

Syllabus

IN THE MATTER OF

DIRECTORY PUBLISHING CORPORATION ET AL.

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

Docket 5920. Complaint, Sept. 6, 1951—Decision, Mar. 17, 1953

Where a corporation and its two officers, engaged in the publication and in the interstate sale and distribution of their "Greater New York City Business Classified Directory", in competition with other publishers of directories selling advertisements and listings therein;

In soliciting business through clipping advertisements or listings from local telephone directories, trade journals, magazines, or business directories, and pasting such clippings, under appropriate business classifications, on their order forms—mailed to those solicited with a preaddressed reply envelope—upon which there were displayed, among other things, in 14-point extrabold letters the words "New York City Classified Business Directory", followed in capital letters, but in 10-point type, by "DIRECTORY PUBLISHING CORPORATION—PUBLISHERS", with the statement elsewhere in bold-faced, 10 point type "Listing Will Not Be Published Unless Payment Is Made" and in 8-point type the advice that they proposed to publish the "attached listing, taken from another publication" in "A New Annual Publication not connected with any other Directories, Redbooks or Telephone Company", and that a check would be "accepted and considered as approval"—

Falsely represented to a substantial segment of the public, through such use of clippings from other directories, that the advertisement or listing which was ordered would be placed in the directory from which the advertisement was clipped;

With effect of misleading many persons into the erroneous belief that they were buying and paying for advertising space in the publication from which said advertisements were clipped, and with tendency and capacity so to do; whereby trade was unfairly diverted to said corporation and individuals from their competitors, to the substantial injury of competition in commerce:

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

While the above proposal forms, if carefully read by the prospects, would preclude any misunderstanding on their part as to the identity of the publisher or publication actually involved, the practice concerned did actually deceive many into believing they were simply being asked to renew their advertisements in the original publications; the large type printing, the appropriated advertisement or listing, and the format so attracted the attention of the pros-

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pect that more than a cursory examination of the form appeared to him to be useless and time-wasting; some accepted respondent's proposal and mailed their checks in the preaddressed return envelopes without realizing until later that the advertisements or listings were not to appear in the publication from which the clippings were taken; and, in other instances, disregarding the envelope and the folder, mailed their checks for the amounts indicated to the company which had published the directory from which it had been taken; and respondent's practices, regardless of the cautions, disclosures and explanations printed on the folders and in the accompanying listings, were potentially deceptive.

As respects a Post Office proceeding, involving the corporate respondent: respondent's testimony indicated that under the terms of an affidavit of discontinuance submitted by respondent corporation to the Post Office Department they had not, since the date concerned, caused any advertisements to be clipped from classified telephone directories for use with proposals mailed by them.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Jesse D. Kash for the Commission.

Walsh & Levine, of New York City, for respondents.

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 Directory Publishing Corporation, a corporation, Business Directory Corporation, a corporation, and Stanley Oleck and Harvey Oleck, individually and as officers of said corporations, hereinafter referred to as respondents, have 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, Director Publishing Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondent, Business Directory Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania. Respondents, Stanley Oleck is President and Treasurer and Harvey Oleck is Vice-President and Secretary of said corporations, and as such officers formulate, direct, and control the policies and practices of said corporations. All these respondents have their office and principal place of business located at 303 Washington Street, Brooklyn, New York. Business Directory Corporation also has an office at 1001 Chestnut Street, Philadelphia, Pennsylvania.

PAR. 2. The aforesaid respondents are now and for more than one year last past have been engaged in publishing or having published

classified business directories for various cities in the United States. Some of said directories have been published under the names "Greater New York and Surrounding Territories Business Classified Directory," and "greater Philadelphia and Surrounding Territories Business Classified Directory." The publications contain classified lists of manufacturers, wholesalers, distributors, jobbers, and kindred services arranged in alphabetical order under their respective business or product headings. Respondents sell advertising space in said directories and the profitable conduct of their businesses is dependent on the sale of advertising in said directories.

Respondents cause their said publications to be transported through the United States mails and otherwise from the point of publication thereof, or from one or more of the above stated addresses and distributed among persons and firms that have purchased advertising space in said publication and also to other persons and firms at their respective points of location in various States of the United States, including States other than the States of New York, New Jersey, Pennsylvania and Illinois. Respondents maintain, and during all times mentioned herein have maintained, a course of trade in said publications in commerce between and among the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. Respondents' method of securing names, addresses and telephone numbers for use in soliciting prospective customers for advertising space in their publications and also the classified advertisements to be inserted therein, is to clip advertisements from various local telephone and other directories and to paste or otherwise attach said advertisements to their own contracts or order forms. Said forms are then mailed to the persons or firms whose advertisements are attached thereto with a request that such forms together with a check be returned to respondents in an enclosed addressed envelope to insure insertion of the advertisement in respondents' publications. The name and address of the advertiser and the cost of running the advertisement in respondents' publications, together with the business classification under which the proposed advertisement is to be run are inserted in the proposal form by respondents before the form is mailed to the advertiser. The cost of the advertisements in respondents' publications usually corresponds with the price the advertiser has been paying for the advertisement in the publication from which the advertisement was clipped. In many instances, advertising space is solicited in the above manner from, and sold to, persons and firms located in States other than the State in which respondents' offices are

located and from which said publication is shipped to the advertisers therein.

PAR. 4. As a rule, the advertisement attached to respondents' proposal form which is submitted to a prospect is clipped from the telephone or other directory of the locality in which the advertiser's business is located. Said form features in large print the word "directory" and the explanation as to what the document really is appears in much smaller and less conspicuous print, not in immediate conjunction or connection herewith, but on the contrary is substantially removed from the word "directory." Such advertiser recognizes the advertisement submitted to him as being one previously placed by him in the local telephone or other directory and without scrutinizing the proposal form closely and ascertaining that it is not a renewal of the advertisement in a local directory but is a proposal for an advertisement to be inserted in respondents' publication, signs respondents' form in the erroneous belief that he is merely renewing his advertisement in the directory from which the advertisement had been clipped.

PAR. 5. Respondents in the conduct of their businesses are in substantial competition in commerce with other firms and individuals also engaged in the publication of directories and in the sale of advertisements and listings therein.

PAR. 6. By and through the aforesaid acts and practices, the respondents represent and represented, directly and by implication, to business firms and individuals that they are soliciting advertising space from, and giving telephone listings to, such firms and individuals to be placed in the directory in which such persons and firms previously have been listed, when such is not the fact.

PAR. 7. The use by the respondents of the aforesaid acts and practices and the misleading representations employed by them in connection with such acts and practices has had and now has the tendency and capacity to mislead many persons, and has misled many persons, into the erroneous and mistaken belief that they are buying and paying for advertising space in the publications from which said advertisements were clipped. As a result, trade has been unfairly diverted to respondents from their competitors and substantial injury has been and is now being done to competition in commerce.

PAR. 8. The aforesaid acts, practices and methods of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on September 6, 1951, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging said respondents with the use of unfair methods of competition in commerce and 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 by respondents of answers thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission, theretofore designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. On April 2, 1952, the hearing examiner filed his initial decision.

Thereafter, within the time permitted by the Rules of Practice of the Commission, respondents appealed from the initial decision of the hearing examiner and this matter came on for final hearing upon the complaint, the answers, testimony and other evidence, briefs in support of and in opposition to such appeal, an oral argument; and the Commission, having duly considered the record herein and having ruled upon said appeal and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Directory Publishing Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondent Stanley Oleck is president and treasurer and respondent Harvey Oleck is vice president and secretary of said corporate respondent and, as such officers, they formulate, direct and control the policies and practices of the said corporate respondent. The said corporate and individual respondents have their offices and principal place of business at 303 Washington Street, Brooklyn, New York.

Respondent Stanley Oleck is also owner of the Directory Publishing Co., of Chicago, Illinois, a company engaged in a business similar to that of the respondent Directory Publishing Corporation.

The respondent Business Directory Corporation was a corporation organized and formerly existing under and by virtue of the laws of

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the State of Pennsylvania, but it ceased doing business in 1948 and has since been dissolved.

PAR. 2. Respondents Directory Publishing Corporation, Stanley Oleck and Harvey Oleck, are now and for more than one year last past have engaged in the publication of a classified business directory known as "Greater New York City Business Classified Directory," containing classified lists of manufacturers, wholesalers, distributors, jobbers and kindred services arranged in alphabetical order under their respective business or product headings. Respondents sell advertising in said directory primarily to advertisers interested in reaching businesses having plants or offices in the New York City Metropolitan Area, and the profitable conduct of their business is dependent on the sale of such advertising.

