

Complaint

IN THE MATTER OF

MAURICE TALMAGE, INDIVIDUALLY AND DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF DEBESTT CHEMICAL COMPANY

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

Docket 1876. Complaint, Nov. 18, 1930—Decision, Apr. 27, 1931

Where a chemical entity, the disodium salt of dibromoxymERICURI-fluorescein, made under patent process, known as "Mercurochrome", and sold, as required by the makers, under said name and the letters "H. W. D.", their initials, and in the form of a 2 per cent solution, had been on the market and been sold to and used by the public as a general antiseptic and first aid prophylactic, and had come to be recognized and identified by medical profession and public by its aforesaid trade name, letters, and striking natural deep cherry color; and thereafter an individual designated as "Mercurochrome H. W. D. 2 per cent solution" a preparation dealt in by him, and described his said product as "Mercurochrome" in circulars, post cards, letters, pamphlets, magazine, newspaper and other advertising, and as "H. W. & D. 2 per cent Solution Dibrom OxymERICURI Fluorescein, General Antiseptic in place of Iodine", fact being preparation was a spurious product of inferior quality containing little if any genuine mercurochrome, and possessing little of any antiseptic qualities; with capacity and tendency to mislead, deceive, and confuse, and inevitable result of misleading and deceiving purchasing public into belief that said product was the genuine, widely known and generally used antiseptic, mercurochrome, and with effect of unfairly diverting trade of competitors dealing in the genuine solution, and with capacity and tendency so to do:

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

Mr. Richard P. Whiteley for the Commission.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent Maurice Talmage, engaged as DeBestt Chemical Co., in the sale of a product represented to be a general antiseptic for use in place of iodine, and with principal office and place of business in Chicago, with appropriating trade name of product of competitor, and advertising falsely or misleadingly as to source of product, in violation of the provisions of section 5 of said act prohibiting the use of unfair methods of competition in interstate commerce in connection with the application of the words "Mer-

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curochrome" and "Mercurochrome H. W. D. 2 per cent solution" to his preparation, not the genuine mercurochrome, the product of Hynson, Westcott & Dunning, made by them for some ten years last past, and so known and identified, with the capacity and tendency to mislead and deceive and inevitable effect of misleading and deceiving the purchasing public, in respect of the nature, origin and identity of the aforesaid product; to the prejudice of the public and respondent's competitors.¹

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, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission on the 18th day of November, A. D., 1930, issued its complaint against Maurice Talmage, individually and doing business under the trade name and style of DeBestt Chemical Co., respondent above mentioned, and on January 5, 1931, caused the same to be served upon respondent as required by law, in which complaint it is charged that respondent has been and is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act. By notice contained in said complaint, respondent was notified and required within 30 days from aforesaid date of service, unless said time be extended by order of the Commission, to file with the Commission an answer to said complaint; and in said notice respondent was further notified of the provisions of the Commission's Rules of Practice with respect to answer and failure to answer, said provisions being set forth in haec verba in said notice and providing in part as follows (Rule III, subdivision 3):

8. Failure of the respondent to appear or file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

Respondent has not at any time caused its appearance to be entered in this proceeding, nor has it during said 30-day period specified in said notice, or at any time, made or filed answer to said complaint. It has at no time requested that the time within which it may file answer be extended, nor has the Commission granted any such extension of time.

¹Allegations and findings are substantially identical, the case not having been contested.

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Thereupon this proceeding came on for final hearing; and the Federal Trade Commission, acting pursuant to said act of Congress and its aforesaid Rules of Practice, having duly considered the record and being fully advised in the premises, makes this its report in writing, stating its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Maurice Talmage is an individual doing business as DeBestt Chemical Co., with his principal office and place of business in the city of Chicago, State of Illinois. Said respondent is now and for more than one year last past has been engaged in the sale and distribution in interstate commerce of a product represented and designated by him as "Mercurochrome H. W. D. 2 per cent Solution", and further represented and designated as a general antiseptic to be used in place of iodine, which aforesaid product respondent packs and sells in $\frac{1}{4}$ -ounce bottles, 2 dozen to the carton, and in $\frac{1}{2}$ -ounce bottles, 1 dozen to the carton, and said respondent has caused said product so designated, represented and described when sold, to be sent from his place of business in the State of Illinois to purchasers thereof, located in a State or States of the United States, other than the State of Illinois. In the course and conduct of his business, respondent is, and was at all times hereinafter referred to, in competition with other individuals, firms, partnerships and corporations likewise engaged in the sale and distribution in interstate commerce of similar products.

