

IN THE MATTER OF
JACOB STEIN, TRADING AS CLIMAX RUBBER COMPANY

COMPLAINT, MODIFIED FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914¹

Docket 2303. Complaint, Feb. 20, 1935—Decision, Apr. 13, 1938¹

Where an individual engaged in offer and sale of certain rubber, sanitary, and waterproof specialties, including infant bibs, baby pants, and crib sheets; in describing same in certain advertisements, pamphlets, and booklets—

(a) Represented that they were antiseptic and actually killed bacteria and germs, facts being that while they did have antiseptic properties and combatted growth of germs and bacteria which came in direct contact with them under normal conditions of use, and had power to inhibit to a large extent growth and activity of bacteria brought in such contact, and to kill many such germs and bacteria, they did not actually thus kill all germs and bacteria;

(b) Represented that said products were antacid and neutralized perspiration and other body wastes and completely deodorized all odors, facts being that while they had property of neutralizing, to a substantial extent, odor of such wastes when brought in close contact with them under normal conditions of use and had deodorant properties in combatting obnoxious odors developing from fermentation or putrefaction of such wastes when brought in such contact as aforesaid, they were not completely effective so as to deodorize and neutralize all such odors;

With tendency and capacity to mislead and deceive purchasing public into erroneous and mistaken beliefs that said products actually killed all germs and bacteria and were completely effective in neutralizing odors as aforesaid, and would completely deodorize all such odors, irrespective of their origin or character, and into purchase of substantial quantities of said products in and on account of such erroneous and mistaken beliefs, induced as aforesaid, and with result of furnishing to dealers in its said products means and instrumentality whereby they might misrepresent true nature and character of same and extent to which they were effective in use, and increase sale thereof to purchasing public thereby, and with tendency and capacity unfairly to divert trade to him from competitors who do not make use of any such misleading statements and representations with respect to nature and effectiveness in use of their respective competitive products:

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

Before *Mr. William C. Reeves*, trial examiner.

Mr. Edw. W. Thomerson for the Commission.

Mr. Nathaniel Phillips, of New York City, for respondent.

¹ See, for original findings and order, 22 F. T. C. 24.

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Complaint

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 Climax Rubber Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said Act of Congress, and in violation of the Act of Congress approved June 16, 1933, known as the "National Industrial Recovery 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:

Count 1²

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business as such, with its office and principal place of business in the city of Brooklyn in the State of New York. Respondent has been and is engaged in offering for sale and selling to dealers therein and to other persons located at various places in the several States of the United States certain sanitary and waterproof specialties, including infant bibs, baby pants, and crib sheets. Respondent, when said products are sold, causes the same to be transported from its said place of business in the city of Brooklyn, N. Y., to purchasers thereof in other States of the United States and in the District of Columbia, at their respective places of business, and there is now and has been for more than 1 year last past a course of trade and commerce by the said respondent in such products between and among the States of the United States and in the District of Columbia. In the course and conduct of its said business, respondent is in competition with other persons, firms, associations, or corporations who are likewise engaged in offering for sale and selling the same, like, or competitive products in commerce between and among the several States of the United States and within the District of Columbia.

² Count II of the complaint, charging the methods, acts, and practices alleged as in violation of the standards of fair competition of the Sanitary and Waterproof Specialties Manufacturing Industry, and particularly in violation of Article VI, Sec. 3, of the Code for such industry, and as in violation of Sec. 3 of the National Industrial Recovery Act, and as unfair methods of competition in commerce within the meaning and intent of the Federal Trade Commission Act, as amended, was dismissed in the original order to cease and desist under Count I, in 22 F. T. C. 24, at 32, and is accordingly not republished at this time.

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PAR. 2. Respondent, in the course and conduct of its said business as described in paragraph 1 hereof, and in connection with and aid of so offering for sale and selling its said products, and as an inducement to the purchase thereof, advertises said products above specifically mentioned upon labels thereon, in printed advertisements and otherwise as being made of rubber that has antiseptic and antiacid properties and powers, which actually kill bacteria and neutralize perspiration and other body wastes, completely deodorizing all odors. In truth and in fact, said rubber and said articles made therefrom do not have antiseptic and antiacid properties and powers which actually kill bacteria and neutralize perspiration and other body wastes, completely deodorizing all odors. Said rubber and said articles made therefrom do not have any antiseptic or antiacid qualities of value, nor have they qualities and powers to neutralize acid perspiration.

PAR. 3. The use by respondent of said method and the false and misleading statements and representations so made by respondent have the tendency and capacity to mislead and deceive the purchasing public into the erroneous belief that said statements and representations are true, and to induce the public in and because of such erroneous belief to purchase respondent's said products. Said false and misleading representations so made by respondent furnish to dealers in respondent's said products the means of misleading and deceiving the purchasing public into the erroneous belief that said statements are true, and to induce the public in and because of such erroneous belief to purchase respondent's said products. Said false and misleading representations so made by respondent have the tendency and capacity to divert trade from the aforesaid competitors of respondent to the respondent and to dealers in respondent's said products.

