

Complaint

IN THE MATTER OF

ARNOLD STONE COMPANY, INC.

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

Docket 1732. Complaint, Dec. 11, 1929—Decision, Dec. 8, 1930

Where a corporation engaged in the manufacture and sale of products composed of cement, crushed stone, and other ingredients, designated the same as "stone", "cast stone", "cut cast stone", "pink marble", "Kre-tex stone", "Kre-tex cast stone" or "Kre-tex cut cast stone", notwithstanding the fact that aforesaid products were neither stone nor marble in either the geologic or architectural sense nor cast stone; with capacity and tendency to mislead, deceive or confuse the purchasing public and particularly such secondary purchasers as buyers or lessees of completed buildings or parts thereof containing aforesaid products thus designated, described and referred to, into believing same to be the product quarried from the ground or otherwise obtained in its natural state and generally known as stone:

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

Mr. Robert H. Winn for the Commission.

Mr. F. C. Hillyer, of Jacksonville, Fla., and *Curtis, Fosdick & Belknap*, of New York City, 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, a Florida corporation, engaged in the manufacture of artificial products for use as substitutes for natural stone in architectural work, and in the sale and distribution thereof among various States, and with principal place of business in Jacksonville, with using misleading corporate name, misrepresenting product as to composition, and advertising falsely or misleadingly 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, engaged as above set forth, designated its product, not quarried from the ground or otherwise obtained in the natural state and understood by the purchasing public as being stone, but "manufactured and/or fabricated and composed of a product or

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products fused or otherwise held together by chemical and/or mechanical action" as "stone", "cast stone", "trimming stone", "pink marble", "pink granite", "bluish-gray granite", "Kre-Tex stone" and/or "Kre-tex cast stone", in its advertisements, letterheads, billheads, contracts and specifications circulated in interstate commerce, and features its aforesaid corporate name on its letterheads and advertising matter distributed among the various States.

The use by respondent, as alleged, "of the words 'stone', 'marble' and/or 'granite', either independently or in connection or in conjunction with the words, or any of them, used to describe said products", as above set forth, "or in its corporate name, to represent, designate and describe its products in the manner hereinbefore set out, has the capacity and tendency to mislead and deceive, and to confuse, and in some instances has misled and deceived, the purchasing public into the belief that its said products so represented, designated, described, and referred to are stone, that product quarried from the ground or otherwise obtained in its natural state, and so understood by the purchasing public to be and is stone", and said acts and things done by respondent, as alleged, are, as charged, "to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of section 5".

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 issued and served a complaint upon the respondent, Arnold Stone Co., Inc., a corporation, charging it with the use of unfair methods of competition in interstate commerce in violation of the provisions of said act.

Respondent having entered its appearance and filed its written return in answer to the complaint herein, 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 matter came on regularly for final hearing on the briefs of counsel and oral argument, and the Commission having duly considered the record and being now fully advised in the premises makes this its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized and existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located in the city of Jacksonville in the State of Florida. It has a branch office and factory located in the city of Greensboro in the State of North Carolina. It is now and for more than one year last past has been engaged in the manufacture of products composed of cement, crushed stone, and other ingredients for use as substitutes for natural stone in architectural work and in the sale and distribution thereof in commerce between and among various States of the United States. It causes the said products when sold, to be shipped or transported from its place of business in the State of Florida, or from its place of business in the State of North Carolina, to purchasers thereof located in various States of the United States other than, respectively, the State of Florida or the State of North Carolina.

PAR. 2. In the course and conduct of its business respondent was at all times herein referred to in competition with other corporations, individuals, firms, and partnerships likewise engaged in the sale and distribution in interstate commerce of artificial products, for use as substitutes for natural stone in architectural work and with other corporations, individuals, and partnerships engaged in the sale and distribution in interstate commerce of natural block stone.

PAR. 3. The products manufactured by respondent are composed of an aggregate of crushed stone, usually marble, granite, limestone or sandstone, and Portland cement. The proportion is approximately 75 per cent crushed stone and 25 per cent Portland cement. In some instances mineral color is added to the mix. When the greatest dimensions of any block manufactured by the respondent exceed two times the sum of the other two dimensions, the block is reinforced with steel rods. All lintels and sills with a span of less than 4 feet, all bearing blocks and all other blocks subject to cross bending are reinforced with deformed steel rods, placed 2 inches from the tension surface. Columns and lintels having a span of more than 4 feet have special reinforcement.

PAR. 4. In the course and conduct of its business as described in paragraph 1 hereof respondent in soliciting the sale of and selling its products in interstate commerce caused them to be represented, designated, described and referred to in its advertisements, letter-heads, contracts, specifications, and on samples of its products circulated in interstate commerce as "stone", "cast stone", "cut cast

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stone", "pink marble", "Kre-tex stone", "Kre-tex cast stone", or "Kre-TeX cut cast stone".

PAR. 5. The products of respondent by it so represented, designated, described, referred to and sold in interstate commerce under trade names or designations containing the words "stone" or "marble" are not stone or marble in either the geologic or architectural sense.

PAR. 6. The words or phrases used by respondent to modify and accompany the words "stone" and "marble" when used by it as aforesaid, do not indicate that respondent's product is not stone or marble. The phrase "Kre-TeX" is a meaningless coined phrase taken from the two words "concrete texture". The word "cut" is a word used by natural stone quarrymen and finishers to describe the finishing process which is used in connection with preparing natural stone for structural uses. The word "cast" is descriptive of a process and as used (i. e., cast stone) denotes stone obtained by means of casting. Respondent's products are not cast stone.

PAR. 7. Respondent's products are similar to concrete blocks or cement blocks in that both are largely composed of stony matter, both are molded and both are used structurally. Concrete blocks or cement blocks are usually made with gravel and sand and Portland cement. Respondent's products are made with crushed stone and Portland cement. This is the principal difference between respondent's products and cement blocks or concrete blocks.

PAR. 8. There is no evidence of actual deception in the record. The products of respondent are usually purchased by architects, contractors and builders. Possibility of deception in such instances is remote because such purchasers are familiar with the composition of products manufactured by respondent. The evidence of such contractors, architects and builders who testified on that point was that they were not deceived.

PAR. 9. The use by respondent of the words "stone" or "marble" either independently or in connection and in conjunction with the words or any of them used to describe its product as set out in paragraph 4 hereof, to represent, designate, describe, and refer to its products in the manner hereinbefore set out has the capacity and tendency to mislead, deceive or confuse the purchasing public, and particularly such secondary purchasers as purchasers of completed buildings or lessees of completed buildings or parts thereof, in which buildings respondent's products have been used, into the belief that its said products so represented, designated, described and referred to are stone, that product quarried from the ground or otherwise obtained in its natural state and known generally as "stone".

CONCLUSION

The practices of the said respondent under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and of respondent's competitors, and are unfair methods of competition in commerce and constitute a violation 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard and considered by the Federal Trade Commission upon the complaint of the Commission and the record, 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, Arnold Stone Co., Inc., a corporation, its officers, agents, and employees, do cease and desist from the use of the phrases "cast stone", "cut cast stone", "pink marble", "Kre-tex cast stone", and "Kre-tex cut cast stone", or any of them, in the designation of or in the advertising of the products manufactured by it and composed principally of cement and crushed stone and sold and distributed by it in interstate commerce, unless or until the phrases "cast stone", "cut cast stone", "pink marble", "Kre-tex cast stone", and "Kre-tex cut cast stone, or any of them, are qualified by the use of the words "imitation" or "artificial" or some other word or words equally explanatory and equally as conspicuous in type and position as the phrases "cast stone", "cut cast stone", "pink marble", "Kre-tex cast stone", or "Kre-tex cut cast stone".

It is further ordered, That the respondent, Arnold Stone Co., Inc., a corporation, its officers, agents, and employees do cease and desist from the use of the words "stone" or "marble" in the designation or in the advertising of the products manufactured by it and composed principally of cement and crushed stone and sold and distributed by it in interstate commerce unless or until the words "stone" or "marble" are qualified by the use of the words "imitation" or "artificial" or some other word or words equally explanatory and equally as conspicuous in type and position as the words "stone" or "marble".

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It is further ordered, That the respondent shall within 60 days after the service upon it of a copy 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 the order to cease and desist hereinbefore set forth.

Dissent by Commissioner Humphrey

I find myself unable to agree with the majority of the Commission in issuing an order in this case.

CAST STONE

The main complaint is that the respondent is guilty of falsely describing its products by the use of the words "cast stone". In paragraph 3 of the findings, it is stated, "The products manufactured by respondent are composed of an aggregate of crushed stone, usually marble, granite, limestone or sandstone and Portland cement. The proportion is approximately 75 per cent crushed stone and 25 per cent Portland cement". And in paragraph 7 of the findings it is stated, "Respondent's products are similar to concrete blocks or cement blocks in that both are largely composed of stony matter, both are molded and both are used structurally. * * * Respondent's products are made with crushed stone and Portland cement".

According to such findings and according to the evidence, the words "cast stone" are a correct and accurate description of respondent's product. To require the respondent to call its product "artificial cast stone", or "imitation cast stone", is to require it to use a misnomer. The product is genuine cast stone. To add the words "artificial" or "imitation" nullifies the true meaning of the words "cast stone" and carries a meaning at variance with the truth.

DECEPTION

"The products of respondent are usually purchased by architects, contractors, and builders", says the 8th paragraph of the findings of fact. These products are not sold to the public. They are made to order. Those purchasing them specify the size and shape, and the ingredients of each unit. They are intended for a particular building and can be used in no other building. To deceive the purchaser or the public under the facts as set forth is impossible, and the findings so state in these words in paragraph 8: "There is no evidence of actual deception in the record. The products of respondent are usually purchased by architects, contractors, and builders. Possibility

of deception in such instances is remote because such purchasers are familiar with the composition of products manufactured by respondent. The evidence of such contractors, architects, and builders who testified on that point was that they were not deceived."

The burden of proving deception or the probability of deception is upon the Commission and it must make a finding to that effect. In this case we not only fail to find deception but on the contrary find affirmatively that deception is only a possibility, and we further find that not only is it only a possibility but a remote possibility. How can it be contended that an order based upon deception can be sustained in the face of such findings? It has been held many times that a finding of the "possibility of deception" is not sufficient, and if a finding of the possibility of deception is not sufficient, how about a finding that there is "only a remote possibility of deception"? A finding of remote possibility makes the finding somewhat more than completely fatal. Such an express finding that there is only a remote possibility of deception, makes the assurance of fatal error more than doubly sure.

This finding of "remote possibility of deception", reminds me of the old lawyer who said of a certain instrument, "If your honor please, it is unparalleled in the history of courts for being void". So I think this finding of "remote possibility of deception" is unparalleled in the history of the Commission for being insufficient to sustain a finding of deception. Nor is this finding in any way cured by the finding in paragraph 9, which says that respondent's product "has the capacity and tendency to mislead or deceive, or confuse the purchasing public, and particularly such secondary purchasers as purchasers of completed buildings or lessees of completed buildings or parts thereof."

The first part of such finding as quoted, as to the purchasing public, is completely destroyed by the findings in paragraph 8, already quoted, and such finding in paragraph 9, is not only unsupported by the evidence, but the evidence shows affirmatively that it is not true. As to that part of the findings in paragraph 9, in regard to secondary purchasers or lessees of buildings, there is no evidence to sustain it, and if there were, it would be too remote to constitute the probability of deception, and no court would sustain such a finding, based on evidence of secondary deception.

There is no relation whatever between the purchaser or lessee of completed buildings, and the respondent, and no possible theory upon which an order could be based against respondent for the acts of such a purchaser or lessee. But if the evidence on secondary deception were full and complete—which it could not be by any possi-

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bility—it would not sustain an order in this case, for the all sufficient reason that nothing of the kind is alleged in the complaint. This part of the order is entirely outside the issue in the case and is improvident, and will be set aside by the courts. (*Federal Trade Commission v. Gratz*, 253 U. S. 421.)

Legally there is no finding of deception made by the Commission, for the findings in paragraph 8 completely nullify the findings in paragraph 9.

There are other objections to the order but they need not be mentioned.

Complaint

IN THE MATTER OF

C. N. COX DOING BUSINESS UNDER THE TRADE NAME
AND STYLE THE NORTON INSTITUTE

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

Docket 1581. Complaint, Mar. 14, 1929—Decision, Dec. 9, 1930

Where an individual engaged in conducting correspondence courses for the competitive examinations of the United States Civil Service Commission,

- (a) Adopted and employed the trade name The Norton Institute and represented one C. H. Norton as president thereof, the fact being that said individual's place of business consisted of a portion of two office rooms, the business was conducted by himself with one clerical assistant, with no structural organization, and the name of the supposed president was entirely fictitious and represented no one connected in any way with the business in question;
- (b) Falsely represented the prices at which his courses were offered as "special" prices and lower than those usually received by him;
- (c) Published and distributed letters of recommendation falsely represented as having been received from persons who had taken his courses, the fact being that such letters, if genuine, had no application to said courses;
- (d) Represented in advertising circulars and circular letters that his courses had been prepared by men of experience in the matters concerned and were sufficient to enable applicants quickly and effectively to prepare for and pass aforesaid competitive examinations and qualify for appointment to such positions as Forest Ranger, United States Mail Service, etc., the fact being that he failed to show necessary age limits or other prerequisites, gave misinformation as to number of questions, failed to state that a mental test and practical experience were necessary in certain positions, and in other respects gave many erroneous answers, and failed adequately to cover subjects of examination as prepared by said Commission; and
- (e) Made such statements in newspaper advertising and "help wanted" columns as "Men, get Forest Ranger job, \$125-\$200 month and home furnished; hunt, fish, trap. For details, write Norton Institute", etc., thereby strongly implying himself to be an employer of labor or an employment agency;

With capacity and tendency to deceive the public and induce persons to enroll and pay for his said courses in reliance upon the truth and accuracy of the aforesaid representations, and to divert patronage from his competitors:

Held, That such practices, under the conditions and 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.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged