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## Complaint

with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioner Elman dissenting.

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IN THE MATTER OF

## MARY CARTER PAINT COMPANY ET AL.

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

*Docket 8290. Complaint, Feb. 15, 1961—Decision, June 28, 1962*

Order requiring manufacturers of paint and related products, with principal place of business in Tampa, Fla., to cease representing falsely in advertisements in newspapers and periodicals and by radio and television—by such statements as “Buy only Half the Paint You Need”, “Every Second Can Free of Extra Cost”, etc.—that the advertised price was their usual retail price for a can of paint and was a factory price, and that if one can was purchased at that price, a second can would be given “free” when, actually, the advertised price was the regular retail price for two cans.

## 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 Mary Carter Paint Company, Inc., a corporation, and John C. Miller and I. G. Davis, individually and as officers of said corporation, and Robert Van Worp, Jr., individually, 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 as follows:

PARAGRAPH 1. Respondent Mary Carter Paint Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Gunn Highway at Henderson Road, Tampa, Florida. Respondent corporation also maintains offices in New York, said address being 666 Fifth Avenue, New York, N.Y.

John C. Miller and I. G. Davis are officers of said corporation. They presently formulate, direct and control the policies of the corporate respondent. Their address is the same as that of the corporate respondent.

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Robert Van Worp, Jr., was formerly an officer of said corporate respondent, at which time he cooperated in formulating, directing and controlling the policies of the said corporate respondent in connection with the acts and practices set forth herein. His address is the same as that of the corporate respondent.

PAR. 2. Corporate respondent Mary Carter Paint Company, Inc., and John C. Miller and I. G. Davis, officers of said corporation, are engaged in the business of manufacturing, selling and distributing paint and related products to the public, under the label or trade name of "Mary Carter", through various retail outlets and franchise dealers located in the various States of the United States.

PAR. 3. In the course and conduct of their business, respondents cause, and have caused, their paint products to be transferred from their factories in Florida, New Jersey and Texas to Mary Carter paint stores and franchise dealers located in various other States of the United States, where said products are sold at retail. Said respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in said paint products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents advertise, and have caused to be advertised, their paints in various newspapers and periodicals of general circulation, and by commercial announcements over the radio and television across state lines. Among and typical, but not all inclusive, of the statements contained in such advertisements are the following:

Buy only Half the Paint You Need  
 Every Second Can Free of Extra Cost  
 Let us show you how to save ONE HALF on your paint costs  
 Buy 1 and get 1 Free  
 I am satisfied with pennies per gallon! . . . . You buy only half the paint you need! . . . . The rest is free of extra cost  
 These Mary Carter Paint Factories will be making free paint half the coming year.  
 Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy  
 On all paint every Second can FREE, gallon or quart  
 No limit. . . .  
 Buy a gallon—get a gallon  
 Buy a quart—get a quart  
 How is the FREE gallon possible?  
 I can manufacture high quality paint at low cost because of operational economies and because I'M satisfied with a modest profit! Middleman eliminated by direct factory-to-store shipments . . . modern paint factories and equipment . . . streamlined merchandising methods. My own fleet of diesel trucks to cut raw materials and shipping costs . . . All of these effect savings which I pass on to you with every 2nd can of paint free of extra cost.

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WHY NOT JUST CHARGE HALF PRICE? My paints are quality priced because they are quality paints, and I refuse to "second rate" them with low unrealistic price tags. I'll never classify Mary Carter Paints with cheap imitations being offered, nor will I ever downgrade my products with price reductions, discounts or special sales. I manufacture high quality paint and dramatize my operation economies with every 2nd can free of extra cost!

ACRYLIC ROL-LATEX \$2.25 Quart \$6.98 Gallon Every 2nd CAN FREE OF EXTRA COST.

LIQUID GLASS OUTSIDE OIL PAINT \$3.00 Quart \$8.98 Gallon EVERY 2nd CAN FREE OF EXTRA COST.

PAR. 5. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and do represent, directly or by implication, that the usual and customary retail price of each can of Mary Carter Paint is the price designated in the advertisement; that this advertised price is a factory price; and that if one can of Mary Carter Paint is purchased at the advertised price, a second can will be given "free", that is, as a gift or gratuity without cost to the retail purchaser.

PAR. 6. The aforesaid advertisements referred to in paragraph 4 are false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisements but was, and is now, substantially less than such price. The advertised prices were not, and are not now, the prices charged by the factory for said paint but were, and are now, substantially in excess thereof. The second can of paint was not, and is not now, "free", that is, was not, and is not now, given without cost to the retail purchaser since the purchaser paid the advertised price, which was, and is now, the usual and regular retail selling price for two cans of Mary Carter paint.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, individuals and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to 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* for the Commission.

*Sullivan & Cromwell*, by *Mr. David W. Peck*, *Mr. Richard Sexton*, of New York, N.Y., and *Mr. Joseph P. Tumulty, Jr.*, of Washington, D.C., for respondents.

#### INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

The Federal Trade Commission has charged the respondents in this proceeding with engaging in false and deceptive practices arising mainly from the use of the word "free" in the advertising of paint products offered for sale. The complaint was issued February 15, 1961, and alleges that these practices are in violation of the Federal Trade Commission Act because they constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of that Act. Although the corporate respondent is named in the complaint as Mary Carter Paint Company, Inc., its correct name is Mary Carter Paint Co. The case has been litigated in this form and, for the purposes of this proceeding, it may be regarded as being brought against Mary Carter Paint Co. and the individuals named. All the respondents appeared herein and filed an answer to which reference will be made below.

The advertising to which reference is made in the complaint is conceded to be that of the corporate respondent (to which reference may be made from time to time as Mary Carter and which, for the purpose of this proceeding, may be deemed to include its predecessor or predecessors in the paint business). The complaint charges that this advertising is false and deceptive and Mary Carter says it is not.

Typical are the following quotations from advertisements which appear repeatedly and consistently in newspapers and on the radio or television:

Buy only Half the Paint You Need

Every Second Can Free of Extra Cost

Let us show you how to save

ONE HALF on your paint costs

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## Initial Decision

Buy 1 and get 1 Free  
 I am satisfied with pennies per gallon! . . . .  
 You buy only half the paint you need! . . . .  
 The rest is free of extra cost

These Mary Carter Paint Factories will be  
 making free paint half the coming year.

Anytime you can get enough paint to do the  
 extra job, yet pay for only half as much as  
 you need, you're really practicing economy

On all paint every Second can FREE, gallon  
 or quart  
 No limit. . . .

Buy a gallon—get a gallon  
 Buy a quart—get a quart

How is the FREE gallon possible?

I can manufacture high quality paint at low cost because of operational economies and because I'M satisfied with a modest profit! Middleman eliminated by direct factory-to-store shipments . . . modern paint factories and equipment . . . streamlined merchandising methods. My own fleet of diesel trucks to cut raw materials and shipping costs . . . All of these effect savings which I pass on to you with every 2nd can of paint free of extra cost.

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## WHY NOT JUST CHARGE HALF PRICE?

My paints are quality priced because they are quality paints, and I refuse to "second rate" them with low unrealistic price tags. I'll never classify Mary Carter Paints with cheap imitations being offered, nor will I ever downgrade my products with price reductions, discounts or special sales. I manufacture high quality paint and dramatize my operation economies with every 2nd can free of extra cost!

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It is clear that the attack is mainly on the use of the word "free," but the complaint alleges also that Mary Carter represents that purchasers of its paint acquire it at factory prices when such is not the fact.

Respondents freely concede that the method of advertising, using the word "free," in the manner shown, is Mary Carter's permanent, established policy and that this policy is accountable for its spectacular

growth. Indicative of its growth is the rise of its sales from just over \$2,000,000 in 1956 to more than \$12,000,000 in 1960. Basically, their position is (a) that there has been built up in the minds of the public by the large national brand paint companies, and the national trade association, the idea that quality of paint is to be judged by price; and (b) that since Mary Carter paint is of a quality comparable to the best paints of the industry, it very properly prices its paint at prices similar to the prices of such other paints and it distinguishes itself from the other manufacturers by passing on to consumers savings which it realizes in the manufacturing and distribution processes by giving to its customers a second can of paint free and without cost with each purchase of a first can. Since, under the theory thus espoused, price has become the standard of value in the paint industry, it contends it has every right to establish its prices at figures equivalent to the prices fixed for what it claims to be comparable paints. It says that if it were to place a lower price on its paints, this, in effect, would make it appear that its paints are not as good as the higher priced paints. However, since it wants to pass on to Mary Carter customers a part of the savings which it achieves, it does so by giving its customers the so-called "free" can of paint. It asserts that this practice, contrary to being against the public interest does in fact benefit the public by providing increased competition in the business and by providing consumers with true quality paint value.

Respondents contend also that, in any event, the individuals who have been charged are not such participants in the practices alleged as to justify their inclusion as respondents in this proceeding. Motions have been made to dismiss as to them. After consideration of all the evidence presented and the facts and nature of this case, it is my conclusion that neither Miller nor Davis ought to be made parties to any remedial action, if any be taken herein. Miller, although formerly an officer, was brought into the company as a result of a series of mergers and his identification with the particular practices which are involved herein is only incidental thereto. Similarly, Davis was brought into the company only late in 1960 and, to the extent that he may be connected with the practices involved herein, it can be said only that he acquired that connection by reason of having become president in December 1960. The company is a large publicly-owned corporation and his mere holding of the executive office does not justify his being charged with responsibility for the ancient practice involved herein. The motions to dismiss as to Miller and Davis will be granted. *Book of the Month Club, Inc., et al.*, 48 F.T.C. 1297, at 1308. However, the motion to dismiss as to Robert Van Worp, Jr., is denied. He and

