

Syllabus

IN THE MATTER OF
GENERAL FOODS CORPORATION; FROSTED FOODS SALES
CORPORATION; GENERAL SEAFOODS CORPORATION;
AND 40-FATHOM FISH, INC.

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

Docket 4627. Complaint, Nov. 7, 1941—Decision, Nov. 18, 1944

Where a corporation and its three wholly owned subsidiaries, with principal offices and places of business in New York City and in Boston, engaged in the interstate sale and distribution, among other things, of frozen rosefish fillets which they usually shipped in cartons of from 5 to 10 pounds to wholesalers and retailers in the inland regions of the United States, and principally in the Middle Western States centering around Chicago, in which area is also usually sold the fresh water yellow perch or "perch"—

Designated their said rosefish fillets as "Ocean Perch Fillets" and, when sold under trade name "Birds Eye Frosted Foods" by particular subsidiary concerned, as "Fillets of Red Perch," and prominently displayed said words on the cartons packaging said products, on the waxed paper in which they were wrapped, in advertisements in newspapers and periodicals, and in booklets, pamphlets and other advertising material and sold the same to dealers by whom they were displayed, usually with skin side down, so as to be indistinguishable by purchasers generally from yellow perch, and by whom they were in some instances designated as perch, or so sold;

The facts being the fish properly designated and commonly known to the consuming public generally, particularly in the Middle Western States, as "perch," the yellow perch, which is found exclusively in fresh water and chiefly in the Great Lakes region, is in large demand by the public, and particularly so in aforesaid States; and there is no scientific basis or common usage which would justify use of the word "perch" to thus designate said former throwaway fish, price of which was as low as 25¢ for 100 pounds prior to the time they began marketing the fillets thereof under the aforesaid names;

With the result that, through thus advertising and designating their rosefish fillets as "ocean perch" and "red perch," they placed in the hands of retailers and resellers of said products a means and instrumentality wherewith to mislead and deceive members of the consuming public, and many customers of aforesaid dealers purchased as and for yellow perch such rosefish fillets; and with tendency and capacity to mislead and deceive members of the buying and consuming public in the aforesaid respect, and with effect of inducing purchase of substantial quantities of said fillets of rosefish by members of the consuming public by reason thereof:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Arthur F. Thomas* and *Mr. Andrew B. Duwall*, trial examiners.

Mr. Merle P. Lyon and *Mr. Clark Nichols* for the Commission.

Mr. Lester E. Waterbury, of New York City, for respondents.

Complaint

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that General Foods Corporation, a corporation, Frosted Foods Sales Corporation, a corporation, General Seafoods Corporation, a corporation, and 40-Fathom Fish, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of 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, General Foods Corporation, is a Delaware corporation, having its principal office and place of business located at 250 Park Avenue, New York, N. Y. Affiliated with and controlled by it, through stock ownership, are the respondents, Frosted Foods Sales Corporation, a New York corporation, having its principal office and place of business located at 250 Park Avenue, New York, N. Y.; General Seafoods Corporation, a Massachusetts corporation, having its principal office and place of business located at Boston Fish Market, South Boston, Mass.; and 40-Fathom Fish, Inc., a Massachusetts corporation, having its principal office and place of business located at Boston Fish Market, South Boston, Mass. The said respondents are now, and for several years last past have been, engaged, among other things, in the sale and distribution of certain fish products in commerce between and among the various States of the United States and in the District of Columbia. Respondents have maintained, and now maintain, a course of trade in said products in said commerce, and have caused and now cause said products, when sold by them, to be shipped from their respective places of business aforesaid to purchasers, including retailers, located in various States of the United States other than the State of origin of the shipment.

PAR. 2. In the course and conduct of their business, as described in paragraph 1 hereof, and in connection with the offering for sale, sale and distribution of their fish products in commerce, respondents have cause and now cause certain of their said products to be packaged in cartons on which appeared the following:

40-Fathom
(picture of fish).
Quick-Frozen Fish
Ocean Perch Fillets
Packed by General Seafoods Corporation;
Boston, Mass. Distributed by 40-Fathom Fish, Inc.

