

Complaint

14 F. T. C.

IN THE MATTER OF
ROYAL BAKING POWDER COMPANY

COMPLAINT AND ORDER IN REGARD TO THE ALLEGED VIOLATIONS OF SEC. 5
OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1499. Complaint, Mar. 7, 1928—Order, Dec. 2, 1930

Order requiring respondent corporation to cease and desist from—

- (a) Publishing directly or indirectly adverse, disparaging, or derogatory interviews, expressions, etc., relative to competitive baking powders and concealing or withholding its connection with or interest in such publications and causing such expressions, etc., to appear as anonymous and disinterested or the voluntary interviews, etc., of disinterested and technically qualified authorities or persons acting only in the public interest or to be merely usual news items published only as matters of public interest and not at its inspiration or for its use and benefit; and
- (b) Representing directly or indirectly that the Commission has approved or adopted the report of its examiner in the proceeding in docket 540 against it or has through such method or means or by findings, orders, or otherwise decided whether or not an ingredient or ingredients of any baking powder are injurious to the health of the users of the powder or has in anywise or way approved any method or methods or sales policy of it.

Mr. Martin A. Morrison for the Commission.

Moore, Hall, Swan & Cunningham, of New York City, and *Covington, Burling & Rublee* and *Mr. John Marshall*, 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 the Royal Baking Powder Co., 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 the said act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, Royal Baking Powder Co., is a corporation organized under the laws of the State of New Jersey, with its principal office and place of business in the city of New York, State of New York. It is engaged in the manufacture of baking powder and the sale thereof to purchasers located at various points in States other than the State of New York. It causes its said

product, when so sold, to be transported from its said place of business in the city and State of New York, into and through other States of the United States to the said purchasers at their various points of location. In the regular course and conduct of its said business, respondent is in competition with other corporations, partnerships, and individuals who are also engaged in the sale and transportation of baking powder in commerce between the various States of the United States.

PAR. 2. On the 18th day of May, 1923, the Federal Trade Commission in certain preceedings then pending before it in which said Royal Baking Powder Co. was party respondent and which proceedings were by said Commission denominated the Commission's Docket No. 540,¹ issued a supplemental and amended complaint against the Royal Baking Powder Co., respondent herein, charging it with the use of unfair methods of competition in commerce, and setting up various specific statements alleged to have been used by respondent in a campaign against competing products containing sodium aluminum sulphate. Respondent having entered its appearance and filed its answer to the said complaint, hearings were had before Edward M. Averill, a trial examiner duly appointed theretofore by the Commission, testimony was taken and other evidence adduced in support of the complaint and in opposition thereto, the record comprising 4,711 pages of typewritten testimony and 632 exhibits. The taking of testimony was closed by said trial examiner on the 2nd day of May, 1925.

On the 12th day of November, 1925, the said trial examiner, Edward M. Averill, made in writing his report upon the facts, and served copies upon counsel for the respondent and counsel for the Commission. Such a report is not binding upon the Commission, which Commission alone has the power and authority to find facts in proceedings before it. No action was taken by the Commission adopting or approving said report, so far as the same relates to the question of the wholesomeness or deleteriousness of alum in baking powder. Counsel for the Commission in due course filed exceptions to the trial examiner's report in its entirety, stating his reasons.

Thereafter, on March 3, 1926, the Commission heard oral argument in said matter, and on March 23, 1926, without making any findings as to facts, issued its order dismissing the complaint, and, concurrently with the issuance of such order of dismissal, granted the motion of counsel for the Commission for a reargument, set the time and place therefor, and served notice thereof upon the respondent.

¹ See *infra*, p. 287.

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Further oral argument was heard by the Commission on April 5, 1926, and May 6, 1926, and thereafter on July 7, 1926, the Commission issued its order vacating the said order of dismissal of the proceedings and directed the reopening of the record for the taking of further testimony on certain specified issues.

PAR. 3. On or about the 5th day of April, 1926, at a hearing before the Federal Trade Commission in this cause at its office in Washington, at which there were present and sitting Commissioners Hunt, Van Fleet, Humphrey, and Nugent, and at which hearing the respondent was present by its counsel, Archibald Cox, Esq., Mathew H. O'Brien, Esq., Dale D. Drain, Esq., Paul Reighard, Esq., and Marvin Farrington, Esq., Commissioner Van Fleet speaking from the bench stated:

The Commission, in passing on this case, did not render any decision whether alum baking powder was harmful or not. That point was not argued. All those things we have had to go over again together were not argued. Seemingly they were not thought of enough importance to bring to the attention of the Commission the last time. Consequently we went ahead and decided the case on the one question; whether the Commission could forbid you from saying on your cans that it did not contain alum. It was the opinion of a majority of the Commission that you could not be prohibited from doing that any more than a man making an all wool blanket could be restrained from saying that it contained no shoddy. That is all that was decided.

