

Syllabus

IN THE MATTER OF

ISADOR SOMMERFELD, TRADING AS DUBINER &
SOMMERFELD

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

Docket 1303. Complaint, April 8, 1925—Decision, Feb. 4, 1937

Where the term "Havana Tobacco" had long meant to cigar tobacco trade and cigar purchasing public of the United States tobacco grown on the Island of Cuba, and where many members of cigar tobacco and cigar trades and of cigar purchasing public had long believed such tobacco to be superior in quality for manufacture of cigars to be sold and consumed in the United States, and such trades and public had long considered that tobacco there grown in the Vuelta Abajo area or district of said Island was of a higher or more desirable quality for aforesaid use than tobacco grown in other countries or grown elsewhere on said Island; and thereafter an individual, engaged in New York in manufacturing and selling cigars which contained no tobacco grown on said Island, and in packing same for display and resale to members of the public who purchase cigars for consumption in and from wooden boxes and other containers, and in transporting such products to wholesale and retail dealer purchasers thereof into and through the District of Columbia and various other States; and never a recipient of any medals, prizes, or awards from any persons or associations on account of cigars made by him—

- (a) Caused words "Havana" and "Vuelta Abajo" to be placed on his cigar boxes and containers, and on the bands of cigars made and sold by him, with effect of misleading and deceiving many of said cigar and tobacco trades and members of cigar purchasing public into the belief that his said cigars were made wholly of Havana tobacco from the aforesaid district;
- (b) Caused to be placed on the boxes or containers of his said cigars certain labels carrying an outline map of the Island of Cuba and certain inscriptions in the Spanish language to the effect that cigars contained therein were made of finest Vuelta Abajo tobacco, and that tobacco in question was guaranteed as of the best Havana, and that anyone representing composition thereof to the contrary would be prosecuted to the fullest extent of the law, and containing also Spanish inscriptions and depictions of Spanish scenes and persons; and
- (c) Placed on his said boxes depictions of medals such as are awarded at World's fairs or conventions by governments, ruling members, manufacturers, trade associations, or others throughout the world, to manufacturers or dealers as prizes, decorations, or honors for the exceptional quality of their products, with effect of misleading and deceiving aforesaid trade and public into purchasing his said cigars as and for such products either imported from Cuba or made of Havana tobacco;

With result that many of the trade and public, relying on such words, labels, and inscriptions thus used by him in the manufacture and sale of said products,

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were caused to buy the same instead, or in preference to cigars of competitors who were properly labeling, branding, or advertising their products under said names, brands, or labels, "Havana" and "Vuelta Abajo," and also to cigars of competitors who were making and selling such products from domestic tobacco and who properly did not brand, label, or otherwise represent the same as made of Havana tobacco:

Held, That such acts and practices were to the prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. Edward E. Reardon for the Commission.

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 Isadore Sommerfeld, hereinafter referred to as respondent, an individual doing business under the trade name and style of Dubiner & Sommerfeld, has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act, issues this complaint, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent is, and for a number of years immediately prior to the date hereof, has been engaged in the business of manufacturing and selling cigars, with a principal place of business in the city of New York, State of New York. Respondent causes, and during the times above referred to has caused, the cigars sold by him to be packed for display and resale to the members of the public who purchase cigars for consumption, in and from wooden boxes or other containers and to be transported to individuals, firms, and corporations, wholesale and retail dealers, the purchasers thereof, from his said place of business to, into, and through the District of Columbia and various States of the United States other than the State of origin of the shipment of the cigars.

During the times above mentioned, other individuals, firms, and corporations have been, and now are, engaged in manufacturing and selling cigars packed for display and resale in and from wooden boxes or other containers, and who cause and have caused the same, when sold by them, to be transported from without the District of Columbia to the purchasers, individuals, firms, and corporations, wholesale and retail dealers, located in the District of Columbia and in various States of the United States, other than in the State of origin of the shipment, and including those States into which, from other States than those in which his shipments originate, the respondent causes and has caused his said cigars to be transported.

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The respondent has been during the said times, and now is in competition in commerce with the above individuals, firms, and corporations, in the sale of his said cigars.

PAR. 2. For many years prior to the date hereof, and ever since tobacco has been a commercial export product of the Island of Cuba, the term "Havana" tobacco, has meant and continues to mean tobacco of Cuban growth to the cigar tobacco trade, the cigar trade and the cigar purchasing public of the United States, many of whom have during said times considered and continue to consider Cuban grown or "Havana" tobacco superior in quality, for the manufacture of cigars to be sold and consumed in the United States, to tobacco grown elsewhere. Many of the said trade and public have also during said times considered and continue to believe that cigars made in the United States, for sale and consumption there, of Cuban tobacco, or cigars made of such tobacco in Cuba for sale and consumption in the United States, are likewise superior in quality to cigars made of tobacco grown elsewhere.

PAR. 3. Vuelta Abajo is the name of an area or district in the Island of Cuba, a part of which is in the Province of Pinar del Rio, and in which tobacco is grown which is and has been considered, during the times above referred to, by many of the said tobacco and cigar trade and public, to be of a higher and more desirable quality for use in the manufacture of cigars for sale and consumption in the United States than tobacco grown, not only in countries other than Cuba, but even of a higher and more desirable quality for such purpose than any tobacco grown elsewhere on the Island of Cuba.

Likewise many of the said tobacco and cigar trade and of the said public have also considered during said times, and still believe, that cigars made in Cuba for sale and consumption in the United States of tobacco grown in Cuba either wholly or in part in said Vuelta Abajo district, or cigars made in the United States for sale and consumption there, of tobacco grown in Cuba, either wholly or in part in said Vuelta Abajo district, are and have been superior in quality to cigars made wholly of tobacco grown outside of said district. To the said trade and public Vuelta Abajo tobacco is the most famous tobacco in the world that is used in the manufacture of cigars.

PAR. 4. For a long period of years prior to and at the time respondent engaged in his said business, cigars made wholly of Cuban tobacco were made in Cuba and in the United States for sale and consumption in the United States by manufacturers whose surname was "Garcia" and who, respectively, used and displayed and still use and display their said surname either alone or in combination with the rest of their

name or with other words on the bands of the cigars, on the said boxes or containers and on labels thereon.

For a long time prior to the use of the name "Garcia" by the respondent as hereinafter described, many in the said trade and many of the said public, became accustomed to believe and still believe that cigars in connection with the sale of which the name "Garcia" so appeared, were made by manufacturers having that name, of Cuban nationality and of Cuban grown tobacco exclusively and that they were and are of a quality superior to cigars made by many other manufacturers and of tobacco wholly or in part grown elsewhere, and in purchasing cigars became accustomed to and still call for them either by the name "Garcia" alone or in combination with the rest of the name of one of the manufacturers of that surname, and the said manufacturers whose surname is or was "Garcia" have during said times gained a valuable interest and good will in said word when used in connection with the manufacture and sale of cigars in the United States.

PAR. 5. Respondent has caused and still causes the words "Havana", "Vuelta Abajo" and "Garcia" either alone or in combination with one or more other words to be placed on his said cigar boxes or containers and on the labels on said boxes or containers, and the word "Garcia" to be placed on the bands of the cigars made and sold by him.

Respondent has caused and still causes the name M. Garcia y Ca, purporting to be the trade name of an individual or the name of a firm or corporation to be placed on the said boxes or containers of the said cigars as the manufacturer of said cigars.

Respondent causes and has caused certain labels to be placed on the boxes or containers of his said cigars, carrying the outline map of the Island of Cuba and certain inscriptions in the Spanish language that the cigars contained in the said boxes are and were made of the best Vuelta Abajo tobacco and that the tobacco contained in them was guaranteed to be of the best Havana tobacco and that anyone representing to the contrary would be prosecuted to the fullest extent of the law. Respondent during said times has placed labels containing only Spanish inscriptions and Spanish pictures or illustrations on the boxes or containers of his said cigars. Pictures or illustrations of medals, such as are or have been awarded by governments, trade associations, etc., to manufacturers as prizes, decorations or honors for the exceptional qualities of their products, have been and are caused by respondent to be placed on the labels of the boxes or containers of his said cigars.

PAR. 6. The said cigars made and sold by the respondent have never at any time contained more than a very small amount of Cuban

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grown tobacco, and during most the aforesaid time they have contained no Cuban grown tobacco.

Neither the respondent nor anyone connected with the said business has or ever had the name "Garcia" as part of his name, and the name M. Garcia y Ca is fictitious and does not represent any individual, firm, or corporation engaged in the manufacture of respondent's cigars. Respondent has caused the said words "Havana," "Vuelta Abajo" and "Garcia" and the said name "M. Garcia y Ca" to be used on the boxes or containers and labels thereof, and on the bands of his cigars aforesaid, in order to compete with the long established concerns having the name "Garcia" or the right to use it, who are engaged in the manufacture and sale of cigars, and to divert the latter's trade to respondent by confusing the identity of the products of both, and leading purchasers to buy those of respondent for those of the said established concerns. Respondent chose the names "Garcia" and "M. Garcia y Ca" unnecessarily and for the purpose of unfair competition with those lawfully entitled to use the name "Garcia."

During the aforesaid time, the name M. Garcia y Ca used by respondent, as aforesaid was and is fictitious and by his said use of the same, respondent knowingly, falsely and unlawfully represents and has represented to the said trade and public that his said cigars are made by a business concern properly using the name of "Garcia." By the use of the word "Garcia" alone or with other words as aforesaid respondent knowingly, falsely and unlawfully represents to the said trade and public that his cigars are made by manufacturers having that name, and that they are made of Havana tobacco.

By the use of the said words Havana and Vuelta Abajo, respondent knowingly falsely and unlawfully represents and has represented to the said trade and public that his said cigars were made of Havana tobacco and either partly or wholly of tobacco grown in the district of Vuelta Abajo.

Respondent has knowingly and falsely represented and guaranteed to the said trade and public by the labels that the said cigars are not only of Havana tobacco but are of the best Havana tobacco from the district of Vuelta Abajo, and has knowingly and fraudulently used the aforesaid labels containing only Spanish inscriptions, pictures, and illustrations in further effort and with intent to receive and defraud the trade and members of the public into the belief that his said cigars were and are made of Havana tobacco and have the qualities characteristic of such cigars.

PAR. 7. The acts and practices of respondent, all hereinbefore set out, have the capacity and tendency to and have misled, and deceived

many of the trade and consuming public into the belief that respondent's cigars are manufactured by an individual, firm, or corporation named M. Garcia y Ca; that the manufacturer thereof has the name or the right to use the name "Garcia" in connection with the manufacture and sale of cigars; that the tobacco composing his said cigars is Havana tobacco either wholly or in part from the said district of Vuelta Abajo, and that they are made in and imported from Cuba to the United States.

PAR. 8. Among the individuals, firms, or corporations referred to in paragraph 1 hereof, who are and have been in competition with the respondent, are some who manufacture, and sell cigars made of tobacco, part of which only is grown in Cuba, or of tobacco grown wholly elsewhere than in Cuba, and who are not branding or labeling the cigars made by them or the containers thereof with or under the words, "Havana," "Vuelta Abajo," or "Garcia."

Among the individuals, firms, or corporations referred to in said paragraph 1 are some engaged in the manufacture and sale, in commerce, of cigars made wholly of tobacco grown in Cuba, either wholly or in part from the district of Vuelta Abajo, who are properly labeling, branding, and advertising cigars made by them under the name, brand or labels, "Garcia," "Havana," and "Vuelta Abajo."

PAR. 9. The above alleged acts and things done by respondent are each and 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 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.

REPORT, MODIFIED 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 8th day of April 1925, issued and served its complaint in this proceeding upon said respondent, Isador Sommerfeld, doing business under the trade name and style of Dubiner & Sommerfeld, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. Thereafter, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts signed and executed by the respondent, and W. H. Fuller, Chief Counsel of the Federal Trade Commission, subject to the approval of the Commission, might be taken as the facts in this proceeding and in lieu of testimony in sup-

port of the charges stated in the complaint and in opposition thereto, and that the said Commission might proceed upon said statement of facts to make its report, stating its findings as to the facts (including inferences which it might draw from said facts) and its conclusion based thereon, and enter its order disposing of the proceeding without presentation of argument or the filing of briefs. Thereafter this proceeding regularly came on for final hearing before the Commission on said complaint and stipulation, said stipulation having been approved and accepted, and the Commission having duly considered the same and being now fully advised in the premises, makes this its modified findings as to the facts and its conclusion drawn therefrom:

MODIFIED FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent for a number of years immediately prior to April 9, 1925, had been engaged in the business of manufacturing and selling cigars with his principal place of business in the city, county, and State of New York. During the time above referred to, respondent had caused cigars sold by him to be packed for display and resale to the members of the public who purchase cigars for consumption in and from wooden boxes and other containers, and to be transported to individuals, firms, and corporations, wholesale and retail dealers, the purchasers thereof, from his said place of business to, into and through the District of Columbia and various other States of the United States other than the State of New York.

During the time above mentioned and referred to, other individuals, firms, and corporations had been engaged in manufacturing and selling cigars packed for resale in wooden boxes and other containers, and who caused the same when sold by them to be transported from without the District of Columbia to the purchasers, individuals, firms, and corporations, wholesale and retail dealers located in the District of Columbia and in various States of the United States other than the State of origin of the shipment, and including those States into which from other States the respondent had caused said cigars to be transported. The respondent had been during the said time, in competition in commerce with the above individuals, firms, and corporations in the sale of his said cigars.

PAR. 2. During the time above mentioned and referred to, and ever since tobacco has been a commercial export product of the Island of Cuba, the term "Havana Tobacco" has meant and continues to mean to the cigar tobacco trade and the cigar purchasing public of the United States, tobacco grown on the Island of Cuba. Many members of the cigar tobacco trade, the cigar trade and cigar purchasing public

of the United States have, during said times believed, and now believe, Havana tobacco grown on the Island of Cuba to be superior in quality for the manufacture of cigars to be sold and consumed in the United States.

Vuelta Abajo is the name of the area or district in the Island of Cuba in which tobacco is grown which was believed during the times above referred to and is now believed by the said tobacco and cigar trade and the said purchasing public to be of a higher and more desirable quality for use in the manufacture of cigars for sale and consumption than tobacco grown not only in other countries than Cuba, but of higher and more desirable quality for such purposes than any tobacco grown elsewhere than on the Island of Cuba.

PAR. 3. Respondent had caused the words "Havana" and "Vuelta Abajo" to be placed on his cigar boxes and containers and on the bands of cigars made and sold by him.

Respondent had caused certain labels carrying an outline map of the Island of Cuba and certain inscriptions in the Spanish language to be placed on the boxes or containers of his said cigars. The said inscriptions were to the effect that cigars contained in the said boxes were made of the finest Vuelta Abajo tobacco and that the tobacco in the cigars was guaranteed to be of the best Havana tobacco and the said inscriptions stated that anyone representing the composition of the said cigars to be to the contrary would be prosecuted to the fullest extent of the law.

Respondent had placed labels containing only inscriptions in the Spanish language on his cigar boxes or containers and had also placed thereon pictures or illustrations of Spanish scenes and persons on said cigar boxes or containers. Respondent had placed on said cigar boxes pictures or illustrations of medals such as are or have been awarded at World's fairs or conventions, by governments or ruling members thereof, or by manufacturers, trade associations or others throughout the world, to manufacturers or dealers as prizes, decorations or honors for the exceptional quality of their products.

The cigars made and sold by the respondent had never at any time contained any tobacco grown on the Island of Cuba.

The respondent had never received any medals, prizes or awards from any persons or associations on account of cigars manufactured by him.

PAR. 4. Among the individuals, firms, and corporations referred to above who had been in competition with the respondent there were some who manufactured and sold cigars made of tobacco part of which only was grown in Cuba, or of tobacco grown elsewhere than in Cuba,

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and who were not branding or labeling the cigars made by them or the containers thereof, with the words "Havana" and "Vuelta Abajo."

PAR. 5. The use, by the respondent, of the terms or words "Havana" and "Vuelta Abajo" on the labels or containers of cigars in connection with their manufacture and sale as above described or in other advertising referred thereto, was false and misleading and had the tendency and capacity to and did mislead and deceive many of said cigar and tobacco trade and members of the public purchasing cigars for consumption into the belief that respondent's said cigars were made wholly of Havana tobacco from the District of Vuelta Abajo.

Respondent's use of labels on the boxes or containers of his cigars having thereon an outline map of Cuba, inscriptions solely in the Spanish language, and the said guarantee that the tobacco composing his cigars was Havana tobacco, had the capacity to mislead and deceive the said trade and public, and said trade and public have been misled and deceived thereby into purchasing respondent's cigars as cigars either imported from Cuba or made of Havana tobacco.

The use by the respondent of the said words "Havana" and "Vuelta Abajo" and the said labels of Cuba and inscriptions in the Spanish language as above set forth, in the manufacture and sale of his cigars, has caused many of the trade and public relying thereon to purchase respondent's cigars instead of or in preference to cigars of competitors of respondent who were properly labeling, branding or advertising their cigars under the said names, brands or labels "Havana" and "Vuelta Abajo," as well as cigars of competitors who were manufacturing and selling cigars made of domestic tobacco and who properly did not brand, label, or otherwise represent their said cigars had been made of Havana tobacco.

CONCLUSION

The aforesaid acts and practices of respondent, Isador Sommerfeld, trading as Dubiner & Sommerfeld, were to the prejudice of the public and of respondent's competitors, and constituted unfair methods of competition in commerce, within the intent and meaning 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."

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the stipulation as to the facts filed herein by respondent on July 16, 1925, admitting all the material allegations of the complaint to be true and waiving

the taking of further evidence and all other intervening procedure, and the Commission having made its modified findings as to the facts and its conclusion that said 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 ordered, That respondent, Isador Sommerfeld, doing business under the trade name and style of Dubiner & Sommerfeld, his officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution in interstate commerce or in the District of Columbia of cigars, do forthwith cease and desist from using:

1. The words "Havana" or "Vuelta Abajo," when the said cigars are not composed entirely of Havana tobacco;

2. Words or writing on labels or otherwise solely in the Spanish language, an outline map of Cuba, or pictures or representations of Cuban scenes indicating Cuban origin in the composition of respondent's cigars when the same are not made entirely of Havana tobacco;

3. Words or writing in Spanish language on labels or otherwise to such extent or in such manner as to indicate that the cigars are made of Cuban tobacco when the same are not made entirely of Havana tobacco.

It is further ordered, That the respondent shall, within 60 days after service upon him 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 this order.

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IN THE MATTER OF
LOFT, INC., AND DR. DANIEL R. HODGDONCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2496. Complaint, July 10, 1935—Decision, Feb. 4, 1937*

Where a corporation, which was one of the largest candy product manufacturers in the world, and publicly represented itself as the largest, and which owned or operated over two hundred retail stores, in addition to its sales to independent retailers, and expended large annual sums for advertising, and an individual, its agent and employee, entitled to use of word "Doctor", but not as physician, engaged under contract with it in advertising and promoting sale of its products through broadcast of lectures on food, and in lending his recommendation, name, title and photograph in promoting the sale of its said candy products, and for such use in literature advertising the same—

Featured the slogan and representation "Made without Glucose," and contains no glucose, in an extensive advertising campaign initiated and carried on by them through newspapers and radio broadcasts of said individual and through inserts in the boxes and through the labels, seals, and literature distributed through said corporation's stores, and through its store and window displays, and accompanied such slogan and representation generally with words "Seal of Protection" and "Loft Really Pure Candy," and depicted such seals in approximately all of its advertising literature, along with such words as "This Seal is Your Protection," and represented that candy products made with or containing glucose were impure and harmful to health and unsafe, and that the candies of said corporation contained no glucose, and that other candies made therewith were inferior in quality to its own and less wholesome and safe, through such statements as those above set forth and numerous others, asserting its new method of making candies without use of glucose, and purity, etc., of its own said products, and safety and beneficial quality thereof for children, and warnings against use of glucose as an adulterant made through treating starch with sulphuric or hydrochloric acid, etc., and other statements inferring or implying that said substance was a filler, preservative, cheap substitute for sugar, less digestible, etc.;

Fact being that word "Glucose," as a matter of primary definition and meaning, is a name for a certain sugar or group of sugars, glucose is contained in corn syrup, usually employed with cane sugar in the making of candy, was used by corporation in question prior to campaign in question, is regarded by many candy-makers, its competitors, as an absolutely essential ingredient for all or most of their products, has been used in industry in question for approximately fifty years because of its unique combination of values as a candy ingredient, and industrial chemistry incident to use thereof as now practiced is consistent with safe and wholesome candy, and glucose in any form, inclusive of sugar or corn syrup, as used or found in candy, is safe and wholesome and regarded as a natural and essential ingredient thereof in commercial candies, and said product, as sugar or corn