

IN THE MATTER OF
AQUELLA PRODUCTS, INC., AND PRIMA PRODUCTS,
INC., 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 5622. Complaint, Nov. 24, 1948—Decision, June 1, 1953

Water may penetrate the masonry walls or floor of a basement by seepage, a broad term, which includes (1) leakage, namely, penetration of moisture through openings considerably larger than pore spaces, and (2) capillary penetration, namely, penetration through pore spaces or openings similar in size.

Where a corporation and its four officers, engaged in the competitive interstate sale and distribution of a mineral coating, designated "Aquilla", under rights conveyed to it by another concern; in advertisements in newspapers and periodicals of general circulation and by folders, pamphlets and other advertising material, directly or by implication—

- (a) Falsely represented that said product operated on an entirely new principle in the control of water seepage through masonry, by means of such typical statements as "Over and over Aquilla does 'the impossible' where all other materials failed. Working on an entirely new principle, this amazing mineral surface coating controls seepage above or below ground, inside or outside";

Notwithstanding the fact that the scrubbing of the product into the surfaces concerned did not, as contended, represent a new principle but was a method which had long been used in the application of cementitious water paint products;

- (b) Falsely represented that said product was used in waterproofing and controlling seepage in the Maginot Line; and
(c) Represented that the manner of application of said product was as easy and almost as simple as whitewashing;

The facts being that while the directions for use were comparatively simple, they clearly indicated that proper application of the product was a painstaking task much more complicated and difficult than the simple process of whitewashing;

- (d) Represented that application of said product to the surface of all forms of porous masonry would positively prevent water leakage, dampness, and seepage above and below grade, and would render such surface impermeable to the passage of water regardless of its kind, porosity, or condition;

The facts being that while such a cementitious water paint was of value as a coating on the outside surface of masonry walls above grade, it would not prevent capillary penetration through the coating when used below grade on the inside; and while, properly applied, it might reduce leakage through

1394

Syllabus

cracks in the masonry if a sufficient number of coatings were used to cover all openings not too wide to be bridged, such capillary penetration might in time result in damp walls and high humidity as to make living conditions uncomfortable and the basement unsafe for storage of materials which might be thus damaged; and

- (e) Falsely represented through use of the terms "waterproof" and "water-tight" in connection with said product, and particularly through use of testimonials in pamphlets and other advertising material, that such product would render units or structures to which it was applied impermeable to and proof against the passage of water and moisture for their life under all conditions of water and moisture contact and exposure;

With capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous belief that such representations were true and thereby induce purchase of substantial quantities of said product:

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

As respects testimony offered by respondent with reference to a purported test somewhere in Queens, and also with reference to an exhibit erected for display in one of the office buildings: such testimony was vague and indefinite and did not constitute scientific consideration of the matter; the towers involved were not so constructed as to simulate wall construction in a building; and it was concluded, after careful consideration, that the testimony was of little or no evidentiary value and in no way tended to effectively counteract or contradict tests of respondent's product made by the National Bureau of Standards as a result of which it was concluded that coatings of the product involved were equal to, but not better than, coatings made of a high-grade cement water paint; that the product might be considered to be an effective and durable preparation when applied to the exposed faces of masonry walls above grade; but that, used below grade, while the coating greatly reduced the rate of leakage, it was not waterproof.

With regard to respondent's claim as to successful use of the product to control seepage in the Maginot Line and use thereof to waterproof the same, and its description thereof: while no direct evidence was introduced as to such claims, the Commission was of the opinion, following the answer of an expert witness from the Bureau of Standards to a hypothetical question embodying the description of the Line as set out in said advertising, that the product under the conditions described would not prevent the penetration of water through such a wall, prevent seepage by capillary action, or prevent condensation, and would not waterproof under said circumstances; and was consequently of the opinion that the greater weight of the evidence established that such advertising representation was false and misleading.

With respect to respondent's contention that it participated in the trade practice rules of the Commission for the masonry waterproofing industry promulgated August 31, 1946, and that on or before October 1, 1946, their effective date, it destroyed and had not subsequently issued any of the advertising containing any of the representations referred to in the complaint, and that the term "waterproof" had not since been used in connection with its prod-

Complaint

49 F. T. C.

uct: respondent disregarded certain excerpts of testimonial letters which appeared in its current advertising, and also disregarded a circular which, as stipulated, was used by it during the two years preceding; and while there was some contradictory testimony on the part of one witness, the record as a whole sustained the facts as stipulated; it further appearing, moreover, that respondent vigorously contended that the representations charged in the complaint were proper, and did not constitute false or deceptive advertising.

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

Mr. Edward L. Smith, Mr. George M. Martin and Mr. J. M. Doukas for the Commission.

Mr. Robert E. Kline, Jr., of Washington, D. C., and *Kirlin, Campbell & Keating*, of New York City, for Aquella Products, Inc., and the officers thereof.

Mr. Milton Elias Schattman, of New York City, for Prima Products, Inc., and the officers thereof.

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 Aquella Products, Inc., a corporation, Ira A. Campbell, L. J. Clarke, Leandro W. Tomarkin and Zella F. Campbell, individually and as officers of Aquella Products, Inc., and Prima Products, Inc., a corporation, Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer, individually and as officers of Prima Products, Inc., 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 Aquella Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1270 Sixth Avenue, New York 20, New York. Individual respondent Ira A. Campbell is president, individual respondents L. J. Clarke and Leandro W. Tomarkin are vice presidents and individual respondent Zella F. Campbell is treasurer of respondent Aquella Products, Inc. Acting individually and in their official capacities, the said individual respondents formulate, direct and control the acts, policies, practices and business affairs of said respondent corporation.

PAR. 2. Respondent, Prima Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of

the State of New York, with its office and principal place of business at 10 East 40th Street, New York 16, New York.

Individual respondents Milton P. Schreyer, Charles S. Brody, Milton E. Schattman and Edward P. Schreyer are president, vice president, secretary, and treasurer, respectively, of the respondent Prima Products, Inc. Acting individually and in their official capacities, the said individual respondents direct and control the policies, acts, practices and business affairs of the said respondent corporation.

PAR. 3. Respondent Aquella Products, Inc., and the individual respondents Ira A. Campbell, L. J. Clarke, Leandro W. Tomarkin and Zella F. Campbell, are now and ever since the organization of said corporation have been engaged in the manufacture, sale and distribution of a mineral surface coating designated "Aquella," in commerce between and among the various States of the United States and in the District of Columbia.

Respondent corporation Prima Products, Inc., for more than one year last past has had and still has the exclusive right for the sale and distribution of Aquella in the United States, Canada, Hawaii and the Philippine Islands; and is now and ever since the acquisition of such right, has been engaged in the sale and distribution in commerce between and among the various States of the United States and in the District of Columbia of Aquella to retail dealers, who in turn sell to the consuming public. Respondent corporation Prima Products, Inc., has caused and now causes said product, when sold by it, to be shipped and transported by respondent corporation Aquella Products, Inc., from the place of business of said respondent Aquella Products, Inc., located in the State of New York, to the purchasers thereof located in the various States of the United States and in the District of Columbia.

All of the respondents maintain and at all times for more than one year last past have maintained a constant course of trade in the said product "Aquella" in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their said businesses all of the respondents are now and at all times for more than one year last past have been in substantial competition with other firms, partnerships, and corporations and individuals engaged in the manufacture, sale and distribution of products of the same general type and designed for the same purposes, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. In the course and conduct of their business, respondent Aquella Products, Inc., and its officers above set forth have furnished and now furnish certain statements, claims, representations and information concerning the product Aquella to respondent Prima Products,

Complaint

49 F. T. C.

Inc., and its officers above set forth, for the purpose of and with the intent and expectation that such statements, claims, representations and information shall be used by the said Prima Products, Inc., and its officers in advertising and promoting the sale of said product in commerce.

In the course and conduct of their business and for the purpose of inducing the sale of the product Aquella in commerce, respondent Prima Products Inc., and its officers have and do make use of said statements, claims, representations and information supplied to it by Aquella Products, Inc., and its officers, and circulate said statements, claims, representations, and claims, statements and representations based upon such information with the knowledge and consent, and for the benefit and profit of said Aquella Products, Inc. Among and typical of such claims, statements and representations used by Prima Products, Inc., and its officers and circulated by means of folders, pamphlets and labels and in advertisements inserted in newspapers and periodicals of general circulation and by other advertising media, are the following:

Aquella, the amazing mineral surface coating that controlled seepage in the Maginot Line, works on entirely new principle—where other materials fail! Use inside or outside, above or below ground, on all porous masonry surfaces—such as brick, concrete, stucco, stone, cement, cement plaster masonry units.

AQUELLA . . . first used to waterproof the Maginot Line.

Aquella is the positive, easy way to remedy water leakage, dampness or seepage inside or outside . . . above or below ground . . . on all porous masonry surfaces.

Tests (by National Bureau of Standards) won Aquella a rating of "excellent" on ordinary brick or concrete walls.

Because of the filling of the pores with Aquella, the presence of a hydrostatic head of water on the unprotected side does not impair the integrity of the treated surface nor its property to resist capillary action or seepage of water.

Already scores of new buildings and even low priced homes have been made damp-proof by a process almost as simple as whitewashing.

. . . it becomes a substance which is water-tight and which continues to harden with age.

PAR. 6. Through the use of foregoing statements, representations and claims, and others of the same import but not specifically set out herein, all of the respondents represented that the product Aquella operates upon an entirely new principle in the control of water seepage through porous masonry; that it was used in waterproofing and controlling seepage in the Maginot Line; that its manner of application is easy and almost as simple as whitewashing; that its application to the surface of all forms of porous masonry will positively prevent water leakage, dampness and seepage, inside and out, above and below grade and will render such surface impermeable to the passage of

water regardless of the kind, porosity or condition of the surface to which it is applied, regardless of cracks or other structural failures resulting from ground movement, settlement or other cause arising subsequent to application, regardless of the location of the structure or of the water, moisture or atmospheric conditions which such structure may encounter, regardless of whether it is applied to the internal or external surfaces of masonry and regardless of whether it is applied above or below grade; that as a result of tests made by the National Bureau of Standards, Aquella was given a rating of "excellent" under all conditions of use on ordinary brick and concrete walls.

PAR. 7. The foregoing statements, representations and claims are false, misleading and deceptive. In truth and in fact, Aquella does not involve any new principle in attempting to control water seepage through porous masonry. It was not used in the Maginot Line for the purpose of waterproofing or controlling seepage. The application of the product is not easy and is not comparable in any manner to whitewashing. Many porous masonry surfaces are of such a kind, of such porosity, in such a condition, so located and exposed to such water, moisture and atmospheric conditions that application of the product whether applied above or below grade or to external or internal surfaces will not prevent water leakage, dampness and seepage, and will not render such surfaces impermeable to the passage of water. The application of said product to masonry surfaces will not prevent the passage of water through cracks or structural failure resulting from ground movement, settlement or other cause arising subsequent to application.

The rating of "excellent" given by the National Bureau of Standards was not based upon tests involving the various water exposures and pressures to which brick and concrete walls are subjected throughout the country but was limited to the results of a test in which the product Aquella was applied to the exposed surfaces of brick and concrete walls, above grade, and subjected to a water pressure equivalent to a head of two inches applied to the exposed faces.

PAR. 8. Through the use of the words "waterproof" and "water-tight," respondents represented that the application of said product to porous masonry units and structures will render such units and structures impermeable to and proof against the passage of water and moisture throughout the life of such units and structures under all conditions of water and moisture contact and exposure.

PAR. 9. The foregoing representations set forth in Paragraph Eight are false, misleading and deceptive for the reasons set forth in Paragraph Seven, which are incorporated in and made a part of this paragraph by reference thereto.

PAR. 10. The use by all of the respondents of the foregoing false, deceptive and misleading statements, representations and claims, disseminated as aforesaid, has had, and now has the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements, representations and claims are true and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief so induced, to purchase substantial quantities of respondents' product. As a result thereof, trade has been unfairly diverted to respondents from their competitors in commerce between and among the various States of the United States and in the District of Columbia. In consequence, substantial injury has been done by respondents to substantial competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 11. The aforesaid acts and practices 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 November 24, 1948, issued and subsequently served its complaint in this proceeding upon the respondents as above-named in the caption hereof, charging them 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 filing of answers to the complaint, 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 said testimony and other evidence were duly recorded and filed in the office of the Commission. On September 30, 1952, the hearing examiner filed his initial decision.

Thereafter, this matter came on to be heard by the Commission upon the appeals from said initial decision filed by the counsel for respondents, Prima Products, Inc., Milton P. Schreyer, Charles S. Brody, Milton E. Schattman and Edward P. Schreyer, and by counsel supporting the complaint, briefs in support of and in opposition to said appeals, and oral arguments of counsel; and the Commission, having duly considered and ruled upon said appeals and having considered

1394

Findings

the record herein 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 Aquella Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1270 Sixth Avenue, New York 20, New York. Individual respondent Ira A. Campbell is president, individual respondents L. J. Clarke and Leandro W. Tomarkin are vice presidents and individual respondent Zella F. Campbell is treasurer of respondent Aquella Products, Inc.

PAR. 2. Respondent Prima Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 10 East 40th Street, New York 16, New York. Respondent Milton P. Schreyer served until January 1951 as president of said corporate respondent and respondents Charles S. Brody, Milton E. Schattman and Edward P. Schreyer are vice president, secretary and treasurer, respectively, thereof. Acting individually and in their official capacities, the said individual respondents have directed and controlled the policies, acts, practices and business affairs of said respondent corporation.

PAR. 3. Respondent corporation Prima Products, Inc., for several years last past has been engaged in the sale and distribution of a mineral surface coating designated "Aquella." This corporate respondent causes said product, when sold by it, to be transported from the place of manufacture in the State of New York to the purchasers thereof located in the various other States of the United States and in the District of Columbia.

Said respondent maintains and at all times mentioned herein has maintained a course of trade in the said product in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its said business, the respondent Prima Products, Inc., at all times mentioned herein has been in substantial competition with other corporations and with firms, partnerships and individuals engaged in the manufacture, sale and distribution of products of the same general type and designated for

the same purposes, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. On March 28, 1945, one Rene Haguenaue entered into a contract with the respondents Ira A. Campbell and L. W. Tomarkin, at that time copartners trading as Modern Waterproofing Paint Company, granting to said respondents the exclusive right to manufacture and sell the product "Aquella." Thereafter on January 18, 1946, said respondents assigned said contract to the respondent Aquella Products, Inc., which thereafter granted to respondent Prima Products, Inc., the exclusive right for the sale and distribution of the product Aquella in the United States and certain other areas. Thereafter on December 6, 1949, the respondent Aquella Products, Inc., sold and assigned to respondent Prima Products, Inc., all of its right, title and interest in and to said contract of March 28, 1945, between Rene Haguenaue and Modern Waterproofing Paint Company and also assigned the registered name "Aquella" (U. S. Registration No. 405422) and the goodwill thereof so far as it applied to the territory of the United States, Canada, Alaska, Hawaii and the Philippine Islands. By said sale respondent Aquella Products, Inc., and its officers were divested of all interest in the product Aquella except as to royalties.

PAR. 6. The record indicates that the respondent Aquella Products, Inc., delivered to the respondent Prima Products, Inc., all information which it had concerning the product Aquella at the time exclusive sales rights were granted. There is, however, no evidence that respondent Aquella Products, Inc., or its officers, at any time advertised said product or otherwise participated in the advertising issued by the respondent Prima Products, Inc. From the time that the Prima Products, Inc., took over the exclusive sales of said product Aquella, the advertising of said product was entirely in the hands of said respondent Prima Products, Inc., under the contractual relations which existed between it and the respondent Aquella Products, Inc.

PAR. 7. In the course and conduct of their business and for the purpose of inducing the sale of the product Aquella in commerce, respondent Prima Products, Inc., and its officers have represented directly or by implication by means of advertisements inserted in newspapers and periodicals of general circulation and by folders, pamphlets or other advertising material:

- (1) That the product Aquella operates on an entirely new principle in the control of water seepage through porous masonry;
- (2) That Aquella was used in waterproofing and controlling seepage in the Maginot Line;
- (3) That the manner of application of Aquella is as easy and almost as simple as whitewashing;

(4) That the application of Aquella to the surface of all forms of porous masonry will positively prevent water leakage, dampness and seepage above and below grade and will render such surfaces impermeable to the passage of water regardless of the kind, porosity or condition of the surface to which it is applied; and

(5) That through the use of the terms "waterproof" and "water-tight" in connection with the product Aquella and particularly by means of the use of testimonials in pamphlets and other advertising material, Aquella will render units or structures to which it is applied impermeable to, and proof against, the passage of water and moisture throughout the life of such units and structures under all conditions of water and moisture contact and exposure.

PAR. 8. The product Aquella is a cementitious water paint. The directions for use provide that before application the surface must be thoroughly scrubbed clean of all dirt, dust, loose particles, paint, oil, grease, lacquer, paraffin or any other substance which would prevent Aquella from striking in or bonding into the masonry pores. The surface to which Aquella is to be applied must then be wet down until uniformly moist but without visible water film. The first coat of Aquella is then applied with a stiff fibre fender brush with thorough and vigorous scrubblings of Aquella into every pore of the surface taking care not to leave pinholes through which water may penetrate. The finished surface must be kept moist for at least 48 hours by using a fine spray at frequent intervals. While these directions for use are comparatively simple, they clearly indicate that proper application of respondents' product is a painstaking task much more complicated and considerably more difficult than the simple process of whitewashing. Respondents' representation that the application of the product Aquella is almost as simple as whitewashing consequently is deemed to be deceptive and misleading.

PAR. 9. The product Aquella does not operate upon a new principle. Typical of the statements made by the respondent in its advertising with reference to the contention that the product Aquella operates on a new principle is the following: "Over and over Aquella does 'the impossible' where all other materials fail. Working on entirely new principle, this amazing mineral surface coating controls seepage above or below ground, inside or outside." By such statements the respondents represent that the product Aquella has some inherent property which constitutes a new principle in the control of water seepage. In their defense in this proceeding the respondents contended that the new principle involved was the scrubbing of the product into the surfaces to which applied. This is simply a method of application which has long been used in connection with the appli-

Findings

49 F. T. C.

cation of cementitious water paint products; consequently, the representation that Aquella operates on a new principle is false, misleading and deceptive.

PAR. 10. The product Aquella is composed essentially of white Portland cement, calcium carbonate (probably either ground limestone or chalk) and quartz (fine sand or finely ground quartz rock). These materials are commonly used ingredients of cement water paints. In December 1942, the National Bureau of Standards of the United States Department of Commerce made certain tests of the product Aquella, samples of which were supplied by respondent L. W. Tomarkin. For the purpose of testing, four walls were built, two of highly absorptive brick and two of stone-concrete block. The tests simulated exposure to wind-driven rain. The exposed face of the walls was covered with a thin sheet of running water and subjected to an air pressure of 10 pounds per square foot above atmospheric pressure. The walls treated on the exposed faces were rated as "Excellent" and the walls treated on the back or unexposed faces with Aquella were rated "Poor" when tested after the application of the first coat, and "Good" after the application of the second coat. The pressure applied to the exposed surfaces of these walls was equivalent to a head of 2 inches of water and the test did not indicate how effective such coatings might be when subjected to higher water pressure. After making the above test, the walls were stored out of doors and the coatings allowed to weather for about eight months. Further tests after this period indicated that the walls painted on the exposed faces, which had been rated "Excellent," were rated "Good" in tests made after weathering. The walls painted on the back or unexposed faces were rated "Poor" after the weathering period. As a result of these subsequent tests, it was concluded by the Bureau of Standards that the coatings of Aquella paint were equal to but not better than coatings made of a high-grade cement water paint and that this product might be considered to be an effective and durable preparation when applied to the exposed faces of masonry walls above grade.

PAR. 11. In December 1946 further tests of the product Aquella were made by the National Bureau of Standards to determine the effectiveness of this product when used below grade. In this test the product was applied to walls about 8 inches thick, 46 inches long and 54 inches high. The bottoms, ends and tops of the walls were built of absorptive brick laid with all the mortar joints completely filled with mortar. The center portions of the walls were built of 3-cell, 8 x 16 x 8 cinder-concrete blocks. Aquella was applied to the wall as directed by the manufacturer and was liberally applied to the back of the wall with

a scrub brush. Two coats were applied. The coatings were wetted down daily for two days after they were applied and the treated walls were kept indoors at a temperature between 60 and 70 degrees Fahrenheit. The wall was tested more than a month after the coatings were applied. The treated test walls were placed so that their exposed (untreated) faces formed an inner face of a test chamber which was then filled with water to a depth of 4 feet. An overflow pipe at the 4-foot level prevented the water from rising higher than the top of the cinder block portion of the walls. After the chamber was filled, a small amount of water was continually added in order to maintain a constant head of 4 feet. The coating of Aquella as the result of this test was rated as "Poor." The entire area of the coating over the cinder block was damp or wet and droplets of water ran down the treated face to the flashing. The rate of leakage from the flashing reached a maximum of 1 liter per hour in 6 hours. At the end of one day the rate of leakage was 0.8 liter per hour. The points of leakage through the Aquella coating were widely distributed throughout the area of the coating on the cinder-concrete block and there were no large holes or openings in the coating through which the leakage poured in a continuous stream. Although the coating of Aquella greatly reduced the rate of leakage through the cinder-concrete block portion of the wall, the coating was not waterproof.

PAR. 12. Water may penetrate the masonry walls or floor of a basement by seepage. The term "seepage" is a broad one and includes (1) leakage and (2) capillary penetration. The penetration of moisture through openings considerably larger than pore spaces would be termed "leakage." The penetration through pore spaces or openings similar in size would be termed "capillary penetration." Capillary penetration may occur whether there is water pressure or not.

PAR. 13. Aquella or any other similar cementitious water paint is of value as a coating on the outside surface of masonry walls above grade. At such a point, cement water paints would prevent the leakage of water through fairly large-sized cracks. The penetration of moisture by capillarity through a coating of Aquella on the outside face of the masonry wall above grade would occur, but such moisture would probably be evaporated on the inside of the wall as fast as it came through unless very highly absorptive units were used, and such capillary penetration may not be objectionable or a serious matter.

PAR. 14. When used below grade on the inside of a basement wall, a coating of Aquella properly applied may reduce leakage through cracks in the masonry if a sufficient number of coatings are applied to cover all openings not too wide to be bridged by the paint. Such

Findings

49 F. T. C.

a coating would not prevent capillary penetration from the wall through the coating. A coating of Aquella on a basement wall may not control dampness on the wall. In a closed room, like a basement, the moisture penetrating a coating of Aquella, through permeable concrete or other porous masonry walls by such capillarity, approaches the inner face of the coating and may be changed from a liquid state to water vapor by the air in the capillary cell, a process known as evaporation or diffusion. The air in the cell will then enter into the room of the basement and be taken up by the air of the basement. As this process continues, the ability of the air in the basement to take up moisture becomes diminished. The relative humidity of the air in the basement rises, and as the process continues, the ability of the air in the basement to take up the moisture from the walls may be less than the rate of flow of moisture through the walls, so that the moisture passing through the capillary pores will eventually reach the face of the wall in a liquid state making the walls damp with the possibility of droplets of water being visible on the walls. Long before the walls become damp, the relative humidity in the basement may be so high as to make living conditions uncomfortable and the basement may not be safely used for storage of materials which may be damaged by a high relative humidity.

PAR. 15. The respondent introduced testimony with reference to a purported test made somewhere in Queens and also with reference to an exhibit erected for display in one of the office buildings. The testimony with reference to these purported tests or exhibits was vague and indefinite and did not constitute scientific consideration of the matter. The towers involved were not so constructed as to simulate wall construction in a building. Careful consideration has been given to the testimony introduced with reference to these purported tests and it has been concluded that this testimony is of little or no evidentiary value and in no way tends to effectively counteract or contradict tests of respondents' product made by the National Bureau of Standards.

PAR. 16. In its advertising the respondent Prima Products, Inc., has variously represented also that the product Aquella had been successfully used to control seepage in the Maginot Line and that said product had been used to waterproof the Maginot Line. In such advertising the Maginot Line was described as fortifications built hundreds of feet under ground with walls 20 to 30 feet thick, under valleys honeycombed with springs and water courses and in places built through marshes and swamps. There was no evidence introduced as to the use of the product Aquella on the Maginot Line, nor was any

1394

Findings

direct evidence introduced as to the effectiveness or noneffectiveness of the product Aquella in controlling seepage on the Maginot Line. However, the expert witness from the National Bureau of Standards, C. C. Fishburn, was asked a hypothetical question embodying the description of the Maginot Line as set out in respondents' advertising and he testified that the use of Aquella under the conditions described would not prevent the penetration of water through such a wall, prevent seepage by capillary action, or prevent condensation, and would not waterproof under those circumstances. To the extent thus noted, the Commission is of the opinion that the greater weight of the evidence establishes that the advertising representation here under consideration is false and misleading.

PAR. 17. In the course of the hearings in this proceeding the respondent Prima Products, Inc., contended that it participated in, and subscribed to, the Trade Practice Rules of the Federal Trade Commission for the Masonry Waterproofing Industry promulgated August 31, 1946. Respondent further contended that on or before October 1, 1946, the effective date of said Trade Practice Rules, it destroyed and has not subsequently issued any advertising containing any of the representations referred to in the complaint in this proceeding and that the term "waterproof" has not since been used in conjunction with or descriptive of the product Aquella. In making this contention the respondent has disregarded excerpts from testimonial letters appearing in its current advertising and has also disregarded Commission's Exhibit No. 4 which is a circular which was stipulated, in the record, as having been used during the past two years and which was submitted to the Federal Trade Commission with respondent's transmittal letter dated July 30, 1947, as a sample of current advertising. While there is some contradictory testimony on the part of one witness, the record as a whole sustains the facts as stipulated in the record. Furthermore, the respondent has vigorously contended that the representations charged in the complaint were proper and did not constitute false or deceptive advertising.

PAR. 18. The use by the respondent, Prima Products, Inc., a corporation, and respondents, Milton P. Schreyer, Charles S. Brody, Milton E. Schattman and Edward P. Schreyer, individually and as officers of said corporation, of the false, deceptive and misleading statements, representations and claims, as hereinbefore described, has had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements, representations and claims are true and to induce them, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' product.

Order

49 F. T. C.

CONCLUSION

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

ORDER

It is ordered, That the respondents Prima Products, Inc., a corporation, and Milton P. Schreyer, Charles S. Brody, Milton E. Schattman and Edward P. Schreyer, individually and as officers of said corporation, and their respective agents, representatives 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 respondents' product, now designated "Aquella," or any other product of substantially similar composition or possessing substantially similar properties under whatever names sold do forthwith cease and desist from:

(1) Representing, directly or by implication, that respondents' product, now designated "Aquella," operates on an entirely new principle in the control of water seepage through porous masonry;

(2) Representing, directly or by implication, that respondents' products, now designated "Aquella," will waterproof or prevent the penetration of water through the walls of underground fortifications such as those constructed on the Maginot Line;

(3) Representing, directly or by implication, that the manner of application of respondents' product, now designated "Aquella," is as easy or simple as whitewashing or that the ease of application of said product in any way approaches the ease of application of whitewashing;

(4) Representing, directly or by implication, that the application of respondents' product, now designated "Aquella," to porous masonry surfaces below grade will render such structures impermeable to or proof against the passage of water or moisture; and

(5) Using the words "waterproof" or "watertight" or any other word or words of similar import or meaning to designate respondents' product or to describe or refer, directly or by implication, to use thereof, when applied to below grade masonry surfaces or structures.

It is further ordered, That the complaint be dismissed as to the respondents Aquella Products, Inc., a corporation, Ira A. Campbell,

1394

Order

L. J. Clarke, Leandro W. Tomarkin, and Zella F. Campbell, individually and as officers of Aquella Products, Inc.

It is further ordered, That respondents, Prima Products, Inc., Milton P. Schreyer, Charles S. Brody, Milton E. Schattman and Edward P. Schreyer, 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 the terms of this order.

Commissioner Howrey not participating for the reason that oral argument was heard prior to his appointment to the Commission.

Complaint

49 F. T. C.

IN THE MATTER OF

MIRACLE HEARING AID, INC. 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 6067. Complaint, Nov. 28, 1952—Decision, June 2, 1953

Where a corporation and an officer thereof, engaged in the interstate sale and distribution of a device designated "Miracle Hearing Aid" designed for insertion in the external auditory canal; in advertising their said product in newspapers and other advertising literature and on letterheads—

- (a) Falsely represented that said device was a hearing aid and that by its use the hearing of deaf persons, or those with a partial or complete loss of hearing, would be benefited;
- (b) Falsely represented that said device had been approved by physicians; and
- (c) Falsely represented that the initial cost thereof was the only expense to the purchaser as there was nothing to wear out or replace;
- (d) Falsely represented through the use of the words "Hearing Aid" as a part of the corporate name and of the trade name, that the device would be of benefit to deaf persons with partial or complete loss of hearing; and
- (e) Failed to reveal facts material with respect to the consequences which might result from the use of the device under prescribed and usual conditions in that they failed to disclose that, used as directed, it might cause serious injury to the auditory canal or ear drum and might cause the extension of an infection should such be present;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said representations were true, and that the use of said device was free from danger, and because of such erroneous and mistaken belief to purchase respondents' said device:

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

Before *Mr. John Lewis*, hearing examiner.

Mr. A. S. Scott, Jr. for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Miracle Hearing Aid, Inc., a corporation, and Henry Pollack and Ruth Miller, indi-