

Syllabus

IN THE MATTER OF

W. H. BARNARD, TRADING AS W. H. BARNARD RUBBER
COMPANY

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

Docket 3520. Complaint, July 30, 1938—Decision, Mar. 15, 1939

Where an individual engaged in sale of garden hose and other rubber goods to customers in other States and in the District of Columbia, in substantial competition with the others engaged in sale and distribution of such products in commerce and in said District, and including many jobbers and distributors of like and similar products who do not falsely and deceitfully represent to public that they are manufacturers thereof, or that their products have a value, merit, and quality that they do not have—

- (a) Represented to prospective customers and to buying public generally that he was manufacturer of such goods and products by causing to appear on his letterheads word "Manufacturers," along with trade name employed by him and statement of goods dealt in, and such references in correspondence with customers and prospective customers as " * * * We bought a lot of Extra Heavy Yarn, at a price, and used it to make this Hose * * *," and "In order to keep our factory running full time * * *," and "As soon as we have received enough orders to run us full time * * *," etc., and, through such letterheads and aforesaid and other similar statements in correspondence, informed customers that he was a manufacturer of such products and owned or operated a factory, mill, or plant for manufacture thereof;

Facts being all garden hose sold by him for many years last past had been made by another company, to which he transmitted all orders for such goods and which filled same and made shipment thereof in his name from its said factory direct to purchasers, he was only jobber of rubber goods and not manufacturer of such products, for direct purchase of which as from manufacturer there is marked preference on part of substantial portion of purchasing public, as affording better prices, products, and advantages not obtainable from jobbers or other middlemen, and representations made by him as aforesaid were false and misleading; and

- (b) Sent to customers and prospective customers samples of garden hose, together with quoted price thereon, and represented that product offered, and which would be shipped upon order, was of same quality, fabric, material, construction, merit, and value as sample thus enclosed;

Facts being garden hose sold and shipped as result of such solicitation was of an inferior grade and quality to sample originally forwarded to purchaser, in that it contained approximately one-third less fabric;

With tendency and capacity to mislead and deceive substantial portion of purchasing public into erroneous belief that all said representations were true, and with effect of leading such public into false and erroneous belief that garden hose and other products sold and distributed by him were made by him and had a greater value, quality, and merit than they actually

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possessed, and with result, as direct consequence of such erroneous and mistaken belief, that number of consuming public purchased substantial volumes of his said product and trade was diverted unfairly to him from competitors likewise engaged in distribution and sale of garden hose and other products and who truthfully advertise the same:

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

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. Charles S. Cox for the Commission.

Saul, Ewing, Remick & Saul, of Philadelphia, Pa., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that W. H. Barnard, an individual trading and doing business under the name of W. H. Barnard Rubber Co., hereinafter referred to as the respondent, has violated the provisions of the 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. W. H. Barnard is an individual trading and doing business under the name of W. H. Barnard Rubber Co., with his principal office and place of business located at 131 South Fourth Street, Philadelphia, Pa.

PAR. 2. Respondent is now and for more than 2 years last past has been engaged in the business of selling garden hose and other rubber goods. Respondent causes said products when sold to be transported from the manufacturer in the State of New Jersey to his customers located in other States of the United States and in the District of Columbia.

Respondent maintains, and at all times mentioned herein, has maintained, a course of trade in said products sold and distributed by him in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his said business respondent is in active and substantial competition with other individuals and with partnerships and corporations engaged in the sale and distribution of garden hose and other rubber products, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of said business and for the purpose of inducing the purchase of his said products, respondent has

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represented to prospective customers and to the buying public generally that he is a manufacturer of garden hose, mechanical rubber goods, and other rubber products, by causing to appear on his letterheads, which he has transmitted to customers and prospective customers located in the various States of the United States and in the District of Columbia, the following words:

W. H. BARNARD RUBBER CO.

Manufacturers of

Mechanical Rubber Goods

Garden Hose Mats and Mattings

Respondent has further represented that he is a manufacturer of said products by including in his correspondence to customers and prospective customers in the various States of the United States and in the District of Columbia such phrases as:

We have 25,000 ft. of $\frac{5}{8}$ " Extra Heavy One Braid Brown Corrugated Barnard Moulded Garden Hose, like sample enclosed. We bought a lot of Extra Heavy Yarn, at a price, and used it to make this Hose and are giving our customers the benefit of the purchase. Quote you a special price of $5\frac{1}{2}\text{¢}$ per ft. coupled in 50 ft. sections, freight prepaid on full bales (500 ft.) or more;

In order to keep our factory running full time the month of November; and,

As soon as we have received enough orders to run us full time for the month of November.

Respondent's letterheads and all said statements, together with similar statements appearing in respondent's correspondence, inform his customers that respondent is a manufacturer of garden hose and rubber products and owns or operates a factory, mill, or plant for the manufacture of said product.

PAR. 5. The representations thus made by respondent are false and misleading. In truth and in fact, respondent is not a manufacturer of garden hose or other rubber products, and neither owns, operates, nor controls any factory, plant, or mill for the manufacture of such products. Respondent is only a jobber of rubber goods. All the garden hose sold by him for many years last past has been manufactured by the Thermoid Co., a corporation having its offices and factory at Trenton, N. J., and all orders for such goods received by respondent have been, and are, transmitted by him to the Thermoid Co. at its place of business in Trenton, N. J., where the said Thermoid Co. fills all of such orders and makes shipments in respondent's name from the factory of said company in Trenton, N. J., direct to the purchasers in the various States of the United States and in the District of Columbia.

PAR. 6. In the course and conduct of said business and for the purpose of inducing the purchase of his said garden hose, respondent

has sent and is sending to customers and prospective customers, located in the various States of the United States and in the District of Columbia, samples of garden hose, quoting his price thereon and representing that the product thus offered for sale and which will be shipped upon order, is of the same quality, fabric, material, construction, merit, and value as the sample so enclosed. In truth and in fact, the garden hose thus sold and shipped as a result of said solicitation was and is of an inferior grade and quality to the sample originally forwarded to the purchaser, in that the product so sold and shipped by respondent contains approximately one-third less fabric, the fabric portion of same being braided with one end per carrier, each end being composed of a six-ply yarn, while the fabric portions of the sample forwarded by said respondent are braided with two ends per carrier, each end being composed of three strands, and each strand being a two-ply yarn.

PAR. 7. For many years a substantial portion of the purchasing public has shown a marked preference for products sold and distributed to the public by the manufacturers thereof, said preference resulting from the belief that the manufacturer is able to offer better prices, superior products and other advantages not obtainable from jobbers or other middlemen.

There are among the competitors of respondent, many who are jobbers and distributors of like and similar products, who do not falsely and deceitfully represent to the public that they are manufacturers of such products, or that the products they are selling and offering for sale, have a value, merit, and quality that they do not have.

PAR. 8. Each and all of the false and misleading statements and representations made by respondent, as hereinabove alleged, were and are calculated to, and have had and now have, a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that all of said representations are true, and have led said purchasing public into the false and erroneous belief that the garden hose and other rubber products sold and distributed by respondent are manufactured by him, and that said products have a greater value, quality, and merit than they do actually have.

As a direct result of this erroneous and mistaken belief, a number of the consuming public have purchased a substantial volume of respondent's said product, with the result that trade has been diverted unfairly to respondent from his competitors, likewise engaged in the business of distributing and selling garden hose and other products, who truthfully advertise their respective products. As a result thereof, injury has been and is now being done by respondent to com-

petition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 9. The aforesaid acts and practices of the respondent, as herein alleged, are all 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 the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on July 30, 1938, issued and served its complaint in this proceeding upon respondent, W. H. Barnard, an individual, trading as W. H. Barnard Rubber Co., charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. On February 28, 1939, the respondent filed his answer, in which answer he admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to said facts. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint and answer thereto, and the Commission, having duly considered the matter, 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. W. H. Barnard is an individual, trading and doing business under the name of W. H. Barnard Rubber Co., with his principal office and place of business located at 131 South Fourth Street, Philadelphia, Pa.

PAR. 2. Respondent is now and for more than 2 years last past has been engaged in the business of selling garden hose and other rubber goods. Respondent causes said products when sold to be transported from the manufacturer in the State of New Jersey to his customers located in other States of the United States and in the District of Columbia.

Respondent now maintains, and has for more than the past 2 years maintained, a course of trade in said products sold and distributed by him in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his said business respondent is in active and substantial competition with other individuals and

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with partnerships and corporations engaged in the sale and distribution of garden hose and other rubber products, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of said business and for the purpose of inducing the purchase of his said products, respondent has represented to prospective customers and to the buying public generally that he is a manufacturer of garden hose, mechanical rubber goods, and other rubber products, by causing to appear on his letterheads, which he has transmitted to customers and prospective customers located in the various States of the United States and in the District of Columbia, the following words:

W. H. BARNARD RUBBER CO.
Manufacturers of
Mechanical Rubber Goods
Garden Hose Mats and Mattings

Respondent has further represented that he is a manufacturer of said products by including in his correspondence to customers and prospective customers in the various States of the United States and in the District of Columbia such phrases as:

We have 25,000 ft. of 5/8" Extra Heavy One Braid Brown Corrugated Barnard Moulded Garden Hose, like sample enclosed. We bought a lot of Extra Heavy Yarn, at a price, and used it to make this Hose and are giving our customers the benefit of the purchase. Quote you a special price of 5½¢ *per ft. coupled in 50 ft. sections, freight prepaid* on full bales (500 ft.) or more;

In order to keep our factory running full time the month of November; and,

As soon as we have received enough orders to run us full time for the month of November.

Respondent's letterheads and all said statements, together with similar statements appearing in respondent's correspondence, inform his customers that respondent is a manufacturer of garden hose and rubber products and owns or operates a factory, mill, or plant for the manufacture of said products.

PAR. 5. The representations thus made by respondent are false and misleading. In truth and in fact, respondent is not a manufacturer of garden hose or other rubber products, and neither owns, operates, nor controls any factory, plant, or mill for the manufacture of such products. Respondent is only a jobber of rubber goods. All the garden hose sold by him for many years last past has been manufactured by the Thermoid Co., a corporation having its offices and factory at Trenton, N. J., and all orders for such goods received by respondent have been, and are, transmitted by him to the Thermoid Co. at its place of business in Trenton, N. J., where the said

Thermoid Co. fills all of such orders and makes shipments in respondent's name from the factory of said company in Trenton, N. J., direct to the purchasers in the various States of the United States and in the District of Columbia.

PAR. 6. In the course and conduct of said business and for the purpose of inducing the purchase of his said garden hose, respondent has sent and is sending to customers and prospective customers, located in the various States of the United States and in the District of Columbia, samples of garden hose, quoting his price thereon and representing that the product thus offered for sale and which will be shipped upon order, is of the same quality, fabric, material, construction, merit, and value as the sample so enclosed. In truth and in fact, the garden hose thus sold and shipped as a result of said solicitation was and is of an inferior grade and quality to the sample originally forwarded to the purchaser, in that the product so sold and shipped by respondent contains approximately one-third less fabric, the fabric portion of same being braided with one end per carrier, each end being composed of a six-ply yarn, while the fabric portions of the sample forwarded by said respondent are braided with two ends per carrier, each end being composed of three strands, and each strand being a two-ply yarn.

PAR. 7. For many years a substantial portion of the purchasing public has shown a marked preference for products sold and distributed to the public by the manufacturers thereof, said preference resulting from the belief that the manufacturer is able to offer better prices, superior products, and other advantages not obtainable from jobbers or other middlemen.

There are among the competitors of respondent, many who are jobbers and distributors of like and similar products, who do not falsely and deceitfully represent to the public that they are manufacturers of such products, or that the products they are selling and offering for sale, have a value, merit, and quality that they do not have.

PAR. 8. Each and all of the false and misleading statements and representations made by respondent, as aforesaid, were and are calculated to, and have had and now have, a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that all of said representations are true, and have led said purchasing public into the false and erroneous belief that the garden hose and other rubber products sold and distributed by respondent are manufactured by him, and that said products have a greater value, quality, and merit than they do actually have.

As a direct result of this erroneous and mistaken belief, a number of the consuming public have purchased a substantial volume of respondent's said product, with the result that trade has been diverted unfairly to respondent from his competitors, likewise engaged in the business of distributing and selling garden hose and other products, who truthfully advertise their respective products.

CONCLUSION

The aforesaid acts and practices of the respondent are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint, and states that he waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, W. H. Barnard, an individual, trading as W. H. Barnard Rubber Co., or under any other name or names, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of rubber garden hose and other rubber goods in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or indirectly that respondent manufactures said products, unless and until respondent owns and operates or directly and absolutely controls the factory or plant wherein said products are manufactured.

2. Representing that a product similar to sample displayed will be delivered, unless in fact the product delivered is of the same quality, fabric, material, construction, and value as the sample.

3. Representing directly or indirectly that said products are of a quality, fabric, material, construction, or value other than such products are in fact.

It is further ordered, That respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with this order.

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IN THE MATTER OF

MARTIN M. SLATON, INDIVIDUALLY, AND TRADING AS
ALLIED GIFT SHOPCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3252. Complaint, Oct. 25, 1937—Decision, Mar. 16, 1939*

Where an individual engaged in sale and distribution of various novelties and articles of merchandise, including rotary clocks, electric razors, toasters, and other articles; in soliciting sale of and in selling and distributing his said products—

Furnished with such articles various devices and plans of merchandising which involved operation of games of chance, gift enterprises, or lottery schemes for distribution of such merchandise to ultimate consumer, wholly by lot or chance, and which included number of different types of push cards for use in sale and distribution of said products under plan and in accordance with said card's explanatory legends, pursuant to which amount paid by customer or, in case of some, receipt of free chance, was dependent upon number pushed by chance, and receipt of article being thus disposed of was dependent upon success or failure in selecting, from list on card, girl's name corresponding to that concealed under card's master seal and selectors of certain numbers, in case of some, received secondary prizes and under which, failing such contingencies, customers received nothing, and operator handling cards received for his services one of articles without additional charge; and

Supplied thereby and placed in the hands of others, means by which lotteries were conducted in the sale of his said merchandise in accordance with such sales plan, under which various articles were distributed to members of the public wholly by lot or chance and amount that each member of public was required to pay for chance to participate in lottery was also thus determined, and involving game of chance or sale of a chance to procure articles of merchandise for sums much below the prices for which they sell in usual course of trade, contrary to an established public policy of the United States Government and in violation of the laws of several of the States, and in competition with many engaged in sale of articles of like or similar grade and quality and who are not willing to sell such articles by any sales plan involving game of chance, gift enterprise, or lottery scheme, and refrain from use thereof;

With result that many persons were attracted by said sales plan and element of chance involved therein and were thereby induced to purchase articles from him and resell same to consuming public by use of such plan in preference to buying and reselling like or similar articles of merchandise offered by competitors who do not make use of such or equivalent sales plan, and he was thus able to sell substantial quantities of some of the articles dealt in by him and trade was diverted unfairly to him from competitors;