

Complaint

IN THE MATTER OF
DOLCIN CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT AND OF SEC. 2(d) OF THE CLAYTON ACT

Docket 6569. Complaint, June 12, 1956—Decision, Aug. 31, 1956

Consent order requiring the distributor of "Dolcin" medicinal preparation, treatment for arthritis and rheumatism, to cease contracting to pay or paying promotional allowances to certain favored customers but not to others competing with them, and making promotional allowances to customers on conditions restricting their right to enter into promotional agreements with its competitors.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. Donald K. King for the Commission.

Mr. Sigmund Eisenstein, of New York City, for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the corporation named as the respondent in the caption hereof, and hereinafter more particularly designated and described, 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 (15 U.S.C.A., Section 13), and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C.A., Section 45), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent, Dolcin Corporation, is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 683 Fifth Avenue, New York, New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the offering for sale, sale, and distribution of a medical preparation known as "Dolcin" (U. S. Patent No. 2,471,394), a succinate-salicylate formula intended for the relief of pain accompanying arthritis and rheumatism. Dolcin is manufactured, packaged, and shipped for respondent by Arner Company, Inc., of Buffalo, New York. Dolcin is packed in bottles of 100, 200, and 500 tablets.

Dolcin 100's are sold to all direct accounts, both wholesale and retail, at \$13.30 a dozen; 200's at \$23.40 per dozen; and 500's at

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\$53.40 a dozen. Dolcin is resold to retailers by wholesalers at \$15.96 per dozen 100's, \$28.08 per dozen 200's, and \$64.08 per dozen 500's. The fair trade retail price is \$2.00 per bottle of 100's, \$3.50 per bottle of 200's, and \$8.00 per bottle of 500's.

The minimum order shipped by respondent is one case, which represents 6 dozen 100's, or 3 dozen 200's or 1 dozen 500's. The minimum order for prepayment of freight by Dolcin is 4 cases. In purchases for lesser amounts, freight is for the customer's account. Cash discount terms are 2% 10 days.

Dolcin is sold by respondent on a nation-wide basis to some 526 direct accounts, of which 421 are wholesalers, 83 are retail chains (three or more stores) and 22 are retail independents (one or two stores). Approximately 80% of respondent's sales volume is accounted for by sales to wholesalers, 16% to retail chains, and 4% to independents. In the year 1954, retail sales of Dolcin exceeded the total sales of all other competitive anti-rheumatic, anti-arthritic products combined.

Indirect retail accounts are serviced by the wholesalers and are visited once every three months by respondent's manufacturer representatives, who, on occasion, take turnover orders from such accounts for shipment by the wholesaler of the retailer's choice.

PAR. 3. As a method of promoting the sale of Dolcin, respondent, during the past three years, has entered into a series of one-year-term contracts with certain of its direct retail accounts. These sales initiative plans, designated by respondent as "X-CON" contracts, generally provide that respondent will pay the retailer a cash promotional allowance of 5% of net purchases quarterly if the retailer will (1) provide a continuous counter display of Dolcin; (2) provide a window display of Dolcin at least every two months; (3) use Dolcin window stickers and streamers if such are generally employed; (4) permit inspections of stock by Dolcin representatives; (5) instruct clerks not to switch or substitute when Dolcin is requested by a customer; (6) pay clerks, at the retailer's own expense, the same commission or P.M. (push money) on Dolcin as the retailer may pay, or as may be paid, to the clerks by a Dolcin competitor on products competing with Dolcin; (7) not engage in cooperative newspaper or radio advertising with any Dolcin competitor unless such advertising has been afforded by such competitor, under like conditions, to all other retailers in the same trading area; and (8) purchase an initial order of four cases of Dolcin if not already a customer.

The X-CON contracts further provide that, in addition to the 5% promotional allowance, respondent will pay to the retailer certain price discount allowances totaling up to 10% of net purchases, de-

pending upon the status of the retailer (that is, whether the retailer is an independent or a chain) and upon the quantity of Dolcin purchased by the retailer from respondent during the contract term.

