

Complaint

IN THE MATTER OF

STERLING MATERIALS COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6426. Complaint, Oct. 4, 1955—Decision, Mar. 6, 1956*

Consent order requiring three associated New York paint firms to cease making false representations, with respect to exclusive sales territory and sales and promotional assistance; through their salesmen whom they trained to recruit "Franchise Dealers"; and representing falsely in advertising in newspapers and periodicals, and in circulars and other literature furnished to dealers, that they had been selling their paint products for 30 to 35 years, and that many well-known manufacturers, industrial firms, railroads, and agencies of the U. S. Government had used and approved them.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Terral A. Jordan for the Commission.

Mr. S. Michael Ress, 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 Sterling Materials, Inc., a corporation; David Jacobs and Jacob Nadler, individually and as officers of Sterling Materials Company, Inc.; Carbozite Protective Coatings, Inc., a corporation; Sidney Jacobs and Jacob Nadler, individually and as officers of Carbozite Protective Coatings, Inc.; Ohmlac Paint and Refining Co., Inc., a corporation, and Charles A. Jacobs and Lillian Nathan, individually and as officers of Ohmlac Paint and Refining Co., Inc.; all 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 Sterling Materials Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its offices and principal place of business at 1860 Broadway, New York 23, New York. Respondents David Jacobs and Jacob Nadler are president-treasurer and secretary, respectively, of said corporate respondent, Sterling Materials Company, Inc., and these individuals acting in cooperation with each other, formulate, direct and control the acts, policies

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and practices of said corporate respondent. Their addresses are the same as that of said corporate respondent.

Respondent Carbozite Protective Coatings, Inc., is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its offices and principal place of business at 24-13 Bridge Plaza, North, Long Island City 1, New York. Respondents Sidney Jacobs and Jacob Nadler are president-treasurer and secretary, respectively, of said corporate respondent, Carbozite Protective Coatings, Inc., and these individuals acting in cooperation with each other, formulate, direct and control the acts, policies and practices of said corporate respondent. Their addresses are the same as that of said corporate respondent.

Respondent Ohmlac Paint and Refining Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its offices and principal place of business at 24-13 Bridge Plaza, North, Long Island City 1, New York. Respondents Charles A. Jacobs and Lillian Nathan are president, and secretary-treasurer, respectively, of said corporate respondent, Ohmlac Paint and Refining Co., Inc., and these individuals acting in cooperation with each other, formulate, direct and control the acts, policies and practices of said corporate respondent. Their addresses are the same as that of said corporate respondent.

PAR. 2. Said respondents are now, and since January 1947 have been, engaged in the sale and distribution in commerce, as the term "commerce" is defined in the Federal Trade Commission Act, of various types of roofing and foundation paints and coatings, which products are manufactured at plants owned and operated by the respondent Ohmlac Paint and Refining Co., Inc., at Newark, New Jersey and Chicago, Illinois. Said respondents and each of them cause their said products when sold to be shipped, transported and distributed in commerce to dealer-distributors thereof located in various States of the United States other than the States in which said products are manufactured and sold. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade, in commerce, among and between the various States of the United States, and are now and at all times mentioned herein have been, in substantial competition in commerce with other corporations, firms or businesses similarly engaged in the manufacture, sale and distribution of roofing and foundation paints or coatings.

PAR. 3. Respondents since January 1947, have operated and continue to operate a sales plan by means of which they secure agents or dealers for the sale and distribution of their products to the purchasing public. These agents or dealers are secured or re-

cruited by salesmen employed by the respondents, which salesmen are specially selected and trained by the respondents for this purpose. The primary function of these salesmen is to establish said dealerships and to obtain orders for the products of the respondents by means of written contracts or agreements with which are combined a provision for the initial orders for respondents' products. These agents or dealers are hereafter described and referred to as "Franchise Dealers."

Said written agreements which are referred to therein as "Special Dealer's Franchise" or as "Exclusive Franchise for () Dealership" are executed for a definite period of time ranging from one to two calendar years and they include the initial order for the products of the respondents together with optional provision for payment therefor.

PAR. 4. As a part of said sales plan, but not restricted thereto, said salesmen for the respondents acting within the scope of their employment and with knowledge, acquiescence and support on the part of the respondents, and for the purpose of inducing prospective dealers to enter into the aforementioned franchise agreements and to purchase respondents' products, falsely represented and continue to falsely represent to prospective dealers that:

1. Following the execution of the aforementioned franchise agreements, respondents will:

(a) designate and assign to said dealer certain definite, exclusive and restricted sales territory for the period of time in said franchise agreement provided;

(b) furnish the dealer with adequate and timely selling or sales assistance in the form of missionary salesmen and demonstrators who will call shortly thereafter for the purpose of assisting the newly established franchise dealer in order that he may sell to his prospective customers all of the materials included in the initial order executed simultaneously with said franchise dealer agreement;

(c) furnish the dealer with adequate quantities of advertising materials and related sales helps in the form of direct mail advertising, including letters, testimonials, circulars, folders, and brochures, all at no cost to said dealer;

(d) will undertake to and arrange for the direct mailing of respondents' advertising material to prospective customers of said dealer in accordance with lists of such prospects furnished by the dealer to the respondents for that purpose, all at no cost to the dealer;

(e) assume and pay or allow to the dealer up to fifty per centum of the total cost of special or periodic newspaper advertising in-

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curred by said dealer for the purpose of advertising the products of the respondents based upon newspaper mats to be furnished free of charge by the respondents to the dealer for that purpose;

(f) assume and pay or allow to the dealer up to fifty percentum of the total cost of outdoor advertising, described by said salesmen as billboards or bill-posters for the purpose of advertising the products of the respondents;

(g) assume and pay or allow to the dealer up to fifty percentum of the total cost of radio spot advertising for the purpose of advertising the products of the respondents;

(h) furnish free of charge to the dealer or to his prospective customers, free samples of the respondents' products;

(i) furnish promptly and free of charge to the dealer adequate displays or models showing the application of the products manufactured by the respondents.

2. That certain designated leading manufacturers, oil companies, railroads and industrial corporations throughout the United States are users and indorsers of the products of the respondents.

PAR. 5. Respondents, acting by and through said salesmen in turn acting within the scope of their employment, enter into written contracts or agreements with dealers or franchise distributors for the sale and distribution of their said products, said agreements being described as franchise agreements as hereinbefore set forth. Among the covenants and stipulations provided therein are those denominated "Sales Corporation" and "Sales Promotion," whereby said respondents stipulate and agree with the franchise dealer to provide a factory representative to assist said dealer in selling to such prospects of the dealer as have therefore been furnished with samples of respondents' products; and to correspond directly with such prospects on behalf of the said dealer in case the dealer has furnished respondents with the names and addresses thereof.

Notwithstanding said covenants and stipulations with respect to sales cooperation and promotion as above set forth respondents have failed and continue to fail to carry out the provisions in said agreements set forth although called upon to do so by the said franchise dealers.

PAR. 6. Respondents, in the course and conduct of their business and for the purpose of inducing the purchase of their products, have made and now make certain statements with respect to their said products in newspapers and periodicals and in circulars and other advertising literature furnished to their dealers. Among and typical of such statements are the following:

For over 30 years CARBOZITE PROTECTIVE COATINGS have served America's industries * * * including Railroad, Automotive, Rubber, Steel, Chemical and Oil Companies.

UNANIMOUS ACCLAIM BY HUNDREDS OF ELATERITE PRODUCTS Users Offers Concrete Evidence of This Materials' Enduring and Protective Qualities (together with reproductions of order forms or letterheads grouped to one side showing names of a number of large railroads and manufacturers).

OVER 30 YEARS IN USE—For over 30 years America's largest industries have put all their faith in CARBOZITE. * * *

DURING THE PAST 30 YEARS, CARBOZITE PROTECTIVE COATINGS HAVE BEEN CONSPICUOUS IN SERVING AMERICA'S LARGEST INDUSTRIES, SOME OF WHICH APPEAR IN THE LISTING BELOW:

(There follows the names and addresses of a large number of nationally known manufacturers, railroads, public utilities, mail-order houses, United States Army and Navy bases, and Federal agencies.)

CARBOZITE PRODUCTS MUST BE TOPS TO BE ACCEPTED BY USERS LIKE THESE. * * *

(There follows a number of names of well-known manufacturers, railroads, and references to the U. S. Army and Navy, concluding with) “* * * and many hundreds of others.”

FOR OVER 30 YEARS CARBOZITE PROTECTIVE COATINGS HAVE SERVED AMERICA'S MOST PROMINENT INDUSTRIES.

Listed on this page are only a few of the thousands of famous users of Carbozite products. The approval of these large nationally known corporations is your assurance of Carbozite's outstanding quality and dependability.

(There follows, listed in three parallel rows the names and addresses of some 66 well-known railroads, manufacturers, oil companies, etc.)

For over 30 years, Carbozite Protective Coatings have been widely used by America's largest industries. * * *

For over thirty years CARBOZITE PROTECTIVE COATINGS have served America's leading industries. Included are Railroads, Automotive, Rubber, Steel, Chemical and Oil Companies—also the United States Army, Navy and other government agencies.

For over 30 years, Carbozite Protective Coatings have served America's industries, including key railroads, and automotive, rubber, steel, chemical and oil companies. * * *

—It, (Carbo-tex) is backed by a concern which, since 1905, has served America's largest industries; Railroads, Steel, Chemical and Oil Companies.

Carbozite has been manufactured for 35 years and numbers among its users many of the most prominent concerns in the United States.

PAR. 7. By and through the use of the statements set out above, respondents represented that they had marketed and sold their said products for a continuous period of time of 30 to 35 years and that the various manufacturers, industrial corporations, railroads and the various agencies and departments of the United States

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Government designated in the advertising matter had used and approved their said products.

PAR. 8. Said statements were false, misleading and deceptive. In truth and in fact, the length of time during which each of the respondents has sold its said products is much less than 30 years and many of the manufacturers, industrial corporations, railroads and agencies and departments of the United States Government listed in said advertising have neither used nor approved any of respondents' products.

PAR. 9. The use by the respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their said products has and has had the tendency and capacity to mislead and deceive a substantial number of their said franchise dealers as well as members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of said franchise dealers as well as members of the purchasing public to purchase substantial quantities of the respondents' products because of such erroneous and mistaken belief. As a consequence, substantial trade in commerce has been unfairly diverted to the respondents from their competitors and substantial injury done to competition in commerce.

PAR. 10. The acts and practices of the respondents as hereinbefore set forth were and are all to the prejudice and injury of their representatives or franchise dealers and the public and of their competitors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On October 4, 1955, the Federal Trade Commission issued its complaint in this proceeding, charging the respondents with unfair and deceptive acts and practices and unfair methods of competition in commerce by failing to carry out the provisions with respect to cooperation and promotion assistance contained in contracts or agreements with dealers or franchise distributors for the sale and distribution in commerce of respondents' roofing and foundation paints and coatings, and by the use of false, misleading and deceptive representations as to the length of time respondents had marketed and sold their said products, and as to the use and approval thereof by various manufacturers, industrial corporations, railroads, and agencies and departments of the United States Gov-

ernment, in violation of the Federal Trade Commission Act, as amended.

On November 14, 1955, respondents submitted their answers to the complaint herein, and on January 6, 1956, all respondents, except Jacob Nadler and Lillian Nathan, entered into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the hearing examiner an Agreement Containing Consent Order To Cease And Desist, to which were attached three affidavits, one, signed by respondent David Jacobs, averring that the duties of respondent Jacob Nadler, as Secretary of respondent Sterling Materials Company, Inc., are nominal and clerical, and that he has not formulated, directed, controlled or participated in the acts or practices alleged in the complaint herein; another affidavit of similar import with regard to respondent Jacob Nadler as Secretary of respondent Carbozite Protective Coatings, Inc., signed by respondent Sidney Jacobs; and a like affidavit respecting respondent Lillian Nathan as Secretary-Treasurer of Respondent Ohmlac Paint & Refining Co., Inc., signed by respondent Charles A. Jacobs.

The agreement also states that the duties of respondents Jacob Nadler and Lillian Nathan are clerical, that neither formulated, directed, controlled nor participated in the acts, policies or practices alleged in the complaint herein, that the complaint should be dismissed as to these two respondents individually, and that therefore they are not included in the term "respondent" as used thereafter in the agreement. In view of the foregoing facts, the complaint will be dismissed as to respondents Nadler and Nathan.

Respondent Sterling Materials Company, Inc., is identified in the agreement as a New York corporation, with its office and principal place of business located at 1860 Broadway, New York, New York, and respondent David Jacobs as an individual and president-treasurer of respondent Sterling Materials Company, Inc., his address being the same as that of the said corporate respondent.

Respondent Carbozite Protective Coatings, Inc., is identified in the agreement as a Pennsylvania corporation, with its office and principal place of business located at 24-13 Bridge Plaza, North, Long Island City, New York, and respondent Sidney Jacobs as an individual and president-treasurer of respondent Carbozite Protective Coatings, Inc., his address being the same as that of said corporate respondent.

Respondent Ohmlac Paint & Refining Company, Inc., is identified in the agreement as a New York corporation, with its office and principal place of business located at 41-40 Crescent Street, Long Island City, New York, and respondent Charles A. Jacobs as an

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individual and president of respondent Ohmlac Paint & Refining Company, his address being the same as that of said corporate respondent.

Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondents in the agreement waive any further procedure before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance therewith. All parties agree that the answers heretofore filed by respondents shall be withdrawn, and for all legal purposes they will hereafter be regarded as withdrawn; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The agreement sets forth that the order to cease and desist contained therein shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; and that the complaint herein may be used in construing the terms of the order.

After consideration of the charges set forth in the complaint, the agreement, the three affidavits appendant thereto, and the provisions of the proposed order contained in the agreement, the hearing examiner is of the opinion that such order will safeguard the public interest to the same extent as could be accomplished by the issuance of an order after full hearing and all other adjudicative procedure waived in said agreement. Accordingly, in consonance with the terms of the aforesaid agreement, the hearing examiner accepts the Agreement Containing Consent Order To Cease And Desist; finds that the Commission has jurisdiction over the respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That the corporate respondents, Sterling Materials Company, Inc., Carbozite Protective Coatings, Inc., Ohmlac Paint & Refining Company, Inc., their officers; and David Jacobs, individually and as an officer of Sterling Materials Company, Inc.; Sidney Jacobs, individually and as an officer of Carbozite Protective Coatings, Inc.; Charles A. Jacobs, individually and as an officer

of Ohmlac Paint & Refining Company, and said respondents' respective representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of roofing and foundation paints or coatings or other related products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly, indirectly or by implication, through salesmen, agents, solicitors, in advertising or in any other manner or by any other means:

1. That respondents will sell or dispose of or assume the responsibility for the sale or disposition in whole or in part of the aforesaid products for the dealers, agents or other distributors to whom the aforesaid products are sold or that such distributors will not have to pay respondents until said products have been sold or that advertising material, direct mail canvassing, advertising allowances or other sales assistance will be provided to an extent not actually made available or furnished;

2. That the sales territory assigned to dealers, agents or other distributors for the sale and distribution of those of respondents' aforesaid products specified in the franchise or agreement of assignment of said territory is exclusive where all or part of said sales territory has been or is subsequently assigned to others for the sale and distribution of the same named product during all or a part of the period of said assignment;

3. That respondents' aforesaid products have been used, endorsed, acclaimed or approved by persons, firms, corporations, organizations or instrumentalities either public or private which have not within a reasonable period of time prior to the making of the aforesaid representations by respondents actually used substantial quantities of respondents' aforesaid products in the manner and for the purposes for which respondents represent said products to be effective, and which have not affirmatively given thereto their endorsement, acclamation or approval;

4. That respondents' aforesaid products have been offered for sale and sold for a period of time in excess of that for which substantially similar products have actually been offered for sale and sold by respondents or their predecessors in interest.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Jacob Nadler and Lillian Nathan.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 6th day

of March, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Sterling Materials Company, Inc., a corporation, and David Jacobs, individually and as an officer of Sterling Materials Company, Inc.; Carbozite Protective Coatings, Inc., a corporation, and Sidney Jacobs, individually and as an officer of Carbozite Protective Coatings, Inc.; Ohmlac Paint & Refining Co., Inc., a corporation, and Charles A. Jacobs, individually and as an officer of Ohmlac Paint & Refining Co., Inc., shall, within sixty (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 the order to cease and desist.

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IN THE MATTER OF
THOMAS Y. CROWELL COMPANYCONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (a) OF THE CLAYTON ACT*Docket 6480. Complaint, Dec. 21, 1955—Decision, Mar. 6, 1956*

Consent order requiring a New York City publisher to cease discriminating in price in violation of Sec. 2 (a) of the Clayton Act, as amended, by allowing greater discounts from list prices of its trade books to customers it classified as "wholesalers" than it allowed its "institutional suppliers" or "sub-jobbers."

Before *Mr. William L. Pack*, hearing examiner.

Mr. Fletcher G. Cohn for the Commission.

Greenbaum, Wolff & Ernst, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of an act of Congress entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes", approved October 15, 1914 (Clayton Act), as amended by an act of Congress approved June 19, 1936 (Robinson-Patman Act) (U.S.C., Title 15, Sec. 13), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Thomas Y. Crowell Company, hereinafter referred to as "respondent", has violated the provisions of sub-section (a) of Section 2 of the Clayton Act, as amended, hereby issues its complaint stating its charges in these respects as follows:

PARAGRAPH 1. Respondent Thomas Y. Crowell Company is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 432 Fourth Avenue, New York, New York.

PAR. 2. Respondent is now and has since 1875 been engaged directly or indirectly in the publication, sale, and distribution of the various types and classes of books, including popular fiction and non-fiction books which are commonly known as trade books. For the fiscal year ending June 30, 1955, the total gross sales of books published, sold and distributed by this respondent was \$1,942,039.79.

Respondent classifies the customers to whom it sells and distributes the books published by it into several different categories of customers, the principal classifications being (1) "wholesalers," (2) "institutional suppliers", and (3) "retailers."