

IN THE MATTER OF
STRUCTURAL CLAY PRODUCTS, INC., COLONIAL CLAYS,
INC., ET AL.

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

Docket 5468. Complaint, Oct. 16, 1946—Decision, May 28, 1948

In a proceeding in which various manufacturer sellers, their corporate selling agency, and their trade association were charged with violation of the provisions of section 5 of the Federal Trade Commission Act, through the concerted use, among other things, of certain means of price fixing under which each manufacturer was able to and did match the delivered quotations of any other to a given purchaser on a given order, as the result of the use of a zoning method of computing delivered price quotations and under which they charged higher net prices from customers located near their plants than from those more distant: said systematic discriminations resulted in part because of their failure to make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

Where a trade association, a corporate selling agency, and certain manufacturers of sand-struck brick, namely—

(1) Said corporate association, organized in 1934 by the clay products industry under the code authority provisions of the National Industrial Recovery Act, which embraced in its membership manufacturers of all types of structural clay products, including manufacturers of sand-struck brick herein concerned, and which, upon invalidation of said act, reached agreement with the former code authorities representing said industry (including those joined in the instant proceeding), whereby it was to continue on a voluntary basis the activities which had been carried on under the code, and pursuant to which it recommended to manufacturers herein concerned the establishment of regional sales agencies by said industry;

(2) A corporate selling agency which was one of a number of regional agencies established as a result of the aforesaid recommendation, by member manufacturers, who owned all the stock, and officers and directors of which consisted of individuals affiliated with them; and which was designated the exclusive selling agent for their products (and for which they were sub-agents), and through which they cooperated to suppress competition and fix and maintain the price of said products; and

(3) Nine manufacturers of sand-struck brick in Connecticut and Massachusetts, which sold some 75,000,000 bricks a year, with their 1944 production amounting to about 75 percent of all the bricks shipped by New England brick manufacturers;

(a) Cooperated in a common course of action and agreement resulting in substantial frustration and prevention of competition in the sale and distribution of brick in trade and commerce; and

Where said manufacturers, in pursuance thereof—

- (b) Established and maintained said corporate selling agency as a device for collectively and collusively pricing and selling their products; and
- (c) Through it agreed upon and established prices, terms, and conditions of sale, and contracted with it and with one another to sell their products in accordance therewith;

Whereby prices were arbitrarily made the same for all points of delivery within a zone, irrespective of the fact that some were nearer than others to points of production; quotations in some zones were at higher levels than those in other zones; and quotations to any prospective purchaser in a given zone were matched by the different manufacturers concerned, who thus formed a united front in presenting a single quotation;

- (d) Established and maintained a system for securing adherence to published and agreed-upon prices, under arrangements to file with said selling agent a copy of each invoice of sale, in order to determine whether it showed conformance with said prices, and, in the event of apparent nonconformance, empowered said agent to investigate and assess penalties;
- (e) Established and maintained (1) a policy of limiting the sale of second- and third-quality brick to agreed upon outlets; (2) a uniform classification of types and sizes of bricks; and (3) common-dealer policies which included the definition, designation, and selection of dealers, the terms and conditions of sale to them and the division of sales between dealers and themselves; and

Where aforesaid corporate trade association—

- (f) Participated in the aforesaid general combination, by devising, recommending, and assisting in the formation of said corporate selling agency, and bringing the general combination, as formed by said manufacturers, into existence;
- (g) Used other methods and means to effectuate their common purpose to suppress, hinder, and lessen competition between them; and

Where each of said manufacturers—

- (h) Contributed to the accomplishment and effectiveness of the aforesaid acts, things, and results by use of a zoning system of computing, formulating, and using delivered-price quotations simultaneously made use of by other manufacturers; and by discriminating among customers through demanding, charging, accepting, and receiving higher net prices for goods of like grade, quality, and quantity from customers located near a plant of the particular manufacturer than from those more distant;

Whereby each was enabled to and did match quotations on a delivered basis with those of the other manufacturer members;

Inherent effects of which methods and practices included the substantial lessening of competition among said members, unfair and oppressive discrimination against portions of the purchasing public in large areas by depriving such purchasers of the advantages which would otherwise accrue to them as a result of their proximity to the factories of said members; and by requiring them to pay increases over what the net prices to them would have been if such prices had been fixed by competition among them; and

Capacity, tendency, and effect of which combination, agreements, etc., and acts, practices, etc., followed pursuant thereto, were to operate unfairly

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and to the prejudice of the public and deprive it of the benefits of competition, and to promote discrimination against some buyers and users of their products; and dangerous tendency and capacity of which were unreasonably to restrain competition in the sale thereof in commerce:

Held, That such acts and practices constituted unfair methods of competition in commerce and unfair acts and practices therein.

Mr. Lynn C. Paulson for the Commission.

Sanders, Gravelle, Whitlock & Howrey, of Washington, D. C., for respondents.

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 the respondents named and represented in the caption hereof have been and are using unfair methods of competition and unfair or deceptive acts or practices in commerce as "commerce" is defined in said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Structural Clay Products, Inc., is a Delaware Corporation, with its office and principal place of business at 1756 K Street, Washington, D. C.

Respondent, Colonial Clays, Inc., is a Delaware corporation, with its office and principal place of business at Worcester, Mass.

Respondent, The Bridgewater Brick Co., is a Connecticut corporation with its principal office at New Haven, Conn.

Respondent, The North Haven Brick Co., is a Connecticut corporation with its office and principal place of business at North Haven, Conn.

Respondent, The Stiles & Hart Brick Co., is a Connecticut corporation with its principal office at North Haven, Conn.

Respondent, The I. L. Stiles & Son Brick Co., is a Connecticut corporation with its office and principal place of business at North Haven, Conn.

Respondent, The Stiles & Reynolds Brick Co., is a Connecticut corporation with its office and principal place of business at North Haven, Conn.

Respondent, The Donnelly Brick Co., is a Connecticut corporation with its office and principal place of business at New Britain, Conn.

Respondent, The Michael Kane Brick Co., is a Connecticut corporation with its office and principal place of business at 245 New Park Avenue, Hartford, Conn.

Respondent, The Eastern Brick Co., is a Connecticut corporation with its office and principal place of business at East Berlin, Conn.

Respondent, The New England Brick Co., is a Massachusetts corporation with its office and principal place of business at 22 Beacon Street, Boston, Mass.

The aforesaid respondents, The Bridgewater Brick Co., The North Haven Brick Co., The Stiles & Hart Brick Co., The I. L. Stiles & Son Brick Co., The Stiles & Reynolds Brick Co., The Donnelly Brick Co., The Michael Kane Brick Co., The Eastern Brick Co., and The New England Brick Co. for convenience will sometimes hereinafter be referred to as respondent manufacturers; respondent Colonial Clays, Inc., for convenience will sometimes hereinafter be referred to as respondent selling agent; and respondent Structural Clay Products, Inc., will sometimes hereinafter be referred to as respondents S. C. P. I.

PAR. 2. Respondent manufacturers are engaged in the manufacture of sand struck brick, a product in general use throughout the country as a building material in the construction and repair of public and private structures and private homes. Respondents sell on an average of 75,000,000 bricks a year and in 1944 their production amounted to approximately 74 percent of the total of all bricks shipped by New England brick manufacturers.

PAR. 3. Respondent, Structural Clay Products, Inc., was organized in 1934 by the clay industry under the code authority of the National Industrial Recovery Act. It is a voluntary trade association, the members of which consist of the manufacturers of all types of structural clay products, including the respondent manufacturers of sand struck brick.

Upon invalidation of the National Industrial Recovery Act, the former code authorities for the clay industry authorized respondent, S. C. P. I., to continue code activities on a voluntary basis. Pursuant to this end, respondent, S. C. P. I., recommended the adoption of and presented a complete plan for the establishment of regional sales agencies by the clay industry. Following this recommendation a number of regional sales agencies, including the respondent selling agent, were established by the member manufacturers of respondents,

S. C. P. I., in the various producing regions. Respondent, Colonial Clays, Inc., is one of the selling agencies thus established.

PAR. 4. Respondent, Colonial Clays, Inc., is a corporation organized under the laws of the State of Delaware. Its voting stock is entirely owned by respondent manufacturers, and its officers and directors consist of individuals affiliated with the said respondent manufacturers. It was organized in 1937 following the recommendation and plan presented to the members of the clay industry by respondents, S. C. P. I., as alleged in paragraph 3 hereof. By contracts running between respondent selling agent and respondent manufacturers, respondent selling agent is designated as the exclusive selling agent for respondent manufacturers' product with authority to appoint sub-agents subject to the consent of respondent manufacturers and in practice, respondent manufacturers are the subagents.

Respondent selling agent has at all times herein mentioned served as a vehicle or medium through which respondent manufacturers have jointly and cooperatively operated to suppress competition and fix and maintain the price of brick.

PAR. 5. Respondent manufacturers in the regular course and conduct of their business sell and ship, or cause to be sold and shipped through respondent selling agent and its subagents sand struck brick to purchasers located in the various States of the United States, and during the time referred to herein have carried on and engaged in, and do now carry on and engage in, commerce as the term "commerce" is defined in the Federal Trade Commission Act.

Respondent, S. C. P. I., has at all times herein mentioned cooperated with, assisted, and served as an implement or vehicle for the promotion of the mutual interest of respondent manufacturers and respondent selling agent.

PAR. 6. For more than 5 years last past respondents have done and performed, and are now doing and performing, unfair acts and practices, have engaged in and are now engaging in unfair methods of competition, in violation of section 5 of the Federal Trade Commission Act in that they have acted and are still acting wrongfully and unlawfully by cooperating between and among themselves in establishing, adopting, and continuing a common course of action, concert of action, and agreement, resulting in substantial hindrance, frustration, restraint, suppression, and prevention of competition in the sale and distribution of brick in trade and commerce, as "commerce" is defined in the Federal Trade Commission Act.

Pursuant to, in furtherance of, and in order to effectuate the purposes and objectives of the aforesaid cooperation and common course

of action respondents, as a part of their said cooperation, common course of action, and agreement have formulated, adopted, performed, and put into effect, among others, the overt acts and used the methods, systems, practices, and policies listed, described and set forth in the immediately succeeding subparagraphs numbered 1 to 7, inclusive, of this paragraph 6:

1. Respondents have established and are now maintaining respondent corporation, Colonial Clays, Inc., as a device or instrumentality for collectively and collusively pricing and selling their products. Through and by means of respondent, Colonial Clays, Inc., respondents agree upon and establish the prices, terms, and conditions of sale for their products. Each respondent manufacturer by contract with respondent corporation agrees with the respondent corporation and with each other respondent to sell its own products in accordance with the prices, terms, and conditions of sale all have agreed upon through and by means of respondent, Colonial Clays, Inc.

Prices so established are determined from quotations made on a delivered basis. The quotations are arbitrarily made the same for all points of delivery within a zone geographical area, irrespective of the fact that some of the said delivery points are nearer than others to points of production of the respective respondent manufacturers. Quotations as thus made to purchasers in some zones are at higher levels than thus made to purchasers in other zones. The quotations as thus made to any prospective purchaser in a zone are matched by the respondent manufacturers; the latter are thus enabled to and do present a united front in presenting what is in effect a single quotation to any prospective purchaser, thereby denying to such purchaser benefits of price competition. Respondent manufacturers in making sales in accordance with said quotations discriminate among their purchasers in that they demand, charge, accept, and receive from customers located near points of production higher net prices than from customers more distantly located for merchandise of like grade and quality. The said systematic discriminations result in part because of failure of respondent manufacturers to make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

2. Respondents have established and are maintaining a system for securing adherence to published and agreed upon prices. By agreement they file with respondent, Colonial Clays, Inc., a copy of each invoice of sale showing the price at which each sale was made. These, by agreement between them, are checked and analyzed by re-

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spondent, Colonial Clays, Inc., to determine whether or not they show conformance or nonconformance with published or agreed upon prices. In the event there is apparent nonconformance, respondent, Colonial Clays, Inc., is empowered by agreement and does investigate the case and bring about a settlement which by agreement may include the assessment of a penalty.

3. Respondents have established and maintained a policy of limiting the sale of second and third quality brick to agreed upon outlets.

4. Respondents have established and maintained a uniform classification of types and sizes of brick for the purpose of facilitating the elimination of price competition.

5. Respondents have established and maintained common policies toward dealers which includes the definition, designation, and selection of dealers, the terms and conditions of sale to them, and the division of sales between dealers and themselves.

6. Respondent, S. C. P. I., has participated in the general combination alleged by devising, recommending, and assisting in the formation of respondent, Colonial Clays, Inc., and bringing the general combination as formed by respondent manufacturers into existence.

7. Respondents have used other methods and means to effectuate their common purpose to suppress, hinder, and lessen competition between them.

PAR. 7. Each of the respondent manufacturers has contributed to the accomplishment and effectiveness of the acts, things, and results alleged in the immediately preceding Paragraph Six hereof through its—

1. Use of a zoning method of computing, formulating, and using delivered-price quotations when other respondent members simultaneously do likewise and by which it is enabled to, and does, match its quotations on a delivered basis with the quotations of other respondent manufacturers.

2. Discrimination between and among its customers through its demanding, charging, accepting, and receiving higher net prices from its customers located near its plant than from its customers more distantly located for goods of like grade, quality, and quantity, and thereby is enabled to, and does, match its quotations on a delivered basis with the quotations of other respondent members.

PAR. 8. The inherent effects of the adoption and maintenance by the respondent manufacturers of the methods and practices described and alleged in paragraphs 6 and 7 herein include, all and singularly, the following, to wit:

1. Substantial lessening of competition among respondent manufacturers.

2. Unfair and oppressive discrimination against portions of the purchasing public in large areas by depriving such purchasers of the advantage which would otherwise accrue to them as a result of their proximity to the factories of respondent members, and by requiring such purchasers to pay increases over what the net prices to such purchasers would have been if such net prices had been fixed by competition among respondents.

PAR. 9. The combination, agreements, and understandings of the respondents and the acts, practices, pricing methods, systems, devices, and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public; deprive the public of the benefit of competition; promote discrimination against some buyers and users of respondents' products; have a dangerous tendency and capacity to restrain unreasonably competition in the sale of such products in commerce; have actually hindered, frustrated, restrained, suppressed, and prevented competition in such products in commerce; and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the meaning of section 5 of the Federal Trade Commission Act, as amended.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 16, 1946, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with using unfair methods of competition and unfair and deceptive acts or practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answers, the Commission, by order entered herein, granted respondents' motion for permission to withdraw said answers and substitute therefor answers admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts. The filing of the substitute answers having been conditioned upon a recommendation by counsel supporting the complaint of a form of order agreed upon between counsel, and said recommended order having been altered by the Commission to the extent and for the reasons shown in the tentative order entered herein on January 26, 1948, respondents were afforded opportunity to show cause why the recommended order, as modified, should not be entered as an

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order to cease and desist; and respondents not having appeared in response to said leave to show cause, the substitute answers were duly 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 answers; 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. (A) Respondent, Structural Clay Products, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 1756 K Street, Washington, D. C. It is a voluntary trade association organized in 1934 by the clay industry under the code authority provisions of the National Industrial Recovery Act. Its membership consists of the manufacturers of all types of structural clay products, including the manufacturers of sand-struck brick named in subparagraphs (C) to (K) hereof, inclusive (sometimes hereinafter referred to as respondent manufacturers). Upon invalidation of the National Industrial Recovery Act, the former code authorities for the clay industry authorized respondent, Structural Clay Products, Inc., to continue code activities on a voluntary basis. Pursuant to this end, respondent, Structural Clay Products, Inc., presented and recommended the adoption of a complete plan for the establishment of regional sales agencies by the clay industry. Acting upon this recommendation, the member manufacturers of respondent, Structural Clay Products, Inc., established a number of regional sales agencies in the various producing regions, including respondent, Colonial Clays, Inc. (sometimes hereinafter referred to as respondent selling agent). Respondent, Structural Clay Products, Inc., has at all times herein mentioned cooperated with, assisted, and served as an implement or vehicle for the promotion of the mutual interest of respondent manufacturers and respondent selling agent.

(B) Respondent, Colonial Clays, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at Worcester, Mass. Its voting stock is entirely owned by respondent manufacturers, and its officers and directors consist of individuals affiliated with said respondent manufacturers. It was organized in 1937 following the afore-said recommendation and plan presented to the members of the clay

industry by respondent, Structural Clay Products, Inc. By contracts running between respondent selling agent and respondent manufacturers, respondent selling agent is designated as the exclusive selling agent for respondent manufacturers' products, with authority to appoint subagents subject to the consent of respondent manufacturers, and in practice respondent manufacturers are the subagents. Respondent selling agent has, at all times herein mentioned, served as a vehicle or medium through which respondent manufacturers have jointly and cooperatively operated to suppress competition and fix and maintain the price of brick.

(C) Respondent, The Bridgewater Brick Co., is a corporation organized and existing under the laws of the State of Connecticut, with its office and principal place of business at New Haven, Conn.

(D) Respondent, The North Haven Brick Co., is a corporation organized and existing under the laws of the State of Connecticut, with its office and principal place of business at North Haven, Conn.

(E) Respondent, The Stiles & Hart Brick Co., is a corporation organized and existing under the laws of the State of Connecticut, with its office and principal place of business at North Haven, Conn.

(F) Respondent, The I. L. Stiles & Son Brick Co., is a corporation organized and existing under the laws of the State of Connecticut, with its office and principal place of business at New Haven, Conn.

(G) Respondent, The Stiles & Reynolds Brick Co., is a corporation organized and existing under the laws of the State of Connecticut, with its office and principal place of business at New Haven, Conn.

(H) Respondent, The Donnelly Brick Co., is a corporation organized and existing under the laws of the State of Connecticut, with its office and principal place of business at New Britain, Conn.

(I) Respondent, The Michael Kane Brick Co., is a corporation organized and existing under the laws of the State of Connecticut, with its office and principal place of business at 245 New Park Avenue, Hartford, Conn.

(J) Respondent, The Eastern Brick Co., is a corporation organized and existing under the laws of the State of Connecticut, with its office and principal place of business at East Berlin, Conn.

(K) Respondent, The New England Brick Co., is a corporation organized and existing under the laws of the State of Massachusetts, with its office and principal place of business at 22 Beacon Street, Boston, Mass.

PAR. 2. The aforesaid respondent manufacturers are engaged in the manufacture of sand-struck brick, a product in general use throughout the country as a building material in the construction and

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repair of public and private structures and private homes. Said respondents sell on an average of 75,000,000 bricks a year, and in 1944 their production amounted to approximately 74 percent of the total of all bricks shipped by New England brick manufacturers. In the regular course and conduct of their business, said respondents sell and ship sand-struck brick, or cause it to be sold and shipped through respondent selling agent and its subagents, to purchasers located in various States of the United States, and during the time referred to herein have maintained, and do now maintain, a course of trade in sand-struck brick in commerce, as the term "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. (A) For more than 5 years last past respondents have been cooperating between and among themselves in establishing, adopting, and continuing a common course of action, concert of action, and agreement resulting in substantial hindrance, frustration, restraint, suppression, and prevention of competition in the sale and distribution of brick in trade and commerce, as "commerce" is defined in the Federal Trade Commission Act. Pursuant to, in furtherance of, and in order to effectuate the purposes and objectives of the aforesaid cooperation and common course of action, respondents, as a part of their said cooperation, common course of action, and agreement have formulated, adopted, and put into effect the methods, systems, practices, and policies set forth below in subparagraphs numbered (B) to (H), inclusive, of this paragraph.

(B) Respondents have established, and are now maintaining, respondent, Colonial Clays, Inc., as a device or instrumentality for collectively and collusively pricing and selling their products. Through and by means of respondent, Colonial Clays, Inc., respondents agree upon and establish the prices, terms, and conditions of sale for their products. Each respondent manufacturer, by contract with respondent selling agent, agrees with the respondent selling agent and with each other respondent to sell its own products in accordance with the prices, terms, and conditions of sale all have agreed upon through and by means of respondent selling agent. Prices so established are determined from quotations made on a delivered basis. The quotations are arbitrarily made the same for all points of delivery within a zone or geographical area, irrespective of the fact that some of the said delivery points are nearer than others to points of production of the respective respondent manufacturers. Quotations as thus made to purchasers in some zones are at higher levels than thus made to purchasers in other zones. The quotations as thus made to any prospective purchaser in a given zone are matched by the respondent

ent manufacturers; the latter are thus enabled to, and do, form a united front in presenting what is in effect a single quotation to any prospective purchaser, thereby denying to such purchaser benefits of price competition. Respondent manufacturers in making sales in accordance with said quotations discriminate among their purchasers in that they demand, charge, accept, and receive higher net prices for merchandise of like grade and quality from customers located near points of production than from customers more distantly located. The said systematic discriminations result in part because of failure of respondent manufacturers to "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

(C) Respondents have established, and are maintaining, a system for securing adherence to published and agreed-upon prices. By agreement, they file with respondent, Colonial Clays, Inc., a copy of each invoice of sale showing the price at which each sale was made. These, by agreement between them, are checked and analyzed by respondent, Colonial Clays, Inc., to determine whether or not they show conformance or nonconformance with published or agreed-upon prices. In the event there is apparent nonconformance, respondent, Colonial Clays, Inc., is by agreement empowered to, and does, investigate the case and bring about a settlement which, by agreement, may include the assessment of a penalty.

(D) Respondents have established and maintained a policy of limiting the sale of second- and third-quality brick to agreed-upon outlets.

(E) Respondents have established and maintained a uniform classification of types and sizes of brick for the purpose of facilitating the elimination of price competition.

(F) Respondents have established and maintained common policies toward dealers which include the definition, designation, and selection of dealers, the terms and conditions of sale to them, and the division of sales between dealers and themselves.

(G) Respondent, Structural Clay Products, Inc., has participated in the aforesaid general combination by devising, recommending, and assisting in the formation of respondent, Colonial Clays, Inc., and bringing the general combination as formed by respondent manufacturers into existence.

(H) Respondents have used other methods and means to effectuate their common purpose to suppress, hinder, and lessen competition between them.

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PAR. 4. Each of the respondent manufacturers has contributed to the accomplishment and effectiveness of the acts, things, and results set out in paragraph 3 hereof by the following methods: Use of a zoning method of computing, formulating, and using delivered-price quotations when other respondent members simultaneously do likewise and by which it is enabled to, and does, match its quotations on a delivered basis with the quotations of other respondent manufacturers; and, further, by discrimination between and among its customers through its demanding, charging, accepting, and receiving higher net prices for goods of like grade, quality, and quantity from its customers located near its plant than from its customers more distantly located, and thereby is enabled to, and does, match its quotations on a delivered basis with the quotations of other respondent members.

PAR. 5. The inherent effects of the adoption and maintenance by the respondent manufacturers of the methods and practices described in paragraphs 3 and 4 herein include, all and singularly, the following: Substantial lessening of competition among respondent manufacturers, and unfair and oppressive discrimination against portions of the purchasing public in large areas by depriving such purchasers of the advantage which would otherwise accrue to them as a result of their proximity to the factories of respondent members, and by requiring such purchasers to pay increases over what the net prices to such purchasers would have been if such net prices had been fixed by competition among respondents.

PAR. 6. The Commission concludes, and therefore finds, that the capacity, tendency, and effect of the combination, agreements, and understandings established and maintained among respondents as aforesaid, and of the acts, practices, pricing methods, systems, devices, and policies followed pursuant thereto, as hereinbefore found, all and singularly, are unfair and to the prejudice of the public, deprive the public of the benefits of competition, promote discrimination against some buyers and users of respondents' products, and have a dangerous tendency and capacity unreasonably to restrain competition in the sale of respondents' products in commerce.

CONCLUSION

The aforesaid acts and practices of respondents constitute unfair methods of competition in commerce and unfair acts and practices 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 substitute answers by respondents, in which answers respondents admit all of the material allegations of fact set forth in said complaint and waive all intervening procedure and further hearing as to the facts, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That respondents, Colonial Clays, Inc., The Bridgewater Brick Co., The North Haven Brick Co., The Stiles & Hart Brick Co., The I. L. Stiles & Son Brick Co., The Stiles & Reynolds Brick Co., The Donnelly Brick Co., The Michael Kane Brick Co., The Eastern Brick Co., and The New England Brick Co., their respective officers, agents, representatives, and employees, in or in connection with the offering for sale, sale, and distribution of bricks in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or practices:

1. Continuing, establishing, or maintaining any common sales agent by or through which the prices, terms, or conditions of sale for their bricks are established, fixed, or maintained, and from otherwise fixing, establishing, or maintaining prices, terms, or conditions of sale for their said bricks.

2. Continuing, establishing, or maintaining, any agency, system, or method for promoting adherence to prices, terms, or conditions of sale for their bricks, regardless of how such prices, terms, or conditions of sale are established or announced.

3. Selecting outlets for substandard bricks or limiting the sale of such bricks to designated outlets.

4. Continuing, establishing, or maintaining any classification of types or sizes of bricks for the purpose or with the effect of restraining price competition in the sale of such products.

5. Continuing, establishing, or maintaining policies or practices respecting the selection, designation, or classification of dealers, or respecting the terms or conditions of sale to dealers, or respecting the division of sales between dealers and respondents or any of them.

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6. Using a zoning method of computing or formulating delivered-price quotations when other respondents simultaneously do likewise and by which any respondent is enabled to, and does, match its quotations on a delivered basis with the quotations of other respondents.

7. Discriminating between and among purchasers of bricks through demanding, charging, or accepting for brick of like grade, quality, and quantity, higher net prices from purchasers located near the producing plant of the seller than from purchasers more distantly located with respect to such plant, and whereby any respondent is enabled to, and does, match its price quotations on a delivered basis with the price quotations of other respondents.

Provided, however, That nothing contained in paragraphs 1 to 5, inclusive, of this order shall be construed as prohibiting the establishment of a sales agency which does not prejudice the public interest by tending unduly to restrict competition or tending unduly to obstruct the course of trade.

It is further ordered, That Structural Clay Products, Inc., its officers, representatives, agents, and employees, do forthwith cease and desist from instigating, aiding, assisting, or cooperating in doing or performing any of the things prohibited in paragraphs 1 to 7, inclusive, of this order.

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

Syllabus

IN THE MATTER OF

EXCELSIOR LABORATORY, INC., AND DOROTHY FLATTER, TRADING AS DOROTHY GOSEWISCH, AND OTTO R. FLATTER

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

Docket 5394. Complaint, Oct. 18, 1945—Decision, June 1, 1948

While garlic has been used in folk medicine for centuries, and there is some scientific opinion to the effect that it possesses therapeutic value in the treatment of hypertension, said view is rejected by the great weight of modern scientific opinion, the present consensus among experts being that it is wholly without therapeutic value in such cases, either for the treatment of the condition itself or the symptoms. The contrary view, it appears, is based largely upon the results of certain experiments in which adequate controls were not maintained, as a result of which the reliability of the experiments is subject to serious doubt.

Where a corporation and two officers thereof, who controlled and directed its policies and practices, engaged in the manufacture and interstate sale and distribution of a medicinal preparation known as Gosewisch's Garlic Tablets, through advertisements in newspapers and trade journals, including such statements as "Why be distressed needlessly when you can now get the effective aid of garlic for relief, without fear of offending with garlic breath," etc.—

- (a) Falsely represented that their said Gosewisch's Garlic Tablets constituted a competent and effective treatment for the symptoms of hypertension (high blood pressure) including the symptoms of dullness, tiredness, nervousness, dizziness, and involuntary naps;

Notwithstanding the fact that garlic has no therapeutic value in the treatment of hypertension or its symptoms; and even if it had, said product would be still wholly ineffectual because of the negligible amount of garlic therein contained; and

- (b) Represented falsely through use of the word "garlic" as a part of the trade name for their product that there was a sufficient amount of said substance therein to possess substantial therapeutic value;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the composition and therapeutic value of product concerned and thereby induce it to purchase substantial quantities thereof:

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. Arthur F. Thomas*, trial examiner.

Mr. William L. Pencke for the Commission.