And at the said hearing further stated from the bench:

There has been no evidence presented here, as I understand it, that you are continuing them down to date, and the burden is on the Commission to sustain that allegation in the motion. I wanted also to get it clear that the action of the majority of the Commission in dismissing the case was not a decision to the effect that in view of the state of affairs, the dispute about whether alum is deleterious or not, it was not a decision that it is deleterious, and not a decision that you have a right to make all the statements that have been alleged against you simply because we passed upon the one point.

And that thereupon, and in reply to the above quoted statement, Archibald Cox, Esq., chief counsel for the respondent, stated:

I assume that the Commission did not decide anything with regard to alum in one way or the other.

And that Commissioner Van Fleet thereupon replied:

We did not.

PAR. 4. That at said hearing on April 5, 1926, in the presence and hearing of the above named Commissioners and counsel for the respondent, the following discussion between the chairman of the

Commission and Commissioner Humphrey and Archibald Cox, chief counsel for the respondent, took place:

CHAIRMAN. Is there anything in this record proving that the unfair practices complained of here have continued since 1922?

Mr. Cox. No. The last of these canvasser things is November, 1922. I think I am right in stating that most of them were back in 1906 and 1910.

Commissioner HUMPHREY. Is there any evidence the other way, that they have been discontinued or is the record silent on that?

Mr. Cox. I think it is silent. The way it was done, we turned over what they wanted and we stipulated that was our advertising and that fairly shows that up to 1914 on several things and that after that substantially all with the exception of "no alum, no bitter taste," I think it is silent on that.

Commissioner HUMPHREY. And what the Commission would have to do on that point is that they would have to take the evidence and draw their own conclusions as to whether or not it had been discontinued or whether there is a probability of no discontinuance. There is no positive evidence on that question one way or the other.

PAR. 5. The Federal Trade Commission has never at any time either in said proceeding, Docket 540, or in any other proceeding, decided or found that sodium aluminum sulphate as used in baking powder is deleterious or injurious to health.

PAR. 6. On or about the 27th day of August, 1926, while said proceeding Docket 540 was pending, respondent with the intention and purpose of injuring its competitors and unlawfully to restrain their trade and prejudice the public against and to induce the public to cease buying and using the baking powders of its said competitors, and instead to buy and use the baking powders of respondent, and for the purpose of prejudicing physicians, biologists, physiologists, chemists, dieticians, teachers, industrial executives, bakers, grocers, home economic experts, and leaders of women's organizations, whose opinions and advice are likely to be followed by others, and to prompt them to advise against the purchase and use of baking powders manufactured by said competitors of the respondent, and to encourage and advise the purchase and use of baking powder manufactured by the respondent, published or caused to be published and widely circulated and distributed, a pamphlet containing copies of the said trial examiner's report upon the facts, and a "foreword" compiled by respondent in which "foreword" it is stated among other things:

An order of dismissal was issued by the Commission on March 23, 1926, after consideration of this report.

and also that

It is proper to conclude, therefore, that the Commission considers the evidence on this subject (the deleteriousness of alum baking powder) final and

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its order may be deemed a refusal to aid in the suppression of the facts as to the use of alum in baking powders.

(Matter in parenthesis not quoted.)

In connection with the publication and distribution of said pamphlet containing said trial examiner's report upon the facts, and respondent's said "foreword", the respondent circulated to newspapers and others a "release" in words and figures as follows, to wit:

To the Editor. Because of the widespread interest of the public in the baking powder case your readers may be interested in the accompanying item.

ROYAL BAKING POWDER COMPANY.

NEW YORK —

The facts in the report following which the Federal Trade Commission rendered its decision in the recent baking powder case will be made available to the public for the first time tomorrow. The full text of the report of Trial Examiner Edward M. Averill to the Federal Trade Commission will be published by the Royal Baking Powder Co., which has for many years insisted that it was justified in informing the public that its products do not contain alum. The decision of the Federal Trade Commission upheld the Royal Baking Powder Co. in this and other respects.

It is understood that health officials in this country and abroad, scientists and women's organizations, are eager to obtain a statement of the facts in the case, which has been followed closely by all interests in pure food and labeling regulations. Some of the greatest scientific authorities in the country were among the 158 witnesses, who included physicians, biologists, physiologists, chemists, dieticians, teachers, home economics experts, industrial executives, bakers, grocers, and women's club leaders, who testified before Trial Examiner Averill.

