

Syllabus

IN THE MATTER OF

THE LARSEN COMPANY ET AL.

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

Docket 5623. Complaint, Nov. 26, 1948—Decision, Feb. 6, 1950

In a proceeding in which it was alleged that respondents paid commissions or allowances upon or in connection with sales made to buyers for their own accounts, and in which it appeared that the sellers made use of so-called consignment contracts or agreements under which the consignee or purchaser made advances, usually 80 percent of the purchase price, upon receipt of the products or within 10 days thereafter, and paid the balance due after he resold it, said purchaser's use of said so-called consignment contract or agreement obviously did not change the real nature of the transaction involved.

Where a corporation engaged in packing, canning, and selling canned fruits and vegetables to buyers in various sections of the United States and the Territory of Hawaii, and two officers thereof and substantial stockholders, who exercised a substantial degree of authority and control over its business; distributing and selling some of their products under their own brands and labels, or those of the particular buyer concerned, through intermediaries or brokers who acted as their agents in negotiating the sale thereof, and were compensated by their brokerage fees or commissions, and were not traders for profit and had no further financial interest in the products sold—

Paid also, directly or indirectly, commissions or brokerage fees on substantial sales of its said products—either unlabeled or under the buyers' labels or brands—directly to buyers who purchased in their own names and for their own accounts, and made use, in said connection, of so-called consignment contracts or agreements under which the food products were purportedly consigned to the particular purchaser, and advances, usually 80 percent of the purchase price, were made to said sellers by said purchaser upon receipt thereof or within 10 days thereafter, and balance due was paid after purchaser's resale thereof:

Held, That the paying and granting of such commissions or brokerage fees to purchasers of food products on purchases for their own accounts, as above set forth, constituted violations of subsection (c) of section 2 of the Clayton Act as amended.

In said proceeding in which it appeared that two other officers, namely, the vice president and the treasurer of said corporation, had also been joined as respondents, but did not, as alleged in the complaint, exercise a substantial degree of authority and control over its distribution and sales policies: the Commission was of the view that the complaint should be dismissed as to said individuals.

Mr. Cecil G. Miles for the Commission.

Covington, Burling, Rublee & Shorb, of Washington, D. C., for respondent.

Complaint

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COMPLAINT

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

PARAGRAPH 1. Respondent Larsen Co. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office and place of business located at 314 North Broadway, Green Bay, Wis. The respondent corporation is engaged in the business of packing, canning, and selling canned fruits and vegetables (all of which are hereinafter designated as food products). Respondent corporation is a substantial factor in the distribution and sale of food products. Such sales are made to buyers located in various sections of the United States and the Territory of Hawaii.

PAR. 2. Respondent R. E. Lambeau is an individual with his principal office and place of business located at 314 North Broadway, Green Bay, Wis. He is now president of Larsen Co. and has been a substantial stockholder and an officer in said corporation since some time after June 19, 1936. After becoming an officer, and at the present time, and for some time past as president, respondent R. E. Lambeau has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said corporation, including the direction of its distribution and sales policies.

PAR. 3. Respondent C. Sumner Larsen is an individual with his principal office and place of business located at 314 North Broadway, Green Bay, Wis. He is now vice president of the Larsen Co. and has been a substantial stockholder and an officer of said corporation since some time after June 19, 1936. After becoming an officer, and at the present time, and for some time past as vice president, respondent C. Sumner Larsen has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said corporation, including the direction of its distribution and sales policies.

PAR. 4. Respondent Donald F. Larsen is an individual with his principal office and place of business located at 314 North Broadway, Green Bay, Wis. He is now secretary of the Larsen Co. and has been a substantial stockholder and an officer of said corporation since some time after June 19, 1936. After becoming an officer, and at the present time, and for some time past as secretary, respondent Donald F.

Larsen has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said corporation, including the direction of its distribution and sales policies.

PAR. 5. Respondent R. H. Winter is an individual with his principal office and place of business located at 314 North Broadway, Green Bay, Wis. He is now treasurer of the Larsen Co. and has been a substantial stockholder of said corporation since some time after June 19, 1936. After becoming an officer, and at the present time, and for some time past as treasurer, respondent R. H. Winter has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said corporation, including the direction of its distribution and sales policies.

PAR. 6. Respondents, and each of them, through said respondent corporation, for a substantial period of time since June 19, 1936, have sold and distributed their food products in commerce, namely, through brokers to buyers; and directly to buyers, including a substantial quantity of such food products to a direct buyer, namely, Taylor & Sledd, Inc., of Richmond, Va.

