

Syllabus

IN THE MATTER OF
POPPER & KLEIN, INC., ALSO TRADING AS PERFEKTUM
PRODUCTS COMPANY

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

Docket 3288. Complaint, Dec. 28, 1937—Decision, Sept. 5, 1940

Where a corporation engaged in offer, sale, and distribution of microscope cover glasses and other laboratory supplies, to purchasers in various other States and in the District of Columbia, in competition with others engaged in sale and distribution of such products in commerce as aforesaid; in selling certain microscope cover glasses of foreign origin purchased by it, in some instances in same cardboard boxes in which originally packed and imported, but generally in wooden boxes or containers which it substituted for original as received by it, and which, as originally contained and received, bore, by virtue of long established practice of imprinting and otherwise marking products of foreign origin or their containers, and in accordance with requirements of law, name of such country or origin, conspicuously and in legible English words—

(a) Attached to such wooden boxes in which it repacked such cover glasses as received by it in cardboard containers clearly and conspicuously marked with words "Made in Japan," its labels, conspicuously bearing words identifying and describing said glasses as its product and positively non-corrosive, and ink-stamped on bottom of boxes aforesaid, dimly and lightly and disassociated and far removed from aforesaid labeling or imprinting bearing its New York address, and so as not to be noticed, word "Japan";

With capacity and tendency to mislead and deceive purchasers and prospective purchasers and users of such cover glasses into mistaken and erroneous belief that they were made in the United States and were of domestic origin, as substantially preferred by purchasers and users thereof over those of foreign manufacture or origin, and into purchase of glasses in question in reliance upon such erroneous and mistaken belief, and thereby unfairly to divert trade in commerce as aforesaid to it from its competitors; and

Where such corporation engaged, as above described, in offering, selling, and distributing certain microscope cover glasses produced, in common with all of said product, in strips or sheets, and by it purchased from a source in the United States by which said cover glasses were merely cut from said sheets or strips as marked therefor, upon importation—

(b) Offered, sold, and distributed said cover glasses, procured as aforesaid, in boxes or containers labeled or imprinted, among other things, with words or letters "Made in U. S. A.," notwithstanding fact glass in question was not changed in any way, except as to size, by operation of cutting as aforesaid, which did not constitute manufacture and only effect of which was to make available such glasses in various sizes convenient for use in microscopical examinations, and accordingly packaged;

With tendency and capacity to mislead and deceive purchasers, prospective purchasers, and users, substantial number of whom substantially prefer micro-

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scope cover glasses of foreign origin wholly over those cut in United States, and of whom others substantially prefer domestic product over foreign, into erroneous and false belief that such glasses were wholly made in the United States and were wholly of domestic origin, and into purchase thereof in reliance upon such belief, and with effect of thereby unfairly diverting trade in commerce among the various States in such products to it from its competitors:

Held, That such acts and practices, under the circumstances set forth, were each and all to the prejudice of the public and competitors, and constituted unfair methods of competition.

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. Jay L. Jackson for the Commission.

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 Popper & Klein, a corporation, also trading as Perfektum Products Co., 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, Popper & Klein, is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York. It trades both under its own corporate name and under the name and style of Perfektum Products Co., with its office and principal place of business located at 300 Fourth Avenue, in the city of New York, State of New York. Since the date of its incorporation, respondent has been, and now is, engaged in the business of selling and distributing, among other things, laboratory supplies of both foreign and domestic manufacture and origin, inclusive of so-called microscope cover glasses, or glass covers, in commerce among and between the various States of the United States and in the District of Columbia. It has caused, and now causes, said products, when sold or ordered, to be shipped and transported from its place of business in the State of New York to the purchasers thereof located in various States of the United States, other than the State of New York and in the District of Columbia. It maintains a course of trade in commerce in said products sold by it between and among the various States of the United States. In the course and conduct of its business, respondent has been, and now is, in competition with other corporations, firms, partnerships, and individuals engaged in the sale and

distribution of like products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its aforesaid business, respondent purchases certain so-called microscope glass covers of foreign manufacture which respondent receives packed in small cardboard boxes. It is the practice of the respondent to resell said products to its customers, in some instances, in the same box in which originally packed, but generally the products are packed in a wooden box or container which respondent substitutes for the said cardboard box in which the glasses are originally packed and received by the respondent.

In the foregoing connection, respondent purchases certain microscope glass covers of Japanese manufacture and origin which are imported into the United States from the country of Japan, and which, when received by respondent, are packed in cardboard containers clearly and conspicuously marked with the words "Made in Japan." Thereafter, respondent causes certain of the said glasses to be repacked in wooden boxes to which respondent attaches its labels conspicuously bearing the following:

PERFEKTUM	POSITIVELY	PERFEKTUM
MICROSCOPE	NON-CORROSIVE	MICROSCOPE
COVER GLASSES		COVER GLASSES

PerfeKtum Products Co.
New York, N. Y.

