

Complaint

IN THE MATTER OF

HARRY GREENBERG AND LEO JOSEFSBERG, DOING
BUSINESS AS GREENBERG & JOSEFSBERG, G. & J.
MANUFACTURING CO., G. & J. PRODUCTS, AND AMERI-
CAN MERCHANDISE CO.

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

Docket 2303. Complaint, Feb. 27, 1935—Decision, July 23, 1935

Where a firm sold toothpicks, purchased in and imported from, Japan, and packaged in small quantities in cartons, which were of substantially the same size as those theretofore used for a number of years by a competitor engaged in the sale of a similar domestic product, and which in the arrangement of labels, and depictions, colors, and arrangement of printed words and statements thereon contained, and construction, and instructions to user, so closely imitated the labels and cartons of said competitor as to simulate the same; with the effect of confusing, deceiving and misleading the trade and public into the belief that said foreign made and imported toothpicks thus sold by it were the domestic product of said competitor, and into purchasing the same in reliance upon such erroneous belief, and with capacity and tendency so to do, and with the result that it was thereby enabled to and did pass off said toothpicks as and for those of competitors and trade was diverted to it from them:

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

Before *Mr. William C. Reeves*, trial examiner.

Mr. Edward E. Reardon 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 partners engaged in importing household articles and novelties and with place of business in New York City, with simulating cartons and labels of competitors in violation of Section 5 of such Act, prohibiting the use of unfair methods of competition in interstate commerce; in that as charged, they sold toothpicks imported from Japan, in cartons which in size, construction, labels, printed matter thereon contained, color, arrangement, instructions to open and general appearance were identical or substantially identical with those used for 12 years by a competitor for the sale of its domestic products and come to be known by the public for many years as

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identifying said domestic product with said competitor, and as superior to similar products made in other countries; with capacity and tendency thereby to confuse, deceive and mislead the trade and public and with effect of so doing, under ordinary conditions prevailing in the usual course of business in the sale of such products, and of inducing purchase of their said Japanese toothpicks as and for the domestic product of said competitor and of diverting thereby trade to themselves and to dealers in their said products from competitors and those dealing in the products of competitors, all to the prejudice of the public and their 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 (38 Stat. 717), the Federal Trade Commission issued and served its complaint upon the above-named respondents charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondents having filed their answer herein to the complaint, a hearing was had and evidence was thereupon introduced on behalf of the Commission and the respondents before an examiner of the Federal Trade Commission duly appointed.

Thereupon this proceeding came on for final hearing on the briefs filed on behalf of the Commission and the respondents, and upon oral argument by counsel for the Commission and for the respondents, and the Commission having duly considered the record and being fully advised in the premises finds that this proceeding is in the interest of the public and makes this its findings as to the facts and the conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents, Harry Greenberg and Leo Josefsberg, are and have been copartners doing business under the trade names, Greenberg & Josefsberg; G. & J. Manufacturing Co.; G. & J. Products; and, American Merchandise Co., having at all times, since on or about January 21, 1930, a place of business in the city of New York, N. Y.

¹ The facts alleged in the complaint as to the details involved in such simulation including the precise wording, appearance and arrangement of labels, etc., are set forth verbatim or substantially verbatim in the findings, infra.

PAR. 2. Prior to September 1934 the respondents, in the usual course of their business, purchased 50 gross of wooden toothpicks in Japan and caused them to be imported into the United States.

PAR. 3. Prior to the time that the toothpicks referred to in paragraph 2 hereof were imported by the respondents into the United States, toothpicks were and had been sold at all times since June 1931 by one of the respondents' competitors to retail dealers throughout the United States and had been and were being resold by the retail dealers to the public, put up or packaged in small quantities in cartons having labels and printed matter on the labels on the sides and ends of the cartons, substantially as follows:

1. On the flat top side a label with a design on the lower half of the label representing white birch trees on a yellow background, with two narrow parallel lines extending lengthwise across the label and a brown strip at the foot of the label representing the ground or earth. Imposed on the yellow background appears a trade mark consisting of a blue shield on which is displayed a spread eagle in white with blue shading, and the words in conspicuous type, on the shield on a white background, as follows:

THE DIAMOND MATCH CO.

U. S. A.

On the upper part of the flat top side label a design representing the foliage of the white birch trees in brown color, and carrying in white letters in conspicuous type the words:

DIAMOND BRAND
DOUBLE POINTED-TAPERED-FLAT
TOOTHPICKS
POLISHED WHITE BIRCH

2. On the opposite side, or bottom of the carton, a label with a yellow background and a brown marginal line, on which the trade mark above described appears, and, beneath the trade mark, in conspicuous type, the words and statements are printed, as follows:

THIS IS OUR TRADE MARK
AND ITS USE ON A PACKAGE OF WOOD
PRODUCTS INSURES DIAMOND QUALITY
OF BOTH MATERIALS AND WORKMANSHIP
EVERY ONE PERFECT

3. On the front vertical side, a label with a yellow background and brown marginal line, on which the above described trade mark appears in white, in the center of the label, and the words and state-

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ments are printed in conspicuous type across the entire label and trade mark, as follows:

DOUBLE POINTED-TAPERED-FLAT MADE,
POLISHED, AND PACKED BY
MACHINE, UNTOUCHED BY HANDS

4. On one of the ends, a label with a yellow background and brown marginal line, on which the above described trade mark appears in white, and on which the following words and statements are printed in conspicuous type across the label:

A PERFECT TOOTHPICK
MACHINE MADE FROM
SELECTED WHITE BIRCH
HIGHLY POLISHED
U. S. A.

5. On the opposite end, a label with a yellow background and brown marginal line, on which the above described trade mark appears in white, and printed in conspicuous type across the label are the words and statements as follows:

DOUBLE POINTED, FLAT,
TAPERED, AND HIGHLY POLISHED,
THE MOST PERFECT TOOTHPICKS MADE

6. All the labels above mentioned and referred to are and have been printed on the white paper of which the cartons were made and cover the respective sides and ends of the cartons with the exception of the narrow edges formed by the sides and ends. The edges of the cartons are white.

At the center of the lower white edge of the flat top side of the cartons beneath the lower brown strip on the label, the words in legible type and in brown color, were printed, as follows:

Lift Cover Here

PAR. 4. The respondents sold the toothpicks mentioned in paragraph 2 hereof during the months of September, October, November, and December 1934 to retail dealers for resale by them to the public, among others, to retail dealers located in Pennsylvania, New Jersey, Ohio, Indiana, and Illinois. And respondent caused the said toothpicks, when so sold by them, to be transported from New York to the purchasers in their respective States.

At the time the toothpicks were purchased by the respondents in Japan and at all times when they were sold by the respondents and

resold by the retail dealers, who purchased them from the respondents for resale, the said toothpicks were put up or packaged in small quantities in cartons of substantially the same size as the cartons of the respondents' competitor mentioned and referred to in paragraph 3 hereof, and with labels printed on the sides and ends of respondents' cartons, with printed matter on the labels in the same or approximately the same colors; in the same size type; and in substantially the same arrangement of the printed words and statements on the labels as in the case of the labels on the said cartons of the respondents' competitor, and substantially, as follows:

1. On the flat top side, a label with a design on the lower half of the label representing white birch trees on a yellow background with two narrow parallel lines extending lengthwise across the label, and a brown strip at the foot of the label representing the ground or earth.

On the upper part of the flat top side label a design representing the foliage of the white birch trees in brown color, and carrying in white letters in conspicuous type of substantially the same size as the letters on the corresponding label on the cartons referred to in paragraph 7 hereof, the respondents' brand name "conqueror" together with other words, as follows:

CONQUEROR BRAND
DOUBLE POINTED-TAPERED-FLAT
TOOTHPICKS
POLISHED WHITE BIRCH

2. On the opposite side, or bottom, of the carton, a label with a yellow background and a brown marginal line, on which the trademark consisting of a diamond figure and the word "products" with the letters arranged in vertical order therein between the capital letters "G" and "J", and other words and statements in substantially the same size type and arrangement as the corresponding labels of the cartons of the Diamond Match Company mentioned and described in subdivision 2 of paragraph 7 hereof, and as follows:

