

Complaint

IN THE MATTER OF
THE LIGHTNING 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 2108. Complaint, July 3, 1933—Decision, June 20, 1934

Where a corporation engaged in the manufacture and sale of a purported electric battery rejuvenator, the ingredients of which in powdered form consisted of Epsom salts mixed with small amounts of alum and glycerine to which was added to the unit quantity in which shipped, a gallon of distilled water and one-half gallon of new sulphuric acid, and which preparation it sold through garage owners, chiefly, by whom it was customarily sold to automobile owners or operators at \$1 or \$1.50 a charge, of which the aforesaid quantity provided five or six—

Represented in advertising said preparation in newspapers and magazines, and in circulars distributed to customers and prospective customers, and by them to automobile owners or operators, that said preparation was a self-charging super electrolyte, which charged batteries instantly, without putting on the "line", or waiting or payment of rentals by customer, made old batteries work like new, and doubled and increased the life thereof, and would charge a totally dead battery and save the cost of a new one, could be set out in the coldest weather and was invented by a famous chemist, and that with a short run, with generator attached, battery would be fully charged, with ample current to turn over the motor, etc.;

The facts being that the ingredients of the powder had no merit, or beneficial effect whatever upon the battery in which used, and the distilled water and sulphuric acid added to make up the liquid constituted the usual mixture for storage batteries, and contributed any virtue possessed by the mixture, and representations were false in every respect, and money expended for preparation was entirely wasted;

With capacity and tendency to mislead and deceive the ultimate consumers of said preparation into the belief that said representations were true, and to induce them to purchase the same in such belief, and to divert trade to it from its competitors, including those dealing in preparations sold for similar purposes, those manufacturing storage batteries or apparatuses used to charge the same, and wholesalers of sulphuric acid when sold for use in such batteries;

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. E. J. Hornibrook 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 respondent, a Delaware corporation engaged for more than

one year last past, in the manufacture of a purported electric battery rejuvenator, and in the sale and distribution thereof under the trade name "Lightning Electrolyte", and with principal office and place of business in St. Paul, Minn., with advertising falsely or misleadingly as to qualities or properties of product, in violation of the provisions of Section 5 of such Act, prohibiting the use of unfair methods of competition in interstate commerce, in that respondent, in advertising said preparation in newspapers and magazines of interstate circulation, and in circulars, pamphlets, and other printed matter distributed to customers and prospective customers, represents that preparation in question charges batteries instantly, makes old batteries work like new, will partially and sometimes wholly charge a totally dead battery without help of the "line", cleans sulphation from the battery plates and charges the customer's battery while he waits, and makes other representations of similar tenor,¹ the facts being said representations are all false and misleading, and preparation depends for any value it may have, upon the addition of the usual quantity of sulphuric acid contained in the ordinary battery solution, to the powdered form, when so sold, and upon the presence thereof when sold as a liquid, old and worn batteries in which the solution is used can be charged only by the induction of a current of electricity from some other source, and batteries containing product will freeze, contrary to respondent's representation, at temperatures frequently prevailing in various parts of the United States; with capacity, tendency, and effect of misleading and deceiving the purchasing public throughout the United States, and in foreign countries, in which respondent's trade literature is distributed, into purchasing such product in erroneous belief that said representations are true, and that preparation is a new and peculiar product, with qualities above attributed to it, and with further effect of diverting business from competitors, among whom there are those who sell and distribute batteries and battery solutions through truthful and fair representations, and with the tendency so to divert.

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 3rd day of July, A. D. 1933,

¹ The respondent's representations, as alleged and quoted in the complaint, may be found set forth, *infra*, in the findings.

issued against and thereafter served its complaint upon respondent, The Lightning Company, 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 heretofore duly appointed, testimony was heard, and evidence taken in support of the charges stated in the complaint and in opposition thereto. Thereafter this proceeding came on for final hearing, and the Commission having duly considered the record and it now being fully advised in the premises, makes this its report, stating its findings as to the facts and its conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, The Lightning Company, is a corporation organized under the laws of the State of Delaware, with its principal place of business located in the city of St. Paul, in the State of Minnesota. It is now and for more than ten years last past has been engaged in the manufacture and sale of a purported electric battery rejuvenator, and in the sale and distribution of the same under the trade name of "Lightning Electrolyte", causing said product when so sold to be transported from its place of business, or factory, located in the State of Minnesota, to purchasers thereof located in States other than the State of Minnesota. For convenience this product will hereinafter be called Lightning.

PAR. 2. The respondent in the sale of Lightning is engaged competitively in interstate commerce with other persons, copartnerships, and corporations likewise engaged in the sale of preparations for use for the same said purposes as respondent's said Lightning; among which are Battery Life, of St. Paul, Minn.; Battery High Ball, of Gainesville, Fla.; Battery Life Company, of Cleveland, Ohio; Electro, of Indianapolis, Ind.; Electro, of Los Angeles, Calif.; Electro-Life, Detroit, Mich.; Enrich Battery Saver, Cincinnati, Ohio; Let's Go, New Orleans, La.; Misto Lite, Glens Falls, N. Y. Respondent in the sale of Lightning is also in competition in interstate commerce with the manufacturers of storage batteries, the producers of apparatuses used for the purpose of charging storage batteries and with wholesalers of sulphuric acid, when such product is sold by them for use in storage batteries.

PAR. 3. Prior to 1931 respondent's volume of business in the sale of Lightning, as aforesaid, reached the sum of \$65,000 per year. Since 1931 it has amounted to approximately \$200 per month.

Lightning is now and since 1922 has been sold by respondent as a rejuvenator of storage batteries, principally those used in auto-

mobiles. Its customers are mainly the proprietors or owners of garages. It is shipped either by parcel post or express to the purchasers thereof.

Lightning is packed and shipped in two forms: First, because the postal authorities object to receiving it in liquid form, it is shipped by parcel post in powdered form; and, second, it is shipped by express in liquid form, that is to say, "ready mixed" in the proportions hereinafter described. Lightning proper, that is to say, in the powdered form, is made of Epsom salts mixed with small amounts of alum and glycerine. In the liquid form it is mixed with three parts of distilled water and one part of sulphuric acid.

The ultimate consumer of Lightning is generally the owner or operator of an automobile, who buys it from said garage men.

When shipped in the powdered form it is to be mixed by the garage man. A carton of Lightning is to be mixed with one gallon of distilled water and one-half gallon of new sulphuric acid. The garage man drains out the old fluid in the battery and replaces it with Lightning, mixed with the proportions of water and sulphuric acid as aforesaid. The garage man charges the owner or operator of a car a fee for this mixture amounting to \$1.50 in the Western States and \$1 in the Eastern States.

A carton of Lightning bears the price mark of \$2. It actually sells to the garage man for \$1. The cost of the water is 10 cents and that of the acid from 40 cents to 50 cents. A carton of Lightning so mixed will make from five to six charges for a battery. A charge of this acid and water costs not to exceed 12 cents; for this charge, when used with Lightning, the garage man receives from \$1 to \$1.50. In other words, the owner of a car who uses the Lightning mixed with sulphuric acid and water has paid from 88 cents to \$1.38 for the product Lightning.

The product Lightning is entirely worthless for use in storage batteries.

Distilled water and sulphuric acid have long been used as a mixture for storage batteries. Sulphuric acid removes sulphation from the plates of batteries and thereby enlivens, strengthens, and preserves them. New sulphuric acid will often make an apparently dead battery perform its functions. If a battery is completely dead nothing will revive it. Also batteries are re-charged by use of electric currents or "lines" as the term is used in the trade.

If there is any virtue in Lightning mixture it is due to the sulphuric acid and distilled water, and not to Lightning itself. No claim is made in respondent's advertising for the virtue of the sulphuric acid and water, when mixed with Lightning; it is represented

in the advertising of respondent, hereinafter described in paragraph 4, that it is the use of Lightning itself (a mixture of Epsom salts, alum and glycerine) which does the things therein claimed.

PAR. 4. In the course and conduct of its said business, respondent, in soliciting the sale of and selling the said product Lightning, has caused advertisements to be inserted in newspapers and magazines having interstate circulation, among which the Chicago Examiner, the Chicago Tribune, New York papers, and such magazines as the Modern Mechanic, Street and Smith publications and the Pathfinder. Respondent also caused and now causes circulars, pamphlets and other printed matter to be distributed to said garage customers and prospective garage customers located in States other than the State of Minnesota, for distribution by them, and they are distributed by them, to their customers who are owners or operators of automobiles, which contain advertising matter and representations with respect to purported virtues of its said product. Up until the year 1931 respondent was expending in such advertising a sum varying between the amounts of \$3,000 and \$5,000 per annum. Owing to the lack of business, respondent discontinued its newspaper and magazine advertising about the year 1931.

In and through such media the respondent made and now makes the following, among other representations and claims as to the virtues of the product Lightning:

Lightning is the self-charging super electrolyte, Lightning charges instantly, Lightning makes old batteries work like new, Lightning doubles the life of a battery, Lightning will partially, sometimes wholly, charge a totally dead battery without help of the line and saves cost of a new battery, Lightning will charge your battery in your car in from 5 to 20 minutes, Lightning won't freeze, can be set out in the coldest climate.

I have just perfected a brand new plan for you to make money. In the enclosed envelope you will find a small sample of a wonderful chemical which was invented by a famous chemist in 1922. It cleans the sulphation from the battery plates and charges them up by chemical action while doing so. It therefore charges the customer's battery while he waits.

You simply pour Lightning Electrolyte into a discharged battery and same commences to charge instantly. No putting on the line. No waiting for days. No rentals to pay.

Lightning and you become the talk of the town as soon as you take an old discharged battery, pour out the old sulphuric acid and water and then pour in Lightning Electrolyte. You will find instantly you have plenty of current to turn over the motor and the battery is charged fully with a short run with the generator attached as usual.

PAR. 5. Two physicists and electrical technicians of the Bureau of Standards made tests of Lightning for the purpose of determining whether the claims of respondent as to its efficacy were true.

Findings

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After mixing the powdered solution of Lightning as directed on the carton, they procured seven batteries for use in these tests. They described these tests in the record as follows:

Having established that these batteries were not capable of starting the car, we then prepared to place in the batteries the solution to be tested. We prepared the Lightning Electrolyte according to the directions * * * using chemically pure sulphuric acid * * * and made up a solution of sulphuric acid without the Lightning. Having prepared the solutions we arranged the batteries in order. * * * Then Mr. Snyder and I flipped a coin to see which solution would go into the first battery and the coin indicating that Lightning should go into the first battery, the Lightning was put in. The battery was immediately placed in the car and we waited ten minutes, timing it carefully by a watch, then we made a test and found no improvement. We allowed this battery to stand over in the laboratory until the next day. The battery did not charge; the motor did not start and the lights were not lit. This battery was called USL.

Then taking up the Delco battery, we put in a solution of sulphuric acid and a corresponding amount of Lightning. We put that in and waited ten minutes, there was no improvement. * * * We allowed that to stand in the laboratory until the next day and then made a reading and found there was no improvement in the condition of the battery.

Those two batteries were dead to all intents and purposes. So far as the starting of the car was concerned, they were not charged by either Lightning or sulphuric acid. We then passed to the three better batteries. Lightning solution was placed in an Exide battery. This battery was placed in the car and we waited until ten minutes had elapsed and we then closed the starter switch on the car and the engine started. I do not regard the fact that the car started after Lightning was put in as being evidence that the battery was charged by Lightning. The same thing can be done with sulphuric acid.

We next placed the sulphuric acid solution in Exide battery No. 4 and we put that battery in the car. We waited ten minutes and then closed the starter switch. There was a partial revolution of the engine as there had been when the battery was first tried, but there was no start. This battery was then put back to the laboratory and the sulphuric acid solution dumped out. Then we put in the Lightning solution. Again we waited ten minutes. Again there was a partial revolution of the engine, but no start. This Exide battery No. 4 was tried with both the sulphuric acid solution and the Lightning solution and in neither case would it start the car. Then we put the sulphuric acid solution in the Moco battery and placed that battery in the car and waited ten minutes, and it started the engine immediately. We repeated it four times. So, we have of the three better batteries, one battery which started with Lightning, one which started with sulphuric acid solution, and one which failed to start with either. Discussing the battery which started when it contained Lightning, the witness has to say:

"The Exide battery No. 5, which contained Lightning, showed under laboratory tests that it ran the longest of any of these batteries. It gave nearly five times as much capacity as any of the others, and therefore we can say that that battery was distinctly superior to the other batteries," meaning that Exide battery No. 5 had more life in it to begin with than the other batteries which were used in the test.

The Moco battery gave 1.2 ampere hours. The Exide battery gave 1 ampere hour. That was the one which failed to start with Lightning or sulphuric acid. Exide battery No. 5, into which Lightning was placed and the battery which started the car gave MM 5.7 ampere hours, so that was in a distinctly superior condition.

The putting of Lightning in Exide battery No. 5 added nothing to the superior condition which we ultimately found. It was a matter of the sulphuric acid in the Lightning solution working its way into the pores of the plates and the same is true of the Moco battery. That also worked its way into the pores of the plates and the battery was enabled to start the car. There was no Lightning solution there.

The next step was to charge the batteries with electric current. They were charged at 12 amperes, which approximates the charging current of an automobile for a period of one-half hour * * * An important improvement in the voltage of these batteries was noted.

We charged the USL battery with a line, i. e., this is the battery which contained the Lightning solution and which had failed to start the car in its original condition. This battery, after receiving the line, started the car easily and promptly. We tried it three times.

Now as I summarize the seven batteries, and in the order based upon the percent of their rated capacity which was delivered on this discharge, I would like to point out that the first battery in order of merit was the one given the water treatment. (That is to say, where the plates were washed with water.) The second, the Delco battery, was one of the two very bad ones at the beginning. The third was the Moco; the fourth was Exide No. 5 which contained Lightning. The fifth battery was the Firestone with the original electrolyte unchanged, and the sixth was Exide No. 4, which contained Lightning, and the seventh was USL, which also contained Lightning. You will see that out of the seven the three batteries which contained Lightning were among the four last of the seven in the order of merit.

From the tests and experiments described above these said technicians concluded that the efficiency of the cells of a battery was exactly the same with or without the use of Lightning; that Lightning would not prevent a battery from freezing, prolong or increase the life of a battery, rejuvenate or benefit a battery in any way, release or cause to be released any additional energy from a battery, or do or perform any of the things claimed for it in the advertising described in paragraph 4 hereof, and that any money expended in the purchase of Lightning for use in a storage battery is and was entirely wasted.

A Dr. K. Arndt, a German scientist of repute, conducted tests with Lightning for the purpose of determining whether Lightning would rejuvenate a storage battery and from the results of these tests he found that it would not.

Four witnesses for respondent—one its president and general manager, two garage men and one who had sold thousands of gallons of Lightning in the Argentine—testified that Lightning would do

all that is claimed for it in the advertising described in paragraph 4 hereof. Their testimony is not convincing.

PAR. 6. The statements and representations in respondent's advertising as described in paragraph 4 are false and misleading, in that Lightning Electrolyte is not a wonderful chemical and was not invented by a famous chemist; is not a self-charging electrolyte; does not charge batteries instantly, or at all; does not make old batteries work like new; its use has no effect on old or other batteries; does not clean sulphation from the plates of old discharged or other batteries; does not charge a battery or the plates of a battery by chemical or other action, or charge either at all; does not rejuvenate batteries; does not double or increase the life of a battery; does not obviate the need of putting the battery on the service station line; does not save the rentals and days of service and waiting incident to such service; will not wholly or partially charge a totally dead battery; any benefit to a battery from the use of a mixture of sulphuric acid and Lightning Electrolyte is derived solely from the sulphuric acid.

PAR. 7. Each and all of the statements and representations as to the efficacy of Lightning contained in the advertising as set forth in paragraph 4, had and have the tendency and capacity to mislead and deceive the ultimate consumers of said Lightning into the belief that such statements and representations were and are true, and to induce them to purchase respondent's said Lightning in such belief, and had and have the tendency and capacity to divert trade to respondent from its said competitors.

CONCLUSION

The practices of the respondent under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and respondent's competitors and are unfair methods of competition in interstate commerce, and constitute a violation 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 come on to be heard by the Federal Trade Commission, on the complaint of the Commission, the answer of the respondent, the testimony and evidence and the briefs of counsel, and the Commission having made its report in writing, in which it stated its findings as to the facts, with its conclusions that the respondent had violated the provisions of an Act of Congress ap-

proved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes"; and the Commission being fully advised in the premises,

It is ordered, That respondent The Lightning Company, its officers, agents, employees and representatives, in connection with the advertising, offering for sale, and sale in interstate commerce, or in the District of Columbia, of the commodity Lightning Electrolyte, or any other product or products of the same or substantially the same ingredients or compound, cease and desist from representing in any manner, including by or through the use of testimonials or endorsements, in or through newspapers, magazines, radio, circulars, pamphlets, or other printed or written matter, or otherwise, that Lightning Electrolyte, or such other product or products, when used in storage batteries, is a self-charging super-electrolyte, or that it charges such batteries instantly or at all; that it makes old batteries work like new or at all; that it doubles the life of a battery or increases the life of a battery at all; that it will partially, sometimes wholly, charge a totally dead battery without help of the line, or that it will charge a totally dead battery at all; that it saves the cost of a new battery; that it will charge your battery in your car in from 5 to 20 minutes, or that it will charge such battery at all; that it will not freeze, and that it can be set out in the coldest climate without freezing; that it is a wonderful chemical; that it was invented by a famous chemist; that it will charge a battery instantly or at all; that due to the use of Lightning Electrolyte, or such other product or products, one will find that instantly they will have plenty of current to turn over the motor and the battery will be charged fully with a short run with the generator attached as usual; that it aids in charging a battery at all; from the use of any other word, words, or representations stating, importing, or implying that Lightning Electrolyte or any similar substance or compound has any virtue as a storage battery rejuvenator, or that its use will charge, aid in the charging, prolong the life, or increase the efficiency of a storage battery.

It is further ordered, That 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.

IN THE MATTER OF
AMERICAN SMELTING & REFINING COMPANY

COMPLAINT, OPINION, AND ORDER OF DISMISSAL IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 7 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 2102. Complaint, Apr. 26, 1933—Order, June 25, 1934

CLAYTON ACT, SECTION 7—MOTION TO DISMISS—JURISDICTION—SAVING PRO-
VISOS—FORMATION OF SUBSIDIARIES WHERE COMPETITION NOT SUBSTANTIALLY
LESSENED.

Respondent's motion to dismiss goes only to the jurisdiction of the Com-
mission, and the facts must be assumed to be as stated in the complaint.
Therefore, the respondent can derive no benefit from the third paragraph of
Section 7, concerning subsidiaries which do not substantially lessen compe-
tition, inasmuch as substantial lessening of competition must be assumed.

CLAYTON ACT, SECTION 7—"COMMERCE"—INTERPRETATION OF STATUTE—CORPO-
RATE IDENTITY.

Corporate forms will be disregarded when necessary in order to carry out
the substantive purpose of a statute. Therefore, the newly created sub-
sidiary must be deemed identical with the parent company and so engaged
in "commerce".

CLAYTON ACT, SECTION 7—ACQUISITION OF STOCK IN COMPETITOR—ACQUISITION OF
ASSETS PRIOR TO COMPLAINT—SCOPE OF SECTION—JURISDICTION.

The decisions in *Thatcher Manufacturing Co. v. Federal Trade Commission*,
272 U. S. 554, and *Arrow-Hart & Hegeman Electric Co. v. Federal Trade
Commission*, 291 U. S. 587, make it clear that the Commission has no power
to divest assets, even though acquired by unlawful purchase of stock, and
that Section 7 only outlaws mergers effected by stock acquisition. While
the instant case of acquisition of assets through a subsidiary might be dis-
tinguished, the substance of the decisions makes the question of violation one
of means rather than economic consequences. Therefore, the new corpora-
tion must be regarded as a subsidiary of the acquiring company and the
transaction complained of as an acquisition of assets over which this
Commission has no jurisdiction but for which "a remedy is provided through
the courts." *Thatcher Manufacturing Co. v. Federal Trade Commission*, 272
U. S. 554, and *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Com-
mission*, 291 U. S. 587.

CLAYTON ACT, SECTION 7—ACQUISITION OF STOCK IN COMPETITOR—ACQUISITION
OF ASSETS PRIOR TO COMPLAINT—STOCK OF CORPORATE SUBSIDIARY AS ASSET—
JURISDICTION.

Respondent's contention that acquisition of assets prior to the filing of
the complaint defeats the jurisdiction of the Commission cannot be sustained
since the respondent's ownership of the assets is dependent on the stock
ownership of the new corporation, and so an order requiring parting with
the stock of the latter would not be futile, thus distinguishing the instant