

Syllabus

IN THE MATTER OF
AMERICAN CHARACTER DOLL COMPANY, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2728. Complaint, Feb. 20, 1936—Decision, Nov. 13, 1937*

Where a corporation engaged in manufacture, sale, and distribution of dolls, to purchasers at various points in other States, and chiefly through department stores, toy stores, and mail order houses, in substantial competition with others engaged in manufacture, sale, and distribution, or sale and distribution, of such products in commerce among the various States and in the District of Columbia—

Circularized doll trade with broadside displaying print of picture disclosing results of three weeks' immersion of one of its "paratex" hard rubber dolls, and of composition type doll, to the disadvantage of the latter, which was disclosed as in bad state of disintegration, and to the advantage of former, which showed no ill effects, together with statement that such "Dramatic Test of Paratex Dolls" was made by "buyer of a great retail store" and showed "absolutely no effect from its immersion" "for a Week" to "paratex doll," with "what happened to the other" plain enough, and an invitation to "Make this dramatic test yourself in your own doll department" and assertion that "It will sell Paratex dolls for you Right Now!";

Facts being immersion test in question had been for three weeks and not one, composition dolls can be handled and faces and hands washed or bathed without injury thereto, and said test, by reason of age and intelligence of child-buyers of composition dolls as compared with that of child users of rubber dolls, and other relevant circumstances as to qualities desired in dolls, durability of composition dolls under ordinary and customary use, and actual conditions of ordinary usage and customary treatment, which test failed to portray, did not prove its "paratex" dolls more substantial or desirable or superior to the composition dolls for purposes intended;

With capacity and tendency to mislead and deceive substantial portion of trade and public into erroneous belief that composition dolls were inferior because they would disintegrate if left in water, and with result that public, as consequence of such mistaken and erroneous belief, induced by such false and misleading representations, purchased substantial volume of its said products in preference to those of its competitors, and trade was unfairly diverted to it from competitors likewise engaged in manufacture, sale, and distribution, or in sale and distribution, of dolls without in any way unfairly disparaging products of competitors or misrepresenting their own; to the substantial injury of competition in commerce:

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

Before *Mr. Joseph A. Simpson* and *Mr. John W. Bennett*, trial examiners.

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Mr. DeWitt T. Puckett for the Commission.

Mr. Philip Goldfarb, of New York City, 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 American Character Doll Company, Inc., 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 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. Respondent, American Character Doll Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office at 200 Fifth Avenue, New York, N. Y. It is now, and for several years last past has been, engaged in advertising and selling dolls and toys between and among the various States of the United States and in the District of Columbia, and now causes, and for more than one year last past has caused, such products when sold by it to be shipped from its place of business in New York City aforesaid to the purchasers thereof, some located in the State of New York, and others located in the various other States of the United States and in the District of Columbia, and there is now, and has been for more than one year last past, a constant current of trade and commerce by the respondent in dolls and toys between and among the various States of the United States and in the District of Columbia.

Respondent is, and for more than one year last past has been, in substantial competition with other corporations, and with individuals, firms, and partnerships engaged in the sale of dolls and toys between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent, in soliciting the sale of and selling its "Sally Jane" dolls, to purchasers and prospective purchasers thereof, located in various States of the United States, distributed circulars among the retail doll trade, which circulars were used by the said trade in offering for sale and selling said dolls to the purchasing public. Said circulars featured certain pictorial illustrations

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of two dolls, immersed in a jar of water. One of the dolls seemed to show no ill effects from such immersion, but the other doll appeared to be in a bad state of disintegration, its legs having fallen off and the body portion having cracked, broken, and peeled. The following phraseology accompanied these pictures:

THIS DRAMATIC TEST OF PARATEX DOLLS

was made by the buyer of a great retail store who insisted upon PROVING to himself that PARATEX dolls are actually PROOF against wear and water * * * Here's what actually happened when he put an ordinary composition doll and a PARATEX doll into two pickle jars of water for a WEEK * * * The PARATEX doll showed absolutely no effect from its immersion * * * What happened to the other, is plain enough

Make this dramatic test *yourself* in your own doll department. It will sell PARATEX dolls for you RIGHT NOW!

In truth and in fact, the pictures of the featured test displayed in said advertising matter were made three weeks after the tests were initiated, and not, as alleged, one week after the test was started. Dolls are not made to be left in water; nor are dolls of ordinary composition inferior products because they are nonresistant to water. The test displayed in said advertising matter has the capacity and tendency to unwarrantedly disparage dolls of ordinary composition in that it tends to cause, or convey, an erroneous belief that such dolls of ordinary composition are inferior products because they are nonresistant to water and that such dolls, being nonresistant to water, will not withstand the ordinary usage and treatment for which dolls are made and to which they are usually and customarily subjected by the average user of said dolls.

