

Syllabus

IN THE MATTER OF
HARTZ MOUNTAIN PRODUCTS, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2867. Complaint, June 30, 1936—Decision, Jan. 12, 1938*

Where a corporation engaged in the sale of pet shop products, including foods and remedies for birds, fish, and turtles, bird perches, and various other products and accessories pertaining to pets, and in distribution thereof through chain stores, department stores, drug stores, and other media of distribution, in substantial competition with others similarly engaged in sale and distribution, in commerce among the States, of other products and preparations recommended or used for pet foods and remedies, including foods and remedies for canaries; in extensively advertising its said pet foods, remedies, and accessories in various newspapers and other mediums of interstate circulation, and through broadcasts having interstate transmission and reception—

- (a) Designated certain of its pet shop products, including canary foods and remedies, as "Dr. Brehm's Bird Tonic," "Dr. Brehm's Bird Wash," "Dr. Brehm's Bird Bitters," and "Dr. Brehm's Revelenta," notwithstanding fact it did not appear that the famous German naturalist ever prescribed formulas for bird foods and remedies, or was connected with the formulas used by it on products and preparations distributed and sold by it, and none of its said products either were or had ever been made or prepared under direction of a doctor, or a Dr. Brehm, and representation thus made was false; and
- (b) Represented that its "Perfect-Grip" sand perch contained a vibrating spring or embodied a spring action and soothing sensation comparable, in use, to swaying of a tree branch as the canary alighted or jumped from its surface, facts being said product contained no vibrating spring and had no spring action comparable to swaying of a tree branch when used by a bird;

With capacity and tendency to mislead and deceive public into erroneous and mistaken belief that its said products had, in truth and in fact, been prepared by, or under the direction, or according to the formula of, a doctor or a Dr. Brehm, and that its said "Perfect-Grip" sand perch contained a vibrating spring which enabled such perch to simulate the swaying of a tree branch as the canary alighted or left its surface, and to induce such purchasing public to buy its said products in preference to other pet shop products and accessories, including canary foods and remedies, and with result of unfairly diverting trade to it from its aforesaid competitors who do not misrepresent the character and quality of their respective products nor the results to be obtained from the use thereof:

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

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. T. H. Kennedy and *Mr. John F. Richter* for the Commission.

Complaint

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Nims & Verdi, of New York City, *Mr. P. E. Williamson, Jr.*, and *Mr. Meyer Halperin*, of Brooklyn, N. Y. and *Mr. Daniel R. Forbes*, 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 Hartz Mountain Products, Inc., a corporation, hereinafter referred to as respondent, has been and now is using unfair methods of competition in 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, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Hartz Mountain Products, 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 place of business located at 32 Cooper Square, New York, N. Y. Respondent is, and for more than three years last past has been, engaged in the manufacture of fish and bird foods, bird medicines and remedies, bird perches, appurtenances thereto, bird cages, and other equipment for pets, and has been engaged in the sale of said products between and among the various States of the United States and in the District of Columbia. Respondent's bird medicines and remedies have been sold under the trade names of "Dr. Brehm's Bird Tonic," "Dr. Brehm's Bird Wash," "Dr. Brehm's Bird Bitters," and "Dr. Brehm's Revalenta." Respondent has also sold its products under the trade name "Hartz Mountain." During all of said time it has caused, and still causes, said products, when sold by it, to be transported from its place of business in New York, or other places within the United States to purchasers thereof some located in the State of New York and others located in various States of the United States other than the State of origin of the shipment, and in the District of Columbia.

In the course and conduct of its said business respondent is now, and for more than three years last past has been, in constant competition with other corporations, persons, firms, and partnerships engaged in the sale of similar products in commerce 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 herein, respondent included within its corporate name under which

to carry on its business the words "Hartz Mountain." Respondent has sold its products under the trade name of "Hartz Mountain" and has prefixed said trade name with the word "Genuine." It has used continuously for three years last past, and is now using, said corporate name containing the said words "Hartz Mountain" and the said trade name "Hartz Mountain" alone or in conjunction with the word "Genuine" in soliciting the sale of and selling its products in interstate commerce. Respondent has caused its corporate name "Hartz Mountain Products, Inc." and its said trade name "Hartz Mountain" alone or in conjunction with the word "Genuine" to appear on its letterheads, billheads, business cards, circulars, advertising matter, labels on containers containing its said products, and in booklets and otherwise, and has distributed said printed matter in interstate commerce to customers and prospective customers of respondent. Respondent has also caused its said corporate name and said trade name to be used in radio broadcasts in the advertisement of its said products. Respondent has caused its said corporate name "Hartz Mountain Products, Inc." and its said trade name "Hartz Mountain," used alone or in conjunction with the word "Genuine" to be presented to its customers and prospective customers in such a way that the representation is made to its customers or prospective customers that respondent's products are made or originate in the Hartz or Harz Mountain District of Germany. It is well known among owners of birds, and especially canary fanciers, that the Hartz or Harz Mountain District of Germany is a locality wherein a high-grade species of canary has been bred for many years.

In truth and in fact respondent's products are not, nor have they ever been, made or manufactured in, nor have their ingredients or component parts ever, nor do they now, originate in the Hartz or Harz Mountain District of Germany, but on the contrary, respondent has filled and now fills orders with products made or manufactured in the United States from ingredients or component parts procured by the respondent from places other than the Hartz or Harz Mountain District of Germany.

PAR. 3. Respondent at all times herein referred to has sold and now sells preparations under the trade name or brand of "Dr. Brehm's Bird Tonic," "Dr. Brehm's Bird Wash," "Dr. Brehm's Bird Bitters," and "Dr. Brehm's Revalenta," and has used and featured said trade names or brands on labels and in advertisements and in advertising matter, and has caused the following to appear on the

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labels which it placed on the product designated as "Dr. Brehm's Revalenta":

REVALENTA

Prepared according to Dr. Brehm's original recipe, is acknowledged by all German bird breeders to be the best remedy for colds, asthma, coughs, hoarseness, etc.

The use by the respondent of the words "Dr. Brehm" or "Dr. Brehm's" and the title "Doctor" or the abbreviation therefor, to wit, "Dr." is made in such a way that purchasers and prospective purchasers of respondent are led to believe that the products sold by respondent under said trade names or brands are prepared from a formula or under the direction of a doctor or a Doctor Brehm. In truth and in fact none of respondent's products have ever been, nor are they now, made, manufactured, or prepared under the direction of a doctor or a Doctor Brehm, and said representation of respondent is untrue.

PAR. 4. Respondent at all times herein referred to has sold, and now sells, a product designated as "Hartz Mountain 'Perfect-Grip' Sand Perch," and has made representations regarding said product as set forth in the following statements which it has caused to appear in catalogues and other advertisements which it circulates in interstate commerce:

The vibrating spring by which the perch is attached easily from the outside of the cage produces a gentle spring action, a soothing sensation comparable to the swaying of a tree branch as a canary alights and jumps from its inviting surface.

In truth and in fact said product contains no vibrating spring and no spring action comparable to the swaying of a tree branch is produced in its use.

PAR. 5. There is a preference on the part of certain purchasers or prospective purchasers located in different States of the United States for products similar to those sold by the respondent to be resold by retail to the public, made or manufactured in or composed of ingredients or component parts originating in the Hartz or Harz Mountain District of Germany, for products made or prepared according to the formula or under the direction of a doctor or a Doctor Brehm, or for a perch for canaries containing a vibrating spring which when used will produce a spring action comparable to the swaying of a tree. The use by the respondent of the words "Hartz Mountain Products" in respondent's corporate name, and the words "Hartz Mountain," alone or in conjunction with the word "Genuine," in respondent's trade name, as described herein; of the words "Dr. Brehm," "Dr. Brehm's," the title "Doctor" or the ab-

breviation therefor, to wit, "Dr."; or the representation by the respondent that respondent's said "'Perfect-Grip' Sand Perch" is attached to a cage by a vibrating spring which produces, when used, a gentle spring action comparable to the swaying of a tree, has a tendency and capacity to mislead and deceive purchasers who are customers or prospective customers of respondent, into the belief that respondent's products are actually made or manufactured, or the ingredients or component parts thereof originated in the Hartz or Harz Mountain District of Germany, or are prepared under the direction or according to the formula of a doctor or a Doctor Brehm, or that respondent's "'Perfect-Grip' Sand Perch" has the properties, capacities, or effects claimed for it, as hereinabove set forth, and such prospective customers, relying and acting upon such belief, have been and are thereby induced to and do buy respondent's aforesaid products, thereby tending to divert trade to respondent from other corporations, associations, individuals, firms, and partnerships who do not misrepresent the locality of manufacture of their products or the locality from which the ingredients or component parts of their products are obtained, or the persons under whose direction or formula their products are prepared, or the properties, capacities, or effects of their products, but who truthfully advertise and label their products.

PAR. 6. The practices of respondent, described hereinabove, are all to the prejudice of the public and of respondent's competitors, and have been, and are, unfair methods of competition in interstate commerce in violation of the provisions 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 the 30th day of June 1936, issued, and on July 3, 1936, served its complaint in this proceeding upon the respondent, Hartz Mountain Products, Inc., a corporation, charging said respondent 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 the respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Thomas H. Kennedy, attorney for the Commission, and in opposition to the allegations of the com-

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plaint by Nims and Verdi, by P. E. Williamson, Jr., Meyer Halperin, and Daniel R. Forbes, attorneys for the respondent, before W. W. Sheppard, trial examiner of the Commission theretofore duly designated by it; and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceedings regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, and briefs and oral arguments 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, Hartz Mountain Products, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 32 Cooper Square, New York City, within the State of New York. Said respondent is now, and has been since 1933, engaged in the sale of pet shop products, including foods and remedies for birds, fish and turtles, bird perches, dog powder, and various other products and accessories pertaining to pets, and in the distribution thereof in commerce between and among the various States of the United States. It causes said products, when sold by it, to be transported from its aforesaid place of business in New York to purchasers thereof located in various States of the United States other than the State of New York. There is now, and has been for more than three years last past, a course of trade and commerce by respondent in said pet shop products between and among the various States of the United States. In the course and conduct of its said business, respondent is now, and since 1933 has been, in substantial competition with sundry other corporations, and with partnerships, firms, and individuals engaged in the sale and distribution of other products and preparations recommended or used for pet foods and remedies, including foods and remedies for canary birds, in commerce between and among the various States of the United States.

PAR. 2. The pet foods, remedies, and accessories, including foods and remedies for canary birds, sold and distributed by said respondent, are sold and distributed by said respondent through chain stores, department stores, drug stores, and other media of distribution located in the various States of the United States.

PAR. 3. The respondent, in the course and conduct of its said business, has been and now is engaged in extensive advertising as a means

of furthering and aiding in the interstate sale and distribution of its pet foods, remedies, and accessories, including foods and remedies for canary birds, and as media of such advertising it has been and now is using various newspapers and other mediums of interstate circulation, and broadcasts over radio stations having interstate transmission and reception.

PAR. 4. The respondent, in its said advertisements of its pet foods, remedies, and accessories, sold and distributed by it, has made various statements regarding the merits and qualities of said products, preparations and accessories in the feeding and treatment of household pets, including canary birds. Among the statements which said respondent has used in its sales devices, advertisements in newspapers and other mediums of circulation, and over the radio, is the following:

The vibrating spring by which the perch is attached easily from the outside of the cage produces a gentle spring action, a soothing sensation comparable to the swaying of a tree branch as a canary alights and jumps from its inviting surface.

The respondent, in the course and conduct of its business, has, by some of the means aforesaid, represented its "Perfect-Grip" sand perch as containing a vibrating spring by which the perch is easily attached from the outside of the cage and produces a gentle spring action, comparable to the swaying of a tree branch, as a canary alights or jumps from its surface.

PAR. 5. The respondent, in the course and conduct of its business, has, by some of the means aforesaid, represented that its pet shop products, including foods and remedies for canary birds, sold and distributed by it under the names "Dr. Brehm's Bird Tonic," "Dr. Brehm's Bird Wash," "Dr. Brehm's Bird Bitters," and "Dr. Brehm's Revelenta," are the products or brands prepared from a formula prescribed by a doctor, or under the direction of a doctor, or prescribed or prepared according to the formula or under the direction of a Dr. Brehm.

PAR. 6. Use by the respondent of the trade names or brands "Dr. Brehm's Bird Tonic," "Dr. Brehm's Bird Wash," "Dr. Brehm's Bird Bitters," and "Dr. Brehm's Revelenta," is and has been unjustified in that it has not been shown that Dr. Brehm, the famous German naturalist, either ever prescribed formulas for bird foods and remedies, or was connected, either directly or indirectly, with the formulas used by respondent, or the products and preparations distributed and sold by it. None of respondent's products have ever been, nor are they now, made, manufactured, or prepared under the direction of a doc-

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tor, or a Dr. Brehm, and said representation of respondent is untrue.

PAR. 7. Respondent's use of representations in describing its "Perfect-Grip" sand perch as containing a vibrating spring by which the perch is attached easily from the outside of the cage and produces a gentle spring action, or a soothing sensation comparable to the swaying of a tree branch as a canary alights and jumps from its surface is unjustified in that its said product contains no vibrating spring and has no spring action comparable to the swaying of a tree branch in its use by a bird.

PAR. 8. The advertisements and representations made to the purchasing public by the respondent, as hereinbefore set out in paragraphs 4 and 5, are misleading. Such representations have had the capacity and tendency to mislead and deceive the public into the erroneous and mistaken belief that respondent's products have, in truth and in fact, been prepared by, or under the direction, or according to the formula of a doctor or a Dr. Brehm, or that its "Perfect-Grip" sand perch contains a vibrating spring which enables the said sand perch to simulate the swaying of a tree branch as a canary bird alights or leaves its surface, and to induce such purchasing public to purchase respondent's products in preference to other pet shop products and accessories, including foods and remedies for canary birds. The result of such deception and misleading representations on the part of the said respondent is to unfairly divert trade to said respondent from such competitors above-named who do not misrepresent the character and quality of their respective products or the results to be obtained from the use thereof.

CONCLUSION

The aforesaid acts and practices of the said respondent, Hartz Mountain Products, Inc., a corporation, are to the prejudice of the public and of competitors of respondent 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 the respondent, testimony and other evidence taken before W. W. Sheppard, 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 arguments by John F. Richter, counsel

for the Commission, and by P. E. Williamson, Jr., 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, Hartz Mountain Products, Inc., its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of pet shop products and accessories, including foods and remedies for canary birds, or any preparations, under whatever name sold, possessing similar qualities, in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Representing, through use of the term "Dr." or "Doctor" or any other term or word of similar meaning, or in any manner, that said products or preparations, including the formulas therefor, manufactured and sold by them, are manufactured according to a formula of, or under the supervision of a Dr. Brehm or of any doctor of medicine or any other person skilled in the practice of medicine, until and unless such products are so manufactured.

2. Representing that said "Perfect-Grip" sand perch contains a vibrating spring or embodies a spring action simulating or comparable in use to the swaying of a tree branch.

It is further ordered, That the respondent, Hartz Mountain Products, Inc., 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 the order to cease and desist hereinabove set forth.

IN THE MATTER OF
DIETZ GUM COMPANY OF CHICAGO, ETC., ET AL.

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

Docket 3189. Complaint, July 27, 1937—Decision, Jan. 12, 1938

Where a corporation and two individuals, officers, stockholders, and controllers thereof, engaged in sale and distribution of chewing gum assortments which were so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and which included, as typical, assortments composed of (1) one hundred penny pieces of gum of uniform size and shape (within individual wrappers of relatively few of which were concealed, as below set forth, printed legends), together with (a) a number of small felt pennants, of which purchasers securing by chance concealed legend reading "One Base Hit" received one, of which purchasers thus securing legend reading "Two Base Hit" received two, and of which purchasers thus securing legend reading "Three Base Hit" received three; and together with (b) larger felt pennants, to be given to such purchasers procuring by chance legend reading "Home Run"; and together with (c) still larger pennant, to be given to purchaser of last piece in assortment; and (2) similar assortments of chewing gum of uniform size, etc., together with number of small felt pennants, to be given as prizes to purchasers of individually wrapped pieces containing legend "Double Play," and together with further chance toward the securing of baseball uniform or gymnasium outfit through chance securing and accumulating of wrappers containing letters, in sequence, necessary to spell sentence "YOU ARE THE WINNER"—

Sold, to wholesalers and jobbers, for display and resale to purchasing public by retailer-vendee-customers thereof in accordance with aforesaid sales plans, said assortments, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of their products, in accordance with aforesaid sales plans, 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 chewing gum or other confections, 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 of their said assortments to buy their said products in preference to chewing gum or other confections offered and sold by their competitors, and with result that many dealers in and ultimate purchasers of such products were attracted by their said methods and manner of packing said chewing gum and by elements of chance involved in sale thereof as above set forth, and were thereby induced to purchase their said chewing gum thus packed and sold by them, in preference to chewing gum or other confections offered and sold by said competitors who do not use same or equivalent methods, and with tendency and capacity, because of said game of chance, to divert to them trade and custom from their said competitors as aforesaid, exclude from