

Complaint

IN THE MATTER OF

M. F. FOLEY COMPANY

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

Docket 2752. Complaint, Mar. 30, 1936—Decision, Mar. 25, 1937

Where a corporation engaged in sale and distribution at wholesale of fish and other sea food—

Advertised a certain species of fish offered and sold by it, in price lists or bulletins distributed among customers and prospective customers, as "Deep Sea Whitefish Fillets," or as "Fresh Cusk Fillets (Deep Sea Whitefish)," or as "Deep Sea Whitefish Fillets (Cusk)," or as "D. S. Whitefish Fillets," notwithstanding fact said species, or cusk, as known to trade, was not that fresh water, Great Lakes species referred to by trade and consuming public as "Lake Erie whitefish," "Lake Superior whitefish," and "Selkirk whitefish," and also "whitefish," and so advertised and sold and known to such trade and public, and preferred to said salt water species, on the part of a substantial portion of such and purchasing public;

With effect of misleading and deceiving customer and prospective customer members thereof into erroneous belief that said representations were true, and that its said product, thus represented, was the fresh water whitefish, and with result that a substantial number of such customers and prospective customers and purchasing public bought its said product in such belief, and trade was unfairly diverted to it from its competitors, who do not misrepresent the nature and kind of their respective products; all to the injury of competition in commerce:

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

Before *Mr. John J. Keenan*, trial examiner.

Mr. Daniel J. Murphy for the Commission.

Mr. Thomas H. Walsh, of Boston, Mass., for respondent.

COMPLAINT

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, having reason to believe that M. F. Foley Company, a corporation, hereinafter referred to as "respondent," has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

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PARAGRAPH 1. The respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its principal place of business located at corner, Friend and Union Streets in the city of Boston, in the State of Massachusetts. It is now, and for some time past has been, engaged as a wholesaler in the sale and distribution of fish and other sea foods in commerce between and among the various States of the United States. It causes and has caused the said products, when sold, to be shipped from its place of business in the State of Massachusetts to purchasers thereof located in a State or States other than the State of Massachusetts. In the course and conduct of its business respondent was at all times herein referred to in substantial competition with other corporations, individuals, firms, and partnerships likewise engaged in the sale and distribution in interstate commerce of similar products.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, the respondent, in soliciting the sale of and selling its products in interstate commerce, caused the same to be advertised by means of price lists or bulletins distributed in interstate commerce among customers and prospective customers, and in which advertising matter certain species of the fish offered for sale and sold by the said respondent were variously designated, represented and referred to as "Deep Sea Whitefish Fillets," or as "Fresh Cusk Fillets (Deep Sea Whitefish), or as "Deep Sea Whitefish Fillets (Cusk)." Invoices distributed by the said respondent in interstate commerce alluded to said species as "D. S. Whitefish Fillet," when in truth and in fact said species were not that species of food fish known as "whitefish," but were species of food fish other than whitefish.

PAR. 3. There is a preference on the part of a substantial portion of the purchasing and consuming public for that species of food fish genuinely known as "whitefish" which is confined chiefly to the Great Lakes, rather than for that species of food fish found in the Atlantic Ocean and erroneously termed "whitefish."

PAR. 4. The representations by said respondent, as set forth in paragraph 2 hereof, are calculated to, and do, have the capacity and tendency to, and do, mislead and deceive customers and prospective customers of respondent and the purchasing public into the erroneous belief that the said representations made are true, and that the product so represented is of the species of food fish genuinely known as "whitefish," and to cause a substantial number of such customers, prospective customers and the purchasing public, acting on such belief, to buy said respondent's product, thereby diverting trade to

said respondent from its competitors who do not misrepresent the nature and kind of their products, and thereby doing substantial injury to substantial competition in interstate commerce.

PAR. 5. The acts and things above alleged to have been done and the false representations alleged to have been made by respondent are to the prejudice of the public and the competitors of respondent and constitute unfair methods 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," approved September 26, 1914.

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 March 30, 1936, issued and served its complaint in this proceeding upon respondent M. F. Foley Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Daniel J. Murphy, attorney for the Commission, before John J. Keenan, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Thomas H. Walsh, attorney for the respondent; and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto; and the Commission having duly considered the same, and being now 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 its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, M. F. Foley Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its principal place of business located in the city of Boston in the said Commonwealth. It is now, and for some time past has been, engaged as a

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wholesaler in the sale and distribution of fish and other sea food in commerce between and among the various States of the United States. It causes, and has caused, the said products, when sold, to be shipped from its place of business in the State of Massachusetts to the purchasers thereof located in various States of the United States other than the State of Massachusetts.

PAR. 2. In the course and conduct of its business the respondent was at all times herein referred to in substantial competition with other corporations, individuals, firms, and partnerships likewise engaged in the sale and distribution of similar products in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its business, as described in paragraph 1 hereof, the respondent, in soliciting the sale of, and selling, its products in commerce, as herein described, causes the same to be advertised by means of price lists or bulletins distributed in said commerce among customers and prospective customers, in which advertising matter certain species of the fish offered for sale, and sold, by the said respondent were variously designated, represented, and referred to as "Deep Sea Whitefish Fillets," or as "Fresh Cusk Fillets (Deep Sea Whitefish)," or as "Deep Sea Whitefish Fillets (Cusk)," or as "D. S. Whitefish Fillets." For a number of years fish of a species of fresh water fish found chiefly in the Great Lakes region of the United States have been advertised, sold, and known as "whitefish." They are referred to by the trade and the consuming public as "Lake Erie whitefish," "Lake Superior whitefish," and "Selkirk whitefish," and also "whitefish." The fish designated, represented, and described by the respondent in the manner above set forth were not fish of the species of fresh water fish found chiefly in the Great Lakes region of the United States and advertised, sold, and known to the trade and consuming public as "Lake Erie whitefish," "Lake Superior whitefish," "Selkirk whitefish," and "whitefish," but were fish of a species of salt water fish known to the trade as "cusk." There is a preference on the part of a substantial portion of the purchasing and consuming public for that species of fresh water fish known as "whitefish," rather than for that species of salt water fish known as "cusk."

PAR. 4. The representations made by said respondent, as set forth in paragraph 3 hereof, are concluded to, and do, have the capacity and tendency to, and do, mislead and deceive customers and prospective customers of respondent, the same being members of the purchasing public, into the erroneous belief that the said representations are true, and that the product so represented is of the species of fresh water fish known as "whitefish." A substantial number of

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such customers, prospective customers, and the purchasing public, acting on such belief, have bought said respondent's product. As a result thereof, trade has been unfairly diverted to said respondent from its competitors who do not misrepresent the nature and kind of their respective products, all to the injury of competition in commerce between and among the various States of the United States.

CONCLUSION

The aforesaid acts and practices of the respondent, M. F. Foley Company, are to the prejudice of the public and of respondent's competitors, and constitute 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before John J. Keenan, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein by Daniel J. Murphy, counsel for the Commission, and by Thomas H. Walsh, counsel for the respondent, and the Commission having made its 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 the respondent, M. F. Foley Company, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of fish and other sea foods in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Representing, directly or indirectly, through the use of the word "whitefish," alone or in connection or conjunction with any other word or words, that fish of the species of salt water fish known and described as "cusk" are whitefish;

2. Representing, directly or indirectly, through the use of the word "whitefish," alone or in connection or conjunction with any other word or words, that fish of any species other than the species of fresh water fish found chiefly in the Great Lakes region of the United

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States and known to the trade and consuming public as "Lake Erie whitefish," "Lake Superior whitefish," "Selkirk whitefish," and "whitefish" are whitefish.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF
THE CLARK GRAVE VAULT COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3 OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933¹

Docket 2323. Complaint, Mar. 12, 1935—Decision, Mar. 19, 1937

Where a corporation engaged in the manufacture of air-seal type, ferrous metal burial vaults and in the sale thereof to jobbers and funeral directors and undertakers, in competition with those engaged in sale and transportation of metal, stone, concrete, cement and other burial vaults in commerce between and among the various States—

- (a) Represented through warranties issued by it and through advertisements in periodicals of wide interstate circulation, and through booklets, circulars, pamphlets, letters, photographs, testimonials, and other advertising matter, and through its customers, authorized by it so to state in the sale and promotion of sale of its said vaults, that same would remain waterproof and airtight under ground for fifty years, and were so warranted, and that they were made of rust and corrosion resisting metal, proof against moisture and crumbling, and were waterproof and airtight and verminproof, and, buried, had an impenetrable seal and would afford positive and permanent protection to the coffin and body encased therein; and
- (b) Made use of "warranties" or "guarantees" in connection with sale and offer of its said vaults, which were issued by it through the jobber or funeral director and were intended to be, and in many cases were, delivered to ultimate purchasers of said product, and which guaranteed same for fifty years against entrance of water due to defective construction, rust or corrosion, and undertook therein to replace any vault, without cost to purchaser, found defective within the terms of such warranty within such fifty-year period, etc.;

The facts being that, while its said vaults were manufactured by it of highly refined grades of metal of high quality, made as carefully, accurately and thoroughly as possible by exact control of furnacing operations to make the best ferrous metal, that would resist, but not prevent, corrosion and tend to increase durability of such metals for a longer period of time than if impurities had not been removed therefrom, and said metals, by their very nature and texture, would not permit passage of water or air unless punctured, broken or partially destroyed by corrosion, said vaults, by virtue of the circumstances involved, would not, nevertheless, be entirely without moisture after burial, all soils are more or less corrosive and will eventually cause all ferrous metals to pit or corrode, and water, frequently present in graves due to many conditions, will, when present, touch said vaults and in time produce rust, beginning of corrosion, which, once started, will usually continue until puncture of metal, and said vaults were not rust or corrosion proof or rust or corrosion resistant to the extent

¹ Count 2 of the complaint alleging violation of the National Industrial Recovery Act dismissed November 9, 1935.