

Complaint

69 F.T.C.

control a mill, factory or manufacturing plant wherein said hosiery or other textile products are manufactured.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.21 of the Commission's Rules of Practice (effective August 1, 1963), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner shall, on the 16th day of June 1966, become the decision of the Commission.

It is further ordered, That respondents, Midwest Hosiery Incorporated, a corporation, Sidney Leibowitz, Solomon Kopman, and Ann Gruber, individually and as officers of said corporation, shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

WILMINGTON CHEMICAL CORPORATION ET AL.

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

Docket 8648. Complaint, Oct. 28, 1964—Decision, June 17, 1966

Order requiring a Chicago, Ill., manufacturer of a water repellent product, to cease misrepresenting the origin and waterproofing qualities of its product and making deceptive claims concerning testing, profitability, discounting of notes, and guarantee coverage.

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 Wilmington Chemical Corporation, a corporation, and Joseph S. Klehman, individually and as an officer of said corporation, here-

inafter 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 Wilmington Chemical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 33 West Hubbard Street, Chicago, Illinois.

Respondent Joseph S. Klehman is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address 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 offering for sale, sale and distribution of water repellent paint to dealers for resale to the public under the trade name of "X-33."

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped and transported from their place of business in the State of Illinois to purchasers thereof located in various States of the United States, and maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 5. Respondents' method of doing business is to cause salesmen, called franchise managers, to contact prospective customers, first by telephone and then in person. The salesmen or franchise managers then negotiate with the customers, called franchise dealers, exclusive franchises to sell respondents' product within a specified territory. At the same time, and as a necessary part of the transaction, an order is obtained from the franchise dealers for a specified quantity of respondents' X-33. The merchandise is paid for either in cash or by the customers giving trade acceptances in payment thereof, which trade acceptances are immediately transferred to a finance company.

PAR. 6. In the course of such solicitations said salesmen or representatives have made many statements and representations, directly or by implication, to prospective purchasers of respondents' products and have performed many physical demonstrations.

Typical, but not all inclusive of said statements and representations, are the following:

1. That the corporate respondent is a subsidiary of, a division of, an exclusive licensee of, or is affiliated with, E. I. dupont de Nemours & Company, usually designated by the respondents' salesmen or representatives as "Dupont"; or that X-33, the product sold by the respondents, is manufactured, developed or tested by Dupont.

2. That X-33, the product sold by the respondents, is unconditionally guaranteed for ten years.

3. That franchise dealers will realize profits of varying amounts up to \$25,000 per year from the resale of respondents' products.

4. That the franchise may be cancelled by the dealer at any time and that any unsold quantities of respondents' product will be picked up or transferred to another dealer or that a refund will be made for any of respondents' product unsold.

5. That the supply of respondents' product purchased by the dealer will be sold out before the first payment on the trade acceptances becomes due.

6. That X-33 was successfully tested by Dupont, by the corporate respondent or by an independent testing laboratory before being marketed.

7. That X-33 is a waterproof product.

8. That X-33 is suitable for use on silos and will prevent spoilage.

9. That any trade acceptances given in payment for said merchandise will be retained by the corporate respondent and not sold to, or discounted by, a third person.

10. That the corporate respondent is an old established firm with many years of experience in manufacturing paint.

PAR. 7. In truth and in fact:

1. The corporate respondent is not a subsidiary, affiliate, division, or exclusive licensee of E. I. dupont de Nemours & Company, but on the contrary, the sole connection between the corporate respondent and Dupont is that one of the ingredients of X-33 (known by the trade name of "Tyzor HS") is manufactured by Dupont and purchased from it by the corporate respondent; the

product sold by the respondents, known as X-33, is neither manufactured nor developed by E. I. duPont de Nemours & Company; nor has it been tested by that company; on the contrary, X-33 is manufactured by the corporate respondent, and contains "Tyzor HS" in combination with other ingredients not manufactured by Dupont.

2. X-33, the product manufactured and sold by respondents, is not unconditionally guaranteed for ten years or any other period of time, but on the contrary, the only guarantee issued by the respondents to consumers is to the effect that should the application leak where X-33 has been applied, the X-33 will be replaced any time within ten years, provided the X-33 was applied in accordance with the company's directions. The said guarantee specifically provides that it does not cover labor replacement costs.

