

IN THE MATTER OF

JACOB SWIMMER, DOING BUSINESS AS NATIONAL
LACQUER MANUFACTURING CO. AND NATIONAL
TITANIUM CO.

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

Docket 4088. Complaint, Apr. 12, 1940—Decision, July 20, 1942¹

Where an individual, engaged in the interstate sale and distribution of re-conditioned paint which he obtained as waste or salvage material resulting from use of a spray gun by manufacturers of automobiles, electric refrigerators, and other metal products, and reclaimed through the adding of solvents and removal of impurities—

- (a) Represented, by means of sales letters and advertising circulars which were given wide distribution, that the regular and customary price of his paint was \$3.65 per gallon, and that the quoted price thereof of \$1.55 constituted a special, reduced, and sacrifice price;

The facts being said last figure was his usual and customary selling price, and while the manufacturing concerns from whom he obtained his waste material might have paid approximately the higher price for the original paint, he never sold his reconditioned product at any price approaching such figure;

- (b) Represented that he maintained warehouses at numerous points throughout the United States, one of which was located near the prospective purchaser, and that the quantity of paint available from such warehouse at the quoted price was limited to the specific amount mentioned in his letter;

The facts being he had no warehouses other than that maintained by him in Vernon, Calif., in connection with his processing plant, from which he customarily filled the order, and it was only in exceptional cases that he was able to fill an order with a quantity of paint already in the purchaser's vicinity; and contrary to the implications in his said letter referring to "100 gallons" or some other specific amount, he was prepared to and did fill all orders received, at said purported "sacrifice price";

- (c) Falsely represented that his said product was "fresh stock" made entirely from new and unused materials, and obtained direct from the original manufacturer; and

- (d) Failed to reveal, either in his letters or other advertising material or on the labels affixed to the containers, that said product was reclaimed and reconditioned;

With tendency and capacity to mislead and receive a substantial portion of the purchasing public with respect to the nature and value of said product, thereby causing it to purchase substantial quantities thereof as a result of such mistaken belief;

¹ Modified order, published herewith, was made as of September 18, 1942.

Complaint

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

Before *Mr. John P. Bramhall* and *Mr. Edward E. Reardon*, trial examiners.

Mr. Clark Nichols and *Mr. Randolph W. Branch* for the Commission.

Mr. Samuel P. Novick and *Mr. G. V. Weikert*, of Los Angeles, Calif., and *Mr. Henry E. Mangham*, 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 Jacob Swimmer, an individual, trading under the name, National Lacquer Manufacturing Co., and under the name National Titanium Co., hereinafter referred to as respondent, has violated the provisions 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, Jacob Swimmer, is an individual trading and doing business under the name and style of "National Lacquer Manufacturing Co." and under the name and style of "National Titanium Co." with his principal office and place of business located at 123-131 Eleventh Street, in the city of Brooklyn, State of New York. Respondent now is, and for more than 2 years last past has been, engaged in the sale and distribution of paint and paint products in commerce among and between the various States of the United States, and in the District of Columbia. Respondent has maintained, and maintains, a course of trade in said products in said commerce, and has caused and now causes said products, when sold or ordered, to be shipped and transported from his place of business in the State of New York to purchasers and users thereof located in various States of the United States other than in the State of New York, and in the District of Columbia.

PAR. 2. In the course of conduct of said business and for the purpose of inducing the purchase of said products, it has been and is the practice of respondent to mail letters and advertising literature to purchasers and prospective purchasers located in various States of the United States and in the District of Columbia, and therein to make representations with respect to the price, quality, and manu-

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facture of said products and with respect to the life and status of respondent's business. Typical of said representations so made, among others, are the following:

In a warehouse near you, we have 100 gallons of *Genuine Synthetic Outside White Paint*, in five gallon steel buckets, guaranteed to be in perfect condition which we will sacrifice for \$1.55 per gallon, delivered.

This material was originally manufactured by the world's largest synthetic paint maker and is positively fresh stock, regularly priced at \$3.65 per gallon. We procured this lot when we bought out a large manufacturing plant. Its unusual high quality makes it ideal for indoor and outdoor structural maintenance on wood, metal, concrete or over old paint.

It covers solid in one coat, brushes or sprays on easily and dries hard overnight to a beautiful finish. Endures severest exposure without cracking, chipping or flaking and lasts practically a lifetime. May be tinted with all oil colors and thinned with turpentine or benzine.

So sincere are we with this offer that we are willing to extend four months credit on this material with the distinct understanding that unless it exceeds your expectations in every way, you may return the entire quantity at any time and we will pay freight both ways and not charge you for what you've used.

Through and by means of the foregoing statements, and others of similar import and meaning, it has been and is the practice of respondent to represent and imply, among other things, that the regular and customary price of the said paint product is \$3.65 per gallon and that it is being offered for sale and will be sold at a sacrifice price of \$1.55 per gallon; that respondent maintains warehouses at points other than his place of business and at places near or in the vicinity of the solicited prospective purchasers, in which a certain specified number of gallons of said product will be available, and that respondent has been in business for over half a century, that the product is fresh stock, implying that the ingredients used in its manufacture are fresh, unused materials; that the product is direct from the original paint manufacturer and that this paint manufacturer is the world's largest synthetic paint maker; that his product is purchased from the said world's largest synthetic paint manufacturer.

PAR. 3. The aforesaid statements and representations are false, misleading, and deceptive in that the usual, regular, and customary price of the said paint product is not \$3.65 per gallon, but is \$1.55 per gallon, the price at which it has been and is offered for sale and regularly sold by respondent. The respondent maintains no warehouses other than the warehouse located at his place of business in Brooklyn, N. Y., and at no time has had any quantity of paint available to prospective purchasers in any warehouse other than his

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warehouse as aforesaid and not at points near or in the vicinity of the recipients of the said letters and advertising literature. Respondent has not been in business for half a century or for any comparable length of time. Respondent's product is not fresh stock but is made from waste paint which has been lost in the process of the application of the original fresh stock on refrigeration boxes and other surfaces, which is recovered and sold to respondent who reconditions and redissolves it into the product herein described; respondent's product is not direct from the original manufacturer of synthetic paint as it has been used before it was received by respondent. The aforesaid statements of the respondent and all other advertising material used by him are false and misleading in that they fail to disclose that his said product is a reconditioned, redissolved paint product.

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, manufacture, and location, and the failure to disclose in said advertising that his said product is a reconditioned paint, 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 said representations and implications are true, and causes a substantial portion of the purchasing public, because of such mistaken and erroneous beliefs, 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.

Since the date of the issuance of the original complaint herein, respondent has transferred his place of business from 123-131 Eleventh Street, Brooklyn, N. Y., to 2330 East Thirty-seventh Street, Vernon, Calif. From this address respondent, in the course and conduct of his business, has mailed letters to the various States of the United States. Said letters, in addition to containing all the false and misleading statements and representations hereinbefore recited, bear the following letterhead or inscription: "National Titanium Company. Pacific Coast Division." Respondent thus represents that his office at Vernon, Calif., is but one branch or division of his business, and that he has other branches or divisions in various sections of the United States.

The representations thus made by the respondent are false and untrue. Respondent's only place of business is located at Vernon,

Calif., and respondent has no branch or division in other sections of the country.¹

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 12, 1940, issued and subsequently served its complaint in this proceeding upon the respondent, Jacob Swimmer, an individual trading as National Lacquer Manufacturing Co. and as National Titanium Co., charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing of respondent's answer, a hearing was held on August 13, 1940, before a trial examiner of the Commission theretofore duly designated by it, at which hearing the attorney for the Commission served notice upon the respondent, who was present, that an amendment to the complaint would be sought, which amendment would raise certain issues not included in the original complaint. The proposed amendment was dictated into the record at the hearing. No objection being offered by the respondent to the amending of the complaint, the attorney for the Commission proceeded to introduce testimony and other evidence in support of the allegations of the complaint and of the proposed amendment, and the respondent offered testimony and other evidence in opposition thereto. Subsequently, the Commission on April 23, 1941, entered its order amending the complaint in conformity with the announcement made by the Commission's attorney at the hearing, and directing that the evidence introduced at the hearing on August 13, 1940, be consid-

¹ Complaint was amended by the addition of the above two paragraphs by order amending complaint dated April 23, 1941, as follows:

This matter coming on to be heard by the Commission upon the motion of Richard P. Whiteley, Assistant Chief Counsel for the Commission, for an amendment to the complaint herein, and the Commission having duly considered said motion and the record herein.

And it appearing to the Commission that at a hearing in this case in Los Angeles, Calif., on August 13, 1940, the Commission's trial attorney announced his intention to seek an amendment to said complaint and dictated the proposed amendment into the record, the language of such proposed amendment being identical with that set forth in the motion of the Assistant Chief Counsel.

And it further appearing to the Commission that the respondent was present in person at said hearing when said announcement was made by the Commission's trial attorney and when said proposed amendment was dictated into the record and that the respondent offered no objection to the amending of the complaint as proposed by the Commission's trial attorney.

And it further appearing that issue was joined at said hearing upon the charges set forth in said proposed amendment, and that testimony in support of said charges was introduced by the Commission's trial attorney and in opposition to such charges by the respondent.

It is therefore ordered, That the motion of the Assistant Chief Counsel be granted and that the complaint herein be, and it is hereby, amended by adding thereto the following: [Here follow the two paragraphs hereinbefore set out at the end of the complaint].

ered a part of the record to the same effect as though such amendment had been made by the Commission prior to such hearing.

Thereafter, on June 2, 1941, and June 3, 1941, additional hearings were held before a trial examiner of the Commission theretofore duly designated by it, at which hearings further testimony and other evidence were introduced in support of and in opposition to the allegations of the complaint as amended, the respondent being present at these hearings and being represented also by counsel. Subsequently, the proceeding regularly came on for final hearing before the Commission on the complaint as amended, the answer of the respondent, testimony, and other evidence, report of the trial examiners upon the evidence, and brief in support of the complaint (no brief having been filed on behalf of the respondent and oral argument not having been requested); 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. The respondent, Jacob Swimmer, is an individual trading and doing business under the name of National Lacquer Manufacturing Co., and also under the name of National Titanium Co. For several years immediately preceding January 1940, respondent's office and place of business was located at 123-131 Eleventh Street, Brooklyn, N. Y. In January 1940, respondent moved to Vernon, Calif., where he opened an office and place of business at 2330 East Thirty-seventh Street. While it appears that a short period of time elapsed before all of respondent's business operations could be transferred from Brooklyn to his new place of business in Vernon, Calif., all of such operations in Brooklyn had been discontinued by May 1940. Since that time respondent has maintained no office or place of business other than that located in Vernon, Calif.

PAR. 2. Respondent is engaged in the reclaiming and reconditioning of paint, and in the sale and distribution thereof. In the course and conduct of his business respondent sells and has sold his product to purchasers located in various States of the United States and in the District of Columbia, and causes and has caused his product, when sold, to be transported from his place of business in the State of New York or the State of California to the purchasers thereof located in such other States and in the District of Columbia. Respondent maintains and has maintained a course of trade in his product in commerce among and between the several States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his business and for the purpose of inducing the purchase of his product, respondent follows the practice of addressing sales letters to numerous prospective purchasers. Typical of such letters is one addressed to a business concern in Dallas, Texas, in April 1939, which read as follows:

In a warehouse near you, we now have 100 gallons of high grade *Genuine Outside White Paint* in five gallon steel buckets, guaranteed to be in perfect condition which we will sacrifice for \$1.55 per gallon, delivered.

This material was originally manufactured by the world's largest paint maker and is positively fresh stock, regularly priced at \$3.65 per gallon.

Its unusual high quality makes it ideal for inside and outside painting on walls, woodwork, ceilings, floors, fences, exterior structures, window frames, brick, concrete, over old paint and metal surfaces. It covers *solid* in one coat, brushes or sprays easily and dries over night to a smooth finish. Endures severest exposure without cracking, chipping or flaking and lasts practically a lifetime.

It may be tinted with ordinary oil colors and thinned with turpentine.

So sincere are we with this offer that we are willing to extend six months credit on this material with the distinct understanding that unless it exceeds your expectations in every way, you may return the entire quantity at any time and we will pay freight both ways and not charge you for what you've used.

May we have your order for all or any *part* of this material by return mail?

In addition to the use of individual letters addressed to specific prospective purchasers, respondent also makes use of advertising circulars, which are given wide distribution among prospective purchasers throughout the country. These circulars contain in substance much of the same material used in the letters.

Both the letters and circulars used by respondent have imprinted thereon, in connection with respondent's trade name, the legend, "Warehouses—Principal Cities."

PAR. 4. Through the use of these representations and others of similar import, respondent represents, directly or by implication, that the regular and customary price of his paint is \$3.65 per gallon and that the quoted price of \$1.55 per gallon constitutes a special, reduced, and sacrifice price; that respondent maintains warehouses at numerous points throughout the United States, one of which is located near the prospective purchaser, and that the quantity of paint available to the prospective purchaser from such adjacent warehouse at the quoted price is limited to the specific amount mentioned in respondent's letter; that respondent's paint is fresh stock, being made entirely of new and unused materials; and that the paint is obtained by respondent direct from the original paint manufacturer.

PAR. 5. Respondent obtains his paint from manufacturers of automobiles, electric refrigerators, and other metal products on which

paint is used. Such manufacturers usually paint their products by spraying the paint on with the aid of a spray gun. During the process of spraying the paint, a substantial proportion of it rebounds and collects on plates and in trays and troughs in the booth or room where the painting process takes place. This waste or salvage material is subsequently gathered up by the manufacturer and placed in barrels or other containers. Upon obtaining the material, respondent subjects it to certain processes which include, among other things, the adding of necessary solvents and the removal of certain impurities. It is this reclaimed and reconditioned products which respondent sells. He does not obtain any of his paint from paint manufacturers.

Neither in his letters or other advertising material, nor on the labels affixed to the containers in which his product is sold, does respondent disclose that his paint is a reclaimed and reconditioned product. Persons purchasing the paint do so under the impression that they are obtaining new paint made entirely of new and unused materials.

PAR. 6. The price of \$1.55 per gallon at which respondent offers his product for sale is in no sense a special, reduced, or sacrifice price, but is the usual and customary price at which respondent sells his product in the normal and regular course of business. While the manufacturing concerns from whom respondent obtains the waste material may have paid approximately \$3.65 per gallon for the original paint, respondent has never sold his reconditioned product at that price nor at any price approaching that figure.

PAR. 7. Respondent has no warehouses other than the warehouse which he maintains in Vernon, Calif., in connection with his processing plant. It occasionally happens that persons ordering respondent's paint decline to accept it upon arrival, and in such cases it may become necessary for respondent to store the paint with some transportation company or in a public warehouse until a new purchaser for the shipment can be found. At times, also, purchasers who accept the paint later find fault with it, and in such instances respondent may arrange with such persons to hold the paint and forward it to a new purchaser as soon as a resale can be effected. The only points to which respondent ever ships his paint in advance of the sale thereof are Norfolk, Va., and New Orleans, La. Because of certain advantages in freight rates, carload shipments of the paint are sometimes made to these points and stored in public warehouses pending the sale thereof.

Respondent's letters and circulars, however, are sent to prospective purchasers indiscriminately and without regard to their location, and irrespective of whether respondent has any paint on hand in the vicin-

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ity of the prospective purchaser. In fact, it is only in exceptional cases that respondent is able to fill an order with a quantity of paint already in the vicinity of the purchaser. The customary and usual practice is to fill the order by shipment from respondent's plant in Vernon, Calif.

PAR. 8. Although respondent's letters refer to "100 gallons" or some other specific amount of paint, thus implying that the quantity available is limited, respondent is prepared to and does fill all orders received, such orders being filled at the purported sacrifice price quoted in the letters.

PAR. 9. The Commission therefore finds that the representations made by the respondent with respect to his product, as set forth in paragraphs three and four hereof, are misleading and deceptive.

PAR. 10. The Commission finds also that respondent's advertising material, including his letters and labels, is misleading and deceptive in that it fails to disclose that respondent's product is not made of new and unused materials but is a reclaimed and reconditioned product, the essential ingredient of which is waste or salvage material which has previously been used.

PAR. 11. The Commission further finds that the acts and practices of the respondent as herein described, including the failure of respondent to disclose the true nature of his product, have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the nature and value of respondent's product, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of respondent's product as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

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

ORDER MODIFYING ORDER TO CEASE AND DESIST

The Federal Trade Commission having on July 20, 1942, made its findings as to the facts and issued its order to cease and desist in this proceeding (copies of such findings and order being served on the respondent on July 24, 1942), and the Commission now being of the opinion that said order to cease and desist should be modified as hereinafter set forth.

Order

It is ordered, That said order to cease and desist be, and it hereby is, modified to read as follows:

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answer of the respondent, testimony and other evidence in support of the allegations of the complaint and in opposition thereto, taken before trial examiners of the Commission theretofore duly designated by it, report of the trial examiners upon the evidence, and brief in support of the complaint (no brief having been filed by respondent and oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Jacob Swimmer, individually and trading as National Lacquer Manufacturing Co., and as National Titanium Co., or trading under any other name, and his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of respondent's paint in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing as the customary or regular price of respondent's paint any price which is in excess of the price at which such paint is regularly and customarily sold by respondent in the normal and usual course of business.

2. Representing, directly or by implication, that the price at which respondent offers his paint for sale constitutes a special, reduced, or sacrifice price; when in fact such price is the usual and customary price at which respondent sells his paint in the normal and usual course of business.

3. Representing, directly or by implication, that respondent maintains any warehouse other than that maintained at his manufacturing plant in Vernon, Calif.

4. Representing, directly or by implication, that respondent has any specified quantity of paint warehoused or on hand in the vicinity of prospective purchasers, when respondent does not in fact have such quantity warehoused or on hand in the designated locality.

5. Representing, directly or by implication, that the quantity of respondent's paint available to prospective purchasers is limited, when respondent is in fact prepared to fill all orders received.

6. Using the words "fresh stock" to designate or describe any reclaimed or reconditioned paint, or otherwise representing, directly

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or by implication, that such paint is new paint or is made from new and unused materials.

7. Representing, directly, or by implication, that respondent's paint is obtained by him direct from paint manufacturers, when such is not the fact.

8. Advertising, offering for sale, or selling reclaimed or reconditioned paint without clearly disclosing in all sales letters and other advertising media, and on labels affixed to the containers in which such paint is sold, that such paint is a reclaimed or reconditioned product made principally from salvage material.

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.

Complaint

IN THE MATTER OF

UNITED DIATHERMY, INC.

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

Docket 4453. Complaint, Jan. 28, 1941—Decision, July 20, 1942

Where a corporation, engaged in interstate sale and distribution of its "United Short Wave Diathermy" device, for home use in self-administered applications of diathermy; by means of advertisements—

- (a) Represented that its said device or apparatus, when used in the treatment of self-diagnosed diseases and ailments by self-application in the home, was a safe, harmless, and effective means for treatment of rheumatism in its various forms in all parts of the body, arthritis, neuritis, bursitis, lumbago, sciatica, neuralgia, sinus trouble, and colds, and for the alleviation of pain resulting from such conditions;

The facts being diathermy is not a safe therapeutic adjunct for unsupervised home use; said device was not a competent treatment for acute arthritis characterized by infection, acute bursitis, sinus trouble in which there is a retention of pus, or for any disease or condition involving an acute inflammatory process; application in excess dosage in cases where there are advanced blood vessel changes of the legs will not only cause serious burns but lead to gangrene and necessitate amputation; use of such a device for symptoms of neuralgia or neuritis without proper diagnosis may result in fatally delaying treatment of underlying disease or cause; and application in area of the body where appreciation of heat has been impaired or lost may result in serious burns; and

- (b) Failed to reveal all the facts material in the light of said representations or with respect to aforesaid consequences which might result from the use of said device under prescribed or usual conditions;

With effect of misleading and deceiving a substantial portion of the purchasing public into the mistaken belief that such statements were true, thereby inducing it, because of such belief, to purchase said device:

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. Lewis C. Russell*, trial examiner.

Mr. R. A. McOuat, *Mr. James I. Rooney* and *Mr. William M. King* for the Commission.

Mr. Mortimer Cohn, of New York City, 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 United Diathermy, Inc., a corporation, hereinafter referred to as respondent, has violated