

IN THE MATTER OF
PARCO PRODUCTS, INC., AND SOLOMON L. GOLDBERG

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

Docket 2558. Complaint, Sept. 23, 1935—Decision, Sept. 21, 1937

Where a corporation engaged in sale and distribution of a lithopone casein paint, under brand or trade names "Artwall" and "Partwall," principally to and through dealers for resale, but also to members of the public in various other States, in substantial competition with others engaged in the manufacture, sale, and distribution of casein and oil paints to dealers and to the public in other States, as above set forth, and including among aforesaid competitor manufacturers of casein paint, those whose product was sold and resold at substantially lower prices and was freely available to dealers and consumers in any quantity; and an individual, manager thereof and sales executive in charge and control of its agents and salesmen and of methods employed in sale and distribution of paints sold by it; in pursuance of a fraudulent plan, fraudulently conceived by said individual and fraudulently carried out by him and officers of said corporation, through it as instrumentality of such fraud and deception, and directed to the sale, in as large quantities as could be contrived, of said inferior and commercially unsalable paint to dealers, preferably and if possible, inexperienced in sale of paints, under scheme involving enlistment, in first instance, of their interest, and the disarming of their natural skepticism through holding out to them, by means of salesmen and representatives employed for such purpose, chance of being selected at corporation's home office as exclusive distributor in their territory of asserted new and valuable product, but in fact similar to that against sale of which, through methods employed, order of Commission had theretofore issued, as known to said individual and officers, and inducing prospects, as incident to so-called distributor's franchise, at home office, to commit themselves to as large an amount of said paint as aforesaid individual could bring about through misrepresentation of one sort or another, and to obligate themselves to payment therefor preceding opportunity to become fully apprized of the facts respecting the same—

- (a) Represented, in soliciting interest and securing commitments of prospects, as hereinabove indicated, that their aforesaid paint was a one coat paint which was a new discovery and was washable after use, left no disagreeable odor, and was not followed by hot spots on surfaces painted therewith, and could be used by amateurs or inexperienced persons as successfully as by experienced painters, and would give a finish to painted surfaces that could be obtained with other paints by experienced painters only, facts being it was not a one coat paint, left a very disagreeable odor, could not be successfully applied by inexperienced persons, and other representations above set forth were each and all false;
- (b) Represented, as aforesaid, that its vice-president had been associated in paint industry before his connection with aforesaid corporation, and that said corporation was backed by well-known financiers and was a sub-

sidiary of a large oil paint concern, facts being said individual was not at any time thus associated with aforesaid industry, nor was such corporation thus backed by any well-known financiers, nor a subsidiary of any large or small oil paint corporation, and there was no financial interest connected or associated with it outside of its own officers and stockholders;

- (c) Represented as aforesaid, to dealers, that territory assigned or to be assigned to distributor was virgin territory, and that the dealer, as distributor, would have exclusive sale of paint therein, and that it would organize and instruct a competent sales force for the dealers who entered into contracts with it as distributors of its paint, facts being, in many instances, dealer later learned that others before him had entered into similar contracts, had been unable to dispose of the paint acquired by them, and had left on their hands, as unsalable and unreturnable to said corporation, most of the paint acquired by such other prior dealers, corporation's representatives usually spent only one or two days in selecting, organizing and instructing a sales force consisting of only one or two, or at most six or eight, salesmen, who left their employment due to lack of demand for paint in question and its lack, in other respects, of sale, thereafter made no further efforts to assist distributors in selling paint in question, which could not be sold under prices exacted from dealer who bought for resale, promise to organize and instruct competent sales force was not in good faith, and aforesaid representations were false; and

- (d) Represented, as aforesaid, to dealers thus solicited, that its paint was in large demand for purchase and use by large industrial or institutional organizations or others, and exhibited to dealers, prospective distributors or others, purchase orders of large users or others for small quantities of paint sold to them by it, but so prepared as to omit amounts of paint purchased and amounts of purchase price thereof, facts being none of the large concerns, among many others who were induced by them to buy comparatively small or trial quantities of said paint, were ever in any position, by reason of their purchase and use thereof, to recommend its purchase and use to others, at least two of such concerns requested them not to refer prospective purchasers, and photographs of such orders as recommendations or testimonials of the proven success of said paint and consequent large existing demand therefor, bound up and exhibited by agents and salesmen, were reproduced in part only, with figures and amounts, as aforesaid, omitted, and paint in question was confronted with competitive sale, as aforesaid, of lower priced and generally available casein paint and was unsalable on basis of price charged dealers and price fixed to them as resale price thereof to consumers, under penalty of having further supplies cut off, and there was no large demand for purchase and resale and use of its said paint at such higher prices;

With result, by reason of such false representations, that dealers, more or less inexperienced in the paint business, were induced erroneously to believe that their said paint was a new discovery, successful use of which was demonstrated by large industrial users and discriminating purchasers, and that there was a large existing and potential demand for purchase and sale thereof, and, in reliance upon such erroneous belief, to enter into so-called distributor's franchise or agreement and, incident thereto and in connection therewith, to commit themselves to the purchase of large

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quantities of paint in question, and with result further that dealers thus purchased for resale and distribution large quantities of aforesaid paint in preference to that of competitors and were unable to resell same at prices which would be profitable, and many dealers who thus bought their said paint were caused to, and did, sell same as distress merchandise at prices greatly under those at which similar paint of competitors was offered and sold, and in some cases gave same away without charge; to the prejudice and injury of competitors:

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

Before *Mr. John L. Hornor*, trial examiner.

Mr. Edward E. Reardon for the Commission.

Mr. Herbert S. Vogel, 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 Parco Products, Inc., and Solomon L. Goldberg, hereinafter referred to as respondents, have been and now are using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to the 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 Parco Products, Inc., is a corporation, incorporated on or about March 4, 1930, under the laws of the State of New York, having its principal place of business in the city of New York and a place of business in Jersey City, N. J.

PAR. 2. Respondent Solomon L. Goldberg is an individual residing in the city of New York and at all times since in or about the year 1932 he has been and still is the manager of the business of respondent Parco Products, Inc., and during all said times he held and still holds the office or position of sales executive of the corporate respondent. As such sales executive he was and still is in charge and control of the sale and distribution of the corporate respondent's paints, hereinafter mentioned, and of the methods employed by it and its agents in their sale and distribution.

PAR. 3. Respondent Parco Products, Inc., is and has been, since in or about the year 1932, engaged in the sale and distribution of a lithopone casein paint under the brand or trade names "Artwall" and "Partwall" which it has sold principally to dealers for resale as well as to members of the public for use, purchasers thereof, located in various States of the United States other than New York or New

Jersey, or the State of origin of the shipment. Respondent Parco Products, Inc., has caused its "Artwall" and "Partwall" paints when so sold by it to be transported from New York or New Jersey, or the State of origin of the shipment, to the purchasers of said products located in States other than the State of origin of said shipments.

PAR. 4. Prior to and during all the times above mentioned or referred to, other individuals, firms, and corporations, located in the various States of the United States, hereinafter referred to as sellers, are and have been engaged in the manufacture, sale, and distribution of oil paints and casein paints and the sellers have sold and distributed their paints to dealers for resale and to the public for use, purchasers thereof, located in States other than the State of the seller, or the State of origin of the shipment. The sellers, respectively, have caused the paints when so sold by them to be transported from the State of the seller, or from the State of origin of the shipment, to the purchasers of said products located in States other than the State of origin of said shipments.

PAR. 5. Respondent Parco Products, Inc., during all the times mentioned or referred to in paragraph 3 hereof, is and has been in substantial competition in interstate commerce with the other individuals, firms, and corporations referred to as sellers in paragraph 4 hereof in the sale of its "Artwall" and "Partwall" paints.

PAR. 6. Respondent Parco Products Incorporated was caused to be organized by one Phillip Jeffay, who at the time of its organization was in the employ of Duralith Corporation, a corporation organized in 1928 and existing under the laws of the State of New York, and at all times subsequent to its organization, including the time of its employment of said Jeffay, engaged in the sale of a casein paint under the brand name Duralith and under substantially the same plan or scheme for its sale as the plan or scheme employed by the respondents herein. The attorney whose services were employed by said Jeffay in the organization of Parco Products, Incorporated, was the same attorney who similarly acted in the organization of Duralith Corporation. He was also counsel and legal advisor to the latter corporation. By reason of his relation as attorney and counsel to the Duralith Corporation he had knowledge of the plan or scheme employed by it in the sale of its casein paint and of the objects and results of the sale of its paint.

For a certain period of time beginning at the time the respondent corporation became engaged in the sale of its casein paints and subsequently while it was so engaged under the plan or scheme mentioned and described hereinafter, the said Jeffay was and continued to be one of the officers of respondent corporation until he was suc-

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ceeded as such in or about March 1933 by one Norman W. Englehart, who then purchased from said Jeffay 35% of the capital stock of the respondent corporation and became and since continues to be its president.

One Lester P. Van Duzer purchased 65% of the capital stock of the respondent corporation from said Jeffay in or about February 1932 and he then became and has since continued to be vice president of respondent corporation. The entire capital stock of respondent corporation, including that in the name of or held by Norman W. Englehart, is under the control of said Lester P. Van Duzer. Prior to his connection with respondent corporation the said Lester P. Van Duzer was not at any time associated or connected with the paint industry or the sale of paint.

One Benjamin H. Cappe is the secretary and treasurer of respondent Parco Products Incorporated. He has had experience in the sale of roofing materials and paint to dealers throughout the United States who have been engaged in the resale of such products. He has been connected or associated during all the times since long prior to his connection with respondent corporation, with the sale of roofing materials and paints to dealers throughout the United States who have been engaged in the resale of such products.

On January 23, 1934, the Federal Trade Commission issued its complaint against Duralith Corporation, above referred to, and others, Docket No. 2157, stating its charges to the effect that Duralith Corporation was employing unfair methods of competition in commerce in the sale of casein paint substantially the same as the methods now charged in the complaint herein were employed by respondents.

On March 29, 1935, the Federal Trade Commission made and issued its findings as to the facts concerning the methods of the sale of its casein paints by the Duralith Corporation and its conclusion that they were unfair methods of competition in interstate commerce 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," and the Commission on the 29th day of March 1935 upon its said findings of fact and conclusion issued its order to cease and desist restraining the Duralith Corporation and its co-respondents, William and Harry Weiner, from the use of methods employed by them in the sale of the Duralith Corporation's said paints, which the Commission had found were unfair methods of competition in interstate commerce.

The respondents herein at all times mentioned in paragraph 3 hereof knew, or with the exercise of reasonable care should have known, that the methods employed by the respondents mentioned and described in the complaint herein were unfair methods of competition employed by them in the sale of the corporate respondent's casein paint.

PAR. 7. Paints having a casein base, or casein paints, sometimes referred to as cold water paints, have a limited use and are in small demand when sold at fair prices in comparison with oil paints or other paints which are in large demand and in general use at the prices at which they have been sold by competitors of the respondents prior to and during the times above mentioned.

During all the times mentioned and referred to in paragraph 3 hereof, the respondents, for the purpose of fraudulently obtaining large sums of money respectively from dealers in various lines of merchandise throughout the United States, employed a plan or scheme, more particularly hereinafter mentioned and referred to, by means of which they fraudulently induced the dealers to enter into alleged contracts to be the sole distributors, respectively, of the respondents' paints in their respective communities, or within certain defined territory and as a principal purpose and result of such alleged contractual arrangement, such dealers in merchandise were fraudulently induced to buy large stocks of "Artwall" and "Partwall" paints for which there was no dealer or consumer demand and at excessive dealer prices fixed by respondents far above the regular market prices to dealers for such or other kinds of paints, prices not only excessive as prices to dealers for resale but prices which were excessive as retail prices for the purchase of the paints by consumers or others for use, and at which the paints could not be resold to consumers or others for use, except in occasional inconsiderable quantities.

PAR. 8. Pursuant to respondents' plan or scheme and as a part thereof, the corporate respondent's officers and respondent Goldberg, taking casein paints sold by them under the names "Artwall" and "Partwall" as the subject matter, means or device, fraudulently to obtain large sums of money from the dealers referred to, from the sale to them of large stocks of the paints under the pretense that the dealers were made sole distributors thereof in their respective localities, as above stated, adopted and made use of the corporate form, Parco Products Incorporated, as an instrumentality to represent them as well as to conceal them as individuals as the sellers of the said paints, and to aid more effectively to accomplish the object and purpose of the said plan or scheme.

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In further pursuance of the plan or scheme and as a part thereof, the respondents employed agents or salesmen to make surveys of the dealers in various lines of merchandise in communities or localities in the various States to discover and to contact such dealer or dealers in such places who were established, successful, and of sound financial rating or standing sufficient to perform any agreements or obligations into which they might be induced by respondents to enter and preferably those dealers who were not then carrying paint for sale, and to offer to make such dealer or dealers, as they contacted of said financial rating or standing, the sole distributor or distributors in their respective communities or in certain territory for the sale and distribution of respondents' paints, on the understanding, however, that the contract, making the dealer the sole distributor of respondent corporation, was subject to the approval of the respondents and to be made at the office of the respondent corporation in New York City which the dealer prospect so contacted was invited and urged to visit, at respondents' expense, to discuss the final arrangements and closing of the contract.

In further pursuance of the plan or scheme of respondents referred to and as a part thereof and with the knowledge of the respondents, the respondents' agents and salesmen, in the usual course of their employment and in contacting the dealers, were to make many representations purporting and represented to be matters of fact concerning the corporate respondent, its officers and management and its and their financial ability to perform their obligations, and concerning its and their financial and business connections with other persons, firms, and corporations; and were to make demonstrations of the use of respondents' paints and representations concerning the nature, quality, and uses thereof, the dealer and consumer demand therefor and the marketability of the paints and the terms and conditions under which they would be sold to the dealers as respondents' sole distributors thereof, all in such manner, form and substance that as a natural consequence thereof the dealer or dealers who were so contacted and to whom the demonstrations of the paints and representations above referred to were made, would credit and rely upon them as facts reliably supported to such extent that the dealers would not respond to the natural thought or impulse, usually occurring to them when dealing with persons previously unknown, to make ordinary and prudent inquiry or further investigation of the facts and things so demonstrated and represented which involved future financial and other responsibilities on their part.

In further pursuance of the plan or scheme of respondents referred to and as a part thereof, the corporate respondent's officers and more

particularly its sales executive, respondent Goldberg, were to receive the dealer so contacted by respondent's agents, as above set forth, upon his visit to the New York office of the corporate respondent and then and there to make similar demonstrations and statements purporting to be facts and representations concerning the proposed undertaking of the dealer to become the sole distributor of the respondents' paints and the making of a distributor's contract therefor with the respondent corporation. Such representations made to the dealer by the corporate respondent's officers and respondent Goldberg were in the general nature of a summary and confirmation, variously when the occasion arose, of the demonstrations, statements, and representations previously made to the dealer by the respondents' agents or salesmen and were in general devoted to statements and representations concerning the financing of the dealer distributor under the contract and details stated in general terms of what the contract would include as obligations of the corporate respondent as a party thereto.

The respondents relying upon the trust and confidence of the proposed dealer distributor, inspired and developed by the demonstration, statements and representations of their agents and salesmen, above mentioned and referred to, prior to his visit to respondents' New York office, were prepared to make adroit statements and arguments to the dealer of the advisability of closing or executing the contract, all tending to prove that the dealer as a distributor would make large sales of respondents' paints which the respondents would assist in financing and represented were in enormous demand, so that there would be no risk to the dealer in assuming the relation of distributor and that as such distributor he would enjoy large profits in the sale of the respondents' paints which he otherwise would not have.

PAR. 9. The fraudulent plan or scheme employed by the respondents above described and referred to was one briefly described as high pressure salesmanship, an euphony employed with respect to questionable methods or practices generally beyond the accepted boundaries of fair and honorable salesmanship, and consisting, for example, on the part of respondents in the instant case, among other things, principally of misrepresentation of facts to prospective distributors and false implications arising therefrom and depending upon the psychological reaction of dealers to such salesmanship in such manner that his confidence was obtained and he was lulled into such condition that he was prevented as intended thereby, from applying the rule of caveat emptor and was in consequence subject to being meretriciously and fraudulently hurried into executing a one-

sided alleged contract, unfair and burdensome in its obligations only to him and profitable to the respondents only, and an instrument useful in compelling or extorting payment of money from him, alleged to be due under its terms, because of the trouble and expense of interposing legal defense thereto.

PAR. 10. In pursuance of the plan or scheme of the respondents above set forth, the respondents employed agents or salesmen and caused them to make and they made surveys of the wholesale and retail dealers in various localities throughout various states, such as dealers in hardware, lumber, plumbing, and building supplies, builders and contractors, machine and supply companies, dealers in refrigerating and heating equipment, distributors of groceries and beer, and of coal, coke, and oil, dealers engaged in the sale of hay and seed and in other lines of merchandise, including individuals and firms engaged in the occupation of plasterers, and principally such dealers, in preference to dealers in paints who might have knowledge thereof and be acquainted with market conditions for the same. The respondents' agents or salesmen thereupon contacted among such dealers those who were considered of the sound financial rating and standing above mentioned and proposed to them that they become sole distributors in their respective localities for the respondents' paints, and by demonstrations of respondents' paints and various representations, more particularly referred to in paragraph eleven hereof, induced many of the dealers to visit at respondents' expense the respondents' offices in New York City for the purpose of considering and negotiating a contract as sole distributor for respondent corporation.

PAR. 11. The salesmen of the respondents employed to survey and contact the dealers as above set forth, in the course of their employment, and the officers and agents of the corporate respondent including respondent Goldberg at the offices of the corporate respondent in New York City, among other things, demonstrated the application of respondents' paints on various surfaces, to some slight extent, to dealers who were induced to visit respondents' offices at New York City and in connection with such demonstrations stated and represented, among other things, that the paint was an unusual and successfully used casein or cold water paint for practically all interior painting, implying that it was a new discovery in paints that had been successfully introduced and was in substantial demand by consumers and by dealers for resale; that the formula for the paint was the creation of a famous chemist; that it was washable after being applied to surfaces painted by it; that a gallon of the paint when mixed with $\frac{1}{2}$ of a gallon of water and applied or

painted was washable; that it can be cleaned with water after thoroughly drying for approximately 30 days; that it requires only one coat and leaves no disagreeable odor; that it stands up under exposure to light; that the paint is indestructible under normal usage; that finishes can be obtained by amateurs that require experts with other materials; that it is a revolutionary product in the paint industry; that there is no concern that can make a material as good as "Artwall," sell it for less money, do what respondents do, and make a fair profit; that "Artwall" or "Partwall" paste mixed with two quarts of water to the gallon gives satisfactory results in painting and gives coverage with one coat; and respondents, and their salesmen and agents exhibited photostatic copies of parts of small trial orders of the paints by some of the largest business organizations in the United States and stated that such purchasers were large and regular users of the paints.

Respondents' salesmen, officers of the corporate respondent, and its agents represented to the dealers, among many other things, that Lester P. Van Duzer, respondent's vice president, had been associated in the paint business for many years; that the corporate respondent was backed by extremely well known financiers who did not wish to have their names disclosed; that it was the subsidiary of a large paint concern and therefore financially able to carry on its business and perform all its obligations.

The respondents, their salesmen, officers and agents represented to the dealers, respectively, among many other things, that under the contract made between them and the corporate respondent they would be the sole distributors in their respective territories which it was represented to them would be virgin territory, including the implication that respondents' paints had never been previously sold in such territory; that respondents would organize a competent sales force for such distributors and instruct them in soliciting orders for the paints in the territories of the dealers and would turn over to them all inquiries and orders received for the paints by the respondents, implying that such inquiries and orders had been and were being frequently received by the respondents with respect to orders for substantial quantities of the paints; and respondents made representations as to various advertising matter which they were to furnish to the dealers and regarding the financing of the business done by the dealers in the sale of the paints to the effect that dealers, acting as sole distributors, were merely to warehouse the material and distribute it as orders came in to them from purchasers; that there were distributors of respondents' paints who would not sell

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their distributorships for \$50,000; that there were only two other water-mixed paints in paste form on the market and that these two products were inferior to respondents' paints and were selling at approximately the same price as respondents' paints, namely \$3.15 per gallon, and the respondents made it a practice in enforcing payments of monies due for the sale of the paints to dealers in consequence of the above demonstrations, statements and representations, to assign to others their rights to the amounts claimed by them to be due from the dealers in order that the dealers might be compelled through legal process to make payment, without the opportunity of raising defenses to legal action brought by the assignee of the claim that they would have been enabled to interpose had the claims been sued upon by the respondents.

PAR. 12. The statements and representations made by respondents, their agents and salesmen mentioned and referred to in paragraph eleven hereof, were each and all false and fraudulent statements and representations of various facts and conditions to which they applied; the respondents' "Artwall" and "Partwall" paints were not newly discovered or unusual paint products; they were not products made after the formula of a famous chemist but were made after a formula of the respondents which was submitted to a certain chemist to revise, for the reason that paints produced and which had been sold by the respondents under such formula had proved to be unfit for use and unmarketable by reason of the composition of the paints in certain respects; said paints were not washable after being applied to surfaces and could not be cleaned with water or otherwise after thoroughly drying for thirty days and required more than one coat to cover surfaces painted.

The statements and representations that the paints when used left no disagreeable odor, that they stood up under exposure to light and were indestructible under normal usage and that finishes could be obtained by amateurs that required experts with other materials, were each and all false statements and representations in that over some surfaces to be painted more than one coat of respondents' paint was required and in that respondents' paints had a disagreeable odor and did not stand up to exposure to light, were not indestructible under normal usage and finishes could not be obtained by amateurs that experts with other materials could obtain.

The statements and representations that the respondents' paints were revolutionary products in the paint industry and that there was no other concern that could make a material as good as "Art-wall" or "Partwall" paints and sell it for less money and make a fair profit were each and all false in that respondents' product was

not a new or revolutionary product in the paint industry and in that there were concerns in existence long prior to the organization of the corporate respondent that were making cold water paints, known as casein paints, and who were selling them for less money than the respondents offer for sale and have sold their said paints and who made a profit in the sale of such paints.

The statements and representations of the respondents, their salesmen and agents in connection with the exhibition of photostatic parts of orders of the paints received by respondents by large business organizations were false statements and representations in that the photostatic copies of the orders referred to were carefully made by the respondents so as not to show the quantities of the paints ordered and in that said orders of the business organizations referred to were only trial orders and involved only small quantities of respondents' paints and most of the business organizations referred to were not and are not large and regular users of the paints.

The statements and representations that the corporate respondent was backed by well known financiers were false as well as the statement that it was the subsidiary of a large paint concern.

The statements of the respondents, their salesmen and agents, that the exclusive territory offered to the dealers as sole distributors in their respective territories was virgin territory and territory in which the respondents' paints had never been previously sold were false in that the territory referred to was not virgin territory as to the sale of respondent's paints but was territory in which such paints had previously been sold by others, either the respondents themselves or those who had previously been made distributors of the paints by the respondents.

The statements and representations that the respondents would organize a competent sales force and instruct it in soliciting orders for the paints in the territory of the dealers who contracted to be sole distributors of the respondents, were false statements in that the respondents did not make competent efforts to organize such sales forces and to instruct them in soliciting orders and these statements and representations were made to so many dealers who entered into distributors' contracts with the respondents and were in so many instances not kept or observed by the respondents that the respondents knew when making such statements and representations that they never intended to make more than a formal performance of such promises such as would be sufficient as an effort to keep the matter of performance in suspense pending the time when the obligations of the distributors to make payments for the paints they were induced to purchase would become due.

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The statement of representations that inquiries and orders received by the respondents from the respective territories of the dealer distributors would be turned over to the dealers were false and fraudulent in their implication that such inquiries and orders in substantial number had been and were being received by the respondent which was not the fact.

The statements and representations made that the respondents would furnish the dealer distributors with advertising matter and regarding the financing of the business done by the dealers in the sale of the paints and that the dealer distributors were merely to act as warehousemen for the material and distribute it as orders came in to them from purchasers were each and all false statements and representations both as to the facts themselves and to the implications arising from the statements in that the respondents did not furnish the advertising matter to the dealers which they had represented they would furnish nor do the financing of the business done by dealers, and in that the distributors were not merely to act as warehousemen, in that the amount of advertising matter which they in most instances furnished dealers was inadequate to the decent performance of the respondents' promises in that respect and such failures to furnish the advertising referred to were so numerous that respondents well knew at the time such representations were made that they would not perform the promises to the extent that they knew they had led the dealer distributors to expect. The statement that there were distributors of respondents' paints who would not sell their distributorships for \$50,000 was wholly false in that there was no such distributor who would not sell his distributorship for much less and in that most of respondents' distributors endeavored to return respondents' paints and cease being respondents' distributors and were willing to do so even though they sustained considerable loss in their transactions with the respondents.

The statements of the respondents that other water mixed paints in paste form on the market were inferior to respondents' said paints and were selling at approximately the same price as respondents' paints, were false statements and representations in that the products referred to were not inferior to respondents' paints and were selling at lower prices than respondents' paints.

PAR. 13. In consequence of the statements and representations made by the respondents, their agents and salesmen, many dealers among those above referred to were fraudulently induced to enter into distributor contracts with the respondents as a result of which large quantities of respondents' paints were delivered into the hands of the dealer distributors respectively under their alleged contractual

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liability to pay for the same. The paints so delivered to the dealers were not as represented as to their marketability and demand for use by consumers and in consequence thereof the dealers were unable to sell, or move, more than inconsiderable quantities thereof and the said stocks of paints were and became known as "distress merchandise," meaning thereby that it was merchandise that was offered on the market in competition with oil paints and other casein paints at prices much below the prices paid for the competing paints referred to and at which they were sold.

PAR. 14. The above statements and representations made by the respondents' agents and salesmen had the capacity and tendency to deceive and mislead dealers in various lines of merchandise to whom they were made into entering into alleged contracts to act as distributors of the respondents' paints and to accept deliveries of large stocks of respondents' paints at exorbitant prices as above stated; and also the capacity and tendency to deceive and mislead such dealers in merchandise into the belief that the statements regarding the use and application of the respondents' paints were true and into causing the dealers to pass on such representations to members of the public who bought respondents' paints, on occasions, from the dealers. In consequence thereof the dealers who were so deceived and misled, acquired large stocks of respondents' paints which they could not sell or move at the prices at which they allegedly contracted to pay for the same and in order to move or close out the whole or parts of such stocks of paint the dealers were compelled to offer or throw the same upon the market for sale at prices much less than those they had allegedly contracted to pay respondents therefor, or at any price or prices at all which they could obtain for it, thereby causing the market for both oil and casein paints to be demoralized and the trade of dealers in oil and casein and other paints to be injured and trade in paint was thereby diverted to respondents from their competitors. As a result of the deception of the public by means of the statements and representations of the respondents above mentioned and referred to members of the public were deceived and misled into purchasing respondents' paints in the belief that they were purchasing paints which were washable and had no disagreeable odor, among others of the representations and statements of the respondents above mentioned and referred to, and trade in paints was thereby diverted to respondents from their competitors.

PAR. 15. The above acts and things done and caused to be done by the respondents were and are each and all to the prejudice of the public and of respondents' competitors and constitute unfair methods of competition in commerce within the meaning and intent of Section

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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

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on the 23rd day of September, 1935, issued its complaint in this proceeding and thereafter caused it to be served upon the respondents, Parco Products, Inc., and Solomon L. Goldberg, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondents filed their answer to the complaint on December 4, 1935, and thereafter testimony and evidence in support of the allegations of the complaint were introduced by Edward E. Reardon, Esq., attorney for the Commission, before John L. Hornor, Esq., an examiner of the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint by Herbert S. Vogel, Esq., attorney for the respondents; and the testimony and evidence were duly recorded and filed in the office of the Commission.

Thereafter, the proceeding regularly came on for final hearing before the Commission upon the complaint and the answer thereto, the testimony and evidence, and the brief in support of the complaint; and, the Commission, having duly considered the same, and being now fully advised in the premises, finds that the proceeding is in the interest of the public, and makes this, its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Parco Products, Inc., is a corporation, organized March 4, 1930, under the laws of the State of New York and having its principal place of business in the city of New York.

PAR. 2. The respondent, Solomon L. Goldberg, is an individual residing in the city of New York and at all times since on or about February 1, 1932, he has been and still is the manager of the business of the respondent, Parco Products, Inc., and its sales executive in charge and control of its agents and salesmen and of the methods employed in the sale and distribution of the paint sold by Parco Products as hereinafter mentioned.

PAR. 3. The respondent Parco Products, Inc., is and has been, since sometime in April 1932, engaged in the sale and distribution of a lithopone casein paint under the brand or trade names "Artwall" and "Partwall" which it has sold principally to dealers for resale, as well as to members of the public for use, purchasers of the paint, located in various States of the United States other than New York, or the State of origin of the shipment.

Respondent Parco Products, Inc., has caused its "Artwall" or "Partwall" paint, when so sold by it, to be transported from New York, or the State of origin of the shipment to the purchasers located in said other States.

PAR. 4. Prior to and during all the times above mentioned or referred to, other individuals, firms, and corporations, located in various States of the United States, hereinafter referred to as sellers, are and have been engaged in the manufacture, sale, and distribution of casein paints and oil paints and the sellers have sold and distributed their paints to dealers for resale and to the public for use, purchasers thereof, located in States other than the State of the seller, or the State of origin of the shipment.

The sellers, respectively, have caused the paints when so sold by them, to be transported from the State of the seller, or from the State of origin of the shipment, to the purchasers located in said other States.

PAR. 5. The respondent Parco Products, Inc., during all the times mentioned and referred to in paragraph 3 hereof, is and has been in substantial competition in interstate commerce with the other individuals, firms, and corporations, referred to as sellers in paragraph 4 hereof, in the sale of its "Artwall" or "Partwall" paints.

PAR. 6. The following individuals were connected with Parco Products, Inc., prior to the issuance of the complaint by the Commission in this proceeding:

Philip Jeffay, a British citizen, 44 years of age, born in Scotland, who has been in this country 15 years. At his instance the respondent Parco Products was incorporated as set forth later herein.

The respondent Solomon L. Goldberg, above mentioned, who promoted taking over of Parco Products, from Jeffay, up to that time an inactive corporation, and its employment in the business of the sale of paint, including the casein paint called "Artwall" or "Partwall."

Goldberg and Jeffay, during the 15 years that the latter has been in the United States, were intimately acquainted with each other and have visited at each other's homes.

Lester P. Van Duzer, who was persuaded by respondent Goldberg to put money into the project to engage Parco Products, Inc., in the business of the sale of paint, and who became, on or about February 1932, and still is, the vice president of Parco Products.

Norman W. Englehart, who became president of Parco Products.

Benjamin H. Cappe, who was secretary and treasurer of Parco Products, Inc., and had had experience in the sale of roofing materials and paint.

PAR. 7. The Commission in a proceeding under its complaint issued on January 23, 1934, against the Duralith Corporation and its president and another, Docket No. 2157, found that the Duralith Corporation had employed unfair methods of competition in the sale of a casein paint and issued its order to the Duralith Corporation, its officers and agents to cease and desist from the said methods.¹ The methods of competition employed by respondents Parco Products and Solomon L. Goldberg, hereinafter described were, substantially, methods that were employed by the Duralith Corporation and restrained by the Commission's above order.

PAR. 8. Philip Jeffay knew the president of the Duralith Corporation quite a few years, and had visited his office quite a few times, prior to March 4, 1930. He knew that the Duralith Corporation was engaged in the sale of a casein paint in powder form to which, when used as a paint, water was added.

On March 4, 1930, Jeffay had just left employment with the Sterling Materials Company and was out of work. Because he wanted a job, he caused the respondent Parco Products to be incorporated on that date. To incorporate Parco Products, Jeffay employed the attorney who was counsel to the Duralith Corporation, and shared its suite of offices and the services of its stenographer. The attorney for the Duralith Corporation had engaged in the prosecution of suits for the collection of money due from dealers on commercial paper given for the purchase price of paint sold by the Duralith Corporation. He knew the paint was a casein paint.

He knew the nature of the defenses interposed by the defendants in those suits, one of which was that the Duralith paint had been misrepresented as washable.

PAR. 9. After the organization of the respondent Parco Products, Inc., Jeffay took a job with the Duralith Corporation and allowed Parco Products, Inc., to lie dormant without ever having been engaged in business. He was employed by the Duralith Corporation as sales manager in charge of a lot of its salesmen who, as was the case with the salesmen of Parco Products in the sale of its paint, were

¹ See 20 F. T. C. 256.

engaged in appointing dealers as distributors of Duralith paint. He remained in the employ of the Duralith Corporation as sales manager until the end of 1933. In the meantime he also remained as president of Parco Products, Inc., until March 1933, notwithstanding he transferred to Solomon L. Goldberg all of the books and effects and all of the capital stock of Parco Products on or about February 2, 1932, as hereinafter set forth. At the end of 1933, Jeffay left the employ of the Duralith Corporation. The time when he left the employ of the Duralith Corporation was only a few weeks before January 23, 1934, when the Federal Trade Commission issued its complaint against the Duralith Corporation after a usual preliminary investigation. Shortly thereafter, Jeffay, in or before March 1934, entered the employ of Parco Products, Inc., as sales manager at a salary of \$125 a week, in charge of ten salesmen. In 1933, the stenographer named as an incorporator of Parco Products and whose services were shared jointly by the Duralith Corporation and by its attorney, who was employed to incorporate Parco Products, Inc., had become assistant secretary of the Duralith Corporation.

PAR. 10. Respondent Solomon L. Goldberg, on or about February 1, 1932, was out of work and vitally interested in getting a job. He solicited the interest of Mr. Lester P. Van Duzer in Parco Products. He told him that it was a corporation that had been formed by a man who had the roofing business in mind and could be bought very reasonably. Thereupon, Mr. Van Duzer put some money into the proposition and Mr. Goldberg, on or about February 1, 1932, negotiated the transfer of the books and seal and the capital stock of Parco Products, Inc., from Philip Jeffay for the sum of \$150, of which \$100 was paid Jeffay in cash. Mr. Van Duzer acquired 65% of the stock of Parco Products and became and since then has been its vice president. Mr. Goldberg retained custody of the remaining stock for the account of Jeffay until the balance of \$50 owing to him was paid, and Jeffay, while acting as sales manager for the Duralith Corporation, remained as president of Parco Products until March 1933, even while it was engaged in selling its casein paint as above stated.

PAR. 11. Parco Products, Inc., was organized as a corporation primarily to engage in the sale of a roofing paint. On or about February 1, 1932, when control of it was acquired by respondent Goldberg and Lester P. Van Duzer, Parco Products did not have a formula for the successful manufacture of casein paint. It engaged for a short time in the sale of a roofing paint called Sealpor or Lockpor. In a transaction on February 4, 1932, it sold a quantity of Sealpor or Lockpor to a concern in Massachusetts and in another transaction it sold Sealpor or Lockpor, on February 23, 1932, to a concern at

Elmira, N. Y. It made one or more other sales of such roofing paint between February 1 and April 1932.

PAR. 12. Substantially the same practices that were later employed by the respondents in the sale of its Artwall or Partwall casein paint, as hereinafter set forth, and that are alleged to be unfair methods of competition, were employed by the respondents in the few sales of its roofing paint above referred to. For example, a salesman of Parco Products approached the concern at Elmira, N. Y., above referred to. It was never before in the paint business. The salesman stated to its president that he wanted a distributing center for the paint and thought that Elmira, N. Y., was the proper place for it; that he had looked up his concern and found it was just about the best one in that locality. The proposal of Parco Products was that they would furnish the Elmira concern with a stock of roofing paint called Sealpor or Lockpor and that their agents would come on and sell it; that it was not to cost the Elmira concern anything until it was sold by the agents of Parco Products and then the Elmira concern was to pay for the paint; that the Elmira concern was to be the exclusive distributor and receive the paint and warehouse it. The Elmira concern signed a distributor's special franchise. The Parco Products salesman wrote into the signed franchise an order by the Elmira concern for 695 gallons of the paint for the price of \$799.25. When the Elmira concern received the bill for \$799.25, it objected to any further proceeding in the matter or to making payment, claiming it was not according to its agreement. Parco Products, Inc., threatened suit but later settled the claim of \$799.25 for \$400. The Elmira concern found no demand for the paint and sold it all off at a loss, obtaining about 60 cents a gallon for it instead of \$1.50, the selling price fixed by Parco Products.

PAR. 13. Artwall paint, sold by Parco Products, later named Partwall, and the Duralith paint sold by the Duralith Corporation above mentioned, were both casein paints.

The Duralith paint was in powder form, and required to be diluted with sufficient water to the proper consistency when used as paint.

The Artwall or Partwall paint, containing about 29% of water, was in paste form when sold by Parco Products, and required the addition of some water when used as paint.

Casein, a constituent of the paint of the Duralith Corporation and the basis of the Artwall or Partwall paint of Parco Products, is the ingredient in milk that forms cheese or curd. Casein in dry form, after a period of time, deteriorates, if improperly stored, until it is in a condition in which it is not fit to be used for all purposes. If water should be added to casein and it was permitted to stand for a

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few days, it would then develop an odor obnoxious to most persons, such as emanates from a certain cheese product or from stale milk long soured and rotted.

PAR. 14. In or about April 1932, Parco Products, Inc., began the sale of Artwall casein paint which it manufactured from a certain formula. At first it sold the Artwall paint so made direct to consumers, certain large corporations in or about New York City, whose names and businesses conducted by them are nationally known and who are readily recognized by the public to be large users and purchasers of paint. The quantities of Artwall paint that Parco Products sold to nine, among others, of such large corporations, varied from one quart on May 13, 1932, to the Bell Telephone Laboratories, to five gallons on May 3, 1932, sold to a large department store. It sold one gallon on May 11, 1932, to the Equitable Building Corporation.

The contents of one of the containers of the paint sold to the department store exploded, as did also the contents of the container of the gallon of Artwall purchased by the Equitable Building Corporation. The last mentioned paint exploded all over the ceiling, all over the employee examining it, all over the floor and "stunk out" the entire room where it was kept. It smelled like rotten eggs.

The nine large purchasers of Artwall paint above referred to included, besides the Bell Telephone Laboratories and The Equitable Building Corporation, the following, all of New York City: The Consolidated Edison Company, formerly The Consolidated Gas Co. of New York; The Singer Building Rental Department; The Chrysler Building Corporation; The Cross & Brown Co., real estate operators, managing large properties in mid-town New York; and, the Shattuck Co., operating Schrafft's Stores; also, L. Bamberger & Co., a large department store at Newark, New Jersey; and, The Solo-Horton Brush Co., which is not actually a user of paint and never used in the past more than $\frac{1}{2}$ gallon of paint in a period of one year. None of these nine concerns, among many other consumers who bought trial quantities of Artwall paint were ever in any position, by reason of the purchase and use of the paint, to recommend its purchase and use to others. At least two of the nine concerns mentioned above wrote to the respondents requesting them not to refer prospective purchasers to them concerning their use of the paint.

PAR. 15. Sometime shortly after Parco Products, Inc., made the first sales of Artwall paint above referred to, the formula for the paint was submitted by respondent Goldberg to a chemist for correction or revision and the chemist was engaged in that work for a period of a month or two. However, Artwall paint manufactured

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later under its revised formula and sold by Parco Products in 1933, was examined and analyzed. It was found to have "soft-settled" in its container and also to have a disagreeable odor such as above described. By "soft-settled" it is meant that the paint was getting into a condition where the liquid in its composition was coming to the top and the part of the paint which settled in the bottom of the container was becoming hard. Such soft-settling in casein paint is a condition that is objectionable in the use of the paint and to its sale commercially for, in some instances, that condition progresses until the paint becomes so hard it cannot be used. The respondents received complaints from purchasers, whom they induced to buy large quantities of Artwall and Partwall paint, that it had become so hard it could not be used or sold for use. One of these complaints was made in October 1934. A representative of Parco Products examined the paint complained of in this instance. He said it was useless and ordered it returned to Parco Products for a replacement.

PAR. 16. The respondents, having caused Artwall paint to be purchased by numerous large nationally known consumers, amongst others, in comparatively small or trial quantities, as above mentioned in paragraph 14 hereof, proceeded to use, and they used such sales as recommendations or testimonials of those purchasers, as hereinafter set forth, among other means to the same purpose, falsely to induce dealers to believe that the Artwall paint was in practical use a proven success, and that there existed a very large demand for its purchase and use in large quantities by large users of paint throughout the United States, such as large industrial and institutional organizations.

In order to use the purchases of those small or trial quantities, indicating the purchase and use of the paint by large and discriminating purchasers and users, as recommendations or testimonials of the proven success of Artwall paint and a consequent large existing demand for its purchase and sale by consumers, the respondents caused the purchasers' orders, bearing the names of those consumers, to be photographically reproduced in part, with the figures representing the amounts and prices of the paint omitted. The respondents assembled a great many of such photographs, bound in portfolio form, and exhibited and caused their agents and salesmen to exhibit them to dealers, prospective purchasers of Artwall paint, stating at the same time, and causing their salesmen and agents to state to the dealers that those concerns were large purchasers and users of Artwall paint.

PAR. 17. The unsatisfactory formula under which the respondents at first manufactured and sold Artwall paint was revised about

the middle of 1932, and the respondents were then prepared to manufacture the paint under the revised formula, under which the paint produced also was an inferior paint. In some instances it was found to be useless and unsalable, as above set forth.

The respondents began the business of the manufacture of Artwall paint under the revised formula and its sale in wholesale quantities to dealers about the middle of 1932. The selling price of the paint to dealers in wholesale quantities was fixed by the respondents at \$2.05 per gallon, regardless of the amount purchased. The price at which the dealers were to resell the paint to consumers was fixed by respondents at \$3.15 per gallon. Substantially all dealer-purchasers were required to make the price to consumers \$3.15, regardless of the amount purchased. The respondents warned dealers that they must sell to consumers at \$3.15 a gallon, otherwise they would be cut off by respondents from further purchases of the paint.

During all the times the respondents were engaged in the sale of Artwall or Partwall casein paint there were other manufacturers of paint, competitors of Parco Products, Inc., whose products were being, and for some time had been, successfully purchased and used by consumers. Casein paint was, and had been sold by such competitors to dealers at prices ranging from \$1.00 to \$1.29 a gallon, and resold by dealers to consumers at prices from \$1.75 to \$2.10 a gallon. Both dealers and consumers, respectively, could freely purchase such competing paint in any quantities, from one gallon upwards.

Prior to the time in 1932 when the respondents began the sale of Artwall paint in wholesale quantities, it sold the paint to a large number of consumers in gallon quantities, at from \$2.50 to as low as \$1.95, or in other words, at considerably less than the price at which they later sold it to dealers for resale, or at from 65 cents to \$1.20 a gallon less to consumers than the price of \$3.15 which they later suggested and required dealers to obtain from consumers, regardless of quantity. Indicative of the cost of production of Artwall paint to Parco Products is the fact that, an arbitration committee, acting under the arbitration clause in respondent's contract, decided the matter by directing that the balance of 1,750 gallons of paint which the dealer had on hand, should be returned to Parco Products at the price of \$2 a gallon or, in the alternative, that Parco Products was to pay the dealer \$1,250, the dealer to retain the 1,750 gallons of paint. Parco Products could thus have repossessed itself of 1,750 gallons of paint at the price of about 70 cents a gallon. The respondents paid the dealer the alternative award of \$1,250, rather than take back the 1,750 gallons at 70 cents a gallon.

PAR. 18. During all the times from about the middle of 1932 until up to the present time, the respondents, their agents and salesmen, have represented to dealers, for the purpose of inducing them to enter into contracts with Parco Products, Inc., which included orders for large wholesale quantities of Artwall or Partwall paint, among other things, that the vice president of Parco Products, Lester P. Van Duzer, had been associated in the paint industry before his connection with Parco Products; that Parco Products was backed by well-known financiers and was a subsidiary of a large oil paint corporation.

These representations were wholly false. Lester P. Van Duzer was not at any time associated with the paint industry before his connection with Parco Products. Parco Products was not backed by any well-known financiers. There was no financial interest connected with or associated with it outside of its own officers and stockholders. Parco Products was not a subsidiary of any large or small oil paint corporation.

The respondents, their agents and salesmen, represented among other things respecting the nature and quality of Artwall or Partwall paint, that it was a one coat paint, meaning that one coat of Artwall or Partwall paint would cover a surface to be painted, whereas in the case of oil or other paints, two or more coats would be required; that it was a new discovery in paint, an unusual casein or cold water paint; that when applied as paint it left no disagreeable odor; that it left no hot spots; that it could be used by amateurs or persons inexperienced in painting to obtain a finish that, with the use of other paints, could only be obtained by professional painters; and, that it was washable.

The above representations concerning the nature and quality of Artwall paint were each and all false. Artwall or Partwall paint is not and has not been a one coat paint. It leaves a very disagreeable odor, apparently from decomposing casein, an odor described by purchasers to be like the odor from certain cheese or rotten eggs; hot spots appeared on walls painted with it; it could not be successfully applied in painting walls or other surfaces by amateurs or persons inexperienced in painting. In many instances, professional painters found they could not successfully paint various surfaces with it that could be painted successfully with other paints.

The respondents, their agents, and salesmen, represented to dealers that the territory assigned or to be assigned to a distributor of Artwall or Partwall paint was virgin territory and that the dealers, as distributors, would have the exclusive sale of the paint in that territory; and, that Parco Products would organize and instruct a compe-

tent sales force for the dealers who entered into contracts with it as distributors of its paint.

The representations that the territory assigned to the distributor was virgin territory and that the distributor would have exclusive sale of the Artwall or Partwall paint therein, were false. In many instances where such representations were made, the dealer learned later that others before him had entered into similar contracts with Parco Products, were unable to dispose of the paint acquired similarly by them and ever since had most of the paint remaining on hand because it was unsalable and they were unable to sell it or to return it to Parco Products, Inc. The representations that Parco Products would organize and instruct a competent sales force for its distributors were not bona fide representations. Usually only one or two days was spent by the representatives of Parco Products in selecting organizing and instructing a sales force, consisting sometimes of only one or two, or at the most six or eight salesmen, who afterwards, in every instance from Massachusetts to Wisconsin, left their employment in the sale of the paint because there was no demand existing for the paint and it was otherwise unsalable. After such slight efforts to organize and instruct a sales force, the respondents made no further efforts to assist distributors in selling the paint and the circumstances in connection with the paint and its sale, on the whole, were such that no matter what efforts were put forth by the respondents, no sales force could be assembled that could possibly sell Artwall or Partwall paint at the prices to consumers that the respondents obtained per gallon from its dealers who bought it for resale.

PAR. 19. The respondents sold a total of 44,033 gallons of Artwall or Partwall paint from 1932 to 1935 to at least 61 dealers in eight States for substantially all of which they obtained \$2.05 a gallon, or a total amount of approximately \$90,267.

In selling the paint, the respondents furnished their salesmen with a governing sales talk containing representations which the salesmen were to make to the dealers whom they approached. The salesmen made statements and representations to dealers substantially in accordance with the sales talk in every instance of their transactions with the dealers. In the sales talk, the respondents' salesmen, in contacting the dealers, stated to them that they were not authorized by Parco Products to offer them the appointment to be a distributor of the paint but that the officials of Parco Products, who were in New York City, must first pass upon their selection to be distributors of the paint. Thereafter, substantially all the dealers who were appointed distributors visited the New York office of the respondents, and on such occasions the same representations mentioned and

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referred to in paragraph 18 hereof, and those set forth or indicated in the sales talk, were made to the dealers, respectively, by the representatives of Parco Products in New York City, and on all such occasions particularly by respondent Solomon L. Goldberg. The sales talk referred to was in substance as follows:

I am here to place with one distributor in this territory a business proposition with a material that has very little competition, the nature of which is unusual, requires very little or no time or personal attention and is sold through an advertising campaign conducted by my company—a plan whereby the consumer is not asked to buy one penny's worth of merchandise until he has tried, at our expense, a generous sample which is furnished by us for the purpose of proving to the consumer's entire satisfaction that our merchandise is the best and most economical; the consumer is not asked to purchase until he has actually seen the demonstration or tested the product; a plan whereby every order or inquiry that comes to us from this territory is referred to the distributor; a plan whereby the distributor does not carry any dead stock on his shelves; a plan whereby my company assists the distributor in financing the business; a plan whereby we help build a selling organization for the distributor. If I could satisfy you that this material is an absolute necessity for which there is an enormous market, and if I could show you how it is possible to make a substantial turnover on a profitable basis and the plan contains all the features I have mentioned, would you be in a position to expand your business with additional lines? Now where is your desk, so I can tell you all about the famous, revolutionary one-coat paint and its distribution. (After being seated): Mr. Prospect, I tell you we have investigated a few concerns in this town in order to satisfy ourselves as to whom we shall offer the distribution of our paint, and your name appears on our list. This does not mean that I am authorized by my company to place it with you—My company must pass upon it.

PAR. 20. In making the false statements and representations above mentioned and referred to, including the statements and representations indicated in the sales talk of their salesmen and agents, referred to in paragraph 19 hereof, the respondents adopted and put in practice a systematic method or procedure which was designed to and did accelerate the decision of the dealers with respect to entering into the agreements while they were under the influence or dominance of the false statements and representations.

The essential features of the method and procedure referred to, consisted first in causing agents or salesmen to travel and make surveys of dealers in the various communities or trading centers, and to interview among those dealers one or more whose financial or credit standing was found to be satisfactory, and preferably those not engaged or experienced in the sale of paint and to make statements that tended to and did overcome the natural sales resistance on the part of dealers to purchase large quantities of paint, the merchandising of which was unfamiliar to them. To that end, the re-

spondents' agents and salesmen stated to the dealers they contacted that they were not interviewing them for the purpose of selling anything, and then, following the false representations concerning the respondent, and its paint and concerning its financial associations or connections, the demand for the paint and the possibilities of large profits in its sale, they stimulated the interest of the dealers so incited by stating that their appointment as exclusive distributor of the paint could only be made by the officials of Parco Products at its New York office; that they, the salesmen, having investigated and approved the selection of the dealer in question, would recommend his appointment, and they offered to pay his expenses to and from New York where he might, they said, if satisfactory to those officials, obtain the appointment as distributor in his territory.

PAR. 21. In the light of all the facts regarding the prices of competitive casein paints to dealers and to consumers and the prices paid for its products to Parco Products, Inc., by dealers who, respectively, from time to time, over a period of four years, entered into contracts to act as distributors of its paint and none of whom, to the respondents' knowledge at all times, were able to dispose of the paint except at great loss, if at all, and in the absence of any proof that any dealer-distributor purchased more of the paint after the initial shipment, it is reasonable to infer, and the Commission finds it is the fact, that the object of the respondents in securing distributor contracts from dealers was solely to include therein orders for as large an amount of the paint as was possible with no reasonable hope or expectation of their making any further sales to the same dealers. Outside of those one-time sales, and the receipt of payment for the paint, the respondents neither evinced nor had further interest in the dealers' contracts or their resale of the paint.

To succeed in making such sales to dealers the respondents caused the transactions with the dealers to be begun with a preliminary approach by agents, called salesmen, who were merely false propagandists or cappers, and to be concluded with the dealers at the New York City offices of Parco Products, invariably by respondent Goldberg in the name of the respondent company.

PAR. 22. The purpose of the respondents in sending salesmen or agents to make the first contact with dealers and the effect thereof was to break down the dealers' sales resistance and stimulate their interest sufficiently to cause them, or their representatives who had authority to execute contracts, to visit the offices of Parco Products in New York to consider, primarily, not the purchase of paint but the proposal to become a distributor of respondents' paint. At New

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York the dealers were invariably met by respondent Goldberg, whose efforts were ostensibly directed to selling them the proposition of becoming distributors and securing their signatures to agreements to act as distributors of the paint. Up to the moment when the dealer appeared to agree to become a distributor, the matter of including an order for paint in the agreement, or the quantity was not mentioned. By such means and artifices, the false statements and method of approach above referred to, the salesmen first contacting dealers and respondent Goldberg later, largely overcame the dealer's sales resistance, his normal antagonistic, skeptical, and questioning attitude towards the purchase of respondents' paint, or other merchandise, particularly when approached by strangers, and shifted the dealer's interest to the proposition as to whether or not he would be approved by the respondent as a distributor, and it was in that mental attitude the distributors were caused to visit the offices of Parco Products and to discuss, invariably with respondent Goldberg, that proposition. Up to this time, and up to the time the dealer was persuaded by respondent Goldberg to become a party to a distributor's franchise, the purchase of the paint and the amount was only incidentally or subconsciously considered by the dealer. On the other hand, the sale of the paint to the dealer in as large an amount as possible, utterly regardless of any reasonable requirements of the dealer for its resale, was the principal objective of the respondents.

PAR. 23. By means of the false statements and representations above set forth, the respondent Goldberg succeeded in getting dealers to agree to accept a distributor's franchise. He thereupon took up with them the matter of the amounts of the paint in its several colors, that he stated would be the requisite quantities for them to have on hand to begin its sale. The dealers were, to his knowledge, without experience in the merchandising of paint. He falsely represented to them the amounts they would require. He cited to them statistics of the use and demand for paint in general in their territories that he knew were an impractical basis for his estimates of their need of the respondents' paint. He continued this practice of false representation of the amounts of respondents' paint that would be required by the dealers, notwithstanding that he knew for over a period of four years that dealers who previously entered into such franchises were unable to dispose of the paint. To hurry the dealers into accepting the amounts of the paint estimated by him as necessary for them to begin its sale, respondent Goldberg falsely represented, among other things, that the franchise was only an application for their appointment and would not be in effect until it was approved by the offices of Parco Products to whom it would be submitted; that

Parco Products, Inc., was having such a demand for its paint that it was unable immediately to fill the orders it received from distributors and that sometimes there was a delay of from one to two or three weeks in manufacturing and shipping the paint ordered by the dealers. Substantially in every instance where a dealer signed a distributor's franchise and left it with respondent Goldberg, the franchise was accepted and shipment of the paint by Parco Products followed within about two or three days and, in many instances, the shipment of its paint was started before the dealer was able to arrive at his home on his return from the office of Parco Products.

The Distributor's Franchise provided that the amount of the order for the paint included in it was payable ten days from date of shipment, less 2% discount, and that the purchaser had the option of remitting in equal payments at one and two months from date of shipment, provided settlement was made by notes (but without interest) upon arrival of merchandise at destination. Accordingly, payment for the paint was required to be made by the dealers to Parco Products in substantially all instances before the dealers were able to organize the business of its sale and before the sales organization promised in the franchise could be, and before it was, undertaken by Parco Products to be formed and before the advertising could be begun that Parco Products engaged to do under the terms of the franchise. Payment by the dealers for the paint was by the above means secured to respondents before the dealers, by reason of the resale of the paint by them, could receive and before they received complaints from purchasers that were later received from substantially all of their customers to the effect that the paint and its qualities and use were misrepresented and that they could not use it and, therefore, before the dealers discovered there was no demand for the paint; that it could not be resold by them except at a great loss, if at all, and the result in most instances was that having paid or given notes for the payment of the paint the dealers were without redress for the losses they sustained. Parco Products, Inc., refused in nearly all instances to accept return of paint or to make any money allowances to dealers on that account.

PAR. 24. As above set forth, the Artwall or Partwall paint sold by Parco Products, Inc., to dealers was a casein paint inferior to casein paint sold by competitors. Its qualities, its workability, and the results of its use by persons experienced or inexperienced in painting were severally and at all times misrepresented to dealers by respondents. If truthfully represented in the above respects, the circumstances or conditions under which the paint could satisfactorily be used, were so limited that there was not and could not be any

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substantial demand for its purchase or use. For many purposes of its use, including the limited occasions last mentioned, it was also, in general, and to respondents' knowledge, commercially unsalable by dealers to consumers by reason of the prices at which it was sold by respondents to dealers for resale. At all times during the period of four years, to the knowledge of the respondents, it could not, except in occasional instances and in inconsiderable amounts, be resold by dealers even at prices to consumers substantially less than the dealers paid to respondents.

In soliciting dealers to enter into distributor contracts, they were falsely told by respondent Goldberg that Parco Products was a subsidiary of large oil paint manufacturers whose interests would be affected by the displacement of their products by respondents' paint and that their names could not be disclosed on that account until the distribution of its paint by Parco Products had made a certain amount of progress. Following that statement by respondent Goldberg, when dealers persisted in their inquiry as to the identity of such manufacturers and suggested the name or names of one or more of the largest oil paint manufacturers in the country as the interested party or parties, respondent Goldberg did not deny the truth of their suggestion. He remained silent and by his manner and by appropriate facial gestures and expression led the dealers to believe that they had shrewdly hit upon the truth as to the identity of the oil paint manufacturers referred to.

By reason of the false representations made to dealers by the respondents, their agents and salesmen, as above set forth, the respondents succeeded in inducing dealers more or less inexperienced in the paint business, erroneously to believe that the respondents' casein paint was a new discovery in casein paints; that its successful use was demonstrated by large industrial users of paint who were discriminating purchasers; that such large consumers were and had been large purchasers and users of the paint; and, in consequence that there was a large existing and potential demand for its purchase and sale. In reliance upon such erroneous belief, dealers were induced by respondents to enter into an agreement in writing, called a Distributor's Franchise, which purported to appoint the dealers sole distributors of respondents' paint in their respective localities. In all cases, there was included in the form of the Distributor's Contract, when executed by Parco Products and dealers, an order for the purchase of large quantities of the paint, amounting in the various transactions to from several hundred to several thousand gallons and in at least one instance, a carload lot, which at the price to the

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dealer of \$2.05 a gallon, for the latter amounted, approximately, to \$7,800.

In consequence of the premises, dealers purchased for resale and distribution large quantities of respondents' paint in preference to paint sold by competitors of Parco Products, Inc., with the further consequence that they were unable to resell respondents' paint at prices which would be profitable and it was left on the hands of the dealers as "distress merchandise" to be offered and sold, if at all, at prices greatly under the prices at which the similar paint of respondents' competitors was offered for sale and sold. Many of the dealers who bought respondents' paint were caused to and did sell it at such lower prices and, in some cases, gave it away without charge, to the prejudice and injury of respondents' competitors.

PAR. 25. The merchandising of the Artwall or Partwall paint of Parco Products, Inc., was pursuant to a fraudulent plan, fraudulently conceived by respondent Goldberg and fraudulently carried out by him and the officers of Parco Products, Inc., whereby respondents used the paint mentioned as the means or device, fraudulently to obtain large sums of money from the dealers as above set forth, and used the corporate form, Parco Products, Inc., as an instrumentality and more effectively to accomplish the object and purpose of the fraudulent plan or scheme by concealing the officers of Parco Products and respondent Goldberg individually as the sellers of the paint.

CONCLUSION

The above acts and practices of the respondents, Parco Products, Inc., and Solomon L. Goldberg, are to the prejudice of the public and of the competitors of respondent Parco Products, Inc., and constitute unfair methods of competition in commerce, within the meaning and intent 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 the respondents, testimony and other evidence taken before John L. Hornor, Esq., an examiner of the Commission, theretofore duly designated by it, in support of the allegations of the complaint and in opposition thereto, and the brief filed herein in support of the complaint, and the Commission having made its findings as to the

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facts and its conclusion that the respondents have violated the provision 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 ordered, That the respondent Parco Products, Inc., its officers, agents, and employees, and the respondent Solomon L. Goldberg, in connection with the sale and distribution, or the offering for sale of the Artwall or Partwall casein paint or any other paint product of Parco Products, Inc., in interstate commerce or in the District of Columbia, do forthwith and forever;

Cease and desist, From stating verbally or in writing or representing directly or indirectly:

1. That the Artwall or Partwall casein paint of Parco Products, Inc., or any casein paint sold by the respondents or either of them, of substantially the same composition and qualities in its application and use as paint:

(a) Is a one-coat paint; i. e., that surfaces, required to be painted with two coats in the case of oil or other paints, would require to be painted with only one coat of the Artwall or Partwall paint of Parco Products, Inc.

(b) Is washable on surfaces painted with it.

(c) Leaves no disagreeable odor.

(d) Is not followed by "hot spots" on surfaces painted with it.

(e) Can be used by amateurs or persons inexperienced in painting as successfully as when used by experienced painters.

(f) Will give a finish to painted surfaces that can be obtained with other paints only by experienced painters.

2. That Lester P. Van Duzer, vice president of respondent Parco Products, Inc., is or was at any time associated with the paint industry before he became connected with Parco Products, Inc.

3. That Parco Products, Inc., is or has been at any time a subsidiary of any other corporation, or that any person or persons other than its own proper officers, agents, and employees are or have been financially or otherwise interested in the sale or distribution of its Artwall or Partwall casein paint or of any other of its products; unless or until such representations shall hereafter, by change of circumstances, have their basis in fact and in truth.

4. That the territory offered a dealer as a distributor of the paint of Parco Products, Inc., is virgin territory, or that such dealer would be the exclusive seller of its paint therein, when previously Parco Products, Inc., had made other dealers its distributors in the same territory, who were at the time holding large stocks of its paint, whether or not the paint held by them was bought upon misrepres-

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sentation of respondents concerning its qualities and the demand for its purchase and use.

5. That Parco Products, Inc., would select, organize, and instruct a competent sales force for dealers acting as its distributors unless such representation of respondents is made in good faith to be thereafter fulfilled by substantial performance.

6. To dealers solicited by Parco Products to act as distributors, or for any purpose, that its paint is in large demand for purchase and use by large industrial or institutional organizations, or others, when, to the knowledge of respondents, such demand is purely hypothetical and there is no substantial basis therefor on actual purchases made by such users of paint.

7. That there is demand by large industrial or institutional organizations, or others, for the purchase and use of Artwall or Partwall casein paint or any paint product of Parco Products, Inc., by exhibiting to dealers, prospective distributors, or to others, purchase orders of large users, or others, for small quantities of paint sold to them by respondents prepared in such manner as to omit the amounts of the paint purchased and the amounts of its purchase price.

8. To dealers solicited to act as distributors of the paint of Parco Products, or to others, that there is a large demand for the purchase and resale and use of its paint at prices to dealers and consumers greater than the competitive prices for the same class of paints, when such is not the fact.

It is further ordered, That the respondents shall each, within 30 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they each, respectively, have complied with this order.

IN THE MATTER OF

J. W. GIBSON, TRADING AS J. W GIBSON COMPANY

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

Docket 2932. Complaint, Sept. 29, 1936—Decision, Sept. 21, 1937

Where an individual engaged in sale and distribution of food flavoring, spices, toilet articles, and kindred merchandise, to distributors and house-to-house canvassers, in substantial competition with those engaged in sale of such products in commerce among and between the various States; in advertising, in periodicals or publications of interstate circulation, to facilitate the sales of such products and to obtain distributors for purchase of his said merchandise for resale, usually, through house-to-house canvassing, to members of the purchasing public—

- (a) Represented, to prospective distributors and purchasers, that, on becoming distributors, they would receive free sales kits, and that they could earn up to \$24.00 a day, and would earn \$35.00 a week, and that they would be given new automobiles as a bonus in addition to their regular earnings, through such statements as "Free Sales Kit * * * filled with 5 full size Samples * * * at Absolutely NO COST to workers * * *," "Up to \$24 a day," etc., "MEN AND WOMEN needing up to \$35 a WEEK Operate one of my New Kind of Cut-Rate Store-on-Wheels * * *," "I average between \$40.00 and \$50.00 EACH WEEK," "BRAND NEW TUDOR FORD SEDAN FURNISHED WORKERS * * *," "I give it to you IN ADDITION TO YOUR REGULAR EARNINGS," "* * * representatives have earned as many as three, even four brand new Ford cars within a space of two or three years. Not having use for more than one car, they sold the others and pocketed the easy cash for themselves," facts being no such kits are furnished, deposit is required on each, subject to refund in event of aggregate purchase amounting to some \$12.00, distributors did not earn any such amounts under normal conditions in due course of business, but average weekly earnings of all distributors under such conditions were much less than said \$35.00 per week, sale of \$4,500 of merchandise, exclusive of free deals and combinations, was required before any automobile was furnished, and in fact no automobile had ever been supplied by said individual to distributor;
- (b) Represented that merchandise was given away as a gratuity in consideration of purchase of other products, through such statements as "We frequently offer to customers valuable kitchen utensils and many other useful articles when they purchase a big high-quality bottle of food flavoring at regular retail price. This is just one of the hundreds of special combinations and free gift offers that are bound to make you the most popular person in your community," facts being no merchandise was given away as gratuity in consideration of purchase of other products, but cost of such merchandise was included as part of purchase price charged for another article or combination of articles;
- (c) Represented, on letterheads and in pamphlets of instructions sent to his distributors and otherwise, that he was a manufacturer of the products