PAR. 3. The use by the respondent of the representations set out in paragraph 2 hereof, have had and do have the capacity and tendency to mislead and deceive and do mislead and deceive wholesalers, retailers, and the purchasing public into the belief that composition dolls are inferior to Paratex or rubber dolls, and to purchase such dolls from respondent in preference to competitors composition dolls because of such erroneous belief. There are among the competitors of respondent, as mentioned in paragraph 1 hereof, manufacturers and distributors of dolls and toys who do not misrepresent the respective qualities of composition dolls and Paratex or rubber dolls, nor utter disparaging statements about competitors' products, who likewise advertise, sell, and distribute dolls and toys among the various States of the United States and in the District of Columbia. By the representations aforesaid, trade is diverted to

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respondent from such competitors; thereby substantial injury is being done and has been done by respondent to substantial competition in commerce as herein set out.

PAR. 4. Said acts and practices of respondent are 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, 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 February 20, 1936, issued and on February 24, 1936, served its complaint in this proceeding upon respondent, American Character Doll Company, Inc., 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 Joseph A. Simpson and John W. Bennett, examiners of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Philip Goldfarb, 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 (respondent having not requested oral argument), 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, American Character Doll Company, Inc., is a corporation organized in 1919 and doing business under the laws of the State of New York. Its principal office is at 200 Firth Avenue, New York, N. Y., and its factory is at 1027 Metropolitan Avenue, Brooklyn, N. Y. The respondent is now, and since

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1919 has been, engaged in the manufacture, sale, and distribution of dolls.

When orders are received for respondent's dolls, it causes them to be shipped from its factory at Brooklyn, N. Y., to the purchasers thereof located at various points in States of the United States other than the State of New York. Said dolls are marketed chiefly through department stores, toy stores, and mail-order houses. At all times mentioned herein the respondent has maintained a constant current of trade in said dolls, in commerce among and between the various States of the United States.

At all times since respondent entered into said business, it has been in substantial competition with other corporations and with partnerships, and individuals likewise engaged in the manufacture, sale and distribution or in the sale and distribution of dolls, in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. Dolls are classified, as to type, according to the materials used in their manufacture. Composition dolls are manufactured from wood flour, rosin, starch, and glue. The materials are molded into a form by a heating process. Rubber dolls are made from crude rubber. Practically all dolls on the market today are either composition dolls or rubber dolls. Many years ago most dolls were made of a hard breakable substance and were known as bisque dolls. Because they were heavy and easily broken, they were gradually supplanted by composition dolls and rubber dolls.

During the past two or three years respondent has been offering for sale and selling a hard rubber doll which it calls a "paratex" doll. "Paratex" dolls are manufactured by respondent according to a secret formula. Respondent has featured its "paratex" doll in its advertising, representing it to be superior to composition dolls because it is impervious to water. Said "paratex" doll is manufactured to be sold in competition with the more expensive composition dolls, such as the Shirley Temple doll.

PAR. 3. In April 1935, a representative of J. C. Penney Company took two dolls, one of which was a composition doll known as the Shirley Temple doll and the other a "paratex" doll heretofore described, and immersed each of said dolls up to the neck in a jar of water. Three weeks after said immersion, pictures were taken of the dolls. The picture of the composition doll showed it to be in a bad state of disintegration. The legs had fallen off and the body covering had cracked and had peeled off in places. The picture of the "paratex" doll disclosed no ill effects of the water upon it. The respondent herein obtained a negative of said picture from a J. C.

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Penney Company employee, had prints made therefrom, and circularized said picture in the form of a broadside among the doll trade. Alongside the picture appeared the following statement.

THIS DRAMATIC TEST OF PARATEX DOLLS

was made by the buyer of a great retail store who insisted upon PROVING to himself that PARATEX dolls are actually PROOF against wear and water * * * Here's what actually happened when he put an ordinary composition doll and a PARATEX doll into two pickle jars of water for a WEEK * * * The PARATEX doll showed absolutely no effect from its immersion * * * What happened to the other, is plain enough
Make this dramatic test yourself in your own doll department.
It will sell PARATEX dolls for you RIGHT NOW!

In fact, the dolls had actually been in the water for three weeks at the time the picture was taken and not one week as represented by the respondent.

PAR. 4. From the testimony of doll buyers for three leading department stores and the proprietor of a toy and doll store it is found that composition dolls are not made to withstand immersion-in-water tests and that they are not inferior products because they will disintegrate if left in water for substantial periods of time. Composition dolls, as a rule, are sold to children who are old enough to understand that dolls of that character cannot be left in water. Rubber dolls of the cheaper variety are designed to be sold to infants too young to understand how to care for expensive composition dolls. Composition dolls can be handled and their faces and hands can be washed or bathed without injury to said dolls.

The essential qualities desired in dolls by children are attractiveness, style of dress, type of wig, finish, and, especially among older children, likeness to living models. Parents desire a doll that is sufficiently durable to withstand the use to which the doll will be subjected by children. Composition dolls are sufficiently durable to withstand the ordinary and customary use to which dolls are subjected by children under ordinary and usual conditions of use. Composition dolls are not immersed in water for any substantial period of time. The comparative test made, as hereinabove set forth, does not prove that the "paratex" dolls are more substantial, desirable or superior to composition dolls for the purposes intended inasmuch as such a test does not accurately portray the actual conditions of ordinary usage and customary treatment to which dolls are subjected and such test affords no basis in fact for the representations made.

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PAR. 5. The use by respondent of the representations described herein in its advertising literature has had and now has the capacity and tendency to mislead and deceive a substantial portion of the trade and public into the erroneous belief that composition dolls are inferior products because they will disintegrate if left in water. As a consequence of the mistaken and erroneous belief induced by the false and misleading representations above referred to, the public has purchased a substantial volume of the respondent's products in preference to the products of its competitors with the result that trade has been unfairly diverted to the respondent from its competitors likewise engaged in the manufacture, sale and distribution or in the sale and distribution of dolls, who in no way unfairly disparage their competitors' products or misrepresent their own products. As a result thereof a substantial injury has been done, and is now being done, by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of said respondent under the conditions and circumstances described in the foregoing findings of facts are to the prejudice of the public and of competitors of respondent and constitute unfair methods of competition in commerce in violation 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 Joseph A. Simpson and John W. Bennett, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein by DeWitt T. Puckett, counsel for the Commission, and by Philip Goldfarb, counsel for respondent (no oral argument having been requested), 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, American Character Doll Company, Inc., a corporation, its officers, representatives, agents, and

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employees in connection with the offering for sale, sale and distribution of dolls in interstate commerce or in the District of Columbia do forthwith cease and desist from:

1. Representing, through the use of comparative water immersion tests, or other similar tests which do not fairly simulate actual conditions of ordinary and customary usage, or through any other means or device, or in any manner, that, because of imperviousness to water when immersed for extended periods of time, its dolls are superior to composition dolls;

2. Representing, directly or by inference, through the use of comparative tests, or otherwise, that composition dolls are inferior products because they are not impervious to water when immersed for substantial periods of time.

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

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IN THE MATTER OF
MELLS MANUFACTURING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 3059. Complaint, Feb. 15, 1937—Decision, Nov. 13, 1937*

Where a corporation engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to ultimate consumers thereof, and several of which, so packed and assembled that they might be resold to consuming public as single assortment, were contained in two separate boxes, composed of (1) number of small penny pieces of candy, of uniform size and shape, the flavor of a small number of which differed from that of majority, and (2) number of larger pieces or bars, to be given free of charge, or as prizes, to chance purchasers of such uniform penny pieces, flavor of which differed as aforesaid from that of majority—

Sold, to wholesale and retail dealers for display and resale to purchasing public in accordance with aforesaid sales plans, said assortments, and thereby supplied to and placed in the hands of others the means of conducting, and under which they did conduct, lotteries in the sale of its said products, in accordance with such plan, contrary to public policy long recognized by the common law and criminal statutes and to an established public policy of the United States Government, and in competition with many who, unwilling to offer or sell candy so packed and assembled, or otherwise arranged and packed, for sale to purchasing public, as to involve a game of chance, refrain therefrom;

With capacity and tendency to induce purchasers to buy its said products in preference to candy offered and sold by its competitors, and with result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing same and by element of chance involved in sale thereof as above described, and were thereby induced to purchase its said candy, so packed and sold by it, in preference to that offered and sold by its competitors who do not use same or equivalent method, and with tendency and capacity, because of said game of chance, to divert trade and custom from its competitors as aforesaid, exclude from candy trade all competitors who are unwilling to and do not use such or an equivalent method as unlawful, lessen competition therein, and tend to create a monopoly thereof in it and such other distributors as do use same or equivalent method, deprive purchasing public of benefit of free competition in trade in question, and eliminate from said trade all actual, and exclude therefrom all potential, competitors who do not adopt and use such or an equivalent method:

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