The scientific testimony is carefully summarized and reviewed in the report. Considerable evidence centered on the question as to whether manufacturers using alum in their baking powders were endeavoring to conceal from the public the presence of alum by using its scientific name on labels. The examiner declared in his findings that alum as it is commonly known, is being used in these baking powders. He also found that the evidence does not prove that the use of baking powders containing alum is harmless and that it "does prove that there are substantial grounds upon which to predicate an honest opinion that they are harmful." After this report the proceedings against the Royal Baking Powder Co. were dismissed and the decision with respect to alum later confirmed. The Commission has, however, voted to reopen other aspects of the case.

PAR. 7. That said pamphlets containing said examiner's report and said respondent's "foreword", both with and without said "release", were widely circulated and distributed by respondent among the public; that the same have the tendency and capacity, and were so intended and purposed by respondent, to mislead and deceive read-

ers thereof and the public and to cause such readers and the public to believe:

(a) That said examiner's report represents the official finding and conclusions of, and is a decision by the Federal Trade Commission.

(b) That the Federal Trade Commission had officially and as a body approved the methods of competition charged in said supplemental and amended complaint known as Docket No. 540 to have been used by respondent in its attacks upon competing baking powders.

(c) That said order of dismissal of Docket No. 540 entered March 23, 1926, had been based upon the approval by the Federal Trade Commission, officially and as a body, of the methods of competition charged in said supplemental and amended complaint known as Docket No. 540 to have been used by respondent in its attacks upon competing baking powders, and that such order of dismissal of itself constituted an official approval by said Commission of said methods.

(d) That the Federal Trade Commission had officially, and as a body, adopted and approved said trial examiner's report filed in said Docket No. 540.

PAR. 8. That, in fact, as respondent at all times well knew:

(a) That the Federal Trade Commission had never taken any action, officially or as a body, adopting or approving the report of said trial examiner as the official findings or conclusions of, or as a decision by the Federal Trade Commission.

(b) That the Federal Trade Commission had not officially and as a body approved the methods of competition charged in said supplemental and amended complaint, known as Docket No. 540, to have been used by respondent in its attacks upon competing baking powders.

(c) That the order of the dismissal of March 23, 1926, was not based upon the approval by the Federal Trade Commission officially and as a body, of the methods of competition charged in said supplemental and amended complaint known as Docket No. 540 to have been used by the respondent in its attacks upon competing baking powders, and that said order of dismissal did not of itself constitute an official approval of said methods by the Federal Trade Commission.

(d) That the Federal Trade Commission had never officially, or as a body, taken any action adopting or approving the report of the trial examiner filed in Docket No. 540.

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PAR. 9. That the aforesaid acts of the respondent in circulating and distributing said pamphlets containing said "foreword", both with and without said "release", tend to cause the public to be prejudiced against and to refrain from the purchase and use of the baking powders of respondent's competitors, thereby also tend to greatly injure said competitors and also tend to unlawfully restrain and restrict their trade and competition, and constitute an unfair method of competition in commerce within the meaning and intent 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".

PAR. 10. That in the month of April, 1926, and thereafter, the respondent employed Thomas R. Shipp, Inc., a corporation having its principal office in the city of Washington, D. C., and engaged in the business of acting for pecuniary reward and consideration as the press agent for its various clients; that such Shipp agency acting under and in pursuance of its said employment by the respondent and the instructions of respondent in that behalf, and with the knowledge and consent of the respondent, did send and furnish to various newspapers throughout the United States articles prepared by said Shipp agency, consisting of and containing comments on baking powders and the ingredients used in baking powders, and alleged interviews with and opinions of various scientists and public officials concerning baking powders and the ingredients thereof, the effect of which articles was derogatory and disparaging to the baking powders manufactured and sold by respondent's competitors and to such competitors themselves. Respondent wholly concealed its connection with and interest in the various methods, devices and agencies through which this practice was carried into effect and caused the expressions, opinions, and comments to seem to be the voluntary contributions of disinterested and technically qualified authorities or persons acting in the public interest.

PAR. 11. That said Shipp agency further, in pursuance of its said employment and with the knowledge and consent of the respondent and under its instructions, caused and induced said newspapers to accept the articles so prepared by said Shipp agency and publish the same as items of news, ostensibly received or gathered by such newspapers in the regular course of newspaper work, and without mention of the fact that said articles were prepared by and originated with said Shipp agency, or were in any manner inspired by respondent.

PAR. 12. That the said articles so prepared, distributed, and caused to be published by the said Shipp agency, as aforesaid, the respond-

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ent's interest in and connection therewith being concealed, as aforesaid, were calculated and intended to mislead the public into the belief that said articles contained the disinterested, unbiased and voluntary expressions and statements of qualified experts and officials acting in the public interest and have the capacity and tendency to prejudice the purchasing public against the purchase and use of baking powders manufactured by respondent's competitors, and thus to injure the business of said competitors.