3. Franchise dealers generally do not earn \$25,000 a year or whatever lesser amount was represented to them at the time of the purchase and, in some cases, make no profit at all.

4. No cancellation of the contract is permitted and the respondents do not pick up any unsold quantities of X-33 or transfer them to another dealer nor do the respondents make any refund to the franchise dealers for unsold merchandise.

5. The supply of X-33 purchased by the franchise dealers is not usually sold before the trade acceptances fall due but, on the contrary, in many cases, the dealers are unable to make any substantial sales at all.

6. X-33 had never been tested by Dupont, the respondent nor any independent laboratory prior to being marketed.

7. X-33 is not a waterproof product but, on the contrary, is only a water repellent.

8. X-33 is not a sealer and does not close the pores in the material to which it is supplied. Therefore, it is not suitable for use in making silos airtight.

9. Any trade acceptances given in payment of the merchandise are immediately sold to, or discounted by, a third party who becomes a holder in due course.

10. The corporate respondent is not an old established firm and does not have many years experience in manufacturing paint. On the contrary, the corporate respondent was incorporated September 23, 1961 and started to market X-33 some time subsequent to that date.

Therefore, the representations set forth in Paragraph Six,

above, and others similar thereto, were and are false, misleading and deceptive.

PAR. 8. The use by the 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.

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 methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy B. Pope and *Mr. Carlos P. Lamar, III*, supporting the complaint.

Mr. Herbert I. Rothbart and *Mr. Edgar A. Blumenfeld*, Chicago, Ill., for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

SEPTEMBER 17, 1965

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Initial Decision

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PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission October 28, 1964, but was not served on the respondents until December 5, 1964. The complaint charges respondents with the use of false, misleading, and deceptive representations in the sale of a water repellent sold under the trade name X-33, in violation of Section 5 of the Federal Trade Commission Act.

An answer generally denying all the allegations of the complaint was filed January 5, 1965, by the respondent Klehman on behalf of the corporation and himself.

An informal prehearing conference was held January 5, 1965, followed on February 2, 1965, by a formal prehearing conference. Neither respondent was represented by counsel at the time of those conferences, the individual respondent, Joseph S. Klehman, appearing *pro se* and as president of respondent Wilmington Chemical Corporation.

Shortly before the hearings began on March 19, 1965, Edgar A. Blumenfeld, of Chicago, filed an appearance as counsel for respondents. On the first day of hearings, he was joined as counsel of

record by Herbert I. Rothbart, also of Chicago, who acted as principal defense counsel in the course of the hearings.

After Mr. Blumenfeld's retention as counsel, respondents filed motion March 12, 1965, for postponement of the hearing for 60 days, on the ground that counsel's belated entry in the case necessitated additional time for preparation of the defense. The hearing examiner denied the motion by order filed March 16, 1965, and the Commission, by order dated March 18, 1965, denied respondents' request to file an interlocutory appeal. The motion was renewed on the first day of hearings (Tr. 10) and again it was denied (Tr. 14).

Provision was made, however, for an interval between the close of the Government's case-in-chief and the commencement of defense hearings. For various reasons, that precise arrangement was not carried out, but, as a practical matter and by general agreement, there was an interruption in the hearing schedule to allow respondents additional opportunity to prepare their defense (Tr. 924-27, 1169-70).

There were 16 days of hearings, resulting in a transcript of 1,851 pages. More than 450 documents were offered in evidence, of which more than 350 were admitted.

Hearings were held in Chicago, Illinois, and Washington, D.C., as authorized by Commission order dated March 2, 1965.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed in the office of the Commission.

The parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

After the conclusion of all the evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and counsel for respondents. Replies or exceptions also were filed by counsel for both parties.¹

Proposed findings not adopted, either in the form proposed or

¹ Although each party was required, by order of the examiner, to file its exceptions not later than July 30, 1965, respondents' Exceptions were not filed until August 2, 1965. However, in view of respondents' explanation regarding a delay in their receipt of the Government's Proposed Findings and Brief, respondents' Exceptions have been received and considered by the hearing examiner.

