

IN THE MATTER OF
**THE MARSH LUMBER COMPANY, TRADING AS MARSH
WALL TILE COMPANY**

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 2827. Complaint, May 29, 1936—Decision, Nov. 6, 1937

Where a corporation dealing, among other things, in wall coverings and counter coverings compounded from wood chips and fibers and other substances under process resulting in hard durable sheeting or covering upon which were scored or stamped, by manufacturer, squares resembling, when painted or lacquered by it with different color from remainder of the sheeting, mortar lines on a completely installed ceramic surface, and in selling and distributing, in other States and in District of Columbia, such products, in competition, among others, with many engaged in sale and transportation, as aforesaid, of tile made from clay and baked in kilns and properly thus described and designated, with others who sell and distribute wall coverings and counter coverings and various other products, including copper tile, glass tile, wood tile, rubber tile, cork tile, and the like, properly thus designated and described by such names, and with those who sell and distribute such coverings made from quarried marble and who, as marble, properly describe their said products—

- (a) Made use of names "Marstile" and "Marsh Wall Tile" as designations of its said products in extensively advertising same, notwithstanding fact its said products, thus designated, were not that baked clay or ceramic product connoted, to building trade and general public, by word "tile" standing alone and without qualifying prefix, as hereinbefore set forth; with tendency and capacity to mislead and deceive substantial portion of purchasing public, to its damage and injury, into the belief that aforesaid products, thus described, were made from baked clay, and with tendency to and effect of diverting trade from competitors who sell and distribute thus made, tile products; and
- (b) Made use of name "Marsh Marble" as designation of product made and sold by it as aforesaid; with tendency and capacity to mislead and deceive substantial portion of purchasing public into belief that product thus described was marble, to the damage and injury of said public, and with tendency to and effect of diverting trade from competitors who quarry and finish such substance:

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

Before *Mr. Charles F. Diggs*, *Mr. John J. Keenan* and *Mr. John L. Hornor*, trial examiners.

Mr. Alden S. Bradley and *Mr. Morton Nesmith* for the Commission. *Dyke & Schaines*, of New York City, and *Wilkins, Fisher & Limbach*, of New Philadelphia, Ohio, for respondent.

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Hines, Rearick, Dorr & Hammond, of New York City, for Tile Manufacturers' Assn, Inc., amicus curae.

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 Marsh Lumber Company, a corporation, trading as Marsh Wall Tile Company, hereinafter designated as respondent, is now, and has been, using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating the charges in that respect as follows:

PARAGRAPH 1. The respondent, Marsh Lumber Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its offices and principal place of business located at 535-611 Tuscarawas Avenue, in the city of Dover, State of Ohio. Respondent is now and for more than one year last past has been engaged, under its corporate name of Marsh Lumber Company, and also under the trade-name and style of Marsh Wall Tile Company, in the business of selling wall coverings and counter coverings, which are products manufactured from wood fibre, and which respondent designates and terms "Marsttile" and "Marsh Marble." Respondent distributes said products to purchasers thereof, and when orders are received therefor they are filled by respondent by shipping said wall coverings and counter coverings to purchasers from the city of Dover, Ohio, in and through other States of the United States, and in the District of Columbia, and there is now, and has been during the time hereinbefore mentioned, a constant current of trade in commerce in said wall coverings and counter coverings so distributed and sold by said respondent, between and among the various States of the United States, and in the District of Columbia.

In the course and conduct of its business, respondent was and is in substantial competition with other individuals, firms, partnerships, and corporations likewise engaged in the sale and distribution of wall coverings and counter coverings, between and among the various States of the United States, and in the District of Columbia.

PAR. 2. Respondent, in the course and operation of its business as described in paragraph 1 hereof, in soliciting the sale of, and selling its products in interstate commerce, sells its wall coverings and coun-

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ter coverings under the trade name and style of "Marsh Wall Tile Company," which name respondent caused and causes to be conspicuously displayed on its letterheads and advertising matter, and also caused and causes said products to be described in its advertisements, letterheads, billheads, contracts, and specifications circulated in interstate commerce as "Marshtile," "Marsh Wall Tile," "tile," "wall tile," "Marsh Marble."

PAR. 3. The aforesaid wall coverings and counter coverings sold and distributed by respondent, as set forth in paragraph 1 hereof, are made by exploding pine wood chips with high pressure steam treating with oil welding together, and compressing into sheets by subjecting to high pressure in steam heated hydraulic presses. The products are then glazed with lacquer and processed in such a manner as to give said products the appearance of tile or marble respectively. To further simulate tile the products are made with a glazed surface with scores and lines of various colors in such manner and at such intervals as to make the said wood fibre products more closely resemble tile slabs, with various colored cement between them; and to simulate marble the products are grained, giving said product the appearance of marble. The use of the words "Marshtile," "Marsh Wall Tile," "tile," "wall tile," and "Marsh Marble," in said trade name and in said advertising literature hereinabove referred to, and the placing of said wall coverings and counter coverings in the hands of builders and dealers, enables builders, architects and speculative builders, and dealers to confuse, impose upon, and deceive those members of the purchasing public who buy houses, and also those for whom houses are built, into the belief that when they are buying respondent's wood fibre products and installations, they are buying and receiving silica or burned clay tile products and installations, or marble as the case may be.

PAR. 4. The word "tile" is understood in the building trade, and by the general public, to mean a clay product shaped in comparatively small sized units and baked in a kiln or oven.

Marble is understood by the building trade and the purchasing public to be a stone, which is a product of nature and which is capable of taking a polish.

PAR. 5. A substantial number of the members of the purchasing public, who have occasion to purchase buildings or equipment wherein wall coverings and counter coverings form an integral and necessary part thereof, have a preference in many instances, for wall coverings and counter coverings, made from tile or from marble, believing that tile and marble are products of a quality and durability superior for the purposes herein named, to other products, such as wood, irre-

spective of any method of processing. Such members, when they observe such wall coverings and counter coverings already installed that have the same appearance, such as graining in various types of marble or marking simulating mortar joints in tile construction, as marble or tile respectively, believe that said products are actually tile or marble, and not a product made of wood; and said members of the purchasing public, when buying wall coverings and counter coverings having the appearance of tile or marble and unaccompanied by any explanation or description of said products and which have been installed as aforesaid, are entitled to receive tile or marble, as the case may be, and not wall coverings or counter coverings manufactured from wood fibre.

PAR. 6. The acts and practices of respondent, as herein set forth, are calculated to and do have the capacity and tendency of inducing many of the purchasing public to purchase said wall coverings and counter coverings as aforesaid, in the mistaken belief that they are purchasing wall coverings and counter coverings made of tile or marble.

PAR. 7. There are among the competitors of respondent engaged in the sale of wall coverings and counter coverings, as mentioned in paragraph 1 hereof, corporations, individuals, firms and partnerships, who sell and distribute wall coverings and counter coverings manufactured by the same methods as respondent's products, but who truthfully represent that the counter coverings and wall coverings sold by them are not tile or marble but are imitations of tile or marble. There are also among the competitors of respondent engaged in the sale and distribution of wall coverings and counter coverings, corporations, individuals, firms, and partnerships, who sell and distribute wall coverings and counter coverings which are made of clay baked in a kiln or oven, or wall coverings and counter coverings which are marble, and who truthfully represent the same to be tile or marble.

The acts and practices of respondent, as herein set forth, are calculated to, tend to and do unfairly divert trade to respondent from such corporations, individuals, firms and partnerships, engaged in the sale of wall coverings and counter coverings in interstate commerce, throughout the various States of the United States, and in the District of Columbia. By the acts and practices of the respondent hereinbefore set forth, substantial injury is done to competitors in interstate commerce.

PAR. 8. The above and foregoing acts, practices, and representations of respondent, have been, and are, all to the prejudice of the public and respondent's competitors as aforesaid, and have been, and

are, unfair methods of competition, 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."

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 May 29, 1936, issued, and on June 3, 1936, served its complaint in this proceeding upon respondent, The Marsh Lumber Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Alden S. Bradley and Morton Nesmith, attorneys for the Commission, before John J. Keenan, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Dyke and Schaines, attorneys for the respondent; and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto and testimony and other evidence; and the Commission having duly considered the same and being now fully advised in the premises, finds that this 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, The Marsh Lumber Company, is a corporation, organized and existing under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 535-611 Tuscarawas Avenue, city of Dover, State of Ohio. Respondent has been, during its corporate existence, engaged, among other things, in the business of selling and distributing wall coverings and counter coverings, which products are manufactured from wood fibre and which respondent designates as "Marsh tile," "Marsh Wall Tile," and "Marsh Marble."

Respondent, in the course and conduct of its business, has sold, distributed, and transported or caused to be transported, its aforesaid products from its place of business in the State of Ohio to

purchasers thereof located in various points of the States of the United States other than the State of Ohio, and has maintained a constant current of trade and commerce between and among the various States of the United States and in the District of Columbia.

There are among competitors of respondent many persons, firms and corporations located and doing business in the United States, engaged in the sale and transportation of tile in commerce between and among the different States of the United States, which tile is manufactured from clay and baked in kilns, whose products are properly described and designated as tile. There are others who sell and distribute wall coverings and counter coverings and various other products, such as copper tile, glass tile, wood tile, rubber tile, cork tile, and the like, whose products are properly designated and described by such names. There are also competitors of the respondent who sell and distribute wall coverings and counter coverings manufactured from quarried marble, who properly describe their products as marble.

PAR. 2. The term "tile," when used alone and not in conjunction with other words, is generally understood in the building trade and by the general public to be a hard clay product which has been baked in kilns and in its final form shaped into comparatively small-sized units. Tile, as so understood, is compounded from clays and a mixture of clays, feldspar, flint, talc, ball clays, prophyllite, aluminum hydroxide, silica, and some chemicals for coloring purposes. The materials are mixed in various proportions to produce various qualities in the tile. They are mixed in large mixing vats containing agitators, until the mixture of the ceramic materials with the admixture of water approaches the consistency of a thick soup. Then it is put in a filter press, the water being reduced to a certain percentage of the total content of the materials, and the materials coming from the filter press are dried until they have a moisture content ranging from ten to fifteen percent. The materials are then pulverized into a dust form, which is pressed into tiles of various shapes. The tiles are then dried down to approximately zero percent moisture content and fired in a kiln at a temperature exceeding red heat, which may run from twelve hundred degrees Fahrenheit upward. The purpose of this firing is to harden the ceramic material until it is an impervious, dense, durable mass. There are glazed and unglazed types of tiles. The unglazed tile has a rough, unfinished surface, while the glazed tile has a shiny glass or decorative surface, the glaze being matured after the first firing operation by the addition of certain mineral oxides, after which it is put

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through a process known as "gloss firing." Floor and wall tiles are produced in relatively small individual units, the extreme permissible size of the units being about six by twelve inches, the reason being that the manufacturers of ceramic products are confronted with the fact that clays and mixtures of clays with other materials, when formed into wares, undergo shrinkage during the drying and firing processes. Therefore, one of the problems of the tile manufacturer is to produce wares free from warping or cracking, and the larger the unit the greater the liability of warping and cracking resulting from shrinkage of the mixture.

Floor and wall tile of baked clay is installed upon a proper base and set in cement by workmen known as "tile setters." The term "tile" when used alone and without descriptive words, means ceramic tile, which is a more complete name for the product just described.

The use of the word "tile," standing alone and without descriptive words, dates back some four thousand years to the Egyptians, who, according to man's knowledge, were the first to discover the art of molding and baking clay into hard units, as above described.

There are sellers and distributors, however, of other products designed to be used as wall and counter coverings, whose said products are properly designated and described as rubber tile, glass tile, copper tile, acoustical tile, cork tile, composition tile, metal tile, cement tile, linoleum tile, wood tile, asphaltum tile, stone tile, and the like. These products are generally understood in the building trade and by a substantial portion of the general public as being coverings made from the substances so indicated by word or words preceding the word "tile."

The respondent's products, known as "Marshtile" and "Marsh Wall Tile," are compounded from wood chips and wood fibres and other substances, and siccative materials, which are unique, and are baked in an oven at a high temperature, pressed and tempered, so that the final product is a hard, durable sheeting or covering. These sheets can be cut in practically any size desired, but the general size ordinarily sold by respondent is three by four feet. The surfaces of these sheetings or coverings known as "Marshtile" and "Marsh Wall Tile," are scored or stamped by the manufacturer from whom respondent purchases, so that lines forming squares are impressed upon the sheets or coverings, and when painted or lacquered by respondent a different color from the remainder of the sheeting appears similar to mortar lines on a completely installed ceramic surface. The respondent, after finishing these products, brands and labels them "Marshtile" and "Marsh Wall Tile."

"Marble," as generally understood in the building trade and by the purchasing public, is a natural, one-piece, solid formation which is quarried out of the earth and cut and finished from the solid mass formation, and is capable of taking a polish.

PAR. 3. Many experts, including prominent architects, tile manufacturers, tile contractors, tile jobbers, professors of ceramics, structural engineers, architectural and structural standardists, and contractors, testified, and the Commission finds it to be a fact, that the word "tile" when standing alone means or connotes a baked clay or ceramic product; further, that the term "tile" standing alone does not have to be accompanied by the word "ceramic" to denote a ceramic tile. By the use of the word "tile" alone a ceramic tile is meant. There are different types of tiles, or ceramic tiling, such as roofing tiles, hollow tiles, drain tiles, and decorative wall tiles. The term "tile," if used in conjunction with some other word or words, descriptive of the material or substance of which the product is composed, means or connotes not a baked clay or ceramic product, but a product manufactured from the other material or substance employed. Examples of this are rubber tile, asbestos tile, cork tile, wood tile, tin tile, glass tile, and cement tile. These various products have been so known to the building trade and to a portion of the general public for a number of years. Several experts and others, including prominent architects, manufacturers, building contractors, jobbers and members of the general purchasing public, testified that the word "tile" when standing alone meant nothing to them, and they had to be informed of the substance of which the tile was made.

The Government of the United States, through the Procurement Department of the Treasury, in asking for bids on public buildings, includes in its specifications references to various products under the designation of cork tile, rubber tile, linoleum tile, acoustical tile, and others.

PAR. 4. Respondent, in the course and conduct of its business as aforesaid, in extensive advertising of its products, uses the names "Marshtile" and "Marsh Wall Tile." The aforesaid designations, when used alone by respondent as descriptive of or as a designation for its products, have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that the products so described are manufactured from baked clay, all of which is to the damage and injury of said purchasing public, and tends to and does divert trade from competitors of respondent, who sell and distribute tile products manufactured from baked clay.

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The use by the respondent of the words "Marsh Marble" has a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that the product so described is marble, to the damage and injury of the purchasing public, and tends to and does divert trade from competitors of respondent who quarry and finish marble.

PAR. 5. The designation and description by respondent of its products as "Marshtile" and "Marsh Wall Tile" as heretofore described, is deceptive and misleading, and has the capacity and tendency to deceive purchasers of said products into the belief that said products are manufactured from baked clay.

The designation and description by respondent of its product as "Marsh Marble," as heretofore described is deceptive and misleading, and has a capacity and tendency to deceive purchasers of said product into the belief that said product is marble, as before described.

CONCLUSION

The aforesaid acts and practices of the respondent, The Marsh Lumber Company, are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning 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 respondent, testimony and other evidence taken before John J. Keenan, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, no briefs being filed and oral argument not having been requested and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondent The Marsh Lumber Company, a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of its wall boards, wall coverings and counter coverings in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing:

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1. Directly or indirectly, by the use of the words "Marsttile," "Marsh Wall Tile," "Wall Tile," or "tile" that its products are "tile" unless in immediate conjunction with the words "tile," "Marsttile," "Marsh Wall Tile," or "Wall Tile" wherever used, in the same conspicuous type, there appear a word or words designating the material or substance of which the products are made, such as wood tile, glass tile, rubber tile, asbestos tile, copper tile, cork tile, or metal tile; and
2. Directly or indirectly, by the use of the words "Marsh Marble" or "Marble" that its products are marble, when such is not the fact.

It is further ordered, That the respondent shall, within 90 days after service upon it of this order, file with the Commission a report in writing setting forth in detail, the manner and form in which it has complied with this order.

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IN THE MATTER OF
LEWYN DRUG, INC.

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

Docket 2934. Complaint, Sept. 30, 1936—Decision, Nov. 6, 1937

Where a corporation engaged in the sale and distribution of various pharmaceutical preparations including, in tablet and capsule form, so-called "Dr. Haller's Prescription 5000," made for it by others and sold and distributed by it, through wholesale and retail druggists and direct to the consuming public on mail order, to purchasers in other States, in active competition with those engaged in manufacture and sale, or sale, of various preparations for treatment of conditions similar to those for which it recommended its aforesaid preparation—

- (a) Represented, in advertisements thereof in newspapers and periodicals of general circulation, and in circular letters distributed among its customers and prospective customers, that preparation in question was a safe and dependable remedy for delayed or suppressed menstruation, and that through the use thereof women suffering therefrom would end such condition and obtain relief safely, quickly and dependably, and that preparation in question had been dispensed to American women through ethical channels for almost half a century; and
- (b) Represented, as aforesaid, that said preparation was best product in the world for cases of unnaturally delayed menstruation and successfully relieved some of the longest and most stubborn cases, and that with it countless women had obtained and were obtaining most gratifying results; Facts being it would not bring about such relief or end such delay safely, quickly, and dependably, and was completely ineffectual in many cases, and use thereof was always dangerous, it was not best product in such unnaturally delayed cases, and did not successfully relieve some of the longest and most stubborn cases, and was not a dependable product nor a safe or competent abortifacient, and various representations aforesaid were false;

With effect of misleading and deceiving many members of the purchasing public and causing them erroneously to believe that said representations were true, and, because of such erroneous belief, to purchase substantial quantities of its said preparation, and of thereby diverting trade in such commerce to it from its competitors who truthfully represent their products; to their substantial injury and to that of public:

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

Before *Mr. Charles P. Vicini*, trial examiner.

Mr. Reuben J. Martin for the Commission.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commis-