

Decision

IN THE MATTER OF

DAVID E. FISCHER ET AL. TRADING AS AMERICAN
ASPHALT CO.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 6912. Complaint, Oct. 9, 1957—Decision—Feb. 27, 1958

Order requiring sellers in New York City of waterproof roof coatings and specialty paints, to cease representing falsely in letters and advertising literature mailed to members of the consuming public that they had certain specified quantities of "Kantleek" asbestos roof coating "left over" from a larger shipment for sale at or near the residence of the addressee at a "substantial discount * * * 20% off * * *", and that they were "Manufacturers of waterproofing specialties" and "Established 1909."

Mr. Edward F. Downs and *Mr. Thomas A. Sterner* supporting the complaint.

No appearance for the respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

On October 9, 1957, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violation of the Federal Trade Commission Act as set forth in said complaint. From the record it appears that on October 22, 1957 copies of said complaint were duly served on respondents together with copies of an order designating and appointing the undersigned as hearing examiner in this proceeding. The complaint so served contained a notice that a hearing would be held in the Federal Trade Commission office, United States Court House, Foley Square, New York, N.Y., on December 17, 1957, on the charges set forth in said complaint at which time respondents would have the right to appear and show cause why an order should not be entered requiring each of them to cease and desist from violations of the law charged in the complaint. The complaint further contained a notice that respondents were afforded an opportunity to file with the Commission an answer to the complaint on or before 30 days after service.

The record further shows that no answer to the complaint was filed within the time prescribed and that after the time for filing answer had expired, upon motion of counsel supporting the complaint calling attention to the default in the matter of filing answer, the undersigned, on December 10, 1957, issued an order cancelling the hearing set for New York, N.Y., on December 17, 1957, and in lieu

thereof scheduling a hearing in room 332, Federal Trade Commission Building, Washington, D.C., on December 17, 1957 at 10 a.m. which order was duly served on respondents on December 12, 1957.

On December 17, 1957, pursuant to the order of the hearing examiner, a hearing was held at 10 a.m. in room 332, Federal Trade Commission Building, Washington, D.C. At that hearing counsel supporting the complaint was present but neither of the respondents were present in person or by counsel and that fact was duly noted of record. Attention of the hearing examiner was called to the fact and it was noted on the record that no answer was filed by or for either of the respondents. Following section 3.7(b) of the Commission's rules of practice, the respondents David E. Fischer and Rose Berr, individuals trading and doing business as American Asphalt Co., having failed to answer the complaint within the time provided therefor and having failed to appear either in person or by attorney at the time and place fixed for hearing, after due notice thereof, were deemed to be in default and it was so stated on the record by the hearing examiner at the hearing. Also at said hearing, consideration was given to determination of the form of order to be entered herein. In view of the foregoing the hearing examiner now makes the following findings as to the facts, conclusions, and order:

FINDINGS AS TO FACTS

PARAGRAPH 1. Respondent Rose Berr is at present sole owner trading and doing business as American Asphalt Co. and respondent David E. Fischer prior to about April 5, 1956, was sole owner of said business. Both individual respondents now formulate, control, and direct the policies and practices of said American Asphalt Co. Their office and principal place of business is located at 32 Union Square, New York, N.Y.

PAR. 2. Respondents are now, and for more than 1 year last past have been, engaged in the sale and distribution of waterproof roof coatings and specialty paints to the consuming public. In the course and conduct of their business respondents cause said products, when sold, to be transported from the place of manufacture in various States of the United States to purchasers located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents, in the course and conduct of their business, are engaged in substantial competition in commerce with other firms,

individuals and corporations engaged in the sale of the same or similar products.

PAR. 4. In the course and conduct of said business and for the purpose of inducing the purchase of their products, it has been and is the practice of respondents to mail letters and advertising literature to prospective purchasers in various States of the United States, and therein make representations with respect to price and location of said product and with respect to the date of organization and status of respondents' business. Typical of such representations, but not all inclusive, are:

In letters to prospective customers located in or near the city therein named appears the following:

We shipped a carload of "Kantleek" asbestos roof coating to Pittsburgh recently with the understanding that any material left over could be returned to us for credit.

We are now informed that there are eight 55 gallon drums "over." Can you use these drums or any part of them? If you can cooperate with us in this matter we will allow you a substantial discount from our specification price of \$1.50 per gallon. 20% off * * *

Manufacturers of waterproofing specialities.
Established 1909.

PAR. 5. Through and by means of the foregoing statements and others of similar import and meaning not specifically set out above, respondents represented and implied that certain specified quantities of "Kantleek" asbestos roof coating were available and for sale at or near the residence of the prospective purchaser, as excess from larger shipments; that the regular and customary price of "Kantleek" asbestos roof coating was \$1.50 per gallon and that it was being offered for sale and would be sold at a reduced price, viz, 20 percent off; that respondents manufacture some or all of the products they sell; and that American Asphalt Co. was established in 1909.

