

Syllabus

IN THE MATTER OF

HOBOKEN WHITE LEAD & COLOR WORKS, INC.

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

Docket 1565. Complaint, Feb. 19, 1929—Decision, June 7, 1929

Where a corporation engaged in the manufacture of paint and paint materials and in the sale thereof to dealers and consumers through letters, telephonic, and other communications, salesmen and agents, and advertisements in circulars, pamphlets, magazines, newspapers, and similar publications of general circulation,

- (a) Conspicuously branded or labeled as "White Lead" containers of one of its products resembling white lead in general appearance of color, consistency and commercial packing, but inferior thereto in quality, and so advertised, represented, offered, and sold the same, and as a product with pigment composed wholly or in greater part of lead carbonate or lead sulphate; the facts being that the pigment thereof contained approximately 80 per cent of barium sulphate, together with a small percentage of lead sulphate, zinc, and siliceous matter; with the capacity and tendency to cause dealers therein to offer, sell, and distribute the same under the afore-said name and designation and as and for white lead and a product composed as above set forth, and to mislead and deceive a large and substantial part of the purchasing public in respect of the composition thereof and cause its purchase as and for white lead or a product with pigment chiefly composed as above set forth, and containing neither barium sulphate nor any substantial quantity of other inert material; and with the effect of so doing;
- (b) Conspicuously branded as "Zinc Lead" a paint material and so represented, advertised, described and sold the same, and as a product with a pigment composed in whole or in greater proportion of lead carbonate or lead sulphate or zinc or a mixture thereof, the facts being that said product consisted principally of barium sulphate and similar inert materials, contained no lead carbonate, and only a small proportion of zinc and lead sulphate, and was inferior in quality to zinc lead as understood by the trade and purchasing public; with the capacity and tendency to mislead and deceive a substantial part of said trade and public and cause the purchase by them of said product as and for zinc lead or with the pigment thereof composed as above set forth, and with the effect of so doing;

With the result of placing in the hands of dealers in said products a means for defrauding and deceiving the public, and of unfairly diverting trade from competitors dealing without misrepresentation in genuine white lead and zinc lead and similar materials with pigment composed of lead carbonate or lead sulphate and zinc or a mixture thereof; and with the capacity and tendency so to do;

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. Henry Miller for the Commission.

Complaint

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SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a New Jersey corporation engaged in the manufacture of paint and paint materials and in the sale thereof to dealers and consumers, in various States and particularly in New York and New Jersey, through letters, telephonic, and other oral and written communications, salesmen, and advertisements in circulars, pamphlets, magazines, newspapers, and similar publications of general circulation and with offices and place of business in Hoboken, with misbranding or mislabeling as to composition of product and advertising falsely or misleadingly and misrepresenting same in regard thereto in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, for more than three years last past, has branded, advertised, represented, offered and sold as "white lead" and as a product with a pigment composed wholly or in greater part of lead carbonate or lead sulphate, a white paint material similar in general appearance of color consistency and commercial packing to white lead, but not in fact white lead nor with a pigment composed in whole or in greater part of lead carbonate or lead sulphate, as above set forth, but an inferior product, with a pigment containing approximately 80 per cent of ingredients other than lead carbonate or lead sulphate, namely barium sulphate (the remainder consisting of a small percentage of lead sulphate, zinc, and siliceous matter), an inert ingredient, the predominating part of said product.

As alleged by the complaint, respondent's aforesaid practices in branding, advertising, representing, describing and selling its product hereinabove referred to "as and for white lead and as and for a product whose pigment is composed in whole or in greater part of lead carbonate or lead sulphate is false, misleading, and deceptive and had and has the capacity and tendency to, and did mislead and deceive a large and substantial part of the purchasing public into, and thereby cause them to purchase said product in and because of, the erroneous beliefs that said product is in fact white lead, or is a product whose pigment is composed in whole or in greater part of lead sulphate or lead carbonate, and that said product does not contain said barium sulphate or any substantial quantity of inert material".

Respondent further, as charged, has similarly branded, advertised, represented, offered and sold as "zinc lead" and as a product with

a pigment composed in whole or greater proportion of lead carbonate or lead sulphate and zinc, or a mixture thereof, a product which is not "zinc lead" (meaning to the paint trade and purchasing and consuming public a paint pigment consisting of zinc and lead in approximately equal proportion), nor white lead nor with a pigment composed, as above set forth, but with a pigment consisting principally and predominantly of barium sulphate and similar inert materials and with no lead sulphate and only a small and minor proportion of zinc and lead sulphate, not exceeding in the aggregate approximately 20 per cent, and a product inferior in quality to zinc lead as understood as above set forth.

As further alleged by the complaint, respondent's advertising, branding, representing, and describing its product immediately hereinabove referred to "as 'zinc lead', and as and for a product whose pigment consists solely or in greater part of lead carbonate, or lead sulphate and zinc, or a mixture thereof, is false, misleading and deceptive, had and has the capacity and tendency to, and did, mislead and deceive a substantial part of the trade and purchasing and consuming public into, and thereby cause them to purchase said product in and because of, the erroneous beliefs that said product is zinc lead as understood in the paint trade and by the purchasing and consuming public, or that the pigment of said product is composed of lead carbonate, or lead sulphate and zinc, or a mixture thereof".

According to the complaint "The acts and practices of respondent of selling, advertising, branding, and representing its so-called 'white lead' and 'zinc lead', as hereinabove set forth, has the capacity and tendency to, and does, place in the hands of dealers in said products a means and instrument for committing fraud and deception upon the public, and a means and instrument by which said products may be and are sold and delivered to and purchased by the purchasing and consuming public under and because of the respective erroneous beliefs set forth", and have the capacity and tendency to and do unfairly divert trade from competitors many of whom sell and distribute in competition with respondent and in interstate commerce, "paint materials similar in general appearance to respondent's so-called 'white lead' and 'zinc lead', but which are in fact not white lead and zinc lead, and similar materials whose pigment is composed of lead carbonate, or lead sulphate and zinc, or a mixture thereof, and which competitors in no wise misrepresent the character of said material or its ingredients"; all to the prejudice of the public and of respondent's competitors.

Upon the foregoing complaint the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission on the 19th day of February, A. D. 1929, issued its complaint against Hoboken White Lead & Color Works, Inc., respondent above mentioned, and on February 20, 1929, caused the same to be served upon respondent as required by law, in which complaint it is charged that respondent has been and is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act. By notice contained in said complaint respondent was notified and required within thirty days from aforesaid date of service, unless said time be extended by order of the Commission, to file with the Commission an answer to said complaint; and in said notice respondent was further notified of the provisions of the Commission's Rules of Practice with respect to answer and failure to answer, said provisions being set forth in haec verba in said notice and providing in part as follows (Rule III, subdivision 3):

3. Failure of the respondent to file answer within the time as above provided for shall be deemed an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

Respondent has not at any time caused its appearance to be entered in this proceeding, nor has it during said thirty-day period specified in said notice, or at any time, made or filed answer to said complaint. It has at no time requested that the time within which it may file answer be extended, nor has the Commission granted any such extension of time. Upon the expiration of said thirty-day period specified in said notice for filing answer to said complaint, the Commission, on March 27, 1929, caused to be served upon the respondent by registered mail a further notice signed by its secretary and reading as follows:

FEDERAL TRADE COMMISSION,
Washington, March 25, 1929.

HOBOKEN WHITE LEAD & COLOR WORKS, INC.,
Hoboken, N. J.

In the matter of Hoboken White Lead & Color Works, Inc.

Docket 1565

DEAR SIRS: You are informed that the complaint in the above-entitled matter pending before the Federal Trade Commission having been served upon you by registered mail on February 20, 1929, the thirty-day period, therein specified, from the date of said service within which you were required to file answer

has expired. No application for extension of the time within which you may file answer to the complaint has been received or granted by the Commission.

The Rules of Practice of the Commission provide that such failure to answer shall be deemed to be an admission of all the allegations of the complaint, to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint. Notice of these provisions in the Commission's Rules of Practice is contained in the complaint which was served upon you; and accordingly, it will be deemed that by such failure to answer you have elected to, and do, admit the allegations of the complaint, authorize the Commission to find them to be true, and waive hearing on the charges set forth therein.

Very truly yours,

OTIS B. JOHNSON, *Secretary.*

Respondent failed to avail itself of opportunity to be heard on, or to make answer to, the charges set forth in said complaint, or with respect to aforesaid notice as to answer and failure to answer.

Thereupon this proceeding came on for decision, and the Federal Trade Commission, acting pursuant to said act of Congress and its aforesaid Rules of Practice, having duly considered the record and being fully advised in the premises, makes this its report in writing, stating its findings as to the facts and conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Hoboken White Lead & Color Works, Inc., is a corporation organized in the year 1919, and existing under and by virtue of the laws of the State of New Jersey. It is and at all times since said date of its organization has been engaged as hereinbelow set forth in the business of manufacturing, selling and distributing paint and paint materials to dealers and consumers, with its offices and place of business in the city of Hoboken, N. J. Respondent manufactures its product at Hoboken, N. J., where it also causes the same to be packed in commercial containers of the customary type and sizes commonly and widely used for such purpose in the paint industry. It offers for sale and sells said products, (a) through and by means of letters, telephonic, and other oral and written communications sent by it from time to time from its place of business in Hoboken, N. J., to its customers and prospective customers in various States of the United States, particularly the States of New York and New Jersey; (b) also through and by means of salesmen and agents who, on behalf of respondent, solicit and take purchase orders for respondent's products from dealers and users thereof in various States, particularly the States of New York and New Jersey, and (c) through and by means of advertisements of its products published by it from time to time in circulars and pamphlets and in magazines, newspapers, and similar publications of general circulation among the trade and consuming public

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throughout various States of the United States, particularly the States of New York and New Jersey. As a result and because of said solicitation and offering for sale by respondent, many dealers and consumers purchase said products from respondent, and in so doing, transmit their purchase orders for such merchandise and make remittances in payment thereof from States other than the State of New Jersey to respondent at its place of business in Hoboken, N. J., where respondent receives such remittances and purchase orders and thereupon causes its products so ordered by its customers and sold by it to be transported from its place of business in Hoboken, N. J., to the respective purchasers thereof in States other than New Jersey; and in so conducting its business, respondent engages in and carries on a constant current of commerce between and among the State of New Jersey and other States contiguous thereto, particularly the State of New York. In the course and conduct of said business respondent is, and at all times since the afore-said date of its organization has been, engaged in interstate commerce and in direct, active competition with many individuals, partnerships, and other corporations similarly engaged in the sale and distribution of paint and paint materials in commerce in and between the various States of the United States, particularly the States of New Jersey, New York, and other States contiguous thereto.

PAR. 2. Among the products manufactured, sold, and distributed by respondent, as set forth in paragraph 1 hereof, is a white paint material of the consistency of stiff paste, which material respondent brands, designates, and describes as "white lead." For more than three years last past respondent has offered for sale and sold and continues to offer for sale and sell said product packed in steel pails or containers of the respective capacities of 12½ pounds, 25 pounds, 50 pounds, and 100 pounds, all conspicuously branded with the words "white lead"; and it has further caused and still causes said product to be advertised, represented, offered for sale, and sold as and for, and under the brand, designation, and description of "white lead," and as and for a product whose pigment is composed wholly or in greater part of lead carbonate or lead sulphate. Said describing, branding, offering for sale, and selling of said product as and for white lead and as and for a product whose pigment is composed in whole or in greater part of lead carbonate or lead sulphate, has the capacity and tendency to and does cause dealers in said product to offer for sale, sell and distribute said product to the public under the name, designation, and description of, and as and for, white lead, and as and for a product whose pigment is composed in whole or in greater part of lead carbonate or lead sulphate. Said product when marketed by respondent and by other dealers is similar in general appearance of

color, consistency, and commercial packing to white lead, but in truth and in fact said product is not white lead, and its pigment is not composed in whole or in greater part of lead carbonate or lead sulphate. Respondent's said product is inferior in quality to white lead, and its pigment contains approximately 80 per cent of ingredients other than lead carbonate or lead sulphate, to wit, barium sulphate. The remaining part of said pigment consists of a small percentage of lead sulphate, zinc, and siliceous matter. Said barium sulphate and siliceous matter are inert ingredients and comprise the greater and predominating part of said product of respondent.

PAR. 3. Aforesaid practices of respondent of branding, advertising, representing, describing, and selling its product, referred to in paragraph 2 hereof, as and for white lead and as and for a product whose pigment is composed in whole or in greater part of lead carbonate or lead sulphate is false, misleading, and deceptive and had and has the capacity and tendency to, and did mislead and deceive a large and substantial part of the purchasing public into, and thereby cause them to purchase said product in and because of, the erroneous beliefs that said product is in fact white lead, or is a product whose pigment is composed in whole or in greater part of lead sulphate or lead carbonate, and that said product does not contain said barium sulphate or any substantial quantity of inert material.

PAR. 4. Another product sold and distributed by respondent, as set forth in paragraph 1 hereof, is a paint material in paste form denominated, described, and branded by respondent as "zinc lead," which product is packed, sold, and distributed by respondent to the trade and consuming public in steel pails and containers of the respective capacities of 12½ pounds, 25 pounds, 50 pounds, and 100 pounds. In extensively marketing said product in the trade and to the purchasing and consuming public, respondent has caused for more than three years last past and still causes said product to be conspicuously branded on said containers with the words "zinc lead"; and further, to be represented, advertised, described, and sold as and for "zinc lead," and as and for a product whose pigment is composed in whole or in greater proportion of lead carbonate or lead sulphate and zinc or a mixture thereof. Whereas, in truth and in fact, said product is not zinc lead, nor white lead, nor is it a product whose pigment is composed in whole or in greater proportion of lead carbonate, or lead sulphate and zinc, or a mixture thereof, but the pigment of said product consists principally, predominantly, and in greater proportion of barium sulphate and similar inert materials; and further, said product contains no lead carbonate and only a small and minor proportion of zinc and lead sulphate, the aggregate of which zinc

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and lead sulphate does not exceed the approximate proportion of 20 per cent. The words "zinc lead" in the paint trade and to the purchasing and consuming public mean a paint pigment consisting of zinc and lead in approximately equal proportions. Respondent's so-called "zinc lead" product is inferior in quality to said zinc lead as understood by the trade and purchasing public.

PAR. 5. Respondent's advertising, branding, representing, and describing its product, referred to in paragraph 4 hereof, as "zinc lead", and as and for a product whose pigment consists solely or in greater part of lead carbonate, or lead sulphate and zinc, or a mixture thereof, is false, misleading, and deceptive, had and has the capacity and tendency to, and did, mislead and deceive a substantial part of the trade and purchasing and consuming public into, and thereby cause them to purchase said product in and because of, the erroneous beliefs that said product is zinc lead as understood in the paint trade and by the purchasing and consuming public, or that the pigment of said product is composed of lead carbonate, or lead sulphate and zinc or a mixture thereof.

PAR. 6. The acts and practices of respondent of selling, advertising, branding, and representing its so-called "white lead" and "zinc lead", as hereinabove set forth, has the capacity and tendency to, and does, place in the hands of dealers in said products a means and instrument for committing fraud and deception upon the public, and a means and instrument by which said products may be and are sold and delivered to and purchased by the purchasing and consuming public under and because of the respective erroneous beliefs set forth in paragraphs 3 and 5 hereof.

PAR. 7. There are, among the competitors of respondent mentioned in paragraph 1 hereof, many individuals, partnerships, and corporations which sell and distribute in competition with respondent, and in interstate commerce, paint materials similar in general appearance to respondent's so-called "white lead" and "zinc lead", but which are in fact white lead and zinc lead, and similar materials whose pigment is composed of lead carbonate, or lead sulphate and zinc, or a mixture thereof, and which competitors in no wise misrepresent the character of said material or its ingredients. Respondent's acts and practices hereinabove set forth have the capacity and tendency to, and do, unfairly divert trade from said competitors.

CONCLUSION

Aforesaid acts and practices of respondent in the sale and distribution of its so-called "white lead" and "zinc lead", under the circumstances and conditions set forth herein, are to the prejudice of the

public and of respondent's competitors, and constitute unfair methods of competition 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.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the record, and the Commission having made its report in which it stated its findings as to the facts and conclusion that respondent Hoboken White Lead & Color Works, Inc., has violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That respondent, Hoboken White Lead & Color Works, Inc., its officers, agents, representatives, servants, and employees, cease and desist in the course or conduct of the sale of paint material or paint pigment in interstate commerce:

(1) From using the words "white lead", or word or words of like import, upon the containers of, or with which to brand, label, represent, advertise, or describe, any such paint material or paint pigment which contains less than 50 per cent white lead, lead carbonate or lead sulphate; and, if and when said paint material or paint pigment is not composed wholly of white lead or of lead carbonate or lead sulphate or of the two in combination, but contains white lead, lead carbonate, or lead sulphate as its principal and predominant ingredient to the extent of not less than 50 per cent by weight of the product, from similarly using said words "white lead" or word or words of like import unless immediately preceded in equally conspicuous form and color by a word or words clearly indicating that said paint material or paint pigment is not composed wholly of white lead.

(2) From using the words "zinc lead", or word or words of like import, upon the containers of, or with which to advertise, brand, label, represent, or describe, any such paint material or paint pigment when said product is not in fact zinc lead or is not in fact wholly composed of zinc in combination with lead carbonate or lead sulphate.

It is further ordered, That respondent, Hoboken White Lead & Color Works, Inc., shall within thirty days after service upon it of a copy of this order file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.