In the process of marking the containers to which respondent transfers the glasses of Japanese origin, respondent also causes the word "Japan" to be dimly and lightly ink-stamped in small letters on the bottom of said wooden boxes in such a manner as to make the said word practically illegible and unnoticeable. The ink-stamping of the word "Japan" on the bottom of said containers in the manner herein described, is done in such a manner as to enable unscrupulous dealers and venders to obliterate or remove said stamp. Said glasses have been, and are, sold and shipped by respondent in commerce as herein described to its customers in the wooden boxes stamped and labeled as aforesaid.

PAR. 3. At all times material to this complaint there has been, and now is, among purchasers and users of microscope cover glasses in and throughout the United States, and in the District of Columbia, a substantial and subsisting preference for products of domestic manufacture or origin, as distinguished from products of foreign manufacture or origin.

By virtue of the practice, heretofore and now established, of imprinting and otherwise marking products of foreign origin, and their

containers, with the name of the country of their origin, in legible English words, in a conspicuous place, and as required by law, a substantial portion of the buying public has come to rely, and now relies, upon such imprinting or marking, and is influenced thereby, to distinguish and discriminate between competing products of foreign and domestic origin, inclusive of microscope cover glasses, such that said products now offered for sale and sold in the channels of trade and commerce throughout the United States are purchased and accepted as and for, and taken to be, products of domestic manufacture and origin unless the same are imprinted or marked in a manner which informs purchasers that the same are not of domestic origin.

PAR. 4. In the course and conduct of repacking and selling, in its own containers, its microscope cover glasses of Japanese origin, the respondent did not, and does not, mark, stamp, brand, or label the containers for said articles in such a manner as to make conspicuous or patent to the eye and attention of purchasers the fact that the said glasses are of foreign origin. On the contrary, the respondent's method of repacking and selling its glasses of Japanese origin in its own containers has had, and has, the tendency and capacity to create among many purchasers thereof the false and erroneous impression that the said glasses are of domestic origin and not of foreign origin, and into the purchase thereof in reliance upon said beliefs.

PAR. 5. Respondent's method of repacking and labeling the said glasses of Japanese origin, by removing the words "Made in Japan" as originally, clearly, and conspicuously imprinted upon the containers in which the said glasses are imported and received, by labeling the substituted containers conspicuously with the respondent's trade name and trade-mark, as above set out, and by dimly, lightly, and inconspicuously printing the word "Japan" on the bottom of said containers in such a way as to make said word practically unnoticeable to purchasers, operates to remove and destroy the mark of origin originally imprinted on the containers for said glasses, and to evade, suppress, and otherwise conceal and withhold from purchasers the fact and information that said glasses are of foreign origin and not of domestic manufacture or origin.

The conduct of respondent, as aforesaid, in conspicuously labeling the containers, in which it repacks and sells its glasses of Japanese origin, with its trade name and trade-mark, and New York address, without indicating in an equally conspicuous manner, or without clearly and conspicuously indicating or marking thereon, the country of origin, has had, and has, the tendency and capacity to mislead and deceive purchasers and prospective purchasers of microscope cover glasses into the false and erroneous beliefs that the said glasses

so encased and labeled are of domestic origin and not of foreign origin, and to cause many purchasers of microscope cover glasses to buy, deal in, and accept respondent's microscope cover glasses of Japanese origin in lieu and in place of glasses of domestic origin made or sold by competitors of respondent. In consequence thereof, trade is unfairly diverted to respondent from its said competitors who do not in any way misrepresent their respective products.

PAR. 6. Respondent's method of repacking, labeling, and imprinting containers for its glasses of Japanese origin, all as aforesaid, places in the hands of jobbers and retail sellers who deal in the said products of respondent, a means wherewith they mislead and deceive purchasers of microscope cover glasses into the false and erroneous belief that the said glasses are of domestic origin and not of foreign origin and thus into the purchase thereof.

PAR. 7. The above acts, conduct, and things done by respondent are to the injury and 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 the Federal Trade Commission Act, the Federal Trade Commission, on December 28, 1937, issued and subsequently served its complaint in this proceeding upon respondent, Popper & Klein, Inc., charging respondent, trading under its corporate name, and also trading as Perfektum Products Co., with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act. On January 17, 1938, respondent filed its answer to the complaint. After the service of the complaint and the filing of respondent's answer thereto, testimony and other evidence in support of allegations of said complaint were introduced by Jay L. Jackson, attorney for the Commission, and in opposition to the allegations of the complaint by Mr. I. A. Popper, President of the respondent corporation, before Edward E. Reardon, Esq., theretofore designated an examiner by the Commission, 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 upon the complaint, the answer thereto, testimony and other evidence, and brief in support of the complaint, respondent having filed no brief and

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not having requested oral argument, and the Commission having duly considered the matter, 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, Popper & Klein, 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 and place of business now located at 300 Fourth Avenue (formerly located at 110 East 23d Street) in the City of New York, State of New York. Said corporation was incorporated in December of 1936 as successor of the business theretofore conducted by the president of the respondent corporation under the trade names "Popper & Klein" and "Perfektum Products Company."

