

It is ordered, That respondents herein 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.

IN THE MATTER OF

NATIONAL TITANIUM COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 8139. Complaint, Oct. 12, 1960—Decision, May 3, 1961

Consent order requiring sellers in Pico Rivera, Calif., to cease misrepresenting, in letters and advertising literature mailed to prospective buyers, the availability, price, and quality of their "Nitrosol" "Genuine Exterior White Paint"—which "we must move immediately"—as in the order below specified.

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 National Titanium Company, Inc., a corporation, and Henrietta Swimmer and Tessie Somers, individually and as officers of said corporation, 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 National Titanium Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 7270 Crider Avenue, Pico Rivera, California. Respondents Henrietta Swimmer and Tessie Somers are officers of said corporation. They formulate, direct and control the policies and practices of the corporate respondent. The address of the individual respondents is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale of paint under the brand name of "Nitrosol" which they describe as "Genuine Exterior White Paint".

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The quantitative formula of said paint is as follows:

840 lbs.	Titanium Dioxide (Pure)	
4,200 lbs.	Albacar 25-11 (Spec. Calcium Carbonate Extender)	
840 lbs.	Kettle bodied Z6 Pure Linseed Oil	
340 lbs.	Ardex P.E. (Esterfield Tall Oil)	
105 lbs.	P-610 (Estergum Solution)	
242 gals.	325 Standard Thinner (Mineral Spirits)	
2 lbs.	Ultra Marine Blue	
3 lbs.	Phenol Mercury	
5 lbs.	Maglite D. (Merck Chem. Co.)	
14 lbs.	Lead Drier	
14 lbs.	Cobalt Drier	
7 lbs.	Manganese Drier	
162 gals.	Water	} boiled, cooled and filtered twice for special results, and added to above formula.
17 lbs.	Ivory Flakes	
7 lbs.	Tri-Sodium Phosphate	

PAR. 3. In the course and conduct of their business respondents ship, and have shipped, their said paint from their place of business in the State of California and from their warehouse in Chicago and from public warehouses in other States to purchasers thereof located in various States other than the State in which the shipments originated, and maintain, and have maintained, a substantial course of trade in said paint, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents in the course and conduct of their business are engaged in substantial competition in commerce with corporations, firms and individuals engaged in the sale and distribution of paint.

PAR. 5. In the course and conduct of their business and for the purpose of inducing the purchase of said paints, it has been and is the practice of the respondents to mail letters and advertising literature to purchasers and prospective purchasers located in various States of the United States and therein make statements with respect to the availability, price and quality of said products. Typical but not all inclusive of the statements so made are the following:

In our western warehouse we have 60 gallons of our Genuine Exterior White Paint in 5 gallon steel pails and 140 gallons in ones packed four to the carton; which we must move immediately. We will accept \$2.75 per gallon delivered in either ones or fives, and you may take all or any part of this lot.

This is our highest quality paint . . . and is guaranteed for years of outdoor exposure on almost every type of surface.

The pure Titanium in our paint assures you of excellent coverage.

Because this paint is of such high quality and worth twice the price, we suggest you take as much of this quantity as you can.

An exterior white Pure Linseed Oil and Titanium base paint, formulated for excellent durability and protection. Will not crack, chip, peel or yellow even after years of exposure to all adverse weather conditions.

COMPOSITION & DURABILITY: The combination of durable, high-hiding Titanium pigments, kettle-bodied Pure Linseed Oil and finely ground selected extenders, gives this paint those qualities necessary in every good exterior paint: **DURABILITY** and **HIDING POWER**. As extra protection, our paint is treated with a fungicide which helps protect it from attack or discoloration by mildew. Resistant to dampness, smoke, steam, fumes, salt air and water.

USES: Exterior surfaces such as wood, metal, brick, concrete, stucco, and general maintenance. Works equally well over new or previously painted surfaces.

**MANUFACTURERS FOR OVER A QUARTER OF A CENTURY
LONG LASTING—NON YELLOWING**

The use of Pure Titanium Dioxide, which has the highest covering power of any pigment, assures the paint of solid coverage in one coat.

PAR. 6. Through the use and by means of the foregoing statements, and others of similar import and meaning not specifically set forth, respondents represented, and now represent, directly or by implication, that:

1. Their said paint is being offered at a special reduced price of \$2.75 a gallon;
2. Said paint is distress merchandise and it is necessary to sell the designated quantity immediately;
3. Only the quantity of paint set out in the advertisement is available for sale;
4. Delivery will be made of the quantity ordered;
5. Said paint is a high quality paint and is worth twice the amount at which it is sold;
6. Said paint is of excellent durability and provides excellent protection;
7. Respondents sell more than one grade of paint and their "Nitrosol" brand is their highest quality paint;
8. Said paint is guaranteed;
9. One coat of said paint gives solid coverage;
10. Said paint will not crack or yellow after years of exposure;
11. Said paint is not subject to mildew;
12. Titanium is a major ingredient in said paint; and
13. Respondents have been manufacturers of paint for 25 years.

PAR. 7. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. The price of \$2.75 a gallon is not a special or reduced price but said amount is the usual and customary price at which said paint is sold by respondents;
2. Said paint is not distress merchandise, and it is not necessary for respondents to sell any quantity of said paint immediately or at any other time;

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3. The quantity of paint on hand is frequently greatly in excess of the amount offered for sale;
4. Respondents frequently deliver greater quantities of paint than the quantity ordered;
5. Respondents' said paint is not a high quality paint, and it is not worth twice the amount at which it is sold;
6. Said paint is not of excellent durability nor does it provide excellent protection;
7. The paint sold by respondents under the brand name of "Nitro-sol" is the only paint sold by them;
8. Such guarantee that is given by respondents for their said paint is limited and conditional, which limitations and conditions and the manner in which respondents will perform under the said guarantee are not set out in their advertisements;
9. One coat of said paint will not give solid coverage;
10. Said paint will crack and yellow in a short period of time;
11. Said paint is subject to mildew;
12. Titanium is only a minor ingredient of said paint; and
13. Respondents have not been manufacturers of paint for over 25 years.

PAR. 8. The use by the respondents of the foregoing false and misleading statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that said statements and representations were, and are, true and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase said product. As a result thereof, trade in commerce has been, and is being, unfairly diverted to the respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' 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 the Federal Trade Commission Act.

Mr. Garland S. Ferguson and Mr. John J. McNally for the Commission.

Mr. G. V. Weikert, of Los Angeles, Calif., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on October 12, 1960, issued its complaint herein, charging the above-named respondents, who are engaged in the sale of paint under the brand name of "Nitrosol", which they describe as "Genuine Exterior White Paint", with violation of the Federal Trade Commission Act by the dissemination, in letters and advertising literature mailed to purchasers and prospective purchasers located in various States of the United States, of false, misleading and deceptive statements and representations with respect to said paint.

On February 20, 1961, there was submitted to the undersigned hearing examiner of the Commission, for his consideration and approval, an "Agreement Containing Consent Order To Cease And Desist", which had been entered into by respondents, their counsel and counsel supporting the complaint, under date of February 7, 1961, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent National Titanium Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 7270 Crider Avenue, Pico Rivera, California.
2. Respondents Henrietta Swimmer and Tessie Somers are individuals and are officers of said corporation and have the same address as that of said corporation.
3. Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.
4. This agreement disposes of all of this proceeding as to all parties, including provisions for the dismissal of the charges set forth in subparagraphs numbered 13 of Paragraphs Six and Seven of the complaint for reasons set forth in affidavits of respondents Henrietta Swimmer and Tessie Somers which are incorporated in the agreement by reference.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This 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.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist", the hearing examiner approves and accepts the said agreement; finds that the Commission has jurisdiction of the subject matter of this proceeding and of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act against the respondents, both generally and in each of the particulars alleged therein, with the exception of subparagraphs 13 of Paragraphs Six and Seven thereof, as set forth in the affidavit which is, by reference, made a part of the agreement; that this proceeding is in the interest of the public; and that the following order, as proposed and provided for in said agreement, is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto. The hearing examiner therefore issues the said order, as follows:

It is ordered, That respondents National Titanium Company, Inc., a corporation, and its officers, and Henrietta Swimmer and Tessie Somers, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their "Nitrosol" paint or any other paint of substantially the same composition or possessing substantially the

same properties, whether sold under said name or any other name, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Any amount is a reduced price for their paint, unless it is less than the price at which respondents usually and customarily sell their paint in the normal course of business;

2. Said paint is distress merchandise or that it is necessary to sell any designated quantity immediately, or at any other time;

3. Only a limited or designated quantity of paint is available for sale;

4. Delivery will be made of the quantity ordered, unless such is the fact;

5. Said paint is a high quality paint, or that it is worth twice the amount at which it is sold; or misrepresenting the quality or worth of said paint;

6. Said paint is of excellent durability or provides excellent protection; or that it possesses any degree of durability or provides any degree of protection that is not in accordance with the fact;

7. Respondents sell more than one grade of paint;

8. Said product is guaranteed, unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly set forth;

9. One coat of said paint gives solid coverage or that one or any number of coats gives coverage to any degree that is not in accordance with the facts;

10. Said paint will not crack or yellow after years of exposure;

11. Said paint is not subject to mildew; and

12. Titanium is a major ingredient in said paint.

It is further ordered, That the complaint herein, insofar as it relates to the charges set forth in subparagraphs numbered 13 in Paragraphs Six and Seven thereof, be, and the same hereby is, dismissed.

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 3rd day of May 1961, become the decision of the Commission; and, accordingly:

It is ordered, That respondents National Titanium Company, Inc., a corporation, and Henrietta Swimmer and Tessie Somers, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission

