DIAMOND HOLFAST RUBBER COMPANY.

COMPLAINT IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914.

Docket 788—February 25, 1922.

SYLLABUS.

Where a corporation engaged in the manufacture and sale of automobile tires, inner tubes and accessories as The Diamond Rubber Co., advertised its business at large expense and extended the same largely, so that the word "Diamond" and the name "The Diamond Rubber Co.," had become identified extensively in the public mind with goods made in its factories; and thereafter a competitor, the name of whose president purported to be "Dimond" or "Diamond,"

(*a*) Adopted the name "Diamond Holfast Rubber Co."; and

(*b*) Intentionally and extensively imitated the Diamond packages, brands, and labels;

Thereby causing confusion respecting the identity of the two concerns and of their respective products, and resulting in the sale of the products of the latter concern as and for those of the former:

Held, That such simulation of trade or corporate names, brands and labels, under the circumstances set forth, constituted an unfair method of competition.

COMPLAINT.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that Diamond Holfast Rubber Co., hereinafter referred to as the respondent, has been and is using unfair methods of competition in violation of the provisions of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH 1. That the respondent is a corporation organized under the laws of the State of Georgia, with principal place of business at Atlanta in said State.

PAR. 2. That respondent is engaged in the business of manufacturing and selling automobile accessories and repair materials, including fan belts, friction tape, inner tubes, patches and cement, and causes commodities sold by it to be transported to the purchasers

thereof, from the State of Georgia, through and into other States of the United States, and carries on such business in direct, active competition with other persons, partnerships and corporations similarly engaged.

PAR. 3. That on June 6, 1912, the B. F. Goodrich Co., a corporation organized under the laws of the State of New York, acquired the physical assets, trade marks, trade names, and good will of the Diamond Rubber Co., a corporation organized in May, 1907, under the laws of the State of Ohio, and in order to obtain the benefits accruing from the use of said name and trade marks, which had become well known to the trade and the general public and were of great value, immediately thereafter caused to be organized under the laws of the State of New York a subsidiary corporation under the name of Diamond Rubber Co., and said B. F. Goodrich Co. has continuously, since 1912, manufactured and sold through said subsidiary, under the trade marks acquired from said Ohio corporation, various kinds of rubber goods, including inner tubes, patching material, and cement for automobile tires, and has caused commodities sold by it as aforesaid to be transported to the purchasers thereof from the State of New York through and into other States of the United States, and has carried on such business in direct, active competition with other persons, partnerships, and corporations similarly engaged.

PAR. 4. That the respondent was originally organized on October 27, 1916, with the corporate name of Diamond Holfast Patch Co., and on January 20, 1919, its charter was amended and its name changed to Diamond Holfast Rubber Co.; that the present corporate name of the respondent so closely resembles that of the Diamond Rubber Co., described in Paragraph 3 hereof, that confusion in the trade as to the products of the respondent and the products of said Diamond Rubber Co., has resulted; that the adoption of the corporate name, Diamond Holfast Rubber Co. by respondent, was calculated to and does mislead and deceive the public, and purchasers have been misled thereby into buying respondent's products, under the mistaken belief that they were the products of said Diamond Rubber Co.

PAR. 5. That since its organization, the Diamond Rubber Co., described in Paragraph 3 hereof, has marketed its products in containers upon which were placed labels in which the word "Diamond" was featured, and respondent, since its organization, as a means of enabling or assisting it to pass off its products as and for the products of said Diamond Rubber Co., has marketed its products in containers upon which were placed labels which also featured the word "Dia-

mond," and so closely resembling the labels of the Diamond Rubber Co. in typographical arrangement, color scheme, general appearance and design as to cause confusion in the trade; that the use by respondent of the labels as aforesaid, was calculated to and does mislead and deceive the purchasing public and purchasers are thereby deceived and induced to purchase respondent's products under the mistaken belief that they are the products of said Diamond Rubber Company.

PAR. 6. That by reason of the facts recited, the respondent is using an unfair method of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an Act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, Diamond Holfast Rubber Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said Act.

The respondent having entered its appearance by its attorneys and filed its answer herein, hearings were had and evidence was thereupon introduced in support of the allegations of said complaint and on behalf of the respondent before Warren R. Choate, an examiner of the Federal Trade Commission theretofore duly appointed.

And thereupon this proceeding came on for final hearing and counsel having submitted briefs and the Commission having duly considered the record and being now fully advised in the premises, makes this its findings as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent is a corporation organized under the laws of the State of Georgia, with its principal place of business at 33 Auburn Avenue, Atlanta, Ga. It was originally incorporated under the name of Diamond Holfast Patch Company, October 27, 1916. On January 20, 1919, the charter was amended and the name changed to Diamond Holfast Rubber Co.

