

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JUNE 12, 1929, TO MAY 4, 1930

IN THE MATTER OF CALUMET BAKING POWDER COMPANY

COMPLAINT (SYNOPSIS), FINDINGS AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 3 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914.

Docket 1127. Complaint, Feb. 26, 1924¹—Decision, June 12, 1929

Where a corporation engaged in the manufacture of baking powder; in promoting the sale of its product through salesmen and demonstrators, who systematically covered and recovered assigned territories in large numbers as required satisfactorily to sustain the sale of the product and thus "demonstrated" whole States,

Employed the so-called cold water glass test of its powder and those of its competitors, before retail and wholesale grocers or dealers and their customers, bakers, chefs, and managers or owners of cafés, restaurants and hotels, department stores and cooking or demonstrating schools, housewives, and the purchasing and consuming public, together with talks, representations, and statements to show and claim the superiority of its said powder over competitive products by reason of its alleged quick and sustained action irrespective of oven and other conditions, as demonstrated by the rising or effervescence of its own product to the top of the glass and beyond, upon the addition of cold or room temperature water thereto, and/or the relative stability of the resulting foaming effervescence, in contrast with results secured from competitive powders, which in either one or both of the foregoing respects fell short, and thereby allegedly indicated corresponding shortcomings of said powders, in being too slow, or fast, or not sustained, in their action, and thus responsible for soggy or fallen bread, biscuits, etc., and unsatisfactory or unwholesome results;

The facts being that the amount of effervescence of the various powders was dependent on the chemical reaction from the particular acids employed and the relative stability of its own mixture was due to inclusion in the product of a small proportion of dried white of egg (to which product said ingredient added nothing in the way of carbon dioxide strength or leavening power or efficiency), action of said powder in the test was in nowise comparable to the action taking place in baking and cooking, the test afforded no criterion whatever as regards size, character or uniformity of

¹ Amended, Nov. 21, 1925.

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bubbles, collapse of competing foam mixtures and retention of its own under the manipulations of its salesmen and demonstrators, or otherwise, as to the efficacy or carbon dioxide or leavening strength of its powder or competing products in mixes and cooking, but falsely indicated powders of superior leavening efficiency as being inferior and was made the basis for falsely representing such powders as having only one-third to one-half the leavening power of its own product, and was in and of itself deceptive irrespective of any statements as to comparative gas strength or leavening efficiency:

With the result that through the making of said cold water glass test by its salesmen and demonstrators, as authorized, directed and required by it, and its misrepresentation and false statements and those of its agents as to the alleged superiority of its powder and alleged inferiority of competitive powders, made in conjunction with and as a part of said test, countless housewives and others of the consuming and purchasing public purchased its said powder:

Held, That such practices, under the circumstances set forth, were to the prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. Richard P. Whiteley for the Commission.

Mr. Daniel R. Forbes, of Washington, D. C., and *Miller, Gorham, Wales & Noxon* of Chicago, Ill., for respondent.

SYNOPSIS OF COMPLAINT¹

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an Illinois corporation engaged in the manufacture and sale of baking powder to wholesale and retail dealers in the various States, and with principal office and place of business in Chicago, with disparaging or misrepresenting products of competitors, misrepresenting own product, and advertising falsely or misleadingly, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged in the sale of its product, as above set forth, in competition with competitive products including the "K. C. Baking Powder" of the Jaques Manufacturing Co., a wholesome product, properly composed of good materials, i. e., of that standard of purity commonly used in the trade and in nowise adulterated, falsely and misleadingly asserts (said false and misleading assertions being among numerous others concerning said K. C. powder), in advertisements, articles, and other writings in newspapers and trade journals, and in circulars, letters, pamphlets, and other trade literature, and orally through salesmen and other agents, that said K. C. Baking Powder is (a) cheap, (b) of a poor

¹ As amended.

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and inferior quality, (c) composed of inferior materials, (d) carelessly compounded by inexact methods, so that it does not function properly, uniformly or satisfactorily in the preparation of foodstuffs and renders food products in which used, unwholesome, and (e) adulterated; with the direct effect and result of misleading the trade into believing said K. C. Baking Powder to be "an inferior, impure, adulterated, and undesirable product; to prejudice the trade against the said Jaques Manufacturing Co. and its said product, and to injure and damage the business and good will of said company".

Respondent further, as charged, employs through its canvassers, salesmen, and demonstrators a false and misleading purported comparative test of its powder with those of its competitors, to wit, the so-called water glass test or foaming test, in which it places samples of the two powders to be compared in glasses or similar containers and adds and stirs in a small quantity of water, with the result that the mixture of respondent's powder (which contains a minute quantity of albumen or white of egg), rises higher in the glass and remains sustained longer than the mixture of such competitive powders as that of the aforesaid Jaques Manufacturing Co. or the Royal Baking Powder Co. or other competitive powders containing no white of egg, sometimes with statements of the demonstrator to the effect that the test represents the respective leavening strength and efficiency of the two powders concerned.

The aforesaid test, as alleged, whether accompanied by such statements or not, "does not represent the leavening strength of the respective powders and the results shown in the comparative tests are misleading and deceptive in that the method used by respondent when applied to a powder containing no white of egg can not and will not fairly or accurately evidence the gas strength of the competitive baking powder and said method inherently possesses the capacity and tendency to deceive the merchant or consumer before whom said comparative water glass test may be made", by said house-to-house canvassers and demonstrators, who are "carefully trained and instructed in the manner of so manipulating the said samples above referred to that the desired deceptive and misleading results are obtained, all of which tend to create a state of mind in the purchasing public which is detrimental to the purchase and use of powders of respondent's competitors and especially products of the Jaques Manufacturing Co. and of the Royal Baking Powder Co., and consequently tend to injure the trade and business conducted by said competitors".

Respondent further, as charged, for several years last past, in making its aforesaid test through its house-to-house persons, can-

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vassers, demonstrators, and salesmen, against competitive powders also containing white of egg, "varies its manipulations and treatments of the two respective powders tested so as to cause the mixture in the glass containing respondent's powder to rise higher and to remain sustained longer in the glass than the mixture in the glass containing the competitor's powder, thereby falsely misleading and deceiving the purchasing public into the belief that Calumet Baking Powder has a greater leavening strength or efficiency than the powder of the said competing company so tested against".

The above alleged acts and things done by respondent, as charged, "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of section 5".

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914 (38 Stat. 717), the Federal Trade Commission issued and served an amended complaint upon the respondent, Calumet Baking Powder Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having filed its answer herein, hearings were had and evidence was thereupon introduced on behalf of the Commission and the respondent before an examiner of the Federal Trade Commission duly appointed.

Thereupon this proceeding came on for a final hearing on the briefs and oral argument, and the Commission having duly considered the record and being fully advised in the premises, makes this its findings as to the facts in accordance with and in affirmation of the findings of the trial examiner and conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Calumet Baking Powder Co., is, and has been for more than 10 years prior to the date of the service of the amended complaint herein, a corporation duly organized under the laws of the State of Illinois, having at all said times its principal factory and place of business in the city of Chicago in said State.

PAR. 2. The respondent is and has been since about 1890 engaged in the manufacture of baking powder under the brand name "Calumet Baking Powder" and throughout said period has been and still is engaged in the sale of said baking powder to various individuals,

firms, and corporations, and wholesale and retail dealers, located in the District of Columbia and in various States of the United States of America, other than in the State of Illinois, and has caused and still causes its said baking powder when so sold by it to be transported, in commerce, from its principal factory and place of business in the city of Chicago, Ill., to, into, and through said other States and the District of Columbia to the said individuals, firms, and corporations, and wholesale and retail dealers, to whom the said baking powder was sold by respondent.

PAR. 3. During the times above mentioned and referred to, other corporations, firms, and individuals, located in the various States of the United States have been engaged in the manufacture and in the sale of baking powder, which they have sold and still sell to corporations, firms, and individuals, and to wholesale and retail dealers located in the various States of the United States and in the District of Columbia. The respondent during the aforesaid times was, and still is, in competition in commerce in the sale of its baking powder with said other corporations, firms, and individuals likewise engaged in the manufacture and sale and distribution of baking powder.

PAR. 4. The labels attached to the cans of baking powder manufactured and sold by respondent as described in the preceding paragraphs contain the following statement with respect to the ingredients of said baking powder:

This baking powder is composed of the following ingredients and none other:

Sodium bicarbonate, calcium acid phosphate, corn starch, sodium aluminum sulphate, and fifteen one-hundredths of 1 per cent of dried white of egg.

The dried white of egg furnishes a means of estimating the available gas, and is not a substitute for eggs in cooking.

For a number of years, at least 20 or more, respondent has required its salesmen and demonstrators to make what is called the cold water glass test of Calumet Baking Powder and of competing powders. This so-called test has been made by respondent's salesmen and demonstrators in various States of the United States before retail and wholesale grocers or dealers and the purchasing and consuming public. These so-called cold water glass tests have usually been made by respondent's salesmen before retail and wholesale dealers, before the customers of said dealers, and before bakers, chefs, and managers or owners of cafés, restaurants, and hotels. The said tests have usually been made by respondent's demonstrators in department stores and cooking or demonstrating schools and in the homes of the consuming public before housewives and cooks. The so-called cold water glass test consists of mixing a small quantity of baking powder,

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usually two, three, or four level teaspoonfuls with an equal quantity of cold water or water at room temperature, the mixing taking several seconds. With the addition of water to the baking powder a chemical reaction occurs, differing according to the different acid ingredients used in the several powders. To the acid ingredients, which cause the evolution of carbon dioxide gas (the leavening agent in baking powder) when combined with moisture and bicarbonate of soda, the respondent adds a minute quantity of dried white of egg or dried albumen. This quantity of dried white of egg, which is fifteen one-hundredths of 1 per cent by weight, adds nothing to the leavening efficiency of the baking powder but causes a film (a minute quantity of soap or glue would bring about the same result) to form over the foam mixture, thereby restraining the escape of the carbon dioxide gas evolved. The mixture of foam which results from the making of the water glass test, in the case of respondent's powder, at the end of two minutes or in an even shorter period of time, rises to the top or over the top of the demonstrating glass used by respondent's representatives and gives the appearance of finely beaten whites of fresh eggs. In the case of powders containing acid ingredients like the respondent's but without this added bit of dried white of egg the mixture of baking powder and water will also rise similarly, but will immediately or very soon drop back into the glass because of the escape of the gas. In case of powders containing different acid ingredients varying results are obtained.

In the case of a powder which contains a small amount of calcium acid phosphate in proportion to the sodium aluminum sulphate such as Snow King Baking Powder, manufactured by the Kenton Baking Powder Co. of Cincinnati, Ohio, the volume of the foam mixture in the cold water glass test is sufficient to fill the testing glass to the extent of one-half to two-thirds only. This powder also contains fifteen one-hundredths of 1 per cent of dried white of egg which, to a certain extent, restrains the escape of the gas. The white of egg was added by the manufacturers of Snow King Baking Powder in order to protect said powder against the cold water glass tests made by respondent. In the case of a powder which contains a larger percentage of sodium aluminum phosphate than its percentage of calcium acid phosphate, such as K. C. Baking Powder, manufactured by the Jaques Manufacturing Co. of Chicago, Ill., the volume of foam mixture in the cold water glass test is sufficient to fill the testing glass to the extent of one-half or two-thirds, but the mixture soon collapses because the powder contains no dried white of egg to restrain the gas from escaping. In the case of a powder containing as its acid ingredients calcium acid phosphate alone, such as

Rumford Baking Powder manufactured by the Rumford Chemical Works of Providence, R. I., the foam mixture in the cold water glass test rises as high in the testing glass as the foam mixture of respondent's powder. The mixture, however, upon being jarred collapses, leaving the glass about half full of foam. This powder also contains fifteen one-hundredths of 1 per cent of dried white of egg, added by its manufacturers for the purpose of protecting it against the cold water glass test as made by respondent. In the case of powders such as Royal Baking Powder, manufactured by the Royal Baking Powder Co. of Brooklyn, N. Y., where the acid ingredients are cream of tartar and tartaric acid and which powder does not contain dried white of egg the foam mixture in the cold water glass test rises to the top of the testing glass but upon jarring the glass or if the mixture be allowed to stand for a short period of time, the foam mixture collapses.

Respondent issues test talks, instructions, and various other literature to its salesmen and demonstrators, directing and requiring them to make the cold water glass test of its powder and other competing powders. The following are some of the statements contained in said talks, instructions, or other literature issued by respondent:

This moisture when applied to baking powder immediately evolves the gas just as it occurs when the housewife adds cold water or milk in making up her mix. Seeing is believing.

This shows exactly the amount of leavening power or gas strength Calumet has in the cold.

White of egg added to baking powder imprisons the gas which in itself is of great importance. The white of egg serves as a distinct aid to the efficiency of our powder by making a larger percentage of gas strength available. Practical tests have proven that it contributes in an appreciable degree to produce lightness in biscuits, through its power of entangling and holding in the dough the gas evolved.

- Now I stated to you that Calumet has an ingredient that held its gas which a cream of tartar powder did not have. This ingredient is dried white of egg. All we need to take is the pin head of the white of an egg. We will take the same amount of baking powder and water as used before and stir it the same. Now you notice how this looks and holds its gas exactly like Calumet. Now isn't this very plain that this one ingredient alone is a great improvement? You have heard your wife or sister or whoever does the baking in your family, complaining a number of times about their bread, cake, or biscuits being soggy or falling, and these complaints occur frequently when you are going to have company and are very anxious to turn out a nice baking. The cause of it is that this powder is so compounded that there is no secondary action, and there is nothing to retain the gas that it produces. Therefore, if ideal conditions of oven temperature are not maintained or if there is any jarring of the oven through opening the door or walking on the floor, gas will escape, it makes the baking fall and that is the cause for its being soggy. Calumet overcomes this by the aid of white of egg and the secondary action.

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This white of egg holding the baking exactly where the gas in the powder has the power to put it, and anyone can make a successful baking with this baking powder.

CHEAP OR BIG CAN POWDER

I am going to test this powder for you just to show you what it is. Baking powders of this class are generally made by rule of thumb methods, the ingredients put together according to weight and not according to chemical strength; consequently, they are undependable, and it is impossible to secure a uniform product. The gas strength of these goods run very irregular. They are manufactured with but one idea—that of giving a large amount of goods for a small amount of money. This is accomplished by using a large quantity of cheap ingredients. Generally a cheap grade of starch is used. A few firms have been fined for using White Earth as a filler in these cheap goods.

You see, we have taken exactly the same amount of this powder as of the other powders. We treat them exactly alike. You can see there is very little chemical action. There is hardly any change in the powder, except for the presence of the moisture, it remains about the same as it was in the can. There is practically no leavening from this powder till a mix is warmed in the oven and when the oven is hot it crusts over before the gas is all liberated, and proper leavening is not accompanied. The residues are extremely bitter, making the food unpalatable. Inasmuch as baking powder is not a food, but only valuable in leavening strength, you can readily see the false economy of allowing your trade to be deceived by Big Can goods.

The test is decidedly the most important part of your work, and your standing as a demonstrator will depend largely on your percentage of tests to calls.

* * * It is better to lose a sale than to miss an opportunity to test.

Now I will treat the Royal exactly the same as I did Calumet, but this cold water test will not show the strength of Royal because it does not contain white of egg and is therefore not a comparative test of the strength of the powders, but there are other things about baking powder, just as important as strength, as I will show you.

I take one spoonful of Royal exactly as I did Calumet, and add three spoons of water. You see the powder effervesces very quickly. The gas bubbles are uneven, some large, some small. They break rapidly. The gas escapes. To bake a good cake with this powder you must handle the dough very quickly, get it into a hot oven at once and great care must be taken or your cake will fall just as this mixture has fallen. This often occurs in the oven if cold air is allowed to strike the baking.

Cheap and "Big Can" powders, such as K. C. Health Club, Jack Frost or 10 cents a pound powders such as Bon Bon, Good Luck, Snow King, Sodarine, etc. (If you find the housewife using this class of baking powder.)

Oh! do you use ———. The goods are manufactured with but one idea, that of giving a big can for a small amount of money. This can only be accomplished by using cheap materials together with a surplus of cheap fillers.

These slow acting baking powders which give off almost no gas when mixed with cold water or milk and set the gas free only when heated in the oven require a slow oven. If placed in a hot oven they crust over before the gas is set free, and heavy, poorly leavened food results.

RUMFORD, Horsford's Baking Powder or Horsford's Self-Rising Bread Preparation.

(If the housewife is using either of these say:)

An exceptionally good and careful cook may SOMETIMES GET FAIRLY GOOD RESULTS WITH THESE POWDERS IF the powder is perfectly fresh.

Being quick-acting powder it will not keep like Calumet. They are forced to sell their goods almost exclusively in large cities, where they hope to have the goods used quickly before they deteriorate.

Make test: See how quickly it acts. It effervesces very quickly, having only one action and requiring expert handling to get good results even from fresh goods. Food prepared with such quick-acting powder must be baked in a quick oven. If baked in a slow oven the gas will escape before it is set by cooking and any jarring will result in a fallen cake.

The expert cook, when everything goes well, can get fair results from a straight phosphate baking powder, if perfectly fresh. One who is a little careless or somewhat slow in handling their mix is almost sure to make a failure. Frequently the powder loses more than half its strength before the can is used.

This test of leavening strength can not be made with baking powders that do not contain white of egg. Buy it—Use it. Be protected against baking powder that has lost its proper leavening strength.

Similar statements are contained in numerous other advertising matter and sales literature and distributed by respondent to its salesmen and demonstrators to be used by them in their selling talks and demonstrations before dealers, housewives, and the purchasing public. As recently as 1913, the respondent advertised in the Daily Press under the heading "BAKING POWDER TESTS Made from actual photographs taken two minutes after moisture was applied." Under this heading appeared pictures of photographs of three water glass tests. Under the first picture in which the foam mixture is shown to have risen less than one-half way up the testing glass appears the following:

CHEAP OR "BIG CAN" BAKING POWDER

Note the unevenness of the contents; also the small amount of leavening gas from the height the powder has risen in the glass. The residues from these powders vary considerably.

Under the second picture in which the foam mixture is shown to have risen about one-half way up the testing glass appears the following:

CREAM OF TARTAR POWDER

You will also note the small amount of leavening gas here; also the sediment in the bottom of glass, which is a solution of Rochelle Salts. About 80 per cent of this powder used is left in the food as Rochelle Salts. Ask your doctor about constant dosing with Rochelle Salts.

Under the third picture in which the foam mixture is shown to have risen above the top of the glass in a nicely mushroomed form appears the following statement:

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CALUMET BAKING POWDER

Note here the amount of leavening gas by the way the powder has risen over the top of the glass. Note how light and fluffy it is; also how even the grain is. This test proves CALUMET has a great amount of leavening gas that is gradually and uniformly given off. It leaves no unwholesome residue.

Under the above quoted statements describing these three water glass tests of Cheap or Big Can Baking Powder, Cream of Tartar Powder and Calumet Baking Powder, the following statement was made:

This Proves the Wonderful Leavening Qualities—the Purity—the Economy—the Superiority of CALUMET Baking Powder.

Ask your Grocer—Insist on Calumet.

The vice president and former general sales manager of respondent stated late in 1927 that the cold water glass test was being made at that time and had been made constantly in all essential respects in the same way that it was made in 1913, and that representations as to it were being made by respondent's salesmen and demonstrators similar to those made in 1913 although the newspaper advertising as above described had been discontinued in 1913 or 1914.

PAR. 5. When the so-called cold water glass test, as made by respondent, is made of competing powders which also contain a minute quantity of dried white of egg the representatives of respondent are instructed to state, and they do state, that the said tests show the comparative gas strength or leavening efficiency of respondent's powder and the competing powders; that as the foam mixture rises and remains sustained in the testing glass, so will the cakes or other baked products rise in the oven and be light or palatable. As a matter of fact the extent to which the said foam mixtures rise in the so-called cold water glass test is not indicative of the comparative leavening strength of powders so tested and the statements made by respondent to that effect are literally false, deceptive and misleading. The foam mixture in the case of Snow King Baking Powder rises to about one-half the extent that the foam mixture of respondent's powder rises in the cold water glass test, and Snow King Baking Powder is approximately 15 per cent stronger in leavening efficiency than is Calumet Baking Powder. Rumford Baking Powder also contains fifteen one-hundredths of 1 per cent of dried white of egg and the agents of respondent are instructed to state that it can be tested against respondent's powder for gas strength. While the cold water glass test of Rumford evolves a foam mixture which rises as high as the foam mixture of Calumet in the cold water glass test the mixture collapses when jarred and as a result gives the appearance of being greatly inferior to respondent's powder. Other powders con-

taining dried white of egg are tested with similar results and respondent's salesmen and demonstrators constantly claim that said results indicate the inferiority of the competing powder and the superiority of their own brand. These statements are untrue.

PAR. 6. In the case of powders not containing dried white of egg, the respondent, in writing, instructs its salesmen and demonstrators to test such powders and at the same time to demonstrate Calumet by means of the same test. The respondent also, from time to time, issues cautionary letters to its salesmen and demonstrators, in which said letters the salesmen and demonstrators are instructed to follow closely the written instructions, and are told to emphasize that the test is not a comparison between baking powders that contain white of egg and those that do not. The salesmen and demonstrators are required to make the test of the two powders before the eyes of the merchant or consumer, and despite these letters of caution, if the instructions are carried out and the test is made, it is, in fact, an implied test of the comparative gas strength of the two powders. In numerous instances the salesmen and demonstrators of the respondent make a cold water glass test of competing powders not containing dried white of egg, and state that the resulting foam mixtures indicate the gas strength of the powders. Numerous statements are made that the cold water glass tests of Calumet and K. C. show that Calumet is several times as strong as K. C. in carbon dioxide gas or leavening efficiency. These statements have been and are made by experienced Calumet salesmen and demonstrators to retail dealers and to the purchasing and consuming public. Calumet instructors have told their salesmen and demonstrators to make such statements, and salesmen and demonstrators are told that in making the cold water glass tests they should follow the example of experienced salesmen and demonstrators. Repeated instances of the making of the cold water glass test accompanied by statements set forth above have been brought to the attention of the directing officials of respondent, and it does not appear that a single salesman or demonstrator has ever been dismissed because of the manner in which the test has been made, or because of the statements made during the demonstration. With or without any statements or representations by respondent or its agents in connection or conjunction with the making of the water glass test, the test in itself misrepresents the facts as to the strength and efficiency of Calumet Baking Powder and of competing powders.

PAR. 7. In making the water glass test before retail merchants and consumers, the following statements are made by the salesmen or demonstrators of respondent: "That Calumet is stronger and purer

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than Snow King or K. C. and that the test so shows." "That Calumet was two or three times stronger than K. C., and that cakes won't fall with Calumet." "That bread made overnight with Calumet would stand, but with K. C. it would not." "That K. C. would function in cake baking just as it does in the water glass test." "That Calumet contained white of egg and cakes would not fall made with it and that they would with K. C., and that Calumet was stronger than K. C." "That Calumet was as strong a baking powder and that if oven was not at proper heat K. C. would fall, but it didn't matter how cold you got the oven with Calumet it would not fall." "That Calumet would cause the cake to rise in the oven just as the foam mixture rises in the water glass test." "That you see how much more strength Calumet has than the K. C., boiling up like that." "That you could see for yourself the results of the tests and that to use a half or a third as much Calumet as K. C. would give the same results." "The powder that would fall like that in the water glass would fall in the cake in the same way." "You see how much better the Calumet is; it has the rising qualities that stay and the others subside." These and similar statements to the effect that the water glass test shows how Calumet and other powders will function in the baking have been made by respondent's salesmen and demonstrators throughout the United States. In some instances they call attention to the fact that Calumet contains white of egg and in other instances they do not do so. In some cases they do not say anything about the absence of white of egg in competing powders unless the matter is suggested by the person before whom they are demonstrating.

PAR. 8. Many of the statements of the agents, employees, and officers of respondent made in connection and conjunction with the making of the cold water glass test consist of statements to the effect that the several competing powders will function in the baking just as they do in the tests. That, as the foam mixture fails to rise or, after having risen, collapses either with or without jarring, so the baked products will fail to rise or collapse or become heavy and soggy, if said competing powders are used instead of Calumet. These representations have been made continuously and uniformly for years, and are still being made by respondent's agents and representatives throughout the country, with respect to various competing powders, among which are the following: Davis, Dr. Price, K. C., Royal, Rumford, Snow King, Red Front (A & P brand), Sea Gull, Aunt Jemima, Hunt's Perfection, Clabber Girl, Dakota Maid, Monkey and Parrott, Southern Maid, Crystal Pearl, Delecto, Jewel T., Hellick's Grand Union, Golden Seal, Golden Key, Bob

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White, Sodarine, Success, Richelieu, Excelo, Good Luck, Golden Rule, Watkins, and Larkin. At times the incorporation of the white of egg is mentioned as the reason why Calumet bread and cakes will rise and be well leavened in the oven just as its foam mixture rises and remains sustained in the cold water glass tests; at other times no mention is made of the said white of egg.

PAR. 9. Respondent, in addition to its sales force which calls on the retail dealers and the wholesalers, upon café and hotel owners or managers and upon bakers, uses a large force of demonstrators or canvassers who call upon the housewife and there make the water glass test of Calumet and of any other baking powder which said housewife may be using. These demonstrators travel in crews of from 12 or 15 to 25 or more, each crew being in charge of a crew leader and an assistant. Headquarters are established by these crews and the members of the crews systematically cover an entire territory, being instructed to call upon at least 90 per cent of all housewives and to make water glass tests in every possible instance. Where a housewife is absent, a later visit is made. Checkers, also employed by respondent, follow the demonstrators to see that they have made calls and demonstrations according to their reports and to ascertain how the water glass tests and talks are made. In this way, whole States are demonstrated, the work lasting several years in some cases and where a diminution in the sale of its baking powder is reported, the same territory is often redemonstrated after a lapse of a year or more. During the period from January 1, 1925, to June 30, 1926, inclusive, 1,500 of such demonstrators were employed in the 10 States of Tennessee, Iowa, Missouri, Arkansas, Oklahoma, Pennsylvania, New Jersey, Maryland, North Carolina, and South Carolina. In other States many more demonstrators were employed during that period. The respondent also employs at all times at least 200 salesmen who are instructed to make the cold water glass test constantly before retail grocers and such customers as may be present in the stores. These tests are made according to instructions and reports are constantly forwarded by salesmen and demonstrators to the principal office of the respondent in Chicago. The reports show the number of tests made, the name of the competing powder or powders, and, in the case of the demonstrators, whether the housewife made a purchase of Calumet Baking Powder. The demonstrating crews are equipped with the glasses to be used, teaspoons, cans of Calumet Baking Powder, and in many instances with cans of the principal competing powders in the territory in which they are demonstrating. Salesmen making water glass tests of competing powders usually purchase same from the retailer. The water

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glass tests made before retailers are almost always made in connection with sales promotion talks of respondent's salesmen and rarely to test respondent's powder for deterioration.

PAR. 10. The addition of the fifteen one-hundredths of 1 per cent of dried white of egg to Calumet Baking Powder has no appreciable or measurable effect upon the leavening strength or efficiency of said powder. Biscuits, cakes, and other products baked with baking powder similar in all respects except for the incorporation of fifteen one-hundredths of 1 per cent of dried white of egg (the quantity used in respondent's powder) in one powder, and a like quantity of starch (the filler used in all baking powders) in the compared powder exhibits no appreciable or measurable differences either in volume or in quality. The statements made by salesmen and demonstrators of respondent to dealers, housewives, and other members of the purchasing and consuming public that the water-glass test shows the superiority of respondent's powder or the inferiority of competing powders are misleading, deceptive, and untrue. Statements made constantly by the agents of respondent that as the foam mixture rises or remains suspended in the testing glass after having risen, the efficiency and leavening strength of respondent's powder in comparison with competing powders, is determined, are misleading, deceptive, and untrue.

PAR. 11. In testing Calumet and competing powders by means of the cold water-glass test both before housewives and merchants the representatives of respondent have upon innumerable occasions stated that products baked with Calumet would rise and remain light and palatable just as the foam mixture rises in the testing glass, and that products baked with the competing powders would often be heavy, soggy or poorly leavened just as the foam mixtures of said competing powders failed to rise in the testing glass or, after having risen, collapsed. Respondent's salesmen and demonstrators strike the testing glasses sharply with their hand or upon the table after making the test causing the foam mixtures of many powders to collapse while the Calumet foam mixture does not collapse, and it is stated that as these mixtures fall in the glass so will the baked products fall in the oven or fail to rise. Baking powders such as Snow King, K. C., and Hellicks (the first of which contains fifteen one-hundredths of 1 per cent of dried white of egg, while the other two contain none) all of which have a higher carbon dioxide gas strength and leavening efficiency than respondent's powder, are made to appear to have not more than one-half the gas strength of Calumet in the cold water-glass test. Demonstrators and salesmen of respondent have many times told the purchasing and consuming public that the cold water-glass tests showed that Snow King and K. C. baking powders were

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only one-half or one-third as strong as Calumet. The test itself is misleading and deceptive in such cases and in similar ones, even when the salesman or demonstrator makes no statement as to comparative gas strength or leavening efficiency. The spectator, housewife, or dealer sees the respondent's powder rise to the top of the glass during the test and remain sustained; he sees the competing powder fail to rise or after having risen collapse. Such a test causes the average spectator to conclude that respondent's powder is stronger, or more efficient, when, as a fact, the test furnishes no evidence whatever as to the comparative leavening strength of the powders tested, and is, in fact, not a test of leavening strength, or of baking efficiency.

PAR. 12. The action of Calumet Baking Powder in the cold water glass test—that is, the extent to which the foam mixture rises and the size, character, and uniformity of the gas bubbles in said foam mixture—is in no wise similar or comparable to the action of said powder when mixed with doughs or batters for baking purposes. The flour in a batch of dough contains several hundred times as much soluble protein as the albumenized baking powder in said batch contains. The flour albumen functions in the same way as the egg albumen in the cold water glass test, and water glass tests made with albumen from wheat are indistinguishable from those made with egg albumen. The addition of one part of egg albumen in baking powder to a batch of dough already containing several hundred parts of flour albumen has no appreciable or measurable effect in the leavening power or efficiency of the baking powder used. Respondent's agents are constantly directed and required by it to assert and they do assert, that the addition of dried white of egg (fifteen-hundredths of 1 per cent) to Calumet Baking Powder serves as a distinct aid to the efficiency of said powder and that it contributes to an appreciable degree in producing lightness in biscuits. These statements are false.

PAR. 13. In some instances the salesmen and demonstrators of respondent test Calumet Baking Powder only and the retail dealer or housewife is advised that they may make their own tests in a similar way of competing powders, or they are advised that the tests show the leavening strength, purity, and freshness of Calumet Baking Powder. Respondent prints instructions with regard to the making of the water glass test which are widely distributed by it both to dealers and housewives as follows:

HOW TO MAKE THE TEST

First, take an ordinary drinking glass holding one-half pint, or in other words, the quantity that is usually known in the household as "one-cupful". All that is needed is this empty glass, which must be dry, an ordinary teaspoon and a

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little water of the ordinary room temperature (not ice water nor hot water). Place 2 level teaspoonfuls of the powder in the dry glass, to which add the same quantity (2 teaspoonfuls) of water, quickly; stir rapidly for a moment; (while counting 5) just long enough to thoroughly moisten the powder; remove the spoon and watch the mixture rise. Note the action of the powder. CALUMET rises slowly and evenly, requiring 2 minutes to show the full strength. If the powder is of full strength, and you have proceeded properly, the gas released will form bubbles sufficient to HALF fill the glass.

The statement of the respondent, "If the powder is of full strength and you have proceeded properly, the gas released will form bubbles sufficient to half fill the glass", is false and deceptive. The alleged test is in no sense a true test for or of the leavening strength of Calumet or any other powder. A powder which is 2 per cent or even 3 per cent below the legal standard set for carbon dioxide (leavening) strength by the United States Department of Agriculture or by the laws or regulations of various States, will, if it contains white of egg, act in the cold water test as favorably as a powder containing the full legal strength or even going 3 per cent above it; and such a test has the capacity and tendency to mislead and deceive the dealer or housewife who relies upon same to determine the strength of the baking powder to be sold or used.

PAR. 14. The Department of Agriculture of the United States on February 26, 1918, adopted as a guide for the officials of that department in enforcing the Food and Drugs Act, the following standard of strength for baking powder shipped in interstate commerce:

It yields not less than 12 per cent of available carbon dioxide.

A number of the States of the Union have adopted the standard of the Department of Agriculture of 12 per cent, and baking powder offered for sale which has a carbon dioxide strength less than 12 per cent by weight is subject to seizure and condemnation by the authorities of said States and the food officials of most of the States of the Union are charged with the duty of seizing and condemning baking powder which does not conform to the minimum standard of available gas strength, in some States 10 per cent by weight, but in most States 12 per cent by weight.

As a result of a great number of chemical analyses of cans of Calumet Baking Powder purchased on the open market, it was found that many of these powders containing less than 12 per cent available carbon dioxide gas strength by weight produced larger volumes of foam in the cold water glass test than samples of said powder containing more than 12 per cent available carbon dioxide gas. In many cases water glass tests of Calumet powder containing less than 12 per cent available carbon dioxide gas gave foam volumes sufficient to one-half fill an 8-ounce glass, or to more than one-half fill

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it, and in some instances Calumet powders containing less than 10 per cent available carbon dioxide gas gave foam volume in the water glass test sufficient to one-half fill an 8-ounce glass. A large number of housewives used samples of Calumet Baking Powder purchased on the open market and followed the printed instructions of respondent for the making of the cold water glass test, made said tests in accordance with their understanding of said instructions. One hundred and nine housewives made these tests using powders ranging in available carbon dioxide gas strength from 8.51 per cent to 12.15 per cent, most of said powders having an available gas strength of less than 10 per cent. Over 80 per cent of the water glass tests so made gave a foam volume more than sufficient to one-half fill an 8-ounce glass.

PAR. 15. At times the respondent distributes literature or causes to be advertised in the daily press, in connection with the water glass tests made or to be made by its representatives, the following statement:

The demonstration and test she will make are interesting and instructive. The test is not a comparative test of the strength of different baking powders because the water glass test does not show the strength of baking powder that does not contain white of egg. The test will, however, show the superiority of Calumet in other respects and prove why it has solved all baking problems in millions of homes.

Snow King Baking Powder manufactured by the Kenton Manufacturing Co. of Cincinnati, Ohio, contains fifteen one-hundredths of 1 per cent of dried white of egg and can be tested for available gas strength by dealers and housewives under the above quoted directions of respondent. The cold water glass test of Snow King Baking Powder which is approximately 15 per cent stronger in carbon dioxide gas than respondent's powder, produces a foam mixture of not more than half as much as the cold water glass test of respondent's powder. Other competing powders, also containing dried white of egg, but which contain acid ingredients which do not react in cold water to the same extent that the acid ingredients in respondent's powder react are tested or demonstrated against by respondent with results similar to those obtained in a test of Snow King Baking Powder.

PAR. 16. Where the respondent makes the cold water glass test against competing powders containing dried white of egg and also containing acid ingredients which react in cold water to the same extent that the acid ingredients in Calumet Baking Powder react, the salesman or demonstrator of respondent calls attention to the difference in the size and uniformity of the gas cells and strikes the

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testing glasses sharply with his hand or against the table which usually causes the foam mixture of the competing powder to collapse but leaves the foam mixture of the Calumet test standing. In many instances the glass containing the foam mixture of Calumet is inverted and the mixture does not fall from the glass. In the case of the competing powders, the mixture will pour out. The dealers and housewives are told by respondent's salesmen and demonstrators that doughs or batters in which respondent's powder and the competing powders are used will function in the baking just as the foam mixtures have functioned in the water glass test.

That is to say, those food products in which competing powders are used will collapse or become heavy or soggy in the baking and those in which Calumet Baking Powder are used will remain light, well leavened, and palatable.

The recipes of respondent call for one level teaspoon of its baking powder to 1 cup of flour, and for 4 level teaspoons of its powder to 1 quart of flour. The fifteen one-hundredths of 1 per cent of dried white of egg in 1 level teaspoon of Calumet Baking Powder is equivalent to one eight-hundred-and-forty-third part of the white of one fresh egg, and in 4 level teaspoons of said powder the dried white of egg present is equivalent to one two-hundred-and-tenth part of the white of one fresh egg. The addition of the aforesaid quantities of dried white of egg to doughs or batters made up with the stated quantities of flour has no appreciable or measurable effect in producing larger volumes of baked products or lighter or better leavened cakes or biscuits.

PAR. 17. Respondent alleges that the cold water test is valuable and necessary, in order to protect the retail grocer and the housewife by removing deteriorated powders from the grocer's shelves and from the housewife's kitchen. There is no evidence that the test is so used by grocers or by housewives. Most deteriorated powders offer physical evidence of deterioration, such as the condition of the powders, etc., and these physical evidences are equally, if not more dependable than the water glass test, and do not offer the opportunities for studied deception that the water glass test necessarily and inherently possesses.

PAR. 18. The addition of white of egg to a baking powder does not add to its carbon dioxide strength nor increase its baking efficiency. The water glass test is not a test for carbon dioxide or leavening strength, and when made with the powder of respondent, only, is misleading and deceptive. The water glass test is not a test for carbon dioxide or leavening strength, and when made in comparison

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with competing powders which do or do not contain dried white of egg is misleading and deceptive and inherently possesses the capacity and tendency to deceive the merchant or consumer before whom it is made.

PAR. 19. As a result of the making of the cold water glass test by respondent's salesmen and demonstrators as they are authorized, directed, and required by respondent to make it, and as a result of the misrepresentations and false statements of respondent and its agents both as to the alleged superiority of Calumet Baking Powder and the alleged inferiority of competing baking powders made in conjunction with and as a part of the said cold water glass test countless housewives and others of the consuming and purchasing public have made purchases of said Calumet Baking Powder. Said sales of respondent's product have been secured by the false, deceptive, and misleading oral and written statements and representations of respondent and its authorized agents.

CONCLUSION

The practices of the respondent under the conditions and circumstances set forth in the foregoing findings are to the prejudice of the public and of respondent's competitors, and are unfair methods of competition in commerce and constitute a violation 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission and upon the answer of the respondent filed herein, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated 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":

It is now ordered, That the respondent above named, Calumet Baking Powder Co., its officers, agents, representatives, and employees, in connection with the sale or distribution in interstate commerce of Calumet Baking Powder, do cease and desist:

1. From making the water glass test described and set out in the findings of fact herein with Calumet Baking Powder in comparison with any other baking powder.

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2. From making the aforesaid water glass test with another manufacturer's baking powder or suggesting that such test be made with another manufacturer's baking powder.

3. From making any assertion, claim, or statement that the aforesaid water glass test in any way demonstrates or determines the carbon dioxide gas strength or leavening efficiency of any baking powder.

4. From making any assertion, claim, or statement that doughs or batters or like mixtures in which baking powders are used will function in the baking as the foam mixtures function in the aforesaid water glass test.

It is further ordered, That the respondent, Calumet Baking Powder Co., shall, within 60 days after the service on it of this order, file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with the above order to cease and desist.

By the Commission; Commissioners Humphrey and March dissenting.

Syllabus

IN THE MATTER OF
JOHNSON & JOHNSON

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1546. Complaint, Nov. 6, 1928—Decision, June 26, 1929

Where a corporation engaged in the manufacture and sale of medicinal and surgical plasters and toilet specialties, including an antiseptic borated talcum powder for nursery use, and other products; in furtherance of endeavors to maintain the minimum uniform selling price fixed by it for resale of its aforesaid nationally advertised, popular, and largely demanded powder, sold by it chiefly directly to retail dealers consisting principally of some 30,000 drug and department stores, and to a limited extent at the same price through the wholesale trade, with allowance for freight on certain minimum quantity purchases,

- (a) Secured generally from customers promises and assurances to observe and maintain its said price;
- (b) Secured from retail dealer customers and from its selling agents and otherwise information and evidence concerning price cutting by retailer customers and used such information to induce said price cutting customers thereafter to observe its said price;
- (c) Refused further sales of its said product to customers disclosed as price cutters by investigations based upon customers' reports and also upon its own initiative, and secured said price cutters' promises and assurances to immediately maintain and thereafter observe its aforesaid price;
- (d) Sought to ascertain source of supply of dealers cut off by it as price cutters in order to refuse further sales to the supplying dealer or dealers and did so discontinue selling such a supplying dealer; and
- (e) Secured from all retailers in localities involving price cutting by one or more dealers, through its sales agents and with the assistance of favorably disposed dealer customers, a general agreement on the part of all to immediately put its price into effect therein and to observe and maintain the same thereafter;

With the result that its aforesaid suggested minimum resale price was rigidly enforced and maintained as both the minimum and maximum price for the resale of its said product in the eastern section of the United States to which its aforesaid activities, as disclosed, were principally related, and retail dealer customers were prevented therein from selling its said product at such lower prices as might be deemed by them to be warranted by their respective selling costs and by trade conditions generally and competition between retailers in respect of said product was thus suppressed and prevented:

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

Mr. William T. Kelley for the Commission.

Mr. Archibald Cow, of New York City, for respondents.