

Complaint.

FEDERAL TRADE COMMISSION

v.

PHILLIPS BROTHERS & COMPANY.

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

Docket 777—March 6, 1922.

SYLLABUS.

Where the surname of a manufacturer of sausage who began business in 1859 had become so well known in the trade as the brand name of the product of such manufacturer and his successors in business that it denoted the product of such manufacturer and his successors, and such surname had acquired a secondary significance and such product had acquired a widespread and valuable reputation; and thereafter, in 1920, grandsons of the original manufacturer, who had the same surname, organized a corporation which began to compete with the successors to such original manufacturer, and marketed its product under labels or wrappers which closely resembled in general appearance those used by the successors to the original manufacturer, and in which the surname of the original manufacturer was featured, with the result that there was confusion in the trade, and retail dealers were able to and did palm off the product of the later manufacturer as and for the product of the successors to the first manufacturer:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

COMPLAINT.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that Phillips Brothers & Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce, 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 on or about September 21, 1920, under the laws of the District of Columbia, with principal place of business at Washington, in said District.

PAR. 2. That respondent, since October 1, 1920, has been engaged in the business of manufacturing and selling to the retail trade, hotels and restaurants in the District of Columbia, sausage and other pork products, and has carried on such business in direct,

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active competition with other persons, partnerships and corporations similarly engaged.

PAR. 3. That in 1859 there was established in the District of Columbia, by one Thomas W. Phillips, a business consisting of the manufacture and sale of pork sausage; that in 1885 Joseph Phillips, a son of said Thomas W. Phillips, became a partner in said business with said Thomas W. Phillips, which partnership continued until 1892, when said Thomas W. Phillips died, leaving as his sole heir said Joseph Phillips, who thereafter succeeded to the interest of the said Thomas W. Phillips in the property and business of said partnership, and said business was thereafter conducted by said Joseph Phillips, as the sole owner, until 1910, when said Joseph Phillips leased the said property and business to Fred A. Spicer and Charles H. Leavell, and gave them licenses to use all secret formulas for the manufacturing of pork sausage which had been owned by said Joseph Phillips, upon a stated annual rental and royalties, and said business has since been conducted by said Fred A. Spicer and Charles H. Leavell as partners, under the name and style of Jos. Phillips Co., who together with the former proprietors of said business have built up an extensive business in the sale of pork sausage, which product, for a great number of years prior to the organization of respondent, became well-known to the consuming public, and continued to be, and still is, so known.

PAR. 4. That respondent since its organization has marketed its product in packages, upon the wrappers of which appear the words "PHILLIPS All Pork OLD TIME Sausage, manufactured by Phillips Bros. & Co., 705 North Capitol Street, Washington, D. C. Net weight one pound.", with the words "Phillips" and "Old Time" in large display type, while the Joseph Phillips Company, described in Paragraph Three hereof and its predecessor, have marketed their product, since 1892, in packages, on the labels of which appear the words "Ask for JOS. PHILLIPS, manufacturer of the ORIGINAL All Pork Sausage, 1 lb. net, Washington, D. C.", with the words "Jos. Phillips" and "original" in large display type.

PAR. 5. That the adoption and use by respondent of the words "Phillips" and "Old Time" on the labels under which respondent markets its product, and the resulting resemblances in size, style of type, typographical arrangement and general appearance between respondent's labels and those of the Jos. Phillips Co., described in Paragraph Three hereof, was calculated to, and does mislead and deceive the consuming public, and enables the respondent and the retail dealers handling its said product to pass same off as and for the product of said Jos. Phillips Co., and the public has been induced

by such similarity in the labels to purchase respondent's product, under the mistaken belief that it was the product of said Joseph Phillips 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, Phillips Brothers & Company, 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, thereupon witnesses were examined and evidence received in support of the allegations of said complaint and on behalf of the respondent, before Edward M. Averill, an Examiner of the Federal Trade Commission, theretofore duly appointed, and the testimony so taken was reduced to writing and filed in the office of the Commission, whereupon the proceeding came on for final hearing by said Commission, and it having duly considered the complaint, the answer thereto, the evidence adduced and printed briefs, and being fully advised in the premises, and being of the opinion that the method of competition in question is prohibited by said Act, makes this its report, stating its findings as to the facts:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent, Phillips Brothers & Company, is a corporation, organized under the laws of the District of Columbia on or about September 21, 1920, with place of business in Washington, in said District.

PAR. 2. On or about October 1, 1920, Phillips Brothers & Company began to manufacture and sell in the District of Columbia, sausage and other pork products, selling to retail dealers, hotels and restaurants, the products of their manufacture in direct, active competition with other persons, partnerships and corporations similarly engaged.

PAR. 3. Prior to the outbreak of the Civil War, namely, about 1859, one Thomas W. Phillips, a resident of the District of Columbia, established in the said District a business of manufacturing and selling pork sausage, manufacturing said sausage under a secret

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formula known only to himself. The sausage so made was of superior quality and acquired, under the name and appellation of "Phillips' Sausage," a favorable and extensive reputation for excellence in the District of Columbia. About the year 1885, the health of the said Thomas W. Phillips became seriously impaired and his son Joseph Phillips, who had for years worked in the sausage manufactory with his father, took over the active management of, and continued to carry on, the business, Joseph Phillips then being about forty-four years of age. In the year 1892, Thomas W. Phillips died leaving, by will, to his daughter, Sarah MacQueen, a certain brick house in the District of Columbia and to his son, Joseph Phillips, all the rest and residue of his estate, real, personal and mixed.

PAR. 4. Thereafter Joseph Phillips, in his own name, continued to carry on the said business, manufacturing and selling the same sausage, sustaining and extending the business in and the good will and reputation of, the "Phillips' Sausage" until about the year 1910, when by contract an interest in the business was acquired by Fred A. Spicer and Charles H. Leavell and thereafter was carried on under the name of Joseph Phillips Company; and under successive contracts and agreements between Joseph Phillips on the one part and Fred A. Spicer and Charles H. Leavell on the other, is so carried on at this time. Joseph Phillips is now 80 years of age and physically incapable of taking an active part in the business, but in accordance with the secret formula and under his directions he causes to be prepared the seasoning which enters into the manufacture of the "Phillips Sausage" and for such seasoning and right to use his name and the good will acquired by over 50 years of uninterrupted manufacture and sale of the "Phillips' Sausage" Joseph Phillips has received in royalties, by the terms of the last contract, the sum of Twenty Thousand Dollars.

PAR. 5. The sausage, so manufactured and sold by Joseph Phillips Company, is put up in packages of one pound each with a wrapper reading:

Ask for
JOSEPH PHILLIPS
Manufacturer of
THE ORIGINAL
All Pork Sausage

The volume of the sale of such sausage has increased in the past 20 years from 4,000 pounds per week to 14,000 pounds per week for the season beginning October 1 of each year and ending on March 31 of the following year. Over half the retail dealers and half the hotels and restaurants have it on sale regularly. The consuming

public, in the District of Columbia, knew the sausage as manufactured and sold first by Thomas W. Phillips and later by his son, Joseph Phillips, as "Phillips' Sausage," asked for it at their dealers' by the name "Phillips' Sausage" and associated that name with the particular brand of sausage put up by Joseph Phillips and later by Joseph Phillips Company.

PAR. 6. Joseph Phillips had several sons, among them being Thomas C. Phillips and Harry M. Phillips, both of whom as boys worked in the sausage factory of their father. About the year 1891, owing to a disagreement with the father, Thomas C. Phillips left the employ of Joseph Phillips and started a sausage and pork-products business upon his own account in the District of Columbia and about the year 1894 entered into a partnership with one Joseph Henning; together they conducted the aforesaid business until the year 1904 when Thomas C. Phillips withdrew from said partnership and discontinued the manufacture or sale of sausage, engaging in the smoked meat business until about the year 1915, at which time he became engaged in an entirely different line of business. For 17 years prior to October 1, 1920, Thomas C. Phillips was not engaged in or connected with the manufacture or sale of sausage in any way.

Harry M. Phillips, while quite young, left his father and entered the employ of his brother Thomas C. Phillips, remaining in the sausage business between three to five years, after which he left the business and for 15 years prior to October 1, 1920, had not been engaged in any way with the sausage business.

PAR. 7. Between the years 1894 and 1904, Thomas C. Phillips and Joseph Henning, trading as Phillips & Henning, manufactured and sold in the District of Columbia a sausage put out as the "Thomas C. Phillips Sausage," made under a formula alleged to have been given by Thomas W. Phillips to his daughter, Sarah MacQueen, and by her given to her brother, Thomas C. Phillips, and upon the dissolution of the partnership aforesaid, Thomas C. Phillips transferred such rights, title, and interest as he had in such formula and the right to use the name "Thomas C. Phillips" to Joseph Henning, and since the year 1904 Joseph Henning, and after his death his widow and son, have continued uninterruptedly to manufacture and sell, and are now manufacturing and selling, in the District of Columbia, a sausage which is described on the wrapper of each package as

Phillips Genuine
T all pork C
HOME MADE SAUSAGE
P Company
Made and Prepared by
THOMAS C. PHILLIPS

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Upon this label there is, in red ink, the figure of a hog. This brand of sausage is known in the District of Columbia, but not to such an extent as the Joseph Phillips original sausage.

PAR. 8. In October, 1920, Thomas C. Phillips and Harry M. Phillips, in association with others, reentered upon the business of manufacturing and selling sausage in the District of Columbia, this time conducting business as a corporation under the name and style of Phillips Brothers & Company, putting the sausage manufactured by them up in packages bearing the label

PHILLIPS
All Pork
OLD TIME SAUSAGE
Manufactured by
Phillips Brothers & Company

and engaged in quite an extensive advertising campaign in the newspapers, published and circulated in the District of Columbia. Said advertisements contain, among others, the following statements:

"The flavor of plantation days. PHILLIPS OLD TIME SAUSAGE has just that flavor. The family will be quick to appreciate its full, fresh flavor and superb quality. Beware of substitutes. Always say: PHILLIPS OLD TIME, made by Phillips Brothers & Company."

"PHILLIPS 'OLD TIME' and what it means to you. Whenever you see 'OLD TIME' on a Phillips Sausage wrapper you know that the pork from which it is made is of the choicest quality, and that it has been prepared with the utmost care by grandsons of Thomas W. Phillips, who made Phillips Sausage famous in this City way back in 1860. Always say PHILLIPS 'OLD TIME.' Phillips Brothers & Company."

"The crowning delightful breakfast, PHILLIPS OLD TIME SAUSAGE. Thomas W. Phillips made it famous way back in 1860. His grandsons are making it now just as their granddad made it then. Accept no substitutes. See that the words 'OLD TIME' appear on the green wrapper. Phillips Brothers & Company."

There were also advertisements inserted in the newspapers in the District of Columbia, put out by customers of the respondent, and with the knowledge and approval of the respondent, the data for which was furnished by respondent, such advertisements reading:

"PHILLIPS OLD TIME SAUSAGE, famous for quality in 1860, even more so now. The only Phillips Sausage made and prepared by Phillips themselves."

"There is other sausage sold under the name of Phillips' in the City of Washington, but the sausage sold in our stores under the brand 'OLD TIME' is the only Phillips' Sausage made and prepared by the Phillips themselves."

"PHILLIPS 'OLD TIME' SAUSAGE. In 1860 Thomas W. Phillips made and placed on the market in the City of Washington a pure all pork sausage seasoned according to a recipe handed down by his forefathers. This sausage was a superb product and created a demand that he found difficult in those

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days to supply. The same sausage is now made by Phillips Brothers, grandsons of Thomas W. Phillips at 705 North Capitol Street and sold under the brand PHILLIPS 'OLD TIME.'"

The advertisements above referred to were inserted by the Piggly Wiggly.

"Beginning tomorrow all the stores of this company in the District of Columbia will carry in stock Phillips 'OLD TIME' SAUSAGE. Phillips 'OLD TIME' SAUSAGE made and prepared by grandsons of Thomas W. Phillips has the 'OLD TIME' quality and is the identical product made famous in the City of Washington by Thomas W. Phillips as far back as 1860."

This advertisement and similar ones, appeared in both the Washington Post and Times, newspapers published and circulated in the District of Columbia, on December 3, 1920, and were inserted with the knowledge, consent and approval of the respondents by the Great Atlantic & Pacific Tea Company.

PAR. 9. That the adoption and use by respondent of the words "Phillips" and "Old Time," in the labels under which respondent has marketed its product, as hereinbefore set out, and the resemblance of such labels to the labels of the Joseph Phillips Company, herein described, have misled and deceived the consuming public in the District of Columbia to the extent that retail dealers handling respondent's said product in the District of Columbia have been able, because of such labels, to pass off respondent's said product as and for the product of the Joseph Phillips Company; that by the use of such labels a substantial portion of the public in the District of Columbia has been induced to purchase respondent's said product under the mistaken belief that it was the product of the Joseph Phillips Company.

CONCLUSION.

That the practices of the 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 provisions of Section 5 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 printed briefs of counsel, and the Commission being of the opinion that the method of competition in question is prohibited by the Act of Congress approved Sep-

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tember 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and having made its report in which it stated its findings as to the facts, with its conclusion that the respondent has violated the provisions of said Act,

It is therefore ordered, That the respondent, Phillips Brothers Company, its officers, directors, agents, representatives and employees, cease and desist from directly or indirectly:

(1) Marketing in the District of Columbia, through retail dealers or by other means, sausage, upon the containers of which are placed wrappers or labels containing a description or brand name of such sausage, which description or brand name includes the words "Phillips" and "Old Time," or the word "Phillips" alone or in combination with other words.

(2) Using upon the containers of sausage marketed by it in the District of Columbia, through retail dealers or by other means, labels, or wrappers which closely resemble in style of type, typographic arrangement, color of ink, or general appearance, the labels or wrappers under which sausage manufactured by the Joseph Phillips Company is marketed in the District of Columbia.

It is further ordered, That respondent, Phillips Brothers & Company, shall within thirty (30) days after the service upon them of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist hereinbefore set forth.

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A. LISNER, TRADING UNDER THE NAME AND STYLE
OF PALAIS ROYAL.