PAR. 2. For some 10 years last past the chemical entity known as mercurochrome, the disodium salt of dibromoxymercuri-fluorescein, has been on the market and has been sold to and used by the public generally in the form of a 2 per cent aqueous solution (which solution possesses a deep cherry color) for use as a general antiseptic and first aid prophylactic. Both the medical profession and the public have come to recognize and to identify said antiseptic by its trade name, "Mercurochrome", and by the striking color of its solution, which color is not artificially produced. Mercurochrome is produced under a patented process by Hynson, Westcott & Dunning, a pharmaceutical laboratory engaged in the production of bacterial and biochemic therapeutic products, located in Baltimore, Md., and is sold under said trade name with the accompanying initials "H. W. D." to indicate its origin. The aforesaid manufacturers of mercurochrome require that said trade name and their initials appear on distributors' labels and that the strength of the solution shall be accurately 2 per cent.

PAR. 3. In the course and conduct of his business as described in paragraph 1, hereof, said respondent has caused advertising matter consisting of circulars, post cards, letters, pamphlets and magazine or newspaper or other advertising to be distributed in interstate commerce, in soliciting the sale of and selling his said product, which said advertising matter referred to, or otherwise represented, his product as follows:

Safe, Mercurochrome does not irritate, burn, or injure tissues as Iodine does. Chicago * * *.

Mercurochrome H. W. & D. 2 per cent solution Dibrom Oxymercuri Fluorescein. General Antiseptic in place of Iodine. DeBestt Chemical Co.

Handy. Use handy applicator rod attached to stopper for applying solution. Illinois.

Special offer on Mercurochrome H. W. D. 3 per cent SOLUTION. We are in a position to offer Mercurochrome at the lowest price obtainable as we specialize in this item and our large output and big volume of business enables us to undersell";

when in truth and in fact the product sold and distributed as aforesaid by respondent in interstate commerce was not mercurochrome the disodium salt of dibrom-oxymercuri-fluorescein, an antiseptic in general use produced under a patented process by Hynson, Westcott & Dunning, of Baltimore, Md. (H. W. & D.), and was not the H. W. & D. 2 per cent solution, but was a spurious product of inferior quality containing little if any mercurochrome, the disodium salt of dibrom-oxymercuri-fluorescein, the well known general antiseptic widely sold to and used by the public in the form of a 2 per cent aqueous solution.

PAR. 4. The use by respondent of the word "Mercurochrome" and the words "H. W. & D. 2 per cent Solution Dibrom Oxymercuri Fluorescein, General Antiseptic in place of Iodine", either independently or in connection or in conjunction with any other word or words to describe the product of respondent in the manner heretofore set out, has the capacity and tendency to mislead and deceive and to confuse and inevitably results in misleading and deceiving the purchasing public into the belief that respondent's said product so designated and advertised is mercurochrome, a widely known and generally used antiseptic and/or that respondent's product is a 2

per cent aqueous solution produced from the disodium salt of dibrom-oxymercuri-fluorescein manufactured by Hynson, Westcott & Dunning (H. W. & D.), when in truth and in fact respondent's product is a spurious product of inferior quality containing little if any mercurochrome, the disodium salt of dibrom-oxymercuri-fluorescein, and possessing little if any antiseptic qualities.