* * * *

Birdseye Frosted Foods
Fillets of Red Perch
Packed for
Frosted Foods Sales Corporation
New York, N. Y.

The words "Ocean Perch Fillets," or "Fillets of Red Perch," appear at five different places on cartons used in packing said products and also appear in booklets and pamphlets distributed by said respondents among customers and prospective customers containing menus and directions for handling and cooking said fish products. In addition to the above, respondents wrap the fillets in wax paper on which the above descriptive words are printed in a conspicuous manner. Retailers usually make use of said wrappings in displaying and offering said products for sale in such a manner that said words are easily and ordinarily observed by prospective purchasers.

PAR. 3. The fish properly designated and commonly known to the consuming public generally as "perch" is a yellow perch, which is found exclusively in fresh water and chiefly in the lakes of the Middle Western States of the United States and is in large demand by the public, particularly in the Middle Western States. The perch, properly so-called, is a fish of the Order Percomorpha, Series Kurtiformes, of the Family Percidae Genus Perca, and Species Flavescens.

The fish products packaged and sold by respondents in the manner hereinbefore set out and designated and described as "Ocean Perch Fillets" and "Fillets of Red Perch" are fillets of a fish properly known and described as "rosefish," a small red colored fish found abundantly in the North Atlantic Ocean, and popularly known as redfish.

The said rosefish is of the Order Cataphracti, Series Scorpaeniformes, Family Scorpaenidae, Genus Sebastes, Species Marinus, and is related generally to the scorpion fishes and rock cods, and has no family connection with or relation to the perches.

The names or terms "ocean perch" and "red perch" have no factual basis and there is no precedent for them either in scientific classification or popular usage. Said names or terms are, in fact, inherently false in their implication.

PAR. 4. The established market value and desirability of the rosefish are far inferior to those of the yellow perch. The principal market existing for the sale of rosefish was developed by respondent, beginning in 1933, and thereafter expanded by them, in the area of the Great Lakes region of the United States during a period of scarcity of yellow perch. Respondents cause their rosefish fillets to be "block frozen" in cartons of five or ten pounds, and ship them in such condition to wholesalers and retailers in the inland regions of the United States. The frozen rosefish fillets are ultimately sold, both in a frozen and unfrozen condition, to the general public as and for "ocean perch" or "red perch," in competition with yellow perch.

PAR. 5. Respondents' practice in advertising and packaging fillets of rosefish as "ocean perch" or "red perch" has had, and now has, the tendency and capacity to mislead and deceive members of the buying and consuming public into the false and erroneous belief that said fillets of rosefish are in fact fillets of yellow perch, or of a fish closely related thereto, or fillets of fish of the perch family. Such practice has induced and now induces, the purchase of substantial quantities of said fillets of rosefish by members of the consuming public due to such false and erroneous belief engendered.

The respondents' aforesaid practice further places in the hands of retailers and resellers of respondents' said products a means and instrumentality wherewith to mislead and deceive members of the buying and consuming public in the manner and form as aforesaid.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 7, 1941, issued and subsequently served its complaint in this proceeding on the respondents, General Foods Corporation, a corporation; Frosted Foods Sales Corporation, a corporation; General Seafoods Corporation, a corporation; and 40-Fathom Fish, Inc., a corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of the answers of the respondents thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a 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, this proceeding regularly came on for final hearing before the Commission upon said complaint, answers thereto, testimony and other evidence, report of the trial examiner upon the evidence, briefs in support of and in opposition to the complaint, and oral argument of counsel; 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, General Foods Corporation, is a Delaware corporation, having its principal office and place of business located at 250 Park Avenue, New York, N. Y.

Respondent, Frosted Foods Sales Corporation, is a Delaware corporation, having its principal office and place of business located at 250 Park Avenue, New York, N. Y., and is a wholly owned subsidiary of respondent, General Foods Corporation.