Said respondents have caused and are now causing their directories, when published, to be transported, through the United States mails and by other means, from the point of publication thereof to persons and firms that have purchased advertising space in said publication, and to other persons and firms, at their respective locations in various States of the United States, including States other than the State of New York. Respondents maintain, and during all times mentioned herein have maintained, a course of trade in said publication in commerce between and among the various States of the United States. Although the directories published and distributed by respondents contain the names of persons and firms primarily interested in the markets represented in the New York Metropolitan Area and the listings are predominantly from that area, the volume of respondents' trade in commerce has been and is substantial. At the time of the hearing two directories had been published by respondents and one was in process. These contained 2,650, 4,130 and 3,841 listings, respectively, of which 127, 130 and 183 were from States other than New York.

PAR. 3. Respondents' method of soliciting business has been and is to clip business advertisements or listings from local telephone directories, trade journals, magazines or from its own or other business directories and to paste such clippings on proposal or order forms under appropriate business classifications.

One of the proposal forms illustrative of those which have been used by respondents is approximately $3\frac{1}{2} \times 8\frac{1}{2}$ inches in size and is printed in three sizes of type, 8-point, 10-point and 14-point. Emphasis is added by printing certain portions in bold-faced, heavy capital letters and by the use of ruled boxes. For instance, in such a box in the upper left-hand corner of the proposal next to the blank space where the clipping is attached, there appear in 14-point, extra-

bold letters the words "New York City Business Classified Directory." Immediately under this box, also in capital letters but in 10-point type, appear the words "Directory Publishing Corporation—Publishers"; the address follows in 8-point type. In the lower right-hand corner in bold-faced 10-point type is the statement, "Listing Will Not Be Published Unless Payment Is Made," and immediately below this in 14-point extrabold, abbreviated or condensed type are the words "Cost Per Year." Following this last phrase respondents insert an amount indicating the price of publishing the clipped advertisement or listing. Near the top of the proposal is a statement in 8-point bold-faced capital letters, "Additional Information—See Descriptive Folder."

The body of the text of the proposal consists of four lines in 8-point type running lengthwise across the middle of the form. In this portion of such form, information is given that respondents propose to publish "the attached listing, taken from another publication" in "A New Annual Publication not connected with any other Directories, Red Books or Telephone Company," and that a "check will be accepted and considered as approval and a Complimentary Copy of the Directory will be sent to you when printed." The prospect's name and address corresponding to that in the clipping is then written in the lower left-hand corner.

These proposal forms so filled out are mailed to the persons or firms whose advertisements or listings have been clipped and attached thereto and whose business is solicited. Accompanying each form is a pre-addressed reply envelope and a four-page folder describing respondents' directory.

PAR. 4. The proposal forms, if carefully read by the prospects to whom they are sent, would preclude any misunderstanding on the part of such prospects as to the publisher by whom the proposals were sent or the publication in which the advertisements are to be printed. The record shows, however, that respondents' practice of attaching to the proposals advertisements or listings appropriated from local telephone or other directories or publications has actually deceived many of the prospects to whom such forms were sent into the mistaken belief that they were simply being asked to renew their advertisements in the publications from which the attached advertisements or listings were taken.

Respondents' practices are potentially deceptive regardless of the cautions, disclaimers and explanations printed on the proposals and in the accompanying circulars. The large type printing, the appropriated advertisement or listing, and the format so attract the attention of the prospect that more than a cursory examination of the form

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appears to him to be useless and time wasting. The statements, explanations and disclaimers on the forms have not been and are not effective to prevent deception or the likelihood of deception. The record shows that some advertisers accepted respondents' proposals and mailed checks to the respondents in the pre-addressed, return envelopes furnished by respondents and yet did not realize until later that their advertisements or listings were not appearing in the publication from which the clippings above referred to were taken. In still other instances, advertisers, disregarding the pre-addressed return envelope and the folder enclosed by the respondents, mailed their checks for the amounts indicated on the proposals to the company publishing the directory from which the clipped advertisement or listing had been taken.

PAR. 5. Under the terms of an affidavit of discontinuance submitted to the United States Post Office Department, corporate respondent, Directory Publishing Corporation, on August 17, 1951, H. E. Docket No. 1/48, agreed to delete from the proposal forms the words "not connected with any other directories, redbooks or Telephone Company," and since that date the proposal form has carried in place of those words the phrase "Established Annual Publication of proven merit." In the settlement with the Post Office Department, said corporate respondent also agreed not to clip or use on its proposal form "any advertisement cut or taken bodily from the classified telephone directories of the New York Telephone Company or any other telephone company." Respondents have presented testimony in this proceeding indicating that, since August 17, 1951, they have not, for use in connection with proposals mailed by them, caused any advertisements to be clipped from classified telephone directories.

PAR. 6. Said respondents in the conduct of their business are in substantial competition in commerce with other firms and individuals also engaged in the publication of directories and in the sale of advertisements and listings therein.

PAR. 7. The use by respondents in the circumstances here presented of listings and advertisements physically clipped and removed from other directories has constituted a representation to a substantial segment of the public that the advertisement or listing which is ordered by each of such persons or firms will be placed in the directory in which such person or firm has been previously listed and from which the advertisement or listing was clipped by the respondents, when such is not the fact.

PAR. 8. The use by said respondents of the aforesaid acts and practices and the misleading representations employed by them in connection with such acts and practices has had and now has the tendency

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and capacity to mislead many persons and has misled many persons into the erroneous and mistaken belief that they are buying and paying for advertising space in the publications from which said advertisements were clipped. As a result, trade has been unfairly diverted to respondents from their competitors and substantial injury has been and is now being done to competition in commerce.

CONCLUSION

The aforesaid acts, practices and methods of said respondents, as herein set forth, are all to the prejudice and injury of the public and of said respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Directory Publishing Corporation, a corporation, and its officers, and respondents Stanley Oleck and Harvey Oleck, individually and as officers of said corporation, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as commerce is defined in the Federal Trade Commission Act, of advertising in industrial, commercial or other directories or registers, or any other publication, do forthwith cease and desist from using in the solicitation of such advertising by mail, advertisements which have been physically clipped or removed by or for the respondents from any publication issued by others than the respondents.

It is further ordered, That the charges of the complaint be, and the same hereby are, dismissed as they relate to the acts and practices of respondent Business Directory Corporation, and as they relate also to the acts and practices engaged in by respondents Stanley Oleck and Harvey Oleck, as officers of said corporation prior to its dissolution.

It is further ordered, That respondents, Directory Publishing Corporation, Stanley Oleck and Harvey Oleck, shall, within sixty (60) days after service 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.

Commissioner Mason dissenting from the order in this case for the reasons stated in his dissent of July 19, 1950, filed in the Matter of Independent Directory Corporation, Docket No. 5486.¹

¹ See 47 F. T. C. 13.

IN THE MATTER OF
SHELL OIL COMPANY

COMPLAINT, SETTLEMENT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 3 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 6051. Complaint, Oct. 16, 1952—Decision, Mar. 17, 1953

Where a corporation, which was engaged in the production and distribution of a complete line of petroleum products, made about 67% of its sales of kerosene and fuel oils in the "Eastern Midcontinent Territory", and sold in excess of 8% of the total sales for the industry in said territory, which comprised all States east of the Rocky Mountains; and which, prior to 1951, sold to independent dealers who resold its products and similar products of its competitors under their individual trade names, and to other independent dealers who handled its products exclusively and resold them under its own trade name—

- (a) Adopted, put into effect, and enforced a marketing plan whereby sales and contracts for the sale of its kerosene and fuel oils were made only on condition that the purchaser should not use, deal in, or resell such products of its competitors;
- (b) Effectuated said plan through sales contracts with independent dealers which required them, among other things, (1) to adopt and use its color scheme, trademark, and trade name on all delivery equipment; (2) to refrain from selling and delivering kerosene and fuel oils other than its own under its trade name; and (3) to purchase from it specified minimum quantities, based upon the dealer's total purchases of said products from all suppliers during the preceding year; and
- (c) Refused to sell its products to independent dealers who were unwilling or unable to enter into such sales contracts with it and thereby handle and deal in its kerosene and fuel oils exclusively;

Capacity, tendency and effect of which plan, sales contracts, and acts and practices in pursuance thereof might be to prevent its competitors from selling any such products to independent dealers who executed such contracts; to preclude such dealers from all benefits of competition between it and other sellers; and to cut off the source of supply for independent dealers who were unwilling or unable to handle its products exclusively; and

With the further result that its said marketing plan and sales contracts might substantially lessen competition in the lines of commerce in which it and its customers were engaged, and might tend to create a monopoly in it in the production, distribution, and sales in commerce of said products:

Held, That such acts and practices constituted a violation of Section 3 of the Clayton Act.