

Complaint

24 F. T. C.

IN THE MATTER OF

H. N. HEUSNER & SON

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 2355. Complaint, Apr. 6, 1935—Decision May 29, 1937

Where a corporation engaged in the manufacture, sale, and distribution of cigars to wholesalers, cigar stores and drug stores in various parts of the United States, including two brands respectively and usually sold at retail at a price of two for five cents and five cents apiece, and wholly composed of domestic tobacco grown in the United States—

Respectively designated, branded and sold said cigars as "Heusner's Original Havana Smokers" and "Martinez Havana Smokers," notwithstanding fact said cigars were not made of Cuban or Havana tobacco, as (1) long understood from term "Havana" 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 grown on the Island of Cuba and finest quality of tobacco for cigar purposes, and (2) as designating cigars made from such tobacco, preferably purchased as more desirable by many cigar dealers and many of the consuming public;

With capacity and tendency to mislead and deceive substantial portion of the purchasing public into the erroneous belief that said cigars were composed of tobacco grown on aforesaid island, and with result that many members of the public, acting in such erroneous belief induced by such misrepresentations, bought said cigars, and with capacity and tendency thereby to divert unfairly to it trade of competitors engaged in sale in commerce of cigars composed of Havana tobacco, and also of cigars composed of tobacco grown in the United States, and who truthfully advertise and represent their said products; to the substantial 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 L. Hornor*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Mr. John Walsh, of Washington, D. C., 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 H. N. Heusner & Son, a corporation, hereinafter called respondent, has been and is using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to 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:

PARAGRAPH 1. The respondent is now, and since 1918 has been, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business at Hanover, in said State. It is now and since its organization has been engaged in the manufacture of cigars and in the sale thereof between and among the various States of the United States to retailers thereof. In the course and conduct of its business it ships the cigars manufactured by it, when sold, to the purchasers thereof located in the various States of the United States, and there is now, and has been for more than two years last past, a constant current of trade and commerce by respondent in such cigars. In the course and conduct of its said business respondent is now, and at all times since its organization has been, in substantial competition with other corporations and with individuals, firms and partnerships engaged in the sale of cigars between and among the various States of the United States.

PAR. 2. For many years prior to the organization of respondent, and at all times since its organization, tobacco grown on the Island of Cuba and cigars made from such tobacco have been referred to, sold, purchased and designated as "Havana" tobacco and as "Havana" cigars, respectively, by the trade and the purchasing public throughout the United States. The word "Havana," when applied to tobacco, has for many years signified and meant to the trade and purchasing public of the United States that such tobacco was grown on the Island of Cuba. The word "Havana" when applied to cigars has for many years signified and meant to the trade and purchasing public of the United States that such cigars are made of tobacco grown on the Island of Cuba. For many years many retailers and the purchasing 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 cigars, as hereinbefore stated, are known and designated as "Havana" cigars, and which tobacco, as hereinbefore stated, is known and designated as "Havana" tobacco, and such retailers and purchasing public have considered and still consider such Havana tobacco to be superior in quality or value to tobacco grown elsewhere than on the Island of Cuba, and Havana cigars to be superior in quality or value to cigars made of tobacco grown elsewhere than on the Island of Cuba.

PAR. 3. In the course and conduct of its business hereinbefore described, respondent, since 1918 has caused, and still causes, certain of the cigars manufactured by it to be designated, branded or labeled with the words "Havana Smokers." Such cigars it has caused and still causes to be packed in box containers, on the inner and outer

Findings

24 F. T. C.

face of which have appeared and still appear the imprint, "2 for 5¢ Martinez Bigger and Better Havana Smokers," or "Heusner's Original Havana Smokers," which such cigars, so branded, labeled, and packed, the respondent has sold and still sells between and among the various States of the United States, as described in paragraph 1 hereof. In truth and in fact, such cigars have not been made and are not made wholly, or in greater part, of tobacco grown on the Island of Cuba.

PAR. 4. The use by respondent of the words "Havana Smokers," "2 for 5¢ Bigger and Better Havana Smokers," and "Heusner's Original Havana Smokers," in describing, designating, labeling, and branding such cigars, is false and misleading and has the capacity to mislead and deceive retailers and the purchasing public into the erroneous belief that such cigars are composed wholly or in greater part of tobacco grown on the Island of Cuba and to purchase such cigars in such erroneous belief. The aforesaid use by respondent of the word "Havana" places in the hands of retailers the means of deceiving the purchasing public into the belief that the cigars so labeled, branded, and designated, are made wholly or in greater part of tobacco grown on the Island of Cuba. The aforesaid misrepresentations in designating, labeling, and branding such cigars has tended to and does divert, and has diverted trade to respondent from its competitors engaged in the sale of cigars between and among, the various States of the United States who truthfully designate, brand, and label the cigars manufactured and sold by them. Thereby, substantial injury is done by respondent to substantial competition in interstate commerce.

PAR. 5. The acts and practices set forth in paragraph 3 hereof are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in interstate 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."

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 April 6, 1935, issued and served its complaint in this proceeding upon respondent H. N. Heusner & Son, 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 DeWitt T. Puckett, attorney for the Commission, before John L. Hornor, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Joseph G. Denny, Jr., 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 oral arguments of counsel aforesaid; 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, H. N. Heusner & Son, is a Pennsylvania corporation organized in 1918, with its principal office and place of business located at Hanover, Pa. Respondent is now, and since the date of its incorporation has been, engaged in the business of manufacturing various brands of cigars and selling and distributing the same to wholesale dealers, cigar stores and drug stores located in various parts of the United States. The said cigars are manufactured by respondent in Hanover, Pa., where they are packed, branded, and labeled by respondent for sale and distribution by it to the purchasing and consuming public of the United States. In consummating such sales and in distributing such products the respondent causes the cigars so sold to be transported and delivered from its place of business in Hanover, Pa., through and into various other States of the United States to the respective purchasers thereof at their respective points of location. In the course and conduct of its business the respondent has been, and is now, engaged in direct and substantial competition with various corporations, partnerships, and individuals likewise engaged in the sale and distribution of cigars in commerce between and among the various States of the United States and within the District of Columbia.

PAR. 2. The cigar originated in the Spanish West Indies. The finest quality of tobacco for cigar purposes is grown in Cuba, not far from the city of Havana. The 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

Findings

24 F. T. C.

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. Such Havana tobacco has the reputation among the cigar consuming and purchasing public of the United States as being cigar tobacco of highest quality and excellence, and cigars made in whole or in part from said tobacco are in large demand throughout the United States. Many of the cigar dealers and many 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.

For many years cigars made of Cuban and Havana tobacco were manufactured in the city of Havana, Cuba, and shipped therefrom to the various cigar markets of the world. Consequently such cigars became known in the trade and to the public as Havana cigars and Cuban cigars, the terms being used interchangeably and synonymously. In fact, the term "Havana" has been used for many years to designate or brand said cigars and has come to mean, when applied to cigars, cigars manufactured from tobacco grown in the Island of Cuba.

Cuban tobacco has long been imported into the United States and widely and extensively used and consumed therein in cigars manufactured from such tobacco.

During the past several years factories making cigars from Havana tobacco have been located in the United States, principally in and near the city of Tampa, Fla. Cigars manufactured at those factories from tobacco grown in the Island of Cuba and imported into the United States are also known in the trade and to the public as Havana cigars.

PAR. 3. Among the cigars manufactured and sold by respondent, as aforesaid, is a type of cigar designated, labeled, and branded "Havana Smokers."

The brand name "Havana Smokers" appears on the cigar band that surrounds each cigar. The containers in which the said cigars are packed, offered for sale, and sold are the usual and customary cigar boxes. Imprinted on the outside and inside of the lid of one type of said boxes appears the following:

2 for 5

2 for 5

HEUSNER'S
ORIGINAL

HAVANA

SMOKERS

1370

Findings

The expression "Heusner's Havana Smokers" also appears on the edge and one end of said box.

On both sides of the lid, the front edge and one end of another type of box in which said cigars are packed, offered for sale and sold is imprinted the following:

MARTINEZ

HAVANA

SMOKERS

The cigars designated, branded and sold by respondent as "Heusner's Original Havana Smokers" are usually resold by the retail dealer at the price of two for five cents. The cigars designated, branded and sold by respondent as "Martinez Havana Smokers" are usually resold by the retailers at five cents each.

PAR. 4. In truth and in fact respondent's cigars branded, labeled, described and advertised, respectively, as "Heusner's Havana Smokers" and as "Martinez Havana Smokers", and sold by the respondent and by dealers to the purchasing and consuming public, as hereinbefore described, do not contain Havana tobacco, or tobacco grown on the Island of Cuba, and they have not at any time contained such tobacco. Such cigars are, and have been manufactured entirely from, and wholly composed of, domestic tobacco grown in the United States.

PAR. 5. The use of the aforesaid false and misleading representations and practices on the part of the respondent in the sale and offering for sale of its cigars branded and labelled with the word "Havana" has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that respondent's said cigars are composed of tobacco grown on the Island of Cuba. Acting under such erroneous belief, induced by the various misrepresentations of the respondent as herein detailed, many members of the public have purchased respondent's cigars. The aforesaid representations and practices on the part of respondent have and have had the capacity and tendency to unfairly divert to respondent the trade of competitors engaged in selling in interstate commerce cigars composed of Havana tobacco and likewise cigars composed of tobacco grown in the United States, and who truthfully advertise and represent their cigars. As a result thereof, substantial injury has been done, and is being done, by respondent to competition in commerce, among and between the various States of the United States and in the District of Columbia.

Order

24 F. T. C.

CONCLUSION

The aforesaid acts and practices of the respondent, H. N. Heusner & Son, a corporation, 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 thereto, testimony and other evidence taken before John L. Hornor, 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, and oral argument by DeWitt T. Puckett, counsel for the Commission, and by John 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, H. N. Heusner & Son, a corporation, its officers, representatives, employees, or agents, individual or corporate, in connection with the offering for sale, sale and distribution of cigars in interstate commerce and in the District of Columbia, do forthwith cease and desist from:

Representing, through the use of the words "Havana" or "Habana," alone or in conjunction with any other word or words, or through the use of any other words of similar import and effect, or in any other manner, that cigars not manufactured entirely from tobacco grown on the Island of Cuba are Havana Cigars.

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.