

IN THE MATTER OF
SAMUEL SWIMMER, DOING BUSINESS AS SEABOARD
PAINT & VARNISH COMPANY

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

Docket 4014. Complaint, Feb. 5, 1940—Decision, Aug. 5, 1940

Where an individual engaged in reconditioning "Spray Booth Off Fall" paint, or product lost in painting of various products with spray guns, and in sale and distribution of such reconditioned product as outside paint to purchasers in various other States and in the District of Columbia; in letters mailed to prospective purchasers in various States—

- (a) Represented that the usual, regular and customary price of said product was \$2.65 a gallon, and that it was being offered and would be sold at a sacrifice price of \$1.55, and that he had, in a warehouse located in the vicinity of the recipient, some 100, or other specified number, of gallons of such product, accounting for reputed sacrifice in price, facts being regular price thereof was that at which offered, and he did not have said quantity thereof, or any other number of gallons of paint, in a warehouse in recipient's vicinity, but product was warehoused at his place of business in New York State and shipments made therefrom to purchasers; and
- (b) Represented that said product was manufactured for use on surfaces exposed to the weather and was clean, fresh stock in perfect condition and of extremely high quality, and would last practically a lifetime, facts being it was not made for use on outside or exposed surfaces, but for use in the painting of "frigidaires," ice boxes and other articles of merchandise not exposed to the weather, was not clean, fresh stock, as aforesaid, but made from paint lost or wasted in painting of various products with spray guns, and did not last practically a lifetime;

With effect of misleading substantial portion of purchasing public into mistaken and erroneous belief that such representations were true and, by reason of such belief, of causing substantial portion of such purchasing public to buy said products:

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

Before *Mr. L. C. Russell*, trial examiner.

Mr. Clark Nichols for the Commission.

Mr. Simon Michelet, of Washington, D. C., 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 Samuel Swimmer, an individual doing business under the firm name of Seaboard Paint

& Varnish 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. Respondent, Samuel Swimmer, is an individual, trading and doing business under the firm name of "Seaboard Paint & Varnish Co." with its principal place of business at 275 Russell Street, Brooklyn, N. Y. Respondent is now and has been for more than 2 years last past engaged in the sale and distribution of paint. The paint offered for sale and sold by respondent is commonly known as "spray booth off fall" paint, which is paint that is lost in the painting of various products with spray guns. This paint is reconditioned by the respondent and sold as an outside paint. Respondent causes said product, when sold by him, to be transported from his place of business in the State of New York to purchasers thereof at their respective points of location in various 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 product in commerce among the between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business and for the purpose of inducing the purchase of his said product, the respondent has mailed to prospective purchasers located in various of the several States of the United States, letters containing representations as to the price and quality of such product. Typical of the letters mailed to prospective purchasers by the respondent as aforesaid, containing such representations is the following:

In a warehouse near you, we have 100 one gallon cans, packed in cartons, of our Outside White Paint, guaranteed to be clean fresh stock in perfect condition which we will sacrifice for \$1.55 per gallon, delivered, freight prepaid; original price was \$2.65 per gallon.

This material is superior in quality and composition to the most expensive made well known brands of Outside White and is far superior to White Lead as to whiteness and durability.

Its unusual high quality makes it ideal for inside and outside painting on wood, metal, concrete or over old paint. It covers solid in one coat, brushes easily and dries in six hours. Endures severest exposures without cracking, chipping or flaking and lasts practically a life time.

Through the use of the foregoing statements and others of similar import and meaning not set out herein, the respondent represents and implies that the regular and customary price of said paint is \$2.65 per gallon and that it is being offered for sale and will be sold at a sacrifice price of \$1.55 per gallon; that said paint was

manufactured for use on surfaces exposed to the weather; and that the respondent has, in a warehouse located in the vicinity of the recipient of the letter, some 100 or other specified number of gallons of such paint, which accounts for the sacrifice he is reputedly making in price, and that such paint is of clean fresh stock, in perfect condition, and that it is of extremely high quality and "lasts practically a life time."

PAR. 3. The above representations are false, misleading, and deceptive, for in truth and in fact, the usual, regular and customary price of the paint referred to in said letters is not \$2.65 per gallon but is \$1.55 per gallon, the price at which it is offered for sale to the recipients of such letters. The respondent does not have 100 gallons of paint or any other number of gallons of paint at a warehouse located in the vicinity of the recipient of the letter containing such representation for, in truth and in fact, all of respondent's paint is warehoused at his place of business in the State of New York and all shipments are made therefrom to purchasers. Respondent's paint was not manufactured for use on outside or exposed surfaces, but was manufactured for use in the painting of "frigidaires," ice boxes and other articles of merchandise which are not exposed to the weather. Respondent's paint is not of clean fresh stock, but is made as alleged from paint lost or wasted in the painting of various products with spray guns, and it does not "last practically a lifetime" or any other such extended period of time.

PAR. 4. The use by the respondent of the foregoing false and misleading representations and implications respecting his said product as to its price, quality and location has had, and now has, the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that such representations and implications are true, and causes a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase said product.

PAR. 5. The aforesaid acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute 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 the 5th day of February 1940, issued and served its complaint in this proceeding upon respondent Samuel Swimmer, doing business as Seaboard Paint & Varnish Co.,

charging him with 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, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answer was filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer 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. Respondent, Samuel Swimmer, is an individual trading and doing business under the firm name of Seaboard Paint & Varnish Co., with his principal place of business at 275 Russell Street, Brooklyn, N. Y. Respondent is now, and has been for more than 2 years last past, engaged in the sale and distribution of paint. The paint offered for sale and sold by respondent is commonly known as "Spray Booth Off Fall," which is paint that is lost in the painting of various products with spray guns. This paint is reconditioned by respondent and sold as an outside paint. Respondent causes said product, when sold by him, to be transported from his place of business in the State of New York to purchasers thereof at their respective points of location in various 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 product in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business and for the purpose of inducing the purchase of his said product, the respondent has mailed to prospective purchasers located in various of the several States of the United States, letters containing representations as to the price and quality of such product. Typical of the letters mailed to prospective purchasers by respondent as aforesaid, containing such representations, is the following:

In a warehouse near you we have 100 one-gallon cans, packed in cartons, of our Outside White Paint, guaranteed to be clean fresh stock in perfect condition which we will sacrifice at \$1.55 per gallon, delivered, freight prepaid; original price was \$2.65 per gallon.

Conclusion

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This material is superior in quality and composition to the most expensively made well-known brands of Outside White and is far superior to White Lead as to whiteness and durability.

Its unusual high quality makes it ideal for inside and outdoor painting on wood, metal, concrete or over old paint. It covers solid in one coat, brushes easily and dries in six hours. Endures severest exposures without cracking, chipping or flaking and lasts practically a lifetime.

Through the use of such statements, the respondent represents and implies that the regular and customary price of said paint is \$2.65 per gallon and that it is being offered for sale and will be sold at a sacrifice price of \$1.55 per gallon; that said paint was manufactured for use on surfaces exposed to the weather; that the respondent has, in a warehouse located in the vicinity of the recipient of the letter, some one hundred or other specified number of gallons of such paint, which accounts for the sacrifice he is reputedly making in the price, and that such paint is of clean fresh stock, in perfect condition, and that it is of extremely high quality, and lasts practically a lifetime.

PAR. 3. The above representations are false, misleading, and deceptive. The usual, regular, and customary price of the paint referred to in said letters is not \$2.65 per gallon, but is \$1.55 per gallon, the price at which it is offered for sale to the recipients of such letters. The respondent does not have 100 gallons of paint or any other number of gallons of paint in a warehouse located in the vicinity of the recipient of the letter containing such representations. All of respondent's paint is warehoused at his place of business in the State of New York and all shipments are made therefrom to purchasers. Respondent's paint was not manufactured for use on outside or exposed surfaces, but was manufactured for use in the painting of "frigidaire," ice boxes and other articles of merchandise which are not exposed to the weather. Respondent's paint is not of clean, fresh stock, but is made from paint lost or wasted in the painting of various products with spray guns, and it does not last practically a lifetime.

PAR. 4. The use by the respondent of the foregoing false and misleading representations and implications respecting his said product as to its price, quality, or location has had, and now has, the capacity and tendency to mislead, and does mislead, a substantial portion of the purchasing public into the mistaken and erroneous belief that said representations are true and causes a substantial portion of the purchasing public to purchase said products because of such mistaken and erroneous belief.

CONCLUSION

The aforesaid acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and constitute unfair

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Order

and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST¹

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, Samuel Swimmer, his representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of reclaimed or reconditioned paint in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that the usual, regular, or customary price per gallon of said paint is \$2.65, or any sum in excess of the price at which said paint is usually and customarily sold.

2. Representing that respondent has a quantity of said paint warehoused at any point other than his place of business, when in fact he does not have any of said paint warehoused at such other point or points.

3. Representing that said paint was manufactured for use on outside or exposed surfaces or that said paint is clean, fresh stock and will last practically a lifetime.

It is further ordered, That the 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.

¹ Order published as modified as of October 1, 1940.

IN THE MATTER OF
CHARLES POLK, TRADING AS SALES PROMOTING
COMPANY

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

Docket 4175. Complaint, July 6, 1940—Decision, Aug. 5, 1940

Where an individual engaged in sale and distribution of watches, clocks, leather goods, electric lamps, and various other articles of merchandise, to purchasers in various States; in soliciting the sale of and in selling and distributing his said products—

Furnished various devices and plans of merchandising which involved operation of games of chance, gift enterprise, or lottery schemes, including plan under which he sold to fraternal and charitable organizations contacted by him articles of merchandise dealt in by him as above indicated, together with push cards for use in sale and distribution of merchandise in question to purchasing public by said organizations' members, under scheme or plan by which person selecting by chance one of feminine names displayed corresponding to name concealed under card's master seal became entitled to one of articles of merchandise being thus disposed of, and operator and seller of chances was similarly compensated for his services, and amount paid by each purchaser of chance was dependent upon number concealed and secured under disk selected; and

Supplied thereby to and placed in the hands of others, in accordance with aforesaid and similar plans involving the furnishing of other push cards and lottery devices for use in sale and distribution of such merchandise, means of conducting lotteries in sale of his said products in accordance with such plans, as above set forth, involving game of chance or sale of a chance to procure an article of merchandise at a price much less than normal retail price thereof, contrary to an established public policy of the United States Government and in violation of the criminal laws, and in competition with many who are unwilling to adopt and use said or any method involving game of chance or sale of a chance to win something by chance, or any other method contrary to public policy, and refrain therefrom;

With result that many persons were attracted by said sales plan or method employed by him in sale and distribution of his merchandise, and element of chance involved therein, and were thereby induced to buy and sell same in preference to that offered and sold by competitors aforesaid, who do not use such or equivalent method, and with effect through use of such method and game of chance aforesaid, of unfairly diverting trade to him from his said competitors who do not use such or equivalent method; to the substantial injury of competition in commerce:

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 practice therein.

Mr. D. C. Daniel for the Commission.