

ORDER DISMISSING THE COMPLAINT

This matter having been heard by the Commission upon the appeal of the respondent from the hearing examiner's initial decision, and the Commission having considered the briefs and oral argument:

It is ordered, That the complaint be, and it hereby is, dismissed.
By the Commission, Commissioners Kern and MacIntyre dissenting.

IN THE MATTER OF

OHMLAC PAINT & REFINING CO., INC., ET AL.

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

Docket 8081. Complaint, Aug. 19, 1960—Decision, Feb. 24, 1962

Order requiring a seller of paint products in Long Island City, N.Y., to cease misrepresenting its prices in newspaper advertising by such statements as "2 for 1 Sale—Buy one gallon or quart—Get One Free", "Quality Paint at Factory Prices", etc., when the customary retail prices were substantially lower than the amounts listed, two gallons were always sold for \$6.98, the price specified for one, and the advertised prices were two to four times as much as factory prices.

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 Ohmlac Paint & Refining Co., Inc., a corporation and Charles A. Jacobs, individually and as an officer of Ohmlac Paint & Refining Co., Inc., and Betty Jordan Paint Factories, Inc., a corporation, and Irving Rubin, Sidney Jacobs and Charles A. Jacobs, individually and as officers of Betty Jordan Paint Factories, Inc., 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 Ohmlac Paint & Refining Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 41-40 Crescent Street, Long Island City, N.Y. Individual respondent Charles A. Jacobs is an officer of Ohmlac Paint & Refining Co., Inc., and his address is the same as that of said corporate respondent. Respondent Betty Jordan Paint Factories, Inc., is a corporation organized, existing and doing

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business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 24-13 Bridge Plaza North, Long Island City, N.Y. Individual respondents Irving Rubin, Sidney Jacobs, and Charles A. Jacobs are officers of Betty Jordan Paint Factories, Inc., and their addresses are the same as that of said corporate respondent.

Respondent Betty Jordan Paint Factories, Inc., is a wholly owned subsidiary of respondent Ohmlac Paint & Refining Co., Inc., and the individual respondents, Charles A. Jacobs, Irving Rubin, and Sidney Jacobs, cooperate in formulating, directing and controlling the policies, acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for more than two years last past have, engaged in the business of selling and distributing paint and related products to the public under the label or trade name of "Betty Jordan" through retail outlets located in the States of Connecticut and New York.

PAR. 3. In the course and conduct of their business respondent Ohmlac Paint & Refining Co., Inc., manufactures Betty Jordan Paint in a factory owned and operated by it in Newark, New Jersey, and upon order by respondent Betty Jordan Paint Factories, Inc., the parent corporation ships or causes such paint products to be shipped from the State of New Jersey to the Betty Jordan paint stores in the States of Connecticut and New York, where said products are sold at retail, and 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 their paints in various newspapers. Among and typical, but not all inclusive, of the statements contained in such advertisements are the following:

for the Gal with Home Decorating on Her Mind
NOW . . . PAINT TWO ROOMS
FOR THE PRICE OF ONE!

(picture of
a girl
pointing a
pencil at
certain
words in the
advertisement)

during BETTY JORDAN'S

2 for 1 SALE

BUY ONE
GALLON
or quart
GET ONE
FREE

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There's no time to lose while the 2-for-1 Sale is on.
 * * * Only Betty Jordan can make this offer because
 only Betty Jordan sells direct-to-you through
 factory branches. There are no middlemen
 profits * * * no fancy stores or selling
 fixtures * * * PLUS TREMENDOUS SAVINGS during
 the 2-for-1 Sale. So make your selections now. . .
 BUY ONE gallon or quart. GET ONE FREE!
 SATISFACTION GUARANTEED
 Your Money Back On Unused Portion of Your Paint
 Purchase If You Are Not Completely Satisfied
 QUALITY PAINT AT FACTORY PRICES (And NOW the Second
 Gal. or Qt. is FREE)

(Picture of
 can of
 paint)

ALKYD FLAT ENAMEL FREE TINTING SERVICE! NOW 2-For-The-Price-Of-1! * * * * * \$5.98	Exterior House Paint FREE TINTING SERVICE NOW 2-For-The-Price-Of-1! * * * * * \$5.98	Decor-Tex LATEX FLAT NOW 2-For-The-Price-Of-1! In-colors Slightly Higher. \$6.98
Cement and Stucco Paint FREE TINTING SERVICE NOW 2-For-The-Price-Of-1! * * * * * \$6.98	SEMI-GLOSS ENAMEL FREE TINTING SERVICE! NOW 2-For-The-Price-Of-1! \$6.98	Floor and Deck Enamel NOW 2-For-The-Price-Of-1! * * * * * \$6.98

SOLD ONLY IN FACTORY BRANCHES
 BETTY JORDAN
 PAINT FACTORY

(Picture of
 can of paint)

PAR. 5. Through the use of said advertisements, and other similar thereto not specifically set out herein, respondents represented, directly or by implication, that the usual and customary retail price of each can of Betty Jordan paint is the price designated in the advertisement; that this advertised price is a factory price; and that if one can of Betty Jordan 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 were false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each can of Betty Jordan paint was not the price designated in the advertisements but was substantially less than such price. The advertised prices were not the prices charged by the factory for said paints, but were substan-

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tially in excess thereof. The second can of paint was not "free", that is, was not a gift or gratuity, and was not given without cost to the retail purchaser since the purchaser paid the advertised price which was the usual and regular retail selling price for two cans of Betty Jordan 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. Arthur B. Edgeworth for the Commission.

Mr. Murray Glantz, of New York, N.Y., for the respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

By complaint issued August 22, 1960, the respondents in this proceeding were charged with violation of Section 5 of the Federal Trade Commission Act in the sale and distribution of paint and related products under the label or trade name of "Betty Jordan." By answer filed December 27, 1960, respondents admitted certain of the allegations of the complaint, but denied that any of their actions constituted violations of the Act and asked that the complaint be dismissed. Hearings were held and all parties given an opportunity to file proposed findings and briefs. Counsel supporting the complaint has filed such findings and brief, but none of the respondents has done so.

FINDINGS OF FACT

1. Respondent Ohmlac Paint & Refining Co., Inc., hereinafter referred to as Ohmlac, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 41-40 Crescent Street, Long Island City, N.Y. Individual respondent Charles A. Jacobs is the president of Ohmlac, and his address is the same as that of the corporation.

2. Respondent Betty Jordan Paint Factories, Inc., hereinafter referred to as Betty Jordan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 24-13 Bridge Plaza North, Long Island City, N.Y. Individual respondents Irving Rubin, Sidney Jacobs, and Charles A. Jacobs are officers of Betty Jordan, and their addresses are the same as that of said corporation.

3. Betty Jordan is a wholly-owned subsidiary of Ohmlac, and the individual respondents, Charles A. Jacobs, Irving Rubin, and Sidney Jacobs, formulated, directed and controlled the business activities of Betty Jordan from the date of its incorporation until October 1960; thereafter, respondent Irving Rubin ceased to be an employee of Betty Jordan, while continuing as an officer.

4. Respondent Betty Jordan and the individual respondents are, and since September 1957 have been, engaged in the business of selling and distributing paint and related products to the public under the label or trade name of "Betty Jordan" through retail distribution outlets located in the States of Connecticut and New York.

5. Respondent Ohmlac manufactures paints and upon order by Betty Jordan ships or causes paints to be shipped from the Ohmlac factories in New Jersey to the Betty Jordan Paint stores in the States of Connecticut and New York, where such products are sold at retail and respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in such trade products in commerce as "commerce" is defined in the Federal Trade Commission Act.

6. Respondent Irving Rubin, as president and store supervisor of Betty Jordan, visited all the Betty Jordan retail stores to check on their operations and placed some of the advertising in question for Betty Jordan in various local newspapers. In his work at Betty Jordan between 1957 and 1960, he was supervised by the other individual respondents, Sidney Jacobs and Charles A. Jacobs. Mr. Rubin

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was also plant manager of Ohmlac at one time, but not while employed by Betty Jordan.

7. Respondent Charles A. Jacobs is the president and principal operator of Ohmlac, as well as an officer of Betty Jordan who supervised, among other things, the advertising activities of respondent Rubin as store supervisor of Betty Jordan.

8. Respondent Sidney Jacobs is an officer of Betty Jordan who at times also supervised the activities of respondent Rubin while employed at Betty Jordan.

9. Respondents Ohmlac and Betty Jordan utilized the same office space. Betty Jordan, however, has its own bookkeeper and sales force. Ohmlac also has its own clerical staff, although Ohmlac's invoices for paint shipped to Betty Jordan stores are prepared by Betty Jordan's bookkeeper.

10. Betty Jordan and the individual respondents have advertised Betty Jordan paints in various newspapers and over television and radio. Among and typical of the statements contained in newspaper advertising are the following:

for the Gal with Home Decorating on Her Mind

NOW . . . PAINT TWO ROOMS

FOR THE PRICE OF ONE!

during BETTY JORDAN'S

(picture of a girl
pointing a pencil at certain words in the advertisement)

2 for 1 SALE

BUY ONE

GALLON

or quart

GET ONE

FREE

There's no time to lose while the 2-for-1 Sale is on. * * * Only Betty Jordan can make this offer because only Betty Jordan sells direct-to-you through factory branches. There are no middlemen profits . . . no fancy stores or selling fixtures * * * PLUS TREMENDOUS SAVINGS during the 2-for-1 Sale. So make your selections now . . . BUY ONE gallon or quart. GET ONE FREE!

(Picture of
can of paint)

SATISFACTION GUARANTEED

Your Money Back on Unused Portion of Your Paint
Purchase If You Are Not Completely Satisfied

QUALITY PAINT AT FACTORY PRICES (And NOW the Second Gal. or Qt. is FREE).

ALKYD FLAT ENAMEL FREE TINTING SERVICE NOW 2-for-The Price-of-1. \$5.98 * * * * *	Exterior House Paint FREE TINTING SERVICE NOW 2-For-The Price-Of-1! \$5.98 * * * * *	Decor-Tex LATEX FLAT NOW 2-For-The Price-of-1! In—Colors Slightly Higher \$6.98 * * * * *
Cement and Stucco Paint FREE TINTING SERVICE! NOW 2-For-The Price-Of-1! \$6.98 * * * * *	SEMI-GLOSS ENAMEL FREE TINTING SERVICE! NOW 2-For-The Price-Of-1! \$6.98 * * * * *	Floor and Deck Enamel Now 2-For-The Price-Of-1! \$6.98 * * * * *

SOLD ONLY IN FACTORY BRANCHES

(Picture of can of paint)

BETTY JORDAN
 PAINT FACTORY

11. Through the use of said advertisements Betty Jordan and the individual respondents represented, directly or by implication, that the usual and customary retail price of one can of Betty Jordan paint is the price designated in the advertisement; that this advertised price is a factory price; and that if one can of Betty Jordan paint is purchased at the advertised price, a second can will be given free to the purchaser.

12. The advertisements referred to were false, misleading and deceptive. In truth and in fact the usual, customary retail price of one can of Betty Jordan paint was not the price designated in the advertisement but was substantially less than such price. Nor was the second can of paint "free." Whereas the advertisements specified a price for one gallon of paint (e.g. \$6.98 for semi-gloss), in fact it was sold for half that price, inasmuch as *two* gallons were always sold for \$6.98. Moreover, the use of such words in the advertisement as "sale" "buy now" "now two for the price of one" confirmed the impression that the \$6.98 price for one gallon was the usual and regular price, whereas the \$6.98 price was really the customary price for two gallons.

13. The advertised prices were not factory prices. Despite the corporate name of Betty Jordan (Betty Jordan Paint Factories,