PAR. 13. That said publication and distributing by respondent of said articles so prepared by said Shipp agency, containing said derogatory and disparaging expressions, comments, and alleged interviews, published and distributed by means of said newspapers on an extensive scale and over a wide area of population in the guise of disinterested news items, the respondent's connection therewith, and the interest of the respondent therein being wholly concealed and undisclosed, is to the prejudice and injury of the public and respondent's competitors and constitute 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".

ORDER TO CEASE AND DESIST

The above case coming on for consideration before the Commission on the certain written pleading filed herein by respondent, Royal Baking Powder Co., wherein respondent expressly elected to refrain from making a defense to the complaint herein and consented that the Commission might make, enter, issue, and serve upon respondent an order to cease and desist from the methods of competition charged in such complaint, without issue, trial, evidence, or finding herein; and the Commission having accepted and considered such pleading and being fully advised in the premises,

It is ordered, That respondent, Royal Baking Powder Co., its officers, agents, representatives, employees, and all persons under the control or employment of respondent, do cease and desist from doing directly or indirectly any and all the acts hereinafter designated and set forth in offering for sale or selling its baking powder in commerce as defined by section 5 of an act of the Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914, as follows:

PARAGRAPH 1. From publishing or causing to be published, directly or indirectly, adverse, disparaging or derogatory interviews, expres-

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sions, opinions, statements, or comments regarding the nature, ingredients, composition or effect of its competitors' baking powders, concealing or withholding respondent's connection with or interest in such publication thereof, and causing such expressions, opinions, statements, or comments to seem to be either anonymous and therefore disinterested, or the voluntary interviews or contributions of disinterested and technically qualified authorities or persons acting only in the public interest, or to be mere news items or the ordinary and usual record of current events published only as matters of public interest, not inspired by nor published for the use and benefit of, or by procurement of, respondent.

PAR. 2. From representing, directly or indirectly, expressly or by implication, that the Federal Trade Commission made, or has approved, confirmed or adopted, the report of the examiner in Docket No. 540, Federal Trade Commission v. Royal Baking Powder Co., or has by that method or means, or by or through such report of such examiner, or by a finding or findings, and order or orders, or in any other way or ways, found, ordered, or otherwise decided whether or not an ingredient or ingredients of any baking powder is or are, or any baking powder is, deleterious or injurious to the health of the users of such powders; or that the Federal Trade Commission has by any such means or methods, or otherwise, approved any method or methods or sales policy of respondent.

PAR. 3. *It is further ordered*, That respondent, within 60 days from and after the date of the service upon it of this order, shall file with the Commission a report or reports in writing setting forth in detail the manner and form in which it is complying and has complied with the order to cease and desist hereinabove set forth.

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IN THE MATTER OF

ROYAL BAKING POWDER COMPANY

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

Docket 540. Complaint, Apr. 18, 1923—Order, Dec. 3, 1930

Complaint charging respondent company with disparaging and misrepresenting products of competitors directly and through ostensibly disinterested and informed sources; dismissed for reasons in order set forth.

Mr. Robert O. Brownell and Mr. Martin A. Morrison for the Commission.

Mr. Archibald Cox, Hall, Cunningham, Jackson & Haywood and Moore, Hall, Swan & Cunningham, of New York City, Fitzgerald, Abbott & Beardsley, of Oakland, Calif., and Mr. Dale D. Drain, O'Brien & O'Brien, Mr. Frank W. Mondell and Covington, Burling & Rublee, of Washington, D. C., for respondent.

Mr. C. C. McChord, of Washington, D. C., general counsel (Mr. H. B. Jones of Bronson, Robinson & Jones, of Seattle, Wash., Mr. Harry D. Nims of Nims & Verdi, of New York City, and Mr. John Walsh and Mr. Daniel R. Forbes, of Washington, D. C., associate counsel) for intervenors R. B. Davis Co., Seagull Specialty Co., Kenton Baking Powder Co., Crescent Manufacturing Co., Calumet Baking Powder Co., Southern Manufacturing Co., and Rich Maid Manufacturing Co., Inc., and Mr. Marvin Farrington, of Washington, D. C., for intervenor A. Schilling & Co.

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 Royal Baking Powder Co., 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. That the respondent, Royal Baking Powder Co., is a corporation chartered and organized under the laws of New Jersey, by which was effected a consolidation of four previously organized corporations, one by the same name, the Cleveland Baking Powder Co., Price Baking Powder Co., and the Tartar Chemical Co., having its principal office and place of business at 135 Williams Street, New

¹ Supplemental and amended.