THIS IS OUR TRADE MARK
AND ITS USE ON A PACKAGE OF WOOD
PRODUCTS INSURES DIAMOND QUALITY
OF BOTH MATERIALS AND WORKMANSHIP
EVERY ONE PERFECT

3. On the front vertical side, a label with a yellow background and brown marginal line on which the words and statements are printed in type of substantially the same size and color and in the same

arrangement as on the corresponding label of the cartons of respondent's competitors referred to in subdivision 3 of paragraph 7 hereof, as follows:

DOUBLE POINTED-TAPERED-FLAT
MADE, POLISHED, AND PACKED BY MACHINE,
UNTOUCHED BY HANDS

with the words "Made in Japan" in small type just above the brown marginal line in the lower righthand corner of the label.

4. On one of the ends of the carton, a label with a yellow background and brown marginal line on which the same words and statements are printed, and in the same size type, in the same arrangement and in substantially the same color as on the corresponding label of the cartons of respondents' competitors mentioned and described in subdivision 4 of paragraph 7 hereof, as follows:

A PERFECT TOOTHPICK
MACHINE MADE FROM
SELECTED WHITE BIRCH
HIGHLY POLISHED

5. On the opposite end, a label with a yellow background and brown marginal line on which the same words and statements are printed, and in the same size type, in the same arrangement and in substantially the same color as on the corresponding label of the cartons of respondents' competitors mentioned and described in subdivision 5 of paragraph 7 hereof, as follows:

DOUBLE POINTED, FLAT
TAPERED AND HIGHLY POLISHED
THE MOST PERFECT TOOTHPICKS MADE

6. All the labels mentioned and referred to are labels that are printed on and have been printed on the white paper of which the cartons or packages were made and they cover the respective top, sides and ends of the cartons with the exception of the narrow edges formed by the sides and ends. The edges of respondents' carton are white.

At the center of the lower white edge of the flat top side of the cartons, beneath the brown strip on the label, the words in legible type and in brown color were and are printed as follows:

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PAR. 5. During all the times above mentioned and referred to, besides the respondents and the respondents' competitor above referred to, other individuals, firms, and corporations hereinafter referred

to as sellers, located in the various States of the United States, are and have been engaged in the business of the manufacture and of the sale of toothpicks to dealers located in the District of Columbia and in the various States of the United States for resale to members of the public, users of toothpicks.

The sellers have caused the toothpicks, when sold by them, respectively, to be transported from the State of the seller or from the State of origin of the shipment to, into, and through other States and the District of Columbia, to the purchasers.

PAR. 6. During all the times above mentioned and referred to, the respondents are and have been in substantial competition in interstate commerce with the other individuals, firms, and corporations referred to as sellers in paragraph 5 hereof, including the competitor of respondents referred to in paragraph 3 hereof, in the sale of toothpicks, including the toothpicks mentioned and referred to in paragraph 4 hereof.

PAR. 7. The pictorial design on the labels on the cartons of the respondents mentioned and described in paragraph 4 hereof, in which respondents sold toothpicks that were made in and imported from a foreign country, closely imitated in color and other respects the pictorial design on the label on the flat top side of the cartons in which toothpicks were sold by the competitor of the respondents referred to in paragraph 3 hereof. The printed matter on the labels on respondents' cartons was in the same size type and printed in the same or approximately the same colors and in substantially the same arrangement as in the case of the labels on the cartons of the respondents' competitor, as set forth respectively in paragraphs 3 and 4 hereof, and in those respects imitated the printed matter on the labels on the cartons of their competitor.

PAR. 8. The effect of the design and arrangement of the printed matter above described on respondents' labels or cartons was the simulation by respondents of the cartons or packages of their said competitor. Such simulation by the respondents of the cartons and labels of their competitor had at all the times above mentioned and referred to the capacity and tendency to confuse, deceive, and mislead the trade and public and was calculated to, and it did, confuse, deceive, and mislead the trade and public into the belief that the toothpicks which were made in a foreign country and sold by respondents were toothpicks made in the United States and sold by respondents' competitor; and in reliance upon such erroneous belief, into purchasing the respondents' toothpicks instead of the toothpicks made in the United States and sold by respondents' competitors. By such means the respondents were enabled to pass

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off and they did pass off their said toothpicks as and for the toothpicks of their competitors.

PAR. 9. In consequence of the practices of the respondents above set forth, trade in toothpicks was diverted to the respondents from competitors to the substantial injury and prejudice of such competitors and to the substantial injury and prejudice of the public.

CONCLUSION

The practices of the respondents, Harry Greenberg and Leo Josefsberg, doing business under the above mentioned trade names, under the conditions and circumstances described in the foregoing findings, were to the prejudice and injury of competitors of the respondents and were to the prejudice and injury of the public, and were unfair methods of competition in commerce and constitute a violation of 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission, upon the complaint of the Commission, the answer of the respondents, testimony and evidence introduced, and upon the brief on the part of the Commission; and the Commission having made its findings as to the facts and its conclusion that the respondents, Harry Greenberg and Leo Josefsberg, doing business under the trade names Greenberg & Josefsberg, G. & J. Manufacturing Co., G. & J. Products, and American Merchandise Co., have 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 respondents, Harry Greenberg & Leo Josefsberg, copartners, doing business under the trade names Greenberg & Josefsberg, G. & J. Manufacturing Co., G. & J. Products, and American Merchandise Co., or under any other trade name, their agents, representatives, and employees, in the sale and offering for sale of toothpicks or other merchandise in interstate commerce, do—

Cease and desist from selling or offering for sale, or causing others to sell or offer toothpicks or other merchandise for sale in boxes, cartons or other packages, whose dress or appearance, when sold to dealers for resale or to the public for use or consumption, is contrived or otherwise formed with or without the use of attached labels, by means of pictorial or other designs or printed words or state-

ments in type of the same or approximately the same size, form and arrangement, in white or black or in colors, so that the dress or appearance simulates the dress or appearance of boxes, cartons, or other packages, in which similar merchandise is sold or offered for sale by a competitor, with the effect that the dress or appearance of the boxes, cartons or packages has the capacity and tendency to confuse, deceive and mislead dealers and members of the public into the belief that respondents' toothpicks or merchandise are toothpicks or merchandise of the competitor.

It is further ordered, That the respondents, Harry Greenberg and Leo Josefsberg, shall within 30 days after the service of this order file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

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IN THE MATTER OF

DOUGLAS P. BORDEN, TRADING AS MORMILES

COMPLAINT AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2333. Complaint, Mar. 16, 1935—Order, July 26, 1935*

Consent order requiring respondent, his agents, etc., in connection with the sale or offer of automobile tires in interstate commerce, to cease and desist from—

- (a) Representing in any manner that any automobile tires, the reconditioning of which has been limited to the repair of worn or damaged portions and to vulcanizing and painting the tires so that they will present a new appearance, and to regrooving treads which have worn smooth by cutting through the smooth face a tread design, are reconstructed tires; or
- (b) Representing in any manner that said tires so sold and distributed by him have their original treads when such is not the fact.

Mr. Astor Hogg for the Commission.

COMPLAINT

Pursuant to the provisions of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission, having reason to believe that Douglas P. Borden, an individual, trading as Mormiles, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce, as "commerce" is defined in said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, states its charges in that respect as follows:

PARAGRAPH 1. Respondent is, and at all times hereinafter mentioned was an individual trading as Mormiles, with his principal place of business located in the city of Chicago, in the State of Illinois. He is, and for more than one year last past has been engaged in the business of repairing partially used or discarded automobile tires and in the sale and distribution thereof. His sales are to wholesalers and retailers located throughout the United States and the District of Columbia, and pursuant to such sales, shipments are made from respondent's place of business in Chicago, Ill., into and through various States of the United States other than the State of the point of origin of such shipments and in the District of Columbia. There are in the United States other persons, firms, and corporations engaged in the business of repairing partially