

IN THE MATTER OF
DURALITH CORPORATION AND WILLIAM WEINER,
HARRY WEINER, AND JOSEPH D. WEIL

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

Docket 2157. Complaint, Jan. 23, 1934—Decision, Mar. 29, 1935

Where a corporation organized by two individuals, its executive officers, in order to afford a corporate instrumentality for putting into effect a scheme of fraud evolved by them for the sale of a plastic wall paint, the formula of which they controlled, and also to serve as a corporate shield against the consequences of their acts in carrying out said scheme, and said individuals; in pursuance of said scheme, directed to securing distributor dealers, signatures, through fraud and misrepresentation and through agreements, assurances and promises, which were not to be, and were not, kept, observed or performed, to (1) contracts obligating said dealers to accept and pay for specified quantities of said product, and (2) trade acceptances in payment of the purchase price, and acting through numerous agents, or contact men, in order to induce distributors and prospective distributors to visit their executive offices, so that they might secure their signatures, as aforesaid—

- (a) Represented to such distributors, solicited to undertake sale of said product, that corporation had been and was having great success in distribution and sale thereof in other sections, where distributors had effected a great volume of sales, and were sending monthly repeat orders for such product, by the carload, and that the consumer demand for product was 55 percent of that for all competing products, facts being there was no demand whatever therefor, they had not had and were not having any success whatever in the sale thereof, except in unloading it on unsuspecting distributors through such representations and assurances, and no distributor had had any such success as to give any repeat orders of any kind;
- (b) Represented that said product was waterproof and washable and could be applied successfully by anyone, and was the only product for such purposes that could be applied to a large surface by one operation, facts being it was not waterproof unless glazed by varnish or shellac, and could not be applied by one operation, or by housewife, child, or any unskilled person;
- (c) Represented that the territory for which prospect's service was sought, was virgin territory, in that corporation had neither had a distributor therein, nor had product been there offered or sold, or in any part thereof directly or through any other agency, fact being they had sold product therein one or more times, and it was then being offered therein by former distributors at less than cost;
- (d) Represented that a careful survey in the territory had been made of homes and other institutions therein, in order to approximate amount of product which territory would require or consume, as result of which it had been concluded that prospect should have on hand as a month's supply amount determined, for which amount prospect was to obligate himself,

facts being that amount thus ascertained was not based on product's market, but upon amount prospect could be induced to purchase, and said surveys were directed to his financial ability, and not to possibilities of retail outlet for product;

- (e) Falsely represented that after receipt of initial order, and prospect's execution of distributor's agreement, and compliance with their practice of requiring trade acceptances covering purchase price, a representative would organize prospect's sales division, demonstrate product's application and use to trade and public, assume burden of selling first shipment, conduct newspaper and radio campaign to promote its sales, establish or develop retail or other outlets, conduct sales campaign to insure success in disposing of first shipment, or first month's supply, and, in fact, sell it for distributor, and that outlets for the product had already been established, and orders received or promised which would be credited to prospective distributor after signing the agreement and trade acceptance, facts being it conducted no such campaign, did not effect sales of first shipment or any part thereof, neglected to establish any retail or other sales outlets, had no such orders to be credited, and said various statements and representations were all false;
- (f) Represented that it was in financial position to retain and would retain trade acceptances until their maturity, or would renew or extend same until distributor could pay them out of proceeds of sale of product purchased, and that there would be little or no investment required of distributor, who would be doing business really upon their money, facts being it was their policy and practice as an essential part of their fraudulent plan to disregard their said assurances, as to investment required, and violate their verbal agreements to hold, renew or extend said acceptances;
- (g) Made it their policy and practice, at conferences with prospects in their executive offices, to repeat, elaborate and emphasize aforesaid false statements, agreements, assurances and promises, and exhibited letters purporting to be from distributors expressing pleasure on account of their success in distribution of said product, notwithstanding fact former distributors were then offering product in territories involved by said letters as distress merchandise, at nominal prices, and falsely stated at such times, that no definite delivery dates for product could be fixed because company was flooded with back orders;
- (h) Sold or purported to sell said acceptances while actually retaining control thereof, to certain so-called finance companies (charged with or possessed of full knowledge of the circumstances), for sale by said companies as pretended innocent purchasers for value, so that, through said collusive practices, said companies might hold themselves out to said distributors as having purchased such acceptances for value, without notice of any defenses thereto, and demand payment thereof by suits or threats thereof, and they themselves might thereby be able to preclude legitimate defenses for fraud which, as against them, the distributor could interpose successfully, and thus escape the consequences of their fraudulent plan or scheme;

With the result that trade in said product was disrupted and demoralized in different communities in the various States, the public was misled and deceived and induced to purchase product in question in reliance upon erroneous beliefs thereby caused, and trade was diverted to them from competitors offering similar products in interstate commerce:

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

Mr. James M. Brinson for the Commission.

Mr. Abram F. Myers, of Washington, D. C., and *Apfel, Berliner & Freidin*, of New York City, for respondents.

COMPLAINT

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, having reason to believe that Duralith Corporation, and William Weiner, Harry Weiner, and Joseph D. Weil, individually, have been or are using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Duralith Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business located in New York City in said State, and is now and since 1928 has been engaged in the business of manufacturing, selling and shipping in interstate commerce plastic paint or wall texture material known as Duralith to purchasers thereof, hereinafter called distributors, located throughout the different States of the United States. Respondent, Duralith Corporation, causes said Duralith so purchased to be shipped and transported to said distributors located throughout numerous States of the United States other than the State in which said shipments originated.

That respondent has devised and carried out a fraudulent scheme in competition in interstate commerce by which it has in the ways hereinafter described sold its products under the pretense of securing distributors therefor, obtained orders from said so-called distributors by false representations and obtained and undertaken to enforce collections of trade acceptances secured by false representations.

In the course and conduct of said business respondent, Duralith Corporation, has been and is engaged in direct and substantial competition with individuals, partnerships, and corporations engaged in offering for sale and selling in interstate commerce among the several States of the United States plastic paints and wall texture materials and allied products.

The individual respondents, William Weiner and Harry Weiner, have been and are sole owners of the said Duralith Corporation's no par value common stock of which there are 1,000 shares carrying all the stockholders' voting rights in said corporation. There are 25,000 shares of preferred nonvoting capital stock of said corporation, all of which is owned by respondents, William Weiner, Harry Weiner, and Joseph D. Weil, with the exception of 1,000 shares. Such individual respondents have been since the organization of respondent corporation and now are its executive officers. They have created, formed, and instituted and have maintained and directed all of the policies, methods, and practices of respondent corporation and at all times hereinafter mentioned they have dominated and controlled the affairs of respondent corporation and have directed and been responsible for and now direct and are responsible for all of the representations, transactions, sales, and other activities of respondent corporation hereinafter mentioned. Respondents William Weiner, Harry Weiner, and Joseph D. Weil caused respondent Duralith Corporation to be organized in order to acquire a corporate instrumentality through which they would be enabled to institute, establish, and carry out said fraudulent sales plan.

PAR. 2. As a part of said fraudulent sales plan said respondent Duralith Corporation's agents acting within the scope of their employment and with the knowledge, acquiescence and support of respondents have solicited sales of Duralith to distributors and have secured the signatures of distributors to certain commercial paper known as trade acceptances in payment therefor upon the false and fraudulent representation that such trade acceptances would be retained by respondent Duralith Corporation until their maturity and until the product Duralith purchased from respondent Duralith Corporation could and would be sold by said distributors to retail dealers and consumers thereof with respondent Duralith Corporation's aid and assistance and that said trade acceptances would be retained until said distributors could meet and pay same from and out of such sales of said product with resultant profit to said distributors.

Respondents, as a part of said fraudulent sales plan, after receiving said executed trade acceptances instead of retaining and holding same as represented would be done, so as to enable said distributors to pay for said trade acceptances with and from money derived from sales of said product, Duralith, delivered and transferred said trade acceptances prior to their maturity to certain finance companies whereby such finance companies would be and are placed in a position to interpose the claim of innocent purchasers for valuable considera-

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tion and without notice of any defense thereto. In truth and in fact said finance companies are controlled by respondents or are in collusion with them and knew the methods and pretenses by which the execution of said trade acceptances were procured and knew that the trade acceptances in their hands were subject to the same defenses by said distributors as though they had remained in the hands of respondent Duralith Corporation. Pursuant to said fraudulent sales plan it was and is the practice of finance companies to hold themselves out to said distributors as purchasers and holders of said trade acceptances for value and without notice of any defenses thereto and said finance companies have demanded and now demand payment therefor under penalty of suit.

PAR. 3. Pursuant to said fraudulent sales plan, respondent Duralith Corporation's agents acting within the scope of their employment and with the knowledge, acquiescence, and support of respondents have induced and persuaded numerous distributors and prospective distributors located throughout the United States to visit the executive offices of respondent Duralith Corporation located in New York, N. Y., and Chicago, Ill., for the purpose and with the intent of securing the signatures of said distributors and prospective distributors to contracts or printed instruments requiring the purchase of a supply of said product Duralith and to secure the signatures of said distributors and prospective distributors to said trade acceptances, in pursuance of which the purchase price of a supply of Duralith, as determined by respondent Duralith Corporation, must be paid by said distributors within or during periods of time varying in different cases from sixty to ninety days. Said distributors and prospective distributors were persuaded and induced to visit respondent's executive offices and sign and execute said instruments as the result of one or more of the numerous false and misleading representations hereinafter set forth in paragraph 4, particularly such representations: (a) concerning the kind and quality of Duralith; (b) concerning the amount of sales and demand for Duralith; (c) market conditions; (d) distributors' profits; (e) concerning the amount and quality and character of advertising matter and advertising service furnished distributors; (f) concerning the amount and quality and character of sales service furnished distributors.

PAR. 4. Pursuant to said fraudulent sales plan, respondent Duralith Corporation's agents acting within the scope of their employment and with the knowledge, acquiescence, and support of respondents and with the purpose and intent of deceiving, misleading, and defrauding distributors and prospective distributors into buying

Duralith and signing said trade acceptances made and now make false, misleading and deceptive statements and representations to the following effect; that respondent Duralith Corporation had been and was having great success in the distribution and sale of Duralith in other sections of the United States where distributors had effected a great volume of sales and were sending monthly repeat orders for Duralith by the carload; that the consumer demand for Duralith is 55 percent of all competing products; that Duralith contains as its base casein, which is a product of the dairy industry and that no other plastic paint or wall texture material on the market contains or has such substance for its base; that Duralith is waterproof and washable and can be successfully applied by anyone and is the only product for the same or similar purpose or purposes that can be applied to a large surface by one operation; that the territory for which the service or cooperation of the prospective distributors is sought, is virgin territory for Duralith, since respondent corporation has neither had a distributor in such territory, nor offered for sale or sold the product directly or through any other agency in such territory or any part thereof; that said respondent had carefully studied the territory, and its available or desirable agencies for the distribution of the product and had chosen the individual, partnership, or corporation approached.

That a careful survey of the territory had been made to ascertain the number of homes and other institutions, private and public, in order to approximate the amount of Duralith such territory would require or consume, and it has been concluded from such survey that the prospective distributor in such territory should have on hand as a month's supply the amount determined by respondent corporation from such survey which the prospective distributor must purchase after execution of the agreement for the position of distributor; that after receipt of the initial order of Duralith, following execution of the agreement naming the prospective distributor, as authorized distributor, and compliance with said respondent's practice of requiring trade acceptances covering purchase price of the product, a representative of said respondent would organize the distributor's sales division for Duralith, demonstrate its application and use, to the trade and public and assume the burden of selling the first shipment; that such respondent would also conduct a newspaper and radio advertising campaign for the distributor to promote sales of the product and establish or develop retailers or a retail outlet for disposition of the product; that respondent would in fact conduct a sales campaign to insure success in disposal of the first shipment of Duralith, or the first month's supply of

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the product, for its distributors; that respondent corporation was in a financial position to retain and would retain the trade acceptances until their maturity; that the representative was unauthorized to conclude the negotiations but that it would be necessary for the prospective distributor to visit the executive offices of respondent corporation in New York or Chicago, the expense of which would be borne by such respondent and there conclude the final arrangements, necessary to become the exclusive distributor of respondent Duralith Corporation in the particular territory to which the allocation was to be made.

In some instances, representatives of said respondent have assured prospective distributors, that retail dealers for the product have already been established by it, and orders for Duralith received from them which would be credited to such prospective distributors, after consummation of the negotiation through agreement with such respondent, and execution of the trade acceptances. Said respondent has at its executive offices when concluding or attempting to conclude an agreement with prospective distributors followed the practice of representing the great success being achieved by its distributors in disposing of Duralith to the consuming public. To such purpose respondent corporation has exhibited to such prospective distributors written papers, purporting to be letters from other distributors, when such prospective distributors, have inquired relative to time when Duralith purchased by them, would be delivered at their respective places of business, in which letters or purported letters such alleged distributors expressed pleasure on account of success in the distribution of Duralith. On such occasions said respondent has sometimes replied to the inquiry with the statement that time of delivery could not be forecast, as respondent company was flooded with back orders, and that the order under consideration probably could not be filled within thirty days.

In general the statements and representations of respondent corporation to its prospective distributors are all to the effect that in accomplishing the sale of Duralith, to be purchased by the prospective distributor, the work of securing retail outlets, will be done by respondent corporation, and that the expense of advertising both in newspapers and by radio broadcasting will be borne by it. The prospective distributor is questioned in respect to warehouse facilities, and his situation relative to the local railroads or one of them, and is led to believe that the principal service to be performed by the distributor will be as warehouseman. In truth and in fact, while respondent corporation may have been having some success in leading distributors, who had been misled by the aforesaid false and

misleading statements and representations, with large supplies of the product, it was not having, and had not had, and is not having success in the distribution of any more of its product, than the initial purchase thereof required by respondent of its distributors. No distributor of said respondent has at any time given it a so-called repeat order and all of them have encountered and still encounter, insurmountable obstacles, in the sale and distribution of Duralith purchased by them, attributable to a substantial extent, to the failure of respondent corporation to fulfill, as hereinafter described, the representation which led or induced its distributors to make the initial purchase. Duralith is not waterproof but on the contrary must be supplemented by shellac or some varnish glaze to become waterproof.

While it may have casein, as its base, such substance is also, contrary to representations of respondent corporation, the base of various products sold in competition with Duralith. It cannot be applied by anyone, uninstructed or unskilled in its use and it is not the only plastic paint that can be applied on large surfaces by one operation, nor can it be applied so as to be washable and unimpaired, on large surfaces by one operation.

The territory represented to the prospective distributors, as virgin territory for Duralith, usually is not virgin territory, and on the contrary, at the time such false and misleading representation is being made to the prospective distributors as hereinabove stated, there are one or more former distributors in such territory, who have been unable to dispose of Duralith, which they purchased when they became distributors of respondent corporation although the period of their contract, one year, has expired. These former distributors unable to dispose of the Duralith which they had been led by said respondent to believe would be a month's supply and which they had purchased in reliance on such erroneous belief, have classified it as "Distress" merchandise and have been, and were at the time said respondent's contact men were offering the foregoing inducements to others to become distributors in such territory, offering Duralith at such low prices, that their successor or successors as distributors for such respondent have at the outset of their attempt to distribute such Duralith, been confronted with a competition which they could not meet or overcome.

It has been and is the policy and practice of respondent corporation to withhold from the prospective distributors any knowledge or information regarding such situation in so-called virgin territory and to acquire its profits chiefly by means of this method of impressing and selling prospective distributors, and at the end of the speci-

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fied year or term, of replacing them, with other distributors similarly misled and of continuing such practice. It is continued always without contact with the trade in plastic paint and is so employed with prospective distributors in such business as to render it unlikely, that the falsity of the representations, as to virgin territory would be discovered until the prospective distributors become the real distributors and undertake to sell the product and thereupon find other Duralith in the community offered at a price impossible to meet without great loss. Such distributors have after some lapse of time, been compelled also to classify their stock of Duralith as "Distress" merchandise, and thereby furnish the next distributors of respondent corporation with the same competition, the former encountered when first assuming the role of distributors for it.

Respondent corporation has furnished its distributors, with the services of demonstrators for brief periods of time, but has failed and neglected in all instances to conduct an advertising campaign by radio or newspapers or otherwise in behalf of distributors and such demonstrators have remained with the distributors only long enough to insure their execution of the aforesaid trade acceptance and have on all occasions refused even to demonstrate Duralith for the distributors until they have signed such trade acceptances. Thereupon it has been and is the practice of such demonstrators of respondent corporation to advise distributors that they must respond to necessary calls elsewhere but will return to such distributors to carry on the sales campaign for them. It has been their practice, however, never to return after the execution of such trade acceptances. Respondent corporation has not effectuated sales of the first shipment of the product for their distributors, as represented by the contact men who engaged the attention and enlisted the interest of the distributors before they were induced to sign contracts and which were in fact signed in reliance on the truthfulness of the statements and representations which led them to the executive office of respondents. Respondent corporation has failed and neglected to establish any retail outlets for absorption of the Duralith sold its distributors by means of the aforesaid representations, and has at no time received from any retail dealers orders for Duralith to be credited to the prospective distributors on assumption of the proposed relationship to respondent corporation.

The estimated amount of Duralith, respondent corporation represents as necessary for the adequate supply of the solicited distributor, is not based on the probable market the product will have, but upon the amount such prospective distributors can probably be induced to purchase, ascertained by respondent corporation in the

course of the so-called surveys, which have related more directly to the financial ability of the prospective distributors than to the probabilities of a retail outlet for the merchandise said respondent seeks to sell. There is no consumer demand for Duralith to the extent of 55 percent over other competitors or to any other extent, and in all instances in which said respondent has declared that on account of a flood of back orders, merchandise cannot be shipped within thirty days, it has been shipped within a few days, since respondent corporation is not and never has been flooded with back orders and in the very sections from which it has exhibited to prospective distributors letters from so-called successful and well-pleased distributors, there have been former distributors, attempting to sell as "Distress" merchandise, the Duralith or part of it purchased when they became distributors of said respondent at nominal prices likely to enable them to unload.

PAR. 5. There are individuals, corporations, and partnerships offering for sale and selling in interstate commerce plastic paints of various kinds and wall texture materials truthfully described and represented in competition with Duralith, the product of respondent corporation.

PAR. 6. The false and misleading statements and representations of respondents described and set forth herein have had and have and each of them has had and has the capacity and tendency to mislead and deceive and they and each of them have misled and deceived and do mislead and deceive individuals, partnerships and corporations into becoming distributors of said product Duralith and into the purchase of said product from respondent Duralith Corporation greatly to their financial detriment.

The aforesaid false and misleading statements and representations of said respondents have had and each of them has had and has the capacity and tendency to divert trade to respondent Duralith Corporation from competitors offering for sale in interstate commerce plastic paints, wall texture materials and other products for the same or similar purposes as those for which respondent Duralith Corporation offers for sale and sells its product Duralith, and to disrupt, demoralize and otherwise to injure the entire trade in paints, wall texture materials and allied products.

PAR. 7. The above and foregoing practices of respondent corporation are all to the prejudice of the public and respondents' competitors and have been and are unfair methods of competition in violation of the provisions 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".

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Acting in the public interest 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 its complaint upon respondents, Duralith Corporation, and William Weiner, Harry Weiner, and Joseph D. Weil, individually, charging them with the use of unfair methods of competition in interstate commerce in violation of the provisions of said act.

Respondents having entered their appearance and filed answers to the complaint herein, testimony was taken and evidence received in support of the complaint and on behalf of the respondents before the examiner for the Federal Trade Commission theretofore duly appointed for such purpose. Thereafter this matter came on for final hearing before the Federal Trade Commission upon the record, briefs and oral argument. The Commission having duly considered the record and the arguments of counsel for the Commission and for the respondents, and being duly advised in the premises, files this its report in writing stating its findings as to the facts and its conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Duralith Corporation is now and has been since 1928 a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business in the City and State of New York.

Respondents William Weiner and Harry Weiner are individuals who caused the incorporation and organization of respondent Duralith Corporation, and who ever since have been and now are its chief executive officers. They own all of the no par value stock in said respondent corporation, the stock which carries the voting rights and privileges therein.

Respondent Joseph D. Weil had some connection with the early history of respondent corporation but there is no evidence which associates him with its activities or methods of business as herein-after particularly described, and in these findings as to the facts and conclusions use of the word respondents shall not be deemed to include him.

Respondents William Weiner and Harry Weiner have owned and controlled and now own and control the International Research

Corporation, which itself owns the formula for a plastic paint or wall texture material known as Duralith. In the exercise of their control over such International Research Corporation, they caused it to license respondent Duralith Corporation, upon its organization, to manufacture and sell Duralith in the United States.

Said individual respondents caused respondent Duralith Corporation to be incorporated in order that they might acquire a corporate creature which would serve them as an instrumentality by which they might institute, establish and maintain a fraudulent plan, for the sale of Duralith, hereinafter described, and also serve as a corporate shield to protect them as individuals from the consequences of such fraudulent plan.

Respondent Duralith Corporation on its creation, became and ever since has been the instrumentality through which William Weiner and Harry Weiner conducted business. The said individuals William Weiner and Harry Weiner have, therefore, been more than mere executive officers of respondent Duralith Corporation. They have conceived and created its system of fraud and they have fabricated and fashioned all of the plans, methods and practices which compose the mechanism of this fraudulent system as hereinafter described. They have dominated and controlled its affairs from its major policies down to the minor detail of its business, and they have been and are responsible for all the transactions, contracts, sales, representations and other activities of respondent Duralith Corporation and its agents.

When in these findings as to the facts and conclusions drawn therefrom respondent Duralith Corporation is mentioned in connection with practices, methods, sales plans, and fraudulent devices, it is to be considered as the instrumentality or agency of respondents William Weiner and Harry Weiner, and the word respondents, whenever used for the purposes of these findings, shall signify or mean all of the respondents except respondent Joseph D. Weil.

In the course of their said business, respondents William Weiner and Harry Weiner, and their corporate agency or medium, respondent Duralith Corporation, have been engaged in the manufacture of the product Duralith, and in its sale, in commerce among and between the State of New York and the various other States of the United States than the State of New York and the District of Columbia, causing such product when sold to be transported from its said place of business in New York to purchasers located in the various other States of the United States than the State of New York.

Respondents have been in the course and conduct of such business in competition in interstate commerce with individuals, part-

nerships and corporations engaged in offering for sale or selling in such commerce plastic paints, wall texture materials, and other allied or competitive products.

PAR. 2. The fraudulent scheme or sales plan mentioned in paragraph 1 hereof has consisted chiefly of the following practices, to wit:

(a) Inducements to enter into contracts for the purchase of Duralith by representations and statements, hereinafter found to be false, fraudulent, and misleading and by agreements, assurances and promises which were not to be, and have not been, observed, kept or performed as hereinafter found.

(b) Inducements to sign trade acceptances in payment for Duralith by representations and statements hereinafter found to be false, fraudulent, and misleading and by agreements, assurances and promises which were not to be, and have not been observed, kept or performed as hereinafter found.

PAR. 3. Pursuant to the fraudulent sales plan of respondents, respondent Duralith Corporation's agents, acting within the scope of their employment and with the knowledge, acquiescence, and support of individual respondents William Weiner and Harry Weiner, and under their supervision and direction, have induced and persuaded numerous distributors and prospective distributors located in many States of the United States to visit the executive offices of respondent Duralith Corporation, in New York City, in the State of New York, and at Chicago in the State of Illinois, for the purpose and intent and with the effect of securing the signatures of said distributors and prospective distributors to contracts or printed instruments requiring the purchase of said product Duralith, and the signatures of such distributors and prospective distributors to trade acceptances providing for payment of the purchase price therefor.

Such agents, called contact men, having been first thereunto duly authorized, have so induced and persuaded said numerous distributors and prospective distributors, by means of one, or more, or all of the following representations, statements, agreements, assurances, and promises:

That respondent Duralith Corporation had been and was having great success in the distribution and sale of Duralith in other sections of the United States where distributors had effected a great volume of sales and were sending monthly repeat orders for Duralith by the carload;

That the consumer demand for Duralith is 55 per cent of all competing products;

That Duralith is waterproof and washable and can be successfully applied by anyone and is the only product for the same or similar purposes that can be applied to a large surface by one operation;

That the territory for which the service or cooperation of the prospective distributors is sought, is virgin territory for Duralith, because respondent Duralith Corporation has neither had a distributor in such territory, nor has Duralith been offered for sale or sold directly or through any other agency in such territory or any part thereof;

That a careful survey of the territory had been made to ascertain the number of homes and other institutions, private and public, in order to approximate the amount of Duralith such territory would require or consume, and it had been concluded from such survey that the prospective distributor in such territory should have on hand as a month's supply the amount determined by respondent corporation from such survey which the prospective distributor must purchase after execution of the agreement for the position of distributor;

That after receipt of the initial order of Duralith, following execution of the agreement naming the prospective distributor, as authorized distributor, and compliance with said respondent's practice of requiring trade acceptances covering purchase price of the product, a representative of said respondent would organize the distributor's sales division for Duralith, demonstrate its application and use to the trade and public and assume the burden of selling the first shipment;

That such respondent would also conduct a newspaper and radio advertising campaign for the distributor to promote sales of the product and establish or develop retailers or a retail or other outlet for disposition of the product;

That respondent corporation would in fact conduct a sales campaign to insure success in disposal of the first shipment of Duralith, or the first month's supply of the product, for its distributors and would in fact sell it for distributors;

That respondent corporation was in a financial position to retain and would retain the trade acceptances until their maturity or would renew or extend them until the distributor could pay such trade acceptances out of proceeds from sale of Duralith so purchased, and that there would be little or no investment required of distributors who would be doing business really on respondents' money;

That retail dealers or outlets for the product had already been established by it and orders for Duralith received from, or promised by them, which would be credited to such prospective distributors after agreement with such respondent relative to becoming its distributor, and execution of the trade acceptances.

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It has been and was the policy and practice of Respondents William Weiner and Harry Weiner, and executives, and employees of respondent Duralith Corporation, to repeat, elaborate and emphasize the aforesaid representations, statements, agreements, assurances and promises during conferences in Chicago and New York, with distributors and prospective distributors, who had been so persuaded and induced to come there. On such occasions it has been the practice of respondents or their representatives to exhibit to such prospective distributors written papers, purporting to be letters from other distributors, in which letters or purported letters such alleged distributors expressed pleasure on account of success in the distribution of Duralith.

It has also been the practice, on such occasions, to represent that no definite time of delivery could be stated because respondent company was flooded with back orders.

In truth and in fact, there was not, has not been and is not any consumer demand or any demand for Duralith, and respondents were not having, have not had and are not having any success whatever in the sale of Duralith except in unloading it on unsuspecting distributors by means of the representations and assurances hereinbefore set forth, and no distributor of respondent Duralith Corporation has had any such success as to give said respondent any repeat car-load order or any repeat orders; Duralith is not waterproof or washable, unless glazed by varnish or shellac nor can it be applied by one operation, or by housewife, child or any unskilled person; territory represented as virgin has not been and was not virgin territory but on the contrary Duralith had been sold in it by respondents one or more times, and was being offered for sale in it by former distributors of respondents, at less than its cost price, at the very time such territory was being represented as virgin territory in which it had never been sold or offered for sale.

Respondent Duralith Corporation has failed and neglected in all instances to conduct a sales campaign as promised its distributors, nor has it conducted any advertising campaign under its present contracts; it did not effect sales of the first shipment of the product for distributors, or any part thereof.

Respondent Corporation has failed and neglected to establish any retail or other outlets for absorption of the Duralith sold its distributors by means of the aforesaid representations and assurances and has at no time received from retail dealers or others, orders for Duralith to be credited to the prospective distributors on assumption of the proposed relationship to respondent corporation, nor has any

distributor received any orders from retailers or other sources arranged or secured by respondents or agents.

The estimated amount of Duralith respondent corporation has represented as necessary for an adequate supply of the solicited distributors has not been based on the market the product would have, but upon the amount the prospective distributor could be induced to purchase, ascertained by respondent corporation in the course of the so-called surveys, which surveys have related directly to the financial ability of the prospective distributor and not to the probabilities of a retail outlet for the merchandise.

Respondent corporation has not been flooded with back orders, and in the very sections from which it has exhibited to prospective distributors alleged letters from so-called successful and well pleased distributors, there have been former distributors with large supplies of Duralith in their possession attempting to sell it as distress merchandise at nominal prices.

It has been the policy and practice of respondents, as an essential part of its fraudulent sales plan, to disregard its assurance to distributors and prospective distributors, that little or no investment would be necessary to represent them as distributors, and to violate its verbal agreements and promises to hold trade acceptances until maturity, or to renew or extend them, until distributors could meet them with money derived from the sale of Duralith. Such practice has been the ostensible or pretended transfer for value of such trade acceptances shortly after their receipt from distributors to certain so-called finance companies, with an understanding that such finance companies would collect or attempt to collect them as innocent purchasers for value while in fact respondents remained their owner and controlled their disposition.

The principal finance companies with which respondents have conducted such collusive transactions have been Abrams and Company, Gotham Factors Corporation and Marsol Credit Corporation of the City of New York, in the State of New York. Litigation or controversies involving trade acceptances which respondents had pretended to transfer to Abrams and Company were settled by respondents as when and how they pleased.

They pretended to transfer to Gotham Factors Corporation trade acceptances amounting to \$462,690.56 and to Marsol Credit Corporation approximately \$125,000 worth of them.

Gotham Factors Corporation was formed in August 1932 by employees of the respondent corporation who had served it in such capacities as necessarily to furnish them and each of them full knowledge of the fraudulent practices by which respondent corporation acquired its trade acceptances. This knowledge they carried with

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them when as executives of Gotham Factors Corporation they pretended in collusion with respondents, to acquire such commercial paper.

The Marsol Credit Corporation was advised soon after its organization, through the executive who controlled it, by the Federal Trade Commission, of the complaints received from various sections of the United States regarding the fraudulent practices of respondents.

As the result of this feature of respondents' sales plan, such financial companies have been enabled to hold themselves out to distributors of respondents as purchasers and holders of the said trade acceptances for value and without notice of any defenses thereto. They have been demanding payment of such trade acceptances and are now demanding payment thereof by suits or under threat or penalty of suits. Respondents have been enabled by such collusive practices to preclude legitimate defenses for fraud, which, as against them, could be interposed successfully by distributors and thereby respondents have been enabled to escape the consequences of said fraudulent sales plan.

PAR. 4. There have been and are individuals, corporations and partnerships offering for sale and selling in interstate commerce, plastic paints of various kinds and wall texture materials truthfully described and represented in competition with Duralith the product of respondent corporation.

PAR. 5. The acts and practices of respondents have had and have and each of them has had and has the capacity and tendency to mislead and deceive and have misled and deceived the public into the belief that the representations, statements, and assurances of respondents, described in paragraph 3 hereof, have been true and into the purchase of Duralith from respondents because of and in reliance on such erroneous belief.

The aforesaid acts and practices of respondents have had and have the capacity and tendency to divert and they have diverted trade to respondents from competitors offering for sale and selling in interstate commerce plastic paints, wall texture materials and allied products. Such acts and practices have also had the capacity and tendency to disrupt and demoralize and they have disrupted and demoralized the trade in plastic paints, wall texture materials and allied products in different communities in the various States of the United States.

CONCLUSION

The aforesaid acts and practices of respondents have been and are all to the prejudice of the public and of respondents' competitors and

have been and are unfair methods of competition in violation of the provisions 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 by the Federal Trade Commission upon the complaint of the Commission, the answer of respondents, testimony and evidence in support of the complaint, and on behalf of the respondents' briefs and oral arguments, and the Commission having considered the record and being fully advised in the premises—

It is now ordered, That respondent Duralith Corporation, its officers and agents, in connection with advertising, offering for sale or selling in interstate commerce the product known as Duralith or any other product or products, cease and desist from representing directly or indirectly, and respondent William Weiner, as an individual, cease and desist from causing respondent Duralith Corporation to represent or from himself representing by or through respondent Duralith Corporation, or through any other corporation, or otherwise, directly or indirectly:

(1) That Duralith is waterproof or washable or can be applied by any housewife, child or unskilled person.

(2) That Duralith is the only product for the same or similar purposes that can be applied to a large surface by one operation, or that Duralith itself can be so applied.

(3) That respondent Duralith Corporation has been or is successfully distributing and selling Duralith or any other product in other sections of the United States than that of the solicited respective distributor, unless and until said respondent is actually and successfully distributing and selling Duralith or such other product in other sections of the United States than that of the solicited prospective distributor.

(4) That distributors of respondent Duralith Corporation in other sections than that of the solicited prospective distributor have been effecting a great volume of sales or have been and are sending monthly repeat orders for Duralith to said respondent corporation, unless and until the distributors of respondent in other sections of the United States than that of the solicited prospective distributor actually have been effecting a great volume of sales and actually have been and are sending in monthly repeat orders for Duralith to respondent Duralith Corporation.

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(5) That the consumer demand for Duralith is 55 per cent of all competing products, or that there is any demand for Duralith unless and until there is an actual consumer demand for Duralith in accordance with such representations.

(6) That respondent Duralith Corporation or any other corporation has not had a distributor and has not offered for sale or sold Duralith in the particular territory of the solicited prospective distributor or that such territory is virgin territory unless in fact Duralith has never before been offered for sale or sold in the particular territory of the solicited prospective distributor.

(7) That respondent Duralith Corporation, or other corporation, has studied the territory of the solicited prospective distributor and has chosen such prospective distributor from available or desirable agencies for distribution of its product or products, unless such territory actually has been studied by said respondent corporation, or other corporation, with a view to the selection of a distributor, and from such survey the prospective distributor has been chosen as the most available or desirable agency for the distribution of Duralith, or any other product.

(8) That a careful survey of the territory of the solicited distributor has been made to ascertain the number of homes and other institutions, private and public, in order to approximate the amount of Duralith such territory would require or consume, and that as a result of such survey it has been concluded by respondent Duralith Corporation, or other corporation, that the prospective distributor in such territory must have on hand an amount necessary for a month's supply of such product, to be determined by respondent corporation, or other corporation, from such survey, unless and until such a survey has actually been made by respondent corporation, or any other corporation, and from such survey and it alone the amount distributor must have for a month's supply has been determined.

(9) That the amount of Duralith so determined by respondent Duralith Corporation, or other corporation, by means of such survey is necessary to serve for a month's supply for the prospective distributor who must purchase such amount, or any other similar representation which implies or imports the existence of a consumer demand or a probable consumer demand for Duralith in such territory unless such consumer demand actually exists and probably will absorb such monthly supply.

(10) That respondent Duralith Corporation, or other corporation, will organize distributor's sales division for Duralith, or other product, or demonstrate its application and use to the trade or public, or assume the burden of selling a month's supply, or a first shipment,

or any amount of Duralith, or other product, for its distributors if, when, and so long as its practice is to the contrary, unless said respondent Duralith Corporation, or other corporation, actually organizes distributor's sales division for Duralith, demonstrates its application and use to the trade and the public, and assumes the burden of selling a month's supply of Duralith, or a first shipment thereof, in accordance with such representations.

(11) That respondent Duralith Corporation, or any other corporation, will conduct a campaign, including a newspaper and radio advertising campaign, for its distributors to insure sale to the consuming public of Duralith, or any other product, for its distributors, unless and until respondent corporation, or other corporation, actually performs such service in accordance with such representation.

(12) That respondent Duralith Corporation, or other corporation, will establish or develop retailers or a retail outlet for the sale of Duralith, or other product, for its distributors, unless respondent corporation, or other corporation, actually performs such service in accordance with such representation.

(13) That respondent Duralith Corporation, or other corporation, has established retail dealers for the sale of Duralith, or other product, for prospective distributors, and has received orders from them which will be credited to such prospective distributors, unless respondent corporation, or other corporation, has actually established retail dealers for the product, or other products, or has received orders therefor which it can and will credit to the prospective distributor upon consummation of an agreement for distribution of such product, or products.

(14) That distributors by letters are expressing pleasure on account of their success in the distribution of Duralith, unless distributors are achieving success in the distribution of Duralith, and until they actually are expressing pleasure on account of such success in letters to respondent Duralith Corporation.

(15) That respondent Duralith Corporation, or other corporation, has been or is flooded with back orders, unless and until respondent Duralith Corporation, or other corporation, has received or is receiving such an amount of orders for Duralith that it is unable promptly to fill them.

(16) That trade acceptances or other commercial paper received from purchasers of Duralith, or any other product, will be retained by respondent corporation, or other corporation, until their maturity, if, when, and so long as in fact such retention of trade acceptances or other commercial paper so received by respondent corporation, or

other corporation, is contrary to the policy and practice of respondent corporation, and unless and until they are so retained.

(17) That trade acceptances or other commercial paper received by respondent corporation, or other corporation, on account of purchase by distributors of Duralith, or other product, will be retained until the product Duralith, or any other product, or products, sold by respondent Duralith Corporation, or any other corporation, can or will be sold by distributors, if, when, and so long as the contrary is the usual and customary practice of respondent, and until and unless such trade acceptances are so retained.

(18) That trade acceptances or other commercial paper obtained from distributors on account of the purchase of Duralith, or other product, will be retained until distributors can pay them out of the sale of the product, if, when, and so long as the contrary is the usual and customary practice of respondent corporation, or other corporation, or unless and until such trade acceptances or other commercial obligations are actually retained in accordance with such representation.

It is further ordered, That respondent Duralith Corporation, in connection with offering for sale or selling the product Duralith, or any other product, in interstate commerce, cease and desist directly or indirectly, and respondent William Weiner individually cease and desist directly or indirectly, by means of and through respondent Duralith Corporation, or any other corporation, or by any other means:

(a) From selling, discounting, or otherwise disposing of trade acceptances or other commercial obligations given respondent corporation, or other corporation, by the distributors or other purchasers of Duralith, or any other product, upon the representation by respondent corporation, or any other corporation, that such trade acceptances or other commercial obligations will be retained by respondent corporation, or other corporation, or renewed or extended until such distributors of Duralith, or other product, have been able to dispose of the Duralith, or other product, for which such trade acceptances or other commercial obligations were given, unless and until such distributors or other purchasers of Duralith, or other product, actually have sold such Duralith, or other products.

(b) From selling or pretending to sell trade acceptances or other commercial paper secured from purchasers of the product Duralith, or from purchasers of any other product or products to Abrams and Company, Gotham Factors Corporation, or Marsol Credit Corporation, or any other finance company or companies in which respondent

ents have, or either of them has, an interest, or with which respondents, or either of them, act in collusion with respect to such trade acceptances or other commercial obligations, for the purpose or with the effect of permitting such finance companies, or any or either of them, to bring suits for collection of such trade acceptances or other commercial paper, and therein to assert that they are innocent purchasers for value, and without notice, or for the purpose and with the effect of permitting such finance companies, or any or either of them to attempt to defeat defenses available to the distributors against respondent Duralith Corporation, or other corporation, by such assertion of innocence, falsely originating from such pretended or collusive sales.

It is further ordered, That this proceeding be and hereby is dismissed as to the respondents Harry Weiner and Joseph D. Weil, because of the death of the former and failure of the evidence to establish connection of the latter with the fraudulent sales plan of respondents or their practices.

It is further ordered, That respondent Duralith Corporation and respondent William Weiner individually shall file with the Commission within 60 days from and after service of this order a report in writing setting forth in detail the manner and form of their compliance and the compliance of each of them with this order.

IN THE MATTER OF
**PURITY ICE COMPANY, INCORPORATED, AND FELES
FERLISE, AS AN INDIVIDUAL AND AS PRESIDENT OF
SAID PURITY ICE COMPANY, INCORPORATED**

COMPLAINT EX REL. NATIONAL RECOVERY ADMINISTRATION, OPINION OF
COMMISSION, AND ORDER OF DISMISSAL IN REGARD TO THE ALLEGED VIO-
LATION OF SEC. 3 OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933, AND
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2203. Complaint, June 24, 1934—Decision, Apr. 4, 1935

Complaint, on relation of National Recovery Administration, charged respondent corporation and respondent individual, its president and moving spirit, with using unfair methods of competition, in or affecting commerce within the intent and meaning of Section 3 of the National Industrial Recovery Act and of Section 5 of the Federal Trade Commission Act, in constructing and equipping, in Lakeland, Fla., an ice plant, subsequent to date fixed by Article XI of the Code of Fair Competition for the Ice Industry, adopted and approved under said act, without applying to or securing from the Administrator for Industrial Recovery the certificate of public convenience and necessity there provided, sanctioning such construction, and finding the need of additional ice production, storage or tonnage at or in the city and territory involved, or seeking or offering to establish to the satisfaction of said administrator such requirement of public necessity and convenience, and without the establishment thereof or the giving of such a certificate or making of such a finding, and in beginning to manufacture and sell ice therefrom for transportation in interstate commerce, and for use for refrigerating food stuffs in process of transportation in commerce between and among the States, in competition with others similarly engaged;

With capacity and tendency to divert trade and custom to them from their competitors, to injury of latter and the public, endangering, through overproduction in said city and area, the permanence and orderly conduct of the industry therein, with the public loss and inconvenience incident to inability of its manufacturers to continue to produce, offer, sell and deliver ice to public in accordance with the requirements of said code, and to make it impossible for operators in said area to continue their enterprises without violating the same, and thus deny the public the benefit of its provisions relative to labor conditions and minimum wages and hours, embraced therein as a necessary part of the plan and purpose of said National Recovery Act; all in violation thereof and of said code adopted thereunder, and to the prejudice of the public and competitors.

Product of plant in question, construction of which without securing or seeking to secure such certificate was conceded, with capacity of about 15 tons a day, output of about 10, and fourteen employees, was sold entirely in said city in which located, and the surrounding territory, within said State, in competition with that from the plant of one of the largest ice concerns in the United States, with a daily capacity of 375 tons. Neither concern, however, shipped or caused to be shipped any ice outside the State, and