PAR. 2. Respondent is engaged in the business of manufacturing and selling automobile accessories and repair material, including fan belts, friction tape, patches, cement and inner tubes, and causes such commodities sold by it to be transported to the purchasers thereof, from the State of Georgia, through and into other states in

the United States, and carries on such business in direct and active competition with other persons, partnerships and corporations similarly engaged.

PAR. 3. On June 6, 1912, The B. F. Goodrich Co., a corporation organized under the laws of the State of New York May 1, 1912, acquired the physical assets, patents, copyrights, trademarks, trade names and good will of The Diamond Rubber Co., a corporation organized under the laws of the State of Ohio, November 6, 1905, said physical assets including a rubber factory and equipment therefor located at Akron, Ohio, and from the time of such acquisition continued the business of said The Diamond Rubber Co., as its successor, using the same factory, equipment, names, marks and labels. To facilitate the sale of Diamond products and keep them separate and distinct from the Goodrich products The Diamond Rubber Co. was incorporated under the laws of the State of New York, April 25, 1917, as a subsidiary corporation of The B. F. Goodrich Co. Since the incorporation of said subsidiary the Diamond line of goods has been sold through it.

PAR. 4. Long prior to the organization of respondent corporation, or its predecessor, Diamond Holfast Patch Co., the general rubber business of The Diamond Rubber Co., including automobile tires, inner tubes and accessories, had been advertised at large expense and had been extended in large volume into all parts of the United States, and the word "Diamond" and the name "The Diamond Rubber Co." had become identified in the public mind with such goods made in The Diamond Rubber Company factories at Akron, Ohio, having been used as the business name and on the goods of that company and its predecessors since 1898. In the years from 1915 to 1920 inclusive, a sum exceeding $1,714,000 was spent in advertising The Diamond Rubber Co.'s tires and automobile accessories, and the business in these goods for that period exceeded $72,000,000.

The Diamond Rubber Co. maintains a branch at Atlanta, Ga., through which branch the Diamond products are distributed throughout a district comprising eight states, from Virginia to Texas. The business in The Diamond Rubber Co.'s tires, tubes and accessories in the Atlanta district for the period from 1917 to 1921 were approximately $6,000,000. Respondent's sales are principally in this territory.

The word "Diamond" and also a mark which prominently includes two diamond-shaped figures inclosing letters D were registered in the United States Patent Office in 1907, by The Diamond Rubber Co., of Ohio, as trademarks for rubber vehicle tires. Respondent has no registered trademarks or labels.

PAR. 5. The use of the word "Diamond" as a part of the corporate name of respondent has caused confusion with the name of The Diamond Rubber Co., in that letters intended for Diamond Holfast Rubber Co. frequently have been sent in the mails addressed to The Diamond Rubber Co. and delivered to that company; in that goods have been shipped to The Diamond Rubber Co., and so addressed, that were intended for the respondent company; in that state officials have mailed matter to The Diamond Rubber Co. intending the mail matter to be sent to Diamond Holfast Rubber Co.; and in that a garage owner at Tuscumbia, Ala., being visited by a salesman of respondent, purchased a bill of goods from him under the impression that they were goods of The Diamond Rubber Co.

On a number of occasions and in different retail stores in Atlanta where respondent's goods are sold, requests have been made for the purchase of "Diamond" products, such as inner tubes, patching rubber and cement, and such requests have been complied with by delivering the products of the respondent company, Diamond Holfast Rubber Co.

PAR. 6. Since 1916 the respondent and its predecessor have intentionally and extensively imitated the "Diamond" packages, brands and labels. This imitation includes the use by respondent on its goods and packages of the figure of a diamond with the word "Diamond" placed therein, a device of this character having been used from an earlier time on The Diamond Rubber Co. goods; of labels having parallel stripes of contrasting colors, in combination with the word "Diamond," such a combination having been used from an earlier time on the Diamond goods; and of labels including such word and having borders consisting of chains of diamond-shaped figures with the word "Diamond" spelled out by letters placed one in each diamond, a feature of the Diamond accessory labels being a field, and in some instances a single chain, of diamond-shaped figures with the word "Diamond" so spelled out therein.

PAR. 7. The use of the word "Diamond" as a part of the corporate name of respondent and upon the goods sold by it and upon the containers thereof, and the similarity of respondent's labels to those used from an earlier time upon the "Diamond" goods has made possible and has resulted in the sale to ultimate purchasers of respondent's goods as goods of The Diamond Rubber Co.

PAR. 8. The Diamond Rubber Co. notified respondent on May 29, 1920, that "the use of the word 'Diamond' in any form or combination on rubber goods and particularly as used by you on tire accessories is a clear infringement of our trademark rights and must be

stopped." Respondent thereafter continued to use the word "Diamond" as a part of its corporate name and upon goods sold by it and to use labels so similar to those of The Diamond Rubber Co. as to be likely to be confused therewith.

PAR. 9. Respondent's president has at various times given his name as "Dimond" and "Diamond," having in 1906 signed his application for naturalization as "Dimond," having so signed it on January 19, 1915, to a petition to be declared a bankrupt, and on February 28, 1916, to an application for registration of a motor vehicle, and having obtained life insurance policies applied for on May 23, 1917, under that name, which policies later he had changed to the name of "Diamond." It has not been proven to the satisfaction of the Commission that either the name "Dimond" or "Diamond" is the legal surname of respondent's president.

PAR. 10. In an advertising circular sponsored by respondent company promoting its sale of stock it is stated, "Mr. Diamond is a genius. He was educated in the best technical schools in Europe, specializing in the rubber industry. Later he engaged in research work with several big companies in Ohio, the center of this industry. There he absorbed all the practical methods of manufacture and marketing rubber goods." These are not facts and are false and misleading. He never "attended any technical schools in Europe, specializing in the rubber industry." He was born at sea on a vessel plying between Russian Poland and France in the year 1886. The first three years of his life he spent in France and then he went to Poland and left there at nine years of age. Then he went to England, then back to France, then to Germany, then to Austria, living in each country for periods and times indefinite and unascertainable. He ran away from home at about the age of 14 or 15 years, and came to the United States in 1903, at the age of 17 years. He never engaged in research work with any big rubber company in Ohio. He was employed as a common laborer a short and indefinite time in a factory in Akron, the name of which he could not remember.

Since coming to the United States in 1903, respondent's president was "off and on in New York City for about seven years." It is not possible to find from the record what his occupations were for these seven years. Thereafter he engaged in various lines of activity beginning in Atlanta in 1910. In 1911 he bought a soda fountain business, operated it for two or three months and sold it and entered the optical business, which lasted a few months. He then entered

the tailoring business, which went into bankruptcy. Then he established a grocery business for a period of 18 or 19 months, when he went into bankruptcy again in 1915. Then after a short period unaccounted for, he operated a few jitney cars for five or six months. Then about the close of 1915 he went into business with his brother-in-law selling an automobile accessory called Everloc Patches. This lasted but a short while, a few months, and he sold out to his brother-in-law, and in the bill of sale agreed not to sell Everloc Patches in the States of Georgia and Tennessee or "Any other patch in these two states." The sale took place in June, 1916.

After the signing of said agreement, respondent's present president adopted the name Diamond Holfast Patch Company, secured the same location of business from which his brother-in-law had removed the former partnership business, adopted labels and circulars in which were copied illustrations and the major part of the text, as well as the general design, of labels and circulars previously used in the partnership business in which he had sold his interest under the terms of the contract above mentioned, and shortly thereafter incorporated Diamond Holfast Patch Co., respondent's predecessor, as stated in Paragraph 1 hereof.

The facts showing the steps from this point on to the time of filing the complaint in this cause appear in other paragraphs of these findings of fact heretofore set forth. A bill of equity was filed against Diamond in the Superior Court, County of Fulton, State of Georgia, by C. Chomsky, to whom the rights under previous agreements had been transferred, praying for an injunction to prevent the sale of patches in imitation of Everloc Patches. Apparently, this bill was not pushed and arbitration was entered into in lieu thereof and under it an award was made permitting Diamond to manufacture patches but not to personally travel in the two States of Georgia and Tennessee to sell them. This was the result of the difficulties existing between Chomsky and Diamond and in no way was The Diamond Rubber Company a party to this dispute.

CONCLUSION.

The practices of the said respondent under the conditions and circumstances described in the foregoing findings are unfair methods of competition in interstate commerce and constitute a violation of the Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes."

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, the testimony and evidence and the briefs of counsel and the Commission having made its findings as to the facts, with its conclusion that the respondent has violated the provisions of the Act of Congress approved September 26, 1914, entitled: "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It is now ordered, That the respondent Diamond Holfast Rubber Co., its officers and agents, cease and desist from using, as a part of the corporate name of respondent, the word D-I-A-M-O-N-D or any word or combination of words likely to be confused with the name of The Diamond Rubber Co.; from using the word D-I-A-M-O-N-D or the figure of a diamond, or any symbol or mark likely to be confused therewith, upon or in connection with the sale of rubber goods; and from directly or indirectly suggesting, by the use of a word, mark or label or otherwise, that goods of respondent are goods of The Diamond Rubber Co.

And it is further ordered, That said respondent shall file within sixty (60) days from the date of service of this order, a report with the Commission setting forth in detail the manner and form in which it has complied with the order of the Commission herein set forth.