

which they have complied with the order to cease and desist as set forth herein.

IN THE MATTER OF
MORTON PHARMACEUTICALS, INC.

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

Docket 8322. Complaint, Mar. 14, 1961—Decision, Sept. 28, 1962

Order dismissing for failure of proof complaint charging a Memphis, Tenn., distributor of drugs and pharmaceuticals with offering fictitiously priced merchandise as premiums to purchasers of stated amounts of said products.

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 Morton Pharmaceuticals, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of 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 Morton Pharmaceuticals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 1625-39 N. Highland in the city of Memphis, State of Tennessee.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of drugs and pharmaceuticals to wholesalers, to retailers for resale to the public and direct to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Tennessee to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the purchase of its said products, the respondent

offered certain fictitiously priced merchandise as premiums to the purchasers of stated amounts of respondent's said products. Said offers were made in circulars and other advertising media sent through the mails to prospective purchasers of respondent's products.

Among the representations made by respondent, as aforesaid, are the following:

World Famous HELBROS Watches * * * BERING * * * Retail \$65.00
(Men's watch pictured with price tag of \$65.00)

ELECTRA * * * Retail \$71.50 (Ladies' watch pictured with price tag of \$71.50)

* * * we propose to ship you 100 Vials * * * and INCLUDE THE \$65.00 BERING FREE OF EXTRA CHARGE.

BANQUET—America's Most Beautiful Fry Pan RETAIL \$24.95

9 piece Sheffield Carving & Steak Knife Set \$49.95 Suggested Promotional Price

PAR. 5. By and through the use of the aforesaid representations, the respondent represented, directly or by implication, that said amounts were the usual and customary retail prices of said premium products in the trade areas where the representations were made.

PAR. 6. The aforesaid representations were false, misleading and deceptive. In truth and in fact, the amounts set out in said representations were fictitious and greatly in excess of the prices at which said premium products were actually sold at retail in the trade areas where the representations were made.

PAR. 7. The fictitiously priced merchandise which respondent offered as premiums to purchasers of stated amounts of respondent's drugs and pharmaceuticals, as described in paragraph 4 hereof, likewise was shipped by respondent from his place of business in Memphis, Tennessee, to said purchasers located in various states of the United States.

PAR. 8. In the conduct of its business at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of drugs and pharmaceuticals of the same general kind and nature as that sold by respondent.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being unfairly diverted to respondent.

ent from its competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. DeWitt T. Puckett for the Commission.

Mr. Eulyse M. Smith, of Memphis, Tenn., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondent with the use of fictitiously priced premiums to promote the sale of its products, in violation of the Federal Trade Commission Act. At a hearing held on December 21, 1961, a stipulation as to the facts was entered into by counsel on the record. Proposed findings and conclusions have been submitted on behalf of both parties, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. The respondent, Morton Pharmaceuticals, Inc., is a Tennessee corporation, with its place of business in Memphis, Tennessee. It is engaged in the sale of drugs and pharmaceuticals, the products being sold to wholesale and retail dealers and also to physicians direct. In the sale of its products respondent is engaged in interstate commerce and is in competition in such commerce with other sellers of drug products. While its annual volume of business is substantial, respondent is a relatively small company, its volume of business representing only a small fraction of the total volume of interstate drug business in the United States.

3. This is an unusual "fictitious pricing" case in that the charges have nothing to do with the products sold by respondent, that is, drugs and pharmaceuticals; the charges relate only to merchandise offered by respondent as premiums to promote the sale of its own products. Respondent employs no traveling salesmen and solicits business only through the use of circulars and other advertising material, the material being distributed among prospective purchasers by means of the United States mail. Among the representations made in some of this advertising were the following:

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World Famous HELBROS Watches * * * BERING * * * Retail \$65.00 (Men's watch pictured with price tag of \$65.00)

ELECTRA * * * Retail \$71.50 (Ladies' watch pictured with price tag of \$71.50)

* * * we propose to ship you 100 Vials * * * and INCLUDE THE \$65.00 BERING FREE OF EXTRA CHARGE.

BANQUET—America's Most Beautiful Fry Pan RETAIL \$24.95

9 piece Sheffield Carving & Steak Knife Set \$49.95 Suggested Promotional Price

4. None of the representations as to the prices of the premiums originated with respondent; respondent simply passed along to its own customers and prospective customers the representations made to it by the respective manufacturers or suppliers of the premiums. Insofar as respondent's liability under the Federal Trade Commission Act is concerned, this would seem to be immaterial. If the premiums were in fact fictitiously priced, respondent would be responsible under the Act for passing along the misrepresentations. Nor would the fact that apparently respondent had no knowledge of the actual retail prices of the premiums absolve it from responsibility, the presence of knowledge or wrongful intent not being an essential element in a proceeding under the Act.