PAR. 6. The aforesaid statements and representations were false, misleading, and deceptive. In truth and in fact, respondents did not have certain specified quantities of "Kantleek" asbestos roof coating available and for sale at or near the residence of the prospective customer, as excess from a larger shipment; the regular and customary price of "Kantleek" asbestos roof coating was not \$1.50 per gallon but considerably less; and the offering price of \$1.50 less 20 percent was not a reduced, special or discount price, but more closely approximated the price at which said product was usually sold. Respondents do not manufacture any of the products they sell or distribute. American Asphalt was not established in 1909, but at a much later date.

PAR. 7. There is a preference on the part of a substantial portion of

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the public for purchasing from manufacturers due to the general belief that manufacturers' prices are lower and there is a preference for purchasing from sources which have been in business for a long period of time, due to the general belief that such businesses offer products of greater dependability.

PAR. 8. The use by respondents of the foregoing false and misleading representations and implications respecting their products 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 representations and implications are true, and causes a substantial portion of the purchasing public, because of such mistaken and erroneous beliefs, to purchase said products. As a result of said practices, trade in commerce has been and is being unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

CONCLUSIONS

The aforesaid acts and practices of the respondents, as herein set out, were and are all to the prejudice and injury of the public and 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.

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents herein. The complaint states a cause of action against respondents under the Federal Trade Commission Act. This proceeding is in the public interest.

ORDER

It is ordered, That respondents David E. Fischer and Rose Berr, individually and trading and doing business as American Asphalt Co., or trading under any other name, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of waterproof roof coatings, specialty paints or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That any quantity of roof coating or other products is available for sale in any locality at reduced prices because of an excess shipment, or for any other reason, unless such is the fact;
2. That the customary or regular price of respondents' products

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is any price which is in excess of the price at which such products are regularly and customarily sold by respondents in the normal and usual course of business.

3. That the price at which respondents offer their products for sale constitutes a special, reduced or discount price, when in fact such price is the usual and customary price at which respondents sell their products in the normal and usual course of business.

4. That respondents manufacture the products sold or distributed by them.

5. That their business was started at an earlier date than it actually was or that they have been in business longer than they actually have.

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 27th day of February 1958, become the decision of the Commission; and, accordingly:

It is ordered, That the 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
INTERNATIONAL SHOE CO. AND SHOENTERPRISE CORP.
CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6835. Complaint, July 9, 1957—Decision, Mar. 6, 1958

Consent order requiring the world's largest manufacturer of shoes, with sales in the year ending November 30, 1955, of over \$262 million, the majority of which were to family-type shoe stores in towns of less than 10,000 population, to cease engaging in exclusive-dealing arrangements with shoe dealers or prospective shoe dealers involving loans of substantial sums of money or the furnishing of special supervisory and advisory services and other special assistance to such dealers, on the condition that the dealer feature, handle, and advertise only respondent's shoes to the exclusion of any other line of shoes and merchandise not approved by it.

Mr. Wilmer L. Tinley and Mr. John B. Clayton for the Commission.
Sullivan, Bernard, Shea & Kenney, by *Mr. John E. Shea*, of Washington, D.C., and *Mr. Richard O. Rumer* of St. Louis, Mo., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of section 5 of the Federal Trade Commission Act (U.S.C. Title 15, sec. 45) the Federal Trade Commission on July 9, 1957, issued and subsequently served its complaint in this proceeding against respondent International Shoe Company, a corporation existing and doing business under and by virtue of the laws of the State of Delaware and respondent Shoenterprise Corp., a corporation existing and doing business under and by virtue of the laws of the State of Missouri with their office and place of business located at 1509 Washington Avenue, St. Louis, Mo.

On December 19, 1957, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, 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. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive 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. Such agreement further provides that it

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disposes of all of this proceeding as to all parties; and that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; 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; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it 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 may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued.

1. Respondent International Shoe Co. is a corporation existing and doing business under and by virtue of the laws of the State of Delaware and respondent Shoenterprise Corp. is a corporation existing and doing business under and by virtue of the laws of the State of Missouri. Both corporations have their office and place of business located at 1509 Washington Avenue, St. Louis, Mo.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered, That respondents International Shoe Co. and Shoenterprise Corp., corporations, and their respective officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale and distribution of shoes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Contracting to make loans, granting loans, or offering to grant loans, on the condition or understanding, that the recipient thereof shall not deal in, handle, or sell, shoes or other similar or related products supplied by any competitor, or competitors, not approved by respondents.

(2) Contracting to furnish, or make available, services or offering to furnish, or make available, services on the condition or understanding that the recipient thereof shall not deal in, handle, or sell, shoes or other similar or related products supplied by any competitor, or competitors, not approved by respondents.

(3) Selling, or making any contract or agreement for the sale of, shoes or other similar or related products on the condition or understanding that the purchaser thereof shall not deal in, handle, or sell, shoes or other similar or related products supplied by any competitor or competitors, not approved by respondents.

(4) Enforcing, or continuing in operation or effect, any condition or understanding in, or in connection with, any existing contract of sale, which condition or understanding is to the effect that the purchaser of said products from respondents shall not deal in, handle, or sell shoes or other similar or related products supplied by any competitor or competitors, not approved by respondents.

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 1958, become the decision of the Commission; and, accordingly:

It is ordered, That the 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.

