

Complaint

IN THE MATTER OF

JOHN H. MULKEY, TRADING AS WESTERN NOVELTY
COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 4082. Complaint, Apr. 4, 1940—Decision, July 16, 1940*

Where an individual engaged in offering for sale novelty jewelry, including finger rings with setting of hematite or certain nonprecious crystal, to dealer purchasers in various States and in the Territory of Alaska, and in substantial competition as thus engaged with others engaged in sale of novelty jewelry and gem jewelry, including rings as aforesaid, and including some who sell rings set with nonprecious crystals, including hematite, and who do not in any manner misrepresent their products or origin thereof—

Represented and implied that hematite settings in his said rings were diamonds or gem or jewel stones of dark or unusual color produced in Alaska, through such typical statements, etc., in advertisements circulated among prospective purchasers, as "Alaska Black Diamond" and "Genuine Laska Black Diamond" and through latter words also on metal tag customarily attached to such rings, and through statements on placards circulated by him among tourists journeying to Alaska and advertising his said products as "sold at all reliable curio and jewelry stores in Alaska—Watch for this label (meaning tag above referred to and depicted in advertisement)—There are imitations on the market";

Fact being none of his said rings were set with diamonds or gem or jewel settings but, as indicated, with ground, shaped, polished settings of hematite crystals, substance of which is not precious stone or gem, but is an ore of iron and called also in crystal form "Specular Iron" and constitutes nonprecious crystal of variable dark colors;

With result that purchasing public was deceived and erroneously led to believe and understand that his said rings were in fact set with diamonds or jewels or gems of dark and unusual color, produced in Alaska, and with consequence, as result of such belief, that number of purchasing public bought his said rings and trade was thereby diverted unfairly to him from his competitors in commerce between and among the various States and with said Territory; to their injury and that of public:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and competitors, and constituted unfair methods of competition in commerce, and unfair and deceptive acts and practices therein.

Mr. Wm. T. Chantland for the Commission.

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 John H. Mulkey, an individual, trading as Western Novelty Co., has violated the pro-

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visions of 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, John H. Mulkey, an individual, trading as Western Novelty Co., with his office and principal place of business at 305 Southwest Third Avenue, Portland, Oreg., is now and for several years last past has been, engaged in the business of offering for sale and selling novelty jewelry, including finger rings with settings of hematite, a nonprecious crystal, to dealer purchasers in various States of the United States and in the Territory of Alaska, and in so offering said wares for sale, and when so sold to dealer purchasers outside of the State of Oregon, respondent has caused said wares to be transported from his principal place of business in Oregon to said dealer purchasers in various States of the United States and the Territory of Alaska.

PAR. 2. In the course and conduct of his said business, respondent is now, and for more than 2 years last past has been, in substantial competition with corporations and with individuals, firms, and partnerships engaged in the business of selling novelty jewelry and gem jewelry, including finger rings, in commerce among and between the various States of the United States and with the Territory of Alaska. Among said competitors are many who sell rings set with nonprecious crystals, including hematite, and who do not in any manner misrepresent their products or the origin thereof.

PAR. 3. In the course and conduct of his business in said commerce as aforesaid and to induce the purchase of his said rings, respondent has circulated among prospective purchasers of such rings advertisements containing statements and representations with reference to said rings and with reference to the material of which the ring sets are composed. Among and typical of the statements and representations so made and circulated by the respondent are the following:

Alaska Black Diamond and
Genuine Laska Black Diamond

On a metal tag customarily attached to said rings appears the statement—"Genuine Laska Black Diamond." In circulars circulated among prospective purchasers, and more particularly among tourists journeying to the Territory of Alaska, the respondent has and does circulate placards advertising said rings, upon which appears the following statement:

Sold at all reliable curio and jewelry stores in Alaska. Watch for this label. There are imitations on the market.

The warning in such statement to watch for "this label" refers to the metal tag above mentioned which is depicted in said advertisement.

PAR. 4. By the means and in the manner aforesaid, respondent represents that the sets in said rings are diamonds, or stones or jewels produced in Alaska and known as Alaska Black Diamond, and through the use of the aforesaid statement warning prospective purchasers that "there are imitations on the market" imports and implies that rings manufactured by competitors and offered for sale and sold to the public containing sets of hematite, as do respondent's rings, are imitations and that respondent's rings contain the "genuine" stone or jewel.

In truth and in fact the sets in said rings are not diamonds, or a stone or jewel produced in Alaska known as Alaska Black Diamonds, but are composed of a nonprecious crystal hematite, as hereinabove alleged.

PAR. 5. The acts and practices of the respondent, as aforesaid, in designating, describing, and referring to said hematite sets as "Alaska Black Diamond" and "Genuine Laska Black Diamond" and warning the public to beware of imitations, have the capacity and tendency to and do mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said rings are set with diamonds, or with stones or jewels produced in Alaska and known as Alaska Black Diamonds. As a result of said erroneous and mistaken belief, members of the purchasing public have purchased a substantial volume of respondent's said hematite rings, thereby unfairly diverting trade to respondent from its competitors in said commerce to their injury and to the injury of the public.

PAR. 6. The aforesaid acts and practices of the respondent are to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 April 4, 1940, issued and thereafter caused its complaint to be served in this proceeding upon respondent John H. Mulkey, an individual trading as Western Novelty Co., charging him with the use of unfair methods of competition in commerce and with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts signed and executed by the respondent and W. T. Kelley, chief counsel for the Federal Trade Commission, subject to the approval of the Commission, may be taken as the facts in this proceeding and in lieu of testimony in support of

the charges stated in the complaint or in opposition thereto, and that the Commission may proceed upon such statement of facts to make its report stating its findings as to the facts and its conclusion based thereon and enter its order disposing of the proceeding without further presentation of argument or the filing of briefs. Thereafter this proceeding regularly came on for final hearing before the Commission on said complaint, the answer and stipulation, said stipulation having been approved, accepted and filed, 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 its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, John H. Mulkey, is an individual, trading as Western Novelty Co., with his office and principal place of business at 305 Southwest Third Avenue, Portland, Oreg., and is now and for several years last past has been, engaged in the business of offering for sale and selling novelty jewelry, including finger rings with settings of hematite, a nonprecious crystal, to dealer purchasers in various States of the United States and in the Territory of Alaska, and in so offering said wares for sale, and when so sold to dealer purchasers outside of the State of Oregon, respondent has caused said wares to be transported from his principal place of business in Oregon to said dealer purchasers in various States of the United States and in the Territory of Alaska.

PAR. 2. In the course and conduct of his said business, respondent is now, and for more than 2 years last past has been, in substantial competition with corporations, individuals, firms, and partnerships engaged in the business of selling novelty jewelry and gem jewelry, including finger rings, in commerce among and between the various States of the United States and with the Territory of Alaska. Among said competitors are some who sell rings set with nonprecious crystals, including hematite, and who do not in any manner misrepresent their products or the origin thereof.

PAR. 3. In the course and conduct of his business in said commerce as aforesaid and to induce the purchase of his said rings, respondent has circulated among prospective purchasers' of such rings advertisements containing statements and representations with reference to said rings and with reference to the material of which the ring sets are composed. Among and typical of the statements and representations so made and circulated by the respondent are the following:

Alaska Black Diamond and
Genuine Laska Black Diamond

On a metal tag customarily attached to said rings appears the statement—"Genuine Laska Black Diamond." In circulars circulated among prospective purchasers, and more particularly among tourists journeying to the Territory of Alaska, the respondent has and does circulate placards advertising said rings, upon which appears the following statement:

Sold at all reliable curio and jewelry stores in Alaska. Watch for this label. There are imitations on the market.

The warning in such statement to watch for "This label" refers to the metal tag above mentioned which is depicted in said advertisement.

None of respondent's said finger rings transported and sold under the advertising and representations stated above, are set with diamonds or gem or jewel settings, but are, in fact, set with ground, shaped, polished settings of hematite crystals. Hematite is not a precious stone or gem, but is an ore of iron, and in crystal form is also called "Specular Iron," a nonprecious crystal of variable dark colors.

By the means and in the manner above described, respondent implied and represented that the settings in his said rings were diamonds or gem or jewel stones of dark and unusual color produced in Alaska, when such are not the facts.

PAR. 4. As a result of the above stated acts and practices of respondent in making the aforesaid representations with regard to said hematite set finger rings, the purchasing public has been and is being deceived and erroneously led to believe and understand that respondent's said rings are, in fact, set with diamonds, or jewels or gems of dark and unusual color produced in the Territory of Alaska, and as a result of this mistaken and erroneous belief a number of the purchasing public have purchased respondent's said rings and as a consequence trade has been unfairly diverted to the respondent from his competitors in commerce between and among the various States of the United States and with the Territory of Alaska to their injury and the injury of the public.

CONCLUSION

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

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ORDER TO CEASE AND DESIST

This proceeding having been heard and considered by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, and a stipulation as to the facts entered into by and between W. T. Kelley, chief counsel for the Commission, and John H. Mulkey, respondent, which has been duly approved by the Commission, and the Commission having made its findings as to the facts and its conclusion that respondent John H. Mulkey, trading as Western Novelty Co., has violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent John H. Mulkey, individually, or trading as Western Novelty Co., or under any other trade or through any corporate or other device, his agents, representatives and employees in connection with the offering for sale, sale and distribution of rings in commerce between and among the various States of the United States and within the Territory of Alaska, do forthwith cease and desist from:

Representing, directly or by implication, that rings set with hematite, or any nonprecious crystal or stone, are set with diamonds, "Alaska Black Diamonds," or "Genuine Laska Black Diamonds"; or that such rings are set with any precious or semiprecious stones; or that the sets in said rings are produced in the Territory of Alaska.

It is further ordered, That the respondent shall, within 60 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.

Syllabus

IN THE MATTER OF
ATLANTIC COMMISSION COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (c) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED
BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3344. Complaint, Mar. 2, 1938—Decision, July 24, 1940

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (C)—BROKERAGE OR COMMISSION
PROVISIONS—SELLER TO BUYER PAYMENTS—SERVICES RENDERED CLAUSE.

The payment of brokerage to, and the receipt thereof by, a buyer upon his own purchases of commodities in interstate commerce is prohibited by paragraph (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C., sec. 13 (c)), and the services rendered clause of that paragraph sets up no condition upon which such brokerage may be paid or received. *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. (2d) 687 (C. C. A. 2d, 1938) 26 F. T. C. 1511, cert. denied 305 U. S. 634 (1938); *Oliver Brothers v. Federal Trade Commission*, 102 F. (2d) 763 (C. C. A. 4th, 1939) 28 F. T. C. 1926; *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. (2d) 667 (C. C. A. 3d, 1939) 29 F. T. C. 1591, cert. denied 308 U. S. 625, 60 S. Ct. 380 (1940), rehearing denied 309 U. S. 694, 60 S. Ct. 466 (1940); and *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. (2d) 268 (C. C. A. 5th, 1940) 30 F. T. C. 1630, cert. denied 310 U. S. 638, 60 S. Ct. 1080 (1940).

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (C)—BROKERAGE OR COMMISSION
PROVISIONS—SELLER TO BUYER PAYMENTS—BUYER BROKERAGE CONCERN ON OWN
ACCOUNT PURCHASES—SERVICES RENDERED CLAUSE.

Where a corporate concern which (1) was a wholly owned subsidiary of a corporation engaged, through several other wholly owned corporate subsidiaries bearing same name, in retail grocery business and in operation of several thousand retail grocery stores owned by it and located in 38 States of the United States, and in the District of Columbia, and which (2) was engaged in buying, selling, and distributing fresh fruits and vegetables and other commodities on and for its own account and on and for the account of aforesaid corporations, and also in thus buying, selling, and distributing such various products and commodities as a broker and on consignment as a commission merchant for the accounts of other sellers and buyers, and which, along with aforesaid corporations, was in substantial competition with others engaged in like businesses;

In purchasing in interstate commerce from various sellers, on and for its own account, substantial quantity of fresh fruits and vegetables—

- (a) Received and accepted allowances and discounts in lieu of brokerage upon its own purchases of commodities in interstate commerce, and without the intervention of a broker, through practice of making such purchases at a "net price" or "net basis" reflecting a reduction from the prices at which sellers were currently selling commodities to other buyers, many of