5. Were the prices shown in connection with the premiums fictitious? As for the last two items mentioned in the advertising excerpts quoted above—the "Fry Pan" and the "Carving & Steak Knife Set"—the record is wholly silent.

6. In connection with the Helbros watches, referred to in the first three excerpts, counsel included in their stipulation of facts a provision to the effect that the hearing examiner might consider as evidence in the present case the testimony as to fictitious pricing given by witnesses who testified in the Helbros Watch Company case, Docket No. 6807, as summarized in the hearing examiner's initial decision in that case (affirmed by the Commission on December 26, 1961) [59 F.T.C. 1377]. That is, it was stipulated that if the witness in question were called in the present case their testimony would be the same as that given by them in the Helbros case.

7. The testimony in the Helbros case (pages 1386-1387 of the initial decision) was to the effect that in three trade areas, Newark, New Jersey; Detroit, Michigan; and Louisville, Kentucky (including nearby New Albany, Indiana)—certain Helbros watches were sold at retail for substantially less than the prices indicated on tickets supplied by Helbros and attached to the watches.

8. The record in the present case does not disclose whether any of respondent's drug products have been sold in these trade areas, nor whether any of the watches, or any representations regarding

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them, have been distributed in the areas. Respondent, as already stated, is engaged in interstate commerce, but the only stipulation as to whether its products have been sold, or the premiums offered, in these three areas is that they "could have been".

9. If no representations regarding the watches have been made by respondent in any of these three trade areas, it seems clear that the evidence in the Helbros case as to fictitious pricing of Helbros watches in the areas serves no real purpose in the present case.

10. Even more serious is the failure of the record to identify the watches offered as premiums by respondent with those referred to by the witnesses in the Helbros case. Stated differently, there is nothing to show that the particular watches offered by respondent were fictitiously priced—that the watches were customarily sold at retail in the trade areas in question at prices less than the prices mentioned in respondent's advertising material.

11. In his initial decision in the Helbros case [59 F.T.C. 1386], the hearing examiner found:

6. Respondents sell different lines of watches, at different prices, to their catalog distributors, to house-to-house canvassers, and to jewelers. The watches all bear the Helbros trade name, but some of them contain additional name designations such as Carla, Aida, Lord Philip, Barnett, etc. Not only are the prices different for each of the lines, but there are different prices within each line.

From the above it is evident that Helbros sold many different kinds of watches at many different prices. The fact that certain watches referred to by the witnesses in the Helbros case were fictitiously priced does not establish that all Helbros watches, nor those involved in the present case, were so priced.

12. In summary, the record fails to establish: (1) that any representations regarding the watches were made by respondent in any of the trade areas covered by the testimony in the Helbros case; and (2) that the particular watches offered by respondent were fictitiously priced. As these points are essential to the Government's case, it follows that the complaint has not been sustained.

ORDER

It is ordered, That the complaint be, and it hereby is, dismissed.

ORDER DISMISSING COMPLAINT

This matter having been heard by the Commission upon exceptions to the initial decision dismissing the complaint and brief in support thereof, filed by counsel supporting the complaint, and upon oral argument, and the Commission having considered said exceptions and the opposition thereto presented by respondent; and

It appearing that the complaint charges that respondent has engaged in unfair methods of competition and unfair acts and practices in commerce in connection with the sale and distribution of drugs and pharmaceuticals, in that in advertising certain premium products for the purpose of inducing the purchase of said drugs and pharmaceuticals, respondent has falsely and deceptively represented that certain amounts are the usual and customary prices of said premium products in the trade areas in which said offers were made; and

The Commission, upon review of all evidence adduced in support of said complaint, having concluded that although the record shows that the advertised prices of certain of said premium products are in excess of the prices at which such products are usually and customarily sold in some trade areas, counsel supporting the complaint has failed to introduce evidence to establish that respondent's offers were made in those particular trade areas and that, therefore, insofar as the initial decision is based upon this failure of proof, it must be affirmed and adopted by the Commission; and

The Commission having further concluded that the circumstances herein are such that the public interest will best be served by continued close scrutiny of respondent's future operations and that, accordingly, remand of this proceeding is not warranted.

It is ordered, That the exceptions of counsel supporting the complaint to the initial decision be, and they hereby are, denied.

It is further ordered, That the initial decision be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.

By the Commission, Commissioner MacIntyre dissenting.

IN THE MATTER OF

FAIRBANKS WARD INDUSTRIES, INC., ET AL.

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