

Complaint

IN THE MATTER OF

MARIETTA MANUFACTURING COMPANY

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

Docket 1686. Complaint, July 15, 1929—Decision, May 27, 1930

Where a corporation engaged in the manufacture of a product for interior walls, wainscoting, ceilings, table tops, and other like purposes, and in the sale thereof to jobbers, contractors, builders and, to a lesser extent, the ultimate user, designated said product as "SANI-ONYX, a vitreous marble", "SANI-ONYX" (or "SANIONYX") and made such statements in advertising same under said names in newspapers and periodicals of national circulation and in catalogues, leaflets and other like literature circulated among the trade and public, as "SANI-ONYX, a vitreous marble, truly modern is this new material for bathroom and kitchen walls * * * offers distinctive surface textures with colors of rare and exquisite beauty. No substitute or makeshift * * * a superior product fused from rock ingredients", the fact being that its aforesaid "SANI-ONYX" was not a product of nature, but was made chiefly of silica, in slab form, in a great variety of colors, capable of being used in place of natural or quarried onyx or marble in similar form, resembling in some of its colors the aforesaid stones, and with other features and characteristics in common between said artificial slab products and slabs of natural onyx and/or marble, permitting use of the former as a substitute for the latter; with tendency and capacity to deceive purchasers of its products into believing same to be onyx and/or marble and to cause purchase by them thereof in such belief:

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

Mr. Alfred M. Craven for the Commission.

Lockwood, Lockwood, Goldsmith & Galt and Roemler, Carter & Rust, of Indianapolis, Ind., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an Indiana corporation engaged in the manufacture of a product for use for interior walls, wainscoting, ceiling, tops of tables and counters and for other like purposes and simulating the appearance of marble and designed and used as a substitute therefor, and in the sale thereof to jobbers, contractors, builders, and the public generally, and with principal place of business at Indianapolis, with naming product misleadingly and advertising falsely or mislead-

Findings

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ingly, 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, engaged as above set forth, describes its said product, neither onyx nor marble, but chiefly composed of silica sand, as SANIONYX and as vitreous marble, in its advertising, catalogues, circulars, leaflets, and other like literature, with the tendency and capacity to deceive purchasers thereof into believing the same to be marble or onyx and to cause them to purchase said product in such belief; all to the prejudice of the public and of respondent's competitors, who include individuals and concerns dealing in products of the same general kind and nature and/or marble and onyx quarried, cut, and fashioned so as to be suitable for the same uses as respondent's said product.

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" (38 Stat. 719), the Federal Trade Commission, on July 15, 1929, issued and served its complaint upon the respondent Marietta Manufacturing Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. Respondent having entered its appearance and filed its answer to said complaint, hearings were had before a trial examiner theretofore duly appointed, and testimony was heard and evidence received in support of the charges stated in the complaint and in opposition thereto. Thereafter, this proceeding came on regularly for decision; and the Commission having duly considered the record, and being now fully advised in the premises, makes this its report, stating its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Marietta Manufacturing Co. is a corporation organized and existing under the laws of the State of Indiana, with a factory and its principal place of business in the city of Indianapolis, in said State. It is now and for the last twenty years has been engaged in the business of manufacturing and selling to jobbers, contractors, builders and, to a lesser extent to the ultimate user, a product used for interior walls, wainscoting, ceilings, table tops, counters, and for other like purposes. It causes and has

caused said product, when sold, to be transported in interstate commerce from Indianapolis, Ind., into and through States of the United States other than the State of Indiana, to purchasers thereof at their respective points of location. In the course and conduct of its business the respondent is, and for many years has been, in competition with other individuals, partnerships and corporations located and doing business in the United States, engaged in the sale and transportation in interstate commerce between and among the various States of the United States of products of the same general kind and nature and/or marble and onyx quarried, cut, and fashioned so as to be suitable for the same uses as respondent's said product.

PAR. 2. The respondent, in order to create a demand by the public for its product and to obtain orders therefor, advertises extensively in newspapers and periodicals of national circulation, and by the circulation among the trade and general public of catalogues, circulars, leaflets, and other like literature. In such advertising, respondent describes and designates its product as SANI-ONYX, a vitreous marble, SANI-ONYX, and sometimes as SANIONYX, and makes use of the following, among other statements, in describing the product which it sells:

SANI-ONYX, a vitreous marble, truly modern is this new material for bathroom and kitchen walls, ceilings, wainscoting. Sani-Onyx offers distinctive surface textures with colors of rare and exquisite beauty. No substitute or makeshift. Sani-Onyx is a superior product fused from rock ingredients.

Sani-Onyx is fused from rock ingredients and comes in convenient slabs in a variety of modern colors and color combinations.

WHAT IS SANI-ONYX? Emphatically Sani-Onyx is not a substitute. It is a superior modern-day material for walls, ceilings, wainscoting—wherever in the past you have been forced to use conventional plaster, tile, or marble.

PAR. 3. Respondent's product is not a product of nature, but is a manufactured product, the chief ingredient of which is silica. It is neither marble nor onyx. It is manufactured in slab form and capable of being used in place of natural or quarried onyx or marble when such onyx or marble is in slab form. It is made in a great variety of colors, and in some of said colors the product resembles marble in appearance, and also, in some of said colors it is somewhat similar in appearance to a type of onyx in slab form.

PAR. 4. Among the competitors of respondent are numerous marble dealers throughout the United States, who deal in, and sell in interstate commerce, marble in slab form, and, to a limited extent, onyx in slab form, adapted to and in fact put to substantially the same uses as are the products of respondent.

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In addition to color there are other features and characteristics in common between respondent's artificial slab product and slabs of natural onyx and/or marble, so that its product under certain conditions may be used as a substitute for natural onyx and/or marble, and to that extent may be said to be artificial onyx and/or marble.

PAR. 5. The designation by the respondent of its said product, as set forth in paragraph 2 hereof, is palpably false and misleading, and has the tendency and capacity to deceive the purchasers of said product into the belief that respondent's said product is onyx and/or marble, and to cause said purchasers to purchase said product in that belief.

CONCLUSION

The practices of said respondent, under the conditions and circumstances described in the foregoing findings, are to the injury and prejudice of the public and of respondent's competitors, and are unfair methods of competition and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and evidence introduced, and briefs and oral argument of counsel, and the Commission having made its findings as to the facts and its conclusion that the respondent 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 the respondent, Marietta Manufacturing Co., its officers, agents, and employees, in connection with the sale or offering for sale of its product in interstate commerce between and among the several States of the United States and in the District of Columbia, do cease and desist from:

(1) Using the term "Sani-Onyx, a Vitreous Marble", or the term "Sani-Onyx", as a designation or description of the product manufactured by it.

(2) Representing in its advertising matter or by other means, that the product which it manufactures is marble, or onyx.

It is further ordered, That the respondent shall, within 30 days after the service upon it of a copy of this order, file with the Com-

mission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

By the Commission, Commissioner Humphrey dissenting in memorandum attached.

Dissent of Commissioner Humphrey in the matter of Marietta Manufacturing Co.

I do not disagree with my associates as to the law, but as to the facts in this case. I do not think the evidence sustains the findings. Fortunately, for the determination of this question if it is appealed, the court can examine all the material evidence in a few moments.

The advertisements and the product itself constitute the material evidence and all of it. In each of the advertisements quoted in the findings of fact, a statement is made that shows no possibility of leading anyone to believe that the product is either onyx or marble. Again, this product is almost exclusively sold to the contractor, generally through the architect. That a contractor or architect would think that this product is either onyx or marble, is to attribute to them lack of human intelligence.

I can not believe that anyone of ordinary capacity, using the ordinary care that one would naturally employ in making a purchase, would ever be deceived into thinking that he was purchasing either onyx or marble.

The term "Sani-Onyx" is really under the circumstances of this case, a fanciful name. The trouble is that the people are not deceived by the respondent's product. They know what it is and they prefer it and they buy it. The sale of this product is not unfair competition, but it is dangerous competition, because the product is cheaper and better suited for most purposes for which it is sold than either marble or onyx.

If the respondent, when it refers to its own product, shall use the word "made-marble", and the word "made-material", and when it refers to onyx or marble were to use the words "natural onyx" and "natural marble", the possibility of deception, if there be any, would be effectually removed. Certainly the respondent should be allowed this privilege.

It might be worth while to call attention to the fact that this trade name was adopted before the Federal Trade Commission Act was passed, and for twenty years nobody has complained about it.

I think in this case the Commission is promoting monopoly instead of competition.

IN THE MATTER OF
THE AMERICAN SCHOOL OF CORRESPONDENCE

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

Docket 1486. Complaint, April 2, 1929¹—Decision, June 23, 1930

Where a corporation engaged in the business of giving courses of instructions in sundry arts, sciences, professions, and branches of learning by correspondence, through the mail; in advertising the same in magazines, periodicals, and other publications of general circulation throughout the United States, and in letters, booklets, pamphlets, leaflets, and other business literature, sent to prospective pupils, and employed by agents in soliciting the same,

- (a) Represented that it was organized and incorporated, and was required by law to operate without profit, that its courses and business were accordingly so conducted, and that its entire income was expended in the interest of the pupil in the preparation and giving of said courses, enabling it thereby to sell courses of a high degree of excellence at prices substantially lower than its competitors are enabled to charge for similar instruction; the facts being that under the law concerned the corporation was not forbidden so to carry on its operations as to derive therefrom a profit to its use and benefit as distinguished from that of the incorporators or organizers thereof, that 35 per cent of the revenue received from pupils was expended for soliciting enrollments and collecting tuition, and that starting with \$30,000 advanced by its organizers, it had accumulated more than \$350,000 worth of property; and
- (b) Held out to prospective pupils a "\$2,000,000 guarantee" of a job and raise, to induce enrollment and payment of tuition in advance, or of an installment thereof with unconditional obligation to pay the residue, in which it undertook to secure for any pupil completing its course and earning less than \$30 a week a satisfactory position paying at least 50 per cent more, or to refund the entire amount paid for its training, and similarly undertook to refund such amount to any such pupil, who earned \$30 a week or more and considered that training and employment service given by it had not been such as to help him secure promotion and increased salary, and made such false and misleading statements incident to aforesaid "guarantee", pupils and enrollment as that prospective pupil need not fear lack of previous education, guarantee insured him a job and pay increase "absolutely without risk of a penny", he was relieved of worry upon enrollment, as he had thereby "put the responsibility for his success up to it", a person enrolling for one of its complete courses could master the same in his spare time and thereby secure the job and salary increase without the risk of a penny, it guaranteed that pupil's choice of one of its 13 courses would lead to a fine position and increase in pay, it was selling him "a training and employment service guaranteed" to fit him for the

¹ Amended.