PAR. 4. Respondent is now, and has been at all times mentioned herein, engaged in commerce as "commerce" is defined in the Clayton Act, as amended, in that it ships or causes to be shipped the product sold by it from the State where it is manufactured to purchasers located in other States of the United States and the District of Columbia; and there is and has been, at all times mentioned herein, a continuous current of trade in commerce in said product between and among the several States of the United States and the District of Columbia.

PAR. 5. Respondent, in the course and conduct of its business in commerce, as aforesaid, is now, and has been at all times mentioned herein, in competition with corporations, individuals, and partnerships likewise engaged in the sale and distribution of rheumatic remedies.

Also, some of the purchasers to whom respondent sells its product Dolcin are in competition with other purchasers of respondent's product, in that many of respondent's purchasers compete or attempt to compete, often in commerce, in reselling and attempting to resell Dolcin to the general public in the same competitive trade area.

PAR. 6. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or contracted to pay, money, goods, or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers in connection with the processing, handling, sale, or offering for sale of respondent's product Dolcin, and respondent has not made or contracted to make such payments or considerations available on proportionally equal terms to all other of its customers competing in the sale and distribution of said product.

PAR. 7. Included among and illustrative of the payments alleged in the preceding paragraph are the promotional allowances which have been paid by respondent under the X-CON contracts described in Paragraph Three.

In dealing with its customers respondent has offered, or has caused to be offered, its X-CON contracts to certain favored customers and has failed to make such contracts available to other customers competing with such favored customers. Furthermore, as between customers who have been offered the X-CON and have signed such contracts, respondent has agreed to waive certain of the requirements of such contracts as to some customers and not to others.

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PAR. 8. The acts and practices of respondent, as above alleged, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

COUNT II

PAR. 9. The allegations of Paragraphs 1 through 3 of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 10. In the course and conduct of its business respondent is now, and has been at all times referred to herein, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, in that it ships its product Dolcin, or causes it to be shipped, from New York to its customers located in the several States of the United States and in other areas subject to the jurisdiction of the United States.

PAR. 11. Except to the extent that competition has been hindered, frustrated, and lessened as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals, and partnerships engaged in the sale and distribution of rheumatic remedies in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 12. All of the X-CON contracts entered into by and between respondent and certain of its direct retail customers during the past three years have contained the following provision:

"(4) You [the retailer] will pay at your expense the same rate of commission or P.M. on DOLCIN that is paid by you to the clerks or direct by vendors of any other products in our field. Of course, if you do not pay any P.M.'s or allow any P.M. to be given on competing products, we [the respondent] do not ask that you allow any P.M. on DOLCIN."

which has the tendency to and has had the effect of preventing the payment of sales commissions on products competitive with Dolcin.

Said retailers are paid a promotional allowance in the amount of 5% of net purchases. From this amount said retailers must reimburse themselves for expenditures made by them for the promotion of respondent's product, as well as for amounts they may have to pay their clerks to match equivalently all commissions or P.M. which their clerks may receive for selling or promoting competing products. It is only to the extent that such expenditures and equivalent commissions or P.M. are made or paid by a retailer that the aforesaid 5% is affected.

Since the respondent infrequently requires its direct retail customers to make expenditures for the promotion of its product, and then only for small amounts, the aforesaid 5% is, to a very large extent, in the nature of extra compensation to the retailer. For this reason said retailers have been, and are, reluctant to permit respondent's competitors to pay commissions or P.M. to said retailers or their clerks, since said retailers would then have to make equivalent payments or inducements to their clerks to promote respondent's product, which they otherwise would not do, or be required to do.

At the retail level approximately twice as much Dolcin is sold as the next leading competitive brand. Consequently, under the provision above quoted, if a retailer's sales of Dolcin double that of any competitive brand stocked, then if the retailer, or any one of the retailer's clerks, is granted any amount by one of respondent's competitors for promoting the competitor's product, the retailer would be required to expend at least twice such amount for the promotion of respondent's product.

In addition, all of the X-CON contracts entered into by and between respondent and certain of its direct retail customers during the past three years have contained the following or a similar provision:

"(8) It is clearly understood that you will not allow advertisements to be run in newspapers or in broadcasting over your slug or referring only to your stores as a source of purchasing by the public and thus creating the impression that you are endorsing a competing product and promoting it in preference to DOLCIN except under the condition hereinafter outlined.

"The exception referred to above is that you may, without violating this agreement, have advertising of competing products run mentioning your name only, where the same offer has been simultaneously made to all other retailers in your area under like conditions."

This provision has the tendency and has had the effect of discouraging retailers from entering into cooperative advertising arrangements with respondent's competitors.

PAR. 13. The above alleged acts, practices, and methods of respondent, all and singularly, have a dangerous tendency unduly to restrain, hinder, suppress, and eliminate competition between and among respondent and its competitors in the sale and distribution of rheumatic remedies in commerce within the meaning of the Federal Trade Commission Act, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The Federal Trade Commission issued its complaint on June 12, 1956, against the respondent, Dolcin Corporation, a corporation existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at No. 683 Fifth Avenue, New York, New York, charging it with unlawful acts and practices in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C.A. Title 15, Section 13), and also with unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C.A. Section 45), all of the acts complained of having been performed in the sale of a drug preparation designated "Dolcin."

After issuance and service of said complaint, the respondent entered into an agreement for a consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the Acting Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though findings of jurisdictional facts had been made in accordance with such allegations. By said agreement the parties expressly waived hearings before the Hearing Examiner or the Commission, the making of findings of fact or conclusions of law by the Hearing Examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the Hearing Examiner and the Commission to which the respondent may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, respondent further agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waived any and all right, power or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order

issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided for other orders of the Commission.

The Hearing Examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice. Therefore, in consonance with the terms of said agreement, the Hearing Examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein, that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondent Dolcin Corporation, a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug preparation "Dolcin" (or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name) in commerce, as "commerce" is defined in the Clayton Act as amended, do forthwith cease and desist from paying, or contracting to pay to, or for the benefit of any customer, anything of value as compensation or in consideration for advertising, display, demonstrator, promotional, or other services or facilities furnished by or through such customer in connection with the handling, processing, sale or offering for sale of said preparation unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the resale or distribution of said preparation.

It is further ordered, That respondent Dolcin Corporation, a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug preparation "Dolcin" (or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name) in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from taking any course of action, making any agreement, paying, or contracting to pay, any allowance, in the form of money or otherwise, to any customer or purchaser, upon terms or conditions

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which are intended to cause, will cause or tend to cause said customer or purchaser, or said purchasers' or customers' employees or representatives, to refrain or abstain from accepting or using any promotional activity or allowance offered or paid by a competitor of respondent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 31st day of August, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (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 the order to cease and desist.

Commissioner Gwynne not participating.

Decision

IN THE MATTER OF

STEPHEN M. ROTH AND FRED D. RUDIN TRADING AS
RUDIN & ROTH; JAMEE KNIT HOSIERY MILLS, INC.;
SUPERBILT HOSIERY MILLS, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 6419. Complaint, Sept. 21, 1955—Decision, Sept. 5, 1956

Order requiring New York City distributors of men's hosiery to wholesalers and jobbers, supermarkets and supermarket chains to cease preticketing their hosiery with fictitious and exaggerated prices and thereby placing in the hands of retailers means for deceiving the purchasing public as to the customary retail prices; and to cease representing falsely, through use of the word "Mills" in their corporate names and otherwise, that they manufactured the hosiery they sold.

Edward F. Downs, Esq., counsel supporting the complaint.

Dickler & Halbert, by *George H. Halbert, Esq.*, of New York City, for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On September 21, 1955, the Federal Trade Commission issued its complaint against Jamee Knit Hosiery Mills, Inc. (hereinafter called Jamee), Superbilt Hosiery Mills, Inc. (hereinafter called Superbilt), and Stephen M. Roth and Fred D. Rudin, individually, as officers of said corporations, and as copartners trading under the firm name and style of Rudin & Roth (all hereinafter collectively referred to as respondents), charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance (1) that Messrs. Rudin and Roth, individually and as copartners, by attaching price labels to their hosiery products, falsely represented that such prices were the regular and usual retail prices for said hosiery when in fact they were not, thereby placing in the hands of retailers a means and instrumentality for deceiving and misleading the public; and (2) that Jamee and Superbilt, through the use of the word "mills" as part of their corporate names, falsely represented that they owned or