

Complaint.

FEDERAL TRADE COMMISSION

v.

MORRIS ERRERA.

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

Docket 983—March 5, 1924.

SYLLABUS.

Where an individual engaged in the sale of an orange beverage in different stores in the same city, all of which stores had similar signs, letterings, legends, white store fronts, counters, arrangements thereof, and distinctive glasses for the serving of such beverage, for which there had come to be a large and increasing public demand; and thereafter a competitor caused his signs, letterings, legends and store fronts to be made to correspond with those of such individual, and also his counters, arrangements thereof, and glasses; with the result that persons were misled into entering said competitor's stores as and for those of such individual, and purchasing the orange beverage there sold by him as and for that of said individual: *Held*, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. Thomas H. Baker, jr., for the Commission.

Mr. P. H. Marshall, of Bell, Marshall & Rice of Washington, D. C., for respondent.

COMPLAINT.

Acting in the public interest pursuant to the provisions 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," the Federal Trade Commission charges that Morris Errera, hereinafter referred to as the respondent, has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH. 1. Respondent is engaged in the business of operating a retail store at No. 439 9th St. N. W., in the District of Columbia, where he sells confectionery, soft drinks, cigars, tobacco and other similar commodities to the consuming and purchasing public, and said respondent has for more than one year last past carried on said business in direct, active competition with other individuals, partnerships and corporations in the District of Columbia similarly engaged.

PAR. 2. For a period of more than five years last past one Carroll H. Dikeman has been engaged, in the District of Columbia, in the business of operating a chain of retail stores known as Dikeman's Orange Beverage Stores, and at present located respectively at 431

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9th St. N. W., 719 14th St. N. W., 1004 F St. N. W., 3034 14th St. N. W., and 931 9th St. N. W., at which stores said Dikeman has, during said period, sold and now sells an orange beverage known as "Dikeman's Orange Beverage" to the consuming and purchasing public in direct, active competition with other individuals, partnerships and corporations in the District of Columbia, including said respondent.

PAR. 3. All of said stores operated by said Dikeman, as aforesaid, have the same distinctive exterior appearance consisting of a white painted store front and on either side of the entrance distinctive signs bearing the legend "Dikeman's Delicious Orange Beverage, 5¢" in gilt lettering on a white background and bearing at the top the representation of a cluster of oranges, the whole being surrounded by a thin blue border. Said distinctive signs displayed by said Dikeman at his said stores, together with the general appearance of the store fronts have become well known to the people of the District of Columbia and have become associated exclusively with said Dikeman's said establishments, and the orange beverage sold and dispensed at said establishments by said Dikeman has acquired a wide and favorable reputation and good will among the consuming and purchasing public of said District, of which facts the respondent herein had full knowledge.

PAR. 4. After the establishment of said Dikeman's orange beverage stores, as aforesaid, respondent adopted for his said store located at 435 9th St. N. W., in the District of Columbia, on the same side of the street as one of said Dikeman's 9th street stores, and two doors north of the same, in the District of Columbia, a store front painted white and arranged in substantially the same manner as the store of said Dikeman, and respondent installed at the entrance of said store a sign on which the words "California Orange Beverage, 5¢" were painted in gilt lettering on a white background, the whole being surrounded with a thin dull colored border, which sign simulated the said signs used by said Dikeman on his said stores, both in size, shape, coloration, general appearance, and principal legend (omitting the name Dikeman), which store front and sign, together with the general appearance and aspect of said store had and have the capacity and tendency to mislead and deceive, and has in fact misled and deceived a portion of the consuming and purchasing public of said District, into the mistaken belief that respondent's said store was and is one of said Dikeman's chain of stores, and that a beverage sold and dispensed by respondent therein was and is said Dikeman's orange beverage, all to the prejudice of the public and of said respondent's said competitors.

PAR. 5. The above acts and conduct of respondent, under the aforesaid circumstances, constitute unfair methods 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 its complaint upon respondent, Morris Errera, charging him with the use of unfair methods of competition in commerce, in violation of the provisions of said Act.

Respondent having entered his appearance by his attorney and having filed his answer herein, thereupon, hearings were had before an examiner of the Federal Trade Commission theretofore duly appointed, and testimony and documentary evidence were thereupon offered and received in support of the allegations of said complaint and in support of the allegations of said answer of respondent; thereupon this proceeding came on for final hearing, and the Commission being duly advised in the premises, and upon consideration thereof, makes this its findings as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. That respondent, Morris Errera, has been for over five years last past and is now engaged in the business of operating a retail store at 435 Ninth Street N. W., in the City of Washington, District of Columbia, wherein during all of said time he sold and now sells confectionery, soft drinks, including orangeade, cigars and other similar commodities, to the general public, and in the conduct of such business he was during all of said time and is now in direct and active competition with other individuals, partnerships and corporations similarly engaged in the District of Columbia, and more particularly with Carrol H. Dikeman; that after the Federal Trade Commission filed its complaint herein the said respondent opened up a second retail store at No. 3318 Fourteenth Street, in said City and District, at which he has ever since also sold and now sells orange beverage in competition, as above described, with said Dikeman.

PAR. 2. That Carroll H. Dikeman has been engaged ever since 1916 and is now engaged, in the City of Washington, District of Columbia, in the business of operating a chain of retail stores known as

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Dikeman's Orange Beverage Stores. The first of such stores was opened by said Dikeman at 431 Ninth Street N. W., in said District. From time to time he opened other stores in addition, in said District. They were and are located at 719 Fourteenth Street N. W., 1004 F Street N. W., 1338 F Street N. W., 3034 Fourteenth Street N. W., and 655 Pennsylvania Ave. S. E. At all of these stores since they have been established said Dikeman has sold and now sells an orange beverage known as "Dikeman's Orange Beverage," to the general public in direct and active competition with other individuals, partnerships and corporations similarly engaged in the District of Columbia, including said respondent.

PAR. 3. That the store fronts of the respondent's places of business, particularly the one at said No. 435 Ninth Street N. W., Washington, D. C., two doors from the Ninth Street store of said Dikeman, were made by said Errera to correspond as nearly as possible with the stores of said Dikeman ever since Errera began business. Consequently, the store fronts of the respondent's places have, ever since, been practically identical in construction and appearance with those of said Dikeman.

PAR. 4. That the store fronts of both during all of the said times consisted and do now consist of a right hand and a left hand set of triple folding doors. Each door in the sets was and is now divided into two light panels, the top panel being about one-half the height of the lower panel, and each set was made to fold back. Thus folded back the store front is entirely open. Across the entire store front of each store and above the folding doors there was and is a transom bar, running up from which are two mullions which divide the transom into three transom lights. Upon the upper part of each of the two mullions a round white glass electric light globe was fastened. Three months before the date of the hearing in this case said Dikeman in an effort to differentiate somewhat his stores from those of the respondent substituted oval light globes in place of the round ones which he has had there for the past seven years. The whole of the store fronts of each of the parties including the folding doors, the transom bar, the two mullions and the two door jambs, with the exception of the hardware, and the door and transom panes are painted white. (Respondent's Exhibits Nos. 1, 2; and Commission's Exhibits Nos. 3, 4, 5, 6—Tr. pp. 14, 21, 94.)¹

PAR. 5. That ever since the establishment of said Dikeman's stores in 1916, there has been and is now upon each door jamb a sign designed by Dikeman himself in that year. There was no other sign like it in Washington. This design (Commission's Exhib. No. 2)¹

¹ Not published.

was given by Dikeman at that time to James L. Hale, a Washington sign painter, doing business as "The Willis Sign Company," with directions to Hale to use it in painting said Dikeman's signs. This style of sign has been used continuously by him on his store fronts ever since. No change has been made in the coloring or appearance during its use.

PAR. 6. That until he began selling orange beverage and on or about July, 1922, the respondent had black signs upon his store fronts. He then engaged said Hale to make, in the words of Hale, "a couple of signs similar to Dikeman's." (Tr. p. 45.) Under those instructions Hale designed for the respondent Commission's Exhibit No. 1. Respondent instructed Hale to "put oranges at the top," but Hale refused to go that far in making a likeness of Dikeman's design (Tr. p. 48). Thereafter Hale painted signs for the respondent after the design of Commission's Exhibit No. 1. These were placed by respondent upon his Ninth Street store and other places of business and have been there ever since.

PAR. 7. That the signs of both the respondent and Dikeman may be described as follows: Each was and is identical in form and about two feet wide and six feet high. They were and are of rounded convex shape and are placed on the entrance door jambs. The bottom of each sign is at about two feet from the sidewalk. Each sign is painted white and has the same narrow blue border. Upon the lower half of each and beginning just below the middle of the sign are the words "ORANGE BEVERAGE," descriptive of the article offered for sale. This word "ORANGE" on each sign is of large Egyptian gilt upper case letters of the same size. The word "BEVERAGE" is also of Egyptian gilt upper case letters of slightly smaller size than those in the word "ORANGE." Below the words "ORANGE BEVERAGE" on each is a large figure 5 in Arabic style of the same form and size, at the upper right of which and a little at one side is the usual symbol of ¢ abbreviation for the word "cents." Above the words "ORANGE BEVERAGE" there appears in the sign of the respondent the word "California" in gilt lower case instead of the words "Dikeman's Delicious" appearing in said Dikeman's sign. In respect to the words the respondent's signs are identical in size, style, color and case to the words in said Dikeman's signs. The upper half of the signs of both respondent and said Dikeman consist of an insignificant gilt decoration topped in the respondent's sign by an oval field of blue upon which is painted a glass of orangeade and topped in Dikeman's sign by a round blue field upon which is painted a twig of two oranges with foliage.

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PAR. 8. That at the time of the opening of each of said stores during the past seven years the said Dikeman placed therein, and has ever since maintained in each, a white marble counter over which he served his orange beverage. These counters were always placed on the right hand side in each store. Into the tops of these counters were sunk white china beverage containers with white metal covers. From these containers his orange beverage has at all times been served in thin, clear, five inch high glasses, slender in the middle and flaring out at the top and bottom.

PAR. 9. That when on or about July, 1922, the respondent opened up his store in Ninth Street, and later on when he opened up his store in Fourteenth Street, he too placed on the right-hand side of each store a white marble counter very similar to those of the said Dikeman. Into the tops of these, following the example set by said Dikeman, he also sank white china beverage containers with white metal covers and from these containers he at all times has served his orange beverage in thin, clear five inch glasses that faithfully imitate the slender waist and the flaring top and bottom of the style used by said Dikeman.

PAR. 10. That from time to time, previous to the issuance of the complaint herein, and since July, 1922, when the respondent began to sell orange beverage, several persons, while looking for said Dikeman's places of business, to purchase his orange beverage, and for other purposes, were misled by said similarity of said respondent's stores and signs to those of said Dikeman, and by reason of such deception were induced to enter into the said respondent's stores instead of said Dikeman's. And some of these thereupon purchased the orange beverage of the respondent believing the same to be that of said Dikeman's.

PAR. 11. That by reason of the quality, taste and excellence of the said Dikeman's orange beverage made by said Dikeman he has at all times enjoyed and now enjoys a large and increasing public demand for the same. This business has increased from one to three gallons a day in 1916 to about 1,200 gallons a day at the time of the hearing herein.

PAR. 12. That in connection with the sale by the respondent of a beverage practically identical in appearance, taste and composition, of that sold by Dikeman, the store fronts, the signs, doors, counters, beverage containers and serving glasses of the respondent's places of business so closely resembled in construction, material, form, size, design, decoration, color, arrangement and general appearance those of the said Dikeman that they had and have now the capacity and tendency to deceive and in many instances have deceived the general public.

Order.

CONCLUSION.

That the above practices of said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in commerce and constitute a violation 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, answer of the respondent and testimony heretofore taken, and the Commission having made its findings as to the facts and its conclusion that respondent has violated the provisions 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,"

It is now ordered, That respondent, Morris Errera, his agents, representatives, servants and employees do cease and desist from simulating the signs, letterings, legend and store front in color, size, shape, design and general appearance of the chain of stores of Carroll H. Dikeman.

It is further ordered, That respondent, Morris Errera, shall within sixty (60) days after the service upon him 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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