TRADING AS ERIE LABORATORIES, INC., AND MELVIN
ROSE, DAVID F. BERLAND AND ROSE KOTENBERGCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4382. Complaint, Nov. 20, 1940—Decision, Mar. 21, 1941*

Where two corporations and three individuals, who directed and controlled their practices and methods of advertising, engaged in interstate sale and distribution of various medicinal preparations, including their "Mrs. Bee Femo Caps," "Femo Caps," and "Bee Caps," and acting in conjunction and cooperation with each other in carrying on acts and practices below set forth; by advertisements of their said last-named preparations disseminated through the mails, newspaper advertisements, circulars, and other advertising literature in commerce and otherwise—

- (a) Represented, directly and by implication, that their said preparations constituted a competent and effective treatment for delayed, unnatural, and suppressed menstruation, and were safe and harmless, facts being they were not competent and effective treatments for said condition, and were not safe and harmless in that they contained certain drugs in quantities sufficient to cause serious and irreparable injury to health if used under conditions prescribed in said advertisements or under such conditions as are customary or usual and, thus used, might result in gastro-intestinal disturbance and excessive congestion and hemorrhage of the pelvic organs and, in case of pregnancy, might cause uterine infection and blood poisoning or other serious injury; and
- (b) Failed to reveal facts material in the light of the representations contained in said advertisements, and that use thereof under conditions prescribed therein or under such conditions as are customary or usual, might cause the dangerous conditions noted above;

With capacity and tendency, through use of such false, misleading, and deceptive representations, to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that their said preparations possessed properties which they did not in fact possess, and that they were in all cases safe and harmless, and with result, because of such mistaken belief, of inducing such public to purchase substantial quantities of their said preparations:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Mr. William L. Taggart for the Commission.

Mr. A. L. Greenspun, of Cleveland, Ohio, for respondents.