Since the date of its incorporation, respondent has traded, and is now trading under its corporate name and under the name Perfektum Products Co., and under said names has been, and now is, engaged in the business of offering for sale, selling, and distributing microscope cover glasses and other laboratory supplies in commerce among and between the various States of the United States and in the District of Columbia, and has caused, and causes, said products, when sold or ordered, to be shipped and transported from its place of business in the State of New York to purchasers thereof located in various States of the United States other than the State of New York, and in the District of Columbia.

In the course and conduct of its said business respondent has been and now is in competition with other corporations, firms, partnerships and individuals engaged in the sale and distribution of microscope cover glasses and laboratory supplies in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its aforesaid business it has been and is the practice of respondent to purchase certain microscope cover glasses of foreign origin and to resell the same to respondent's customers, in some instances in the same cardboard boxes in which originally packed and imported, but generally in wooden boxes or containers hereinafter described which respondent substitutes for the cardboard boxes in which said glasses are originally packed and imported into the United States and received by the respondent. In this connection, respondent has purchased microscope cover glasses of Japanese manufacture which were imported into the United States from the country of Japan, and which, when received by respondent, were packed in cardboard containers clearly and conspicuously marked

with the words "Made in Japan." Thereafter, respondent caused certain of said glasses to be repacked in wooden boxes, to which respondent attached its labels conspicuously bearing the following:

PERFEKTUM	POSITIVELY	PERFEKTUM
MICROSCOPE	NON-CORROSIVE	MICROSCOPE
COVER GLASSES		COVER GLASSES
Perfektum Products Co., New York, N. Y.		

In the process of marking the containers to which respondent transferred and repacked the aforesaid cover glasses of Japanese origin, respondent also caused the word "Japan" to be dimly and lightly ink-stamped in small letters on the bottom of the said wooden boxes or containers but said word was and is disassociated and far removed from the aforesaid labeling or imprinting bearing respondent's New York address so as to be not noticed.

Since the complaint in this proceeding was issued and served upon the respondent, the respondent, under the trade name, Perfektum Products Co., has sold microscope cover glasses imported from Japan, in wooden boxes on the bottom of which are the words stamped in ink in legible type:

CONTENTS MADE IN JAPAN

PAR. 3. In the further course and conduct of its aforesaid business it has been the practice of respondent to offer for sale, sell, and distribute microscope cover glasses in boxes or containers labeled or imprinted, among other things, with the words and letters "Made in U. S. A." The said cover glasses were purchased by respondent from a source in the United States which merely cut the same from sheets or strips of glass imported from a foreign country, the said glass being ready for cutting upon importation.

PAR. 4. All of the glass used in the making of microscope cover glasses is produced in strips or sheets. The only effect produced by the cutting of microscope cover glasses from the strips or sheets is to obtain cover glasses in the various sizes convenient to use in microscopical examinations. The glass cut from sheets or strips of imported glass is not changed in any way except as to size by the operation of cutting the glass. Such operation does not constitute a manufacturing process. The glass cut from the strips or sheets is packaged in boxes containing one-half ounce quantities, one size to a package, the sizes, in disk, square or rectangular form, ranging from about the size of a dime to larger sizes.

PAR. 5. At all times material to this proceeding there have been, and now are, throughout the United States and in the District of Columbia, purchasers and users of laboratory supplies, including

microscope cover glasses, who have a substantial preference for products having a domestic origin as distinguished from foreign manufacture or origin. At all times material to this proceeding there have been and now are, throughout the United States and the District of Columbia, a further substantial number of purchasers and users of microscope cover glasses who have a substantial preference for microscope cover glasses which are wholly of foreign origin, as distinguished from glasses cut by producers in the United States.

By virtue of the long-established practice of imprinting and otherwise marking products of foreign origin, or their containers, with the name of the country of their origin, including the containers for microscope cover glasses of foreign origin, in legible English words, in a conspicuous place and as required by law, a substantial number of purchasers and users of such products in and throughout the United States have come to rely upon such imprinting or marking, and are influenced thereby, to distinguish and discriminate between competing products, inclusive of microscope cover glasses of foreign and domestic origin. Said products are purchased and accepted as and for, and taken to be, products of domestic manufacture or origin, unless the same are imprinted or marked in a manner which informs purchasers that the same are not of domestic origin.

PAR. 6. The offering for sale, and selling, by respondent of microscope cover glasses of Japanese origin, repacked in wooden boxes or containers bearing the trade name and New York address of respondent, and labeled and marked as described in paragraph 2 above, has had, and has, the capacity and tendency to mislead and deceive purchasers and prospective purchasers and users of microscope cover glasses into the mistaken and erroneous belief that the said microscope cover glasses are made in the United States and are of domestic origin and not of foreign origin, and into the purchase of said glasses in reliance upon such erroneous and mistaken belief. The same thereby has had, and has, the capacity and tendency to unfairly divert trade in commerce among and between the various States of the United States in microscope cover glasses to respondent from its competitors.

PAR. 7. The offering for sale, and selling, by respondent of microscope cover glasses packed in boxes or containers bearing the words "Made in U. S. A.," which glasses have been cut from microscope cover glass produced in and imported from a foreign country, has had, and has, the capacity and tendency to mislead and deceive purchasers and prospective purchasers and users of microscope cover glasses into the erroneous and false belief that the said microscope cover glasses were wholly made in the United States and are wholly of domestic origin, and into the purchase of said glasses in reliance upon such erroneous

and mistaken belief. The same thereby has had, and has, the capacity and tendency to, and does, unfairly divert trade in commerce among and between the various States of the United States in microscope cover glasses to respondent from its competitors.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are each and 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 the Federal Trade Commission Act.

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 Edward E. Reardon, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief in support of the allegations of the complaint (respondent not having filed brief and oral argument not 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 the Federal Trade Commission Act.

It is ordered, That the respondent, Popper & Klein, Inc., trading under its own name and as Perfektum Products Co., or under any other name or names, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of microscope cover glasses in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Made in U. S. A.," or any other term or terms indicative of American manufacture, to describe or refer to microscope cover glasses of foreign origin.

2. Causing imported microscope cover glasses to be removed from the containers in which said merchandise was imported into the United States, and on which are brands or marks indicating the foreign origin or manufacture of such merchandise, and to be placed in containers which do not bear legible brands or marks fully informing prospective purchasers of said merchandise of the foreign origin thereof.

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

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IN THE MATTER OF

J. C. WINTER & 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 3563. Complaint, Aug. 30, 1938—Decision, Sept. 5, 1940

Where a corporation engaged in manufacture of various brands of cigars, including 5 cent cigars and 2 for 5 cent cigars, and in sale and distribution thereof to jobbers and retailers throughout the United States, in direct and substantial competition with various others likewise engaged in sale and distribution in commerce of such products—

- (a) Retained, displayed, and used, in brands, descriptions, and labels of machine-made cigars, depictions theretofore made use of for discontinued hand-made product, which displayed workman at table cutting tobacco leaves, with leaves at right and finished product at left, and words "R. J. Allen's" and "Hand Made," notwithstanding fact its said products were no longer, as understood from said words by purchasing public and as preferred by substantial part thereof, made entirely by hand, but were machine-made products; and
- (b) Set forth and made use of such words and legends in brands, labels, and descriptions of cigars made and sold by it, as "R. J. Allen's," "5¢ cigar now 2 for 5¢," and "2 for 5¢—R. J. Allen's," and displayed on containers of its 2 for 5 cent cigars, trade-mark depictions of workman, as above described, and such matter included therein as "Sumatra Wrapper" and "Havana Filler," notwithstanding fact products in question were not of same composition and quality as the original "R. J. Allen's" 5 cent cigar, as long known and understood as hand-made product with Havana filler and Sumatra wrapper, but were no longer made as aforesaid set forth, but of Pennsylvania filler and Connecticut binder of damaged and "flood" tobacco, with wrapper of Ohio, Connecticut, Florida, or Philippine tobacco, and it did not make use of same quality of tobacco in its 2 for 5 cent cigars as in its 5-cent product, and said 2 for 5 cent "R. J. Allen's" cigars, packaged and branded as aforesaid, were not of the quality and grade of the 5-cent "R. J. Allen's" cigar, as well known to purchasing and consuming public and sold by it for number of years prior to acts and practices above set forth, but were composed of inferior and less desirable tobacco, both as to filler, binder and wrapper;

With effect of misleading and deceiving consuming public, and causing it to purchase cigars, labeled, described, and designated as aforesaid, as hand-made, and manufactured with intent of being sold at retail for 5 cents each, or at price in excess of that actually asked, and as sold recently for such price, and as of same grade and quality as the "R. J. Allen's" cigars which formerly retailed for 5 cents, and with result, on account of such mistaken and erroneous beliefs, thus induced, that substantial portion of purchasing public was induced to buy such "R. J. Allen's" cigars from it, and trade thereby was diverted unfairly to it from competitors who truthfully represent quality and character of their products; to the injury of competition in commerce: