

Complaint

IN THE MATTER OF

CAPON WATER COMPANY 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 2736. Complaint, Mar. 3, 1936—Decision, Jan. 20, 1938

Where two corporations engaged, as case might be, in ownership and operation of certain springs and sale of water therefrom, and the president and manager thereof and owner of the majority of stock in both and controller and director of their activities in sale and distribution of said water, and in substantial competition, as thus engaged in sale of said water through dealers and direct to purchasing and consuming public in the several States and in the District of Columbia, with others engaged in sale and distribution of so-called mineral waters and drugs and medicinal preparations used and useful for treatment of the various diseases, ailments, and conditions for which they recommended their said water; in describing said water in advertising matter sent to those making inquiry in response to label contained on containers thereof and inviting such inquiry "For Specific Purposes and Physicians' Statements"—

Represented, through pamphlets, booklets, leaflets, and other written matter containing many statements purportedly made by doctors and laymen, as well as directly, that use of said water alone would cure kidney and bladder trouble, and gout and rheumatism, as well as nephritis, arthritis, neuritis, high blood pressure, constipation, and numerous other ailments and conditions, as there specified, notwithstanding fact use of said water alone would not, either externally or internally, cure said various diseases, ailments, and afflictions;

With effect of misleading and deceiving purchasing public and causing them erroneously to believe that use thereof alone would cure such various diseases, ailments, and conditions for which they represented same as a cure, and to cause such public, by reason of such erroneous belief, to buy their said water, and of thereby unfairly diverting trade to them from their competitors who do not use such acts and practices, to their substantial injury and to that of the public:

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

Before *Mr. Charles F. Diggs*, trial examiner.

Mr. Edw. W. Thomerson for the Commission.

Mr. Phillip W. Austin, of Washington, D. C., for respondents.

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 the Capon

Water Company, a corporation, the Capon Springs Mineral Water, Inc., a corporation, and Louis Austin, an individual, hereinafter referred to as respondents, have been and are 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 Capon Water Company, is a corporation existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 1712 Walnut Street, in the city of Philadelphia, State of Pennsylvania. Respondent Capon Springs Mineral Water, Inc., is a corporation existing under and by virtue of the laws of the State of West Virginia, with its office and principal place of business at 1712 Walnut Street, in the city of Philadelphia, State of Pennsylvania, and a branch office and place of business at Capon Springs, State of West Virginia. Respondent Louis Austin is president of, and the majority stockholder in, both of the other respondents, with his office and principal place of business at 1712 Walnut Street, in the city of Philadelphia, State of Pennsylvania, and with a branch office and place of business at Capon Springs, State of West Virginia.

Respondents are now, and have been for the several years last past, engaged in the sale and distribution, under the name Capon Springs Water, of a purported mineral water for human consumption and for external application to the body, and respondents cause said water, when sold, to be transported from their places of business in Philadelphia, Pa., and Capon Springs, W. Va., into and across the several States of the United States and the District of Columbia, to the purchasers thereof located at various points in said several States of the United States, other than in the States of Pennsylvania and West Virginia, and in the District of Columbia. Respondents make sales direct to consumers and through agents to said consumers.

In the course and conduct of their business as aforesaid, the respondents have been and are in substantial competition in commerce between and among the said several States of the United States and in the District of Columbia with corporations, associations, partnerships, and individuals, who truthfully advertise their products, engaged in said commerce in the sale and distribution of mineral waters and other products used and useful for the same purposes for which respondents recommend their said water. In the course and conduct of their said business as aforesaid, and in the use of the acts, practices, and methods hereinafter alleged, the said respondents have acted and do act together and in cooperation with each other.

PAR. 2. Respondents, in the course and conduct of their business as aforesaid, distribute and circulate, among prospective purchasers of their said water, booklets, leaflets, circulars, and other written matter which contain many statements concerning the curative qualities of respondents' said water. Many of said statements are purportedly made by doctors and laymen and the remainder by the respondents. In said booklets, leaflets, circulars, and other written matter respondents falsely represent and imply that said water will cure, or is beneficial in the treatment of, many of the diseases, ailments, afflictions, and conditions which may be present or exist in the human body.

Among the diseases, ailments, afflictions, and conditions named by the respondents in their said booklets, leaflets, circulars, and other written matter, so distributed and circulated among prospective purchasers of their said water, as diseases, ailments, afflictions, and conditions which their said water will cure, or is beneficial in the treatment of, are the following: Kidney troubles, kidney pains, nephritis; bladder trouble; gout, rheumatism, syphilitic rheumatism, arthritis, neuritis; hyperacidity, uric acid, toxic poisons, acid conditions, acid poisons; catarrhal affections of the stomach and bowels, catarrhal affections of the organs of respiration, catarrhal affections of the kidney and bladder, uterine catarrh; scrofulosis; diabetes mellitus, diabetes; skin diseases, all affections of the skin, poison oak, ivy poison, and other skin affections; diseases of the urinary, digestive and reproductive organs, diseases peculiar to women, female disorders, dysmenorrhea, leucorrhea, amenorrhea, chronic cervical, corporeal endometritis; high blood pressure; chronic pneumonia; constipation; irregular bowels; calculi (kidney and gall stones), gall disorders; prostate troubles, chronic inflammation, enlargement and irritation of the prostate gland; stomach disorders; indigestion; chronic sinus infections; diseases of the liver, particularly hyperemia and fatty degeneration; aching joints, lameness; sterility; pyorrhea; hives; obesity; and general debility.

In truth and in fact the use of respondents' said water, whether by drinking or external application, will not cure, nor is it beneficial in the treatment of all, or any of, the diseases, ailments, afflictions, and conditions above set out.

PAR. 3. Respondents, in said booklets, leaflets, circulars, and other written matter so distributed and circulated among prospective purchasers of their said water, falsely represent and imply that their said water acts "like magic"; "cures almost everything"; "aids digestions"; "restores energy"; is "beneficial to general health"; "keeps you fit"; "keeps you well"; that it has "eliminated tired feeling"; "maintains healthy digestive tract"; that it has "improved hearing"; is "indis-

pensible to health"; "acts as a natural tonic"; "restores mental alertness and vigor"; "will help every living thing"; assures "all year round health and long life"; "supplies every one of the 16 elements in body"; and contains "valuable medicinal properties."

In truth and in fact respondents' said water not only has not acted and does not act like magic, but has not acted and does not act at all on the human body in any different manner than does any pure, potable water, nor does it contain any elements or medicinal properties in sufficient quantities to render it different from, or of any greater benefit than, any pure, potable water, and its use has not resulted and does not result in the benefits claimed for it by said respondents as above set out.

PAR. 4. Respondents, in the course and conduct of their business as aforesaid, and by the means and in the manner aforesaid, falsely represent and imply that the use of their said water "reduces surplus weight naturally, dissolving excess fat." In truth and in fact the use of respondents' said water, whether internally or externally, not only will not reduce surplus weight naturally, but it will not reduce surplus weight at all, nor will it dissolve excess fat.

PAR. 5. Many persons located in the said several States of the United States and in the District of Columbia desire to purchase or obtain a remedy or treatment that will cure, or is beneficial in the treatment of, the diseases, ailments, afflictions, and conditions about which said respondents have made and do make the representations and implications as hereinabove alleged. The acts, practices, and methods of the respondents, as hereinabove alleged, have had and do have the tendency and capacity to and do mislead and deceive a substantial portion of said prospective purchasers, and have caused and do cause such purchasers erroneously to believe that the said false representations and implications are true and that the respondents' said water will cure, or is beneficial in the treatment of, said diseases, ailments, afflictions, and conditions, and cause a substantial portion of such persons, because of such erroneous belief, to purchase respondents said water, thereby diverting trade to the respondents from their competitors who do not use the acts, practices, and methods used by the respondents, to the substantial injury of said competitors in said commerce and to the injury of the public.

PAR. 6. The acts, practices, and methods of the respondents, as hereinabove alleged, are all to the prejudice of the public and the respondents' said 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 March 3, 1936, issued and subsequently served its complaint in this proceeding upon the respondents Capon Water Company, a corporation, Capon Springs Mineral Water, Inc., a corporation, and Louis Austin, an individual, charging them 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 respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Edward W. Thomerson, attorney for the Commission, before Charles F. Diggs, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Phillip W. Austin, attorney for the respondents; 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, and briefs in support of the complaint 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. Respondent Capon Water Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has its principal office and place of business at 1712 Walnut Street, Philadelphia, Pa. It is engaged in the sale and distribution of a so-called mineral water which it secures from the respondent Capon Springs Mineral Water, Inc.

Respondent Capon Springs Mineral Water, Inc., is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, with its principal office and place of business at Capon Springs, W. Va. This respondent owns and operates certain springs located at Capon Springs, W. Va., from which it secures so-called mineral water which it sells to the respondent Capon Water Company, and to other purchasers located at various points in the several States of the United States and in the District of Columbia. Respondent Capon Springs Mineral Water, Inc., also has an office

and place of business at 1712 Walnut Street, Philadelphia, Pa., which is the principal office and place of business of the respondent Capon Water Company.

Respondent Louis Austin is an individual, and he is president and manager of, and owns the majority of the stock in, both of the corporate respondents, and in his capacity as president and manager he controls and directs the activities of the two corporate respondents in the sale and distribution of said water. Respondent Louis Austin has so intermingled the affairs and the businesses of the two corporate respondents that it is not possible to differentiate the acts of one of the corporate respondents from the acts of the other of the corporate respondents, and both of said corporate respondents have been used by the respondent Louis Austin as instrumentalities in the furtherance of his policies in connection with the sale and distribution of said water. Said corporate respondents and the said respondent Louis Austin have cooperated fully and have acted in concert in doing the acts and things hereinafter set out.

PAR. 2. Respondent Louis Austin causes all sales of said water in Philadelphia and vicinity to be made by and through the respondent Capon Water Company, and causes all sales of said water to customers located in States other than the States of Pennsylvania and West Virginia to be made by and through the respondent Capon Springs Mineral Water, Inc. When orders for water from out-of-State customers are received by either of said corporate respondents, the order is transmitted to, and filled by, the corporate respondent Capon Springs Mineral Water, Inc. In the course and conduct of their business, as above stated, said respondents cause said water, when sold, to be shipped from said place of business in the State of Pennsylvania, or said place of business in the State of West Virginia, into and across the several States of the United States and the District of Columbia, to the purchasers thereof located at various points in said several States of the United States, other than in the States of Pennsylvania and West Virginia, and in the District of Columbia.

Respondents market said water through dealers for resale to the public and by sales direct to the purchasing and consuming public.

PAR. 3. Respondents are in substantial competition in commerce between and among the several States of the United States and in the District of Columbia, with individuals, firms, partnerships, and corporations, who are engaged in said commerce in the business of selling and distributing so-called mineral waters and drugs and medicinal preparations used and useful in the treatment of the various diseases, ailments, and conditions in which the respondents recommend the use of their said water.

PAR. 4. Said respondents cause to be placed upon the containers in which said water is sold and distributed in interstate commerce by Capon Springs Mineral Water, Inc., a label upon which appears, among others, the following statement:

For Specific Purposes
and Physicians' Statements Consult
Capon Water Co.
1712 Walnut St.
Philadelphia

When requests for advertising matter are received by either the respondent Capon Water Company or the respondent Capon Springs Mineral Water, Inc., such requests are usually complied with by the respondent Capon Water Company mailing to the person making the request one or more of the pamphlets, booklets, or leaflets hereinafter described, though on occasions the respondent Capon Spring Mineral Water, Inc., mails from its Philadelphia office such advertising matter in response to such requests.

PAR. 5. Respondents, in the course and conduct of their business as aforesaid, distribute and circulate among prospective purchasers of their said water pamphlets, booklets, and leaflets and other written matter containing many statements concerning the curative qualities of said water. Many of said statements are purportedly made by doctors and laymen, and the remainder by the respondents. In said pamphlets, booklets, and leaflets respondents represent and imply that the use of said water alone will cure kidney troubles; kidney pains; nephritis; bladder trouble; gout; rheumatism; syphilitic rheumatism; arthritis; neuritis; hyperacidity, uric acid, toxic poisons, acid conditions, acid poisons; catarrhal affections of the stomach, bowels, organs of respiration, kidneys and bladder; uterine catarrh; scrofulosis; diabetes mellitus; diabetes; skin diseases, ivy poison, and other skin affections; diseases of the urinary, digestive and reproductive organs; diseases peculiar to women, female disorders, dysmenorrhea, leucorrhea, amenorrhea; high blood pressure; constipation and irregular bowels; kidney and gall stones and gall disorders; prostate troubles, chronic inflammation, enlargement and irritation of the prostate gland; stomach disorders and indigestion; chronic sinus infections; diseases of the liver; aching joints; lameness; sterility; pyorrhea; hives; obesity and general debility.

In truth and in fact the use of said water alone, either externally or internally, will not cure kidney troubles, kidney pains, nephritis, bladder trouble; gout; rheumatism; syphilitic rheumatism; arthritis; neuritis; hyperacidity, uric acid, toxic poisons, acid conditions, acid

poisons; catarrhal affections of the stomach, bowels, organs of respiration, kidneys and bladder; uterine catarrh; scrofulosis; diabetes mellitus; diabetes; skin diseases, ivy poison and other skin affections; diseases of the urinary, digestive and reproductive organs; diseases peculiar to women, female disorders, dysmenorrhea, leucorrhea, amenorrhea; high blood pressure; constipation and irregular bowels; kidney and gall stones and gall disorders; prostate troubles, chronic inflammation, enlargement and irritation of the prostate gland; stomach disorders and indigestion; chronic sinus infections; diseases of the liver; aching joints; lameness; sterility; pyorrhea; hives; obesity; and general debility.

PAR. 6. The acts and practices of the respondents, as hereinabove set forth, have the tendency and capacity to, and do, mislead and deceive the purchasing public and cause them erroneously to believe that the use of said water alone will cure the various diseases, ailments, and conditions for which the respondents represent that said water is a cure, and cause them, because of said erroneous belief, to purchase respondents' said water. As a direct consequence of the acts and practices of the respondents, as hereinabove set forth, trade in said commerce is unfairly diverted to the respondents from their competitors who do not use the acts and practices used by the respondents to the substantial injury of such competitors in said commerce and to the injury of the public.

CONCLUSION

The aforesaid acts and practices of the respondents Capon Water Company, Capon Springs Mineral Water, Inc., and Louis Austin are to the prejudice of the public and of respondents' 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 the respondents, testimony and other evidence taken before Charles F. Diggs, an examiner of the Commission theretofore duly designated by it, in support of the allegations of the said complaint and in opposition thereto, briefs filed herein by Edward W. Thomerson, counsel for the Commission, and by Philip W. Austin, counsel for the respondents, and the Commission having made its findings as

to the facts and its conclusion that the said respondents have 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 respondents, Capon Water Company, a corporation, and Capon Springs Mineral Water, Inc., a corporation, their officers, directors, agents, and employes, and Louis Austin, in connection with the offer for sale, sale, and distribution of the water known and described as "Capon Springs water" in interstate commerce and in the District of Columbia, do forthwith cease and desist from representing, directly or by implication, that the use of said water alone, either externally or internally, will cure kidney troubles; kidney pains, nephritis; bladder trouble; gout; rheumatism; syphilitic rheumatism; arthritis; neuritis; hyperacidity, uric acid, toxic poisons, acid conditions, acid poisons; catarrhal affections of the stomach, bowels, organs of respiration, kidneys and bladder; uterine catarrh, scrofulosis; diabetes mellitus; diabetes; skin diseases, ivy poison and other skin affections; diseases of the urinary, digestive and reproductive organs; diseases peculiar to women, female disorders, dysmenorrhea, leucorrhea, amenorrhea; high blood pressure; constipation and irregular bowels; kidney and gall stones and gall disorders; prostate troubles, chronic inflammation, enlargement and irritation of the prostate gland; stomach disorders and indigestion; chronic sinus infections; diseases of the liver; aching joints; lameness; sterility; pyorrhea; hives; obesity; and general debility.

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

IN THE MATTER OF
DILLING & COMPANY

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

Docket 2915. Complaint, Aug. 28, 1936—Decision, Jan. 20, 1938

Where a corporation engaged in manufacture and sale of candy, including various packages or assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and which included assortments composed of (1) number of pieces of candy, together with number of larger pieces and push card, for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received, for penny paid, one of smaller pieces or one of larger pieces, in accordance with number pushed by chance, and purchaser of last push received one of aforesaid larger pieces, and (2) number of candy bars, together with box of chocolate and punchboard, for sale under a plan, and in accordance with said board's explanatory legend, pursuant to which purchaser received one or two additional bars of candy, in accordance with number punched by chance, and purchaser of last punch received box of candy, and, thereby, value in excess of 5 cents paid, as did chance procurers of bars of candy as aforesaid—

Sold to retailers 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 lotteries in the sale of its said 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 candy so packed and assembled as above described, or otherwise arranged and packed for sale to purchasing public, so as to involve a game of chance or any other method of sale contrary to public policy, refrain therefrom;

With result that many dealers in and ultimate purchasers of candy were attracted by its said method and manner of packing same and by element of chance involved in sale thereof as above set forth, and thereby induced to purchase said candy, thus packed and sold by it, in preference to that offered and sold by competitors who do not use same or equivalent methods, and with tendency and capacity, because of said game of chance, to divert to it trade and custom from its said competitors as aforesaid, exclude from said trade all competitors who are unwilling to and do not use such or equivalent method as unlawful, lessen competition in said trade and tend to create a monopoly thereof in it and such other distributors as 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 equivalent method:

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