

Complaint

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IN THE MATTER OF

McKESSON & ROBBINS, INC. AND DRUGGISTS' SERVICE
COUNCIL, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 8510 and 8511. Complaints, June 19, 1962—Decision, Nov. 17, 1964*

Order withdrawing two complaints charging a drug manufacturer and an association of drug wholesalers with inducing discriminatory promotional allowances, but reserving the right to issue new complaints if warranted.

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 respondent, McKesson & Robbins, Inc., has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, issues its complaint charging as follows:

PARAGRAPH 1. Respondent McKesson & Robbins, Inc., hereinafter referred to as McKesson & Robbins, is a corporation organized, existing and doing business under the laws of the State of Maryland. Its executive office and principal place of business is at 155 East 44th Street, New York, New York.

PAR. 2. McKesson & Robbins manufactures a line of drug products distributed under its own name. It also purchases and distributes wholesale, and has done so for many years past, the products of other manufacturers in drug, cosmetic and sundry lines (hereafter referred to as drug products). It is by far the largest drug wholesaler in the United States. Gross sales volume of McKesson & Robbins in all departments in the fiscal year ending March 31, 1959, was \$613,986,000. Sales volume of the Drug Department was \$403,000,000 for the same period (limited to wholesale of products of other manufacturers, and not including goods returned).

PAR. 3. Products distributed through the Drug Department of McKesson & Robbins are sold through 85 Wholesale Divisions throughout the United States to retail drug stores and other retail establishments throughout the United States. Said wholesale divisions are not separately incorporated but are an integral part of the corporate organization of McKesson & Robbins.

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PAR. 4. In the course and conduct of its business, McKesson & Robbins has engaged in, and is presently engaged in, commerce, as "commerce" is defined in the Federal Trade Commission Act. It purchases drug products from suppliers throughout the United States and causes such products to be transported from various States to other States for distribution and resale by McKesson & Robbins to retailers throughout the United States.

PAR. 5. McKesson & Robbins in the course and conduct of its business as aforesaid, actively competes with other drug wholesalers throughout the United States in the purchase for resale of said drug products and in the resale and distribution of such products within the United States. Many of the seller suppliers of said products in such sales to respondent and its wholesaler competitors are engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

PAR. 6. In the course and conduct of its business as aforesaid, McKesson & Robbins has induced and entered into contracts for and has induced and received from many of said seller suppliers so engaged in commerce, various payments, allowances or other considerations of value for its benefit, for services or facilities furnished by or through McKesson & Robbins in connection with the handling, sale and offering for sale of the said products of such suppliers, knowing, or having reason to know, that such payments, allowances or other considerations of value were not made known, offered, and made available on proportionally equal terms to McKesson & Robbins' competitors also purchasing from such same seller suppliers and engaged in the handling, sale and offering for sale of said products. Respondent, in so contracting for, inducing and receiving the said payments, allowances or other considerations of value from said seller suppliers, knew or should have known that the same when so granted and made by said seller suppliers were in violation of subsection (d) of Section 2 of the Clayton Act, as amended.

To illustrate: In 1959, American Safety Razor Products Corporation paid \$3,500 to McKesson & Robbins for advertising in "Profitunities" which is published monthly by McKesson & Robbins as a catalog-price sheet and distributed to its retail customers without charge. That same year, the Mennen Company paid McKesson & Robbins \$2,100 for advertising in "Profitunities."

In 1959 Union Carbide Corporation paid \$385 to McKesson & Robbins for insertion of advertising in "Gift Book," published yearly by McKesson & Robbins shortly before Christmas and distributed to its retail customers without charge. That same year, Eversharp, Inc.,

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paid McKesson & Robbins \$300 for insertion of advertising in "Gift Book."

In 1959 Union Carbide Corporation and American Safety Razor Products Corporation each paid \$1,500 to McKesson & Robbins as a "special merchandising" fee.

PAR. 7. The acts and practices, as alleged above, are all to the prejudice of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

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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 parties named in the caption hereof, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, issues its complaint, charging as follows:

PARAGRAPH 1. Respondent Druggists' Service Council, Inc., hereinafter sometimes referred to as DSC, is a non-profit, non-stock membership corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business located at 24 West 40th Street, New York 18, New York. Prior to January 1, 1962, proposed respondent's name was Druggists' Service Company, Inc.

Individual respondents J. Wayne Luther, George F. Gardner and George J. Meill are the president and general manager, vice president, and secretary-treasurer, respectively, of respondent Druggists' Service Council, Inc. Said officers conduct the business activities of Druggists' Service Council, Inc. The address of said individual respondents is the same as corporate respondent Druggists' Service Council, Inc.

PAR. 2 Respondent Chas. S. Leete Co., Inc., is a corporation organized, existing and doing business under the laws of the State of Connecticut having its office and principal place of business on Derby Avenue, West Haven, Connecticut. In 1959 its total gross dollar volume of sales was approximately \$2,000,000.

Respondent The Sisson Drug Company is a corporation organized, existing and doing business under the laws of the State of Connecticut with its principal office and place of business located at 729 Main Street, Hartford, Connecticut. Its total gross dollar volume of sales in 1959 was approximately \$3,400,000.

Respondent Gilman Brothers, Inc., is a corporation organized, exist-

ing and doing business under the laws of the State of Massachusetts with its principal office and place of business located at 100 Shawmut Avenue, Boston, Massachusetts. In 1959 its total gross dollar volume of sales was approximately \$15,000,000.

Respondent Shoemaker & Busch, Inc., is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business located at 3700 Kensington Avenue, Philadelphia, Pennsylvania. Its total gross dollar volume of sales for 1959 was approximately \$5,000,000.

Respondent Towns & James, Inc., is a corporation organized, existing and doing business under the laws of the State of New York with its principal office and place of business located at 909 Remsen Avenue, Brooklyn, New York. Its total gross dollar volume of sales for 1959 was approximately \$15,000,000.

PAR. 3. Respondent Druggists' Service Council, Inc., is a service organization composed of drug and sundry manufacturers and wholesale druggists. Prior to January 1, 1962, respondent DSC was known as Druggists' Service Company, Inc., and was then composed solely of wholesale druggists as its members. Each wholesale member of DSC must meet certain qualifications and pay a membership fee in order to join DSC, and must also agree to pay annual dues to maintain its membership. Each wholesale member has one vote at membership meetings and its board of directors of fifteen men is composed of J. Wayne Luther, president of Druggists' Service Council, Inc., and fourteen officials of member wholesale drug firms. The control, direction and management of the business of respondent DSC is vested in said board of directors.

DSC was organized for the purpose of rendering information, advice and service to its wholesale member drug firms concerning the purchase, advertising, and sale of drug and sundry merchandise; rendering advice and service to manufacturers and suppliers of drug and sundry merchandise; and to aid and assist in promoting better trade relations between wholesale drug firms and manufacturers and suppliers to the mutual benefit of both the wholesale members and the suppliers. Druggists' Service Council, Inc., in carrying out its activities, is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The respondents named in Paragraph Two are engaged in the wholesale drug business selling primarily to drug retailers numerous products, including drugs, cosmetics and sundry products. Each of said respondents is a member of respondent DSC. Respondent DSC has a total of approximately 182 members located in the various States

of the United States and the District of Columbia which, in the course and conduct of their wholesale drug business or as wholesale members of and participants in the activities of DSC are all engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The wholesale membership of said respondent DSC constitutes a class so numerous and changing as to make it impracticable to specifically name each and all of such wholesale members as parties respondent herein. Those wholesale members named and designated herein are fairly representative of the entire wholesale membership, and are named as respondents herein in their individual capacities in which they have been represented in the wholesale membership of said respondent DSC, and as representatives of all wholesale members of said respondent DSC, as a class, including those not herein specifically named, all of whom are made respondents herein. All such members of DSC are sometimes hereinafter referred to as "buyer respondents."

PAR. 5. The aforesaid wholesale members of Druggists' Service Council, Inc., and all of the other such members of DSC are in competition with other wholesale drug firms, some of which are members of DSC and some of which are not members of DSC. Wholesale members of DSC maintain their membership in furtherance of their business interests and their competitive status in the industry.

PAR. 6. By virtue of the buyer respondents' membership in respondent Druggists' Service Council, Inc., the latter, acting on behalf of its wholesale members, in the course and conduct of its business in commerce, has induced and entered into contracts for, and has induced and received from many manufacturers and suppliers of products handled by the buyer respondents various advertising promotional, consultation or advisory payments to it for the benefit of its wholesale members. Some such payments have been made, or contracted to be made, as compensation or in consideration for advertising in publications or participation in promotions furnished by or through Druggists' Service Council, Inc., in connection with the sale or offering for sale of products sold to its wholesale members by such manufacturers and suppliers. Other such payments have been made, or contracted to be made, as compensation or in consideration for consultation or advisory services furnished by or through Druggists' Service Council, Inc., in connection with the processing, handling, sale, or offering for sale of products sold to its wholesale members by such manufacturers and suppliers. Respondent Druggists' Service Council, Inc., and its wholesale members knew or had reason to know that such advertising, promotional, consultation or advisory payments were not made known,

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offered or made available on proportionally equal terms to buyer respondents' competitors also purchasing from such manufacturers and suppliers and engaged in the handling, sale and offering for sale of like drug and sundry products. All respondents knew or should have known that the inducement of these payments and the payments, when so granted by the manufacturers and suppliers, were in violation of subsection (d) of Section 2 of the Clayton Act, as amended.

PAR. 7. The manufacturers' and suppliers' payments mentioned in Paragraph Six of this complaint contribute to the cost of DSC services designed in whole or in part to benefit the DSC wholesaler in his relationship with the retail druggist. Illustrative of suppliers' payments in 1959 which served this purpose are the following:

White Laboratories, Inc., paid \$2,801.55 to Druggists' Service Council, Inc., for advertising in "Buying Guide," a monthly DSC catalogue publication, available at a minimal charge to DSC wholesale members who then distribute it to their retail customers at no charge.

Eversharp, Inc., paid \$9,000 to Druggists' Service Council, Inc., for advertising in "Gifts Galore," a DSC promotional activity, whereby DSC makes up a promotional kit with advertising and sells the kits only to DSC's wholesalers who in turn sell them to their retail drug customers.

Chesebrough-Pond's, Inc., paid \$2,400 to Druggists' Service Council, Inc., for participation in "Monthly Promotional Service," a DSC monthly promotional kit sold to DSC's wholesalers who resell same to retail druggists.

Warner-Lambert Pharmaceutical Company paid \$1,500 to Druggists' Service Council, Inc., for various consultation and advisory services furnished by DSC and its wholesale members for the mutual benefit of said manufacturer and wholesale members of Druggists' Service Council, Inc.

PAR. 8. The acts and practices of respondents, as hereinbefore alleged, are all to the prejudice and injury of competitors and of the public, and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER WITHDRAWING COMPLAINTS AND DISMISSING MOTION TO
AMEND COMPLAINTS

The complaints in these closely related matters were issued on June 19, 1962, charging respondents with having knowingly induced

and received discriminatory promotional allowance in violation of Section 5 of the Federal Trade Commission Act. After the Commission, on July 27, 1964, issued its decisions and order in 17 cases involving firms which allegedly had made discriminatory promotional allowances to the present respondents in violation of Section 2(d) of the Clayton Act (*Chesebrough-Ponds, Inc.*, F.T.C. Docket 8491, et al.) [p. 252 herein], complaint counsel, on September 30, 1964, made motions before the hearing examiners to amend the complaints against the present respondents. Primarily, the proposed amendments would add a charge that respondents, in inducing or receiving payments or allowances from suppliers, "used the leverage of [respondents'] purchasing power and position" "to the prejudices and injury" of such suppliers and of respondents' competitors. Since the proposed amendments were not "reasonably within the scope of the proceeding initiated by the original complaint[s]," the examiners were not authorized to allow them. Section 3.7(a)(1), Procedures and Rules of Practice (effective August 1, 1963). Accordingly, on October 19, 1964, the examiner in Docket 8511, and on October 20, 1964, the examiner in Docket 8510, certified complaint counsel's motions to amend complaint to the Commission, as prescribed in Section 3.7(a)(1). See *Standard Camera Corp.*, F.T.C. Docket 8469 (Order of November 7, 1963) [63 F.T.C. 1238].

The Commission may issue an amended and enlarged complaint containing new allegations not within the scope of the proceeding initiated by the original complaint in situations where "the interests of both parties and the public interest will best be served by the issuance of an amended and supplemental complaint * * * rather than by the initiation of a new proceeding through the issuance of a new and separate complaint." *Austin Packing Co.*, F.T.C. Docket 7730 (Order of May 23, 1963). [62 F.T.C. 1553]. See, e.g., *Quaker Oats Co.*, F.T.C. Docket 8112 (Order of December 11, 1961) [59 F.T.C. 1487]. In other situations, however, the Commission has determined that delay would be avoided and orderly procedure promoted by withdrawing the original complaint and thereafter issuing a new, superseding complaint containing enlarged allegations. Cf. *Estee Sleep Shops*, F.T.C. Docket 8527 (Order of January 16, 1963) [62 F.T.C. 59]; *Kenron Awning & Window Corp.*, F.T.C. Docket 8459 (Order of December 10, 1962) [61 F.T.C. 1329]; *Perma-Lite Raybern Manufacturing Corp.*, F.T.C. Docket 8486 (Order of May 2, 1963) [62 F.T.C. 1254]. Determination of the appropriate course depends upon the particular circumstances.

Since hearings have not yet been commenced in the present matters

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even though the complaints were issued more than two years ago, the Commission deems the latter procedure, that of withdrawing the complaints rather than issuing amended complaints, more appropriate. In view of the posture of these matters before the hearing examiners, issuance of amended complaints would, in practical effect, be tantamount to issuance of completely new complaints. In these circumstances the more orderly procedure is to withdraw the original complaints, without prejudice to the issuance of new, expanded complaints if found to be warranted. Accordingly,

It is ordered, That the complaints in the above-captioned proceedings be, and they hereby are, withdrawn.

It is further ordered, That the motions of complaint counsel to amend the present complaints be, and they hereby are, dismissed as moot.