PAR. 4. The above alleged acts and practices of respondent are all 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 entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, MODIFIED 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, 1935, issued and served its complaint in this proceeding upon respondent Jacob Stein, an

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individual trading under the name and style of Climax Rubber Company, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. Thereafter, the proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, briefs and oral argument of counsel in support of the complaint and in opposition thereto, and the Commission, on January 16, 1936, having duly considered the matter, found that the proceeding was in the interest of the public and made its findings as to the facts and its conclusion therefrom and issued its order to cease and desist. Subsequently, the Commission reopened the case and testimony and other evidence in support of the complaint were introduced by Edward W. Thomerson, attorney for the Commission, and in opposition thereto by Nathaniel P. Phillips, attorney for the respondent, before William C. Reeves, an examiner of the Commission theretofore duly designated by it, and a stipulation as to the facts, in addition to all the testimony and other evidence already received in the entire proceeding, was entered into subject to the approval of the Commission and said testimony and other evidence were duly recorded and filed in the office of the Commission and said stipulation was approved by the Commission. Thereafter, the proceeding regularly came on for final consideration by the Commission on said complaint, answer thereto, all the testimony and other evidence and the aforesaid stipulation as to the facts, and the Commission having duly considered the record finds that the proceeding is in the interest of the public and makes this its modified findings as to the facts and conclusion drawn therefrom:

MODIFIED FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is an individual trading under the name and style of Climax Rubber Company, with his office and principal place of business in the city of Brooklyn, in the State of New York. Respondent has been, and is, engaged in offering for sale and selling to dealers therein and to other persons located at various places in the several States of the United States certain rubber sanitary and waterproof specialties, including infant bibs, baby pants, and crib sheets. Respondent, when said products are sold, causes the same to be transported from his said place of business in the city of Brooklyn, N. Y., to purchasers thereof in other States of the United States and in the District of Columbia, at their respective places of business, and there is now and has been for more than 1 year last past a course of trade and commerce by the said respondent in such products between and among the States of the United States and in the District

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of Columbia. In the course and conduct of his said business, respondent is in competition with other persons, firms, associations, and corporations who are likewise engaged in offering for sale and selling the same, like, or competitive products in commerce between and among the several States of the United States and within the District of Columbia.

PAR. 2. In the course and conduct of his business as described herein, and for the purpose of promoting and inducing the sale and distribution of his aforesaid various rubber sanitary and waterproof specialties, the respondent has made use of certain advertising pamphlets and booklets wherein are used statements and representations purporting to be descriptive of said products and their effectiveness in use. In said pamphlets and booklets the respondent has stated and represented that said products are antiseptic and antiacid, and that they actually kill bacteria and germs, neutralize perspiration and other body wastes, and completely deodorize all odors. Such statements not only serve as representations that said products are antiseptic and antiacid and will kill bacteria and germs; that said products neutralize perspiration and other body wastes; and that said products completely deodorize all odors; but they have the capacity and tendency to confuse members of the purchasing public as to the extent to which said products are in fact antiseptic in character, the extent to which said products kill bacteria and germs, and the extent to which said products neutralize the odor from perspiration and other body wastes. Such purchasers may, on account of said tendency and capacity, be led to erroneously and mistakenly believe that said products actually kill all germs and bacteria and are completely effective in neutralizing the odors of perspiration, urine, and other body wastes, and will completely deodorize all odors irrespective of origin or character.

PAR. 3. In truth and in fact, said products do have antiseptic properties and do combat the growth of germs and bacteria which come in direct contact with said products under normal conditions of use. Said products do have the power to inhibit, to a large extent, the growth and activity of bacteria brought in direct contact with them and to kill many such germs and bacteria. Said products do not, however, actually kill all germs and bacteria coming in direct contact with them. Said products are not completely effective so as to deodorize or neutralize all odors of perspiration, urine, or other body wastes. Said products do have the property of neutralizing to a substantial extent the odor of perspiration, urine, and other body wastes when such wastes are brought in close contact with said products under normal conditions of use. While such

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products do not completely deodorize all odors, they do have deodorant properties in that said products combat the obnoxious odors developing from the fermentation or putrification of urine, perspiration, and other wastes when said wastes are brought in close contact with said products under normal conditions of use.