The respondents sell and distribute their food products by two separate and distinct methods, described as follows:

(a) The first and principal method is by utilizing intermediaries or brokers who act as respondents' agents in negotiating the sale of respondents' food products, at respondents' prices, and on respondents' terms. Such intermediaries or brokers transmit such purchase orders to respondents who thereafter invoice or ship the food products to the customers. The respondents pay such intermediaries or brokers for their services in negotiating and making such sales, for respondents' account, commission or brokerage fees, which are customarily based on a percentage of the invoice sales prices of the food products sold.

The food products so sold by brokers bear the brand or label of the respondents, or the brands or labels of the buyers to whom respondents sell through such brokers. Therefore, none of the good will established by the products accrues to the intermediaries or brokers. Such intermediaries or brokers are not traders for profit and do not take title to or have any financial interest in the products sold, and neither make a profit nor suffer a loss on the transaction.

In a few or relatively few transactions since June 19, 1936, Taylor & Sledd, Inc., has acted as respondents' sales agent or broker, negotiating the sale of respondents' food products for and on account of the seller as principal.

This part of respondents' business is not challenged by the complaint herein.

(b) The second method, which is challenged herein, is respondents' sales of its food products directly to buyers. Representative of such buyers is Taylor & Sledd, Inc., of Richmond, Va., to whom respondents pay, directly or indirectly, commissions or brokerage fees on such sales of food products purchased by such buyers, including the said Taylor & Sledd, Inc., in their own names and for their own accounts. The respondents sell a substantial quantity of their food products to such buyers either unlabeled or under one or more of the labels or brands of said buyers.

PAR. 7. The respondents pack and sell all, or substantially all, of their food products bearing a printed label upon which one of their own, or their buyers' trade-marks, consisting of a distinctive word, emblem, or symbol, or a combination of any of these, are shown. Such labels are utilized as brands and are attached to such food products at respondents' direction for the purpose of consumers identifying such commodities as the food products of the owner of the brands so that repeat sales may be centered upon such brands.

A brand trade-mark, or trade name, as used herein, is defined as a symbol of business good will. Good-will, as used herein, is defined as an attitude of consumers which causes them to patronize a certain place or person, or to purchase a definite food product. Upon the brand used depends to whom the good will created by the food products accrues. Thus, when respondents sell food products which bear their own brand, good will accrues to them, whereas when they pack and sell their food products under the brand of another, the good will accrues not to the respondents but to the owner of the particular brand. That such is the purpose and effect of the use of brands is well known in the industry and generally.

The respondents' food products are sold and distributed under two distinct brand classifications, namely and principally (a) packer's or seller's brand; and (b) private or distributor's brand.

A packer's or seller's brand may be defined as a brand owned and controlled by the original seller and, as referred to herein, designates the brands owned and utilized by the respondent sellers in the promotion and sale of their products, which brands identify the particular product for which they assume the responsibility all the way through the channels of distribution to the consumer, and whatever good-will is established thereby accrues to the original sellers which in this instance are the respondents named in the caption hereof.

A private brand may be defined as a brand owned and controlled by other than the original seller and, as referred to herein, designates brands utilized by the buyers as distinguished from the original seller

and which brands identify the food products with the buyers, and permits such buyers to promote the sale of these food products independently of the manufacturers or sellers. Under such arrangement the buyers as distributors, rather than the manufacturer as packer or original seller, assume the responsibility all the way through the channels of distribution to the consumer, and whatever good will is established accrues to such buyers and not to the original seller. The buyers determine the sales and price policies with reference to the distribution of such food products for their own accounts, and make a profit or suffer a loss as the case may be.

PAR. 8. The respondents, and each of them, for a substantial period of time since June 19, 1936, and since the enactment of the Robinson-Patman Act, for the purpose of masking their operations so as to impart a color of legality to the brokerage payments made to one of their buyers, Taylor & Sledd, Inc., on its purchases of food products, have entered into a so-called "consignment contract or agreement," originated and promulgated by said buyer. Under the provisions of this so-called "consignment contract or agreement" the food products respondents sell in commerce are alleged to be consigned, and advances, usually 80 percent of the purchase price, are made to respondents by the purchaser, Taylor & Sledd, Inc., upon receipt of the food products, or within 10 days after such food products are received from the respondents. The balance due is paid after the food products are resold by Taylor & Sledd, Inc., to its customers.

PAR. 9. The respondents in the course and conduct of their said business have, since June 19, 1936, sold and distributed a substantial portion of their food products in commerce directly to buyers, including said Taylor & Sledd, Inc. Said buyers are located in States other than the State in which the respondents are located; and as a result of said sales and the respondents' instructions, such food products have been shipped and transported across State lines by respondents to said buyers, or to said buyers' customers.

PAR. 10. The respondents, since June 19, 1936, in connection with the interstate sale and distribution of food products have been and are now paying, or have paid or granted, directly or indirectly, commissions, brokerage or other compensation or allowances, or discounts in lieu thereof, to buyers who purchased said food products in commerce, in their own names and for their own accounts for resale.

PAR. 11. The acts and practices of the respondents, and each of them, in promoting the interstate sale of their food products since June 19, 1936, by paying or granting buyers commissions, brokerage, or other compensation or allowances, or discounts in lieu thereof, by

the second method set forth in paragraph 6 herein, are in violation of subsection (c) of section 2 of the Clayton Act as amended.

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 the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C., sec. 13), the Federal Trade Commission on November 26, 1948, issued and subsequently served upon the respondents named in the caption hereof its complaint, charging said respondents with having violated subsection (c) of section 2 of said Clayton Act as amended. On January 25, 1949, the respondents filed their answer in which they denied the material allegations of the complaint, but on February 21, 1949, they filed a motion for leave to withdraw said original answer and to file in lieu thereof a substitute answer in which they admit, with certain qualifications, all of the material allegations of fact contained in the complaint and waive all intervening procedure and further hearing as to said facts, and the Commission, by order entered herein on August 3, 1949, granted said motion. The filing of the substitute answer having been made with the understanding that if this proceeding were not disposed of by the issuance of a form of order to cease and desist attached thereto and recommended by the respondents, the respondents reserved to themselves the right to file written briefs and present oral argument as to the form of order which should be issued; and said proposed form of order having been altered by the Commission to the extent and for the reasons shown in the tentative order to cease and desist entered August 3, 1949, the respondents were afforded opportunity to show cause why said tentative order should not be entered herein as an order to cease and desist. The respondents not having appeared in response to the leave to show cause, this proceeding regularly came on for final hearing before the Commission upon the complaint and the substitute answer; and the Commission, having duly considered the matter 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 the Larsen Co. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office and place of business located at 314 North Broadway, Green

Bay, Wis. The respondent corporation is engaged in the business of packing, canning, and selling canned fruits and vegetables (all of which are hereinafter designated as "food products"). Respondent corporation is a substantial factor in the distribution and sale of food products. Such sales are made to buyers located in various sections of the United States and the Territory of Hawaii.

PAR. 2. Respondent R. E. Lambeau is an individual with his principal office and place of business located at 314 North Broadway, Green Bay, Wis. He is now president of the Larsen Co. and has been a substantial stockholder and an officer in said corporation since some time after June 19, 1936. After becoming an officer, and at the present time, and for some time past as president, respondent R. E. Lambeau has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said corporation, including the direction of its distribution and sales policies.

PAR. 3. Respondent Donald F. Larsen is an individual with his principal office and place of business located at 314 North Broadway, Green Bay, Wis. He is now secretary of the Larsen Co. and has been a substantial stockholder and an officer of said corporation since some time after June 19, 1936. After becoming an officer, and at the present time, and for some time past as secretary, respondent Donald F. Larsen has exercised, and still exercises, a substantial degree of authority and control over the business conducted by said corporation, including the direction of its distribution and sales policies.

PAR. 4. Respondents, and each of them, through said respondent corporation, for a substantial period of time since June 19, 1936, have sold and distributed their food products in commerce, namely, through brokers to buyers; and directly to buyers, including a substantial quantity of such food products to a direct buyer, namely, Taylor & Sledd, Inc., of Richmond, Va.

The respondents sell and distribute their food products by two separate and distinct methods, described as follows:

(a) The first and principal method is by utilizing intermediaries or brokers who act as respondents' agents in negotiating the sale of respondents' food products, at respondents' prices, and on respondents' terms. Such intermediaries or brokers transmit such purchase orders to respondents who thereafter invoice or ship the food products to the customers. The respondents pay such intermediaries or brokers for their services in negotiating and making such sales, for respondents' account, commissions or brokerage fees, which are customarily based on a percentage of the invoice sales prices of the food products sold.

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The food products so sold by brokers bear the brand or label of the respondents, or the brands or labels of the buyers to whom respondents sell through such brokers. Such intermediaries or brokers are not traders for profit and do not take title to or have any financial interest in the products sold, and neither make a profit nor suffer a loss on the transaction.

In a few or relatively few transactions since June 19, 1936, Taylor & Sledd, Inc., has acted as respondents' sales agent or broker, negotiating the sale of respondents' food products for and on account of the seller as principal.

This part of respondents' business was not challenged by the complaint herein.

(b) The second method, which was challenged by the complaint herein, is respondents' sales of its food products directly to buyers. Representative of such buyers is Taylor & Sledd, Inc., of Richmond, Va., to whom respondents pay, directly or indirectly, commissions or brokerage fees on such sales of food products purchased by such buyers, including the said Taylor & Sledd, Inc., in their own names and for their own accounts. The respondents sell a substantial quantity of their food products to such buyers either unlabeled or under one or more of the labels or brands of said buyers.

PAR. 5. In connection with the sale of food products to Taylor & Sledd, Inc., as described in paragraph 4 hereof, the respondents, and each of them, for a substantial period of time since June 19, 1936, have entered into a so-called "consignment contract or agreement," originated and promulgated by said Taylor & Sledd, Inc. Under the terms of such so-called "consignment contract or agreement" the food products respondents sell in commerce are purportedly consigned, and advances, usually 80 percent of the purchase price, are made to respondents by the purchaser, Taylor & Sledd, Inc., upon receipt of the food products, or within 10 days after such food products are received from the respondents. The balance due is paid after the food products are resold by Taylor & Sledd, Inc., to its customers. The respondents' use of the so-called "consignment contract or agreement" under these circumstances obviously does not change the real nature of the transaction involved.

PAR. 6. The respondents in the course and conduct of their said business have, since June 19, 1936, sold and distributed a substantial portion of their food products in commerce directly to buyers, including said Taylor & Sledd, Inc. Said buyers are located in States other than the State in which the respondents are located; and as a result of said sales and the respondents' instructions, such food products

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have been shipped and transported across State lines by respondents to said buyers, or to said buyers' customers.

PAR. 7. The complaint in this proceeding included as parties respondent, in addition to those named in paragraphs 1 to 3, inclusive, hereof, the individuals C. Sumner Larsen, and R. H. Winters, vice president and treasurer, respectively, of respondent the Larsen Co. It appears that said individual respondents C. Sumner Larsen and R. H. Winters do not exercise a substantial degree of authority and control over distribution and sales policies of respondent the Larsen Co., as alleged in the complaint. The Commission is of the view that the complaint should be dismissed as to said individual respondents C. Sumner Larsen and R. H. Winters.

PAR. 8. The Commission therefore finds that the respondents the Larsen Co., R. E. Lambeau, and Donald F. Larsen, since June 19, 1936, in connection with the interstate sale and distribution of food products have been and are now paying, or have paid or granted, directly or indirectly, commissions, brokerage fees, or other compensation or allowances, or discounts in lieu thereof, to buyers who purchased said food products in commerce in their own names and for their own accounts for resale.

CONCLUSION

The paying and granting by the respondents the Larsen Co., R. E. Lambeau, and Donald F. Larsen, under the circumstances and in the manner aforesaid, of commissions or brokerage fees, or other compensation, or allowances or discounts in lieu thereof, to purchasers of food products on purchases for their own accounts, constitute violations by said respondents of subsection (c) of section 2 of the Clayton Act as amended.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and substitute answer by respondents, in which answer respondents admitted, with certain exceptions, all of the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearings as to said facts, and the Commission having made its findings as to the facts and its conclusion that the respondents the Larsen Co., R. E. Lambeau, and Donald F. Larsen have violated the provisions of subsection (c) of section 2 of the 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),

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as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C., sec. 13) :

It is ordered, That the corporate respondent, the Larsen Co., its officers, agents, representatives, and employees, and the individual respondents R. E. Lambeau and Donald F. Larsen, their agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of food products or other merchandise in commerce as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from :

Paying or granting, directly or indirectly, to Taylor & Sledd, Inc., or to any other buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale made to any such buyer for its own account.

It is further ordered, That the complaint herein as to C. Sumner Larsen and R. H. Winters be, and the same hereby is, dismissed.

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

Complaint

IN THE MATTER OF
THE NIX COSMETICS COMPANY, ETC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 5291. Complaint, Mar. 9, 1945—Decision, Feb. 8, 1950*

Where a corporation engaged in the interstate sale and distribution of a cosmetic preparation which it designated as "Nanette Hormone Cream," to retailers and previously direct to consumers through the mails; in advertisements in newspapers and cards, folders, and circulars which it first published over its own name and address, and later supplied to retailers for publication over their names and paid for through the granting of advertising allowances—

Represented that a woman's breasts which lacked normal growth and size because of insufficient estrogenic substances in her body would be developed and increased in size by the use as directed of its said preparation;

The facts being that the amount of synthetic estrogenic substance made available thereby was insufficient to bring about any substantial physiological changes even in the relatively few cases in which such underdevelopment was due to lack of estrogenic substance; and that in the very large percentage of cases, in which such underdevelopment is caused by other conditions, use of stilbestrol, a synthetic substance and the active ingredient in said preparation, would not be effective to bring about any improvement, regardless of the amount used;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations were true and thereby induce its purchase of said preparation:

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.

Before *Mr. John W. Addison*, trial examiner.

Mr. B. G. Wilson for the Commission.

Mr. Clinton Robb and *Mr. H. E. Manghum*, of Washington, D. C., for respondent.

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 the Nix Cosmetics Co., a corporation, trading as Nanette Cosmetics Co., Nanette Cosmetic Cream, Nanette Co. and Nanette, hereinafter referred to as respondent, has 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: