

Syllabus

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IN THE MATTER OF
QUALITY SHINGLE COMPANY, INC., AND C. V. GRAY, AN
INDIVIDUAL, TRADING AS GRAY LUMBER & SHINGLE
COMPANY

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

Docket 2241. Complaint, Oct. 26, 1934—Decision, Oct. 8, 1935

Where a corporation engaged in the manufacture of red cedar shingles and in the sale thereof to wholesale and retail dealers and other persons and concerns in the several States; and wholesale lumber dealer who purchased large quantities thereof from said corporation—

Sold certain shingles made by said corporation and dealt in by said wholesaler as above set forth, under the brand or trade term "extra clear", notwithstanding fact that said product did not warrant such a designation according to accepted trade usage or understanding and was not 100 percent clear or a first-class or superlative grade of clear shingle, as understood by consuming public, but was so graded as to permit presence of sapwood in any part thereof, and was not their best grade of shingle and corresponded in quality to a "No. 2" product, and was substantially inferior in quality to, and far less durable under exposure than the more expensive "No. 1" shingle, which must be clear of defects for entire length and without sapwood;

With the result that the public and a substantial portion of retailers were misled and deceived, and others, not misled or deceived, were aided in the sale of an inferior and cheaper product as and for the genuine clear article, or in sale thereof without notifying their customers of the true quality of the product and in thus taking advantage of their more scrupulous dealer competitors, some dealers and many consumers purchased said "extra clear" shingle as and for a genuine "clear" product bought, often, at a lower price, to the prejudice and injury of competitors dealing in the genuine clear "No. 1" article, and of those dealing in the supposedly greatly inferior, but actually comparable, "No. 2" product at the same approximate price, from whom trade was diverted to their respective injury, and with the effect of contributing substantially, through such deceptive descriptions of partially clear and comparatively short-lived shingles, to the demoralization of the industry, and bringing about a loss in public good will to and esteem of the red cedar shingle and a loss of a greater volume of business by the producers and marketers thereof to the makers of and dealers in composite roofing than they would otherwise have sustained:

Held, That such acts and practices were all to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Henry M. White*, trial examiner.

Mr. Eugene W. Burr for the Commission.

Wettrick, Wettrick & Flood, of Seattle, Wash., 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 Quality Shingle Company, Inc., a corporation, and C. V. Gray, an individual trading as Gray Lumber & Shingle Company, have been and 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 thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Quality Shingle Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, having and maintaining its headquarters, office, and principal place of business at Edmonds in the said State. Said respondent has been and is engaged in the manufacture of red cedar shingles at its mill or mills located at a place or at places within said State of Washington. Said respondent has been and is also engaged in offering for sale and selling said red cedar shingles in commerce between and among the several States of the United States and the District of Columbia, and in causing said shingles when so sold to be transported from said respondent's principal place of business in the State of Washington or from the place or places of the manufacture of said shingles in the State of Washington into and across the several States of the United States and the District of Columbia to the several purchasers thereof located at various places in said several States other than the State of Washington, or in the District of Columbia.

Said respondent has been and is offering for sale and selling said shingles to and through wholesale and retail dealers in shingles, and to other persons, firms, associations, or corporations located at various places in the several States of the United States and the District of Columbia. Said respondent offers for sale and sells large quantities of said shingles to and through respondent, Gray Lumber & Shingle Company, the latter being a wholesale dealer in lumber products, including red cedar shingles.

PAR. 2. Respondent C. V. Gray is an individual trading under the name and style of Gray Lumber & Shingle Company, having and maintaining his office and principal place of business in the city of Seattle, in the State of Washington. Said respondent has been and is engaged in the purchase for resale of lumber and lumber products, including red cedar shingles, and of offering for sale and selling the

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same, as a wholesaler thereof, in commerce between and among the several States of the United States and the District of Columbia, and in causing said shingles when so sold to be transported from respondent's principal place of business, or from the place or places where the same are produced, or from the principal place of business of respondent, Quality Shingle Company, Inc., all in the State of Washington, to the several purchasers thereof located at various places in said several States of the United States other than the State of Washington or in the District of Columbia. Respondent C. V. Gray purchases of respondent Quality Shingle Company, Inc., and offers for resale and resells large quantities of red cedar shingles manufactured by respondent Quality Shingle Company, Inc., as alleged in paragraph 1 hereof.

PAR. 3. Other persons, firms, associations and corporations have been and are engaged in offering for sale and selling in said commerce between and among the several States of the United States and the District of Columbia red cedar shingles and like or competitive products. In the course and conduct of their said respective businesses each of the respondents herein has been and is in competition with such other persons, firms, associations, and corporations so engaged in offering for sale and selling in said commerce red cedar shingles or like and competitive products, and with all others who may be engaged in offering for sale and selling red cedar shingles or like or competitive products to dealers therein or to the purchasing public.

PAR. 4. In order to aid it in so offering for sale and selling said shingles, and in order to induce respondent C. V. Gray trading as Gray Lumber & Shingle Company, and other dealers in or purchasers of shingles or like or competitive products to purchase said respondent Quality Shingle Company's said shingles in preference to the same or like or competitive products being offered for sale and sold by respondent's competitors and in order to create a public demand for respondent's said shingles, respondent Quality Shingle Company, Inc., brands its said shingles as "Extra Clear" shingles, and in its stationery, letterheads, invoices and otherwise names, designates and refers to its said shingles as "Extra Clear" shingles, and introduces said shingles into said commerce by and under said brand, name and designation.

Respondent C. V. Gray, trading as Gray Lumber & Shingle Company, in order to use said name and designation of said shingles as "extra clear" shingles in aid of the resale thereof, and in order to induce other dealers in or purchasers of shingles or like or competitive products to purchase of respondent C. V. Gray, trading as Gray Lumber & Shingle Company, the shingles so manufactured by re-

spondent Quality Shingle Company, Inc., in preference to the same or like or competitive products being offered for sale and sold by competitors of the respondents herein, and in order to create a public demand for the shingles so manufactured by respondent Quality Shingle Company, Inc., invited and invites respondent Quality Shingle Company to brand, name, designate, and refer to its said shingles as "extra clear" shingles. For said reasons and purposes, respondent C. V. Gray, trading as Gray Lumber & Shingle Company, purchases of respondent Quality Shingle Company, Inc., large quantities of its said shingles under said brand, name, and designation of "extra clear" and resells the same in said commerce above described under said brand, name and designation to dealers in shingles and to other persons, firms, associations, and corporations for resale or for use and consumption.

The said use of said word "clear" in said brand, name, and designation of said shingles conveys to the mind of dealers therein and purchasers thereof and of the public the meaning, representation, and implied assurance that said shingles are in fact clear and free from any and all defects or imperfections. The said use of said word "extra" in said brand, name, and designation of said shingles likewise conveys to the mind of dealers therein and purchasers thereof and of the public the meaning, representation, and implied assurance that said shingles are of a still more exceptional quality and are not only shingles of a first quality, but are of the best and highest degree of said quality; whereas, in truth and in fact said shingles so branded and sold by respondents as "extra clear" are neither "extra clear" nor "clear", but in fact contain many defects and imperfections not tolerated in shingles of the first or highest grade or class.

PAR. 5. Certain dealers in shingles are informed of the actual qualities, grade, defects, and imperfections of the shingles produced by respondent Quality Shingle Company, Inc., and offered for sale and sold by the respondents herein under the brand, name, and designation of "extra clear", and are induced to purchase said shingles for resale to other dealers or to the purchasing public and consumers, in preference to the same, like or competitive products being offered for sale and sold by competitors of respondents herein, in order to make use of said false and misleading brand, name and designation thereof, and because they are able to use said false brand, name and designation to mislead and deceive other dealers or the purchasing public and consumers of shingles into the purchase thereof in the false and erroneous belief that said shingles are of the highest and best grade of shingles.

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In the manner above alleged, respondents place in the hands of all dealers in said shingles so branded, named and designated as "extra clear", the means of misleading and deceiving all subsequent purchasers thereof, including the purchasing public and the consumers of said shingles, into the erroneous belief that said shingles are of the best and highest grade and class of shingles, and have the qualities and meet the requirements thereof.

PAR. 6. The use by respondents of said false and misleading brand, name and designation of said shingles has the tendency and capacity to mislead all purchasers thereof, except those designated in paragraph 5 hereof, including the purchasing public and consumers of said shingles, into the false and erroneous belief that said shingles are of the first and highest quality, grade and class of shingles; and to induce them to purchase said shingles in, and because of, said false and erroneous belief.

Respondents' said use of said false and misleading brand, name and designation of said shingles has the tendency and capacity to divert trade to respondents from their said competitors, to the unfair **advantage of respondents**, to the substantial and unjust injury of respondents' said competitors, and to the deception and injury of the purchasing public.

PAR. 7. The above alleged acts and practices of respondents are all to the prejudice of the public and of respondents' said competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

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 (38 Stat. 717), the Federal Trade Commission on October 26, 1934, issued and served a complaint upon the respondents above named charging them with the use of unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act.

The respondents appeared and filed an answer and thereafter the case came on for trial. It was then by mutual consent and in avoidance of duplication of proceedings, consolidated with the case, *In re Oakland Shingle Company*, Docket 2262, which involves the same method of competition as herein in controversy. The consolidated proceeding was tried at Seattle, Wash., January 18 to 21, 1935.

Findings

Oral argument was waived and the Commission, having duly considered the pleadings and all the evidence taken and the record herein and being fully advised in the premises, makes this its report, stating its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Quality Shingle Company, Inc., is a corporation organized and doing business under the laws of the State of Washington, maintaining its principal place of business at Edmonds in said State. It has been and is engaged in the manufacture of red cedar shingles at its mills located within the State of Washington. Said respondent has been and is also engaged in offering for sale and selling said red cedar shingles in commerce between and among the several States of the United States, and in causing said shingles when so sold to be transported from its places of business in the State of Washington into and across the several States of the United States and the District of Columbia to purchasers thereof located at various places in said several States other than the State of Washington. Said respondent has been and is offering for sale and selling its shingles to and through wholesale and retail dealers in shingles, and to other persons, firms, associations or corporations located at various places in the several States of the United States. It offers for sale and sells large quantities of its shingle to and through respondent, C. V. Gray.

PAR. 2. Respondent C. V. Gray is an individual trading under the name and style of Gray Lumber & Shingle Company, maintaining his office and principal place of business in the city of Seattle, in the State of Washington. He has been and is engaged in the purchase for resale of lumber and lumber products, including red cedar shingles, offering for sale and selling the same as a wholesaler thereof, in commerce between and among the several States of the United States. He causes his shingles when so sold to be transported from his principal place of business, or from the place or places where the same are produced, or from the principal places of business of respondent, Quality Shingle Company, Inc., in the State of Washington, to purchasers thereof located at various places in States of the United States other than the State of Washington, as well as within that State. Respondent C. V. Gray purchases from respondent Quality Shingle Company, Inc., and offers for resale and resells large quantities of red cedar shingles manufactured by respondent Quality Shingle Company, Inc.

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PAR. 3. Other persons, firms, associations, and corporations have been and are engaged in offering for sale and selling in commerce between and among the several States of the United States red cedar shingles and like or competitive products. In the course and conduct of their respective businesses each respondent has been and is in competition with such other persons, firms, associations, and corporations so engaged in offering for sale and selling in said commerce red cedar shingles or like and competitive products, and with all others who may be engaged in offering for sale and selling red cedar shingles or like or competitive products to dealers therein or to the purchasing public.

PAR. 4. Respondent Quality Shingle Company, Inc., in order to induce respondent C. V. Gray and other dealers in or purchasers of shingles, or like or competitive products, to purchase its shingles in preference to red cedar shingles or competitive products being offered for sale and sold by its competitors and, in order to create a public demand for said respondent's shingles, brands a certain grade of its shingles as "extra clear" and introduces them into said commerce by and under said brand or trade term.

PAR. 5. In part because the brand or trade term, "extra clear", aids the saleability of shingles so branded or trade termed respondent C. V. Gray purchases large quantities of the so-called "extra clear" shingles from respondent Quality Shingle Company, Inc., and from the Oakland Shingle Company, hereinabove mentioned, and resells the same in the commerce above described, under said brand and trade term, to dealers in shingles and to other persons, firms, associations, and corporations for resale or direct to ultimate buyers.

PAR. 6. Prior to 1931 there was a great diversity of trade terms in the red cedar shingle industry. Some of these were intrinsically misleading and their diversity added to the confusion in the minds of the retail dealers and public. Several attempts were made to correct, simplify and clarify the nomenclature as well as to reduce the multiplicity of grades. After efforts wholly within the industry had failed, renewed endeavor was made, beginning in 1931, with the cooperation of the Bureau of Standards of the Department of Commerce. Among the reforms then partially carried out was the elimination of the term "extra clear". The reform measures as to nomenclature were continued under the National Industrial Recovery Act and it was provided by an amendment of the Code of Fair Competition for the Lumber and Timber Industry as follows:

Red cedar shingles shall not be branded or labeled "extra clear" or "premium clear" or "all clear", unless they are in fact 100 percent clear, or with any other misleading grade or trade name. (Administrative Order 9293; amendment 87, paragraph D, sec. 11 of Sched. B of the Code.)

This reform in nomenclature has been supported and adhered to by the great majority of those trading in red cedar shingles in interstate commerce and by the two associations into which the industry has been organized. The term "extra clear" was commonly used prior to 1931 by many producers over a period of about 35 years and by a diminishing number since the latter year. At first said term designated a shingle entirely clear of defects for its entire length; soon, however, it was degraded, and came to be used under the then existing grading rules of producers' organizations, for shingles not more than 10 percent of which numerically might have various defects, including knots or knot holes up to 1½ inches in diameter, and rot pockets or worm holes not more than one-third the width of the shingle. Not more than one such defect, however, was allowed by the rules in any one shingle, and that only in the uppermost four inches thereof. But sapwood was expressly permitted in any number or part of the shingles. The term "extra clear" is not included in the existing grading rules for red cedar shingles.

PAR. 7. To the specifications for the former grade of "extra clears", mentioned above in paragraph 6, respondents assert their adherence in the grading of their "extra clear" shingles. Respondents' "extra clear" shingle is not a first class product, nor is it respondents' best grade of shingle. It sells for less at wholesale than the "No. 1" shingle and averages substantially inferior in quality to, and is far less durable under weather exposure than the shingles designated under the present grading rules as "No. 1" shingles, which must be clear of defects for the entire length and without sapwood content. Sapwood in lumber products, including red cedar shingles, has notably less durability for exterior uses than the heartwood content of the same variety of wood. Respondents do not reject sapwood from any part of their "extra clears". Said "extra clears" are about equivalent in quality to the "No. 2" shingles of the present grading rules.

PAR. 8. The consuming public attaches, and has long attached a definite meaning to the term "clear" as applied to shingles, to wit, that the product is without defect or blemish. The term "extra clear" as applied to shingles means to the consuming public not only shingles free from defects and blemishes, but an especially high or a superlative grade of "clear" shingles. There is not sufficient evidence for a finding that the consuming public understands the damaging effect of sapwood in shingles. But the understanding the public has of the meaning of respondents' term "extra clear" is that of a quality of product wholly incompatible with sapwood content and with the resultant loss of durability. The public has been since the term was

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degraded, as in paragraph 6 hereinabove stated, and still is, misled and deceived by the use of said term into the belief that the so-called "extra clear" shingle is an especially high or superlative grade of "clear" shingle. Respondents' so-called "extra clear" shingles are neither "clear" nor "extra clear" as the consuming public understands those terms; and respondents' continued use of said term is deceptive. The average ultimate buyer is the more helpless prey to this term since he buys shingles but seldom in his lifetime.

PAR. 9. A majority of the retail dealers in shingles are not misled and deceived by respondents' use of the said term "extra clear", but on the contrary are informed of the defects and blemishes of the shingles so trade-termed. A minor, but substantial, portion of the retailers, however, are not informed thereof and are misled and deceived by respondents' use of said trade term. Respondents not only so quote and invoice their "extra clear" shingles by that term but they prominently label each bundle thereof with the words, "extra clear". This label is retained and appears on respondents' products in the yards of retailers and is thus visible and conspicuous to the consumers who trade with the retailer customers of respondents. The result is that retailers who know of the inferiority of respondents' so-called "extra clear" shingles as compared with genuinely clear shingles, but who may desire to sell an inferior and cheaper grade of shingles, either as and for genuine clear shingles or without giving express notice to their customers of the true quality of the product, are by respondents afforded aid in so doing. Some retailers, not in themselves misled, take advantage of the aid afforded thus in their competition with more scrupulous retailers.

PAR. 10. There are on the market red cedar shingles which conform to the public's understanding of what constitutes a "clear" shingle which are competitive with respondents' so-called "extra clear" shingles. Through the misleading and deceptive character of respondents' said trade term, as described in paragraph 7 hereinabove, some retailers and many consumers purchase respondents' said "extra clear" shingles in the belief that they are buying, often at a lower price, a "clear", a first-class, shingle. This results in diversion of business to respondents from respondents' competitors and consequently inflicts injury and loss of trade upon respondents' competitors in the sale of the genuinely clear "No. 1" shingles. Respondents' competitors also sell "No. 2" shingles which are of a quality similar and are sold at prices approximate to the quality and prices of respondents' so-called "extra clear" shingles. The public is misled and deceived by respondents' trade term into the belief that said "extra clear" shingles are greatly superior to "No. 2", and thus respondents, by the use of said

term, divert business to themselves and consequently inflict further injury and loss of trade upon their competitors in the sale of competitors' "No. 2" shingles.

PAR. 11. The red cedar shingle industry has an average of \$10,000,000 in annual sales and in 1932 comprised about 95 percent of the lumber shingles produced in the United States. From 1908 to 1912 the average annual sales were 16,000,000 squares, a "square" having 100 square feet of coverage. From 1915 to 1918 the annual average of sales had declined to 10,000,000 squares and in the decade following to 5,000,000 squares and thence to 2,600,000 squares in 1932. There was an increase in 1933. To the demoralization of the industry the use of terms deceptive to the public and particularly the use of the term "extra clear", for shingles which were only partially "clear" and have a comparatively short life, substantially contributed. As a result of the use of the said term red cedar shingles have suffered in public goodwill and esteem and the producers and marketers thereof have lost a greater volume of business to producers and marketers of composite roofing than they would otherwise have lost.

CONCLUSION

The acts and practices of the respondents are all to the prejudice of the public and of respondents' said competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

ORDER TO CEASE AND DESIST

This proceeding having been considered by the Commission upon the pleadings, the evidence received, and the oral and written argument, and the Commission having made its findings as to the facts and conclusion that respondents, Quality Shingle Company, Inc., and C. V. Gray, have 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 respondents, their agents, representatives, and employees, shall cease and desist from using the term "extra clear" in connection with the sale or the offering for sale in interstate commerce, or the advertisement in interstate commerce of any shingles, unless and until the product so sold or so offered for sale under

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said term shall be free from defects and blemishes, including sapwood content; and

It is further ordered, That respondents shall within 60 days after service upon them of copies of this order, file with the Commission a report or reports in writing, setting forth in detail the manner and form in which they have complied with and conformed to the order to cease and desist as hereinabove set forth.

MEMORANDUM

The Commission as of the same date made similar findings in the case of Oakland Shingle Company, Docket 2262, in which complaint issued as of December 12, 1934. Before *Mr. Henry M. White*, trial examiner. *Mr. Eugene W. Burr* for the Commission. *Wettrick, Wettrick & Flood* of Seattle, Wash., for respondent.

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IN THE MATTER OF

THE NATURAL BODY BRACE COMPANY, AND THE
POTTS-TURNBULL COMPANY

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

Docket 2274. Complaint, Dec. 28, 1934—Decision, Oct. 8, 1935

Where a corporation engaged in the sale of an appliance which it described and designated as a natural body brace, and which was similar to appliances sold and offered by others, without misrepresentation, for maintenance of correct body posture, and was held out for cure or relief of ailments for which others, without misrepresentation, offered medicinal preparations; in advertising the said "body brace" in various ways and particularly through radio broadcasting—

Represented that the use thereof would overcome, correct, remove, or relieve female weakness, backache, curvatures, nervousness, constipation, after-effects of flu, organic ailments of men and women, and numerous other ailments and conditions specified by it, and would cause the individual using the same to become 100 percent efficient, successful, useful and happy and confer upon such persons numerous benefits such as physical strength and good appearance and the blessings of comfort, health and a perfect figure, and that it cost nothing to try said device, which was made to the measurements of the individual purchaser after receipt of the order, and that health service was furnished free;

The facts being that while device might appreciably relieve distress and discomfort or be a useful agent in correcting faulty posture caused by fatigue, disease or other conditions, and in thus avoiding serious pathological situations to which such posture sometimes leads, including conditions in growing girls, at times chargeable to incorrect posture, and in relieving strain and possible constipation and other conditions due to weak abdominal muscles, and correction of such condition through use of a brace, the diseases, conditions and physical troubles for which it claimed relief, correction and cure were generally due to causes which could be neither directly nor indirectly, at all overcome, corrected, removed or relieved by the use of said device or any other physical appliance, and it was necessary for the purchaser to pay the required price for said brace, which was made after receipt of order, but promised health service was not furnished free;

With capacity and tendency to mislead and deceive purchasing public into belief that aforesaid representations were true, and into purchase of said product in reliance on such erroneous belief, and divert trade to it from competitors offering and selling body braces or appliances intended for or adapted to the maintenance of correct body posture, and from individuals and concerns selling medicinal preparations of various kinds for the cure or relief of the diseases which it represented could be cured or relieved by its said product:

Held, That such acts and practices were all to the prejudice of the public and competitors, and constituted unfair methods of competition.