PAR. 4. The use by the respondent of said misleading statements and representations as to the nature, character, and effectiveness of said products in use, has the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken beliefs that said products actually kill all germs and bacteria and are completely effective in neutralizing the odors of perspiration, urine, and other body wastes, and will completely deodorize all odors irrespective of origin or character, and into the purchase of substantial quantities of respondent's products in and on account of said erroneous and mistaken beliefs induced as aforesaid. Said misleading statements and representations made by the respondent also furnish to dealers in respondent's products a means and instrumentality whereby said dealers may misrepresent the true nature and character of said products and the extent to which they are effective in use and to increase the sales of respondent's products to the purchasing public on account of such misrepresentations. The aforesaid representations so made by the respondent have the tendency and capacity to unfairly divert trade to the respondent and to dealers in his products from respondent's competitors who do not make use of any misleading statements and representations with respect to the nature and effectiveness in use of their respective competitive products.

CONCLUSION

The aforesaid acts and practices of the respondent, Jacob Stein, trading as Climax Rubber Company, are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

MODIFIED ORDER TO CEASE AND DESIST

Whereas, The Commission heard this proceeding upon the record and upon briefs and oral argument of counsel for the Commission and for the respondent and on January 16, 1936 made its findings as to the facts and its conclusion that said respondent had violated the provisions of an Act of Congress approved September 26, 1914,

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entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and issued its order to cease and desist based thereon; and

Whereas, The Commission on February 12, 1936 reopened the case for the purpose of receiving further testimony and other evidence; and

Whereas, Such testimony and other evidence were introduced by Nathaniel Phillips, attorney for the respondent, and Edward W. Thomerson, attorney for the Commission, before William C. Reeves, an examiner of the Commission theretofore duly designated by it; and

Whereas, A stipulation as to certain facts was entered into between W. T. Kelley, Chief Counsel of the Commission, and the respondent, which stipulation has been approved by the Commission; and

Whereas, The Commission has on this date modified its said findings as to the facts and has duly considered the entire record herein and being now fully advised in the premises;

It is ordered, That the order to cease and desist issued on January 16, 1936 be, and the same is hereby, modified so as to read as follows:

It is ordered, That the respondent, Jacob Stein, trading and doing business under the name of Climax Rubber Company, or under any other name, his agents, representatives, servants, and employees, in connection with the sale and distribution of rubber sanitary and waterproof specialties, including infant's bibs, baby pants, and crib sheets, in interstate commerce or in the District of Columbia, do cease and desist from representing, directly or indirectly:

1. That said products actually kill all germs and bacteria, provided, however, that the respondent is not hereby prohibited from representing that said products have antiseptic properties and combat the growth of germs and bacteria;

2. That said products are completely effective in neutralizing all odors of perspiration, urine, and other body wastes, or that said products completely deodorize all odors, provided the respondent is not hereby prohibited from representing that said products combat obnoxious odors developing from the fermentation or putrefication of urine, perspiration, or other body wastes.

It is further ordered, That the respondent shall, within 30 days after the service upon him of this order file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

Syllabus

IN THE MATTER OF
MARCELLE CANDIES, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2913. Complaint, Aug. 29, 1936—Decision, Apr. 13, 1938*

Where a corporation engaged in manufacture and sale of "draw" or "deal" candy, including assortments composed of number of half-pound trays, number of one-pound boxes; and punchboard or push card with punches or pushes divided into sections, through use of which boards or cards said candy was sold to ultimate consumer-purchaser under scheme by which, in accordance with explanatory statement thereon displayed, purchaser of one of 5-cent chances received, or failed to receive, one of said trays, in accordance with chance selection, or failure to select, one of various designated, concealed numbers, as announced on card or board, and received, by punching or pushing last number in section, one of pound boxes, and thus secured, by lot or chance and in event of correct selection for tray, merchandise exceeding 5-cent cost of chance—

Sold said assortments and cards or boards to wholesale dealers and jobbers, so assembled and packed that they could be and were used and displayed by numerous retail dealer buyers, for distribution to purchasing public by lot or chance, without alteration or rearrangement, and with knowledge that majority of said assortments, as thus packaged by it, were to be, and could be, thus resold to public by lot or chance by said retail dealers, in violation of public policy; in competition with other manufacturers and dealers, many of whom regard such sale and distribution as morally bad and as encouraging gambling and injurious to candy industry as merchandising chance or lottery instead of candy, and some of whom refuse, for reasons set forth, to sell candy so packed that it can be resold to public by lot or chance;

With result of supplying to and placing in the hands of retail merchants means of violating the laws of the several States in sale and distribution of such "draw" or "deal" assortments of candy, preferentially purchased by consumers because of gambling feature connected with sale thereof, and which, in providing means or opportunity of obtaining a prize or becoming a winner by lot or chance, teach and encourage gambling among children, comprising substantial number of purchasers and consumers of such candy, and sale of which in same market with "straight" goods is followed by marked decrease in sales of latter, due to gambling or lottery feature connected with other, and with effect of unfairly diverting from such refusing competitors, thereby put to competitive disadvantage, trade to it and others using similar methods, by reason of retailers' purchase of such candy from it and such others as more salable under "draw" or "deal" method:

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

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. P. C. Kolinski and *Mr. Henry C. Lank* for the Commission.