Respondent, General Seafoods Corporation, is a Massachusetts corporation, having its principal office and place of business located at Fish Pier, Boston, Mass., and is a wholly owned subsidiary of respondent, General Foods Corporation.

Respondent, 40-Fathom Fish, Inc., is a Delaware corporation, having its principal office and place of business located at Boston, Mass., and is a wholly owned subsidiary of respondent, General Foods Corporation.

Respondent, General Seafoods Corporation, is a producer, wholesaler, and distributor of fresh, frozen, and canned fishery products, which it sells entirely to the respondents, 40-Fathom Fish, Inc., and Frosted Foods Sales Corporation.

PAR. 2. Respondent, General Foods Corporation, acting by and through its wholly owned subsidiaries above described, respondent, General Seafoods Corporation, acting by and through respondents, Frosted Foods Sales Corporation, and 40-Fathom Fish, Inc., and respondents, Frosted Foods Sales Corporation, and 40-Fathom Fish, Inc., are now, and for several years last past have been, engaged in the sale and distribution, among other things, of frozen rosefish fillets in commerce among and between the various States of the United States and in the District of Columbia. Respondents cause said products, when sold, to be transported from their respective places of business to purchasers thereof located in the various States of the United States other than the State of origin of such shipments. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their said business, the respondents have designated and described rosefish fillets sold by and through respondent, 40-Fathom Fish, Inc., as "Ocean Perch Fillets." The rosefish fillets, sold by and through Frosted Foods Sales Corporation, are sold under the trade name "Birds Eye Frosted Foods" and are designated and described as "Fillets of Red Perch." The words "Ocean Perch Fillets" and "Fillets of Red Perch" are prominently displayed on the respective cartons used in packing said products. The terms "Ocean Perch Fillets" and "Fillets of Red Perch" are also used to designate and describe said rosefish fillets in advertisements in newspapers and periodicals and in booklets, pamphlets, and other advertising material distributed by the respondents for the purpose of inducing the purchase of their said products. In addition to the designations appearing on the cartons, such designations also appear upon the waxed paper in which said fillets are wrapped.

PAR. 4. There is no scientific basis or common usage which would justify or warrant the use of the word "perch" to designate or describe rosefish. The fish properly designated and commonly known to the consuming public generally, particularly in the Middle Western States, as "perch" is the yellow perch, which is found exclusively in fresh water and chiefly in the Great Lakes region and is in large demand by the public, particularly in the Middle Western States. The yellow perch is a fish of the order Percomorphi, series Kurtiformes, of the family Percidae, genus *Perca*, and species *Flavescens*.

The rosefish, the fillets of which are sold by the respondents as "ocean perch" and "red perch," is a small red-colored fish, popularly known as "redfish," which is found abundantly in the North Atlantic Ocean. The rosefish is related generally to the scorpion fishes and the rock cods and has no family connection with, or relation to, the perches. It is scientifically designated as of the order Cataphracti, series Scorpaeniformes, family Scorpaenidae, genus *Sebastes*, species *Marinus*.

Prior to the time that the respondents began marketing the fillets of rosefish under the names "ocean perch" and "red perch" the rosefish or redfish was a throw-away fish which sold as low as 25 cents for 100 pounds.

PAR. 5. Respondents usually ship their rosefish fillets, designated as "ocean perch" and "red perch," in cartons of 5 to 10 pounds to wholesalers and retailers in the inland regions of the United States. The principal market was in the Middle Western States, centering around the city of Chicago, Ill. This is also the area where yellow perch is usually sold. When offering respondents' fillets for sale to the public, dealers usually display such fillets with skin side down, which causes them to be indistinguishable from yellow perch by purchasers generally. In some instances they were designated by such dealers as "perch" or sold as "perch," with the result that many customers purchased said rosefish fillets in the belief that they were buying yellow perch.

By advertising, designating, and describing their rosefish fillets as "ocean perch" and "red perch," the respondents placed in the hands of retailers and resellers of said products a means and instrumentality where-with to mislead and deceive members of the buying and consuming public.

PAR. 6. Respondents' practice in advertising and packaging fillets of rosefish as "ocean perch" or "red perch" has had, and now has, the tendency and capacity to mislead and deceive members of the buying and consuming public into the false and erroneous belief that said fillets of rosefish are in fact fillets of yellow perch or of a fish closely related thereto or are fillets of fish of the perch family. Such practice has induced the purchase of substantial quantities of said fillets of rosefish by members of the consuming public due to such false and erroneous belief.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice of the public and constitute unfair and deceptive acts and practices 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 on the complaint of the Commission, the answers of the respondents, testimony and other evidence in support of the allegations of said complaint and in opposition thereto taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence, briefs in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered that the respondents, General Foods Corporation, a corporation; Frosted Foods Sales Corporation, a corporation; General Seafoods Corporation, a corporation; and 40-Fathom Fish, Inc., a corporation, and their respective officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, and distribution of rosefish fillets in commerce as

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using the terms "ocean perch" or "red perch" or the term "perch," either alone or in combination with other words, to in any way designate, describe, or refer to the rosefish or redfish.

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
DOW CHEMICAL COMPANY

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

Docket 3991. Complaint, Jan. 4, 1940—Decision, Nov. 22, 1944

Where a corporation engaged, among other things, in the manufacture and interstate sale and distribution of chlorinated hydrocarbon solvents used in dry cleaning clothing, the most important of which were carbon tetrachloride and mixtures thereof with other solvents, making about half of the carbon tetrachloride and ethylene dichloride used in dry cleaning, and selling to nearly half of the 4,000 to 5,000 dry cleaners who use synthetic solvent machines, synthetic solvents, the nonflammable nature of which permits their use in locations where the fire hazard of petroleum solvents would constitute a public hazard and most of which, in contrast to the petroleum solvents, can be recovered after dry cleaning use in synthetic plants designed therefor;

In selling its said synthetic solvents to numerous jobbers or distributors in various cities through or with the aid of men who were skilled in salesmanship and in the chemistry and use of synthetic dry cleaning solvents, called on dry cleaners in the company of salesmen employed by jobbers, carrying with them equipment for testing dry cleaning solvents, and who were given instructions by said corporation's offices on comparative products and the manner in which they were to deal with problems met in the field; in competition, among others, with the corporate manufacturer of "Kolene C" dry cleaning solvent, which solicited business from about half of the dry cleaners using synthetic solvent machines and regularly sold its solvent to about 500 of them—

Made false, misleading and disparaging representations concerning said "Kolene C," to numerous distributors, customers, prospective purchasers of dry cleaning solvents and manufacturers of dry cleaning machines located in various states, and thus also placed in the hands of others the means of further disseminating such misrepresentations,—which were vigorously used to persuade dry cleaners not to use "Kolene C," even to the extent of cancelling orders therefor—whereby in substance it was represented in many different ways that the fumes produced by "Kolene C" were more dangerous and toxic than the fumes produced by its solvent, contents of "Kolene C" were misrepresented, and it was falsely represented directly and by implication that it contained "naptha," was a "Petroleum blend," and was inflammable and explosive and therefore dangerous when used under the usual conditions of operation by dry cleaners;

The facts being that "Kolene C" was not more dangerous or toxic than the solvents sold by it; said competitive preparation contained no "naptha" as used and understood in the trade, and was not a carbon tetrachloride—naptha blend as represented, but was a mixture of carbon tetrachloride, benzol and a small proportion of trichlorethylene; had a small fire hazard rating and was not flammable under standard or usual conditions of dry cleaning clothing; and, during the period concerned, a solvent sold, though not made, by corporation in question, was given the same or higher fire hazard rating than that assigned said competitive "Kolene C"; With tendency and capacity, through said false and disparaging representations made by it as aforesaid, to mislead and deceive a substantial portion of the purchasing