

Syllabus

IN THE MATTER OF

HERBERT L. SMITH

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

Docket 1467. Complaint, June 22, 1927—Decision, Mar. 14, 1932

Where the words "Havana" or "Habana" had long since been used and understood by the cigar purchasing and consuming public of the United States and by cigar manufacturers and dealers thereof as meaning and designating tobacco grown on the Island of Cuba, such tobacco had long been imported into the United States and widely and extensively used and consumed therein in cigars made in whole or in part thereof and had long come to have the general reputation among the aforesaid cigar consuming and purchasing public as being cigar tobacco of highly desirable qualities and superior excellence, and cigars made in whole or in part thereof were in large demand, and purchase thereof was preferred by many of the dealers and a large and substantial part of the consuming public of the United States, who believed that use of said tobacco in cigars added to and increased the quality and desirability thereof; and thereafter an individual engaged in the manufacture of domestic cigars containing no Havana or Cuban tobacco, and sale thereof to wholesale and retail dealers and the consuming public,

Named, banded and advertised his said cigars "Havana Brown" and featured said name in sundry places on the usual and customary cigar boxes and containers in which displayed, offered and sold by him in the regular course of trade and with his knowledge and consent to his aforesaid customers, and in which displayed, offered and sold as aforesaid by his dealer purchasers and other dealers to the purchasing and consuming public throughout the United States;

With effect of misleading and deceiving a large and substantial number of the purchasing and consuming public into buying said cigars as and for those composed in whole or in part of Havana, i. e., tobacco grown in Cuba, and of unfairly diverting trade from competitors dealing in cigars so composed in fact and rightfully and truthfully so advertising, representing, banding, and labeling the same, and from competitors dealing in cigars composed wholly of domestic tobacco and neither banding, labeling, advertising, nor otherwise representing their said cigars as containing any Havana or Cuban tobacco, and with capacity and tendency so to mislead and deceive and unfairly divert trade from competitors and to operate as a competitive burden upon sale of aforesaid competitive cigars:

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

Mr. Henry Miller for the Commission.

Mr. John Walsh and *Mr. L. A. Spiess*, of Washington, D. C., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent individual engaged in the manufacture of cigars and sale and distribution thereof to wholesale and retail dealers and the consuming public throughout the several States, and with office and place of business in Windsor, Pa., with naming product misleadingly, misbranding or mislabeling and advertising falsely or misleadingly, in violation of the provisions of section 5 of said act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged as aforesaid, names, designates and advertises as "Havana Brown," cigars sold and distributed by him as aforesaid and composed wholly or substantially of tobacco other than Havana tobacco, i. e., tobacco grown on the Island of Cuba,¹ and conspicuously so bands said cigars, and labels the containers thereof in which in due course sold, with his knowledge and consent, to his wholesale dealer vendees and in which finally offered to the consuming public by his dealer purchasers and other dealers, thus designated, branded and labeled.

Use by respondent, as alleged, "of the word 'Havana' alone or in conjunction with the word 'Brown' in designating, branding, advertising, describing and representing his so-called 'Havana Brown' cigars" as aforesaid "is false and misleading and is calculated, has, and had the capacity and tendency to and does mislead and deceive many among the trade and many members of the consuming public, into the erroneous belief that said so-called 'Havana Brown' cigars are composed wholly of tobacco grown on the Island of Cuba or that the greater or a substantial part of said cigar is composed of such Cuban tobacco, and thereby cause purchasers to purchase said cigars in such erroneous belief," and said acts and practices "in connection with the sale and distribution of his so-called 'Havana Brown' cigars as hereinbefore set forth tend to and do divert trade from, and otherwise injure the business of" competitors, many of whom sell and dis-

¹ As alleged in paragraph 2 of the complaint, "At all times during which respondent has been engaged in business and for many years prior thereto, tobacco grown on the Island of Cuba and cigars made from such tobacco have been and are sold, purchased, referred to and designated as 'Havana' tobacco and 'Havana' cigars by the trade and public throughout the United States. The word 'Havana' when applied to tobacco, either manufactured or unmanufactured, has at all times herein mentioned signified and meant to the trade and consuming public of the United States tobacco grown on the Island of Cuba. For many years last past many among the trade and the consuming public throughout the United States have preferred and still prefer to purchase cigars made or composed in whole or in greater part of tobacco grown on the Island of Cuba, which as aforesaid, is known as and designated 'Havana' tobacco, and have considered and still consider such cigars to be superior in quality or value to cigars composed in whole or in greater part of tobacco grown elsewhere than on the Island of Cuba."

tribute cigars composed wholly of Cuban or Havana tobacco and rightfully and truthfully so represent the same, many of whom sell and distribute cigars made in part only of such tobacco, without in anywise representing their said products as composed wholly thereof, and many of whom sell and distribute cigars composed wholly of tobacco grown elsewhere than on the Island of Cuba without in anywise representing their products as containing such tobacco; all to the prejudice of the public and competitors.

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 issued and served its complaint in this proceeding upon Herbert L. Smith, respondent above-named, charging him with the use of unfair methods of competition in commerce in violation of the provisions of section 5 of said act.

Respondent entered his appearance in the proceeding and filed answer to said complaint. Thereafter, the matter being ready for the taking of testimony and other evidence with respect to the charges in the complaint, a stipulation as to the facts was agreed upon and entered by respondent and by counsel for the Commission, subject to the approval of the Commission, wherein it is stipulated and agreed that the statement of facts therein recited may be taken as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint or in opposition thereto, and that the Federal Trade Commission may proceed upon said statement of facts to make its report stating its findings as to the facts (including inferences which it may draw from the said stipulated facts) and its conclusion based thereon, and may enter its order disposing of the proceeding. Said stipulation as to the facts was approved by the Commission, and the privilege of filing briefs was waived by counsel.

Thereupon this proceeding came on for final hearing before the Federal Trade Commission and was orally argued before the Commission by counsel for the respondent and by counsel for the Commission; and the Commission, having duly considered the entire record and being now fully advised in the premises, makes this its report stating its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Herbert L. Smith is an individual who is and, at all times since the issuance of the complaint herein and for more than three years prior thereto, has been engaged as hereinafter described in the business of manufacturing, selling and distributing cigars to wholesale and retail dealers and to the consuming public throughout the several States of the United States, having and maintaining his place of business in the city of Windsor in the State of Pennsylvania. The said cigars are manufactured by respondent in York County, Pa., where they are packed, branded and labeled by respondent for distribution and sale by himself and by his dealer-customers to the purchasing and consuming public of the United States. The sales of said cigars are made and purchase orders therefor procured by respondent through and by means of personal solicitation by himself and by his salesmen and agents, and by written correspondence and other communications with his customers and prospective customers, and through and by means of advertisements of said cigars in newspapers, magazines, placards, signs, posters and other advertising mediums which respondent causes to be published, circulated and distributed among the purchasing and consuming public throughout the several States. In consummating the sale of the cigars and in filling said purchase orders therefor and making delivery of the cigars to his customers, the purchasers thereof, respondent causes and throughout the course and conduct of his business has caused the cigars so sold to be transported from his factory and place of business in the State of Pennsylvania through and into the various States other than the State of Pennsylvania to the respective purchasers thereof in such other States. In the course and conduct of said business respondent is and, at all times herein mentioned, continuously has been engaged in interstate commerce in the sale and distribution of his cigars; and he is and continuously has been selling and distributing said cigars and conducting his said business in direct active competition with many other individuals, partnerships and corporations also engaged in the sale, distribution and delivery of cigars in commerce in, between and among the several States of the United States to wholesale and retail dealers and to the consuming public.

PAR. 2. Large and substantial quantities of the cigars sold and distributed competitively by respondent in interstate commerce as described in paragraph 1 hereof have been and still are so offered for sale, sold and distributed by him under the representation, designation, description and name "Havana Brown." Said so-

called "Havana Brown" cigars as and when so sold and distributed by respondent have been and are packed by him in the usual and customary cigar boxes and cigar containers bearing in sundry places and in large, prominent and conspicuous lettering, placed thereon by respondent, the words or phrase "Havana Brown" as the name, designation and description of the cigars; and each of said so-called "Havana Brown" cigars when so marketed had and have affixed to them by respondent a paper band or label bearing as the brand, designation and description of said cigars the words or phrase "Havana Brown" in large and conspicuous lettering. In accordance with respondent's method of distribution and in the regular course of trade and with his knowledge and consent, said so-called "Havana Brown" cigars have been and are displayed, offered for sale and sold by respondent to his aforesaid customers, and by respondent's dealer-purchasers and other dealers to the purchasing and consuming public throughout the United States in aforesaid boxes and other containers and under the designations, descriptions, brands and labels placed thereon and applied thereto by respondent as set forth above. Further, at all times in the marketing of said so-called "Havana Brown" cigars and for the purpose of promoting and aiding the sale and distribution thereof to the purchasing and consuming public throughout the United States, respondent caused and still causes said cigars to be advertised, represented and described to the trade and consuming public as "Havana Brown" cigars through and by means of magazine and newspaper advertisements, placards, posters, circular letters, leaflets and similar trade literature published and circulated by him throughout the several States.

PAR. 3. The said word "Havana," also spelled "Habana," is the name and designation of the tobacco grown on the Island of Cuba, which name and designation is and has been since time immemorial used and understood by the cigar purchasing and consuming public of the United States and by cigar manufacturers and dealers throughout the United States as meaning and designating tobacco which has been grown on the Island of Cuba. Said tobacco has long been imported into the United States and widely and extensively used and consumed therein in cigars manufactured in whole or in part from such tobacco. At all times since and for many years prior to the time respondent began business such Havana tobacco has had and still has the general reputation among the cigar consuming and purchasing public of the United States as being cigar tobacco of highly desirable qualities and superior excellence, and cigars made in whole or in part from said tobacco are and have

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been in large demand throughout the United States. Many of the cigar dealers and a large and substantial part of the consuming public of the United States prefer to purchase cigars containing Havana tobacco, and have believed and still believe that the use of such Havana tobacco in cigars adds to and increases the quality and desirability of such cigars.

PAR. 4. In truth and in fact none of respondent's so-called "Havana Brown" cigars manufactured, branded, labeled, advertised and sold by respondent as hereinbefore described contain any Havana tobacco or tobacco grown on the Island of Cuba, nor have they at any time contained any such tobacco, but are and have been manufactured entirely from and wholly composed of tobacco grown in the United States, principally Pennsylvania tobacco. The effect of the use of the word "Havana" in said designation and name "Havana Brown" in advertising, branding, labeling and describing said cigars containing no Havana tobacco, all as hereinbefore set forth, is misleading and it has and had the capacity and tendency to and did mislead and deceive large and substantial numbers of the purchasing and consuming public into purchasing said cigars in the erroneous belief that they are and were composed in whole and in part of Havana tobacco, that is, tobacco grown on the Island of Cuba.

PAR. 5. Of the competitors of respondent mentioned in paragraph 1 hereof there are many who sell and distribute in competition with respondent cigars composed in whole and also cigars composed in part only of Havana tobacco and who rightfully and truthfully advertise, represent, brand and label such cigars as containing said Havana tobacco. There are also many of said competitors who sell and distribute in, between and among the several States in competition with respondent cigars containing no Havana tobacco, and being composed wholly of tobacco grown elsewhere than on the Island of Cuba, and who do not brand, label, advertise or otherwise represent that said cigars contain any Havana or Cuban tobacco. In the regular course of business respondent's so-called "Havana Brown" cigars are displayed, offered for sale and sold to the consuming public by respondent and in and by cigar stores and other dealer-establishments in competition with the said cigars of competitors. The respondent's use of the word "Havana" as hereinabove described in relation to cigars containing no Havana tobacco has the capacity, tendency and effect of injuring the public and of unfairly diverting trade from respondent's competitors; and, further, tends to operate as a competitive burden upon the sale of said competing cigars.

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CONCLUSION

The acts and practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are and have been to the injury and prejudice of the public and of respondent's competitors, and are unfair methods of competition in interstate commerce and constitute a violation of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the entire record, including the complaint of the Commission, the answer of respondent thereto, the stipulation as to the facts agreed upon and approved; and the Commission having made its findings as to the facts with its conclusion that said respondent has been and is violating the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It is now ordered, That respondent Herbert L. Smith, his agents, representatives, servants, employees, and successors in business, cease and desist, in connection with, or in the course of, the sale or distribution of cigars in interstate commerce.

(1) From using, or causing to be used, the word "Havana" in the brand name or designation "Havana Brown" for any such cigars which do not contain Havana or Cuban tobacco, unless in each instance when and where so used said brand name or designation be immediately accompanied by a statement, assertion or phrase which is equally prominent and conspicuous and which clearly and unequivocally indicates or states the fact that such cigars do not contain any Havana or Cuban tobacco, or that said cigars are composed entirely of certain tobacco none of which is Havana tobacco or tobacco grown in Cuba.

(2) From using, or causing to be used, the word "Havana" in the brand name or designation "Havana Brown" for any such cigars which are not composed entirely of Havana or Cuban tobacco but contain such tobacco in part only, unless in each instance when and where so used said brand name or designation containing the word "Havana" be immediately accompanied by a statement assertion or phrase which is equally prominent and conspicuous and which clearly and unequivocally indicates or states the fact that

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such cigars are not composed wholly of Havana or Cuban tobacco or that the cigars contain certain tobacco which is not Havana tobacco or tobacco grown in Cuba.

(3) From directly or indirectly applying the word "Havana" singly to any such cigars which are not composed entirely of Havana or Cuban tobacco.

(4) From directly or indirectly applying to any of said cigars any other names, designation, statement, assertion, phrase or representation which implies or imports that such cigars contain Havana or Cuban tobacco in whole or in part when such is not the fact.

It is further ordered, That said respondent Herbert L. Smith shall, within 60 days after the service upon him of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist hereinbefore set forth.

Complaint

IN THE MATTER OF
MAX DORF AND DORF & COMPANYCOMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1968. Complaint, Aug. 31, 1931—Decision, Mar. 14, 1932*

Where an individual engaged in the manufacture and sale of umbrellas to jobbers and retailers in the various cities, and a corporation through which as his selling agent said individual thus sold said articles, designated and described as "Servisilk" and "imported Swiss taffeta" the fabric covering thereof, in circulars, advertising matter and sample advertisements employed and furnished for promoting sale of said products, notwithstanding fact fabric in question was composed of 90 per cent cotton; with capacity and tendency to deceive dealers and ultimate purchasers into believing such covering to be made entirely of silk, and divert trade from competitors dealing in umbrellas actually so covered or with silk and cotton coverings as the case might be:

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

Mr. Alfred M. Craven and Mr. J. Butler Walsh for the Commission.

Mr. Benjamin H. Saxen, of New York City, for respondents.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent Max Dorf, an individual engaged as Liberty Umbrella Co. in manufacture of umbrellas and respondent Dorf & Co., a New York corporation officered and principally owned by him and engaged in sale of said umbrellas to jobbers and retailers throughout the various States, and with principal place of business in New York City, with naming product misleadingly, using misleading brand or trade name, advertising falsely or misleadingly and misbranding or mislabeling as to composition of product, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondents, as charged, designate and describe said umbrellas, and the fabric covering thereof by the brand or trade name "Servisilk," and said covering as "the finest silk-mixed imported Swiss taffeta" in advertisements, in newspapers, and periodicals of national circulation, in letters, circulars and other like literature distributed among the trade and general public and in advertising