

Complaint

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which does not set forth in a clear and conspicuous manner the following statements:

“CAUTION: Keep out of reach of children. If taken internally, induce vomiting; consult physician. Avoid prolonged or repeated contact with skin. In case of contact, flush skin with water. After mixing with liquid hardener, use in well ventilated area; avoid vapors.”

It is further 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 this order.

IN THE MATTER OF

RADIATOR SPECIALTY COMPANY ET AL.

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

Docket 7662. Complaint, Nov. 24, 1959—Decision, Sept. 21, 1962*

Order requiring Charlotte, N.C., manufacturers of non-metallic sealing compounds designed for repairing and sealing leaks in automobile radiators and in steam and hot water heating systems, to cease representing falsely in advertising in magazines, by circulars distributed to the trade and the general public, and by use of their trade name “Solder Seal”, that their products were solders, were metallic, and formed a metallic seal or bond.

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 Radiator Specialty Company, a corporation and I. D. Blumenthal, Herman Blumenthal and J. J. Duckworth, 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 Radiator Specialty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 1400 West Independence Boulevard, in the city of Charlotte, State of North Carolina.

*As amended March 8, 1961.

Respondents I. D. Blumenthal, Herman Blumenthal and J. J. Duckworth are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their 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 manufacture, advertising, offering for sale, sale and distribution of sealing compounds designed for repairing and sealing leaks in automobile radiators and in steam and hot water heating systems. Said compounds are designated by respondents as "Solder Seal Radiator Repair", "Boiler Solder Seal Type R-H", "Solder Seal Boiler Repair", "Liquid Boiler Solder Seal", "Liquid Solder Seal Radiator Repair", "Solder Seal Block Seal" and "Liquid Solder Seal Block Seal". Some of these products contain small quantities of metallic substances but all consist principally of organic and non-metallic materials.

Respondents use the trade mark "Solder Seal" on the containers of all of said products.

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

PAR. 4. Respondents advertise their said products in magazines of national circulation and by means of circulars distributed to the trade and the general public. These advertisements list said products under their names, as aforesaid, and set out the trade mark "Solder Seal".

Through the use of said names, said trade mark and various statements and representations contained in said advertising matter, respondents represent and have represented, directly or by implication:

1. That their said products are solders comprised of metals or alloys used to join metals.
2. That said products are metallic and when used form a metallic seal or bond.
3. That their "Solder Seal Radiator Repair" will effect a permanent repair.

PAR. 5. The aforesaid representations are false, misleading and deceptive. In truth and in fact:

Initial Decision

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1. Respondents' said products are not metallic solders and do not have the characteristics and effectiveness of metallic solders. Their effectiveness depends principally on their organic and non-metallic ingredients.

2. Respondents' said products are not metallic and they do not form a metallic seal or bond.

3. Respondents' "Solder Seal Radiator Repair" will not effect a permanent repair.

PAR. 6. By the aforesaid practice, respondents place in the hands of others means and instrumentalities by and through which they may mislead the public as to the nature, composition and effectiveness of their products.

PAR. 7. In the course and conduct of their business respondents are now, and at all times mentioned herein have been, in substantial competition with corporations, firms and individuals in the sale, in commerce, of products similar to those sold by respondents.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and into the purchase of substantial quantities of respondents' products by reason of such 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 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. Frederick McManus for the Commission.

Thigpen & Hines, of Charlotte, N.C., by *Mr. Richard E. Thigpen, Jr.*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the making of certain representations in connection with products designed for use in repairing breaks and stopping leaks in automobile radiators and

steam and hot water heating systems. Hearings have been held at which a substantial volume of evidence, both in support of and in opposition to the complaint, was introduced. Proposed findings and conclusions have been submitted by the parties and have had the careful consideration of the hearing examiner. Any proposed findings or conclusions not included herein have been rejected as not warranted by the record or as not material.

2. The corporate respondent, Radiator Specialty Company, is a North Carolina corporation with its principal place of business at 1400 West Independence Boulevard, Charlotte, North Carolina. It is engaged in the manufacture and sale of an extensive line of chemicals, chemical compounds, rubber goods, and tools and devices used in the automotive and plumbing and heating trades. There is no issue over the elements of interstate commerce and competition. The company sells its products throughout the United States and is in substantial competition with other concerns engaged in the interstate sale of products designed for the same uses as its own products.

3. Respondents I. D. Blumenthal, Herman Blumenthal and J. J. Duckworth are president, vice president, and secretary, respectively, of the corporation. At the close of the Commission's case-in-chief a motion to dismiss the complaint as to J. J. Duckworth in his individual capacity was granted by the hearing examiner. (Tr. 125-126) Similar motions as to the other individual respondents were denied, without prejudice to the right of the respondents to renew the motions at the conclusion of the proceeding. Later in the present decision this matter will be further considered.

4. The principal controversy in the proceeding centers around the use by respondents of the trade mark or trade name "Solder Seal" in connection with the products here involved, and particularly the use of the word "solder" in such name.

5. Respondents' business had its inception around 1926. From practically nothing the business has grown until it is now a very substantial and successful enterprise. It employs some 350 persons in its plant in Charlotte, and has some 80 traveling salesmen selling its products throughout the United States. Its trade name "Solder Seal" is a registered trade mark which is widely and favorably known in the plumbing, heating and automotive supply trades. Both the company and its products enjoy an excellent reputation.

6. The trade name "Solder Seal" unquestionably is a very valuable business asset. In fact, the name is much better known in the trade than is respondents' corporate name. The trade name is used by respondents not only in connection with specific products, but generally

to identify all of the company's products. The name appears on the company's catalogs, advertising circulars, price lists, stationery, bank checks, calling cards, etc.

7. The specific products of respondents which are here involved are: "Solder Seal Radiator Repair", "Liquid Solder Seal Radiator Repair", "Solder Seal Radiator Pressure Seal", "Boiler Solder Seal", "Liquid Boiler Solder Seal", "Boiler Solder Seal Type R-H", "Block Seal" and "Liquid Block Seal". The complaint, as originally issued, charged that through use of the trade name "Solder Seal" and otherwise respondents had represented, contrary to fact:

1. That their said products are solders.
2. That said products are metallic and when used form a metallic seal or bond.
3. That their "Solder Seal Radiator Repair" will effect a permanent repair.

8. Admittedly there is no evidence in support of the third charge (as to the permanency of the repairs effected through use of "Solder Seal Radiator Repair"), and that charge was dismissed by the hearing examiner at the close of the Commission's case in chief. (Tr. 133-135)

9. As to the first charge, particular attention is called to the fact that in conformity with an agreement of counsel this charge was amended by an order of the hearing examiner issued March 8, 1961. As noted above, the original complaint charged that respondents had represented "That their said products are solders". In challenging the correctness of this claim the original complaint stated:

Respondents' said products are not solders and do not have the characteristics and effectiveness of solders. Their effectiveness depends principally on their organic and non-metallic ingredients.

As amended, the complaint charges respondents with representing:

That their said products are solders comprised of metals or alloys used to join metals.

and the corresponding "denial" portion of the complaint, as amended, reads:

Respondents' said products are not *metallic* solders and do not have the characteristics and effectiveness of *metallic* solders. Their effectiveness depends principally on their organic and non-metallic ingredients. (Emphasis added)

10. It will be observed that whereas the original complaint took the flat position that the products in question are not solders, the amended complaint says only that the products are not "metallic" solders. Thus the complaint, as amended, appears to recognize that the products are or may be solders; the only contention is that the products are not "metallic" solders.

11. Testifying at the instance of Commission counsel were two well-qualified experts in the field of metallurgy, Dr. William A. Pennington of the University of Maryland and Dr. Russell W. Mebs of the National Bureau of Standards. To these experts soldering means the joining or bonding of two metals by means of a third metal or metal alloy, the operation being accomplished through the application of heat. The witnesses do not recognize a "non-metallic" solder; to them a solder must be a metal or metal alloy.

Upon examining the formulas for respondents' products the witnesses stated in substance that while the products, or some of them, do contain small amounts of metallic ingredients, none of the products can properly be regarded as a metal or metal alloy, nor as a metallic substance.

12. The record contains definitions of soldering taken from professional manuals. In the Metals Handbook, Volume I, of the American Society for Metals, the terms "brazing" and "soldering" are treated in conjunction with each other and therefore the definitions of both are set out below:

Brazing is defined as:

Joining metals by flowing a thin layer, capillary thickness, of non-ferrous filler metal into the space between them. Bonding results from the intimate contact produced by the dissolution of a small amount of base metal in the molten filler metal without fusion of the base metal.

Soldering is defined as:

Similar to brazing, with the filler metal having a melting temperature ranging below an arbitrary value, generally 800 degrees Fahrenheit. Soft solders are usually lead-tin alloys.

The American Welding Society Soldering Manual, 1959, defines soldering as a:

Joining process wherein coalescence is produced by heating generally below 800 degrees Fahrenheit and by using non-ferrous filler metal that has a melting point below that of the base metal. The filler metal is distributed between properly fitted parts by capillary attraction. The temperature range differentiates soldering from brazing (above 800°F) which is thoroughly discussed in the American Welding Society Brazing Manual.

13. On the other hand, the definitions of "solder" in Webster's New Collegiate Dictionary, 1951, are much broader. These definitions are:

Noun: 1. A metal or metallic alloy used when melted to join metallic surfaces. Solders which melt readily are soft solders; others fusing at a red heat are hard solders. 2. Hence, anything which unites or cements.

Verb: 1. To join by solder. 2. To unite securely, to cement. 3. Hence to mend, patch; often with up. 4. To be or become united by or as by a solder.

While Webster's New International Dictionary, Second Edition, goes into the matter in greater detail, the definitions given are similar to those just quoted.

14. An expert testifying on behalf of respondents was Mrs. Daphne R. Leeds. Mrs. Leeds is a lawyer who has specialized in the field of trade mark law, having practiced some 25 years in that field. She served as Assistant Commissioner of Patents in the United States Patent Office from 1953 to 1960. Unquestionably she is a well-qualified authority on the subject of trade marks and trade names. In her opinion the word "solder" has acquired a secondary meaning and now means to the public simply a sealant or sealing agent. She does not regard respondents' trade name "Solder Seal" as deceptive or misleading.

15. As already pointed out, the complaint itself, as amended, appears to recognize that respondents' products are solders; the only charge is that the products are not "metallic" solders.

16. There is thus presented here a situation in which a word has a dual meaning. To a metallurgist solder means a metal or metallic substance. To others, and particularly the general public, the word may well mean nothing more than a sealant or sealing agent. The word as used by respondents in their trade name therefore is not false, but, in the absence of clarification or qualification, it does have the tendency and capacity to mislead or confuse, because of its dual meaning.

17. In such a situation an order requiring the absolute excision of the word from respondents' trade name clearly would be unwarranted and oppressive. The trade name is a very valuable business asset. Excision should never be required if some less drastic remedy will afford reasonable protection to the public. *Jacob Siegel Company v. F.T.C.*, 327 U.S. 608.

All that would seem to be required here is that when the trade name is used in connection with any of the products disclosure be made that the product is non-metallic.

18. It is urged by respondents that no order at all is required, because, respondents say, the products are not sold to consumers, but to professionals—wholesalers, automotive parts dealers, plumbers, heating engineers, repairmen, etc.—and that such persons are not misled as to the nature of the products. There is no assurance, however, that some of the professionals may not be misled, or at least confused, by the unqualified use of the trade name. Moreover, while it is unquestionably true that generally speaking the products are not sold to consumers, one exhibit (Com. Ex. 27, p. 10) indicates that at least