PAR. 5. There are, among the competitors of respondent mentioned in paragraph 1 hereof, many individuals, partnerships, firms, and corporations who sell and distribute in competition with respondent, and in interstate commerce, mercurochrome, the disodium salt of dibrom-oxymercuri-fluorescein, an antiseptic in general use produced under a patented process by Hynson, Westcott & Dunning, of Baltimore, Md., and who sell and distribute the genuine H. W. & D. 2 per cent solution, and which competitors in nowise misrepresent the character of said products or solutions. Respondent's acts and practices herein above set forth have the capacity and tendency to and do unfairly divert trade of said competitor.

CONCLUSION

The aforesaid acts and practices of respondent in the sale and distribution of its so-called "Mercurochrome" as the "H. W. D. 2 per cent solution", under the circumstances and conditions set forth herein, are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition 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.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the record, and the Commission having made its report in which it stated its findings as to the facts and conclusion that respondent, Maurice Talmage, 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 respondent Maurice Talmage, his agents, representatives, servants and employees, cease and desist in connection with the offering for sale and sale in interstate commerce of so-called antiseptics:

1. From representing that the said so-called antiseptics are "Mercurochrome" unless said products so designated, are made from the disodium salt of dibrom-oxymercuri-fluorescein.

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2. From representing that the said so-called antiseptics are "H. W. D. 2 per cent solution" unless they are a 2 per cent solution of the disodium salt of dibrom-oxymercuri-fluorescein, which salt has been produced in the pharmaceutical laboratories of Hynson, Westcott & Dunning, Baltimore, Md.

It is further ordered, That respondent Maurice Talmage shall within 30 days after the service upon him of a copy of this order file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist hereinbefore set forth.

Syllabus

IN THE MATTER OF

JOSEPH GREENSPAN, INCORPORATED, TRADING AS
GRAND RAPIDS UPHOLSTERING COMPANY

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

Docket 1887. Complaint, Dec. 17, 1930—Decision, Apr. 27, 1931

Where the city of Grand Rapids, Mich., had long come to be a large and important furniture and manufacturing center in this country and to be generally so known, and the furniture industry and manufacturers of said city had long since come to enjoy a wide popularity, good will and demand throughout the country for their product; and thereafter a corporation engaged in purchase, and sale at retail, of furniture bought by it from manufacturers and wholesalers in New York City and vicinity, and doing no manufacturing other than that involved in upholstering frames of living room furniture bought by it as above set forth, nor agent of nor representing any Grand Rapids furniture manufacturer, nor authorized by any such manufacturer to sell his product at factory prices.

Displayed on business cards distributed to public the name and legend "Grand Rapids Upholstering Co., Makers of Upholstered Furniture", and on signs at its place of business such legends as "Grand Rapids Furniture"; "Furniture Mfr Selling Direct to The Public Retail at Wholesale Prices", "Furniture manufacturers selling direct to the public retail at wholesale prices"; "Furniture—See it made on the premises—Manufacturers selling direct to the public—Save the retailers' Profits", and featured its said trade name including words "Grand Rapids", in its advertisements in newspapers of general circulation together with such statements as "From factory to you"; "Our newly adopted policy demands selling direct to the public at our original dealers' Prices", "Buy now at the same price dealers pay", "When manufacturers start selling direct to the public you can expect big things", "Manufacturers? Yes. Buy now at wholesale prices";

With effect of deceiving and misleading public into believing it to be a manufacturer offering furniture made by it in Grand Rapids, of the quality and characteristics associated with furniture there made, and sold direct from manufacturer to public, with profits of middlemen thereby eliminated, and with capacity and tendency so to mislead and deceive, and unfairly to divert sales to it from wholesalers and retailers dealing in furniture made in aforesaid city, those dealing in furniture not there made and not so represented through trade names and otherwise, manufacturers in said city and elsewhere selling direct to the consuming public, and manufacturers located elsewhere who do not falsely represent themselves as Grand Rapids manufacturers, but represent facts truthfully as to place of manufacture, and dealers who do not in any way represent themselves as agents or representatives of manufacturers to whom latter sell their furniture at factory prices:

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