

Complaint.

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IN THE MATTER OF
THE SMITH-KIRK CANDY COMPANY

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

Docket 1061—July 29, 1924.

SYLLABUS.

Where manufacturers of ice cream and other confections, made a confection consisting of a bar of ice cream coated with chocolate, and sold the same to retail dealers and to the public under names suggestive of the ice cream content thereof and there had come to be a large and growing demand for such confection; and thereafter a competitor engaged in the sale of bars of candy, coated with chocolate, which were approximately the same shape and size as the aforesaid confection, but contained no ice cream, sold said bars packed in wrappers bearing the inscription, " * * * Chocolate Ice Cream Bar * * *," together with the picture of a child holding in its hand an ice cream cone, and later packed in wrappers bearing the legend " * * * The All Candy Ice Cream Style Confection * * *," together with a picture as above described, with the effect of deceiving and misleading the public into believing that said candy or confection was composed in whole or in part of ice cream: Held, That such misbranding or mislabeling, under the circumstances set forth, constituted an unfair method of competition.

Mr. Edward E. Reardon for the Commission.

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 the Smith-Kirk Candy 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 said Act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Ohio with its principal place of business in the city of Toledo in said State. It is engaged in the manufacture of confectionery and the sale thereof to wholesale and retail dealers located at points in various States of the United States. It causes said confectionery when so sold to be transported from its said principal place of business in the city of Toledo, Ohio, into and through other States of the United States to said purchasers at their respective points of location.

PAR. 2. There are a number of manufacturers of ice cream and other confections in the United States who make a confection consisting of a bar of ice cream coated with chocolate, and who sell said confection to retail dealers and to the public under names suggestive of the ice cream content of said confection, such as the names "Eskimo Pie," "Polar Cake Ice Cream," and "Guernsey Alaska Bars." Said manufacturers of said confections are located in various States of the United States and in many instances sell the same to dealers and other customers located in States other than the State wherein said manufacturers are located. They cause said confections when so sold to be transported from their respective factories and places of business into other States to said purchasers at their respective points of location.

PAR. 3. Aforesaid confections containing ice cream have become and now are highly popular among the consuming public throughout the United States, and there is a large demand for said confections among the public. Respondent, in order to take advantage of and profit by said popularity and demand for ice cream as a confection, refreshment, or food and the demand for the aforesaid confections, referred to in paragraph 2 hereof, consisting of bars of ice cream coated with chocolate, sold as aforesaid under various names suggestive of a content principally of ice cream and popularly known to be of ice cream with a chocolate covering or casing, on or about May 5, 1922, and for a considerable period prior thereto, manufactured, sold and supplied to the said purchasers referred to in paragraph 1 hereof, bars of candy, coated with chocolate, being of a shape and size approximately of the shape and size of the said confections referred to in paragraph 2 hereof, and packed in containers or wrappers bearing the inscription or legend "Smith-Kirk, Toledo, Chocolate Ice Cream Bar, Net Weight 1¼ oz. The Smith-Kirk Candy Co. Toledo, Ohio," and bearing thereon in addition to the said inscription or legend the picture or illustration of a child holding in its hand a picture or illustration of what is commonly known as an ice cream cone containing ice cream. Respondent's said bars of candy sold as aforesaid in said containers or wrappers, inscribed and illustrated as aforesaid contained nothing of what is known as ice cream.

That on and after May 22, 1922, the respondent manufactured, sold and supplied and now continues to manufacture, sell and supply to its aforesaid purchasers its aforesaid bars of candy, coated with chocolate and of the size and shape heretofore described, in containers or wrappers bearing the inscription or legend, "Smith-Kirk, Toledo. The All Candy Ice Cream Style Confection, Net

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Weight $1\frac{1}{2}$ oz. The Smith-Kirk Candy Co., Toledo, Ohio," and bearing thereon in addition to the said inscription or legend, the picture or illustration of a child, holding in its hand a picture or illustration of what is commonly known as an ice cream cone containing ice cream. Respondent's said bars of candy sold as aforesaid, and still being so sold contained and continue to contain nothing of what is known as ice cream.

PAR. 4. The aforesaid inscriptions or legends, pictures or illustrations used by respondent as above set forth in connection with the shape and size of the aforesaid confections containing ice cream all as hereinbefore set out, are false and misleading and have the capacity and tendency to mislead and deceive the public into the belief that respondent's said candy bars are confections containing ice cream, similar to the aforesaid confections of the manufacturers referred to in paragraph 2 hereof, containing ice cream, and to cause the public to purchase respondent's said candy bars in that belief.

Respondent in the sale of said candy bars aforesaid thus was and still is in actual competition with the aforesaid manufacturers, referred to in paragraph 2 hereof in the sale of ice cream or confections composed partly or wholly thereof, as aforesaid.

PAR. 5. The above alleged acts and things done by respondent are all to the prejudice of the public and of aforesaid manufacturers whose confections actually contain ice cream and 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 a complaint upon the respondent, The Smith-Kirk Candy Company, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent not having filed an answer herein and having stipulated and agreed that a statement of facts signed and executed by the respondent and W. H. Fuller, chief counsel for the Federal Trade Commission, subject to the approval of the Commission, are the facts in this proceeding and shall be taken by the Federal Trade Commission as such and in lieu of testimony before the Commission in support of the charges stated in the complaint, or in opposition thereto, and that the said Commission may proceed further upon

said statement of facts, stating its findings as to the facts and conclusion and entering its order disposing of the proceeding.

And, thereupon, this proceeding came on for final hearing and the respondent having waived the filing of briefs and the hearing of oral argument herein before the Commission, 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.

At the time and immediately prior to the issuing of said complaint, the respondent was and still is a corporation organized under the laws of the State of Ohio with its principal place of business in the city of Toledo in said State. It was and still is engaged in the manufacture of confectionery and the sale thereof to wholesale and retail dealers located at points in various States of the United States. It causes said confectionery when so sold to be transported from its said principal place of business in the city of Toledo, Ohio, into and through other States of the United States to said purchasers at their respective points of location.

There are a number of manufacturers of ice cream and other confections in the United States who make a confection consisting of a bar of ice cream coated with chocolate, and who sell said confection to retail dealers and to the public under names suggestive of the ice cream content of said confection. Said manufacturers of said confections are located in various States of the United States and in many instances sell the same to dealers and other customers located in States other than the State wherein said manufacturers are located. They cause said confections when so sold to be transported from their respective factories and places of business into other States to said purchasers at their respective points of location. Since, on or about January, 1922, there has been a large growing demand throughout the United States among the consuming public for said confections with an ice cream content.

Respondent on or about May 5, 1922, and for a considerable period prior thereto manufactured, sold and supplied to the said purchasers referred to herein, bars of candy, coated with chocolate, being of a shape and size approximately of the shape and size of the said confections referred to herein having an ice cream content, packed in wrappers bearing the inscription or legend reading as follows: "Smith-Kirk, Toledo, Chocolate Ice Cream Bar, Net Weight 1¼ ounces. The Smith-Kirk Candy Co. Toledo, Ohio," and bearing thereon in addition to said inscription or legend the

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picture or illustration of a child holding in its hand a picture or illustration of what is commonly known as an ice cream cone containing ice cream. Respondent's said bars of candy sold as aforesaid in said containers or wrappers, inscribed and illustrated as aforesaid contained nothing of what is known as ice cream.

That on or about May 22, 1922, and thereafter, the respondent manufactured, sold and supplied to purchasers referred to above bars of candy, coated with chocolate and of the size and shape heretofore described, having wrappers bearing an inscription or legend as follows: "Smith-Kirk, Toledo. The All Candy Ice Cream Style Confection, Net Weight 1½ ounces. The Smith-Kirk Candy Co., Toledo, Ohio," and bearing thereon in addition to the said inscription or legend, the picture or illustration of a child, holding in its hand a picture or illustration of an ice cream cone containing ice cream. Respondent's said bars of candy sold as aforesaid, contained nothing of what is known as ice cream.

Respondent in the sale of said candy bars aforesaid was in actual competition in interstate commerce with manufacturers of confections having an ice cream content.

Among the other manufacturers who are and have been engaged in the manufacture and sale of candy, candy bars and other confections in interstate commerce in competition with respondent are many who have during the times mentioned and referred to in the complaint sold candy or other confections having no ice cream content and who have not placed upon the wrappers of the same or advertised the said confections or candy as having an ice cream content.

The inscriptions and illustrations above referred to, caused to be printed by respondent on the wrappers of its candy or confections, which have no ice cream content, were misleading, and had the capacity to deceive purchasers of said candy or confections, or some of them, into the belief that the said candy or confections consisted wholly or in some part of an ice cream content, when such was not the fact.

The sale of candy or confections by respondent having no ice cream content, upon the wrappers of which were inscriptions or illustrations representing or suggesting that the said candy or confections were composed either wholly or in part of ice cream, had the tendency to mislead and deceive the public, and did deceive and mislead the public, into believing that the said candy or confections were wholly or in part composed of ice cream.

CONCLUSION.

The practices of the respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in 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, and the stipulation of facts filed herein by the respondent and approved by the Commission, and the Commission having made this its findings of facts and conclusion that the respondent has violated 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."

It is now ordered, That the respondent, The Smith-Kirk Candy Company, its agents, representatives, and employees, do cease and desist from selling, or offering for sale, candy or confections, upon the wrapper or container of which is any inscription or illustration representing or suggesting, directly or indirectly, other than the true composition, of said candy or confection or the true contents within said wrapper, or container.

It is further ordered, That the respondent, The Smith-Kirk Candy Company, shall within sixty days after the service upon it of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

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IN THE MATTER OF
JAMES B. HALL, JR., INCORPORATED.

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

Docket 1137—July 29, 1924.

SYLLABUS.

Where it had long been generally considered that the highest grade of tobacco from which cigars could be made was that grown on the Island of Cuba and known as "Havana Tobacco," and the word "Havana" signified to the trade and consumers cigars composed exclusively of the aforesaid tobacco; and thereafter a corporation engaged at New York City in the manufacture of cigars not composed exclusively of such tobacco, and in the sale thereof direct to the consumer by mail order,

- (a) Branded and labeled said cigars and the containers thereof with such labels and legends as "Hall's Fancy Tales Havana Cigars," "Hall's Havana Coronas," etc., and so characterized the same in its catalogues and advertisements; and
- (b) Represented in its catalogues that the tobacco from which its cigars were manufactured was grown on the Island of Cuba and on its own plantations, with the result that it was thereby enabled through sale direct from factory to consumer to offer the same to the latter at substantially lower prices than ordinarily charged for comparable cigars, when, as a matter of fact, it owned no such plantations, but purchased the Havana tobacco used by it from growers or through brokers representing the same;

With the result that the trade and consumers were misled and deceived in respect of the composition of said cigars, and consumers were misled and deceived into believing that they were securing a substantial saving in cost in the purchase thereof:

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

Mr. Alfred M. Craven for the Commission.

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 James B. Hall, Jr., Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act, issues this complaint and states its charges in that respect as follows: